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IN THE SUPREME COURT OF THE UNITED STATES

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MARK SELING, SUPERINTENDENT, :
SPECIAL COMMITMENT CENTER, :
Petitioners :
v. : No. 99-1185
ANDRE BRIGHAM YOUNG :

- - - - -X
Washington, D.C.
Tuesday, October 31, 2000

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:05 a.m.

APPEARANCES:
MAUREEN A. HART, ESQ., Senior Assistant Attorney General,
Olympia, Washington; on behalf of the Petitioner.
ROBERT C. BORUCHOWITZ, ESQ., Seattle, Washington; on
behalf of the Respondent.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-1185, Mark Seling v. Andre Brigham
5 Young.

6 Ms. Hart.

7 ORAL ARGUMENT OF MAUREEN A. HART

8 ON BEHALF OF THE PETITIONER

9 MS. HART: Mr. Chief Justice and may it please
10 the Court:

11 This case presents a narrow but important issue,
12 and it concerns how this Court determines the threshold
13 question of whether a statute is civil or criminal. This
14 threshold inquiry is important because it establishes what
15 constitutional rules apply to a statute and that the
16 statute must satisfy, and also what constitutional
17 protections are available to people who are subject to the
18 statute.

19 It also is important because this same threshold
20 inquiry applies to many kinds of statutes, not just
21 statutes such as Washington's, providing for the
22 commitment of sexually violent predators. It applies to
23 numerous statutes, including others that deal with
24 confinement such as more generalized civil commitment
25 laws, commitments for drug or alcohol treatment, statutes

1 such as quarantine statutes, and statutes relating to
2 pretrial detention.

3 In this case, the Ninth Circuit rejected the
4 principle that whether a law is civil or criminal is a
5 threshold question based on legislative intent and the
6 face of the statute. Instead, the Ninth Circuit held that
7 Washington's admittedly civil law may be divested of its
8 civil nature and converted into a criminal law if
9 conditions of confinement at Washington's Special
10 Commitment Center are punitive.

11 In other words, the Ninth Circuit held that the
12 fundamental nature of a law as either civil or criminal
13 may vary and that the same statute may be both civil and
14 criminal at different times and in different places.

15 The Ninth Circuit's decision is fundamentally
16 wrong. It conflicts with the holding of this Court in
17 Hudson v. United States. It doesn't serve --

18 QUESTION: Ms. Hart, I suppose you could have a
19 situation where on habeas some prisoner, some person being
20 held under a statutory scheme of this type could come in
21 and say, on Federal habeas, I'm being held under
22 circumstances that violate the Constitution, and make an
23 individual challenge, isn't that so?

24 MS. HART: I think that in habeas an individual
25 who's subject to confinement could come in and the purpose

1 of habeas would be for that person to indicate that for
2 some constitutional reason the very fact or duration of
3 his or her confinement violates the Constitution.

4 QUESTION: Right. Is that what this person is
5 doing, or is there something different?

6 MS. HART: No, Your Honor. In fact, I think
7 that what Mr. Young has here essentially is a civil rights
8 claim that the conditions of confinement at the Special
9 Commitment Center are not what they ought to be.

10 QUESTION: Now, there is an ongoing 1983 class
11 action, is there, covering this very facility?

12 MS. HART: Yes, there is, Your Honor.

13 QUESTION: And under that action, presumably
14 this respondent would be affected by the outcome of that?

15 MS. HART: I believe that's correct. The
16 Special Commitment Center is under the supervision of the
17 Federal District Court in Washington at the moment. That
18 particular case basically deals with issues of whether
19 there's adequate treatment at the Special Commitment
20 Center.

21 QUESTION: Why is that a constitutional claim?
22 I mean, what constitutional claim does he have other than
23 the double jeopardy claim?

24 MS. HART: In this case, Your Honor?

25 QUESTION: Ex post facto.

1 QUESTION: Or ex post facto.

2 QUESTION: Both. Both.

3 MS. HART: He would have each of those claims,
4 and in this case, provided he -- that our statute is
5 punitive --

6 QUESTION: No, no, but I mean, assuming the
7 statute is not punitive, does he have any other
8 constitutional relief for the fact that he is not getting
9 the treatment which the statute provides he's supposed to
10 be given? Is that a constitutional claim, or just a State
11 law claim?

12 MS. HART: He would have, certainly under
13 Washington statute, a State law claim in the sense --

14 QUESTION: Correct.

15 MS. HART: -- that the statute requires adequate
16 treatment and --

17 QUESTION: Right, but what other Federal
18 constitutional claim would he have?

19 MS. HART: The only Federal constitutional claim
20 that I believe might otherwise be involved here would be a
21 claim that goes to conditions of confinement on some sort
22 of --

23 QUESTION: Cruel and unusual punishment? He's
24 not --

25 MS. HART: No, not with respect to any issues

1 that would flow from the criminal law, Your Honor. There
2 are -- certain decisions of this Court will not precisely
3 reach an issue that I read to suggest that individuals who
4 are deprived of their liberty are entitled to certain
5 minimal adequate conditions of confinement as perhaps a
6 matter of substantive due process.

7 QUESTION: And is that the basis for the -- is
8 it the Turay suit? There is a pending 1983 case, so we
9 don't have to speculate, at least, about the basis of that
10 lawsuit. What is the constitutional right that's invoked
11 in that litigation?

12 MS. HART: In the litigation that's ongoing
13 currently --

14 QUESTION: Yes.

15 MS. HART: -- Justice Ginsburg, the right that
16 is being invoked is essentially a right that one might
17 find derivative from your decision in Youngberg, and that
18 is a right to a certain level of mental health treatment.

19 QUESTION: Well, in effect the claim is that if
20 you commit me for treatment, you've got to treat me. I've
21 got a substantive due process right to that effect --

22 MS. HART: That's correct, Your Honor.

23 QUESTION: -- if I am treatable. But that's the
24 kernel of it, isn't it?

25 MS. HART: That's the essence of the claim, Your

1 Honor.

2 QUESTION: Well, Youngberg certainly didn't go
3 that far.

4 MS. HART: It didn't, Your Honor, but I believe
5 that that's where the genesis of the claim in this case,
6 and as I say, there's certain language in Youngberg that
7 would perhaps lead one in that particular direction.

8 QUESTION: But turning to this case, when at the
9 outset a determination is made for an order for a civil
10 commitment, is there no basis for the court to determine
11 and to look at how the disease is defined, how the
12 treatment is defined, what treatment facilities are
13 available in order to determine whether or not it's
14 punitive?

15 MS. HART: Your Honor --

16 QUESTION: Isn't there some initial assessment
17 that must be made?

18 MS. HART: No, Your Honor. This Court has, for
19 purposes of civil commitment has required two predicates.
20 One is a mental condition, and the other is an existing
21 dangerousness.

22 Once that civil commitment is affected, however,
23 Your Honor, there are certain claims that can be made and
24 are being made in the State of Washington that the
25 individual subject to that commitment is entitled to

1 adequate care and an adequate level of treatment, but that
2 doesn't go to -- the conditions of confinement, Your
3 Honor, wouldn't go to the face of the statute, or whether
4 the statute itself is punitive. This Court --

5 QUESTION: Why is that? I mean, suppose you
6 have a compulsive ax murderer, and you know, he's served
7 his time, but he's still a compulsive ax murderer. You
8 could not commit him simply because he's dangerous and
9 then not provide treatment?

10 Or what about quarantine of someone who has a
11 communicable disease? In order to quarantine, do you have
12 to provide treatment?

13 MS. HART: Your Honor, I don't find an answer to
14 those questions precisely in this Court's jurisprudence.
15 It does seem to me that one of the things this Court has
16 said, however, on a due process level, is that a
17 statute -- if the State is going to claim that it's
18 committing an individual for treatment, that's what its
19 statutory purpose is, then the statute ought to relate to
20 that in terms of the nature of the confinement and the
21 duration of the confinement.

22 QUESTION: Does this statute make that
23 representation, that it's confining him for treatment, or
24 does it simply talk about the abnormality, mental
25 abnormality?

1 MS. HART: Your Honor, this statute confines for
2 treatment and in order to protect the community from these
3 individuals, so it's -- statutorily it serves both
4 purposes.

5 QUESTION: Suppose that he makes out his claim.
6 Suppose he proves what he's trying to prove. Suppose he
7 proves that there's virtually no treatment for people who
8 could benefit by it, that it's virtually impossible to be
9 released to half-way houses even though certain medical
10 people would say he was safe enough for that.

11 He proves that it's being run by prison
12 officials for the most part, and not by mental health
13 officials, and that really there isn't much segregation
14 from the general prison population, and they don't seem to
15 have the status of ordinary mentally ill people confined
16 for civil purposes. Assume he proves that, would that
17 then violate the statute?

18 MS. HART: That would be inconsistent with
19 Washington's statute.

20 QUESTION: So it would violate the statute. So
21 you've read his claims, and you're saying that if he
22 proves what he says he's going to prove, then the
23 conditions violate Washington's statute.

24 MS. HART: Washington's statute specifically
25 requires that individuals --

1 QUESTION: Yes, but I'd like a yes or no answer
2 to my question.

3 MS. HART: I believe my answer to the question,
4 as I understand it, Justice Breyer, is yes.

5 QUESTION: Thank you.

6 QUESTION: That wouldn't afford a basis for any
7 Federal relief, I take it, if it's simply a claim that the
8 confinement violates the Washington statute.

9 MS. HART: No, Your Honor, that would not. One
10 of the things about this statute is that Mr. Young and
11 others like him have a remedy under State law, and that
12 remedy, because of the way our statute is read, is to
13 ensure and press litigation, as is being done in
14 Washington, that the appropriate level of care and
15 treatment is being provided, but he -- but it --

16 QUESTION: Well, if you can find for us a civil
17 purpose that clearly cannot be fulfilled, is that one
18 index at least, or one indicator of an intent to punish?

19 MS. HART: Well, Your Honor, this Court has
20 pointed to a number of indicators, all of them determined
21 facially under the Court's jurisprudence in Hudson, such
22 as whether there is a confinement in the first place, what
23 is the purpose, and whether the statute is rationally
24 related and fulfills that --

25 QUESTION: So you read our precedents as saying

1 our inquiry must be simply confined to a facial inquiry,
2 and not to the reality of what the treatment is or is
3 going to be?

4 MS. HART: Whether a statute is criminal or
5 civil -- civil, excuse me -- this Court has held is a
6 facial matter. That's precisely what the Court held in
7 Hudson, and in doing so disavowed an approach that it had
8 taken in Helper that looked at the actual effects, but
9 -- or conditions of confinement would be the equivalent
10 here.

11 But Your Honor, that doesn't mean that people
12 like Mr. Young are without a remedy, or that they are left
13 unable to secure the --

14 QUESTION: May I put the question just a little
15 differently? Assume our first case holds that a statute
16 is civil, a facial attack on the statute as being criminal
17 authorization for double jeopardy and ex post facto
18 violation, and we reject that by saying the statute on its
19 face is a civil statute.

20 Does that mean that every application of that
21 statute that might subsequently be challenged would have
22 to come up with the same answer? In other words, is it
23 conceivable that a statute which is valid in response to a
24 facial attack could nevertheless be invalid as applied in
25 particular cases?

1 MS. HART: I don't believe so, Your Honor, and I
2 believe that's essentially what this Court held in Hudson
3 when it overruled Helper.

4 QUESTION: Wasn't there language -- perhaps it
5 was in Hendrix -- that the first question is, does the
6 legislature mean to enact a civil or criminal provision,
7 and then the second question is, is the scheme so punitive
8 in purpose or effect, and I emphasize or effect, as to
9 transform the civil remedy into criminal penalty? What
10 does that mean, yes, the legislature wants a civil
11 statute, not a criminal statute, but it is so punitive in
12 effect as to be transformed from civil to criminal?

13 MS. HART: Well, Your Honor, I believe two
14 things about that. First, that Hudson stands for the
15 proposition and reaffirms the notion that the effects test
16 for whether a statute is civil or criminal is a facial
17 test, and having given you that answer, I believe that
18 what the effects test, or what that language means, is
19 what are the necessary consequences of the very statutory
20 provisions that whether it's Congress or State legislature
21 has provided. That would be the effects.

22 QUESTION: Yes, but if the statute has been
23 administered for some period of time before the
24 adjudication, I take it that the experience under that
25 administration may be considered in what we are calling a

1 facial inquiry.

2 MS. HART: I'm afraid I disagree with that, Your
3 Honor.

4 QUESTION: Well, do you have to disagree
5 entirely? I suppose you could take into account the
6 administration in determining what the meaning of
7 ambiguous provisions of the statute are. That wouldn't be
8 harmful, I suppose. But you wouldn't say you could take
9 into account the implementation to such a degree that you
10 would allow the implementation to contradict the very
11 terms of the statute, which is what you're talking about
12 here.

13 MS. HART: That's correct, Your Honor, and
14 that's essentially the essence of the claim before the
15 Court.

16 QUESTION: If that's --

17 QUESTION: You win if -- no, please.

18 QUESTION: Well, all right. If that's so, I
19 take it -- and this is just an elaboration of what I asked
20 you before.

21 I don't know if you're familiar enough with
22 Hendrix to refer to it by page number, but at the end, on
23 page 368, the Court sums up the factors in the statute
24 that make it civil, and they include things, to bring it
25 to your mind, the State's disavowed any punitive intent,

1 it's limited its confinement to a small segment, and
2 particularly -- there are procedural safeguards, they're
3 segregated, they have the same status as the other civilly
4 committed, recommended treatment is possible, et cetera.

5 Does that call to mind the paragraph that you're
6 probably familiar with?

7 MS. HART: Yes, it does.

8 QUESTION: Okay. Am I right in saying from your
9 prior answer that you think your statute meets all those?

10 MS. HART: Yes.

11 QUESTION: And that insofar as the facts in a
12 particular case don't meet them, they violate the statute.

13 MS. HART: That's -- that would be true, Your
14 Honor, and I would point out that the language that you're
15 dealing, or you're quoting from, from Hendrix, is language
16 that for each of those propositions one can go back to the
17 Hendrix opinion and find that the source of those things,
18 such as the procedural protections, the segregation from
19 the prison population, within the statute, just as one can
20 in the State of Washington.

21 And as you noted in writing the dissent in
22 Hendrix --

23 QUESTION: Yes.

24 MS. HART: -- the Kansas law, our State law,
25 Washington State law was a model for the Kansas law.

1 They're essentially identical, except for some places
2 where Washington's --

3 QUESTION: Yes, but it's important they be
4 interpreted the same way. They -- the majority
5 interpreted that statute in Kansas to require certain
6 things, like adequate treatment, and I take it -- at least
7 that's how I read it. That's -- the words are there, and
8 the -- so -- it's important to me that you're saying that
9 if those are not being given in fact, then the remedy for
10 the prisoner is to sue under the State law and say, this
11 is what the State law means, and I'm not getting it.

12 MS. HART: I believe that a resident at the
13 center would have that opportunity under State law to --

14 QUESTION: Insofar as this case is concerned, I
15 take it, you leave open the possibility -- you certainly
16 don't concede it, but you leave open the possibility that
17 there could be a Federal substantive due process claim on
18 the theory that we threw out a moment ago, you and I were
19 talking about a moment ago, which I guess has been
20 asserted, and that is, if the State's purpose in
21 commitment is treatment, and I have a treatable condition
22 and they don't treat me, that is a violation of due
23 process. I'm not asking you to concede that that theory
24 should prevail, but that is at least a possible assertion
25 that could be made in a Federal court.

1 MS. HART: I believe that's true, Your Honor,
2 and I would like to note that since the question really
3 before this Court is that narrow question of how the Court
4 determines whether a statute is civil or criminal, that
5 that kind of issue and concern is one that really is
6 reflected in, I think in part, or you can find in part in
7 the factors that this Court looks at facially.

8 QUESTION: Right, and I take it that the -- that
9 for you to win this case the proposition that your case
10 really turns on is not even a broad proposition, or a
11 broad set of rules about how we determine whether it's
12 criminal or civil, but rather, your case depends on the
13 proposition that it doesn't vary from individual to
14 individual. It is either civil, or it is criminal, and
15 that the details of individual treatment do not affect
16 that determination.

17 MS. HART: That's correct, Your Honor.

18 QUESTION: And perhaps it's even narrower than
19 has been suggested judging from your question presented.
20 What we're actually talking about is, does the -- was the
21 Ninth Circuit wrong in saying that this statute as
22 presented to it could violate either the Ex Post Facto
23 Clause or the Double Jeopardy Clause?

24 MS. HART: That's correct. Those are the only
25 two claims involved in this case and before this Court.

1 QUESTION: How does one respond to the, what I
2 understood to be the complaint in this case, which is, I
3 am civilly committed, and yet I'm housed in a prison and
4 I'm treated worse than I was treated when I was serving a
5 sentence of conviction?

6 That's essentially, as I take it, his complaint.
7 There's no change in my circumstances from the time I was
8 incarcerated as punishment. If anything, I'm being
9 treated worse now than I was. How does one answer that
10 claim?

11 MS. HART: I think the way one answers it in the
12 State of Washington first of all has been referenced by
13 other members of the Court, is that Washington's law
14 requires the provision of adequate care and individualized
15 treatment to these individuals.

16 The other thing that I think answers, or helps
17 answer that, Your Honor, is that Washington's law, just
18 like Kansas' law, is a civil commitment statute, and once
19 having enacted a civil commitment statute, there are
20 certain consequences that fall from that for a State, and
21 among them is to provide care more considerate than one
22 would receive or is constitutionally entitled to receive
23 in a penal institution.

24 QUESTION: My understanding is that he did have
25 a proceeding in the State court before he came to Federal

1 court, is that correct?

2 MS. HART: Yes. There is a direct appeal by
3 Mr. Young from his commitment.

4 QUESTION: It was only that, so at that stage he
5 wasn't complaining about the treatment he was in fact
6 getting. He was complaining about the right to continue
7 confinement, is that so?

8 MS. HART: I'm sorry, I missed the last part of
9 your --

10 QUESTION: I asked if in his States court
11 litigation he was challenging, as he is now, that he is
12 being kept in confinement, that he's being treated no
13 better and, in fact, worse than he was treated when he was
14 in prison.

15 MS. HART: Your Honor, that really wasn't an
16 issue on the direct appeal. When the Washington supreme
17 court affirmed Mr. Young's commitment it remanded the case
18 to the court of appeals for two purposes, to determine
19 whether a less restrictive alternative -- or actually for
20 one purpose, to determine whether a less restrictive
21 alternative to total confinement would be appropriate to
22 Mr. Young, and in the context of that proceeding, at the
23 outset of that proceeding, Mr. Young challenged the
24 conditions of confinement at the Special Commitment
25 Center.

1 There was a hearing of some week's duration on
2 that issue, and the court declined to conclude that the
3 conditions of confinement were punitive.

4 QUESTION: So there is a final adjudication
5 after the remand from the Washington supreme court.

6 MS. HART: Your Honor, my understanding, and it
7 is correct, it's not simply my understanding, is that
8 there has been an appeal from that, and that appeal is --
9 that appeal to the court of appeals is pending now.

10 In other words, the supreme court of Washington
11 sent this back to the trial court on a less restrictive
12 issue, less restrictive alternative. In the context of
13 that proceeding, Mr. Young raised the issue of conditions
14 of confinement, was not successful there, and is now
15 appealing that to the Court of Appeals of the State of
16 Washington, and that matter is pending.

17 QUESTION: You described the first instance
18 decision in rather careful words. You say that they
19 declined to find that. Did they reject such a claim? Did
20 they say, even if he would establish that he's being
21 treated no better and perhaps worse, he still has no
22 claim. What was the reason he was --

23 MS. HART: The court -- this -- the order from
24 this proceeding the Court will find at page JA 49, the
25 joint appendix at 49, and the court after trial simply

1 concluded -- let me see -- simply concluded that he had
2 not demonstrated that the conditions were punitive.

3 QUESTION: And the point was that if they were
4 punitive they would have violated the Washington statute.
5 Was that the point of the proceeding?

6 MS. HART: I believe the proceeding itself was a
7 generalized challenge to conditions of confinement at the
8 Special Commitment Center.

9 QUESTION: As violating what?

10 MS. HART: I believe that the focus there was a
11 constitutional type substantive due process claim, Justice
12 Scalia.

13 QUESTION: What was the mental disorder, or the
14 personality disorder, or the mental abnormality that was
15 established here?

16 MS. HART: Mr. Young was found to suffer from a
17 severe paraphilia characterized either by sexual sadism or
18 rape, as well as a severe antisocial personality disorder.

19 QUESTION: What is paraphilia, if that's the
20 word?

21 MS. HART: It's essentially a mental condition
22 that is characterized by recurrent and intense urges and
23 fantasies, sexual fantasies with respect to things that
24 are either nonhuman objects, nonconsenting adults,
25 children -- it's a pathological, pathologically driven

1 mental condition.

2 QUESTION: Does a person have that disorder if
3 he has or she has volitional control?

4 MS. HART: I think that --

5 QUESTION: They've talked about this in the
6 brief, and I'm never quite sure of the full significance
7 of this part of the inquiry.

8 MS. HART: In Washington's statute, mental -- a
9 mental abnormality, which is a predicate to commitment
10 under Washington law, requires a condition that does
11 affect volitional control.

12 My understanding, Your Honor, of this sort of
13 mental disorder, this sort of paraphilia, is that it is a
14 difficulty with volitional control, that you'll have
15 situations where individuals will have these repeated
16 urges and fantasies and then act on them, perhaps be
17 remorseful, but they will repeat, and the ability to
18 control them is something that the individual cannot do
19 consistently.

20 QUESTION: We talk about this. Do the
21 psychiatrists talk about this in a way that has meaning to
22 them? Do they say, this person has or has not volitional
23 control? Is that a standard psychiatric frame of
24 evaluation?

25 MS. HART: Not that I'm specifically aware of,

1 Your Honor, but I believe it's somewhat inherent in the
2 nature of this particular mental condition.

3 QUESTION: Do you interpret the findings here
4 that he lacked volitional control?

5 MS. HART: Under Washington statute, he would
6 have to have -- suffer from a mental abnormality, or was
7 bound to suffer from a mental abnormality, Your Honor,
8 that entails a lack of volitional control, or at least an
9 impairment of his ability to control what he does.

10 QUESTION: I take it what -- he was originally
11 convicted of rape?

12 MS. HART: He was -- he has a lengthy criminal
13 history, Your Honor, of six violent rapes.

14 QUESTION: And I presume under Washington law
15 some sort of mens rea is required for the offense of rape.

16 MS. HART: I believe -- I believe that's -- I'm
17 not sure, Your Honor. I don't believe there's necessarily
18 a mental element. There may be a mental element.

19 QUESTION: Well I mean, would Washington law at
20 least recognize a defense that he was unable to control
21 his actions? Or would it be the McNaughton test?

22 MS. HART: I think in Washington it would be the
23 ability to discern right from wrong.

24 Just before -- I'd like to save a couple of
25 minutes for rebuttal, but the other thing I would like to

1 do before I do this is essentially to sort of bring this
2 case back to the question before the Court and to make the
3 Court understand that a number -- and I'm sure you do
4 appreciate that, that a number of the questions that
5 you're posing here are ones that have already been
6 resolved against Mr. Young both in the Washington supreme
7 court and in the Ninth Circuit and that the very narrow
8 and limited issue, but important one, before this Court is
9 rather, how the Court determines whether a statute is
10 civil or criminal.

11 If I could, I'd like to reserve --

12 QUESTION: Very well, Ms. Hart.

13 Mr. Boruchowitz. Am I pronouncing your name
14 correctly?

15 MR. BORUCHOWITZ: Yes, sir.

16 ORAL ARGUMENT OF ROBERT C. BORUCHOWITZ

17 ON BEHALF OF THE RESPONDENT

18 MR. BORUCHOWITZ: Mr. Chief Justice, and may it
19 please the Court:

20 I'd like to begin by answering quickly some of
21 the questions that the Court just asked. Justice
22 Kennedy's question with regard to the evidence about
23 Mr. Young's mental abnormality, the testimony was that
24 from the single State psychologist was that he has a
25 paraphilia not otherwise specified. He also has a

1 personality disorder not otherwise specified, neither of
2 which, standing alone, would support the prediction that
3 the psychologist was required to make, but by combining
4 the two, by 51 percent he would say that Mr. Young would
5 be dangerous.

6 There's no evidence of volitional control or the
7 lack of volitional control. There's no jury instruction.
8 There's no requirement about that whatsoever and, as the
9 DSM makes clear, simply having a disorder in the DSM does
10 not make any indication about lack of volitional control.

11 With regard to the question about the evidence
12 below --

13 QUESTION: And is it conceded by all sides that
14 that showing is, under Washington law, sufficient to
15 commit him civilly?

16 MR. BORUCHOWITZ: Under the Washington statute,
17 yes. The test -- well, yes. We have argued that in the
18 State court and lost, that that volitional control element
19 is required, and as the amicus brief suggests, that
20 remains potentially unclarified by the Hendrix opinion,
21 but in Washington that testimony was sufficient.

22 I think it's important to point out with regard
23 to the testimony, to the decision in the superior court
24 below in Mr. Young's case at the joint appendix, page 61,
25 the trial court applied to Mr. Young a burden of proof

1 beyond a reasonable doubt in order to show that the effect
2 of the statute was unconstitutional.

3 The judge did find that we proved by a
4 preponderance of the evidence that certain conditions were
5 less than treatment and greater than prison and so forth
6 but, since she applied to us beyond reasonable doubt, we
7 lost.

8 In the Campbell case, which is pending cert in
9 this Court, a judge found that in fact the conditions were
10 unconstitutional, so that needs to be clarified, I
11 suggest.

12 QUESTION: And then what happened --

13 QUESTION: The Campbell case was in State court?

14 MR. BORUCHOWITZ: Yes. Yes, Your Honor.

15 Campbell lost in the supreme court and is now pending cert
16 here.

17 QUESTION: And what was the reason for
18 overturning the trial judge's disposition in Campbell?

19 MR. BORUCHOWITZ: Basically the State supreme
20 court took the position that the Attorney General is here,
21 that a statute should be looked at only on its face, and
22 that the effect of the statute, the conditions of the
23 statute, the punitive conditions of the statute as
24 implemented didn't make any difference.

25 QUESTION: Obviously, the word isn't applied.

1 That's the wrong concept, I would have thought, that the
2 conditions in an individual case show what the statute may
3 or may not permit.

4 MR. BORUCHOWITZ: That's correct, Your Honor.

5 QUESTION: And if they permit no treatment,
6 then, of course, everybody I think concedes -- I don't
7 know if everybody does, but I'd say then it's
8 unconstitutional.

9 But the difficulty here right now, I think, is
10 the majority's opinion in Hendrix is the law. The
11 majority listed certain features of this case --
12 Hendrix -- which made it civil and not criminal.

13 MR. BORUCHOWITZ: That's correct.

14 QUESTION: Now, you've heard the Attorney
15 General say, and I guess what's important is that your
16 client have some remedy, that he does have a remedy.
17 That's what's important, and the remedy is that those
18 conditions that made the Hendrix statute civil do not
19 pertain to your client, then the law of Washington is
20 violated, and therefore your client has an excellent
21 remedy.

22 Either the Hendrix majority conditions apply, or
23 they do not. If they do apply, you can't complain -- on
24 my -- I was in dissent.

25 But if they don't apply -- if they don't apply,

1 well then, you have a perfect remedy, so what's the
2 problem with that, from the point of view of the law?

3 MR. BORUCHOWITZ: Well, Your Honor, I think
4 there are many problems with it. This Court, of course,
5 has not interpreted the Washington statute. You only
6 interpreted the Kansas statute, and all three opinions in
7 Hendrix focused on the conditions of confinement. The
8 majority said, no one here is claiming that there's
9 punitive conditions. No one here is claiming that Mr.
10 Hendrix is not treated as a civilly committed person, and
11 so we look at that and we decide it's not punitive.

12 Justice Kennedy suggested that if, in fact, it
13 turns out that treatment is a sham, then the decision
14 would go the other way, and the dissent focused heavily on
15 conditions and showed that treatment was not, in fact,
16 there, so my suggestion is that this Court over and over
17 and over again in a series of cases has looked at how a
18 statute is implemented. In the Allen v. Illinois case
19 this Court said this would be a different case if somebody
20 had claimed that there was punitive conditions.

21 Most recently in Gardner v. Jones this Court, in
22 evaluating an ex post facto claim, said, we're going to
23 remand this case because there wasn't enough discovery
24 done below about what's actually going on, and what the
25 Court said is that the respondent must show that, as

1 applied to his own case, his own sentence, the law created
2 a risk of ex post facto, and also said in Gardner, when
3 the rule does not by its own terms show a significant
4 risk, the respondent must demonstrate by evidence drawn
5 from the rules practical implementation in his case.

6 As long ago as Yerkwo v. Hopkins, that's the
7 position that the Court took, that a statute that was on
8 its face neutral, but that was as-applied with, as the
9 Court put it, an unequal eye, or an evil eye, an unequal
10 hand, that --

11 QUESTION: Was Yerkwo either an ex post facto or
12 a double jeopardy case?

13 MR. BORUCHOWITZ: No, it was not, Your Honor,
14 but what I'm suggesting is that the reasoning that the
15 Court has applied in many different areas of the law is to
16 look at the implementation of the statute and that the
17 actions of an administrative agency, whether it's the
18 parole board in Gardner, or the city laundry regulators in
19 Yerkwo, represent the State itself, and that the State --

20 QUESTION: I may in substance agree with you,
21 but is that why we have this case? I mean, I don't -- I
22 didn't think we had this case to determine whether the
23 statute was criminal or civil. I thought we had this case
24 to determine whether, given a classification as civil, it
25 may then later be treated as having a criminal character

1 with respect to its application to particular individuals,
2 and isn't that latter issue the one that's before us?

3 MR. BORUCHOWITZ: I think precisely, Your Honor,
4 the issue before you is whether the Ninth Circuit was
5 correct in ordering an evidentiary hearing on the question
6 of whether the initial confinement render the statute
7 unconstitutional.

8 QUESTION: But the assumption, as I understand
9 it, and I may be wrong on this, but I thought the
10 assumption of the Ninth Circuit's position was that we
11 start with the proposition that it is a civil statute.

12 MR. BORUCHOWITZ: That's correct.

13 QUESTION: But that it's application may be
14 rendered criminal in particular cases.

15 MR. BORUCHOWITZ: That's correct.

16 QUESTION: All right. And so the issue before
17 us is whether the Ninth Circuit, whether that option is,
18 in fact, available, and one of the things that we want to
19 know, and this goes back to Justice Breyer's question is,
20 let's assume it's not available.

21 Let's assume that criminality of the statute's
22 character is not a shifting and springing quality.
23 Does -- on the assumption that it's a civil statute, does
24 your client have a remedy under State law, and I would add
25 to it, does he have a remedy, even on the assumption of

1 civil character, under Federal law?

2 MR. BORUCHOWITZ: He would have a remedy, Your
3 Honor, to sue under 1983 in State or Federal court.

4 QUESTION: And his claim would be --

5 MR. BORUCHOWITZ: His claim would be a due
6 process claim that he --

7 QUESTION: Substantive due process?

8 MR. BORUCHOWITZ: Yes.

9 QUESTION: Okay. The claim that I was talking
10 about with counsel for the State.

11 MR. BORUCHOWITZ: That's correct.

12 QUESTION: Okay. So he's got that, and he has a
13 State law claim that he's entitled to treatment which he's
14 not getting.

15 MR. BORUCHOWITZ: I think it's important to look
16 at the reality, both of the effect of the statute and of
17 the litigation that's been going on. It's been 6 years
18 since a Federal court has enjoined the State in this
19 matter. The Federal court held the State in contempt,
20 noting its foot-dragging and deliberate avoidance of his
21 injunction on the treatment need at the facility. The
22 former Director called the facility dysfunctional, so --

23 QUESTION: Well, it may be all of those things,
24 but wasn't the -- I'm not sure they're before us.

25 MR. BORUCHOWITZ: Well, the reason I mention it,

1 Your Honor, is you ask, does he have a viable alternative,
2 and I think there may be a civil remedy, but the civil
3 remedy does not get at the fundamental question in this
4 case, which is that my client has been punished for 10
5 years under a so-called civil commitment statute.

6 QUESTION: But if you're right, then I take it
7 every member of that class that's now involved in a 1983
8 case would have an equally valid habeas claim.

9 MR. BORUCHOWITZ: Well, Your Honor, some of them
10 certainly would, depending on what the district court
11 eventually finds at the hearing. I would point out, by
12 the way, that I don't believe it's an actual certified
13 class, but there are multiple named plaintiffs, but --

14 QUESTION: Well, all of the named plaintiffs.

15 MR. BORUCHOWITZ: But certainly everyone would
16 be able to bring their own challenge as applied to them,
17 in fact, the statute was unconstitutional.

18 Mr. Young should be able to have his day in the
19 trial court, in the Federal district court, as the Ninth
20 Circuit has ordered, to be able to show that the purpose
21 and effect of this statute are, in fact, unconstitutional.

22 QUESTION: That's why I'm confused on the
23 procedure. I would think the answer to Justice Souter's
24 question, I mean, at least as I would see it, would be you
25 have a civil statute, but this person is suffering

1 criminal treatment.

2 MR. BORUCHOWITZ: That's correct.

3 QUESTION: All right. I'd say if that's so, of
4 course he must have a remedy.

5 MR. BORUCHOWITZ: Right.

6 QUESTION: They're saying he does have. He has
7 two remedies. You don't need to create a new category.

8 The first remedy would be, under State law -- it
9 violates the statute, and then if you lose on that one,
10 there would be another, which would say that the Federal
11 Constitution doesn't permit a person who is civilly
12 committed to be there without any treatment, where he can
13 sustain the treatment, et cetera, et cetera, and that
14 would be the Federal constitutional claim.

15 You might win, you might lose, but it seems to
16 me you have those already in the lower courts, and we
17 don't need a remand on this case to give you those.
18 That's where I'm confused. I mean, they're already
19 pending, those two claims. One's in the Washington
20 system, the other's in the Federal system, and so what's
21 this thing now going to help on?

22 MR. BORUCHOWITZ: Well, Your Honor, the posture
23 of this case is somewhat unusual in that the Court has
24 taken cert of this case before the evidentiary hearing in
25 district court, and the Ninth Circuit said, send this back

1 because Mr. Young didn't have his evidentiary hearing
2 which he should have had.

3 I think it's important to point out, in response
4 to what Justice Ginsburg asked earlier, Mr. Young has
5 claimed that this statute was being punitively applied,
6 and that in fact it was punitive in purpose from the very
7 beginning. He brought a personal restraint petition
8 before he even has his trial in State court, so he has
9 made this claim from the very beginning, both that the
10 effect of this statute illuminates the punitive purpose,
11 and that the effect itself is punitive.

12 After Hendrix, and after the Ninth Circuit
13 remanded the case the first time, then the focus of the
14 court was on the punitive effect.

15 QUESTION: But may I just ask this question. If
16 he's correct that as applied to him it's punitive, then
17 does that not mean that he's been subjected to double
18 jeopardy and is entitled to his release?

19 MR. BORUCHOWITZ: Absolutely.

20 QUESTION: That's your position?

21 MR. BORUCHOWITZ: Yes, Justice Stevens, because
22 in fact the whole purpose of a writ of habeas corpus is to
23 challenge unconstitutional incarceration, and the relief
24 is release, and that's what Mr. Young has been asking for
25 from the day he filed his habeas --

1 QUESTION: And you add that you can make this
2 showing at the very outset of the order committing him to
3 the civil treatment?

4 MR. BORUCHOWITZ: Yes, Your Honor. I think it's
5 even more the case now, after 10 years, but yes, at the
6 very outset this was a facility that was set up with not
7 even a licensed psychologist on staff. This was not what
8 the Court described in Hendrix, of a psychiatric facility
9 with 31 hours a week of treatment. This was a facility
10 that did not even have a licensed psychologist, that had
11 no certified sex offender treatment providers until long,
12 long, long after the injunction was in place.

13 QUESTION: But Mr. Boruchowitz, doesn't --
14 again, doesn't your argument go to a different issue from
15 the one that's before us? You're arguing, I think, that
16 your client should have, or should have had an opportunity
17 to show that this is not like the Hendrix statute, and
18 that this one is, in fact, a punitive statute, and
19 therefore all the punitive protections apply? But that's
20 not the issue that we've got before us, is it?

21 MR. BORUCHOWITZ: Well, Your Honor, I think it
22 is the issue.

23 QUESTION: I thought the issue -- and we can
24 make it either-or. I thought the issue we had before us
25 was a determination by the State court that the statute

1 here was like the Hendrix statute and therefore we had a
2 civil statute, and the question was, may the application
3 of that statute nonetheless be treated as criminal in
4 particular cases, even though the statute is classified as
5 a general matter as civil? I thought we had the latter
6 issue, not the issue whether he should be able to prove,
7 or could prove that it was in constitutional terms unlike
8 Hendrix in a criminal statute.

9 MR. BORUCHOWITZ: Well, Your Honor, I'm not sure
10 I understand the question, but let me try this --

11 QUESTION: The question -- let me do it again.
12 The question is, is the issue before us whether this is a
13 criminal statute, or is the issue before us whether a
14 civil statute may nonetheless give rise to claims of
15 violating criminal constitutional protections if the civil
16 statute is not followed by its own terms? Which question?

17 MR. BORUCHOWITZ: I think between the two I
18 think it's the second question.

19 QUESTION: Okay. That's what I thought.

20 MR. BORUCHOWITZ: Yes, but I believe that on
21 remand the court of appeals opinion suggests that the
22 district court should examine the effect of the statute
23 and along the way mentions some evidentiary aspects that
24 to the Ninth Circuit looked as if the statute, in fact,
25 were -- had a punitive purpose, a deterrent purpose.

1 QUESTION: How would that evidentiary hearing
2 differ from the one that's already been had in the Federal
3 court in the Turay case?

4 MR. BORUCHOWITZ: Well, Your Honor, I think one
5 of the first questions for the district judge to decide
6 would be what nature proceeding he would undertake, and
7 whether he would simply use a record that had been
8 established in the other proceeding, whether collateral
9 estoppel would apply on certain issues and, if not,
10 whether he would take evidence on recent developments.

11 That's something we haven't reached yet, but I
12 would think that would be the first question for the judge
13 to decide. What nature of evidence do I take? Do I
14 simply look at the record Judge Dwyer has prepared over 10
15 years, or do I look at some additional evidence?

16 QUESTION: I thought your position was that you
17 can challenge this statute at the very outset of the order
18 committing him based on the fact that, as demonstrated by
19 the way in which the treatment facility is operated, it
20 is -- it is not for a civil purpose, and that the
21 classification of the disease is too imprecise --

22 MR. BORUCHOWITZ: That's correct.

23 QUESTION: -- to admit of psychiatric treatment.

24 MR. BORUCHOWITZ: Yes. It --

25 QUESTION: And you simply want to use evidence

1 of existing conditions to challenge the operation of the
2 statute at the time that he's subjected to it.

3 MR. BORUCHOWITZ: That's right, Your Honor.

4 QUESTION: And that seems somewhat different
5 than the answer you gave to Justice Souter.

6 MR. BORUCHOWITZ: Well, both -- I have to answer
7 yes to both questions, because that's been our position
8 from the very beginning, that the statute in its purpose
9 was punitive, as evidenced by not only the legislative
10 history, which this Court in *Kennedy v. Mendoza-Martinez*
11 described as the objective manifestation of the law, the
12 legislative history, and also by the purpose and effect.
13 By the effect, the implementation, which this Court also
14 looks at over and over again.

15 QUESTION: But that sounds a lot like my
16 dissent, which the lower courts, as much as I'd like them
17 to follow my dissents rather than the majority, I'm
18 afraid, quite correctly, they follow the majority
19 opinions, not the dissents and that's correct.

20 MR. BORUCHOWITZ: Justice Breyer --

21 QUESTION: So how do we reconcile that with -- I
22 mean, it's the majority --

23 MR. BORUCHOWITZ: Well, there are several ways
24 to do that, Your Honor. First of all, as Justice Kennedy
25 pointed out, *Hendrix* was decided affecting *Hendrix* alone

1 and, as you suggested in dissent, if the concern that
2 Justice Kennedy had in his concurrence about the, either
3 potential of the sham treatment or the imprecision of
4 mental abnormality, were to come true, that in fact due
5 process implications would be raised as well, as you put
6 it in your dissent.

7 So I think all three opinions in Hendrix looked
8 at the condition of confinement and, of course, did not
9 look at the Washington statute. You have not looked at
10 the Washington statute, and that's not your function
11 today, because what you're being asked to do is whether
12 the court of appeals remand was correct or not.

13 Now, along the way, you have to examine the
14 question of how do we go about making that decision, and
15 initially you look at the face of the statute, but that's
16 not enough. The civil label is not enough, you've said
17 over and over again, and what you do then is, you look
18 beyond that to the purpose and effect. Has it been
19 implemented in such a way that the effect is punitive? If
20 it's punitive, then double jeopardy and ex post facto --

21 QUESTION: Well, it doesn't necessarily mean
22 effect that way. I mean, that's the crucial language,
23 purpose and effect. Does it mean, the effect as evident
24 from the face of the statute, which is what your opponent
25 says, or does it mean the effect as it is played out, even

1 if that contradicts the face of the statute? That's the
2 crucial issue.

3 MR. BORUCHOWITZ: I agree.

4 QUESTION: What that language, effect, means.

5 MR. BORUCHOWITZ: Yes, Justice Scalia, I think
6 that's right, and my suggestion is that Hudson doesn't
7 even mention Hendrix. Hendrix talks in all three opinions
8 about the condition of confinement, and cites other cases
9 that talk about implementation. Hudson was a question
10 involving fines and debarment imposed by the Controller of
11 the Currency. Hudson was decided 6 months after Hendrix,
12 doesn't even mention it, let alone purport to overrule it.

13 This Court has over 100 years of history, in
14 many, many different areas of the law, of looking at how a
15 statute is implemented to determine its constitutionality.

16 QUESTION: But Hudson was an opinion dealing
17 precisely with the constitutional claim that you're
18 raising.

19 MR. BORUCHOWITZ: That's correct.

20 QUESTION: With the Double Jeopardy Clause.

21 MR. BORUCHOWITZ: That's correct, Your Honor. I
22 think there are key differences from Hudson, and they boil
23 down to liberty versus money, because in Hudson you're
24 talking about fines and debarment, and --

25 QUESTION: Well, does the Double Jeopardy Clause

1 make any such distinction?

2 MR. BORUCHOWITZ: I don't think it does, no,
3 Your Honor, but I think the Court's opinions have
4 indicated a greater concern about implementation of the
5 law and the facts as applied when liberty is involved, and
6 I think --

7 QUESTION: Sorry. Go ahead.

8 MR. BORUCHOWITZ: I was just going to say that
9 in the Ex Post Facto context, certainly that's what the
10 Gardner decision did, because the Court said the facts are
11 not before us as to how this statute is implemented, and
12 the policies and practices of the parole board certainly
13 should be considered, and so we're going to remand for
14 that.

15 QUESTION: In Gardner the claim was made that
16 the rule in general had an ex post facto effect on gain
17 time, and I think our Court said you -- it's not enough to
18 show it might have affected some people. You've got to
19 show it affected you.

20 MR. BORUCHOWITZ: That's correct.

21 QUESTION: Which is quite different, I think,
22 from what you're saying.

23 MR. BORUCHOWITZ: I understand the Court's
24 point, but I -- my suggestion is this, that just as it was
25 important -- I mean, the ultimate question in Gardner v.

1 Jones is, is there an ex post facto violation for
2 Mr. Jones, and the question here, ultimately, not
3 necessarily at this moment in this Court, but ultimately,
4 is there a double jeopardy and ex post facto violation in
5 Mr. Young's case, and so how do we do that? In Gardner,
6 we look at the implementation as applied to him. He has
7 to put on evidence of as-applied to him.

8 And in Young, all we're asking for is what the
9 Ninth Circuit ordered, which is our opportunity to do
10 that.

11 QUESTION: Is it going to the same judge who's
12 handling the other Federal case?

13 MR. BORUCHOWITZ: No, Your Honor. I suppose
14 they could merge it.

15 QUESTION: It just seems to me this is going to
16 be exactly the same issue. If we just let it alone, it
17 would have gone back to the judge.

18 The judge would have either said, you're right,
19 the conditions are terrible, you're not getting any
20 treatment, in which case you would have had three separate
21 grounds for getting the relief, but you would have gotten
22 it, or you're wrong, in which case you'd be out, and I
23 don't really -- now, see, what we're deciding, we're
24 deciding whether this judge should do it or that judge
25 should do it, and the standards seem to me to be roughly

1 the same. I just don't -- and then the consequence is the
2 same.

3 MR. BORUCHOWITZ: Well, it seems to me, Your
4 Honor, the Court could --

5 QUESTION: It's not your fault --

6 MR. BORUCHOWITZ: No.

7 QUESTION: -- that you're before this Court.

8 (Laughter.)

9 MR. BORUCHOWITZ: Thank you, Mr. Chief Justice.

10 QUESTION: Quite right.

11 MR. BORUCHOWITZ: It seems to me that now that
12 we're here the Court could do many different things. The
13 Court could simply say, we meant in Hendrix that the
14 conditions were important. We were all concerned about
15 that, and the Ninth Circuit is right to consider the
16 purpose and effect as shown by the conditions. You could
17 just do that.

18 You could also say, by the way, mental
19 abnormality, we really did mean what we said about lack of
20 control, and that there should be some showing about, the
21 person has no volitional control, and that would clear up
22 a lot of things in the lower courts. As we pointed out in
23 our supplemental two-page brief, the State of Kansas just
24 decided that yes, in fact, Hendrix just require the lack
25 of volitional control.

1 The Court could also, I suppose, go beyond the
2 question presented, which it has the authority to do, and
3 say, this statute certainly looks like it's very different
4 than what we thought Hendrix was, and at least in
5 Washington as it's being applied there's a problem, but I
6 don't think the Court needs to do that.

7 The Court simply can say, we're going to remand
8 this case and let the court of appeals order stand,
9 because what the court of appeals has simply done is to
10 apply Hendrix. There's nothing different from Hendrix in
11 what the Ninth Circuit did. We're simply going to send it
12 down for the district court to evaluate it, and if the
13 district court, Judge Cunero decided that let Judge Dwyer
14 handle it because he's done the 1983 litigation, that
15 could easily -- that's something the district court could
16 do if it decided to do that.

17 But obviously the 1983 litigation has not been a
18 habeas situation involving the question of release because
19 of unconstitutional punishment, and what this case is
20 ultimately about is that a man has been punished for 10
21 years in a prison, longer than he served under his
22 criminal sentence, without having committed another crime
23 and without having a traditional mental disorder.

24 And so there are many issues presented, and I
25 think one of the things that's difficult about examining

1 this case is that it's something fundamentally radically
2 different from a true civil commitment. There's nothing
3 wrong with a true civil commitment, but this is not civil
4 commitment. This is punishment.

5 And I think that if you look at the various
6 cases that we've cited here, one other thing about Hudson
7 that I think is important is that the Court said that the
8 penalties in Hudson did not approach the infamous
9 punishment of imprisonment. They involved administrative
10 disability, and they were imposed in administrative
11 proceedings.

12 In Ward, the Court found that the penalty for
13 oil discharge and water pollution was more analogous to
14 traditional civil damages.

15 In Shaw v. Martin, before the Court found that
16 pretrial detention did not violate due process, the Court
17 examined the actual conditions of confinement and cited
18 testimony in the opinion about actual practices.

19 QUESTION: Of course, if the -- what
20 constitutional question was involved in Shaw?

21 MR. BORUCHOWITZ: Due process, Your Honor.

22 QUESTION: Yes, and I think that doesn't help
23 you very much when you're trying to transpose that holding
24 over into double jeopardy or ex post facto, which are much
25 more precise.

1 MR. BORUCHOWITZ: I appreciate that, Your Honor.
2 The Court has often considered punishment in a parallel
3 way, whether it's due process, double jeopardy, or ex post
4 facto, but I certainly acknowledge that Shaw was a due
5 process case.

6 This is a situation where, as Judge Dwyer
7 indicated in the Turay 1983 litigation, for all intents
8 and purposes this is a prison. It looks like, feels like,
9 and is a prison run by the Department -- or the external
10 facility run by the Department of Corrections, which is at
11 page 6 of our brief, joint appendix 147.

12 This is a situation where the State of
13 Washington, over the time that the injunction has been in
14 place, has made it harder to get less restrictive
15 alternatives. One of the things that this Court was
16 concerned about in Hendrix, and specifically mentioned,
17 was the less restrictive alternative idea, and what
18 Washington has done in the last 5 years is to eliminate
19 less restrictive alternative from the initial court
20 determination and to make it harder for someone to get it.

21 I would suggest that this Court over and over,
22 in a number of cases involving both double jeopardy and
23 due process and ex post facto has been to look at the
24 statute as applied.

25 In Foosha, Justice Thomas dissented saying that

1 this would be a different case if the procedures as
2 applied would show, as he put it, window dressing in that
3 case. In fact, what we have here is the actual
4 implementation of the treatment has turned out to be a
5 sham.

6 The Court has said over and over that if you can
7 show by the clearest proof that a statute is punitive in
8 effect, then you can win. The clearest proof by its terms
9 suggests that evidence will be taken, because otherwise
10 where is the proof? In answer to Justice Scalia's
11 question, does it just mean what naturally flows from the
12 language, or does it mean the actual implementation? I
13 would suggest that clearest proof means proof of evidence,
14 not simply proof of --

15 QUESTION: May I ask on that point, are you
16 contending -- is it your view that you have to prove that
17 everyone subject to this statute is being punished, or
18 just that your client is being punished?

19 MR. BORUCHOWITZ: Just that my client is being
20 punished, Justice Stevens.

21 QUESTION: Well, what if there are 100 people in
22 prison, 99 of them are civil, and your client is punished?
23 That would -- he would get relief, then?

24 MR. BORUCHOWITZ: I think so, Your Honor,
25 because ultimately the logical extension of the State's

1 position is that you could torture someone and beat them
2 and deprive them of food, and as long as the State calls
3 it civil --

4 QUESTION: Yes, but there are remedies for those
5 things. I mean, those are independent constitutional
6 violations.

7 MR. BORUCHOWITZ: That's correct.

8 QUESTION: Yes.

9 MR. BORUCHOWITZ: But ultimately, if the way the
10 statute is being applied to an individual is punitive --

11 QUESTION: Yes, but it would seem to me your
12 case would be very strong if you could say everybody who's
13 subject to this statute is being punished, but you don't
14 go that far.

15 MR. BORUCHOWITZ: Well, Your Honor, we don't
16 have a record that would allow me to say that
17 categorically, that everyone -- I think certainly in
18 response to Justice, I believe --

19 QUESTION: Part of your allegation could seem to
20 establish that, if this particular facility is -- has no
21 psychiatrist and is in a correction facility, everybody
22 incarcerated there must be punished, I would think.

23 MR. BORUCHOWITZ: Our answer is yes to that,
24 Your Honor, but I don't think the Court has to answer that
25 question to rule in Mr. Young's behalf, but I think you're

1 right that, as we've been arguing from the very beginning,
2 the statute had a punitive purpose, it was designed to
3 close the gaps, we couldn't accept the double jeopardy and
4 ex post facto --

5 QUESTION: Would it be open on remand, under
6 your understanding of the mandate, for you to try to prove
7 what I've just suggested?

8 MR. BORUCHOWITZ: Well, Your Honor, I think the
9 Court could say that the application to all other
10 prisoners would certainly enlighten the question of what's
11 applying to Mr. Young, but the Court doesn't need to reach
12 that question.

13 But I think the answer to the question would be
14 yes, because it has had a punitive purpose and effect from
15 the beginning, but I don't think there's anything that's
16 in conflict with Hendrix for us to go forward. What
17 Hendrix said was, nobody here's saying it's punitive, it
18 applies to Hendrix alone, it would be different if, and
19 that's what the Court has said in many different
20 circumstances, including Allen v. Illinois. The case
21 would be a different case if someone had shown that there
22 was a punitive effect.

23 So over and over again I think the Court has
24 looked at the actual implementation of the statute, but
25 you're right, I think from the very beginning he's been

1 committed without authority of law.

2 Let me just take a minute to mention Ex Parte
3 Virginia, because I think it's important when the State
4 argues that an administrative agency does not bind the
5 State in some way. This Court said that whoever by virtue
6 of a public position under State government deprives
7 another of constitutional rights violates the
8 Constitution, and he acts in the name and for the State
9 and his act is that of the State. There can be no defense
10 here that it's simply the administrative agency running
11 amok. This is certainly an act of the State that binds
12 the State.

13 The State -- thank you, Your Honor.

14 QUESTION: Thank you, Mr. Boruchowitz.

15 Ms. Hart, you have 3 minutes remaining.

16 REBUTTAL ARGUMENT OF MAUREEN A. HART

17 ON BEHALF OF THE PETITIONER

18 MS. HART: Thank you.

19 I would like to point out to the Court again
20 that this case is before the Court on a very narrow issue,
21 and it is a threshold issue, and that is, how the Court
22 determines whether a statute is civil or criminal. Hudson
23 establishes that that is done facially.

24 Washington -- the issue about whether
25 Washington's statute is civil or criminal is not before

1 this Court. Both the Washington supreme court and the
2 Ninth Circuit Court of Appeals have held that Washington
3 statute is civil on its face, meaning the legislature's
4 intent was to have a civil statute and that in purpose and
5 in effect the Washington statute is civil.

6 The predicates for commitment are not at issue
7 before this Court. There is no question that Mr. Young
8 suffers from a mental abnormality and a personality
9 disorder that makes him likely to engage in sexually
10 violent acts if he is not detained. That is not before
11 this Court. The Washington supreme court and the Ninth
12 Circuit have both ruled against Mr. Young on those issues,
13 and there was no cross-petition here.

14 The only issue before this Court, and what
15 Mr. Young is contending, is that because he alleges that
16 he is not receiving treatment consistent with a civil
17 statute, that he ought to be released, and the only way
18 Mr. Young can contend that is by saying, if I do not
19 receive the treatment that I'm entitled to under a civil
20 statute, somehow that converts this statute to a criminal
21 statute, that one day your statute can be civil, the next
22 day it can be criminal.

23 In Mr. Young's view, if Washington had two
24 commitment centers instead of one, the law would be civil
25 at the center where the commitment -- where the treatment

1 was adequate and --

2 QUESTION: Could you answer the question I --
3 supposing he proves that everybody who's been committed
4 pursuant to this statute has been punished?

5 MS. HART: Then everyone committed pursuant to
6 the statute would be entitled to go into either State
7 court or Federal court and get those remedies, get those
8 conditions remedied, but they do not go to the validity of
9 whether -- they do not go back to the character of
10 Washington's statute.

11 Washington's statute is a civil law, and that is
12 meaningful. It means that people confined pursuant to
13 that law are entitled to the treatment that civil
14 committees are given under the statute and under the
15 Constitution, and the proportionate, measured, wholly
16 adequate remedy is to go to court and require the State of
17 Washington to provide the treatment and the care that it
18 has promised.

19 QUESTION: But on your view the reason he could
20 not, on Justice Stevens' hypothetical, argue that the
21 court had made a mistake in finding the statute across the
22 board to be a civil statute is that the character of the
23 statute on your view must be determined on the text of the
24 statute, on the basis of the statutory text alone, is that
25 it? You could find that the text --

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MS. HART: Under the Hudson test.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Hart.
the case is submitted.

(Whereupon, at 12:05 p.m., the case in the
above-entitled matter was submitted.)