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OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MICHAEL OWEN PERRY, Petitioner V.

LOUISIANA

CASE NO: 89-5120

PLACE: Washington, D.C.

DATE: October 2, 1990

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MICHAEL OWEN PERRY,                   :

4                   Petitioner                   :

5                   v.                                   :   No. 89-5120

6   LOUISIANA                                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Tuesday, October 2, 1990

10                   The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 1:58 p.m.

13 APPEARANCES:

14 KEITH B. NORDYKE, ESQ., Baton Rouge, Louisiana; on behalf  
15 of the Petitioner.

16 RENE' I. SALOMON, ESQ., Assistant Attorney General of  
17 Louisiana, Baton Rouge, Louisiana; on behalf of t h e  
18 Respondent.

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1 used. That order said that the medical staff of the  
2 Louisiana State Penitentiary should medicate Mr. Perry with  
3 the drug Haldol solely for the purpose of preparing him for  
4 execution.

5 Mr. Perry has schizoaffective disorder, which is  
6 a major mental illness that is incurable. There are two  
7 major components to this disorder, the first of which is a  
8 mood component -- we commonly think of it as a bipolar  
9 disorder or manic depressive -- and the second is a  
10 psychotic component where Mr. Perry has delusions, has  
11 auditory hallucinations, and very often does not know where  
12 he is.

13 It's also marked by very strong ambivalence,  
14 meaning that he cannot say consistently and know  
15 consistently from one minute to the next the same thing.  
16 The classic example that appears throughout the record is  
17 Mr. Perry on the one hand will say, I killed my mother and  
18 my father, and within the same sentence will say, for  
19 \$20,000 I'll tell you who killed my mother and my father.

20 The Louisiana Supreme Court initially stayed the  
21 forcible medication order in this case and then denied writ.  
22 Under Louisiana law a writ denial is not to be considered  
23 an expression of the law. The tension in this case as  
24 Petitioner sees it is the pitting of the -- the medication  
25 model of treatment versus the punitive model of treatment.

1 QUESTION: Mr. Nordyke, there is a Louisiana  
2 statute, is there not, that deals with forcible medication  
3 of prisoners?

4 MR. NORDYKE: Yes, ma'am, title XV, section 830.1.

5 QUESTION: Was that section called to the  
6 attention of the trial court?

7 MR. NORDYKE: Your Honor, we briefed that section  
8 consistently throughout and the only time the trial court  
9 used the word was in an August 26th hearing where he ordered  
10 forcible medication and he just simply said, in accordance  
11 with 830.1, I order the forcible medication.

12 The problem with him simply doing that is that  
13 830.1 sets up a whole panoply of due process protections  
14 virtually similar to the Harper decision last year.

15 QUESTION: Well, do you take the position that  
16 that statute governs in this situation, or should govern?

17 MR. NORDYKE: Your Honor, from day 1 in this case  
18 we have taken that precise position.

19 QUESTION: Your position being that medication is  
20 not permitted under the statute because he's not a danger  
21 to himself or others?

22 MR. NORDYKE: Your Honor, I think there are two  
23 prongs to that and it's the same two prongs that Your Honor  
24 wrote about in Harper last term.

25 First, we have the best interest component and

1 secondly, the danger to self and others component. The  
2 record in our case is absolutely barren of either. There  
3 is no finding of best interest and no finding of danger to  
4 self or others by the trial court. It's simply an order  
5 that calls for punishment.

6 QUESTION: And you took this position consistently  
7 throughout all the proceedings to this Court?

8 MR. NORDYKE: Yes, Your Honor.

9 QUESTION: Well, is it your contention that the  
10 Louisiana trial court which authorized the medication is  
11 acting in violation of Louisiana law?

12 MR. NORDYKE: Your Honor, it's --

13 QUESTION: That's not one we would be likely to  
14 entertain.

15 MR. NORDYKE: If we're asking about the Pennhurst  
16 problem, the answer is no. What I am saying is that  
17 Louisiana has set up a statutory scheme in title XV 830.1  
18 and title XXVIII, section 59, which is a companion statute  
19 to 830.1, that specifically deal with the forcible  
20 medication of prisoners in the event that they refuse and  
21 that those statutes set up a liberty interest that's  
22 protective --

23 QUESTION: Did you argue that in the trial court?

24 MR. NORDYKE: Yes, Your Honor, we have briefed  
25 those issues --

1 QUESTION: You briefed the argument that the  
2 Louisiana statute set up a liberty interest which gave you  
3 a right under the due process clause of the Fourteenth  
4 Amendment?

5 MR. NORDYKE: I believe we did, Your Honor.

6 QUESTION: You say you believe we did. Are you  
7 uncertain about it?

8 MR. NORDYKE: I am, Your Honor. I don't remember  
9 the first brief, but I am almost certain -- I know that we  
10 briefed 830.1.

11 QUESTION: Yes, but that's quite different than  
12 briefing the argument that 830.1 creates a liberty interest  
13 which would in turn give you a right under the Fourteenth  
14 Amendment. Could you supply us with a transcript citation?  
15 Not at this moment, but after the argument?

16 MR. NORDYKE: We will file that with the Court,  
17 Your Honor.

18 QUESTION: And I would like to know if you -- if  
19 the issue came up before the supreme court.

20 MR. NORDYKE: Definitely it came up before the  
21 Supreme Court of Louisiana, Your Honor. We briefed -- the  
22 brief that we filed in this Court is very similar to the  
23 brief that we filed in the Louisiana Supreme Court and has  
24 virtually all the same arguments, including the due process  
25 argument, the State created liberty interest.

1           We take the position that the order's sole purpose  
2 is for purposes of punishment. The sole reason that the  
3 trial court ordered this medication is to attempt to change  
4 the man, to change the mind of this individual for the  
5 Government's purposes.

6           The injections that the State wants to give Mr.  
7 Perry are for no other purpose than to execute Mr. Perry  
8 and, therefore, become a step in his punishment and part of  
9 the execution that, to our mind, are not part of the  
10 Louisiana law, not authorized by Louisiana law.

11           The second major point that we want to make in  
12 terms of showing its sole purpose is for punishment is that  
13 no prison physicians have ordered this. As was pointed out  
14 a second ago, Louisiana does have a statute which we claim  
15 sets up a liberty interest, and that statute sets up the  
16 medical model that this Court has consistently set up in  
17 Vitek and Harper and Youngberg and --

18           QUESTION: And you're arguing that the Louisiana  
19 court did not follow the Louisiana law? Is that what you're  
20 arguing?

21           QUESTION: No, Your Honor. We're saying we were  
22 denied the expectation that the Louisiana statute gave us.

23           QUESTION: You're talking now about some sort of  
24 a liberty interest?

25           MR. NORDYKE: Yes, Your Honor. Yes, Your Honor.

1 I may -- I may be saying it incorrectly. I may be using  
2 the shorthand of talking about Louisiana law, but when I  
3 say that, what I'm discussing is the liberty interest.

4 QUESTION: You're not making any argument that we  
5 should review this as a decision based on Louisiana law,  
6 that the court interpreted the statute incorrectly?

7 MR. NORDYKE: Oh, no, Your Honor, not at all.  
8 Not at all.

9 QUESTION: Well, the predicate for your argument,  
10 though, is what Louisiana does. Louisiana does -- you claim  
11 Louisiana set up a liberty interest and you claim that the  
12 trial court didn't follow it.

13 MR. NORDYKE: That's correct, Your Honor. But  
14 that's no different than the liberty interest that was set  
15 up in Harper last term or set up in many of the due process  
16 cases that involve State statutes as long as it has the  
17 mandatory language in the -- in the predicates.

18 QUESTION: Did the trial court enter more  
19 than -- what was its very final order about medication?

20 MR. NORDYKE: The precise wording, Your Honor,  
21 was --

22 QUESTION: I mean one of the orders was stayed,  
23 but --

24 MR. NORDYKE: Okay, Your Honor. Yes, Your Honor.  
25 There were two orders entered.

1 QUESTION: What does the last one say?

2 MR. NORDYKE: The last order is fairly lengthy.

3 QUESTION: Right at the end it says  
4 about -- doesn't it say that --

5 MR. NORDYKE: To be prescribed by the medical  
6 staff --

7 QUESTION: It says this order, the one that stayed  
8 in existence -- to maintain treatment as prescribed by  
9 medical staff.

10 MR. NORDYKE: Yes, Your Honor. But I think  
11 that's -- I don't think that solves the problem by any  
12 stretch of the --

13 QUESTION: Oh, I didn't -- do you think that  
14 requires a medical staff to prescribe treatment?

15 MR. NORDYKE: I think it orders them to prescribe  
16 treatment as opposed to use medical judgment.

17 QUESTION: Well, I know, but they wouldn't be in  
18 violation of the order if they said -- if they decided that  
19 the patient didn't need it.

20 MR. NORDYKE: I'm not sure, Your Honor, because  
21 the preceding two sentences --

22 QUESTION: Well, it doesn't say so. It just says  
23 that whatever treatment the medical staff wants to  
24 prescribe, they are supposed to go ahead and do it. That's  
25 just sort of --

1 MR. NORDYKE: Well, that still denies the liberty  
2 interest that the statute that we've been discussing sets  
3 up. The statute sets up, basically, the involuntary  
4 commitment statute that Justice Blackmun discussed last term  
5 in his concurring opinion in Harper as being sort of a  
6 cure-all to this problem of forcible medication.

7 And that's what this statute for criminals -- the  
8 inmates does. It sets up basically first an emergency  
9 procedure for the first 15 days and after that it sets up  
10 basically an involuntary commitment process.

11 QUESTION: Is it clear on the face of this statute  
12 that there's no exception to that when a prisoner has been  
13 condemned to execution --

14 MR. NORDYKE: None whatsoever, Your Honor.

15 QUESTION: -- and which exception can be made by  
16 the State's supreme court?

17 MR. NORDYKE: There is no exception whatsoever on  
18 the face of the statute. And in addition, both 830.1 and  
19 title XXVIII, section 59, were amended subsequent to Ford  
20 v. Wainwright.

21 QUESTION: But, you know, we have interpreted  
22 Federal statutes to permit some exceptions. The case that  
23 we heard argued today urges exceptions from what is normally  
24 a general rule. Why can't the State say that this statute  
25 which prohibits involuntary treatment except where the

1 person is a danger to himself or others, why can't the State  
2 court say, well, as we interpret it it's not meant to apply  
3 to the case of a condemned prisoner, who so long as the  
4 treatment does not harm him and improves his condition, is  
5 not entitled to refuse it simply because he doesn't want to  
6 be made healthy, because if he's made healthy, he'll be  
7 executed. Seems a perfectly reasonable exception. Why  
8 can't the State supreme court make it?

9 MR. NORDYKE: The State supreme court perhaps  
10 could, but they have not. The Louisiana Supreme Court has  
11 never spoken on this statute. They perhaps could make such  
12 an exception, but they haven't. And the fact that they  
13 denied writs in this case means nothing. They are  
14 completely a discretionary court.

15 QUESTION: I don't --

16 MR. NORDYKE: A writ denial under Louisiana law  
17 has no --

18 QUESTION: What -- the court of appeals couldn't  
19 make it? The intermediate court couldn't or the trial court  
20 couldn't?

21 MR. NORDYKE: Your Honor, I guess they could say  
22 that, but I'm not sure that it would be a valid expression  
23 of Louisiana law particularly coming out of the trial court.  
24 The court of appeals perhaps could. But this sort of case  
25 would not go to the court of appeals. It goes on direct

1 writs to the Louisiana Supreme Court.

2 QUESTION: Well, why couldn't the trial court make  
3 it and the supreme court agree with it and simply turn down  
4 the appeal?

5 MR. NORDYKE: Because Louisiana law, as I say,  
6 Your Honor, does not consider a writ denial to be an  
7 expression of the law at all.

8 QUESTION: And district courts in Louisiana have  
9 no power to pronounce the law?

10 MR. NORDYKE: Your Honor, under our civilian  
11 system of law in Louisiana -- and I realize this is a  
12 criminal constitutional issue -- but under our general  
13 proposition of how courts make law in Louisiana, we are a  
14 civilian system and we generally follow statutes, and if  
15 there is no statute, the court generally does not go forth  
16 and make law on it. They have to usually go from a statute  
17 and analogize from a statute.

18 You know, what Your Honor I think says is  
19 interesting and this is that if the court were to say the  
20 statute is silent and we're going to go ahead and allow this  
21 as an exception, then what it does, I think, is clearly make  
22 part of the punishment this medication. And what we are  
23 doing is we are at this point adding a punishment not  
24 authorized by statute.

25 QUESTION: It depends upon your reading of the

1 court's order -- what Justice White was asking you about as  
2 prescribed. I don't think that must be read to say, you're  
3 going to get this treatment even if it isn't in your medical  
4 interest. I read it as saying, if it's in your medical  
5 interest, you will get this treatment even though you want  
6 to turn it down because you know that if you get better  
7 you'll be executed. I think it's perfectly reasonable,  
8 don't you, to read it the other way when it says as  
9 prescribed.

10 QUESTION: No, Your Honor, I don't, because the  
11 preceding two paragraphs -- I guess two paragraphs back in  
12 the order -- the trial court said that he doesn't waive Mr.  
13 Perry's interest, doesn't look at Mr. Perry's interest. He  
14 says, whatever interests Mr. Perry has I find they are  
15 outweighed by the right of Louisiana to effectuate its jury  
16 verdict.

17 QUESTION: I think he's talking about what Mr.  
18 Perry was arguing, and that is a right to turn down even  
19 beneficial treatment because he didn't want to get well.  
20 That's what the issue, as I understood it, before the court  
21 was, and it's what you're arguing here that he has a right  
22 to turn down even beneficial treatment because he doesn't  
23 want to get well. Don't you support that position that even  
24 if it is in his medical interest to get the treatment, he  
25 has a right to turn it down? Is that not your position

1 here?

2 MR. NORDYKE: Yes, sir, it is.

3 QUESTION: And I think -- and I understood it to  
4 be the position below and I understood that to be what the  
5 district judge was addressing.

6 MR. NORDYKE: But I have to qualify that. As long  
7 as it's in his medical best interest and there's -- showing  
8 that he's dangerous to self or others, then of course the  
9 State can do that under the statute and under Harper.  
10 There's no showing --

11 QUESTION: Well, there's no indication of any  
12 finding that he would be of danger to himself or others?

13 MR. NORDYKE: The record is barren of that, Your  
14 Honor. The record -- the trial court's ruling is barren of  
15 that, of course. And we think the record is barren of that  
16 also.

17 QUESTION: So you think -- why don't you win the  
18 case just on that basis, that the judge ordered treatment  
19 which was against his will without the proper findings?

20 MR. NORDYKE: Your Honor, we could. We could  
21 under the liberty --

22 QUESTION: Well, you just -- forget about the  
23 State statute.

24 MR. NORDYKE: If you're talking about the  
25 substantive Fourteenth Amendment due process, absolutely we

1 could.

2 QUESTION: Well, do you? Have you?

3 MR. NORDYKE: I think so, Your Honor. We've  
4 argued in brief that we certainly have under the Fourteenth  
5 Amendment substantive due process problem.

6 QUESTION: Do you think there was a duty under  
7 Louisiana law or any other law, including the constitutional  
8 law, for the doctors to treat this man?

9 MR. NORDYKE: If Your Honor is asking about what  
10 the State has raised, the Estelle v. Gamble 1983 problem,  
11 I think that there is a statutory duty under Louisiana  
12 revised statutes where physicians -- for the State  
13 Penitentiary to provide proper care for Mr. Perry.

14 But there is a concomitant ability of Mr. Perry  
15 to turn down that treatment if he wishes to under the same  
16 statutes, under the same statutory scheme.

17 QUESTION: Isn't it a fair -- Isn't it a fair  
18 inference from the record that the only reason the  
19 medication was turned down was so that he could not be well  
20 enough to be executed?

21 MR. NORDYKE: Your Honor --

22 QUESTION: In fact, isn't that the reason that  
23 counsel ordered him not to take the medication?

24 MR. NORDYKE: Not the first time, Your Honor.  
25 The first time that I wrote the letter to request that he

1 not take medication, which was in March of 1988, the reason  
2 that was done was that Mr. Perry was having discomfort. He  
3 was feeling really bad on the medication. The first time  
4 that I ever met this client was in January of 1988, and he  
5 was agitated and having the side effect of -- the intense  
6 agitation of this medication and I looked at the statute and  
7 found 830.1 and wrote a letter saying, let's discontinue him  
8 from the medication.

9 The second time I didn't discontinue him from the  
10 medication. I wrote a letter to the State Penitentiary  
11 asking that they not medicate him absent compliance with  
12 830.1. And the final time that Your Honor might be talking  
13 about is when there was a last hearing, I believe, and one  
14 of the doctors made some comment about what I said. I  
15 didn't say that. That may be Mr. Perry's auditory  
16 delusions, but I didn't say that.

17 QUESTION: Well, there's nothing in this record  
18 to indicate that medication is against his medical best  
19 interest, is there?

20 MR. NORDYKE: Yes, there -- well, yes, there is,  
21 if you consider the fact that if he takes the medication  
22 under the trial court's findings, that it will kill him,  
23 that will inevitably and inexorably lead to his death.

24 QUESTION: I'm talking about his condition prior  
25 to his execution.

1 MR. NORDYKE: We don't know, because his best  
2 interests were not a focus of any of the hearings. None of  
3 the hearings that we had focused on what Mr. Perry -- what  
4 was good for Mr. Perry, what was bad for Mr. Perry, how much  
5 was good, how much was bad. The problem is that we didn't  
6 use the medical model throughout.

7 As Your Honor knows from the Harper case last  
8 term, this sort of medication has got problems with it.  
9 It's got side effects. It's got dangers. And the use of  
10 these medications, as dangerous as they are, may be good  
11 for inmates under some circumstances. But it's a constant  
12 push and pull and a tension, a medical risk reward analysis,  
13 that the physicians need to undertake and that wasn't done.

14 QUESTION: Do you think under this order, the  
15 physician said, boy, we have to pump the medication into  
16 this fellow no matter what it does to him?

17 MR. NORDYKE: I think --

18 QUESTION: Do you really think that that's how  
19 that order would have read by a medical doctor?

20 MR. NORDYKE: Your Honor, I don't know how a  
21 medical doctor would have read it, but the import of the  
22 order --

23 QUESTION: But don't you have to know to base your  
24 argument on that, and to assert as you've asserted in your  
25 brief that the whole purpose of treatment was not at all to

1 make him well, although that would kill him as you say,  
2 because if he got well, he could be executed. But that  
3 wasn't the purpose. The purpose was simply to have him,  
4 even if it hurt him enormously, to have him rational for one  
5 brief instance so he could be executed. I don't see  
6 anything in the record that justifies that.

7 QUESTION: Mr. Nordyke, in that respect there has  
8 been discussion up here about the wording of the order. It  
9 is the order of October 21, '88, isn't it?

10 MR. NORDYKE: Yes, Your Honor.

11 QUESTION: Well, I don't see that it reads, "as  
12 prescribed by the medical staff." It reads, "as to be  
13 prescribed by the medical staff." I think that's  
14 susceptible of a very different connotation.

15 MR. NORDYKE: I agree, Your Honor. I think it  
16 is. And I think, Justice Scalia, the answer is basically  
17 what was just proposed. The order, as I understand it and  
18 reading it as a whole in pari materia, basically says they  
19 go forth and medicate him.

20 QUESTION: To be -- as to be prescribed means as  
21 to be prescribed contrary to all sound medical practice if  
22 necessary. That's -- do you thing a reasonable --

23 MR. NORDYKE: I can't read it any other way simply  
24 because the trial court, knowing about 830.1, having had it  
25 briefed to him, didn't go through any of the things that one

1 needs to go through under 830.1. He didn't look at any of  
2 the issues. This simply wasn't that sort of hearing.

3 QUESTION: Was there testimony that any doctor  
4 treating him interpreted the order that way?

5 MR. NORDYKE: Well, Your Honor, the trial  
6 court -- excuse me, the trial court stayed his order after  
7 entry, so we don't know. Now, Mr. Perry has been medicated  
8 since then, but under whose authority or why, I don't know.  
9 But theoretically this order is stayed even through today.

10 QUESTION: So the medical staff is probably doing  
11 what they thought they should be doing to him.

12 MR. NORDYKE: I don't know. As of 2 weeks ago --

13 QUESTION: And he hasn't been refusing them?

14 MR. NORDYKE: They are forcibly injecting him, we  
15 understand.

16 QUESTION: Of course, Mr. Nordyke, it never really  
17 makes much sense, does it, in some respects, to cure a man  
18 only to execute him.

19 MR. NORDYKE: Your Honor, we claim it's  
20 fundamentally wrong.

21 QUESTION: And the problem, of course, is the old  
22 rule that you don't execute a man when he's incompetent.

23 MR. NORDYKE: It goes back to Ford. It goes back  
24 to Ford in the common law rule. And the same reasons that  
25 this Court decided in Ford are equally applicable here. The

1 medicines don't cure Mr. Perry. They may mask his insanity  
2 for a short period of time so that we may feel better about  
3 executing Mr. Perry, but they don't cure Mr. Perry. And the  
4 insanity that underlies those medications is still there.  
5 You would still be sending --

6 QUESTION: The trouble may be with the old rule.  
7 But there it is, engraved in stone, I suppose. Why  
8 shouldn't we execute a man when he's incompetent?

9 MR. NORDYKE: Well, the answers to that are  
10 varied. First of all, under Ford v. Wainwright, Your Honor,  
11 we constitutionally don't do so. And secondly, under  
12 Louisiana law, perhaps even more importantly if Ford were  
13 to disappear, under Louisiana law there's a liberty interest  
14 that has been created both by State v. Allen a number of  
15 years ago and State v. Perry where, in the Perry case  
16 itself, the Louisiana Supreme Court said that Louisiana does  
17 not execute the insane.

18 They cited Ford v. Wainwright further down in the  
19 opinion, but that was not the basis for which they made the  
20 decision that Louisiana does not execute the insane.

21 QUESTION: When a case comes to us, don't we judge  
22 it on the basis that this treatment would make him at least  
23 temporarily competent? I know you challenge that. But as  
24 the case comes to us, isn't that --

25 MR. NORDYKE: Your Honor, I agree that we have to

1 pay due deference to the findings of fact to the trial court  
2 and I cannot tell you that's not the law. That is the law.

3 QUESTION: But that's just the beginning of the  
4 argument.

5 MR. NORDYKE: The very, very beginning. And I  
6 had a question from you and I got pulled aside. I'm sorry.

7 In addition to the Fourteenth Amendment argument  
8 that we have been discussing here, we believe that it's  
9 unconstitutional under the Eighth that Mr. Perry be  
10 executed. We also believe that it's fundamentally wrong to  
11 do so.

12 QUESTION: Mr. Nordyke, before you go to the  
13 Eighth Amendment --

14 MR. NORDYKE: Yes, Your Honor.

15 QUESTION: I want to be sure I understand your  
16 position. You contend that there's a liberty interest  
17 created by Louisiana law, I understand. Do you also contend  
18 independently of Louisiana law that there's a liberty  
19 interest in not being subjected to this medication?

20 MR. NORDYKE: Absolutely, Your Honor. We think  
21 it's the Harper interest of last term.

22 QUESTION: You didn't seem to mention it and I  
23 was --

24 MR. NORDYKE: I apologize, but we do believe it's  
25 the Harper interest of last term.

1 QUESTION: Did you make that argument in the trial  
2 court?

3 MR. NORDYKE: Harper was not decided at the time.

4 QUESTION: Did you make the argument even though  
5 Harper was not decided?

6 MR. NORDYKE: Yes, Your Honor.

7 QUESTION: And will you furnish us a transcript?

8 MR. NORDYKE: We'll furnish it. We believe it's  
9 fundamentally wrong under the Eighth and that the Eighth  
10 prohibits this sort of use of forcible medication. We also  
11 think that there's a consensus against the use of forcible  
12 medication that is created by the States. No State has  
13 authorized the use of this medication for purposes of  
14 punishment. And we think that the fact that no State has  
15 authorized it is important.

16 Secondly, the amicus in this case, the American  
17 Medical Association and the American Psychiatric  
18 Association, have filed a brief saying that from their  
19 perspective it's fundamentally wrong and ethically wrong.  
20 And I think that that second element of a consensus starts  
21 with those two organizations. They are the organizations  
22 that will have to carry out this order and they have to know  
23 more about this sort of thing than any other group.

24 QUESTION: You know, there's a consensus against  
25 killing people, too. But when a State has authorized

1 capital punishment, why is it so outrageous as to be  
2 unconstitutional to say an individual may not turn down  
3 normal treatment that he would otherwise receive? Not  
4 treatment that wouldn't otherwise be justified but treatment  
5 which doctors would normally recommend. A person may not  
6 turn that down solely in order to escape the electric chair.  
7 Why is that so outrageous?

8 MR. NORDYKE: Your Honor, I'm not sure it is  
9 outrageous and my position is not as far as the amicus  
10 position on this point. The amicus claim that it is  
11 unconstitutional under all circumstances.

12 The position that we have taken in this case and taken  
13 in brief is that first we believe it unconstitutional under  
14 the Eighth. But if it's not, then under the Fourteenth,  
15 then, there is a possibility that if this case is handled  
16 under the medical model and this competency is some  
17 byproduct, then there may be -- the State may extract its  
18 retribution.

19 QUESTION: Well, what do you mean by handled under  
20 the medical model? Do you mean that the State would have  
21 to adopt a rule that all prisoners, and not merely those who  
22 have been condemned to death, can be forcibly medicated?

23 MR. NORDYKE: I may have missed your hypothet,  
24 Your Honor, but the hypothet that I understood you to give  
25 me was that we not medicate him outside of the realm of the

1 Harper best interest --

2 QUESTION: I'm saying that if the State makes a  
3 determination on the basis of expert medical advice that it  
4 is in the interest of this patient because of his mental  
5 condition to be medicated, and that they would normally  
6 advise an individual in private life outside of prison to  
7 obtain medication, that thereafter that medication may be  
8 forcibly administered to someone who is under sentence of  
9 death, whether or not he wants to turn it down.

10 JUST AS A NORMAL CITIZEN acting reasonably would  
11 take the medication, he should have to take it and not be  
12 able to avoid it merely in order to avoid the death penalty  
13 that's been duly imposed.

14 MR. NORDYKE: Your Honor, that would make the  
15 medicine, then, effectually working towards the purposes of  
16 punishment. And this --

17 QUESTION: Of course, but he's been condemned to  
18 punishment. I mean --

19 MR. NORDYKE: That's right. But the fact that a  
20 person has been condemned to punishment does not justify  
21 anything that the State may in its imagination might wish  
22 to do to them.

23 QUESTION: It's not doing to him anything except  
24 what normal medical advice would justify being done.

25 MR. NORDYKE: And people ignore medical advice

1 all day. It's not --

2 QUESTION: I guess the issue is whether someone  
3 who's been condemned to death continues to have that luxury.

4 MR. NORDYKE: I think that's probably the bottom  
5 issue in this case.

6 QUESTION: Do you agree it's a luxury?

7 MR. NORDYKE: Do I agree it's a luxury to be able  
8 to refuse medication? No, Your Honor, I think it's an  
9 absolute fundamental right that bottoms out in human  
10 dignity.

11 QUESTION: Refuse healthful medication? I mean  
12 that's the condition on all my questions. That it's indeed  
13 in his good and it would be recommended to the normal  
14 patient.

15 MR. NORDYKE: My answer remains the same. I'd  
16 like to reserve my time.

17 QUESTION: Very well, Mr. Nordyke.

18 Mr. Salomon, we'll hear now from you.

19 ORAL ARGUMENT OF RENE' I. SALOMON

20 ON BEHALF OF THE RESPONDENT

21 MR. SALOMON: Chief Justice Rehnquist, and may it  
22 please the Court:

23 I'd like to begin first by making note in response  
24 to a few questions tendered to my colleague in this case in  
25 regard to Justice White's question about what does the order

1 in this case say, it's very clear that the order says, as  
2 to be prescribed by the physicians of the medical staff of  
3 the Department of Public Safety and Corrections. Simply  
4 put, those words have to mean something, and we suggest that  
5 the court in this matter chose those words to afford to the  
6 physicians the opportunity to determine what is in the  
7 medical interests of this particular inmate.

8 QUESTION: Did you draw the order?

9 MR. SALOMON: No, sir, I did not.

10 QUESTION: Who did?

11 MR. SALOMON: Pardon me?

12 QUESTION: Who did?

13 MR. SALOMON: The court.

14 QUESTION: Himself?

15 MR. SALOMON: The judge himself. Judge Emil --

16 QUESTION: That is your Louisiana practice?

17 MR. SALOMON: Yes, it is, Your Honor.

18 QUESTION: Attorneys never draw an order?

19 MR. SALOMON: On criminal cases they occasionally  
20 do, but it was not done on this particular case.

21 QUESTION: You know that of your own knowledge?

22 MR. SALOMON: Certainly. I represented the State  
23 not only at the trial in this matter, but in the hearing on  
24 competency of this matter also.

25 QUESTION: Was there ever a finding here that the

1 forcible medication was in the best interest of the  
2 prisoner, and was there ever a finding here to the effect  
3 that the prisoner would be a danger to himself or others  
4 without it?

5 MR. SALOMON: The court did specifically find, by  
6 asking questions of the individual doctors, whether this  
7 medication was good for him. The doctors, including Cox,  
8 Jimenez, and Vincent collectively said, this medication is  
9 in his medical interest because it is one, rational. Two,  
10 it is appropriate. And three, it is beneficial.

11 QUESTION: Where do I find the court's  
12 determination?

13 MR. SALOMON: I think that it would be found in  
14 the court's order itself where the judge recognizes that  
15 Mr. Perry has an interest in refusing the medication.

16 QUESTION: You can't point to any specific  
17 language?

18 MR. SALOMON: It would be the language on the  
19 second-to-last page of the court's order where the court  
20 recognized --

21 QUESTION: Second order?

22 MR. SALOMON: The order of October 21st, 1988,  
23 where the court basically found an interest of the inmate,  
24 an interest of the State, and the inmate's interest was  
25 overridden.

1           QUESTION: And it's the finding that the defendant  
2 would be a danger to himself or others without the  
3 medication?

4           MR. SALOMON: I don't think there was a finding  
5 that he will be a danger without the medication. But the  
6 State's position in this case is when you examine this title  
7 XV, section 830.1, the State need not prove that he is  
8 dangerous to himself in order to justify medication in this  
9 particular example. What we respond to my colleague's  
10 argument here is that 830.1 is not the particular statute  
11 that governs this particular case, as was in the case of,  
12 I believe, Kentucky v. Thompson in dealing with visitation  
13 privileges. We have a scenario where a State statute  
14 specifically says, you can do medication where the inmate  
15 is dangerous, and that is a sufficient condition on which  
16 the State may choose to exercise its ability to medicate.

17           QUESTION: So it is your position that the statute  
18 830.1 is inapplicable?

19           MR. SALOMON: That's correct, Your Honor.

20           QUESTION: Is it your position also that the  
21 court's findings in all respects comply with the case handed  
22 down by this Court last term, the Harper case?

23           MR. SALOMON: Well, I believe that it does comply  
24 with Harper and in the State's view, Harper indicates the  
25 appropriate result in this case. If, for example in Harper,

1 mental illness can justify involuntary medical treatment in  
2 order to prevent dangerousness to the individual, to others,  
3 or to even their property, then certainly the State's  
4 interest in this case is at least that great if not greater.  
5 That is --

6 QUESTION: But there's no specific finding that  
7 he would be dangerous to himself or others?

8 MR. SALOMON: That's correct, Your Honor, there  
9 is not --

10 QUESTION: But you are saying that even if there  
11 isn't, the State's interest in executing him is sufficient  
12 to override his denial of the medication?

13 MR. SALOMON: That's correct.

14 QUESTION: That's certainly what the judge said,  
15 isn't it?

16 MR. SALOMON: Absolutely. That is correct what  
17 the judge said. And what we are saying, Justice O'Connor,  
18 is basically that Harper, once again, if you can medicate  
19 a person who's mentally ill to protect property, you  
20 certainly should be able to do it to enforce the court's  
21 interest in its laws and in obtaining its punishment.

22 To respond to a point made by Mr. Nordyke also,  
23 we believe that in this particular case there is less of an  
24 interest on behalf of the inmate for the simple reason in  
25 Harper there was an individual who one day was going to get

1 out of jail, who had a long-term interest of the effects  
2 that might result from the administration of the medication.

3

4 In this particular case, because this man is  
5 sentenced to death, his opportunity to live the number of  
6 years in which he will be alive are limited, not as if the  
7 matter in Harper, where we have an infinite number of years  
8 where the individual may stay alive.

9 QUESTION: Mr. Salomon, did the court specifically  
10 hold that as a matter of Louisiana law, 830.1 was  
11 inapplicable?

12 MR. SALOMON: It did not. And I don't think that  
13 the court was clear to be very frank that it did or it did  
14 not apply. The court was somewhat in a vague area whether  
15 or not this statute, 830.1, applied in this particular case.

16 As Mr. Nordyke said, at one juncture he used a  
17 part of 830.1 to stay the medication. At another juncture  
18 he said, no, my interests are different and conducted a  
19 somewhat different analysis.

20 QUESTION: Do you appoint that the only purpose  
21 of this medication is to put him in condition to be killed?

22 MR. SALOMON: I would say there are two purposes.  
23 One is that as you state, basically, so that the State can  
24 satisfy its interest, and, number two, because the State has  
25 a duty to provide treatment to a person that needs

1 treatment. And in this particular case,  
2 if this man is truly incompetent, then he's not in a  
3 position to know to refuse medicine and make that decision  
4 competently. And for the State to deny him that  
5 treatment --

6 QUESTION: But the primary purpose is to kill him?

7 MR. SALOMON: I would say, yes sir, that's  
8 correct. It is basically to execute him, in this case  
9 because the State has an interest.

10 QUESTION: In your second purpose, let me be sure  
11 I have it correct. Is it not correct that when he is  
12 receiving the medication, he is competent to make a  
13 decision?

14 MR. SALOMON: That's correct.

15 QUESTION: And that while he was competent he did  
16 indicate a desire not to receive further medication?

17 MR. SALOMON: That is in dispute. It depends on  
18 where you can draw the line as to he has a blood serum level  
19 that allows him the opportunity to make such a decision.  
20 Some of the doctors have said that it will take 3 months of  
21 consistent treatment, that is, one injection every 4 weeks,  
22 for him to reach a plateau where he would be able to act as  
23 if he were not hallucinating or having delusions or showing  
24 symptoms of psychosis.

25 QUESTION: The finding in October of whatever it

1 was, the 18th or 21st, that he was competent to understand  
2 the punishment, of course, execution, is not equivalent of  
3 a finding he was competent to decide whether or not he  
4 wanted further treatment in your view?

5 MR. SALOMON: Perhaps I'm misunderstanding. Would  
6 you repeat it?

7 QUESTION: Well, I had the impression that there  
8 were times when he was competent to make rational decisions.  
9 And one of which would be to understand the execution. The  
10 other would be whether or not he wanted further treatment  
11 or to object to it. And I thought that the finding by the  
12 judge that he was competent for execution would implicitly  
13 indicate that he also found him competent to decide whether  
14 he wanted further treatment or not.

15 MR. SALOMON: I think in some circumstances that's  
16 correct. The judge did find that he's competent to be  
17 executed when maintained on the regimen of medication, and  
18 so that would lead to your result --

19 QUESTION: But is it not correct that during one  
20 of these periods of competency under medication, he made it  
21 clear that he did not want further medication?

22 MR. SALOMON: I'm not certain of that. I don't  
23 think the record exactly states through any doctor or any  
24 medical record that he was competent as a determination at  
25 the moment that he decided that he didn't want --

1           QUESTION: I don't know. I can't imagine why the  
2 judge would go to the trouble of saying that the State's  
3 interest overrode his decision, his interest in refusing  
4 treatment, if that weren't the case.

5           MR. SALOMON: Well, I agree with you in basic --

6           QUESTION: At least I would think that's the way  
7 we would judge this case.

8           MR. SALOMON: I think you're correct, Justice  
9 White. I'm not trying to quibble with you, Justice Stevens.  
10 But it's just you're asking specifically about the record  
11 and it doesn't so clearly demonstrate as you're asking me  
12 for, but I'm willing to state for you that definitely that  
13 he's got -- he might have a lucid moment where he can decide  
14 that he does not want the medication. And I think in this  
15 case the judge recognized that fact and then conducted this  
16 sort of weighing and balancing --

17           QUESTION: If we assume that we take the case as  
18 we've discussed in acknowledging that maybe the record isn't  
19 as clear as it should be, would it be your view that at that  
20 time he had the kind of liberty interest independent of  
21 Louisiana law that was discussed in Harper to say no unless  
22 sufficient overriding State interests are present?

23           MR. SALOMON: I believe that he does. And our  
24 brief acknowledges such and makes two arguments to that  
25 effect. And in this particular case, we feel that an

1 examination of the facts and the law according to Turner v.  
2 Safley, as was applied in Washington v. Harper, is  
3 appropriate. And if you do this testing a standard of  
4 reasonableness, that is, whether the court's order is  
5 reasonably related to a legitimate penalogical interest,  
6 the State of Louisiana submits that this court order is  
7 appropriate in this case, because it is related to a  
8 legitimate penalogical interest.

9 QUESTION: So you're prepared, really, to have us  
10 judge the case on the assumption that there is a  
11 constitutionally protected liberty interest at stake, but  
12 that it's overcome by the countervailing interest that you  
13 rely on?

14 MR. SALOMON: That's correct, Your Honor.  
15 Now, there was also --

16 QUESTION: Then why do you say 830.1 isn't  
17 applicable? I didn't quite get it.

18 MR. SALOMON: Well, basically for the same reason  
19 that the statute in Kentucky v. Thompson didn't mandate that  
20 visitation privileges were some protected liberty interest.  
21 My point is that 830.1 does not apply to a scenario where  
22 the State of Louisiana seeks to involuntarily medicate an  
23 inmate for the purpose of establishing competency to carry  
24 out its punishment.

25 Now, it says --

1 QUESTION: But the 830.1 sort of conditions  
2 involuntary treatment on --

3 MR. SALOMON: -- dangerousness.

4 QUESTION: -- the basis of dangerousness.

5 MR. SALOMON: Well, I would suggest to you that  
6 that --

7 QUESTION: And is quite consistent with the  
8 constitutional rule.

9 MR. SALOMON: And I think that is correct to the  
10 extent that 830.1 is a statutory expression of what the  
11 State can do and that is a sufficient basis on which the  
12 State may involuntarily treat. But it is not the sole or  
13 only basis is what the State now contends.

14 QUESTION: At least that's your submission?

15 MR. SALOMON: That's my submission, Your Honor.

16 Now there were some other statements to the effect  
17 that treatment in this case is not in his medical interest,  
18 and I have already suggested and would further state that  
19 it is an appropriate, beneficial, rational course of action.  
20 Three doctors have stated such in the record of this  
21 particular case.

22 QUESTION: Mr. Attorney General, is this medicine  
23 given by injection or by the mouth?

24 MR. SALOMON: Both. In this particular case, Mr.  
25 Perry --

1 QUESTION: Well, if all you say is true in the  
2 interest of Louisiana, while you're giving him the  
3 injection, why don't give him enough to kill him then?

4 MR. SALOMON: Well, because I think --

5 QUESTION: It would be cheaper for the State.

6 MR. SALOMON: Right, but I think the State of  
7 Louisiana is limited by the Eighth Amendment and other  
8 provisions that we can't do things that are cruel or unusual  
9 or excessive in nature. And I think that we have to meet  
10 some minimal due process guidelines here procedurally in  
11 what we can and cannot do.

12 Now this particular inmate has previously to go  
13 to trial been treated. And he has been medicated at the  
14 forensic facility in order to establish competency for  
15 trial. Louisiana, like several other States, does allow  
16 for the treatment of incompetent defendants in order to  
17 establish competency for trial.

18 We submit that if Louisiana can establish  
19 competency for a defendant to go to trial when that  
20 individual's presumption of innocence and other rights are  
21 at its zenith, then the State of Louisiana should be allowed  
22 to establish competency in order to carry out its sentence  
23 in this particular case.

24 QUESTION: You say that a prisoner who isn't  
25 dangerous involuntarily be treated in order to make him

1 competent to go to trial?

2 MR. SALOMON: I have no cases, but I think  
3 Appendix J, which sets forth the statutes of 20-some-odd  
4 States, does indicate that at least in Louisiana you don't  
5 need the element of dangerousness in order to treat someone  
6 to establish competency to go trial.

7 QUESTION: Well, are there any decisions under  
8 Federal law that -- are there any decisions saying that this  
9 is consistent with Federal and constitutional law?

10 MR. SALOMON: I'm not able to answer your  
11 question, because I have not researched the Federal aspect  
12 of what a Federal court could order an incompetent defendant  
13 to undergo. But I would be pleased to submit something, if  
14 that would be your desire.

15 QUESTION: You don't think that the Harper case  
16 is applicable in the pretrial situation?

17 MR. SALOMON: I don't think Harper said that it  
18 is applicable in the pretrial situation.

19 QUESTION: You don't think it is logically?

20 MR. SALOMON: Well, I think that it may be, to be  
21 very candid, Justice O'Connor, but I don't think that you  
22 always have to establish dangerousness in order to justify  
23 the involuntary or some other administration of medication  
24 in order to establish competency. I think the statutes that  
25 are set forth in Appendix J reveal that some States do

1 require dangerousness in order to justify the involuntary  
2 administration. And there are some States that do not. And  
3 Louisiana is one of a handful that do.

4 QUESTION: Isn't it true that in that situation  
5 one of the factors that would be considered would be, if  
6 appropriate in the case, the potential permanent side  
7 effects of the first medication? I guess these things  
8 affect different people in different ways. And if the  
9 doctors felt it would cause permanent side effects, you  
10 wouldn't then argue that the mere fact they wanted to make  
11 him competent to stand trial would necessarily overcome his  
12 liberty interest, would you?

13 MR. SALOMON: Well, I think as it stands in  
14 Louisiana you can make that argument. And whether there is  
15 dangerousness or not, you can.

16 QUESTION: Right.

17 MR. SALOMON: And that is not the case here, but  
18 I'm citing it as a premise of sorts to say that we have done  
19 it in this particular case, and because we have done  
20 it -- that is, an involuntary administration of medication  
21 to establish competency to go to trial -- we can do it for  
22 competency to exact our sentence. That is a validly  
23 obtained matter.

24 The trial court in this matter in basic terms  
25 identified --

1           QUESTION: In a way competency to go to trial is  
2 harder, isn't it. I mean here you have a person who has  
3 not been convicted of anything, and you're enforcing  
4 involuntary medication. In the other case, you have someone  
5 who's already been convicted of a crime and thereby loses  
6 some of his liberties, including physical liberty to move  
7 about.

8           MR. SALOMON: Absolutely, I mean because the  
9 punishment -- the whether determination has already been  
10 made what his sentence will be. Many of his rights are  
11 greatly diminished, his freedom from confinement. We know  
12 that his freedom from bodily restraint to be physically  
13 strapped into that electric chair is reduced as well as his  
14 ability to determine his fate.

15          QUESTION: Saying, likewise is reduced his ability  
16 to turn down beneficial medical treatment.

17          MR. SALOMON: That's exactly right.

18          Many of his rights, as I have said, have been  
19 limited, and that includes, for example, his right to life  
20 and his right to self-determination of sorts. To honor Mr.  
21 Perry's request in this case, that is his refusal of  
22 medication and beneficial medical treatment, I might add,  
23 would be to be contrary to several valid interests.

24          First, I think that it's correct to say that the  
25 inmate's right to some sort of self-determination has been

1 greatly diminished by the fact that he has been convicted  
2 of a capital murder and that he has been sentenced to death.

3

4 And I think also that once that right of the State  
5 to impose punishment is established, that we recognize in  
6 some sort of inferential way that the State is the entity  
7 that chooses what a punishment shall be. And if we in this  
8 case honor Mr. Perry's right to refuse medical treatment as  
9 indicated in the record, then I think we give, in a way, to  
10 Perry the opportunity to choose his punishment.

11 QUESTION: Let me just interrupt, if I may.

12 MR. SALOMON: Fine.

13 QUESTION: You seem to make a point earlier that  
14 it was relevant that this treatment was beneficial to him.  
15 What if it wasn't beneficial? You'd have the same State  
16 interest in carrying out the punishment.

17 MR. SALOMON: Right. But I still think that that  
18 interest would not be, then, legitimate, possibly under a  
19 Turner v. Safley analysis, or potentially it could walk into  
20 the prohibition on cruel and unusual punishment.

21 QUESTION: I can understand your argument if you  
22 don't rely on the benefit. But it's a rather strange sort  
23 of benefit to say the benefit is you may now be executed.

24 MR. SALOMON: Well, but there are medical  
25 benefits.

1           QUESTION: He's not particularly interested in  
2 those when he is weighing the various alternatives.

3           (Laughter.)

4           MR. SALOMON: I understand that. But there are  
5 other rights that he has. For instance, this freedom from  
6 confinement and these other steps like medicating him to  
7 establish the competency to go to trial, which are basically  
8 steps on the road to execution which are not beneficial to  
9 him --

10          QUESTION: I know medication to go to trial,  
11 Justice Scalia has already demonstrated, that's a harder  
12 case than this one.

13          MR. SALOMON: Correct.

14          QUESTION: You're relying on one that hasn't been  
15 decided yet, at least by this Court.

16          MR. SALOMON: That's true, but I still say that  
17 even though the State might have an interest in seeing its  
18 penalty satisfied, that a Turner v. Safley analysis says  
19 that you have to have a legitimate penalogical interest.  
20 And possibly in your hypothetical, the State's interest  
21 would be reduced if there is not beneficial medication.  
22 Because there's a benefit to the individual. There is an  
23 interest of the State to carry out its punishment bottom  
24 line. But it's limited. And it's limited by things like  
25 what's legitimate and what's going to be cruel and unusual.

1 QUESTION: It isn't the State's interest is  
2 heightened. It's that his interest is. The interest in  
3 turning down harmful medication is certainly something much  
4 greater than the interest in turning down otherwise  
5 beneficial medication, and as -- the punishment authorized  
6 by this judgment against the defendant was execution, right?

7 MR. SALOMON: Correct.

8 QUESTION: And not any other physical torture or  
9 harm beyond execution or prior to execution. Correct?

10 MR. SALOMON: That's correct, Justice Scalia.

11 QUESTION: And if you medicated him against his  
12 will in a way that was harmful to him that could be  
13 considered to be something beyond the judgment of execution  
14 that had been pronounced.

15 MR. SALOMON: That is correct.

16 QUESTION: The State's sole interest was to kill  
17 him?

18 MR. SALOMON: Well, the State's primary interest  
19 is just that.

20 QUESTION: Well, it seems -- for example, if he  
21 had been sentenced to life, the State wouldn't be  
22 interested, would they?

23 MR. SALOMON: Well, the State would still be  
24 interested to the extent of providing beneficial medical  
25 treatment to a person that's ill.

1 QUESTION: They would? They would insist on it?

2 MR. SALOMON: Well, I think that the State could  
3 insist on it if you --

4 QUESTION: Do you think they would?

5 MR. SALOMON: Well, you asked me to predict, and  
6 I think that they may. And the reason --

7 QUESTION: In this case it's solely to kill him?

8 MR. SALOMON: That's correct.

9 Now, beyond the trial court's analysis in this  
10 particular case --

11 QUESTION: I don't mean to be a pest here. I  
12 really don't. But I want to be sure I have got a thought  
13 in mind. Reading the trial court's order, there has been  
14 a lot of discussion of as to be prescribed by the medical.  
15 We're talking about the order of page 148 I think of the --

16 MR. SALOMON: October 21, '88.

17 QUESTION: October 21. And it says the Department  
18 of Public Safety and Corrections is further ordered to  
19 maintain the defendant on the above medication as to be  
20 prescribed by the medical staff of the Department of if  
21 necessary administers that medication forcibly to defendant  
22 over his objection. Are you arguing that as to be  
23 prescribed means if the medical staff thinks it's  
24 beneficial?

25 MR. SALOMON: Yes, sir. That's correct.

1 QUESTION: You think that's implicit in the order?

2 MR. SALOMON: Yes, sir, I do.

3 QUESTION: Thank you.

4 MR. SALOMON: Beyond the trial court's analysis  
5 in this particular case, the trial court did not conduct  
6 any national consensus search, but we submit to this Court  
7 today that there is no State legislation that exists  
8 anywhere prohibiting involuntary medication for a competency  
9 to execute. In fact we suggest that one State, the State  
10 of Maryland, does specifically allow competency to be based  
11 on the involuntary administration of medication. In fact,  
12 of 37 States which have the death penalty, 24 of those  
13 States contemplate in one fashion or another that treatment  
14 can occur. And it's basically premised upon a finding that  
15 executions cannot be carried out until competency is  
16 established, restored, or regained.

17 If on the one hand, we know that we can't or  
18 cannot execute those who are incompetent and on the other  
19 hand, we can, if they are restored to sanity, the State  
20 suggests something happens between those two points. And  
21 the something that happens is these 24 States basically  
22 permit the administration of medication to establish  
23 competency for execution.

24 QUESTION: You don't really know that. You don't  
25 really know that those laws apply when the patient refuses

1 and he's not dangerous.

2 MR. SALOMON: No, I do not. My colleague in this  
3 case has spent some time in his brief talking in terms of  
4 procedural due process was violated in this matter and we  
5 would submit to the Court again that the court, the trial  
6 court, utilized far beyond the procedures required in Ford  
7 v. Wainwright to determine the interests of Mr. Perry, the  
8 interests of the State, and whether the State's interests  
9 would supersede.

10 In Ford, the court was basically required to  
11 afford an opportunity to be heard, a neutral decision maker,  
12 and those things were in fact provided to Mr. Perry, in  
13 addition to many other matters.

14 If the Court would have any further questions on  
15 any of these matters, I'd be pleased to answer them.

16 QUESTION: Is the defendant being forcibly  
17 medicated now, Mr. Salomon?

18 MR. SALOMON: Difficult question. I checked as  
19 recently as yesterday and it depends how you define what is  
20 forcible medication. The scenario that has occurred as of  
21 June the 20th or so of 1990 was that the doctors determined  
22 that Mr. Perry was in some kind of episode where he was  
23 dangerous and they said to him, we want to give you  
24 medicine. Are you willing to take it? And if you're not  
25 willing to take it, we're going to make you take it and

1 basically he said, yes, I'll take it. And he has taken the  
2 medicine in June, August, and September, and as recently as  
3 a week ago, one of the supervising physicians did in fact  
4 enter another standing order for 3 months' worth of  
5 treatment, which would be one injection every 4 weeks of  
6 approximately 200 milligrams of the medication known as  
7 Haldoldeconate, which is a long-acting and lasting  
8 medication.

9 QUESTION: Thank you, Mr. Salomon.

10 Mr. Nordyke, you have rebuttal. You have 2  
11 minutes remaining.

12 REBUTTAL ARGUMENT OF KEITH B. NORDYKE

13 ON BEHALF OF THE PETITIONER

14 MR. NORDYKE: First let me address the Maryland  
15 statute that counsel addressed. The Maryland statute, if  
16 one would examine the legislative history of that statute,  
17 as we have, would indicate that the Maryland legislature  
18 was very concerned about the ethics of doctors. They  
19 adopted exactly the approach that the AMA would suggest in  
20 this case.

21 There is a legislative task force history of that  
22 statute that is available and subsequent to Ford v.  
23 Wainwright, that statute was reenacted and they commute  
24 after one opportunity at a hearing.

25 The statute does say that a person is not

1 incompetent merely because of the continued administration  
2 of psychotropic medication. But what I suggest that  
3 suggests is somebody that would otherwise be sane even  
4 without the medication.

5 Secondly, turning to the Turner v. Safley analysis  
6 that counsel suggested, Turner simply doesn't apply. Turner  
7 is a method of analysis that applies to a prison regulation.  
8 This is a statute that we're talking about. And if it's not  
9 a statute it's certainly the Eighth Amendment.

10 Justice Marshall asked about the injections. They  
11 are in fact injections and the Haldoldeconate is a large  
12 enough injection where they have to be broken down into  
13 several shots each time in order to give them.

14 The question of whether it was good for him and  
15 it doesn't appear anywhere in the record. I still think it  
16 doesn't. And the reason that I think counsel says that it  
17 appears in the record is that the questions that were posed  
18 were, can you make him competent to be executed? The  
19 questions that were directed to the physicians on the  
20 witness stand had to do with competency to be executed and  
21 not whether or not any of these medications were in Mr.  
22 Perry's best interest.

23 We likewise have spoken to Mr. Perry, not the  
24 physicians, in the last 2 weeks. He believes that the  
25 monthly shots he's getting are lethal injections.

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Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nordyke.

The case is submitted.

(Whereupon, at 2:54 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

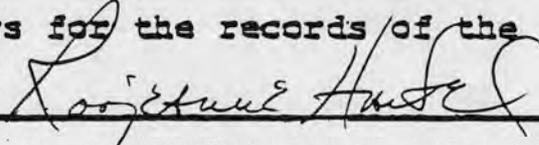
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#89-5120 - MICHAEL OWEN PERRY, Petitioner V. LOUISIANA

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