ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-5195

TITLE MICHAEL JONES, Petitioner
v.
UNITED STATES

PLACE Washington, D. C.

DATE November 2, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL JONES, :

Petitioner :

v. : No. 81-5195

UNITED STATES :

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Washington, D.C.

Tuesday, November 2, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

SILAS J. WASSERSTROM, ESQ., Washington, D.C.; on behalf of Petitioner.

JOSHUA I. SCHWARTZ, ESQ., Washington, D.C; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Jones against the United States.

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

ORAL ARGUMENT OF SILAS J. WASSERSTROM, ESQ.,
ON BEHALF OF THE PETITIONER

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

In September 1975 the Petitioner was arrested when he tried to steal a coat from a department store. Six months later he was brought to trial on a charge of attempted petty larceny. Had the Petitioner pled guilty to that offense or been convicted of it after trial, he could have received a maximum sentence of one year in jail. He would have been released, at the very latest, in September of 1976. He would now long since have been a free man.

But Petitioner did not plead guilty and was not convicted. Instead, he raised an insanity defense, claiming that because he was mentally ill at the time he tried to steal the coat he should not be blamed for his act.

The Government did not contest this claim and the trial court found, after a stipulated trial, that

the Petitioner was not guilty by reason of insanity. On the basis of this acquittal and on this basis alone, the Petitioner was ordered committed indefinitely to a mental hospital. That is, he was ordered confined until he could prove that he was not mentally ill and dangerous.

The Petitioner still remains confined in the hospital on the basis of that commitment, even though more than seven years have now passed six his initial incarceration and more than six years have passed since the time he would have necessarily been released had he been convicted rather than acquitted. Conceivably, he will remain committed in the hospital for the rest of his life.

Petitioner contends that whatever the validity of his initial commitment to the hospital, once he has been confined there for longer than he could have been incarcerated upon conviction, his commitment became an indefinite one. Thus, the Government was constitutionally required to prove the need for his commitment by clear and convincing evidence, something which the Government has yet to do with respect to Mr. Jones.

If it cannot do so now, Petitioner submits, he is entitled to release.

QUESTION: Mr. Wasserstrom, you're not challenging, as I understand it, the initial commitment. The only question, if I understand your position correctly, that you raise is whether he must be released at the time that the sentence period would have expired under the criminal statute, is that right?

MR. WASSERSTROM: Our position is, Your Honor, that he has to be released at that time unless the Government can at that time prove his commitability by the standards required.

QUESTION: And you are not challenging, then, the standard or burden of proof at the time of his commitment?

MR. WASSERSTROM: It's our position that question is not raised in this case. There are arguable justifications for that initial commitment, and we dont discuss one way or another whether those justifications are sufficient to validate that initial commitment and we don't think the Court need reach that question. Whatever reasons there are that might have justified his initial commitment, those reasons would have justified only a commitment that could have lasted, without the Government meeting a burden of proof, for as long as he could have been incarcerated upon conviction.

QUESTION: If his initial commitment is not

punitive, then how is the statutory period of time that he could serve on the criminal charge relevant?

MR. WASSERSTROM: Well, we think the only justifications that could, the only justifications that could countenance that initial commitment are punitive in nature, that is, are a kind of punitive rationale.

QUESTION: And so for us to agree with your position we would have to conclude that his initial commitment was punitive?

MR. WASSERSTROM: Your Honor, I don't think that it's terribly important whether the word "punitive" is used, but I do think that any kinds of justifications which would justify the initial commitment are what I would call backward looking justifications, that is, justifications that do turn on the fact that he was found to have committed a criminal act beyond a reasonable doubt. And whether they're treated as purely punitive or not doesn't seem to me is important, or the label that we attach to them it doesn't seem to me is important.

The point is, though, those rationales all do turn on the nature of his act, and his act is one which, we submit, justifies confinement only for a year.

QUESTION: But hasn't this Court, as well as the United States Court of Appeals in the D.C. Circuit,

said there's no rational connection between the possible sentence and the possible length of stay after an acquittal, not guilty by reason of insanity?

MR. WASSERSTROM: I believe that the law in the United States Court of Appeals in Brown against the United States and in Wade v. Jacobs, in both of those cases the Court suggested that there is a relationship between the sentence that might have been imposed and the length that the commitment can persist without the Government proving commitability under civil commitment standards. I don't think that this Court has addressed that question, and I think this is the first case that raises it.

QUESTION: Oh, the Court has said expressly that there's no connection, in one case some time ago. Well, excuse me.

MR. WASSERSTROM: Well, it is true in Lynch v. Overholser this Court suggested certain rationales for a commitment, but it didn't then go on to say whether those rationales were ones which would justify an indefinite commitment or simply one that would persist as long as the sentence might have been imposed.

And it's our view that those rationales, whether you call them punitive or not, are all ones which evaporate once the insanity acquittee has been

confined for as long as he could have been confined if he had been convicted.

QUESTION: Does your position depend at all on whether or not the initial crime was a crime of violence? Suppose this had been a street mugging, for example?

MR. WASSERSTROM: Well, of course, the more serious the crime, the longer the maximum sentence that could have been imposed and the more distant the rights that we're talking about, the more distant in time the rights we're talking about would become available.

QUESTION: Is a maximum sentence the standard or the actual sentence?

MR. WASSERSTROM: Well, of course, there never is an actual sentence. You mean the actual sentence that likely would have been imposed?

QUESTION: Right.

MR. WASSERSTROM: Well, all we're arguing for here is that at the time, once he's been incarcerated as long as the maximum sentence that could have been imposed is up --

QUESTION: Doesn't the statute say he should be there until he's "eligible for release"? Isn't that what the statute actually says?

MR. WASSERSTROM: That is what the statute

says, Your Honor.

QUESTION: But isn't that clear?

MR. WASSERSTROM: It's clear that that's what the statute says.

QUESTION: That doesn't say he automatically gets out in one year.

MR. WASSERSTROM: Well, we're not arguing that he should automatically get out after one year. All we're arguing is that after one year the state should have to prove the need for his continued confinement. We're asking this Court to in effect read into the statute or strike down the statute to the extent that it authorizes --

QUESTION: Well, I mean, he asked for this, didn't he? Didn't he plead guilty by insanity?

MR. WASSERSTROM: He pled insanity.

QUESTION: Well, so then he says -- I don't understand what the one year has to do with it. He agreed to the sentence, that he should be there until he could be released --

MR. WASSERSTROM: Your Honor, it would be our position --

QUESTION: -- in very broad terms.

MR. WASSERSTROM: Well, it would be our position that by raising the insanity defense he

shouldn't be held to have agreed to anything. The insanity defense is a defense which is available to him under the District of Columbia law.

QUESTION: Well, the law says -- the law doesn't say any time that he shall be given this examination, is that right?

MR. WASSERSTROM: The law -- that's correct. But it's our view that the statute, to the extent that it doesn't provide this protection --

QUESTION: Well, when do you say he must have a hearing?

MR. WASSERSTROM: We say that he must have a hearing after he's been confined for as long as he could have been upon conviction, not because the statute suggests that, but because we think the Constitution requires it.

QUESTION: So you say he should have had a hearing four years ago.

MR. WASSERSTROM: That's right, he should have had one then, and he asked for one then. He went, as soon as he had been incarcerated -- confined, rather, for a year, he asked for a hearing.

QUESTION: I know that. But your position is that's when he should have had it?

MR. WASSERSTROM: That's when he should have

had it. However, the relief we're asking for now is simply that he be given one at this point, or released.

QUESTION: Isn't your major point, perhaps, or a main point the matter of where the burden of proof lies at the time of that hearing?

MR. WASSERSTROM: That's right, and for that we rely on this Court's decision in Addington against Texas.

QUESTION: Of course, that was a civil case, wasn't it?

MR. WASSERSTROM: Addington was a civil commitment. However, it seems to Petitioner that there is no way to distinguish Addington from this case once the insanity acquittee has been incarcerated -- confined, rather -- for a year.

QUESTION: Addington was a case where the person was being committed and it was suggested that he was insane for the first time. Here your client was the one who raised the insanity and persuaded the court that he was insane.

MR. WASSERSTROM: Your Honor, Mr. Addington had been committed seven times in the eight years preceding his commitment.

QUESTION: Well, but that didn't enter into the Court's assessment, I don't think.

MR. WASSERSTROM: It's part of the facts in Addington. He had been committed, and it's mentioned by this Court in its statement of the facts, he had been committed seven times.

QUESTION: Well, do you think a different burden of proof would attach if he was being committed for the first time? Do you think that can be fairly derived from Addington?

MR. WASSERSTROM: No. But I think that, in view of the fact that Addington had in fact been committed all these other times, that this Court did not consider that to be relevant to its determination.

QUESTION: Well, I thought the case mentioned one of the interests is not being stigmatized. Your client brought the stigma on himself by pleading insanity.

MR. WASSERSTROM: Well, first of all, Your Honor, it seems to me that the rationale of Addington is primarily based on the liberty at stake there and this Court's determination that where there was the kind of massive curtailment of liberty that's involved in an indefinite commitment to a mental hospital, one that can last for a person's life, that the risk of error with respect to that determination should be borne disproportionately by the state.

It's true that the Court mentions the fact that there is the additional stigma attached.

QUESTION: It says there are two interests, one the one you've just described and one the stigma. I didn't realize it had treated them as disparate interests.

MR. WASSERSTROM: Well, I think the liberty interest far overshadows the stigma interest. But let me say this --

QUESTION: Do you think that Addington says that in so many words?

MR. WASSERSTROM: It doesn't say it in so many words, Your Honor, but I think that it is clear from the opinion.

Let me say also, though, that it seems to me there is an added stigma when a defendant who prevails on an insanity defense is then ordered committed to a hospital. The hospitalization itself may involve a stigma, and as this Court said in Vitek against Jones, the hospitalization itself also may involve such things as behavior modification and forced treatment in a way that even a prison may not involve.

And so the actual hospitalization, whether you call it a stigma or not, is certainly an oppressive sort of condition.

QUESTION: Well, he invites that by pleading insanity.

MR. WASSERSTROM: Well, the question is whether he invites it beyond what the Constitution permits. We'd agree that he is making a claim that he should be held not guilty for an act some time in the past because at that time in the past, at the time he committed this single act, he was mentally ill and not responsible for his acts.

That's all that he's claiming. He's not also asking that he should be committed to a hospital because he's now mentally ill and dangerous.

QUESTION: No, but society can certainly take into account his behavior in the criminal trial and what he has asserted there in determining what should happen to him thereafter.

MR. WASSERSTROM: Well, to begin with, there's no question that society can take that into account in a civil commitment proceeding. Obviously, they could introduce in the civil commitment proceeding the evidence of his criminal activities. They could introduce into evidence the fact that he had himself claimed that he was mentally ill at some time in the past. Under ordinary evidence rules those kinds of things would be admissible.

The question is whether they could take it into account in such a way as to, simply because he raises an insanity defense, put him in a hospital in a situation where he may stay there for the rest of his life unless he can prove that he's no longer mentally ill or dangerous. And simply because the statute provides that is not a reason to hold that the statute is constitutional.

QUESTION: Mr. Wasserstrom, he had the initial 50-day release hearing, did he?

MR. WASSERSTROM: Yes, Your Honor. And I think there may be some confusion about the 50-day hearing. It's true that the statute does provide a hearing for people who are found not guilty by reason of insanity, and it's an automatic hearing and it is held 50 days after the return of the verdict of not guilty by reason of insanity.

But that hearing is a hearing at which the Government bears no burden whatsoever.

QUESTION: In any event, I gather at the conclusion of that that his confinement to St. Elizabeth's was continued?

MR. WASSERSTROM: That was because, we submit, the statute says that unless he proves that it shouldn't be continued, it is continued. That's all the 50-day

hearing provides.

QUESTION: And was the second hearing six months later or some time longer after?

MR. WASSERSTROM: No, he never had -- well, he didn't really have a second hearing. Once he had been confined for over a year, a legal challenge was raised to his continued confinement.

QUESTION: Did he initiate -- did he request it at that time, after he had been confined over a year?

MR. WASSERSTROM: His attorney did, in his behalf.

QUESTION: Yes.

MR. WASSERSTROM: And there was no evidence held at that -- no evidence was taken at that time. It was purely a legal question of whether, since he had been confined for over a year, the Government should be forced to prove the need for his continued confinement by clear and convincing evidence. And the trial court ruled against him. The Court of Appeals affirmed, then reversed itself, and then reversed itself again.

QUESTION: And that is the -- that actually then is the sequence before the case gets here?

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

Let me say one other thing --

QUESTION: That's six years ago.

QUESTION: At the 50-day hearing, there was evidence taken, wasn't there?

MR. WASSERSTROM: At the 50-day hearing there was evidence taken from a psychologist, although the statute requires that it be a psychiatrist.

QUESTION: Who presented it? Who presented it?

MR. WASSERSTROM: The Government put on the only witness that was put on at that hearing.

QUESTION: So the Government assumed at least the burden of going forward with the evidence?

MR. WASSERSTROM: Although the statute didn't require it to do so, it appears that the Government did assume that burden.

QUESTION: And there was no contrary evidence?

MR. WASSERSTROM: No, the defense counsel put on no evidence.

QUESTION: And so the testimony of the psychiatrist --

MR. WASSERSTROM: It was a psychologist.

QUESTION: -- psychologist was uncontradicted?

MR. WASSERSTROM: It was uncontradicted.

QUESTION: And if you believed him and thought he was right, the burden would have been satisfied.

MR. WASSERSTROM: Well, Your Honor, we would submit that clearly a burden of proof by clear and convincing evidence would not have been satisfied.

QUESTION: Just by the testimony of a psychologist?

MR. WASSERSTROM: Just because the judge -- there's no reason to think that the judge felt it was satisfied. The judge was not operating under that burden of proof. The judge didn't think that the Government had to prove anything at all, much less had to prove it by clear and convincing evidence.

QUESTION: Do you think we're free to operate under that rule here and say, whatever the rule is, it was satisfied?

MR. WASSERSTROM: Well, Your Honor, our position is that the Constitution --

QUESTION: Unless you think, unless you also think, which I suppose you do, that there should have been a jury trial.

MR. WASSERSTROM: As a matter of equal protection, although not as a matter of due process, we do think that there should have been a jury trial. We're not arguing that due process required one.

Your Honor, the judge who made the finding at the 50-day hearing that the Petitioner was mentally ill and dangerous was operating under a statute which told him he should make that finding in any case where the Petitioner didn't prove that he was entitled to be released. And there's just no way, it seems to me, to read into his finding anything affirmative at all.

QUESTION: What should have happened at the hearing is that the Government shouldn't have put on anything?

MR. WASSERSTROM: That's right, they shouldn't have.

Let me suggest something else, Your Honor. It seems to me that to some extent that hearing may have progressed the way it did because the prevailing law in the District of Columbia at that time appeared clearly to be that the Petitioner was going to be entitled to his release after a year if the Government couldn't meet civil commitment standards.

Brown against United States and Waite v. Jacobs, two cases from the U.S. Court of Appeals, had said that once the insanity acquittee is committed, is confined for as long as he could have been upon conviction, then the burden shifts to the Government to prove the need for his commitment. That was the law in

the District of Columbia, to the extent there was any law, at the time of this hearing.

QUESTION: Which hearing?

MR. WASSERSTROM: The 50-day hearing, the 50-day hearing, which came eight months after the Defendant was arrested.

So you see, at that time the worst it appeared that Mr. Jones' situation would be was that within three or four months he would be entitled to that hearing where the Government had the burden of proof anyway. And so it seems to me that to read into what actually happened at that hearing what the Government would have this Court read into it is grossly unfair to Mr. Jones and to Mr. Jones' lawyer.

That lawyer thought that no matter what happened at that hearing after a year his client would be entitled to a full civil commitment proceeding. And as a matter of fact, at that time it was a civil commitment proceeding at which the burden of proof would have been on the Government to prove commitability beyond a reasonable doubt.

QUESTION: Well, there was one stage in this proceeding, as I understand it, when the Court of Appeals agreed that he was entitled to a civil commitment proceeding.

MR. WASSERSTROM: That's right. The Court of Appeals panel first ruled against the Petitioner and then reversed itself. When it reversed itself, interestingly enough, the Government did not proceed with civil commitment proceedings.

QUESTION: Is there any reason this has all taken six years to get here?

MR. WASSERSTROM: Well, the Court of Appeals each time they decided the case took a year, year and a half, and it decided it three different times. But the Petitioner's, not his trial counsel, not his counsel at the 50-day hearing, but a counsel from the Public Defender's Office, brought a petition for his release right after he had served, been confined in the hospital, for one year.

QUESTION: Is there anything in the record to suggest why no evidence was offered on his behalf? Was that a tactical move to sharpen the issue?

MR. WASSERSTROM: Your Honor, no, I think that's very unlikely. The lawyer that represented him -- frankly, I don't know the lawyer that represented him at the 50-day hearing. He's not a lawyer from the Public Defender Service.

Whether he didn't present evidence simply because he thought he had none to offer or whether he

just didn't take the trouble that maybe he should have taken in trying to accumulate evidence, or again, perhaps he simply was relying on the fact that after a year under the prevailing law as it appeared to be at that time his client was going to be entitled to relief anyway. And this hearing occurred eight months after his incarceration, eight months after his arrest and he had been confined from that day forth.

So the lawyer may simply have felt that at this hearing it doesn't really matter much what happens; three months from now the Government's going to have to prove this person is commitable beyond a reasonable doubt.

QUESTION: Also, probably the average person doesn't have psychiatrists waiting around to testify for them, isn't that true?

MR. WASSERSTROM: Well, that, Your Honor, raises what I think is a very interesting point, which is not in any of the briefs. I was looking at the --

QUESTION: I mean, is there any organization of psychiatrists like legal aid?

MR. WASSERSTROM: No, there isn't.

QUESTION: Psychiatrists aid or something?

MR. WASSERSTROM: No. And interestingly enough, when I was looking at the statutes involved

here, it turns out --

QUESTION: Well, there is in Massachusetts.

MR. WASSERSTROM: I thought you meant in D.C. There may be in other places.

But in the statute, where people are civilly committed in the District of Columbia there is provision made for the appointment of a psychiatrist to help him at a release hearing, and he's paid if the committee is indigent. There are no comparable provisions with respect to insanity acquittees. So the insanity acquittee is not supplied with a psychiatrist if he can't afford to hire one, and it's not even clear he's entitled to one should he be able to afford it.

QUESTION: Let me just ask one question about your legal theory. Are you primarily relying on the due process clause or the equal protection clause?

MR. WASSERSTROM: Your Honor, as we said in our reply brief, I think we concede that if our due process argument fails, that is if this Court thinks that the Petitioner here is sufficiently different from the committee in Addington that these procedures that are accorded to him or that are not accorded to him meet due process standards, then it's likely that the Court would uphold the difference, would on the same theory uphold an equal protection claim, but not necessarily.

The fact is that in the District of Columbia civil committees are afforded protections that go beyond those which are constitutionally required, and we still would argue --

QUESTION: The thing that troubles me about your due process argument, supposing we have precisely the same facts, say in Texas, and say in Texas they had a maximum sentence of ten years for this offense. I take it under your theory there would be no due process claim.

MR. WASSERSTROM: He would have a due process claim once the ten years were up.

QUESTION: But otherwise -- different process is required depending on the length of the sentence.

MR. WASSERSTROM: This is because -- this is because the legislature in Texas would have said that this kind of conduct merits a possible sentence of up to ten years, and because the rationales for committing people found not guilty by reason of insanity of that conduct are, if there's a justification for commitment at all, ones that look to the nature of the conduct.

QUESTION: But it seems to me if your case turns on a comparison between his treatment and the treatment of a person who is convicted of the offense, you're really in the final analysis relying on the equal

protection clause.

MR. WASSERSTROM: Well, I think the two in a case like this are almost coterminous.

QUESTION: Suppose it were a life sentence?

MR. WASSERSTROM: Then -- again, we're not conceding that a commitment based purely on a not guilty by reason of insanity is ever justifiable. But this Court, I submit, needn't reach the question in this case. This was not an offense that carried anywhere near life.

QUESTION: Well, unless the rationale you propose inevitably would at least be relevant to the claim, on the very moment that he is acquitted that he may not be committed without having a hearing in which the Government takes the burden of proof.

MR. WASSERSTROM: Your Honor, it's the Government, not us, that take the position that this commitment after not guilty by reason of insanity is just like a civil commitment. Its sole purpose, according to the Government in its brief, is to commit people who are mentally ill and dangerous.

We concede that there may be other purposes for an automatic commitment following a not guilty by reason of insanity.

QUESTION: If we agree with you, the next

challenge will surely be the next day after the acquittal.

MR. WASSERSTROM: Then this Court will have to decide whether those other rationales which we are not challenging will justify a commitment, automatic commitment following not guilty by reason of insanity.

QUESTION: But agreeing with you has a lot to do with deciding about those other rationales.

MR. WASSERSTROM: I don't think they do, Your Honor. The point is, on whatever rationale the commitment is justified, it's not one that can justify a confinement that lasts longer than the maximum sentence.

QUESTION: Because after all, the acquittal was based on the fact that at the time of the crime the person was insane.

MR. WASSERSTROM: That's true.

QUESTION: Not at the time that he was tried or at the time he's acquitted.

MR. WASSERSTROM: And that's why if the only rationale for the commitment is a conclusion that he's presently mentally ill and dangerous, it seems to me it can't survive. But this Court in Lynch v. Overholser, for example, did mention other possible rationales, and it's clear that Congress when they enacted this statute

had other rationales, that is for the purpose of deterring false insanity pleas and trying to close what Congress perceived as a revolving door.

We're not asking this Court to open that revolving door. All we're asking is that it not be wedged shut permanently with respect to people such as Mr. Jones who are found not guilty of a misdemeanor.

QUESTION: But you're also asking -- are you not also asking that the Government must maintain the burden of proof at all times?

MR. WASSERSTROM: All we're arguing here is that it must meet the Addington standard of proof once the Petitioner has been confined for as long as he could have been confined if he had been convicted.

QUESTION: In other words, you'd like to have us import the civil standard into the criminal law?

MR. WASSERSTROM: Well, again, Your Honor, it's because the rationales which support his initial commitment are ones which simply do not justify a commitment of an indefinite duration. They're ones which would justify, arguably, a commitment to the maximum term that he could have been subjected to.

QUESTION: Mr. Wasserstrom, if you rely on a comparison to the criminal proceeding to judge the adequacy of the insanity procedures, would it be

constitutional to do away with the 50-day hearing that you now have and substitute a hearing at the time when the man first becomes eligible for parole?

MR. WASSERSTROM: I would see no problem with that at all. I don't think the 50-day hearing as provided here for is any kind of due process whatsoever.

We suggest at the end of our brief that the Government has several alternatives. After a person is found not guilty by reason of insanity, they could right then and there initiate civil commitment proceedings, and if they can show in a way that satisfies those standards that he is commitable he then can be indefinitely committed. Or they can wait until his maximum sentence is up, at which time then they have to meet a standard of proof.

QUESTION: No, but I'm just thinking that the other side of the coin is, would it be permissible to govern the scheduling of potential release hearings by a schedule that just paralleled what would be appropriate if the man had not been found not guilty by reason of insanity?

MR. WASSERSTROM: Again, Your Honor, this Court would have to first answer the question whether those other rationales for an automatic commitment are

justifiable ones. We're not contending that they're not. They're not raised by this case, but those rationales, to the extent that they exist, are ones which are geared to the offense which the person was found not guilty by reason of insanity of. And therefore, once he's been confined for as long as he could have been upon conviction, he's entitled to release unless the Government can then prove by clear and convincing evidence that he is commitable.

I'd like to reserve whatever limited time I have left. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Schwartz.

ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. SCHWARTZ: Thank you. Mr. Chief Justice and may it please the Court:

This case presents to the Court for review under the due process clause of the Fifth Amendment a key portion of the coordinated scheme enacted by the United States Congress to govern in the District of Columbia two critical problems: One is the question of whether persons who claim that because of reason of mental illness they should be excused from criminal responsibility should in fact be so excused. The second

is the question whether it is sufficient that persons who successfully raise that criminal defense may be treated like other persons who are candidates for civil commitment.

The question, in other words, is whether it was proper for Congress to recognize, as it did, that special procedures are warranted for the treatment of criminal acquittees to protect society's public interests in preventing the injuries that may be caused by those individuals who have been excused from criminal responsibility by reason of criminal at the time of a crime.

These are issues that every jurisdiction confronts. They're fundamental to our criminal justice system. We do not submit that every jurisdiction must answer them the same way, and in fact, as the briefs indicate, there is considerably flux in this area. We do deem it very significant that the majority of the states have chosen to enact special procedures for the handling of criminal acquittees.

But even if that were not so, in confronting this case we think the Court should not lose sight of the fundamental fact that Congress or any state legislature entering into this sphere must confront two conflicting imperatives. One is to convict only those

persons who may justly be held criminally responsible. At the same time, a state legislature or Congress must provide adequate safeguards to society.

The two procedures rest, one on the other. It's not tolerable to have an insanity defense unless some mechanism for providing a tolerable degree of safety to society is available to ensure another means of protecting society from those persons who do remain dangerously mentally ill.

The scheme that the Court is confronted with today is actually the product of several revisions. On two occasions, in 1955 and then again in 1970, Congress reacted to decisions in two cases of the D.C. Court of Appeals and in one case a decision of this Court. And Congress has attempted, made what we think is a constitutionally acceptable effort to fine-tuning this statute to meet various constitutional and statutory concerns.

The first amendment that's of relevance here by way of background occurred in 1955. Congress responded to the decision of the United States Court of Appeals for the D.C. Circuit in Durham against the United States. In Durham, the D.C. Circuit acted to expand the insanity defense, adopting the rule that every individual who can show -- every individual whose

crime is the product of mental illness or mental disease or defect at the time of the crime is to be excused from that responsibility.

Congress was concerned that the effect of the Durham decision, abandoning the M'Naughten rule which had theretofore prevailed, was to make the insanity defense much more widely available. Congress was concerned that some mechanism should be provided to assure that insanity acquittees did not simply fall through the cracks and that they be appropriately considered for civil commitment.

The next thing that's of relevance here is this Court's 1962 decision in Lynch against Overholser. In that case the Court was confronted with a constitutional challenge quite similar to the one presented today. It was argued that the 1955 version of the statute at issue here, which simply provided for an automatic indefinite commitment, was unconstitutional because it did not provide for any follow-up hearing to determine the present mental illness or dangerousness of the acquittee.

It was especially contended that that procedure was unconstitutional because under Davis against the United States this Court had prescribed the rule for the federal courts that an insanity defense

might be sustained simply because the Government had failed to prove beyond a reasonable doubt that the defendant was sane at the time of the crime.

The Court ultimately found it unnecessary, however, to answer the constitutional questions presented. The Court concluded that the statute as then written did not apply to persons such as Lynch, who had not affirmatively availed themselves of the insanity defense. The court in that case had imposed the insanity defense upon him.

Nevertheless, Mr. Justice Harlan in his opinion for the Court noted that whatever problems of rationality might infect such a statutory scheme, which is, as I say, significantly different from the present one, might well not exist when the statute is applied to persons such as the present Petitioner, who have affirmatively availed themselves of the insanity defense.

The issues which this Court was not required to answer in Lynch against Overholser were answered by the D.C. Circuit in Bolton against Harris. There the Court answered the constitutional questions by engrafting onto the statute the requirement that a second hearing be held similar to the 50-day hearing now required by statute, at which time the issues for the

court would be the present mental illness and dangerousness of the acquitted defendant. And the D.C. Circuit required that that hearing conform generally to the requirements of civil commitments.

In 1970, Congress enacted the reform statute for the District of Columbia courts, and among the problems it addressed were those it perceived arising from the decisions in Lynch and Bolton against Harris. The court codified this Court's -- excuse me. The Congress codified this Court's decision in Lynch, making it clear that this procedure which we are discussing today does not have any application to an individual who does not wish to raise the insanity defense but who is nonetheless adjudicated to be insane.

Congress also undertook to repair the constitutional defect recognized by the D.C. Circuit in Bolton against Harris. Congress, however, had options open to it which it as a legislature had available, which were not available to the D.C. Circuit. The problems that the D.C. Circuit had recognized were the absence of affirmative proof at the criminal trial of actual insanity. In addition, the D.C. Circuit had commented upon the gap, the possibility that the mental status of the acquittee had changed in the interval

between the time of the crime and the time of the commitment.

Congress undertook to repair both of these problems, as I say. Congress in Bolton increased the probative value of the adjudication of not guilty by reason of insanity, by requiring that that defense could not be made out unless the court concluded by a preponderance of the evidence shown by the defendant, that the defendant was in fact mentally ill and legally insane and that that insanity was, under the substantive legal standard prevailing, sufficient to excuse the crime.

QUESTION: That was at the time of the crime.

MR. SCHWARTZ: That's right.

Congress, however, took a different approach than the D.C. Circuit --

QUESTION: Mr. Schwartz, was that in effect an overruling of Davis against the United States by the Congress?

MR. SCHWARTZ: No, it clearly was not, Your Honor. Davis, as the Court subsequently made clear in Leland against Oregon and reaffirmed in Patterson against New York, Davis was a rule prescribed by this Court through its supervisory power. It was not a constitutional rule, and it appears therefore to have

been open to Congress to prescribe a different rule for the District of Columbia.

QUESTION: So in effect it was an overruling of Davis.

MR. SCHWARTZ: Well, it changed the result of Davis for the District of Columbia. I took a different inference from the term "overruling," obviously, than was intended. It did change the rule of Davis for the District of Columbia, thereby creating a predicate which had not therefore existed in to be considered in prescribing the appropriate procedures for the subsequent commitment procedure.

Congress, rather than placing the burden of proof upon the Government at the follow-up hearing, however, which was required, Congress did place the burden of proof upon the defendant, the acquitted defendant. However, it compensated for this, in its view, by requiring that the proof at the criminal trial be affirmative by a preponderance of the evidence.

The particular thing of importance to this Court's decision that we believe emerges from the legislative history is that Congress deemed it particularly unacceptable that there be a disparity in the burdens of proof between the procedures used at the criminal trial and the procedures used in the commitment

phase. As this Court's decision in Addington and its more recent decision last term in Santosky against Kramer stress, the purpose of a burden of proof is to reflect a societal judgment as to the fair allocation of the risk of error.

Congress believed that it was unfair that the risk of an erroneous factfinding decision be allocated in a manner in the commitment proceeding that was not coordinated with the allocation of the risk of error at the insanity trial. So Congress adopted comparable burdens, in each case a preponderance of the evidence. Were that not so, were that not done, Congress recognized that the so-called revolving door phenomenon would exist. That is, individuals could be adjudicated to be not criminally responsible by reason of insanity and merely because of the disparity in the burdens of proof, not because of a change in mental status, that individual might escape commitment. Congress thought it unacceptable for there to be that disparity.

Section 301(d) therefore provides today for a temporary automatic commitment. Following that temporary commitment, which is not to exceed 50 days, a hearing is held. In that interim period, although the statute does not say so in so many words, the decisions of the D.C. Court of Appeals and the D.C. Circuit both

interpret the statute to require that the hospital to which the individual is temporarily committed undertake a psychiatric or psychological evaluation.

By the way, so far as we're aware there's nothing in the statute which specifies in any way what type of professional is to undertake that evaluation, and certainly there is no issue in this case.

QUESTION: But "temporary" here in this case is six years.

MR. SCHWARTZ: No. No, Mr. Justice Marshall. The Government disagrees with the Petitioner's contention that his present confinement rests upon that temporary commitment or upon his acquittal.

QUESTION: I am all ears. I am all ears.

MR. SCHWARTZ: The Government's contention is that the reason that Mr. Jones is today committed are twofold: One, a hearing was held at the conclusion of 50 days. At that hearing the only proof that was presented was the Government's proof, by Dr. Gertrude Cooper, a psychologist from St. Elizabeth's Hospital. She testified that Mr. Jones remained mentally ill, that he remained dangerous to himself and to others. She testified that he suffered from auditory hallucinations, that he heard voices that other people did not hear, that his thinking was infected with delusional ideas,

and that, notwithstanding the fact that he was receiving 900 milligrams of Thorazine daily, a very high dose according to all the testimony, he nonetheless continued to have these hallucinations.

QUESTION: Mr. Schwartz, who had the burden at that hearing?

MR. SCHWARTZ: The statute on its face does prescribe that the burden is upon the acquittee. That burden of proof obviously must be subdivided into its two components, the risk of nonpersuasion and the burden of going forward.

In this case it is perfectly clear, we submit, that the Government bore the burden of going forward.

QUESTION: Yet, according to the transcript of that hearing, Mr. Kraskoff -- the attorney for the Government, wasn't he?

MR. SCHWARTZ: Yes.

QUESTION: -- began by stating that the burden is on the Defendant.

MR. SCHWARTZ: That's right. In fact, it's fair to say that transcript reveals a certain amount of confusion.

QUESTION: Well, I certainly would say so, in view of that comment.

MR. SCHWARTZ: He also said that this is a

Bolton hearing, and Bolton of course teaches that the burden of proof is on the Government. But let's let -- if I may, I'd like to deal with the risk of nonpersuasion and the burden of going forward one at a time.

Certainly the burden of going forward was in fact borne by the Government. Mr. Kraekoff, the Assistant United States Attorney, on the page you're referring to, as I recall, said that he thought the burden was upon the Defendant, but nevertheless the Government was prepared to proceed, and he asked whether that would suit the pleasure of the court and of the Petitioner's counsel. In fact, Petitioner's counsel had no witnesses and all agreed that the Government should put on its evidence, and it did so.

Furthermore, that evidence was uncontradicted and was not challenged in any way by the cross-examination. Indeed, we suggest that it's possible to read the transcript as embodying a concession by Petitioner's counsel that the facts were as the Government's witness claimed they were.

In any event, what is critical, we think, to the Court's decision is that this case does not present any issue about whether the burden of going forward with the evidence may be placed upon the acquittee, because

it was not in this case. And furthermore, we are advised by St. Elizabeth's Hospital and the U.S. Attorney's ofice here in the District of Columbia that it simply has not ever occurred so far as we know that an individual's commitment has been continued simply because of a lack of proof. That is, the Government always undertakes to present or to sponsor the testimony of the doctors from St. Elizabeth's Hospital who have examined the individual.

There are times when the Government does not particularly agree with that testimony. The decision of the U.S. Court of Appeals for the District of Columbia in United States versus Ecker refers to the peculiar situation and the fact that this hearing is not always strictly adversary because the Government, as counsel for St. Elizabeth's Hospital, does not in fact in its capacity as prosecutor agree with that testimony.

But the testimony is nevertheless provided. The hospital provides a report. It is open to the Government to find other witnesses if it wishes if it doesn't agree with that report. But evidence is provided to support the commitment, and clearly the record reveals that happened in this case and it's our understanding that that is the norm.

The other issue is the burden, the risk of

nonpersuasion. We would submit that the relevant datum in this case is the ultimate conclusion of the Superior Court in this case. The court entered its findings, and I'd like to read them if I may, that Petitioner "is mentally ill and as a result of his mental illness at this time he constitutes a danger to himself or others."

We'd suggest that, particularly in light of the absence of any contrary argument by Petitioner's counsel, it is perfectly reasonable to infer that the court concluded that, wherever the law might place the risk of nonpersuasion, the Government had successfully shouldered it. And therefore we --

QUESTION: Well, on that basis the case shouldn't be here at all, I suppose.

MR. SCHWARTZ: Your Honor, that may be correct. I suppose it's fair to point out that we had not read this transcript at the time we filed our brief in opposition and these facts were not called to the Court's attention. In fact, it was my brother Mr. Wasserstrom who took the initiative of submitting this transcript to the Court with a copy to us.

It may well be that this case does not present all of the questions or some in the focus that the Court believed that they were in when it granted the

petition. That's obviously not for us to say.

In any event, it is our contention that, although these issues are not presented as we see it on this record, it is of course our contention that the statute assigning the risk of nonpersuasion, as well as adopting a burden of the preponderance of the evidence as the standard of proof, is in any event constitutional.

QUESTION: Mr. Schwartz, by way of background information, if you will, under the present statutory scheme is it still possible for an automatic commitment to be made of a defendant who doesn't himself raise the plea of not guilty by reason of insanity, but who is acquitted on those grounds, as occurred in the Overholser case?

MR. SCHWARTZ: Justice O'Connor, the answer is clear that that is not possible.

QUESTION: All right. How about, then, a defendant who effectively establishes a not guilty by reason of temporary insanity? Is that an automatic commitment under this scheme?

MR. SCHWARTZ: The statute doesn't -- neither the statute for commitment nor the statute on insanity defenses -- and they are all part of Section 301, enacted at one time -- does not recognize any

difference. In fact, in law there is no defense of temporary insanity. The issue is, of course, insanity at the time of the trial and whether it's the product of the time.

So of course there is a possibility that an acquittal reflects temporary insanity. Of course, the jury's verdict -- the jury makes, or in this case the judge because the right of jury trial was waived, makes no finding on that subject. It is not the Government's contention that the finding of insanity which produced the crime is sufficient in itself to support a commitment.

QUESTION: Was there any -- as I understand it, he was insane at the time of the crime, but he wasn't insane at the time of the trial?

MR. SCHWARTZ: No, he wasn't incompetent at the time of the trial.

QUESTION: There is a difference?

MR. SCHWARTZ: Yes, there is. The standard for competency --

QUESTION: Can you be committed if you're incompetent?

MR. SCHWARTZ: If you're incompetent --

QUESTION: The question is, if you're incompetent, solely incompetent, can you be committed to

St. Elizabeth's?

MR. SCHWARTZ: You cannot be committed under this scheme. The courts --

QUESTION: Could you in a civil commitment be put in St. Elizabeth's because you're incompetent? And the answer is no.

MR. SCHWARTZ: Only if you are independently found to be mentally ill and dangerous. The relevant decision is the Court's decision in Jackson against Indiana.

QUESTION: But I understand that in this case they said that he was insane at the time he committed the crime.

MR. SCHWARTZ: But that he nevertheless had become competent by the time of trial.

QUESTION: Well, why was he committed?

MR. SCHWARTZ: He was committed because the standard for -- first of all, the standard for competency in law is --

QUESTION: Well, there was no hearing at all about his competency at that time, was there? I mean, after he was found not guilty by reason of insanity, was there any other hearing held at that time?

MR. SCHWARTZ: Yes, after --

QUESTION: Before he was committed?

MR. SCHWARTZ: No.

QUESTION: Well, that's what I'm talking about.

MR. SCHWARTZ: 50 days elapsed.

QUESTION: So I'm talking about when he was committed, there was no hearing at all on whether or not he should be committed to St. Elizabeth's.

MR. SCHWARTZ: No. At the time he was committed there was a hearing, the hearing at --

QUESTION: What was the hearing?

MR. SCHWARTZ: The hearing was --

QUESTION: I thought the hearing was whether or not he committed the crime.

MR. SCHWARTZ: No. We're talking about two hearings. The Defendant received a criminal trial. In this case he was tried upon a set of stipulated facts. He was committed for 50 days to St. Elizabeth's Hospital. He was evaluated by the doctors there.

He was returned to court. A second hearing was held. At that hearing the Government --

QUESTION: But there was no hearing on that day? I've asked that three times now.

MR. SCHWARTZ: On the -- I'm afraid I --

QUESTION: On the day that he was committed to St. Elizabeth's after he had been acquitted, was there

or was there not a hearing?

MR. SCHWARTZ: I understand now. I'm sorry for being obtuse.

There was no hearing at that time. Petitioner concedes that it was nevertheless lawful to commit him for that 50-day period. There is no issue before the Court as to whether that was lawful.

The issue is whether the hearing that was held 50 days later is sufficient to continue his commitment in the nature of a civil commitment.

QUESTION: Was it a civil commitment or a criminal commitment?

MR. SCHWARTZ: Labels in this area can be confusing and they're rather arbitrary. But the important fact is that the Government's contention is -- the Government's contention is that this commitment may be sustained as a civil commitment.

QUESTION: It's both?

MR. SCHWARTZ: Well, there's no need to reach the issue that Mr. Wasserstrom says that potentially exists, if the Court accepts our argument that Addington is distinguishable and that this class of individuals may be civilly committed, with the full consequences of a civil commitment, with the procedures that are afforded under this statute. There is no reason to

decide whether Congress could in any event adopt a verdict of guilty but mentally ill and sentence someone and empower a judge to sentence someone to St. Elizabeth's Hospital.

There is really no dispute in this case that that was not Congress' intention. The only question presented -- the only way the Court could reach that result in our view is if the Court rejects our arguments distinguishing Addington. And it's to those arguments that I'd like to turn more directly now.

QUESTION: May I ask one question before you do. Do I understand, one of your positions is that the 50-day hearing in this case, it was equivalent to a hearing at which the Government sustained the burden of proof by clear and convincing evidence and therefore is tantamount to a civil commitment? Are you in effect arguing that?

MR. SCHWARTZ: We are arguing that in this case that was a commitment hearing and that the Government did bear the risk of nonpersuasion as well. However, we would argue, should the Court view the facts in a different manner, that that nevertheless was a commitment hearing and not a release hearing, because the statute prescribes that the hearing must be held, that the court must make findings, determine the issues

and making findings and conclusions which are reviewable upon appeal, and that in effect -- and that the only way commitment can be continued without a determination of the issue of present mental illness and dangerousness is if the defendant waives that hearing.

So it's not possible for the commitment to just go on of its own force unless the defendant exercises his right to waive it. So that we contend that, even if it were not true, if in another case or if in this case this was not -- the Government didn't bear the burden of proof, it still is a commitment hearing, which simply cannot be ignored as Petitioner would have the Court do, as though it had never happened.

QUESTION: I'm still not entirely clear on what your view of the legal significance of that having been tantamount to a civil commitment hearing would be. Are you saying that his subsequent history has been the same as if he had been civilly committed?

MR. SCHWARTZ: Well, we may be saying other things, but we are among other things saying that, certainly.

QUESTION: Did he get the same periodic review by the head of the hospital and all that sort of thing?

MR. SCHWARTZ: The release procedures which Mr. Jones now confronts are the same in material respect

to those that confront a civil committee. That is, the standard prescribed by the statute, proof by a preponderance of the evidence of releasability, is the same as that prescribed for civil committees, and the criteria for release are the same.

QUESTION: There are some crucial procedural differences, aren't there?

MR. SCHWARTZ: Well, I'm not sure I would agree that they're crucial. One thing that is clear is that the D.C. Court of Appeals said that the Petitioner had not raised them and therefore it declined to comment on them.

The judicial avenues for release are exactly comparable, are comparable. There are other avenues for release which may or may not be identical.

QUESTION: Doesn't notice go to the prosecutor and you have an opportunity to contest it, or something?

MR. SCHWARTZ: That is true. But that issue is not in this case. Mr. Jones -- in fact, the hospital in Mr. Jones' case, so far as that aspect of the statute is relevant, the hospital on one occasion recommended his conditional release. The court approved his conditional release. So he has no claim that he has been injured by the requirement of judicial review.

That conditional release, as is mentioned in our brief, did not work out and the hospital recommended that it be terminated.

There's really no occasion to --

QUESTION: Mr. Schwartz, he was entitled after the 50-day period periodically to further hearings, was he not? How long are those periods?

MR. SCHWARTZ: I'm afraid, Mr. Justice Brennan, that the answer is not really simple. The statute does not --

QUESTION: Well, really what I'm coming to -- I know your time is running, and I don't want to take it -- is there a distinction between periodic hearings for civil committees and this kind of committee?

MR. SCHWARTZ: Under the statute as written, the right to judicial hearings has the same -- in both cases has a periodic element.

QUESTION: Well, are the periods the same?

MR. SCHWARTZ: They're six-month periods at which the criminal committee may seek his release. On the other, on the civil side, there is no statutory procedure. The statute simply says you have a right to habeas corpus, which the Petitioner also has access to. But a six-month period is the requirement imposed upon the hospital-initiated medical review which may lead to

judicial review.

QUESTION: Well now, you suggested to my brother Stevens that he in effect had all the procedures that a civil committee gets on the occasion of the 50-day hearing, is that right?

MR. SCHWARTZ: On the occasion of the 50-day hearing, it is our submission that in this case he did.

QUESTION: As if he had been a civil committee. Well, since that date has he been treated as a civil committee?

MR. SCHWARTZ: He is treated as a civil committee in the sense that his continued confinement rests upon the fact that he is unable to show that he is no longer mentally ill and dangerous,

QUESTION: Is he entitled to demand a periodic review?

MR. SCHWARTZ: He is entitled to go to court periodically to review, to seek his release.

QUESTION: As a civil committee or as a criminal committee?

MR. SCHWARTZ: I'm not sure the meaning of that term. He is entitled to go tc court and the things he must show are the same things that he would have to show. Therefore, one point that is particularly important here is that the effect of Petitioner's

argument is that he seeks something that a civil committee would not have. He seeks to be recommitted de novo.

That is a substantial burden which is not imposed on the state or the Government in a civil case, and it is our position that were Petitioner's contention to be accepted criminal committees would be better off than the class of civil committees, which strikes us --

QUESTION: Mr. Schwartz, isn't this much true? It's awfully hard to get all these procedures in mind, but that if he were committed as a civil committee under the normal civil procedures he would be entitled to have every six months, at no less -- no greater period than every six months, the chief of the hospital make an independent review of the status?

He's not entitled to that. You don't say he's now entitled to that, do you?

MR. SCHWARTZ: We really don't say anything about that issue, frankly, Mr. Justice Stevens. There is a decision of the D.C. Court of Appeals --

QUESTION: Well, but don't you have to say something about it? If you're saying he's treated exactly as though he were a civil committee, don't you have to tell us whether that means he gets the same periodic review that a civil committee gets?

MR. SCHWARTZ: In major respects, he clearly is treated the same way. The D.C. Court of Appeals --

QUESTION: Well, what about particular respects? Let me get that straight. In this particular respect, is he entitled to the periodic review?

MR. SCHWARTZ: The law of the D.C. Circuit --

QUESTION: Under your view of the law.

MR. SCHWARTZ: -- in Bolton versus Harris is that he is, and there's nothing further.

QUESTION: Has he received that?

MR. SCHWARTZ: I frankly do not know that the record reveals that. I do not know the answer to that question, I'm sorry.

My time has expired.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Wasserstrom?

REBUTTAL ARGUMENT OF SILAS J. WASSERSTROM, ESQ.

ON BEHALF OF PETITIONER

MR. WASSERSTROM: Yes, Your Honor. I'd like to make two points, if I might.

First, with respect to the hearing that was held after 50 days, we would submit that, although the Government did call the only witness who testified, that witness in fact presented no evidence whatsoever as to the Petitioner's dangerousness. Her only testimony was

that he at one point refused to carry out a project involving lacquering some copperwork and gave some anxiety to his supervisor. That was the extent of the evidence with respect to his dangerousness.

She also said something to the effect that, well, I don't know what crime he committed before, but whatever it was he might very well commit it again. She obviously did not give any meaningful testimony with respect to dangerousness.

We don't know what the judge's finding --

QUESTION: You're addressing the weight of the evidence.

MR. WASSERSTROM: Well, our contention is that it was required to be proved by clear and convincing evidence. In Santosky against Kramer this Court made clear that that means qualitatively meaningful evidence, and I don't think there's any question, I don't think the Government would argue that the testimony here would meet a test of clear and convincing evidence.

But I submit there was really no evidence whatsoever on the issue of dangerousness.

QUESTION: Is that the real issue that we've taken this case for?

MR. WASSERSTROM: Well, I hope not, Your Honor. I hope the Court will decide that at that

hearing the burden was on the Petitioner there, and that and our challenges as to the statute as written in that respect, and I hope the Court won't decide the case on the grounds that somehow what happened in this case makes it different.

QUESTION: May I ask this question. I understand your position, there was not clear and convincing evidence at that hearing. But assume that we thought there was just for purposes of my question. Would there be anything left of your case? And assume not only that there was clear and convincing, but that the judge said, I think the burden is on the Government to prove by clear and convincing and I so find.

MR. WASSERSTROM: We would still have an equal protection argument, Your Honor. If this Court was to rule that due process did require that evidence be shown by clear and convincing evidence because of Addington and such cases as that, then the Court would have to address our equal protection claim, which is that he was not accorded all the procedural protections, such as a right to a jury trial, which civil committees are accorded.

QUESTION: I see.

MR. SCHWARTZ: Your Honor, one final point. The Congressional concerns which Mr. Schwartz so

eloquently described when he began his presentation we would submit are fully vindicated by the rule which we're asking this Court to adopt. That is, a rule which says that the Petitioner can be confined under a procedure where he bears the burden of proof, but only so long as he could be confined had he been convicted. Those concerns about revolving doors and so on are simply fully vindicated under the rule we ask this Court to adopt.

Whatever burdens this Court may feel the Defendant was saddling himself with when he raised an insanity defense, surely he did not expect that as a result of raising that insanity defense he would be treated worse than he would have been treated had he pled guilty or been convicted.

QUESTION: Let me ask one more question, if I may, because I'm still not entirely clear on your position. Assume there were a 50-day hearing, clear and convincing proof, and I know this is not realistic, but there were also a jury trial. Are you complaining of any difference in the treatment of your client after that date and the treatment he would have received had he initially been committed in a civil proceeding?

MR. WASSERSTROM: Your Honor, those --

QUESTION: Difference in the sense of ability

to obtain his release?

MR. WASSERSTROM: We would submit that there are meaningful differences in the release procedures.

QUESTION: But you haven't really relied on them.

MR. WASSERSTROM: But we're not challenging them, because they weren't really raised in the Petitioner's case. He has not run into -- he has not been hurt by those different procedures. That's why they're not raised here.

QUESTION: So your case really boils down to the absence of what you consider to be a necessary predicate for indefinite detention, namely a clear and convincing showing in a civil hearing?

MR. WASSERSTROM: That's right. Now, it is true that when the Government talks about Addington it mentions the fact that one reason the Court decided Addington as it did and did not impose a higher burden of proof, that is guilt beyond a reasonable doubt, was because of the safety valves that are built into the system after commitment. And so to the extent, I think, that the Government itself relies on that sort of thinking, the different release provisions that apply for insanity acquittees should perhaps go into this Court's decision.

But they aren't strictly speaking raised by this case, because the Petitioner here has not been hurt by those differences.

The major difference is that where there's a civil commitment the hospital can release the Petitioner outright or give him a conditional release without going back to court, whereas with insanity acquittees the court has to approve even conditional releases.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:02 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:

MICHAEL JONES v. UNITED STATES #81-5195

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