In the

ORIGINAL

Supreme Court of the United States

DUANE YOUNGBERG, ETC., ET AL.	:	
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Petitioners	:	
	:	
v.	:	No. 80-1429
	:	
NICHOLAS ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, PAULA ROMEO	:	

Washington, D. C.

Monday, January 11, 1982

Page 1 thru 58

ALDERSON REPORTING

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NICHOLAS ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, PAULA ROMEO

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:43 a.m.

APPEARANCES:

DAVID H. ALLSHOUSE, ESQ., Harrisburg, Pennsylvania; on behalf of the Petitioners.

EDMOND A. TIRYAK, ESQ., Philadephia, Pennsylvania; on behalf of 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

CHIEF JUSTICE BURGER: We will hear arguments next in Youngberg against Romeo and others.

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

ORAL ARGUMENT OF DAVID H. ALLSHOUSE, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case involves an action brought under 42 USC Section 1983 by a mentally retarded resident of Pennhurst State School and Hospital. The plaintiff seeks damages in this action based on his treatment while there from three supervisory officials at Pennhurst.

In the District Court the case was tried before a jury which found in favor of each of the defendants. On appeal the Third Circuit vacated and remanded the case, holding that the institutionalized mentally retarded had a number of substantive due process rights, including first a right to treatment which must be acceptable in light of present scientific or medical knowledge, and also must be the least intrusive available under certain circumstances. Secondly, a right to be free of restraint absent a showing of substantial or compelling necessity by the state and also a showing that the least restrictive alternative was used.

And finally, it held that there was a right, a constitutional right to be protected from harm absent a showing by the state of substantial necessity.

It's our --

QUESTION: Do you think there is a body of medical opinion defining what is the appropriate or proper medical treatment for each of the conditions that you're dealing with?

MR. ALLSHOUSE: No, Your Honor. As a matter of fact, that's one of the critical flaws in the Third Circuit decision. This is an area where experts continue to disagree as to the types and benefits of various levels of treatment. And an example of the way the Third Circuit has ignored this Court's warning as to the fact that courts are poorly equipped to make medical judgments are what it has done with the treatment standards and the particular standards that would apply to the various rights which it found. For example, it would use such phrases as "least intrusive," "compelling necessity," "least restrictive" to those concepts.

QUESTION: What Judge Aldus referred to as constitutional buzz words?

MR. ALLSHOUSE: Absolutely, Your Honor.

These buzz words are difficult for the health care professionals who are responsible for implementing those

standards to understand and apply, and the danger of applying such concepts in this area is to force health care professionals to make decisions not necessarily based on their professional opinion as to what is best for the mentally retarded, but rather on what the Third Circuit would require based on its decision in this case.

A good example of the way in which the Third Circuit has made medical-psychological judgments is what it has done with the concept of restraints. The Third Circuit held that the use of restraints is presumptively punitive, and to quote the court below, "has been relegated to the closets of an earlier age." Nevertheless, federal regulations, the various amici organizations in this Court, and even plaintiffs recognize the use of restraints under certain circumstances.

In addition, in the very limited circumstances where the court below would recognize use of restraints on the mentally retarded, it did so only for protection of the resident himself or for treatment. Once again, however, the various amici organizations and federal regulations recognize use of restraints in some circumstances either for protection of the resident or for protection of others.

QUESTION: Do we know all these things as a matter of record facts?

MR. ALLSHOUSE: Well, in this case as to the use

of restraints, we don't have specific findings by the jury, but the record does reflect that the use of restraints being challenged here is use of restraints which occurred while Mr. Romeo was in the medical ward, the hospital ward at Pennhurst.

QUESTION: Wouldn't you have been better off from the point of view of your position had you let the case go back and be tried to get a full record instead of coming up here in the condition in which it is?

MR. ALLSHOUSE: Your Honor, under the proper standard, which we would urge this Court to adopt, no purpose would be served by a remand. Under the proper standard the defendants are entitled to judgment as a matter of law. Moreover, the Third Circuit has clearly in an en banc decision decided the constitutional rights of the institutionalized mentally retarded. That decision will apply on remand in this case and will apply to all other cases, at least in the Third Circuit, so long as that decision stands.

QUESTION: At least you're asking us to pass on this case without a developed record.

MR. ALLSHOUSE: Well, Your Honor, this record, in our view, contains all the facts necessary for the Court to make its decision. Under the standard we urge the Third Circuit should have adopted, the traditional due process

test would apply; and that is, whether or not conditions of confinement are rationally related to some legitimate state interest. Such interest in the context of care of the mentally retarded in state institutions include provision of care, provision of treatment, protection of the resident or protection from others, and certain administrative concerns in the management of the institution.

QUESTION: Mr. Allshouse, under that standard -- oh, excuse me.

QUESTION: What about the issue of immunity?

MR. ALLSHOUSE: Well, we urge that the issue of good faith immunity is an alternative basis for affirming the District Court's judgment in vacating the --

QUESTION: Was this raised before the Court of Appeals?

MR. ALLSHOUSE: Yes, it was, Your Honor. We did not separately raise cross appeal on the issue of good faith immunity, because when a defendant prevails in the District Court, we do not understand that is any such burden.

In the Court of Appeals in discussing the right to treatment, discussion of such cases as Wood, Procunier and Scheuer was included in our discussion of those rights. Therefore, we believe the Court erred, independently of its finding of constitutional rights, in remanding the case without ruling that these individuals were entitled to

immunity as a matter of law.

The immunity issue as defined by this Court's decisions reflects that there is both an objective element and a subjective element. As to the objective element, the rights which we argue about today certainly were not clearly established between 1974 and 1978. As to the subjective element, the record reflects here that while Mr. Romeo suffered injuries on various occasions while he was at Pennhurst, the record also reflects that Mr. Romeo was a very aggressive, violent individual both toward himself and toward others, and that while he was at Pennhurst he sustained a number of injuries which were self-inflicted, a number of injuries which occurred as a result of other patients retaliating against him for his aggressive behavior, and a number of the injuries were simply accidents. Therefore, as to that aspect there could be no finding of malice.

QUESTION: Well, Mr. Allshouse, as I recall from reading the briefs, there was some testimony excluded by the trial court that according to the plaintiffs and the court below would have been testimony on the purpose and effect of the restraints that were used. And would that not go to the very question of any qualified immunity?

MR. ALLSHOUSE: No, Your Honor, we believe it would not. As to the question of restraints, the offered

expert testimony would have said that restraints were used for the convenience for the staff. That, I submit, is not the question. Restraints, even if that testimony were admitted, restraints could be used for the convenience of staff and still used for the protection of Mr. Romeo and others. Indeed, the record in this case establishes that restraints were used for the protection of Mr. Romeo and especially protection of others.

QUESTION: But wouldn't the trier of fact have to determine that after listening to the excluded testimony?

MR. ALLSHOUSE: I would respectfully disagree in the sense that the testimony as to whether or not restraints were used for convenience of the staff does not go to the constitutional issue; and that is, whether there was a legitimate state interest for use of restraints.

The record reflected in this case that restraints were used in the hospital ward and were used only when prescribed by a physician, none of the defendants in this case. Moreover, the restraints were used because Mr. Romeo was in close proximity to other patients, some of whom had intravenous tubes attached, some of whom were in traction. And given his aggressive behavior, he posed a danger to these individuals. Moreover, Mr. Romeo's very presence in the hospital --

QUESTION: May I ask you a question about the

restraints? As I understand the way the case comes to us, you have the burden not only of persuading us that Judge Adams' opinion is unsound but also that Chief Judge Sites' test is not an acceptable test. And in order to illustrate the difference between the test you proposed and Judge Sites' test, am I correct in believing that under your test you prevail if you show that restraints were imposed for the convenience of the staff? That's all you have to show, because that's rational.

MR. ALLSHOUSE: No. I could not go that far, Your Honor.

QUESTION: Well, why not? Isn't that rational?

MR. ALLSHOUSE: Well, the convenience of the staff alone would not answer the question if those restraints were not used either for protection of the resident or protection of others. Also, there is an aspect of reasonableness to the rational relationship test.

QUESTION: But it has to be more than just purely rational. You have a somewhat higher standard than mere rationality then. And if you do, what is the difference between your test and Judge Sites' test?

MR. ALLSHOUSE: Well, Chief Judge Sites' test is essentially a modified malpractice standard. It still requires a weighing of the professional and medical judgments in this area, and essentially comes to the bottom

line of deciding whether there's a substantial departure. As such, it's phrased in malpractice terms.

QUESTION: It seems to me it's very close to what you're getting to in your test, though.

MR. ALLSHOUSE: In practical effect it may very well be.

QUESTION: Well, then we should probably affirm rather than reverse it.

MR. ALLSHOUSE: Your Honor, the standard proposed by Chief Judge Sites in his concurrence was proposed as an alternative bases or his view as to what the District Court jury should be instructed on remand. We submit that under the proper standard that the jury, if instructed under that basis, or based on this record that the jury would have had to find in our favor; in essence, would have had to find a directed verdict.

QUESTION: But the jury was not instructed under the standard that you now propose, was it?

MR. ALLSHOUSE: No, it was not, Your Honor.

QUESTION: So why is there not necessarily going to be a new trial in all events?

MR. ALLSHOUSE: Because under the standard the jury -- well, even without the standard the jury was instructed by, the evidence in this case was such that it would have mandated, and in fact the District Court judge

should have granted a directed verdict for defendants. Under the standard, the rational relationship test which we proposed, as a matter of law defendants would be entitled to a judgment.

Now, while Chief Judge Sites' test is different in wording, we would submit that under his test the case is still in a posture where it would be necessary for a remand, and indeed, Chief Judge Sites indicated that was the case. Under the test, the rational relationship test which we proposed, defendants are entitled to judgment as a matter of law.

QUESTION: But you say a rational relationship to the two acceptable purposes, either one of the acceptable purposes.

MR. ALLSHOUSE: Yes.

QUESTION: To protect themselves or others.

MR. ALLSHOUSE: Correct.

QUESTION: You wouldn't say -- as you said to Justice Stevens, it just wouldn't be just any purpose.

MR. ALLSHOUSE: No. It would have to be a legitimate state interest in --

QUESTION: Well, convenience of staff might be a legitimate state interest, but you put that aside. You say it has to be a different one. Now, that certainly is beyond the rational relationship.

MR. ALLSHOUSE: Well, it may be that if a decision were made purely for the convenience of the staff that we could defend that as a legitimate state interest.

QUESTION: Well, you aren't proposing that, though.

MR. ALLSHOUSE: Well, in the facts of this case the Court need not reach that question, because in this case it's clear that restraints were only --

QUESTION: Well, do you concede then in this case that some constitutional rights are involved?

MR. ALLSHOUSE: Yes. We recognize that --

QUESTION: There's a liberty interest. There are liberty interests here?

MR. ALLSHOUSE: Well, I would answer that there are --

QUESTION: The state must have a good enough excuse to impose restraint?

MR. ALLSHOUSE: There is a liberty interest to the extent that the state must show some rational relationship for use of restraints.

QUESTION: And how about the right to treatment?

MR. ALLSHOUSE: Well, on the right to treatment, we submit that the way that issue must be resolved is that you start with the premise that the states are under no affirmative obligation to provide government services. When they choose to provide those services, they have wide

discretion.

QUESTION: So you say the state wouldn't need to treat at all. They would just need to care.

MR. ALLSHOUSE: Yes. We submit that care is a constitutional basis for commitment, and that once a state assumes an obligation to care, and we recognize that we do --

QUESTION: You say the Court of Appeals was totally wrong in saying that there was a constitutional right to care -- I mean to treatment.

MR. ALLSHOUSE: Yes. We disagree completely with the Third Circuit on that.

QUESTION: But you concede there are liberty interests involved in the sense of restraint and protection.

MR. ALLSHOUSE: Well, yes. We would recognize some liberty interest, although not fundamental in the way in which this Court has decribed fundamental liberty interest. There are liberty interests much in the nature of this Court's holding.

QUESTION: But you wouldn't say that the complaint didn't state a cause of action with respect to restraint or protection.

MR. ALLSHOUSE: No.

QUESTION: That would have to be tried out.

MR. ALLSHOUSE: It would have to be tried on that issue. Although based on the record in this case,

particularly on the protection from harm issue, you're faced with a situation where plaintiff proposed three jury instructions on protection from harm. All three were granted. Therefore, the jury tried the protection from harm issue as plaintiff had phrased the constitutional standard.

QUESTION: What was that? How was it phrased?

MR. ALLSHOUSE: Essentially it was phrased in terms of if defendants knew or had reason to know that attacks were occurring on Mr. Romeo and did nothing to prevent it or failed to take all reasonable steps to prevent it, then a constitutional violation had occurred.

QUESTION: Well, on what basis could they appeal?

MR. ALLSHOUSE: Well, on that issue the Third Circuit sua sponte addressed that issue. The issue was never before the Third Circuit, and on that basis alone the protection from harm issue should be vacated.

QUESTION: So they sort of treated it as plain error in a sense.

MR. ALLSHOUSE: Yes. They went beyond what the District Court judge and plaintiffs had suggested below.

Now, as to the treatment issue before the jury, the reason why remand would not be necessary on that issue is that the only testimony offered was expert testimony to suggest that different programs could have been used or better programs. That does not, in our view, constitute a

constitutional violation.

QUESTION: Well, do I understand your position then that with respect to treatment or protection -- I mean with respect to restraint or protection that yes, the state must have a good enough reason to restrain or to fail to protect, but that you think the standard is that any acceptable medical judgment should be -- well, any fair medical judgment or any honest medical judgment ought to be accepted?

MR. ALLSHOUSE: Constitutionally that that is a sufficient standard, as long as it's rational. This Court has in the Bell case provided the caveat that if the means used are somehow excessive and totally beyond rational interest that that also would be a consideration. I think that's part of the concept of being reasonable or rational, and therefore, that's part of the same concept.

QUESTION: Well, how do you know in this case that the medical judgments were made in terms of the standard which you now embrace, namely the protection of the patient or protection of others?

MR. ALLSHOUSE: Well, based upon --

QUESTION: Rather than just staff convenience?

MR. ALLSHOUSE: Based on the evidence presented at trial, the physician who prescribed the restraints testified that he prescribed them to protect Mr. Romeo and to protect

others; and there was no evidence presented to the effect that that was not the purpose behind the restraints.

QUESTION: Well, the case wasn't tried on your standards, so why should we attempt to examine the record and make a judgment in terms of your standards which weren't applied in the trial court either?

MR. ALLSHOUSE: Well, for two reasons. Either based on good faith immunity where there is no evidence --

QUESTION: That's another fact-bound issue, the way immunity is presently administered. Good faith?

MR. ALLSHOUSE: That's correct. But whereas here you have no evidence which would support a judgment in favor of the plaintiffs where the case indeed should not have even gone to the jury, we submit that this Court has the power to decide the issue on that basis.

QUESTION: Well, maybe some court does, but would we? Would you really ask us to canvass the record? If the Court of Appeals was wrong and we took your standard, we'd at least remand to them to judge the case.

MR. ALLSHOUSE: Well, on the current state of the record this case would go back to the District Court, and the District Court jury would be instructed precisely as the Third Ciruit had provided.

QUESTION: I understand. I understand why -- I may not agree with you, but I understand why you object to

the Court of Appeals standards.

MR. ALLSHOUSE: We think that in addition to the other factors there's a judicial economy interest in not having what originally was a week and a half trial and could easily be a long trial occur again, when if we are correct it would be a futile act in all likelihood.

QUESTION: Well, if you're correct on our standards, though, why shouldn't the Court of Appeals then deal first with the case under your standards?

MR. ALLSHOUSE: Why should the Third Circuit --

QUESTION: Why shouldn't they do it rather than us in the first instance?

MR. ALLSHOUSE: Well, the Third Circuit did not agree with our standards, and therefore --

QUESTION: Well, I know, but if they're told what the standards are.

MR. ALLSHOUSE: Well, that, of course, is an alternative way of deciding the case. It's our position that where you're dealing with a situation where a person such as Mr. Romeo, who is unable to care for himself, is committed to a state institution -- and there's no dispute that he was unable to care for himself when he was committed in 1974 -- that the state does assume an obligation to care for him; but beyond that it does not thereby constitutionally incur the obligation of trying to treat or

habilitate him.

QUESTION: Is mere warehousing then a standard that you would apply for those who are committed because they can't care for themselves?

MR. ALLSHOUSE: The term "warehousing" has very negative concepts, but custodial care or care, namely food, shelter, clothing, medical care, and reasonable safety, is what we mean.

QUESTION: All right. What about those individuals who with some treatment could be returned to the community and provide care for themselves, is there an obligation in those instances on the state with a committed patient to provide that treatment?

MR. ALLSHOUSE: There is not a Fourteenth Amendment obligation, Your Honor. While the state may decide as a matter of state law or policy to provide habilitative services to the mentally retarded -- and indeed Pennsylvania does and commits a large portion of its budget for that purpose every year -- the Fourteenth Amendment does not mandate that it do so.

The Fourteenth Amendment is not worded in such affirmative terms, and thus, where the state assumes this obligation, it does not incur the duty to attempt tc habilitate, which is consistent with fiscal reality in a time of budget crises at all levels of government. Under

the Third Circuit standard a state might be faced with a very difficult choice between deciding whether or not to provide lifesaving care to a large number of mentally retarded individuals or providing the more comprehensive habilitative services required by the Third Circuit's decision to a substantially reduced number of people.

It's our position that the state should not be faced with a choice like that or a choice as to whether or not it can afford to financially assume this obligation of habilitation before it simply acts to prevent the mentally retarded who are unable to care for themselves from freezing or starving to death.

QUESTION: What about those patients who are committed and who actually regress in terms of their ability to care for themselves without treatment in the institution, who actually get worse?

MR. ALLSHOUSE: That may be a very compelling question of social policy, whether or not a state should allow that to happen, but constitutionally there is no requirement either in the mental institution setting or in prison settings to maintain skills, to --

QUESTION: Even though the state took the step of committing that individual, is that right?

MR. ALLSHOUSE: That's correct. Because if the state were required to assume an obligation to maintain

skills, what you could be faced with is a situation where an individual prior to the time he was committed had received excellent services from a private source and had high skill levels comparatively. When that person, for example, out of loss of money, lost that private source, was unable to care for himself, when the state thereby commits that person it would have to assume a very high obligation to him if it had to maintain his skills.

QUESTION: General, may I ask you a question along these lines? You concede an obligation to provide medical care. Would that include or not include psychiatric medical care? I suppose if someone acquired pneumonia, contracted pneumonia, medical care would be provided; but if the patient had severe psychiatric problems would that sort of care be provided?

MR. ALLSHOUSE: No, Your Honor. The concept of psychiatric care can be separated from the concept of medical care.

QUESTION: Are you saying that there's no obligation to provide psychiatric care?

MR. ALLSHOUSE: No. With the possible exception of a situation where an individual presents a danger to himself or to others, and in that circumstance the concept of care, of reasonable protection of both that individual and other individuals may require certain action by the

state.

QUESTION: Yes. Well, this case suggests that certain action was taken, but it wasn't psychiatric care action; it was confining the individual.

MR. ALLSHOUSE: Well, the question of psychiatric care and medical care are admittedly very similar concepts.

QUESTION: Yes.

MR. ALLSHOUSE: And it's difficult to distinguish where care ends and habilitation begins.

QUESTION: That's why I asked the question.

MR. ALLSHOUSE: Well, we believe that while even the Third Circuit below recognized the distinction between care and habilitation, that that is a valid distinction; that the question of habilitation in terms of preserving skills or improving someone's functioning level is a different question than just care. And it may well be on certain fact situations that psychiatric care.

QUESTION: May I ask where do you get the requirement to give them any care?

MR. ALLSHOUSE: Well, we believe to provide conditions that are --

QUESTION: The Constitution?

MR. ALLSHOUSE: Yes. Under the traditional rational relationship test.

QUESTION: What part of the Constitution draws the

line between ordinary medical care and psychiatric care?

MR. ALLSHOUSE: Well --

QUESTION: No provision, right?

MR. ALLSHOUSE: Well, the Fourteenth Amendment, in our view, provides for conditions reasonably related to legitimate interests. Care -- if we did not provide care, we would not be providing such conditions. However, as to the question of habilitation, we don't view that as included in legitimate state interests which the state must provide.

QUESTION: So you put yourself over and above the doctors?

MR. ALLSHOUSE: Not at all, Your Honor. Essentially what --

QUESTION: Well, suppose the doctor says the medical treatment that this man needs is psychiatric treatment? You would say he cannot make that decision, the doctor. Your doctor can't make that decision.

MR. ALLSHOUSE: Constitutionally, he may well decide that medical care includes that type of care, and under those circumstances would be --

QUESTION: And if he did, would you honor it?

MR. ALLSHOUSE: I'm sorry, Your Honor. I didn't hear you.

QUESTION: If he did, would you give him psychiatric care?

MR. ALLSHOUSE: Yes. And, you know, as a practical matter --

QUESTION: You would provide psychiatric care.

MR. ALLSHOUSE: Yes.

QUESTION: Well, what are you here for? You just said you wouldn't.

MR. ALLSHOUSE: No. What we're saying is that medical care is a distinct concept from providing the type of habilitative services or maintenance of skill services which the Third Circuit provided below.

QUESTION: But the question Justice Powell asked you was "psychiatric," and you said, "No," I thought, but maybe I misunderstood you.

MR. ALLSHOUSE: That was my answer, Your Honor. I perhaps should have qualified it by saying that there is a concept of habilitation involved in psychiatric care, and in a given fact situation, habilitation may be distinct from medical care, and indeed in most cases can be separated.

QUESTION: Well, suppose the doctor says this man is a danger to himself and to his fellow people, but if given psychiatric care for about two months he would be cured. Would he get it or not?

MR. ALLSHOUSE: Well, the question is --

QUESTION: Please don't add anything to my hypothetical.

MR. ALLSHOUSE: Constitutionally, I can't say that he's mandated to provide that care. While we're talking about questions of medical judgments, these are questions that are better resolved, because of the obvious difference in experts on these various issues, better resolved by the state courts under --

QUESTION: May I ask you because it seems to be critical to your position, how would you best phrase the distinction between care and treatment?

MR. ALLSHOUSE: Care I would define as food, clothing, shelter, medical care, reasonable safety, whereas habilitation, the definition used by the Third Circuit, is that education and training required for the mentally retarded to reach their maximum development.

To the extent we're getting into a situation where we're dealing with an individual who is mentally ill, which is the question as to psychiatric care, that is a slightly different question, and that case is not before the Court today.

QUESTION: No, but I meant to ask you in the context of the mentally retarded. The treatment there would be -- you would define treatment as attempting to enable the patient to attain the maximum potential that he's capable of.

MR. ALLSHOUSE: Treatment, we accept that definition.

QUESTION: But care might involve some improvement in the mental condition of the patient. You wouldn't deny that, would you?

MR. ALLSHOUSE: Well, constitutionally --

QUESTION: Not simply status quo.

MR. ALLSHOUSE: It may, for example, in a medical condition, mean improvement from having a broken arm to having the arm improve to the point it was usable.

QUESTION: But the obligation to treat that you say does not exist is an obligation to enable the individual to achieve his maximum potential.

MR. ALLSHOUSE: Yes. That is the definition used by the court below.

QUESTION: Well, Mr. Allshouse, aren't we dealing here only with, or are we, with people who've been involuntarily committed?

MR. ALLSHOUSE: Yes, Your Honor.

QUESTION: And aren't we therefore by definition dealing with those who are a danger to themselves or to others?

MR. ALLSHOUSE: Not necessarily.

QUESTION: Well, do you mean you involuntarily commit people for other reasons in Pennsylvania?

MR. ALLSHOUSE: Yes. The mentally retarded are committed either because they're unable to care for

themselves -- that is this case, and that is the issue before the Court here -- unable --

QUESTION: What do you mean unable to care for themselves? You mean their economics or their --

MR. ALLSHOUSE: No. Unable to provide for their daily needs.

QUESTION: Well, isn't that within the broad definition of danger to themselves? If the can't take care of themselves, they're dangerous to themselves.

MR. ALLSHOUSE: Yes, Your Honor.

QUESTION: They will expire if you don't do something with them.

MR. ALLSHOUSE: It may be, although you may be also faced with a situation of someone who is physically abusive to himself as opposed to an individual who just can't provide his daily needs.

QUESTION: Well, I understand that, but you nevertheless are dealing with people who in the end would not survive if you didn't --

MR. ALLSHOUSE: Yes. At least in this case that's the case.

QUESTION: And so those are the only people that we're really focusing on here, people who, broadly speaking, are dangerous to themselves or others.

MR. ALLSHOUSE: That's correct.

QUESTION: And do you suggest -- I take it that you would take the position that the state need not commit these people.

MR. ALLSHOUSE: It could provide those services other than by commitment.

QUESTION: Well, must it provide the services? Could it just say we do not commit people who are dangerous to themselves or to others?

MR. ALLSHOUSE: It has that option.

QUESTION: Even the Third Circuit left you with that, didn't they?

MR. ALLSHOUSE: Yes. There is no affirmative obligation to provide government services.

QUESTION: So that your duty arises when you purport involuntarily to hold some person, to commit someone.

MR. ALLSHOUSE: That's correct.

QUESTION: Well, let me ask this question now to get back where I opened up with a question to you. The key is whether the condition is treatable in the first place, and if the person is in this condition of unable tc care because of a permanent brain damage, for example, whether from disease or accident, then do you say that if the psychiatrists determine that it is not a condition that can be improved or changed by treatment, then I take it you say there is no obligation to treat, is that correct?

MR. ALLSHOUSE: That's correct.

QUESTION: If it is now determined that the condition is treatable with some prospect of improvement, what do you say about an obligation to provide treatment? Is there an obligation or not?

MR. ALLSHOUSE: No, Your Honor. If there's no chance of improvement --

QUESTION: No, no. I say if there is a chance, if the psychiatrists come out with a report after examination and say this can be improved, then is there an obligation to treat?

MR. ALLSHOUSE: Not a constitutional obligation. We believe those decisions should be left to legislators, policymakers, or health care professionals.

QUESTION: The alternative then would be if they say we haven't the facilities to treat, so we'll turn this person back to the family and just put them out of the institution?

MR. ALLSHOUSE: That is an alternative, although we also have the option of continuing to provide basic human needs, humane care.

QUESTION: But you wouldn't have that option with the Court of Appeals decision. You would either have to turn them loose or treat them.

MR. ALLSHOUSE: Yes. We would have to treat them

so long as they're committed.

QUESTION: There's nothing in the Court of Appeals majority opinion that would preclude you from simply discharging the patient, saying go back home.

MR. ALLSHOUSE: No. We can always discharge our constitutional obligation by releasing, of course subject to the court's approval because we are dealing with a court-ordered commitment.

QUESTION: So that if a legislature didn't provide the resources, the budget to do these things, then you might be up against sending the person back home.

MR. ALLSHOUSE: That's correct, Your Honor.

CHIEF JUSTICE BURGER: Very well.

MR. ALLSHOUSE: Thank you.

CHIEF JUSTICE BURGER: Mr. Tiryak.

ORAL ARGUMENT OF EDMOND A. TIRYAK, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think the central controversy in this case arises around the question of whether or not there is at all a distinction or at least is there always a distinction between care and treatment.

We reject the concept, and we believe the facts of this case can show that it's impossible in all cases to

provide decent care without providing some habilitation. Example: there's no question in this case that Respondent was injured on 77 occasions in a two-year period while confined at Pennhurst. He was confined with people who were confined because they had behavioral patterns which made them aggressive. Thus, these same --

QUESTION: Was there any question that he had some of those behavioral patterns himself?

MR. TIRYAK: Your Honor, there was a major factual dispute about exactly how aggressive my client was, and our contention -- part of our contention was that it'd be difficult for anyone to live in the conditions he was confined under without developing some aggressive patterns. It was a very hotly disputed issue at trial and something that the jury would ultimately have to --

QUESTION: But would it solve your problem, your client's problem, if the state said you're discharged, go somewhere else?

MR. TIRYAK: No, no, Your Honor, it would not solve our problem because --

QUESTION: Why not?

MR. TIRYAK: Because he needs -- precisely because he needs habilitation. He was committed under state law because of his inability to care for himself and because he needed treatment, and that finding by the court --

QUESTION: You contend then that he is treatable and curable.

MR. TIRYAK: Well, he will never become a person who is not retarded, Your Honor. He can learn skills. He can learn not to be violent. And our testimony, for example, which was excluded by the District Court -- as a matter of fact, it excluded all of our expert testimony -- but our testimony would have showed that had they used programs that they had available at Pennhurst that the violence on his ward, the aggression of the patients would have been diminished or eliminated.

Now, the question I have is is that care or is that treatment? If my client is injured repeatedly by aggressive people who are not receiving habilitation, and if I can show to the jury with my expert testimony that that would have happened, and if they had the resources available to do that, it would seem to me that that question is just as much a question of right to decent care as it is right to decent treatment.

QUESTION: Mr. Tiryak, was this an action just for damages in view of the jury trial, or was it also an action for an injunction?

MR. TIRYAK: Your Honor, at this posture it's just an action for damages. At the District Court stage we filed preliminary injunctive relief asking the court to transfer

him to another institution. The District Court -- it's not in the record -- the District Court --

QUESTION: So that's not before us.

MR. TIRYAK: No. It's not before you. Just simply a damage action before you.

QUESTION: Well, may it not be something of a Pyrrhic victory that you won in the Third Circuit if the state, as everybody appears to concede, is free if it does not wish to provide treatment to simply release the person?

MR. TIRYAK: If the state were to make a decision not to confine people at Pennhurst under the conditions that they're being confined in, it could -- that's a political question, and that's a legislative question, and that's something that will be fought in a different forum.

But my client was injured. He was injured very seriously during his stay at Pennhurst. And if we recover damages, we'll have other resources with which to provide him treatment. So it's not simply a question of what --

QUESTION: So you view it basically as a damage action on behalf of your client.

MR. TIRYAK: Yes. That's the way we view it.

QUESTION: Are you also relying on the state constitution or not?

MR. TIRYAK: Well, our position is -- the second point I'd like to make besides the fact that care and

treatment are the same thing when we're talking about confining people who can't take care of themselves, we believe that when states confine people under state law for the purpose of treatment, then the Fourteenth Amendment guarantees that they receive some amount of treatment.

QUESTION: Well, was he confined for the purpose of treatment or confined for the purpose of protection?

MR. TIRYAK: Well, the statute says care and treatment, Your Honor.

QUESTION: Well, they can do it for either, but your client was -- is there any definition in this record as to why he was committed?

MR. TIRYAK: Well, if you're talking about as a matter of fact why he personally was committed, I don't think there was any decision by the state court. However, we've provided for you the legislative history of the statute under which he was committed, which demonstrates quite clearly that the purpose of that statutory provision was to provide people with treatment.

The sponsor of the legislation -- this is in Footnote 29 of our brief -- saying if we pass this statute we'll now know that everybody in our state schools and hospitals --

QUESTION: But if your client was committed just for treatment, he could get out.

MR. TIRYAK: I'm sorry, but --

QUESTION: You don't suggest that -- do you think that Pennsylvania is insisting that under the Constitution it may commit people involuntarily simply because they would benefit from treatment?

MR. TIRYAK: No, no. I'm sorry, Your Honor. The statute says he was committed for the purpose of care and treatment.

QUESTION: All right. You don't suggest for a minute that your client would be constitutionally entitled to release?

MR. TIRYAK: In the sense that he could not take care of himself or with the help of his friends?

QUESTION: Yes.

MR. TIRYAK: No, no.

QUESTION: So you concede the state may keep him there as long as they live up to what you think their obligations are.

MR. TIRYAK: Yes. Yes, Your Honor. This is not a procedural challenge to his commitment or a challenge to the state's ability to commit people.

QUESTION: Well, do you have a statutory claim for violation of the state statute and not providing treatment?

MR. TIRYAK: Well, we believe there's a right to treatment under the state law.

QUESTION: I know, but have you made a claim that that statute's been violated by these defendants?

MR. TIRYAK: Indirectly through -- we don't have a pendant state claim, no. Our claim is that that statute creates a due process liberty interest in treatment.

QUESTION: Well, is it your view that whatever the statute may provide, it provides everything that you say constitutionally you're also entitled to?

MR. TIRYAK: Yes, yes. And we believe that the state's --

QUESTION: Why didn't you have a statutory claim then? Why didn't you allege one?

MR. TIRYAK: Simply because the immunity situation under state law in Pennsylvania was extremely -- it's different now, but at the time we filed this case, Petitioner Youngberg, for example, was absolutely immune from damages under an offshoot of state sovereign immunity. That has since changed, but only after a large portion of our claims would have expired because of the statute of limitations problem. So we couldn't get relief from the state court, and we couldn't get relief in damages from the state court. We couldn't get relief with a pendant state claim, but we believe that we can get relief from this Court without facing the question of whether the Fourteenth Amendment in and of itself requires states to do these

things. We believe this Court has in the past and should in this case say if you confine somebody for care and treatment, if that's your stated purpose, then you must give them some -- there must be some reasonable relationship between your purpose in the commitment and the nature of the commitment.

QUESTION: Are you familiar with the case of Mills v. Rogers from the First Circuit which is going to be argued Wednesday?

MR. TIRYAK: Well, I read the opinions, yes.

QUESTION: There, there seemed to be no question in the mind of the First Circuit that the public officials involved were entitled to immunity.

MR. TIRYAK: Well, you know, the facts will differ in different situations. Here, we had a situation where someone is a superintendent of a facility. He is a repeatedly informed by outside officials that a particular resident is being physically abused. We have expert testimony that he had at his disposal the means to prevent it from occurring and failed to do it.

It seems to me that -- that struck me as a very different situation than in Rogers, because in Rogers at least the official could day I didn't know that I couldn't provide you with this medication to begin with. Here, the Petitioners don't claim that he didn't have a right to

physical safety while he was committed to Pennhurst. So I don't see good faith immunity as something that could be decided by the court. I could see the jury concluding good faith.

QUESTION: Well, you keep talking about the one issue, physical safety, but there are two other items. One is restraint, and the other is treatment.

Now, you wouldn't suggest at the time of these events that the constitutional right to treatment in a context like this had been clearly enunciated?

MR. TIRYAK: Well, there were a number of --

QUESTION: Under the federal Constitution.

MR. TIRYAK: There were a number of court decisions that we cite for you in the brief that were in effect at the time.

QUESTION: They never have been decided here.

MR. TIRYAK: No, but this Court has never held, and I'm not sure it would be a good thing to do, that this Court would have to make a ruling on point for the good faith immunity to get to the point of being a jury question. I mean that would basically take away the damage remedy in civil rights actions.

QUESTION: And was there some clearly enunciated constitutional right not to be restrained in a context like this?

MR. TIRYAK: Well, this Court in the Ingraham case referred to freedom of bodily movement as being an historic liberty interest recognized from colonial days.

QUESTION: It didn't deal with involuntarily committed people, though.

MR. TIRYAK: Pardon me?

QUESTION: It didn't deal with involuntarily committed people.

MR. TIRYAK: That's true, but it seems to me as Judge Adams below notes, freedom of bodily movement was probably the most traditional concept in terms of what liberty meant in due process from colonial times until today.

QUESTION: What if you have a patient, an inmate who, so the behavioral experts decide, can be restrained from hurting himself or other people only by being kept under constant restraint or constant tranquilizers or both? What about that?

MR. TIRYAK: We believe that if restraints are necessary to protect the patient or to protect others or to maintain the type of institutional order that's necessary to provide treatment, then they're justified.

What we have here, what we sought to prove here was not that but that our client was restrained for virtually all his waking hours for a period of over a year, and our expert was prepared to say that there was no medical

reason for this but it was for staff convenience.

Now, that --

QUESTION: When you say staff convenience do you mean so the staff can go out and play golf, or do you mean by convenience the maintenance of an orderly medical institution?

MR. TIRYAK: Well, I can tell you what I mean. Unfortunately, the record -- you know, the expert never got to testify, and all we have is my proffer of proof. So the record really doesn't find that --

QUESTION: That's because a District Court tried it on an Eighth Amendment theory and excluded evidence?

MR. TIRYAK: Well, Your Honor, even if an Eighth Amendment standard would be used in the District Court's decision, we think it's wrong. In the Estelle case you would still be able to use expert testimony --

QUESTION: Well, go ahead with your answer to the Chief Justice.

MR. TIRYAK: I'm sorry.

QUESTION: You didn't finish your answer to the Chief --

MR. TIRYAK: Oh, I'm sorry.

Our feeling is, Your Honor, is that all we wanted to do is be able to show a jury evidence which we believe would take this case away from a situation where a doctor

was making a reasoned medical choice to put somebody in restraints for a legitimate reason. I don't think we disagree on what the legitimate reasons are.

We're claiming abuse here. We think that repeated daily, hourly, yearly restraint of an individual in the absence of providing treatment when unnecessary, and if we can convince a jury that that was unnecessary, that's sheer abuse, so it's not a question of differing medical judgments.

We concede that psychologists can use restraints as part of behavior modification programs. We want programming for our clients. Any retarded person would not want to be in a restraint, so if we had a retarded person who had an aggressive tendency, we could design a program to restrain him for a minute or two minutes each time --

QUESTION: What you're just saying is not consistent with what the majority opinion in the Third Circuit said.

MR. TIRYAK: Well, I recognize that there is some unclarity there. This case revolves around a complaint about abuse with restraints. And the Court of Appeals said -- we believe in that context the Court of Appeals is correct -- that mental retardation professionals have eliminated that as a reasonable thing. And indeed, the amici that have come in here to this Court from many professional associations have indicated that you can abuse

people with restraints. It's not always --

QUESTION: Well, you got much more out of the Third Circuit than you ever asked the District Court to instruct the jury.

MR. TIRYAK: Well --

QUESTION: The only thing is you just lost in the District Court.

MR. TIRYAK: I'm not sure that's correct, Your Honor. The District Court instructed --

QUESTION: Well, didn't -- were some of your instructions turned down, a lot of critical ones?

MR. TIRYAK: Yes. The District Court would not instruct the jury that we had a right to treatment in the least restrictive alternative. We took a least restrictive alternative approach to this case. The District Court denied that approach, and the Court of Appeals with respect to our treatment claim said that we were wrong. We're not contesting that on this appeal. We accept that decision, and we accept their definition of treatment.

QUESTION: When you say you took the least restrictive alternative approach, precisely what is that?

MR. TIRYAK: Okay. I'm sorry. We are claiming that the restraints were illegal, and we wanted a jury instruction to show that the restraints were illegal unless it was the least restrictive means of dealing with whatever

problem they were trying to solve with the --

QUESTION: By that do you mean they were illegal in the sense that they were more than were necessary?

MR. TIRYAK: That is a definition of least restrictive alternative. My own feeling is that there are so many definitions of least restrictive alternative at this point that it's difficult to separate them out. So we've just basically accepted the Court of Appeals position, which is restraints are legal if they're necessary. This is in the context of these restraints, not a behavior modification program. A behavior modification program it would seem to me would fall under an entirely different review in terms of what treatment is appropriate.

QUESTION: Necessary in the eyes of whom?

MR. TIRYAK: Well, it would be a jury question, Your Honor.

QUESTION: So that every time someone is involuntarily committed and subject to restraints, the person who authorizes the restraints is subjecting himself to possible damage recovery.

MR. TIRYAK: In the context we have here, the facts here deal with long-term custodial use of restraints. In that situation I think the answer is appropriately yes.

QUESTION: But since it's ultimately a jury question, presumably there will be numerous differences of

opinion, and if you can find an expert witness who will support you, it could be in any number of other contexts, too.

MR. TIRYAK: Well, the law could expand beyond this point. But it seems to me here we're talking about -- all we're seeking to do is show that somebody was restrained for over a year for no medical reason. We had evidence that was excluded to that effect.

Now, if we can't convince a jury of that, it seems to me then we would lose. But that doesn't necessarily imply that a short-term restraint necessary would be even encompassed under the Fourteenth Amendment.

QUESTION: What do you mean by no medical reason? What if the reason is they want to protect him from harming himself and harming others?

MR. TIRYAK: Well, I --

QUESTION: Is that a medical reason?

MR. TIRYAK: I consider that a medical reason.

QUESTION: Well, doctors did the confining, didn't they? It was on doctors' orders.

MR. TIRYAK: The mechanism that was used was the nurses would observe my client and make telephone calls to a doctor who would issue an order for --

QUESTION: So your answer is yes, it was on medical orders.

MR. TIRYAK: Okay. In that sense, yes. However, Petitioner Youngberg has a duty under state law, as the Court of Appeals noticed, to prevent people in his institution from being restrained unless absolutely necessary.

It's not under Pennsylvania law viewed as necessarily a medical judgment. It's a judgment that the superintendent of facility is required to make about use of restraints.

QUESTION: May I ask you --

QUESTION: I still have great problem with this medical. If a guy beats up on anybody he sees 24 hours a day, is it a medical decision to restrain him?

MR. TIRYAK: I would say yes, if you're in a hospital that would be a medical decision.

QUESTION: Well, I would suggest that you not try it and wait for a medical person to protect you. I mean any imprisoned person can be decided to need restraint and it's not medical. I don't see why you keep stressing medical. What's the magic of medical, the word "medical?"

MR. TIRYAK: Well, I think you're probably right, Your Honor. I'm not sure there is a magic to that term.

QUESTION: Because you keep saying they're denied medical treatment. Is it they are denied or that they're not given? You know, they're two different things.

MR. TIRYAK: Well, could I answer --

QUESTION: I mean if you don't need medical treatment, you're not denied it, are you?

MR. TIRYAK: That's correct. Certainly if you don't need it, you wouldn't be denied that.

But for example, let's -- this gets back to the question of care and treatment. We have a situation where we have my client confined in a ward under state law where the residents aren't toilet-trained. That's one of the reasons they're there is because they don't have those type of skills. They are not given any toilet training, no rehabilitation to learn how to do that. As a result, his injuries, as the Court of Appeals noted, became infected from fesces that were on the ward.

Now, it seems to me that his need for decent care in that situation has to encompass at least some duty on the part of Petitioners to eliminate the cause of the filth on the ward. And that can be done in one way through rehabilitation.

QUESTION: Well, you said that a certain minimum amount of training is a component of care. Your opponent says that there's no constitutional obligation to provide treatment in the sense of achieving the person's maximum potential.

Do you contend there's a constitutional right to

treatment that would enable your client to achieve his maximum potential?

MR. TIRYAK: No.

QUESTION: Do you really differ between the two of you on what the constitutional right at stake is?

MR. TIRYAK: Yes.

QUESTION: Now, what is the difference between the parties in this litigation?

MR. TIRYAK: The difference is that our feeling is that Petitioners are obligated to use behavioral programming to prevent violent people -- to reduce violence and prevent aggressive --

QUESTION: And you say that's a part of the minimum care that's required.

MR. TIRYAK: That's right.

QUESTION: I'm not sure he disagrees with you.

MR. TIRYAK: Well, okay. I would consider that a step forward.

QUESTION: You wouldn't be hurt then, I suppose, or you wouldn't have standing to object if they simply isolated your person from dangerous people. If they protected him anyway from harm and successfully did so, you couldn't complain that they weren't treating other people.

MR. TIRYAK: That's one of the things they could do. There are others, other things.

QUESTION: Well, on the treatment, the maximum potential business, you're not defending the Third Circuit.

MR. TIRYAK: I think the Third Circuit's opinion has been very seriously --

QUESTION: Well, I'll put it this way. If the Third Circuit announced a right to treatment in the sense of treatment to achieve maximum potential, if that's what they said, you don't defend that. You may agree with it --

MR. TIRYAK: No. I don't think that's what they said. I think what the Third Circuit --

QUESTION: But if they did, I take it you do not defend that.

MR. TIRYAK: No.

QUESTION: Or at least you don't press it here.

MR. TIRYAK: I don't think it's this case. I don't think we need to get that far. I think the Third Circuit ruled with respect to habilitation. Basically it just rephrased Jackson v. Indiana. It said if they can show a coherent relationship between the treatment given and what his needs are, then they're not liable. In Jackson v. Indiana this Court unanimously ruled that there had to be some reasonable relationship between the purpose and the commitment.

QUESTION: Isn't that more Judge Sites than the majority?

MR. TIRYAK: No. That's the majority opinion. See, what happens in this case --

QUESTION: On restraint?

MR. TIRYAK: No. This is treatment. We're on treatment.

QUESTION: All right. On treatment. All right.

MR. TIRYAK: Everybody keeps looking at the first sentence.

QUESTION: Including me, apparently.

MR. TIRYAK: -- That treatment be acceptable in light of present knowledge. But if you go on --

QUESTION: Yes.

MR. TIRYAK: -- They define what acceptable is, and that is --

QUESTION: They have a tri-level arrangement.

MR. TIRYAK: Pardon?

QUESTION: They have one standard for restraint, another standard for protection, and still another one for treatment.

MR. TIRYAK: And it seems to me that's appropriate. I think if we're talking about the medical use of restraints by psychologists, that's part of a treatment program which we would want. It would be reasonable to look at the habilitation standards. But if we're talking about just having somebody bound because he's less trouble that

way, I don't view that as something we'd view as a --

QUESTION: I'm going to give you a concrete, I hope concrete hypothetical which may bear on it.

Suppose, taking the record of what this man's past shows, that he injured himself before he was ever confined, he injured himself after he was in custody, he injured other people, and finally the attendants draw this all to the attention of one of the psychiatrists, and the psychiatrist looking it over says on this record there's only one thing to do and that's restrain this fellow. And so he enters an order that he's to be placed under regular full-time restraint so as not to injure himself or others.

Now, what kind of immunity or qualified immunity does the doctor have for that good faith judgment?

MR. TIRYAK: We believe that if the restraints are necessary, then they're legal, and we don't need --

QUESTION: Well, we don't know in the abstract.

MR. TIRYAK: Oh, I see.

QUESTION: The doctor has said they are necessary, and he's trained and that's his field and there's nothing in it for him. He's exercised his best medical judgment in that hypothetical, that he must be restrained.

Now, can he be held liable for damages?

MR. TIRYAK: I assume the doctor is aware of the Third Circuit opinion, so he doesn't have a good faith

immunity.

QUESTION: Well, I'm not sure I'm fully aware of what they held, so I'm not sure he could be.

(Laughter.)

MR. TIRYAK: Well, you're asking me to say how a jury would react to that.

QUESTION: Not how a jury would react. What is this doctor's liability and responsibility. Does he have to call a lawyer first and say here's what I'm going to do; what will happen to me in a damage suit if somebody brings a damage suit for restricting this man's liberty?

MR. TIRYAK: Well, it would seem to me the advice I would give him would be that if you're going to use restraints on somebody not as part of a treatment program, then make sure that they're necessary.

QUESTION: Well, he has made sure.

MR. TIRYAK: Then he has no fear of liability under our theory.

QUESTION: Well, I don't know about that. He's made the judgment in terms of these standards, but there is testimony offered by you that they weren't necessary at all, and another doctor has said of course they weren't necessary.

MR. TIRYAK: Correct. And then a jury will decide.

QUESTION: And you don't question that you could always get a psychiatrist to testify to the contrary, do you?

MR. TIRYAK: I would. I think that's sort of a standard joke around these days, Your Honor, but I have a very high opinion of the psychiatric community.

QUESTION: You don't think it's a reality?

MR. TIRYAK: Pardon me?

QUESTION: You don't think it's a reality?

MR. TIRYAK: No, I don't think so. I think there are often situations where psychiatrists differ, but I don't think you could always get a psychiatrist --

QUESTION: Well, having reviewed hundreds of records in thirteen years on the Court of Appeals, it was a constant pattern in every criminal case with the defense asserted that one psychiatrist would say it's black, and the other would say it's white.

MR. TIRYAK: Well, you bring more into this than I do, Your Honor. I can't say I have that much experience.

QUESTION: But he's dependent upon what a jury would decide between these two psychiatrists then.

MR. TIRYAK: If he wants to restrain people for long periods of time as we have here -- to rule in our favor here we're not talking about short-term emergency situations. The Court of Appeals mentions that. We're talking about long-term, protracted, daily use of restraints not for a treatment purpose.

QUESTION: Maybe the safe thing for this

psychiatrist to do would be to enter an order that there's nothing more we can do for this man here; I order him released. Is that a solution to the problem?

MR. TIRYAK: It might be a solution to the problem for the doctor. I doubt a doctor would do that. You know, we have our duties as lawyers; doctors have theirs as doctors. And I don't think doctors would --

QUESTION: Then if he goes out and injures somebody after that release, then the doctor is going to be sued for having released him.

QUESTION: He also has a little trouble with the Hippocratic oath, too, doesn't he?

MR. TIRYAK: Yes.

QUESTION: Counsel, the Court of Appeals for the Third Circuit suggested jury instructions that are appended to its opinion. Do you approve of all three of those?

MR. TIRYAK: Well, first of all I think it's important to note that they didn't command the District Court to use these instructions.

QUESTION: That is right.

MR. TIRYAK: I think that the Court of Appeals felt in this case the trial court was in need of some assistance in formulating jury instructions.

Our standards differ slightly. We've noted the standard we have in our belief. For example, we don't think

it's necessary for this Court to get to the question of whether the Fourteenth Amendment itself requires habilitation for all retarded people.

QUESTION: In at least two of the three instructions the language used refers to the need for showing compelling reasons and for employing least restrictive means. Are they standards you urge us to accept?

MR. TIRYAK: The least restrictive standard used in the context of prefrontal lobotomies is --

QUESTION: In the context of what?

MR. TIRYAK: Lobotomies, psychosurgery when they operate on your brain, is --

QUESTION: It's also used in connection with shackling and with failure to provide care.

MR. TIRYAK: Well, Your Honor, it was an alternative ground. Our feeling is that the primary ground on restraints that the Court of Appeals used was the correct one, the necessity standard, or they talk about essential, but we think a necessity --

QUESTION: But returning to my question, just to make sure that I understand your position, if we remand the case, for example, suppose we just remand it because there has been no jury trial, would you urge the three instructions on the District Court that have been suggested by the Court of Appeals?

MR. TIRYAK: Well, I'm not sure that I would -- I think that this is what we have been bound by the opinion, so I'm not sure it would make much difference what we --

QUESTION: In other words, you would approve of the use of the language compelling need and least restrictive means?

MR. TIRYAK: I'm sorry. I realize I'm being confusing to you, Your Honor. I apologize for doing so. Let me try to --

QUESTION: What I'm trying to get at is what your standards would be. This is a difficult question in the case for me.

MR. TIRYAK: We don't feel as though the least intrusive standard is a standard that is necessary to be used to decide this case. To the extent that the Court of Appeals has used that standard, we don't feel it's necessary. We accept the fact that --

QUESTION: You don't think that's necessary.

MR. TIRYAK: Yes. It's unnecessary to decide the case, to get to those issues. And we haven't urged them in our brief.

QUESTION: But do you think the Constitution requires that standard?

MR. TIRYAK: In the abstract -- if you say something is the least restrictive alternative that is

necessary to resolve the need -- for example, restraints -- to say that there are lesser restrictive standards that are available is another way of saying that the restraints would be necessary. So if you look at least restrictive alternative in the appropriate way, we believe that it comes out to mean necessary.

The problem is that least restrictive alternative is a standard that can be looked at and has been looked at by courts in a variety of different ways and is susceptible to a variety of different interpretations. That's the problem we have with the standard, and that's the reason we've just retreated, shall we say, into the necessary standard because of that's appropriate.

QUESTION: Well, I thought you said some time ago in your argument that your approach in the trial court or your submission that you took the least restrictive alternative approach.

MR. TIRYAK: Yes, we did. We asked the Court of Appeals in our treatment claims to find there was a least restrictive alternative, and we lost the Court of Appeals --

QUESTION: And then you say you retreat from them and you take the necessity standard, is that it?

QUESTION: It seems to me like you've -- I'm not sure I quite understand with respect to what did you tell Justice Powell that the least restrictive, least intrusive

approach was not constitutionally required, or at least you weren't pressing it? With respect to what?

MR. TIRYAK: The problem is that the Court of Appeals used least restrictive in three different situations, okay. The first, in a treatment claim, is dicta as far as we're concerned because those claims -- the situation in which the Court of Appeals said you can use the least restrictive alternative, like involuntary sterilizations, are situations that have nothing to do with this case.

In the general right to treatment the Court of Appeals said there is no right to least restrictive alternative. They said that using a least restrictive alternative approach in day-to-day treatment decisions would be a mess because they -- so we lost there.

QUESTION: Yes.

MR. TIRYAK: Okay. So on that part of it we accept the Court of Appeals decision, and we'll take their standard on that.

Now, the Court of Appeals also as an alternate holding on the shackling claim used least restrictive alternative after their primary holding, which is shackles, custodial shackles, would be necessary -- would be illegal if they weren't necessary.

Now, in that situation with restraints we like the

necessary standard. We think it's a clarification in a sense of the least restrictive alternative standard.

It's sort of a mess, I agree.

QUESTION: You're quite right.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:51 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Duane Youngberg, Etc., Et Al. Petitioners v. Nicholas Romeo, an incompetent, by his mother and next friend, Paula Romeo. No. 80-1429

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Boyle Connelly