

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5404

TITLE TERRY B. ALLEN, Petitioner V. ILLINOIS

PLACE Washington, D. C.

DATE April 30, 1986

PAGES 1 thru 59



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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY B. ALLEN, :
Petitioner, :
V. : No. 85-5404
ILLINCIS :
- - - - -x

Washington, D.C.
Wednesday, April 30, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:06 o'clock a.m.

APPEARANCES:

VERLIN R. MEINZ, ESQ., Ottawa, Illinois; on behalf of
the petitioner.
MARK L. ROTERT, ESQ., Chief, Criminal Appeals Division,
Office of the Attorney General of Illinois; Chicago,
Illinois.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Allen against Illincis.

4 Mr. Meinz, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT OF VERLIN R. MEINZ, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. MEINZ: Mr. Chief Justice, and may it
9 please the Court, as I speak to the Court this mcrning,
10 the petitioner, Terry Allen, is incarcerated in a
11 maximum security penal institution in the State of
12 Illinois. He is there with persons who have been
13 frmally convicted of crime, and like them, receives the
14 mental health treatment that is available in that
15 facility.

16 The petitioner, though, has not faced trial.
17 The state of Illinois could have pursued traditional
18 prosecution against him, but chose not to. Instead, the
19 state chose an alternative. They sought to have him
20 declared a sexually dangerous person under Article 105
21 of the Illinois Code of Criminal Procedure.

22 QUESTION: Is that a criminal procedure or a
23 civil prccedure? You cite it as under the Criminal
24 Code.

25 MR. MEINZ: It is under the Criminal Code,

1 Your Honor. The statute itself carries a civil label.
2 We are arguing, though, that it is criminal for purposes
3 of the Fifth Amendment. That is our precise argument
4 here.

5 QUESTION: But you concede the legislature has
6 described this as a civil proceeding.

7 MR. MEINZ: It has in the statute itself. The
8 state pursued this adjudication of Allen as a sexually
9 dangerous person. It conducted --

10 QUESTION: Excuse me. Did he have
11 preponderance, or did he have reasonable doubt?

12 MR. MEINZ: That is the proof beyond a
13 reasonable doubt. The state must make its case that
14 Allen is a sexually dangerous person beyond a reasonable
15 doubt.

16 QUESTION: Is that possible in a civil case?

17 MR. MEINZ: That was the thrust of the
18 decision in Statulak versus Coughlin, a Seventh Circuit
19 case in 1975 which ruled that the proceeding, though
20 denominated civil, was sufficiently criminal as to
21 require the imposition of a burden beyond a reasonable
22 doubt. That is an opinion, by the way, upon which we
23 rely.

24 QUESTION: Will you elaborate a little bit on
25 the type of institution in which these persons are

1 confined? I think you said they were confined also with
2 people convicted of crime. Is it a state prison?

3 MR. MEINZ: It is a state prison, Your Honor.

4 QUESTION: Is it indistinguishable from other
5 prisons that do not have psychiatric cases?

6 MR. MEINZ: It is indistinguishable in our
7 judgment, Your Honor, from other institutions. Indeed,
8 it is simply a part of a larger institution, the Menard
9 Correctional Center in Illinois. In 1933, the Menard
10 Psychiatric Center was set off as a separate
11 institution. A new wall was constructed between it and
12 the rest of the minority correctional center. Mental
13 health treatment is available there.

14 QUESTION: It is a hospital.

15 MR. MEINZ: It is a mental health treatment
16 center. It is not a hospital as such. It is certainly
17 not a mental health hospital, as one might imagine a
18 hospital to be.

19 QUESTION: This person confined in there is
20 just not an outpatient. He is an inpatient. He stays
21 there.

22 MR. MEINZ: He stays there. He stays there
23 indefinitely, Your Honor.

24 QUESTION: Are the persons in the psychiatric
25 wing or whatever the building is segregated completely

1 from persons in the criminal part of the structure?

2 MR. MEINZ: No, they are not, Your Honor.

3 Within the Menard --

4 QUESTION: Do they dine together?

5 MR. MEINZ: Yes, they do. Within the Menard
6 Psychiatric Center --

7 QUESTION: Do the psychiatric people, are they
8 required to occupy cells at night?

9 MR. MEINZ: Yes, Your Honor.

10 QUESTION: They are?

11 MR. MEINZ: Yes, Your Honor. Perhaps I should
12 clarify this just a bit. Menard Psychiatric Center
13 houses about 300 some inmates. About 30 to 35 of those
14 at any one time will be sexually dangerous persons,
15 persons adjudicated under Article 105 of the Code of
16 Criminal Procedure in Illinois. The remainder of the
17 population, obviously, the majority of the population
18 are convicted criminals, convicted felons who have been
19 sent to the Menard Psychiatric Center for psychiatric
20 care. There are convicted sex offenders there who are
21 sent to the center for the sex offender treatment
22 program, which is also available to the sexually
23 dangerous person. Also sent to the Menard Psychiatric
24 Center are inmates from other institutions, also
25 convicted felons, who have been found to be in need of

1 short-term psychiatric care.

2 QUESTION: Mr. Meinz, do I understand from
3 your response that Justice Marshall's question about the
4 burden of proof that the source of the beyond a
5 reasonable doubt burden was not the Illinois legislature
6 but a Court of Appeals for the Seventh Circuit
7 decision?

8 MR. MEINZ: Yes, Your Honor. Originally the
9 statute, and certainly the case law under it, specified
10 a preponderance of the evidence standard. That was
11 litigated in a habeas corpus action, and in 1975 in
12 Stachulak versus Coughlin, an opinion by Chief Judge
13 Fairchild at that time, the Seventh Circuit ruled that
14 there must be proof beyond a reasonable doubt. That
15 standard must be applied.

16 After that decision, the Illinois Supreme
17 Court in People versus Pembrook also ruled, albeit
18 independently, they said, that there was a reasonable
19 doubt standard. The legislature picked up the cue and
20 incorporated a reasonable doubt standard in that
21 legislation in its revision in 1981.

22 QUESTION: Mr. Meinz, Mr. Allen was indicted,
23 wasn't he?

24 MR. MEINZ: Mr. Allen was indicted.

25 QUESTION: Is that indictment still

1 outstanding?

2 MR. MEINZ: Yes, it is, and it will be until
3 such time as Mr. Allen can prove that he has recovered
4 from the sexually dangerous person condition. At that
5 time, and only at that time, will the underlying charge
6 against him be dismissed.

7 MR. MEINZ: But it isn't likely that he will
8 ever be tried for that crime?

9 MR. MEINZ: It is not likely that he will ever
10 be tried for the crime, a crime of deviant sexual
11 assault and --

12 QUESTION: As long as he is not cured, he
13 won't be tried, and when he is cured, it will be
14 dismissed.

15 MR. MEINZ: That is true. The question is,
16 and one significant focus of our argument is that we may
17 be talking about -- we are certainly talking about an
18 indefinite period of time before he can prove that he
19 has recovered and before that charge is dismissed.

20 QUESTION: And he may never be able to prove
21 it.

22 MR. MEINZ: He may never be able to prove that
23 he has recovered.

24 QUESTION: So he will be there until his
25 death.

1 MR. MEINZ: That is true.

2 QUESTION: Like in a civil commitment.

3 MR. MEINZ: That is possible, except we argue
4 there are very real distinctions.

5 QUESTION: Well, I know, but in that respect
6 it is the same.

7 MR. MEINZ: Yes, Your Honor, but there would
8 be periodic review available in such a civil mental
9 health commitment that is not available in a sexually
10 dangerous person commitment. The state will be obliged
11 to come back to court time and time again to prove that
12 the commitment to a secure institution is the least
13 restrictive alternative placement that is appropriate
14 for treatment.

15 QUESTION: You mean in a civil commitment.

16 MR. MEINZ: In a civil commitment.

17 QUESTION: And here who has the burden?

18 MR. MEINZ: The defendant -- excuse me, the
19 accused. He is called the respondent in the
20 proceeding.

21 QUESTION: How often can he raise the
22 question?

23 MR. MEINZ: He can raise the question as often
24 as he wants and as soon as he wants upon being committed
25 to the Menard Psychiatric Center. He could come in

1 within six months. He could come in in a year. He
2 could come in every three months if he wanted to.
3 Importantly, though, at that time he has the burden of
4 proving his entitlement to release. He must show that
5 he is entitled to release. If he fails, he simply goes
6 back to the Menard Psychiatric Center, where he has
7 been.

8 QUESTION: Is the hearing held in the
9 institution or in the court?

10 MR. MEINZ: In the committing court, Your
11 Honor, the court in which he was originally found to be
12 a sexually dangerous person, and that court must make
13 the decision whether or not the respondent, the accused,
14 remains a sexually dangerous person. If I could, I
15 would like to say just a few more words about the
16 sexually dangerous person process.

17 The statutory definition I should get to first
18 of all. The statute defines a sexually dangerous person
19 as a person who has a mental disorder existing for a
20 year or more, as a person who also has criminal
21 propensities to the commission of sex offenses, and a
22 person who has demonstrated those propensities towards
23 acts of sexual assault or molestation.

24 The Illinois Supreme Court in this case, as a
25 matter of fact, gave us a definitive construction of the

1 third element of that definition. The court said that
2 as to the third element, the demonstrated propensity,
3 the state must show that respondent has committed at
4 least one sexual offense. Clearly, then, the definition
5 involves both a mental condition and past misconduct.

6 A petition to have a person adjudicated a
7 sexually dangerous person must be filed in a criminal
8 case. There must be an underlying criminal charge. It
9 is not an independent process in any way, once again,
10 unlike the civil mental health process. Such petition
11 seeking SDP adjudication can only be filed by the
12 prosecutor, not by the accused, not by the court, not by
13 a friend or a relative on the accused's behalf. Only
14 the prosecutor can trigger this SDP process.

15 QUESTION: Does Illinois provide for a civil
16 commitment that might be brought by family or next
17 friend?

18 MR. MEINZ: Yes, it does, as does every other
19 treatment program that I am aware of, Your Honor, in the
20 state of Illinois. If it is a treatment program, if it
21 is a mental health commitment, in Illinois, then the
22 court importantly, or any friend or relative on behalf
23 of the accused, or the accused himself can petition for
24 treatment.

25 QUESTION: So if the family became aware of

1 the potentialities, they, the family might proceed
2 independently of the civil action and ask that the
3 person be committed. Is that right?

4 MR. MEINZ: In the civil area. They could not
5 do so, however, Your Honor, in a sexually dangerous
6 person. They could not ask to have someone adjudicated
7 a sexually dangerous person. Let's assume, for example,
8 that a friend or relative saw the accused now
9 unfortunately charged with his third or fourth sex
10 offense. They said, well, he has pled guilty before, he
11 has done this before, he did a short stretch in prison.
12 We need treatment. There is a Sexually Dangerous
13 Persons Act. Let's try to get him some help.

14 They can't do it. They can't do it. Only the
15 prosecutor can make the decision that the accused should
16 be adjudicated or treated as a sexually dangerous
17 person.

18 QUESTION: Well, the issue here is the Fifth
19 Amendment, I take it.

20 MR. MEINZ: Yes, it is. Yes, it is, Your
21 Honor.

22 QUESTION: And since whether or not a
23 psychiatrist's opinion based on statements that he is
24 making from the respondent is admissible?

25 MR. MEINZ: Yes.

1 QUESTION: The statements themselves were not
2 offered in this case.

3 MR. MEINZ: Only part of the statements were
4 actually admitted into evidence at the formal hearing.

5 QUESTION: The objection really is the
6 opinions of the psychiatrist based on his statements.

7 MR. MEINZ: Yes, Your Honor.

8 QUESTION: And you say that those opinions are
9 inadmissible unless what?

10 MR. MEINZ: Unless he is informed that he has
11 a right to silence, and if he is informed of the
12 consequences of his speaking.

13 QUESTION: Would you say he had to have a
14 lawyer present at the time of the --

15 MR. MEINZ: No, Your Honor. We have made no
16 claim --

17 QUESTION: You say it is a criminal
18 proceeding. If he wants a lawyer, shouldn't have one?

19 MR. MEINZ: Our claim is a narrow one. Our
20 claim is that this is a criminal case for purposes of
21 the Fifth Amendment only.

22 QUESTION: And not for jury trial later?

23 MR. MEINZ: Not for jury trial. We are
24 claiming no entitlement to jury trial. By statute he is
25 given the right to a jury trial.

1 QUESTION: Why are you claiming -- what makes
2 the Fifth Amendment so -- why do you think you are
3 entitled to the Fifth Amendment privilege but not the
4 jury trial?

5 MR. MEINZ: Because this is a criminal case
6 within the scope of the Fifth Amendment, which is
7 construed more broadly than the criminal case provisions
8 of the Sixth Amendment, in our judgment. We make, once
9 again, no claim as to an entitlement to a jury trial.

10 QUESTION: I know, but surely the Fifth
11 Amendment can be claimed in a civil proceeding, but it
12 can't if it isn't incriminating, and these statements
13 certainly can't be used in any criminal case, a wholly
14 criminal case.

15 MR. MEINZ: We believe they can, Your Honor.
16 Our first point, though, is that he should not have been
17 compelled.

18 QUESTION: How could they ever be used in a
19 criminal proceeding?

20 MR. MEINZ: I am sorry, Your Honor.

21 QUESTION: How could they ever be used in a
22 criminal proceeding?

23 MR. MEINZ: After the sexually dangerous
24 person or the person alleged to be a sexually dangerous
25 person had spoken to a psychiatrist, and was compelled

1 to speak for that psychiatrist, it is our judgment that
2 the statements could thereafter be used in a criminal
3 prosecution.

4 QUESTION: Which criminal prosecution?

5 MR. MEINZ: If the state fails to prove beyond
6 a reasonable doubt that a person is a sexually dangerous
7 person, we believe that the state can return to the
8 underlying criminal charge. We also believe that --

9 QUESTION: It would be inadmissible then as
10 having been compelled.

11 MR. MEINZ: But the state of Illinois, the
12 Illinois Supreme Court does not give us that.

13 QUESTION: The Supreme Court of Illinois said
14 you had immunity though.

15 MR. MEINZ: A use immunity, Your Honor.

16 QUESTION: Use immunity.

17 QUESTION: Well, that is not enough?

18 MR. MEINZ: No, Your Honor. It is not even
19 equivalent to the immunity that is required for a waiver
20 of the Fifth Amendment. It is not coextensive with the
21 waiver of the privilege. We need a derivative use. As
22 a matter of fact, in Illinois we have as a general
23 matter a transactional immunity. We are not given
24 transactional immunity here. We are not even given
25 derivative use immunity, which is our most important

1 point.

2 QUESTION: What you say is that your client
3 ought to have the same sort of privilege as a defendant
4 has in a criminal case, and he can't even be called to
5 the stand against his will, and no amount of immunity
6 would do him any good unless it is full transactional
7 immunity.

8 MR. MEINZ: We are insisting that he not be
9 called to the stand, which under our judgment is also
10 possible, given the ruling of the Illinois Supreme Court
11 that he has no privilege against self-incrimination. In
12 our judgment, that is the only thing keeping him off the
13 stand.

14 QUESTION: You are saying that all a defendant
15 has to do is refuse to speak to the psychiatrist and
16 that is the end of it.

17 MR. MEINZ: Yes.

18 QUESTION: So for all practical purposes the
19 state may not compel him to go through the sexually
20 criminal proceeding.

21 MR. MEINZ: No, Your Honor, they cannot compel
22 him to speak to those examples. If he chooses to speak
23 to --

24 QUESTION: How else are they going to
25 determine it?

1 MR. MEINZ: They have a great many other ways
2 to make their case, Your Honor.

3 QUESTION: Like what?

4 MR. MEINZ: They have to prove once again a
5 mental condition and past misconduct. How is past
6 misconduct most often proved? By reference to prior
7 convictions which the Sexually Dangerous Person Act
8 specifically contemplates, the introduction of other
9 crimes evidence. The Sexually Dangerous Persons Act
10 contemplates the introduction of lay witnesses who have
11 been the victims perhaps of past sexual assaults, who
12 have been the victims of the persons --

13 QUESTION: But how would you prove the mental
14 condition?

15 MR. MEINZ: The mental condition could be
16 derived from psychiatric observations of the defendant,
17 of the respondent, rather, at a proceeding, or from past
18 records, prior records of one sort or another.

19 QUESTION: But that isn't a very satisfactory
20 way, is it?

21 QUESTION: If it is proof beyond a reasonable
22 doubt, it strikes me that the mental condition just
23 couldn't be established, period.

24 MR. MEINZ: Your Honor, my experience shows
25 that indeed the state can and has proved a sexually

1 dangerous person without regard, without --

2 QUESTION: When a person being committed has
3 refused to speak at all to the examining physician? You
4 have seen cases like that?

5 MR. MEINZ: Where the -- I should point out
6 where they emphasize where the state's evidence
7 emphasizes past criminal conduct of the respondent, and
8 where the state's case emphasizes the alleged underlying
9 offense, and where the psychiatric testimony was merely
10 a byproduct, was merely only another portion of the
11 evidence that was introduced. I have certainly seen
12 that type of case.

13 In terms of the difficulty of proving, it
14 indeed may be more difficult for the state to prove that
15 an individual is sexually dangerous if the person within
16 that proceeding has privilege against
17 self-incrimination.

18 QUESTION: Under the Illinois law, must he
19 speak to the psychiatrist?

20 MR. MEINZ: He certainly must.

21 QUESTION: Does the law say so?

22 MR. MEINZ: Yes, it does, the law and the case
23 law. Certainly the Illinois Supreme Court --

24 QUESTION: And if he refuses to speak, is he
25 subject to contempt?

1 MR. MEINZ: Yes, he is.

2 QUESTION: That is clear from the law.

3 MR. MEINZ: That is clear from the law. A
4 case that we have cited in brief, People versus Redlich,
5 is in fact a contempt appeal, an appeal from a contempt
6 proceeding --

7 QUESTION: I would think compelled testimony
8 like that would be very difficult to get into a later
9 purely criminal proceeding.

10 MR. MEINZ: Except, Your Honor, we read the
11 Illinois Supreme Court's decision for what it is, and
12 what it is is a statement that the person enjoys only a
13 use immunity, and no more.

14 QUESTION: And what is wrong with that?

15 MR. MEINZ: I don't believe it is coextensive
16 with the privilege which they are requesting him to
17 waive under Kastigar versus the United States. It is
18 certainly not the equivalent of the transactional
19 immunity which he --

20 QUESTION: We haven't insisted on that.

21 MR. MEINZ: Not transactional immunity. No,
22 Your Honor. Derivative immunity you have.

23 QUESTION: We don't have that issue before us
24 in this case, however, its possible use in a truly
25 criminal trial at some future date. That is not before

1 us now.

2 MR. MEINZ: That is not before the Court.

3 QUESTION: Hasn't Illinois, having two prongs
4 to deal with this, given people in this unfortunate
5 situation an opportunity to avoid a criminal conviction
6 and a criminal record by providing a civil means of
7 dealing with it?

8 MR. MEINZ: We wish they had, Your Honor.

9 QUESTION: Well, haven't they?

10 MR. MEINZ: No, they haven't. In our judgment
11 they haven't. They have certainly --

12 QUESTION: Well, in your judgment, but they
13 have two statutes, two provisions. One is civil, and
14 one is criminal.

15 MR. MEINZ: Three provisions, Your Honor, we
16 would submit.

17 QUESTION: Well, the underlying civil
18 commitment. But this is a civil proceeding here.

19 MR. MEINZ: It is announced by the legislature
20 to be civil. It must be distinguished, though, from the
21 civil mental health process. That is Chapter 91 and a
22 half. That is the Mental Health Code in Illinois. This
23 is Chapter 38, the Criminal Code. It has two processes,
24 formal, traditional prosecution and the sexually
25 dangerous person proceeding.

1 QUESTION: Are you suggesting that that makes
2 it a criminal case and not a civil case because of the
3 means?

4 MR. MEINZ: No, not the mere placement of this
5 particular piece of legislation in the Criminal Code as
6 opposed to the Mental Health Code or elsewhere. We are
7 looking at everything that is involved here, the entire
8 process from the fact that it can only be initiated in a
9 criminal prosecution to the point that it can only be
10 initiated by the prosecutor, to the point that it
11 involves a formal hearing, rules of evidence, and proof
12 beyond a reasonable doubt that involves --

13 QUESTION: How strong is your argument to
14 include proof beyond a reasonable doubt when that was
15 really imposed by the Seventh Circuit? They just took a
16 view similar to the one you are arguing here, that this
17 proceeding was a criminal one, but that doesn't indicate
18 that the legislature independently would have come to
19 that conclusion.

20 MR. MEINZ: The legislature has since -- well,
21 has incorporated it, yes.

22 QUESTION: Yes, but it is doubtful it would
23 have done that without the Seventh Circuit
24 constitutional --

25 MR. MEINZ: And the Illinois Supreme Court had

1 done so as well without regard to Stachulak versus
2 Coughlin on the grounds that they recognized that there
3 were very serious consequences. I should point out that
4 Stachulak versus Coughlin in our judgment was well
5 reasoned, and they took a look, the court in that case
6 took a look at decisions of this case, two types of
7 cases from this Court, the sexual psychopath legislation
8 cases --

9 QUESTION: However well reasoned it may have
10 been, I thought you were arguing that here Illinois has
11 incorporated a number of elements into this type of
12 case, and therefore Illinois must have intended it to be
13 a criminal case, because it has put so many criminal
14 protections into it, and all I am saying is that it
15 seems to me that the argument about reasonable doubt is
16 somewhat different because that really didn't start with
17 the Illinois legislature.

18 MR. MEINZ: That is true, Your Honor. We are
19 arguing that without regard to the intent of the
20 legislature, and I would perhaps concede that the intent
21 of the legislature was to come up with a civil
22 proceeding.

23 QUESTION: The Illinois Supreme Court in this
24 case has dealt with it as a civil proceeding.

25 MR. MEINZ: They have indeed, and that is our

1 complaint.

2 QUESTION: Well, I know. I know, but it
3 certainly, even though independently it decided on a
4 reasonable doubt standard, it doesn't believe that the
5 Fifth Amendment privilege is available here because it
6 is a civil case.

7 MR. MEINZ: And we disagree strenuously with
8 that decision on the grounds of the sexual psychopath
9 legislation cases and on the grounds particularly of In
10 Re Gault.

11 QUESTION: In our case, Addington against
12 Texas, that was seven or eight years ago, was that a
13 civil case or a criminal case?

14 MR. MEINZ: That was a civil case. That had
15 to do with the civil --

16 QUESTION: Now, didn't we hold there that
17 there could be an enhanced, a greater than preponderance
18 of the evidence without altering the character of the
19 proceeding as a civil proceeding?

20 MR. MEINZ: Yes.

21 QUESTION: Why do you -- you have spent a
22 great deal of time now arguing that because of the
23 nature of the burden of proof there, that that makes it
24 a criminal case, but Addington is directly contrary, is
25 it not?

1 MR. MEINZ: Then perhaps I have misspoken, and
2 especially in light of Justice Rehnquist's question.
3 Perhaps I have misspoken. We do not focus particularly
4 strongly at all on the fact that there is a burden here
5 beyond a reasonable doubt. We focus on other aspects of
6 the proceeding. We focus particularly on the commitment
7 that is involved here, a commitment that is vastly
8 different from the commitment that was involved in
9 Addington versus Texas. That is vastly different from
10 the commitment undergone by a civil mental health
11 committee under the Mental Health Code in Illinois.

12 They don't go to Menard Psychiatric Center.
13 They don't go to a maximum security penal institution
14 like sexually dangerous persons do. Those committees,
15 the mental health committees, unlike the sexually
16 dangerous person, has his situation periodically
17 reviewed. The SDP does not. The state has a burden, a
18 repeated burden to show the need for secure commitment.
19 There is no such process involved here. A civil
20 committee, one who is in a -- even one in a secure
21 institution, has a bill of rights under Illinois law.

22 QUESTION: May I ask you another question? I
23 still don't understand. If you prevail on your Fifth
24 Amendment argument, will the proceedings that you think
25 this Court should approve be regarded as civil or

1 criminal?

2 MR. MEINZ: I think, Your Honor, that --

3 QUESTION: Are you still contemplating a third
4 type of proceeding where the party involved is a
5 sexually dangerous person, or is so alleged?

6 MR. MEINZ: No, we believe that there is room
7 for the sexually dangerous person proceeding in
8 Illinois.

9 QUESTION: So there could be three
10 proceedings.

11 MR. MEINZ: There would be, in our view, three
12 proceedings. We believe that proceeding can exist. We
13 are not arguing it out of existence.

14 QUESTION: So one is criminal, one is purely
15 civil, and the other is sort of a hybrid one in
16 between?

17 MR. MEINZ: Yes, but we would argue that the
18 sexually dangerous person proceeding, while it lies
19 between the middle of the traditional criminal
20 prosecution and the civil mental health commitment, is
21 skewed to one side, and is skewed very drastically
22 toward the criminal side, and that is why we argue that
23 the proceeding must be considered so far criminal in
24 nature as to warrant the privilege, the application of
25 the privilege against self-incrimination, and we urge

1 this Court to find such privilege.

2 If it does, then there is no question but that
3 the petitioner's adjudication and commitment as a
4 sexually dangerous person must be reversed.

5 QUESTION: If you prevail here, is it
6 reasonable to assume that the state will proceed against
7 him on a criminal charge?

8 MR. MEINZ: They cannot proceed against Allen
9 on a criminal charge, though they might, they might. If
10 this case is, the adjudication is reversed, in our
11 judgment the state would be free to proceed against Mr.
12 Allen in a formal criminal prosecution. My personal
13 guess is, they wouldn't. They had problems with their
14 proof the first time around.

15 QUESTION: Refresh my recollection about the
16 Sachulak case. That case did not hold, did it, that
17 this was a criminal proceeding?

18 MR. MEINZ: Not in so many words, Your Honor.
19 It just viewed --

20 QUESTION: Didn't it hold that the
21 consequences or the stigma in the punitive consequences
22 were severe enough to justify the proof beyond
23 reasonable doubt standard, which also applied in the
24 criminal case?

25 MR. MEINZ: Yes, Your Honor.

1 Thank you, Your Honor.

2 CHIEF JUSTICE BURGER: Mr. Rotert.

3 CRAI ARGUMENT BY MARK L. ROTERT, ESQ.,

4 ON BEHALF OF THE RESPONDENT

5 MR. ROTERT: Mr. Chief Justice, and may it
6 please the Court, there are several points on which
7 respondents differ significantly from the petitioner on
8 both the facts and the law that are relevant to this
9 particular inquiry this morning.

10 One of the most important differences that I
11 would like to emphasize at the outset is that the
12 immunity provision as provided by the Illinois Supreme
13 Court in this very case is coextensive with the
14 privilege against self-incrimination which the
15 respondent to a Sexually Dangerous Persons Act should
16 have.

17 There is no question that the respondent to a
18 sexually dangerous persons proceeding has the ability to
19 claim a Fifth Amendment privilege in any proceeding, but
20 there is also no question that in this case the Illinois
21 Supreme Court has immunized that person. Nothing that
22 Terry Allen said to any psychiatrist at any point in
23 time can ever be used against him in any criminal
24 prosecution for the underlying sex offenses.

25 The Illinois Supreme Court has made that very

1 clear. And this is coextensive with the Fifth Amendment
2 privilege, and this Court has recognized that
3 repeatedly, that transactional immunity is not what the
4 Fifth Amendment requires.

5 QUESTION: But of course his claim is that
6 because this was so much like a criminal proceeding, it
7 shouldn't have been used against him in this proceeding,
8 that he shouldn't have been callable for any purpose, I
9 guess.

10 MR. ROBERT: That is certainly true, Justice
11 Rehnquist, and I think that leads us to the second major
12 fundamental distinction between the parties, and that is
13 the position of the state of Illinois that this is a
14 civil statute. It is a civil statute because the
15 legislature that drafted it and enacted it said it was
16 civil.

17 It is a civil statute because the Supreme
18 Court of Illinois, which has had the opportunity to
19 evaluate it, has concluded it to be civil. And it is a
20 civil statute because in its effect and in its purpose
21 it does what a civil statute is designed to do. Now, I
22 admit that it does it in the context of due process
23 safeguards which are often found in criminal cases, but
24 we point out in our brief how ironic it is that the
25 state of Illinois provides more due process safeguards

1 to a civil proceeding and the result is that people
2 therefore identify it as a criminal prosecution, and I
3 think that that is the ironic result that is proffered
4 to the Court this morning.

5 QUESTION: Mr. Rotert, one point I am worried
6 about is, at the hearing, if the judge put the
7 respondent on the stand and asked him a question, and
8 the guy said, I refuse to testify, what could you do
9 about it? Nothing.

10 MR. ROTERT: Your Honor, I believe that if the
11 respondent to a sexually dangerous persons proceeding is
12 put in that circumstance he faces the same options that
13 a grand jury witness would have faced had he been
14 given --

15 QUESTION: I am not talking about grand jury.
16 I am talking about the proceeding in this case.

17 MR. ROTERT: In this case.

18 QUESTION: The judge put him on the stand and
19 asked him a question, and the respondent says, on the
20 basis of the Fifth Amendment, I refuse to answer. Would
21 that be recognized?

22 MR. ROTERT: It would be recognized if he were
23 claiming the privilege for any criminal prosecution that
24 might result, because he can claim it at any time, but
25 it would not be recognized if he said, I refuse to

1 answer because I think I might be found sexually
2 dangerous as a result of my answer, because being found
3 sexually dangerous is not a criminal prosecution,
4 conviction, or punishment, so it is not something that
5 the Fifth Amendment would provide protection for.

6 QUESTION: So this is a civil procedure which
7 ends up with a jail sentence.

8 MR. ROTERT: It is a civil provision which
9 ends up with nothing of the sort, Justice Marshall, and
10 that is another very serious factual distinction between
11 the parties. The idea that this is a criminal sentence
12 is simply not supported by the data that is before the
13 Court.

14 QUESTION: Well, it is a jail, isn't it?

15 MR. ROTERT: It is a facility for psychiatric
16 care --

17 QUESTION: It is a jail, isn't it?

18 MR. ROTERT: No, Your Honor, it is --

19 QUESTION: It is not a jail?

20 MR. ROTERT: It is not a jail.

21 QUESTION: But it has bars?

22 MR. ROTERT: It has bars.

23 QUESTION: And you can't get out?

24 MR. ROTERT: You are not free to leave.

25 QUESTION: And it is not a jail?

1 (General laughter.)

2 MR. ROTERT: Justice Marshall --

3 QUESTION: It is an institution.

4 MR. ROTERT: It is an institution.

5 QUESTION: Like Sing Sing.

6 MR. ROTERT: No, Your Honor, not like Sing
7 Sing.

8 (General laughter.)

9 QUESTION: Well, isn't Sing Sing an
10 institution?

11 MR. ROTERT: There are many institutions, not
12 all of which are like Sing Sing, Justice Marshall. This
13 particular institution is staffed by a psychiatrist, not
14 by a warden. It is staffed by mental health care
15 professionals, not by guards. It is an institution
16 which does restrict the liberty of someone who is a
17 sexually dangerous person.

18 QUESTION: Don't you eat and live with the --
19 I mean, and exercise with the other criminal prisoners?

20 MR. ROTERT: You have the right to all the
21 facilities available to anyone at the Menard
22 Institution.

23 QUESTION: Well, it is a criminal
24 institution.

25 MR. ROTERT: I understand, Justice Marshall,

1 that that is your belief, but I don't believe that that
2 is what you would conclude if you had an opportunity to
3 examine all of the data. If you had an opportunity to
4 consider that it offers vocational and educational
5 training, that it offers psychiatric therapy, group
6 milieu therapy.

7 QUESTION: You assume I didn't read that? I
8 read all that.

9 MR. ROTERT: Mr. Justice Marshall --

10 QUESTION: I read it in other places. This is
11 an institution that has a wall that separates two groups
12 of people.

13 MR. ROTERT: That's correct.

14 QUESTION: But they are all in one
15 institution.

16 MR. ROTERT: That is not correct.

17 QUESTION: Well, don't they all eat
18 together?

19 MR. ROTERT: The dining arrangements may well
20 be such that they eat in the same facility --

21 QUESTION: You say it may be or is true?

22 MR. ROTERT: It is true, Justice Marshall.

23 QUESTION: It is true. Fine.

24 MR. ROTERT: But the Illinois Supreme Court
25 has insisted years ago that the person committed under

1 the Sexually Dangerous Persons Act is not to be kept at
2 Menard Prison. He is not to be treated like a prisoner
3 at the Menard Penitentiary. He is not to be kept down
4 there without receiving psychiatric care. This is
5 something that the Illinois Supreme Court has been very
6 insistent about. They have said, if you treat him like
7 he is in Menard prison, we will have a problem, but you
8 will not so treat him. You will provide therapy.

9 QUESTION: Does the record show how many
10 people are there?

11 MR. ROTERT: Menard Psychiatric Institute has
12 about 30 sexually dangerous persons.

13 QUESTION: How many?

14 MR. ROTERT: About 30 sexually dangerous
15 persons respondents are there.

16 QUESTION: And how many psychiatrists?

17 MR. ROTERT: I am not aware of the number of
18 psychiatrists on staff. I know that the director of the
19 institutions is a psychiatrist.

20 QUESTION: Is he a physical --

21 MR. ROTERT: He is an MD with a specialty in
22 psychiatry. I think something else that --

23 QUESTION: May I ask one other question about
24 the institution?

25 MR. ROTERT: Please.

1 QUESTION: Menard, as I understand it, part of
2 Menard is a correctional institution in the punitive
3 sense as well as the part that is for psychiatric care.

4 MR. ROTERT: Most certainly.

5 QUESTION: Now, if you take the whole unit,
6 how many inmates altogether are there?

7 MR. ROTERT: There are about 300 in the Menard
8 Psychiatric Center at any given moment.

9 QUESTION: I am asking about the whole unit.

10 MR. ROTERT: The whole unit. Justice Stevens,
11 I don't know the number of the population at Menard
12 Prison.

13 QUESTION: That is what I was asking.

14 MR. ROTERT: But Menard Prison is one of the
15 three major maximum security facilities in the state
16 Department of Corrections. It is most certainly a
17 maximum security prison.

18 MR. ROTERT: Is the hospital portion of Menard
19 -- I don't know, whatever portion the 300 represents of
20 the total, is that also under the jurisdiction of the
21 Department of Corrections?

22 MR. ROTERT: It is managed by the Department
23 of Corrections jurisdictionally. It is staffed by
24 psychiatrists and health care professionals.

25 QUESTION: And then the 300 inmates, persons,

1 patients, whatever we call them, within that group
2 include 30 or 35 sexually dangerous persons and another
3 250 or 270 other convicted felons who need psychiatric
4 treatment.

5 MR. ROTERT: This is correct.

6 QUESTION: And the 35 and the 270 basically
7 are all in the same --

8 MR. ROTERT: They intermingle.

9 QUESTION: Right.

10 MR. ROTERT: They intermingle, Justice
11 Stevens, and I think that it is important to remember
12 that the Menard Psychiatric Institute is not warehousing
13 these people. It is not throwing them into cells and
14 forgetting that they exist. In point of fact, the
15 American Correctional Association in 1980 made the
16 Menard Psychiatric Institution the first state facility
17 of its kind among the 50 states for accreditation for
18 its psychiatric care unit. It has been reaccredited
19 since in 1983. It is a place where people receive
20 treatment from health care professionals who want to
21 provide treatment.

22 I won't deny that their liberty is restrained,
23 but I will vigorously resist the implication that they
24 are just as good as being in jail. The petitioner's own
25 brief says that their conditions of incarcerations

1 differ from those afforded to the convicted felons at
2 the Menard Penitentiary.

3 QUESTION: As part of this special proceeding,
4 must not there be proof beyond a reasonable doubt of the
5 sex act that he had been charged with?

6 MR. ROTERT: Yes, there is such a requirement,
7 Justice --

8 QUESTION: So he has been convicted of a
9 felony in the sense that -- not by a jury but by the
10 judge.

11 MR. ROTERT: No, I don't believe he has been
12 convicted of a felony even in an equivalent sense.

13 QUESTION: Well, beyond a reasonable doubt has
14 it been proved that he committed the act?

15 MR. ROTERT: Yes, it has, Justice White.

16 QUESTION: Would this proof on this record be
17 sufficient to sustain if it were admissible, if all the
18 proof were admissible, to sustain a conviction under the
19 criminal statute?

20 MR. ROTERT: I believe it would have been, Mr.
21 Chief Justice. It would have been because you had the
22 victim stating that on a day certain a certain act
23 occurred forcibly and against her will in the county of
24 Peoria, and I think this brings an interesting point to
25 bear. If that particular finding or showing were made

1 by the prosecutor in a criminal prosecution, he would
2 have the adequate evidence for conviction of a felony,
3 but he wouldn't have adequate evidence for a finding
4 that the person is sexually dangerous.

5 QUESTION: Well, of course not.

6 MR. ROTERT: The sexually dangerous person
7 proceeding requires more information, and as the
8 Illinois -- I am sorry.

9 QUESTION: But he nevertheless has produced
10 evidence to show that a crime has been committed?

11 MR. ROTERT: There has to be a showing that
12 the propensity --

13 QUESTION: Beyond a reasonable doubt.

14 MR. ROTERT: Correct.

15 QUESTION: And then it requires a lot of other
16 things.

17 MR. ROTERT: Correct, and I think that there
18 has been a great deal of effort put into the idea that
19 that element of the sexually dangerous persons finding
20 makes it look very criminal, and I think that that is a
21 very, very illusory argument when you consider that
22 obviously --

23 QUESTION: It makes him much more like the
24 other felons that he is in the hospital with.

25 MR. ROTERT: In the sense I would concede that

1 you put people in the Menard Psychiatric Center only
2 after they have demonstrated that they are going to
3 create problems because of forcible sexual conduct that
4 they indulged in.

5 QUESTION: Well, he is there with a lot of
6 other people who have psychiatric problems who aren't
7 sexually dangerous.

8 MR. ROTERT: That is true. There are
9 psychiatric problems that have been referred from within
10 other institutions of the Department of Corrections, but
11 they get there on the basis of a felony conviction. I
12 think it is important to understand that if the state of
13 Illinois is going to provide treatment for the sexually
14 dangerous person, treatment for those who commit
15 forcible sex offenses, we have got to narrow the statute
16 in some reasonable fashion.

17 We have narrowed it from the class of all
18 citizens in Illinois, narrowed it further than the class
19 of all citizens in Illinois to the mentally -- mental
20 problems, narrowed it further than those with mental
21 problems of a psychosexual nature, and narrowed it down
22 to that class of persons with psychosexual disorders who
23 are going to act out on those disorders against others.

24 That narrowing process is what the statute
25 reflects by saying that it will be an underlying

1 criminal prosecution that will initiate these
2 proceedings. That is how the state's attorney in an
3 individual county learns that the person may well be
4 sexually dangerous.

5 QUESTION: Mr. Rotert, the provisions for
6 commitment under this proceeding result in an indefinite
7 commitment, as I understand it, without any provision
8 for periodic review at the instance of the state, unlike
9 your ordinary involuntary civil commitment proceeding.
10 Is that true?

11 MR. ROTERT: No, it is not, Justice O'Connor,
12 and I think that is another factual matter that needs --

13 QUESTION: Well, would you explain why that is
14 not --

15 MR. ROTERT: The Illinois regulations under
16 which the Department -- the Illinois regulations that
17 the Department of Corrections had imposed on the Menard
18 Psychiatric Institute quite specifically and
19 unambiguously require that the director of the Institute
20 every six months will evaluate every person there
21 because of the sexually dangerous persons finding.

22 He will make a written report on that person.
23 He will submit that report to the committing court, to
24 the committing county attorney, and to the attorney who
25 represented that person as a respondent in the sexually

1 dangerous persons proceeding. Every six months this
2 person's attorney in the free society learns of that
3 person's progress, and the word indefinite as applied to
4 the commitment to a sexually dangerous persons
5 respondent, it may be a semantic difference at first,
6 but --

7 QUESTION: How does it differ from what would
8 happen with an ordinary involuntary commitment to a
9 mental institution --

10 MR. ROTERT: It differs --

11 QUESTION: -- for purposes of review?

12 MR. ROTERT: It differs in factors that innure
13 to the benefit of the respondent. It differs Because he
14 has got the right to appoint a counsel, something that a
15 civil committee might not necessarily have. It differs
16 in that he has to be proven so beyond a reasonable
17 doubt. He has got the right to compulsory process.

18 QUESTION: I am talking about the review
19 mechanism only. Could you focus on that for me and tell
20 me how it differs, please, from that of an involuntary
21 civil commitment of the normal type?

22 MR. ROTERT: Justice O'Connor, it differs in
23 the sense that it is done -- it doesn't differ in the
24 sense that there is automatic review. That is available
25 to the judicial and civil committee and to the sexually

1 dangerous persons respondent. It does differ in that a
2 person committed civilly, under the Civil Mental Health
3 Code, the state will bear the burden of showing by a
4 preponderance that his continued confinement is
5 justified.

6 In the Sexually Dangerous Persons Act --

7 QUESTION: In the civil proceeding is it
8 brought to the court and the state must prove by a
9 preponderance that the commitment should continue?

10 MR. ROTERT: That is correct.

11 QUESTION: That doesn't occur with these
12 proceedings?

13 MR. ROTERT: In these proceedings the
14 respondent files his petition, and he bears the burden
15 of proving by a preponderance of the evidence.

16 QUESTION: Do you think that difference is
17 significant for our purposes under In Re Gault?

18 MR. ROTERT: No, I do not, Justice O'Connor,
19 for the reason that the burden that the respondent
20 shares in filing such a recovery application has to be
21 evaluated in the grasp of the statute which requires
22 that he be given all the procedural protections that we
23 have discussed already. That is something that is not
24 available to the civil committee, who may be at his own
25 in dealing with the Department of Mental Health and

1 seeking release.

2 Here we have someone who has demonstrated a
3 propensity towards highly antisocial conduct. That is
4 not something that is necessarily true of a civil
5 committee. They may be eccentric. They may be
6 suffering from the infirmities of age or some other form
7 of retardation, but they may not be any danger.

8 QUESTION: Well, your involuntary commitment
9 in Illinois, is it not necessary to prove that the
10 person is dangerous to himself or others to be
11 involuntarily committed?

12 MR. ROTERT: The language differs
13 significantly in that at some future time there may be
14 some potential for problem, whereas the sexually
15 dangerous person statute requires that there has been a
16 demonstration within a specific time period in the
17 recent past, and I do have a significant problem with
18 the use of the word "indefinite" commitment.

19 I concede that this is indeterminate
20 commitment. I don't know how it could be anything other
21 than indeterminate commitment. The state legislature
22 has clearly designed this statute with the hope and the
23 goal that treatment will be provided for those with
24 psychosexual disorders. It would be highly artificial
25 for the legislature to say that an individual will be

1 cured within a given period of time.

2 The fact of the matter is that Terry Allen
3 need not spend any more time in the Department of
4 Corrections at the Menard Psychiatric Institute than is
5 required for him to be receiving treatment and
6 responding favorably.

1 The briefs consistently talk about the
2 requirement that Terry Allen be cured. That's not in
3 the statute. That's not an element for his release.
4 What is an element is that he is no longer dangerous to
5 others in the opinion of psychiatrists. That is the
6 extent of the state's interest insofar as others in
7 society are concerned. If he can live without being a
8 danger to others, then the state will give him his
9 release, and if there are doubts, the state will resolve
10 them in his favor, give him conditional discharge, let
11 him live in a free and unstructured environment and
12 prove that he's no longer a danger to others.

13 If the Court would look at the principal
14 factors or the interests of society that we think we
15 foster with the application of the Fifth Amendment and
16 would look to see whether they are actually fostered in
17 the context of a Sexually Dangerous Persons Act
18 proceeding, I believe the Court will very quickly
19 conclude that the logical underpinnings of the Fifth
20 Amendment itself have no application to these
21 proceedings.

22 The Petitioner identifies as one of the most
23 serious goals that's to be achieved the enhancement of
24 accuracy of factfinding. How can we get more reliable
25 and accurate diagnoses when the psychiatrist isn't sure

1 that he's going to get responsive answers from the
2 person whom he's evaluating.

3 The Petitioner says that we want to be free of
4 coercive techniques. For almost 30 years the State of
5 Illinois has allowed coercion in the taking of
6 statements to be brought before a court in a Sexually
7 Dangerous Persons proceeding and resolved pretrial.
8 There's no element of coercion in this case. Terry
9 Allen has never said that he was the subject of coercive
10 practice. Terry Allen has never even said that the
11 psychiatric data on which he was found to be sexually
12 dangerous was less than accurate.

13 QUESTION: Well, but there's coercion in the
14 sense that you say he may be required to testify against
15 his will, and the Supreme Court of Illinois has said so,
16 too, hasn't it?

17 MR. ROTERT: There is compulsion, but as
18 Minnesota v. Murphy teaches us, Justice Rehnquist,
19 compulsion isn't coercion.

20 QUESTION: I see what you mean. Okay, there
21 is compulsion.

22 MR. ROTERT: There is compulsion.

23 Now, the spectre of potential abuse of the
24 statute is raised in one of the briefs. Well, that just
25 doesn't work when you look at the way the statute

1 works. The brief says what if we've got a recalcitrant
2 witness. The prosecutor will use this method to get rid
3 of problem cases that he couldn't prove criminally in
4 the court.

5 Well, when we recall that the problem is going
6 to be the same, he's still going to have to bring in
7 some proof that there was sexual misconduct, he's still
8 got to bring in some witness to testify, as Christine
9 Ray did in this case, he's not going to get around
10 recalcitrant witnesses by going to a statute that
11 requires more proof than the actual criminal felony
12 requires.

13 There's -- the idea is put forth in the brief
14 that people under 91 1/2 in Illinois, the civil
15 commitment procedure, are admonished, but the point of
16 the matter is that they can claim their proceeding in
17 any proceeding, they can claim their privilege. They
18 don't have counsel appointed to them. They may well be
19 exposing themselves to other criminal prosecutions.
20 That doesn't mean that they've got a right to silence in
21 the civil mental health treatment context. It means
22 that they've got the right to claim the privilege in any
23 proceeding.

24 QUESTION: Did he claim the -- where did he
25 have a right to claim the privilege here, before the

1 psychiatrist?

2 MR. ROTERT: He had the right at all times, in
3 any proceeding, to claim a privilege if he thought --

4 QUESTION: Well, didn't the law say out there
5 that you are compelled under penalty of being held in
6 contempt? Is that or is that not the law of Illinois?

7 MR. ROTERT: It's not the statutory law, but
8 it certainly would be the application of a trial court.

9 QUESTION: Well, is it the law?

10 MR. ROTERT: It is the law.

11 QUESTION: That if you don't testify, you are
12 going to be held in contempt.

13 MR. ROTERT: That's correct, Justice
14 Marshall.

15 QUESTION: And you consider that compulsion?

16 MR. ROTERT: No, I do not, where he is
17 immunized from criminal prosecution. The Fifth
18 Amendment certainly protects him against criminal
19 prosecutions that might result from anything he said,
20 but there is no criminal prosecution at issue here.

21 If the state wanted a criminal prosecution
22 here, it could have proceeded him on two Class X
23 felonies that led to --

24 QUESTION: Well, if I for one decided that
25 this has enough of the indicia of a criminal prosecution

1 to require the same rules, then you're in trouble.

2 MR. ROTERT: If you determine that this is --

3 QUESTION: Yes.

4 MR. ROTERT: -- a criminal prosecution, I can
5 see that he's --

6 QUESTION: No, I didn't say "is," has the
7 indicia of a criminal prosecution.

8 MR. ROTERT: All right. If the Court feels
9 that --

10 QUESTION: Which is you go to jail.

11 MR. ROTERT: If the Court feels that this is
12 the functional equivalent of a criminal prosecution,
13 then certainly the Fifth Amendment applies.

14 QUESTION: Right.

15 MR. ROTERT: But what does the traditional
16 criminal prosecution want to accomplish? The two
17 traditional aims, according to this --

18 QUESTION: Not to be convicted out of his own
19 mouth.

20 MR. ROTERT: That's the Fifth Amendment. The
21 criminal prosecution accomplishes two goals: one,
22 retribution or punishment; two, deterrence. The
23 Illinois legislature could not have had either of those
24 goals in mind when it enacted this statute, because if
25 you are talking about punishment, the numbers in the

1 briefs reflect that this person was -- could have been
2 subjected to a penalty of up to 60 years in prison. As
3 a minimum, he was going to get six years in prison.

4 The American Psychiatric Association reflects
5 that the average mean time for a Sexually Dangerous
6 Persons respondent is about 2.2 years.

7 QUESTION: When you say prison, you mean the
8 same prison that he's in?

9 MR. ROTERT: Justice Marshall, I'm talking
10 about the imprisonment --

11 QUESTION: The same prison.

12 MR. ROTERT: -- on a conviction for felony.

13 QUESTION: The same prison.

14 MR. ROTERT: It's -- I understand that that's
15 the Court's opinion, but it's not the same facility, and
16 it's not a prison.

17 But in any event, the punishment aspect can't
18 be found here. If the State of Illinois wants to punish
19 Terry Allen, we have the weaponry to use in a criminal
20 prosecution to far more severely sanction him for his
21 conduct, and if you're talking about the deterrent
22 effect, if you look at DSM 3 or any psychiatric manual,
23 you will find that the psychosexually disordered are
24 impulsive personalities, and the idea that we're going
25 to deter an impulsive sex offender is inherently

1 illogical. This could not have been the intent of the
2 legislature of Illinois.

3 The legislature showed its intent in 1955 when
4 they amended the Sexually Dangerous Persons statute and
5 they said that if you proceed as a county prosecutor
6 against a person as a sexually dangerous person and he
7 receives treatment from the psychiatrists and is
8 discharged from custody as a sexually dangerous person,
9 you may not proceed on the underlying indictment against
10 him. They couldn't have been more clear in saying that
11 the Sexually Dangerous Persons statute provides a
12 treatment alternative to criminal prosecution.

13 If we want to punish and deter people like
14 Terry Allen, we send thousands of people for sex
15 offenses to the prisons every year. But for those 30 or
16 so people we send to the Menard Psychiatric Institute
17 for treatment, we have the right to provide that
18 treatment in a civil context, and the fact that we erect
19 procedural safeguards around that civil procedure does
20 not mean that it shall be labeled for Fifth Amendment
21 purposes a criminal prosecution.

22 QUESTION: Mr. Rotert, does In Re Gault
23 provide the tests that we should employ in determining
24 whether it should be treated as a criminal proceeding
25 for purposes of the Fifth Amendment?

1 MR. ROTERT: I don't believe that Gault is a
2 particularly helpful case in this context, Justice
3 C'Conner, for the reason that I think that Gault
4 involved a juvenile statute, and the language of the
5 Court involved quite clearly indicates that it
6 considered the actual effect of the statute involved on
7 the juvenile to be indistinguishable from a criminal
8 effect that a person would suffer, and in Gault, for
9 example, it was noted that an adult convicted of the
10 same offense would have received a petty fine whereas
11 the juvenile was subjected to incarceration until he
12 reached the age of majority under certain
13 circumstances.

14 So the Court was concerned that the apparent
15 intent of the statute was to punish criminals, and I
16 think that Gault is very much like Specht and some of
17 the cases in the Petitioner's brief where a conviction
18 is obtained, and then there are benignly labeled
19 treatments given contingent upon conviction as
20 alternatives to sentencing, and if we required Terry
21 Allen to be convicted of a sex offense before we offered
22 this treatment, perhaps the issue in analysis would be
23 different.

24 But I think here the fact that Illinois not
25 only doesn't proceed on the criminal prosecution but

1 actually quashes the underlying charge removes this from
2 the ambit --

3 QUESTION: Well, but you do have to find the
4 underlying criminal offense was committed.

5 MR. ROTERT: We have to find that at one point
6 within the past year. For example, it wasn't
7 necessary -- if the State's Attorney got a police report
8 that Victim A had been molested by the Defendant,
9 there's nothing that requires him to bring in Victim A
10 to show that within the past year there has been a
11 demonstration of a sexual propensity. He could bring in
12 any person who would give testimony that within the past
13 year there had been a sexual forcible misconduct.

14 So there isn't this unbreakable link between
15 the underlying criminal charge and a sexually dangerous
16 persons finding. There is a very inextricable and
17 unbreakable link between sexual forcible misconduct and
18 the filing of the petition and the finding of the
19 petition.

20 If the Court analyzes every one of the
21 interests of the Fifth Amendment that are identified by
22 the Petitioner as those which will be promoted by
23 application of the Fifth Amendment and then in a very
24 logical and common sense fashion applies those goals and
25 those ideals to the actual litigation of a Sexually

1 Dangerous Persons Act proceeding, the Court will
2 determine that you have taken the Fifth Amendment out of
3 its context of applicability to a criminal prosecution
4 and thereby undercut the efficacy and logic of the Fifth
5 Amendment and deprived the State of Illinois of an
6 opportunity to provide humane and enlightened treatment
7 for people with psychosexually impulsive disorders.

8 QUESTION: Why do you say not -- what do you
9 have to say in response to your opponent's suggestion
10 there are other ways of proof?

11 MR. ROTERT: I think that that's highly
12 problematic and highly unrealistic, Justice Blackmun.

13 QUESTION: Oh, really.

14 MR. ROTERT: Yes, I do, because first of all,
15 Terry Allen would have a constitutional right to get
16 psychiatric examination, but where would the state be
17 able to rebut his expert testimony? We would fight
18 expert testimony with lay testimony, and do you think
19 that the witnesses for the state would be cross examined
20 about whether they were experts?

21 QUESTION: Oh, they often prevail over
22 psychiatric testimony. You know that.

23 MR. ROTERT: In front of a jury with a
24 beyond-a-reasonable-doubt standard where I'm fighting a
25 psychiatrist with a lay person, now, who are the lay

1 people? Since we know that most sexual misconduct is
2 furtive in nature, we're not going to get a great number
3 of witnesses to these events. We're going to get people
4 with obvious biases, yes, he victimized me. Well, your
5 bias as a witness against him is pretty patent.

6 Yes, he's my son. Your bias is very patent.

7 When you look at what the state would have to
8 do, the prosecutor would be well within his discretion
9 to say if I'm going to go through all of that trouble,
10 I'm going to go for felony conviction, and to heck with
11 sending him to a psychiatric institute.

12 The point is that you've placed in unnecessary
13 fashion the Fifth Amendment in a context where it
14 doesn't apply and provided a disincentive for the
15 provision for treatment.

16 The idea that we can use circumstantial
17 evidence to prove something as private as a mental
18 disorder is very, very difficult to accept.

19 QUESTION: I wouldn't describe it all as
20 circumstantial evidence.

21 MR. ROTERT: Well, there is direct evidence of
22 the psychiatrist that he has examined the individual and
23 drawn certain conclusions. We couldn't provide such
24 direct evidence from a psychiatric examination. We
25 would have to provide secondary resources: because he

1 did this, he must have been psychosexually disordered.

2 But Justice Blackmun, isn't there also another
3 problem that the jury is going to make less reliable
4 findings when it doesn't have the ability to evaluate
5 psychiatrists from both sides?

6 QUESTION: Well, I can't join your suffering
7 for the State of Illinois.

8 MR. ROTERT: Well, I think that the persons
9 who suffer here are the respondents to sexually
10 dangerous persons proceedings. It's not that the State
11 of Illinois believes that it's being grievously wounded
12 by this. It's that we don't think we're going to be
13 able to continue on what we thought was an enlightened
14 path under these circumstances. We believe that in the
15 long run, respondents are less likely to receive
16 treatment and more likely to be criminally prosecuted
17 and convicted under the analysis offered by my
18 opponent. It's not a matter of us not being willing to
19 extend the privilege. The Supreme Court of Illinois, if
20 the Court is familiar with the cases, the Supreme Court
21 of Illinois has been so solicitous of the procedural and
22 substantive rights of the sexually dangerous persons
23 respondent, and if I've indicated to the Court that
24 we're annoyed by the application for privilege, it's not
25 my intent to do so.

1 But we fear that applicaion of the privilege
2 in this context will work a disservice both to the Fifth
3 Amendment and to the people like Terry Allen.

4 QUESTION: May I just ask you, I suppose of
5 course he could always waive the privilege if he wanted
6 to to avoid that particular danger, but I notice the
7 statute provides that he has a right to counsel at the
8 proceeding.

9 If he's unable to pay for his own lawyer, does
10 the state provide him a lawyer?

11 MR. ROTERT: Absolutely, at the very first
12 opportunity, Justice Stevens.

13 For all these reasons, I urge the Court to
14 consider the Illinois Sexually Dangerous Persons Act to
15 be civil, as does the General Assembly which drafted and
16 enacted it, and as does the Supreme Court which
17 construed it.

18 Based on the idea that it is a civil statute,
19 I ask the Court to follow its own well-established
20 precedent in determining that the Fifth Amendment
21 privilege is not available in such a context.

22 Thank you.

23 CHIEF JUSTICE BURGER: Very well.

24 You have four minutes remaining, Mr. Meinz.

25 ORAL ARGUMENT OF VERLIN R. MEINZ, ESQ.

1 ON BEHALF OF PETITIONER -- Rebuttal

2 MR. MEINZ: Thank you, Your Honor, and just
3 briefly, the State argues again about the difficulty of
4 proving a person to be a sexually dangerous person if
5 the respondent in that proceeding is granted a privilege
6 against self-incrimination. They do have a burden
7 beyond a reasonable doubt. They have a lesser burden in
8 a civil mental health proceeding, and yet, an individual
9 in a civil mental health proceeding in Illinois is
10 accorded a privilege against self-incrimination, and the
11 State in fact in that case is obliged to prove its case
12 by its own --

13 QUESTION: Well, but they're not accorded a
14 privilege not to testify at all in that civil
15 proceeding, are they?

16 MR. MEINZ: They are accorded a privilege that
17 the examining psychiatrist must inform the subject of
18 the privilege to remain silent, to refuse to speak to
19 that examining psychiatrist, which is what we are
20 arguing for here.

21 QUESTION: May I ask this question?

22 Would you rather have Terry Allen tried in a
23 criminal case?

24 MR. MEINZ: Absolutely, Your Honor, without
25 question.

1 QUESTION: Absolutely not?

2 MR. MEINZ: Absolutely I would.

3 QUESTION: Oh, you would?

4 MR. MEINZ: I don't -- yes. I can't speak,
5 and counsel has addressed the benevolence hear. They
6 hope to have a program like this for criminal
7 defendants. I speak for Allen more so than I do for
8 other criminal defendants in Illinois, I suppose, but I
9 know I wish that Allen had been prosecuted criminally as
10 opposed to adjudicated --

11 QUESTION: Is that because you think he would
12 not have been convicted?

13 MR. MEINZ: Because he would not have been
14 convicted. I have a doubt about that. I also think he
15 would have been out by now if he had been prosecuted
16 criminally. I believe he -- even if he had received
17 more than the minimum sentence, he would have a better
18 chance of getting out.

19 QUESTION: Is this because of the facts with
20 respect to Allen with which you are familiar or would
21 this be a generalization?

22 MR. MEINZ: This would be a generalization. I
23 should point out in that regard that the 2.2 year
24 statistic that was cited by the State is a nationwide
25 statistic, and that statistic simply does not reflect

1 the average length of commitment of a sexually dangerous
2 person in the State of Illinois.

3 QUESTION: What does the Illinois statute
4 require in terms of maximum sentence for a criminally
5 dangerous person, if tried?

6 MR. MEINZ: These offenses here -- and we can
7 assume that Class X felonies would be involved -- would
8 be a determinant sentence of between six and thirty
9 years, barring extreme brutality or such and such prior
10 record. That time of six to thirty years could be
11 halved by day-for-day good time. So the effective
12 minimum here would be three years.

13 QUESTION: You would still rather have Mr.
14 Allen run that risk?

15 MR. MEINZ: Absolutely, Your Honor. He would
16 have had a privilege against self-incrimination. He
17 could have forced the State to make its own case. He
18 didn't have that opportunity here.

19 Thank you, Your Honor.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.

21 The case is submitted.

22 (Whereupon, at 11:05 o'clock a.m., the case in
23 the above-entitled matter was submitted.)
24
25

CERTIFICATION

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

#85-5404 - TERRY B. ALLEN, Petitioner V. ILLINOIS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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