In the

Supreme Court of the United States

CHARLES D. BRADEN,

Petitioner,

vs.

30th JUDICIAL CIRCUIT COURT OF KENTUCKY.

No. 71-6516

Washington, D. C.
December 5, 1972

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v.	:	No. 71-6516
30th JUDICIAL CIRCUIT COURT OF KENTUCKY	:	

Washington, D.C.

Tuesday, December 5, 1972

The above-entitled matter came on for argument at 1:50 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID R. HOOD, ESQ., Wayne State University Law School, Detroit, Michigan 48202 for the Petitioner

JOHN M. FAMULARO, ESQ., Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 for the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-6516, Braden against Kentucky.

Mr. Hood, you may proceed whenever you are ready now.

ORAL ARGUMENT OF DAVID R. HOOD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOOD: Thank you, Mr. Chief Justice and may it please the court:

This case presents the question of whether or not a petition for a writ of habeas corpus may be brought in a judicial district other than that in which the petitioner is presently confined.

The facts of the case are as follows. Petitioner Braden is incarcerated in the State of Alabama pursuant to an Alabama State prison sentence which he does not here contest. What he complains about is the right of the State of Kentucky to continue to exercise control over him by virtue of a detainer which it has lodged with the State of Alabama pursuant to a 1967 Kentucky indictment. Petitioner, in an Alabama prison, is complaining here of a Kentucky detainer filed in Alabama.

The Petitioner went into the United States District Court for the District of Kentucky and the district court finding, one, that it had jurisdiction and, two, finding that

the Petitioner's rights for a speedy trial had been violated under the teaching of Smith against Hooey, granted relief.

The State of Kentucky then appealed to the Sixth Circuit Court of Appeals, alleging, as it has alleged in the district courts, that the District Court of Kentucky was without jurisdiction to entertain the petition for writ of habeas corpus. The Sixth Circuit appointed counsel and when it heard the case it decided, based upon a decision of its own some few weeks earlier, White against Tennessee and based upon its understanding of Ahrens against Clark decided by this court in 1948 that, indeed, in its view, the Kentucky court was without jurisdiction.

Petitioner here contends that the Sixth Circuit was in error both in regard to the decision in this case and in regard to its previous decision in White against Tennessee and at the same time contends that Ahrens against Clark should not be extended to petitioners -- that is, if it is to have remaining vitality and efficacy at all -- it should not be extended to petitioners who are seeking relief other than immediate release from their present confinement.

When Ahrens against Clark was decided in 1948, the reach of federal habeas corpus, the panoply of remedies that were available, the kinds and quality of circumstances that could be redressed were not as full as they have come to be enunciated and articulated and developed by this court since

1948.

Two classic examples are, of course, presented by Peyton against Rowe, a case in which this court held that a habeas petitioner could complain about a future restraint, a restraint imposed by a prison sentence he had not yet begun to serve and, secondly, a second example is the example most pertinent to the facts of this case, the teaching of Smith against Hooey, that a habeas petitioner may complain against a foreign state which seeks to lodge a detainer against him on account of its desire to bring him to trial.

Now, those kinds of circumstances necessarily contemplate that the respondent against whom the petitioner has his essential grievance will be in a different territorial district than that which embraces the petitioner pursuant to a state prison sentence which he is presently serving and, again, on the facts of this case, about which he may not complain.

Petitioner urgers that within the respective jurisdiction language of 28 U.S.C. 2241, the statute which was construed and interpreted in Ahrens against Clark, does not speak to nor define jurisdiction in what Mr. Justice Rutledge, dissenting in that case, called "the jurisdiction in the fundamental sense." And, indeed, other cases of this court teach that whatever the language means it does not speak to jurisdiction in the fundamental sense and there are

several cases which illustrate that.

First of all, Ex Parte Endo, which was decided by the court prior to Ahrens against Clark, dealing with the same statutory language and a case which was reaffirmed in Jones against Cunningham, stands for the proposition that a petitioner who -- represents circumstances in which a petitioner may secretly, even though not within the district-- (sic) the Hirota case also authored by the author of Ahrens against Clark again stands for and teaches us that the statutory language is not an invariable restriction on a habeas petitioner who seeks to petition other than in the district in which he is presently confined.

Now, Petitioner has reviewed and wishes not here to rereview the legislative history of the 1867 habeas corpus statute, the statute in which the language within their respective jurisdictions was first introduced and language which has continued on down through the history of the habeas statute since 1867.

We have urged in our brief that the legislative history -- and I heard in a previous argument legislative history in another context characterized as brief. I can't imagine briefer legislative history. But the brief legislative history of the 1867 statute is at least as consistent with a construction that it was the territorial presence of the respondent rather than the Petitioner which

the legislature had in mind in 1867.

In short, what the Petitioner contends is that there are circumstances, given the reach of decisions since the decision of Ahrens against Clark, in which a continuing rigid application of the jurisdictional tests of Ahrens against Clark would be inimicable to and be an, in effect, restraint upon a curb upon the full reach of decisions of this court, Peyton against Rowe, Smith against Hooey, and other cases which contemplate that what we have called in our brief, which contemplates the real respondent interest, the real party against whom the petitioner grieves, will be outside the state.

Now, there may be circumstances in which, on account of the petitioner being in one jurisdiction and the ultimate source of the custody about which he complains being in another territorial jurisdiction, there may be circumstances in which the petitioner is presented with a forum choice and, again, I think that the facts of this case are illustrative of perhaps just such a case.

We are here, of course, to defend the forum choice of the Petitioner, that is, his Kentucky forum choice but at the same time giving the lodging of the detainer in the State of Alabama, we are, I think, and we acknowledge, necessarily contending that he could have as well filed his petition with the Alabama District Court.

Q They issued a container in Kentucky?

MR. HOOD: The container was issued out of Kentucky and has been lodged with the Alabama --

Q But the issuor is in Kentucky?

MR. HOOD: That is exactly right.

Q And you would like the detainer cancelled unless they triumph?

MR. HOOD: Well, what -- the essential relief we seek, your Honor, doesn't run to the detainer as much as it does to the indictment. The genius of the Petitioner here is that he has gone to the source of his difficulty. Unlike Nelson against George, he complains his essential grievance is not about the consequences of his detainer.

Q But if habeas corpus has got something to do with custody, there the only custody you can talk about with respect to anybody in Kentucky is the kind of custody that a detainer imposes on him.

MR. HOOD: Yes, and that is, I think, especially pertinent to the possibility of filing in Alabama but, certainly, here the custody, as I say, the custody issue is out of Kentucky.

Q But that habeas corpus does have something to do with custody?

MR. HOOD: Indeed it does and it has --

Q So what kind of custody are you trying to

to be free from as a result of this habeas corpus action?

MR. HOOD: Trying to be free from the kind of custody that is implicit in the issuance of a Kentucky indictment, the kind of freedom -- the kind of restraint on freedom that was discussed by this court in Smith against Hooey, the kind of alteration in the present circumstances of his Alabama tenure in prison which are implicit not only in a detainer but implicit even absent a detainer in the issuance of an indictment by a Kentucky -- by --

Q So you would still be here if there was no detainer issued at all?

MR. HOOD: Indeed I would. I would be here to defend the right of this Petitioner would go to Kentucky and to their complaint of the issuance of --

Q And you would be here on a habeas corpus action?

MR. HOOD: Yes, sir.

Q Rather than the 1983?

MR. HOOD: I would be here prepared to defend Kentucky even absent a detainer as an appropriate forum for the filing of a petition for a writ of habeas corpus.

Q And habeas corpus is a proper vehicle?

MR. HOOD: I think that it is and I think that is what Smith against Hooey teaches and I think that the custody does mean something and I think that the kind of

custodial presence that is contemplated by the statute that was contemplated and discussed by this court in Strait against Laird is certainly present in the State of Kentucky. There is custodial presence in California in the Strait against Laird. Surely there is custodial presence in Kentucky on the facts of this case as given the issuance of an indictment.

Q There are two things, assuming, one, the detainer is lifted and he is out of jail in Alabama, would you still have a right of action?

MR. HOOD: I think I would have a right of action and, pursuant to question, Mr. Justice White, I think that the appropriate form of the action would be to go into --

Q Well, what would be your action?

MR. HOOD: Well, in Klopfer against North Carolina, we had someone --

Q I'm talking about this case.

MR. HOOD: I am talking about this case as well, your Honor, because --

Q What would it be? You'd ask for habeas corpus?

MR. HOOD: I would ask -- I would ask for habeas corpus.

Q And how is he detained?

MR. HOOD: Well, he is detained in the same -- he

has the same kinds of restraints on his freedom and suffers certain disabilities not suffered by the public generally.

Q Then am I correct that you take the position that any time an indictment is issued, a man is entitled to habeas corpus?

MR. HOOD: Well, I think that the teaching of this court is that an outstanding untried indictment represents a sufficient restraint on one's liberty to be tested by habeas corpus, yes.

Q You do?

MR. HOOD: That is my position and I think --

Q You realize -- do you agree you don't have to go that far?

MR. HOOD: I realize that on the facts of this case that I don't have to go this far, but I seek, your Honor, to be responsive to your question and that is my answer.

Q Supposing that you had brought this action in Alabama challenging the Kentucky detainer and the State of Kentucky didn't appear in Alabama and you simply had an adjudication between the Alabama custodian and your client and the court ruled in your favor, the Alabama court, on the speedy trial issue in Kentucky? Now, I take it, all you could get would be relief from the Alabama detainer in that action? If your man shows up again in Kentucky, the Alabama court's

adjudication wouldn't bind the State of Kentucky as to its right to try him.

MR. HOOD: The thing I don't understand about your hypothetical, Mr. Justice, is whether the action that you contemplate in Alabama against whom would it have been brought?

Q Well, you were the one that suggested Alabama being an appropriate forum. I presume the Alabama custodian.

MR. HOOD: Well, I think that the -- I think that not only -- I think that not only the detainer but I think that the indictment itself can -- could perhaps be tested in Alabama although at least as to that I certainly wish not to be pushed that far and that pushes at least two steps beyond the facts of this case.

Q Well, certainly the State of Kentucky wouldn't be bound if it didn't appear in the Alabama proceedings, would it?

MR. HOOD: Well, that is the question, I think the interesting question on your hypothetical would be whether or not there is sufficient custodial presence of the State of Kentucky in Alabama such that they could be served and could be made to answer, again, for the teaching of this court in Strait against Laird, finding although ultimately in Indiana, and Indiand commanding officer finding the

requisite custodial presence in California.

Q You say, though, there might be custodial presence in Alabama then, not merely by virtue of the force which Alabama would give the outstanding detainer, but by virtue of the fact that Kentucky had indicted the man?

MR. HOOD: Because there is -- there are effects of the outstanding Kentucky indictment which are being felt and imposed upon the petitioner in Alabama in prison, given the nature of an outstanding indictment and what it does to rehabilitation. In short, the kinds of factors that were discussed by this court in Smith against Hooey, the negative effect on rehabilitation and all of the other implications of prison life.

Q Well, certainly, of course, he can raise his speedy trial defense ultimately if and when he is ever tried in Kentucky, I take it?

MR. HOOD: He can ultimately raise it.

Q Yes.

MR. HOOD: But, under the decision of this court, he need not wait and assert that as a defense.

Q Now, thus far, you haven't mentioned his Kentucky escape. Do you have any comment on this, as to how it affected the fact situation here?

MR. HOOD: Yes. My comment is that it speaks not at all to the jurisdictional question but only speaks, if at

all to the Petitioner's entitlement to a speedy trial. It was a contention which was urged by the State of Kentucky in the district court and was considered by the district court judge as mentioned in his opinion and to the extent that it weighs and was weighed and, as I say, does not affect the appropriateness of the Petitioner's jurisdictional choice only, if at all, it speaks to whether or not he is entitled to relief.

Q Well, if you insist that habeas corpus is a proper remedy, and in Kentucky, what about exhaustion?

MR. HOOD: Well, I think that the remedies that would be exhausted are Kentucky remedies and those are the remedies that he exhausted here.

Q Like what?

MR. HOOD: Well, he went into Kentucky and filed and requested a speedy trial.

Q And?

MR. HOOD: Made two demands.

Q I mean, what did he do, he filed a motion?

MR. HOOD: Yes, he filed a motion to the trial court, two of them, as a matter of fact and then ultimately took the case to the highest Kentucky court, all the while asking for his right to a speedy trial.

Q And on the grounds of federal entitlement to a speedy trial?

MR. HOOD: Asserting all the while --

Q So he has been denied, right up through and down through the courts?

MR. HOOD: Exactly and of course, it is Kentucky where he should exhaust those remedies. It is Kentucky which should defend on that issue and defend, incidentally, most appropirately and most conveniently in Kentucky rather than in Alabama.

Q Of course, going back to my question of the escape, but for the escape, he would have no Kentucky problems at all, would he? He would have been tried. He would have had a speedy trial. He wouldn't be complaining.

MR. HOOD: Well, I think in a but for causal sense, that is probably true, although I don't think -- I know of no doctrine of waiver. He was indicted in 1967, arrested shortly thereafter. He did escape and went to California. Some weeks later he was held in Alabama and available to Kentucky and has been available to them ever since and the notion that having once had him and having escaped, he is not now entitled to a speedy trial is a doctrine, is a ruling that --

Q Of course, I don't understand Kentucky saying that he was not entitled to a speedy trial. They have that mountain to cross later, if and when they ever determine to try him, do they not?

MR. HOOD: I think that is precisely what Kentucky

says. The state will, of course, speak to that. I can think of nothing else that they are saying with regard to the escape because it escapes me how the question of his flight to California pertains to the appropriateness of his jurisdictional choice.

Q Let me back up. Perhaps I misunderstood you before. I thought you said that if he had an indictment outstanding in Kentucky and was not in custody in Alabama at all, he could challenge the Kentucky indictment in Alabama by habeas corpus. Did I really understand you to say that?

MR. HOOD: Well, Mr. Chief Justice, I think you really did understand me to say that and I hope that you also heard me say that you also heard me say that I think that that is at least two steps beyond the facts of this case.

Q Well, suppose, and I am not so sure that it is not relevant, suppose he is in Alabama because he doesn't want to go to Kentucky where they will arrest him on the indictment and take him into custody and he wants to test out the indictment without being in custody and without having to put up bond if he is available? Do you really think habeas corpus could conceivably go that far?

MR. HOOD: Excuse me, your Honor. I think that I have misunderstood for my part. I think the two things

have gotten put together. I think that what I -- I intended to say no more than that if he was at liberty, he could go to Kentucky even though at liberty and in Kentucky petition for a writ of habeas corpus.

What I additionally said was it is my position that while in prison in Alabama, even though there wasn't a detainer, it is my position that he would nonetheless be able to petition for a writ of habeas corpus in Alabama because of the consequences of the Kentucky indictment on his Alabama prison tenure. The two things that got put together were, number one, his being at liberty and number two, his then wanting to go to Alabama and no, if I may rerespond to your question, your Honor, I don't go that far.

Q But you are still maintaining, apparently -- and I am not sure this is relevant to this case -- that the indictment can be tested in a habeas corpus proceeding, absent any custody, anywhere?

MR. HOOD: I think that is what Klopfer teaches with regard to the amount of restraint, to the amount of custody which is implicit in an outstanding indictment and under that circumstance, as I just said but a moment ago, I think that he could go to Kentucky and I think that he could contest that kind and that amount and that quality of restraint in Kentucky by habeas corpus. I say that, not only in reliance on Klopfer, but when I put Klopfer --

Q You do not because you do have a detainer out against you which you allege, at least, is causing you troubles in Alabama.

MR. HOOD: But I think the reason to face up to the issue is that I don't think that the circumstance that Kentucky has issued the detainer should instruct us -- should be the tail that wags the jurisdictional dog because even without the detainer and the reason we get to the issue at all is because even absent the detainer, I think it makes -- it is an easier case on the fact of the petition.

Q Well, also, what you are really interested in is a remedy. I mean, what you want is the indictment dismissed, not the detainer cancelled.

MR. HOOD: Precisely and with or without a detainer, the place to do all of that and the United States District Court to address itself to that question, it seems to me, is Kentucky.

Your Honor, I do have some time left and with your permission, I would reserve it.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hood.

Mr. Famularo.

ORAL ARGUMENT OF JOHN M. FAMULARO, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FAUMLARO: Mr. Chief Justice and may it please the court:

The Petitioner has fairly and adequately stated the facts of this case. However, we do wish to emphasize that the Commonwealth of Kentucky returned this Petitioner from the distant State of California and that he would have received his speedy trial but for his own conduct.

In this proceeding, the Petitioner seeks --

Q If you agree with his statement, what have you to convince me that he would get a speedy trial?

MR. FAMULARO: That he would get a speedy trial, your Honor?

Q Yes.

MR. FAMULARO: Well, first of all, it is our firm contention that, based upon this factual distinction between this Petitioner and the cases which Petitioner has cited for his right to a speedy trial, certainly distinguished this case from that one. In addition to this, we submit that by his conduct he has foreclosed or precluded from asserting at this time and at Kentucky expense again, his right to a speedy trial.

Q When can he ask for it?

MR. FAMULARO: We submit, your Honor, that he can ask for it at the expiration of his sentence or, if he is to seek relief, he must seek relief --

Q And that would be true if it was a 50-year sentence?

MR. FAMULARO: Your Honor, I --

Q Aren't you really taking the position that because he escaped, he lost his right to a speedy trial forever?

MR. FAMULARO: No, your Honor, we are not saying that he lost it forever.

Q Well, what do you say short of that?

MR. FAMULARO: We are saying that he has lost it at his whim and at his demand and at this time and at Kentucky expense again. Certainly, if we bring him back --

Q How long was he gone?

MR. FAMULARO: He was gone approximately two years, your Honor, before he made -- or at least one year before he made a subsequent demand.

Q Well, how long was he gone before you brought him back?

MR. FAMULARO: He was indicted in 1967 and was brought back in the latter part of 1967.

Q Less than a year?

MR. FAMULARO: Yes. Yes, your Honor, he was, from California.

Q Well, then how much longer would he have to wait for a speedy trial appointment?

MR. FAMULARO: I think he is presently serving the --

Q I said no under your rule how long would he

have to wait after that?

MR. FAMULARO: The Jefferson Circuit was a continuous circuit. He could have obtained his trial at that time, your Honor, and if he had --

Q Well, why wasn't he tried?

MR. FAMULARO: He wasn't tried due to his escape. He was not subject to our --

Q I thought you said you brought him back to Kentucky?

MR. FAMULARO: He escaped before we could afford him the speedy trial which he demanded.

Q But you never brought him back, did you?

MR. FAMULARO: Yes, he was in the Jefferson County jail awaiting trial, which was set, presumably, for the next day.

Q And then he escaped from jail?

MR. FAMULARO: And then he escaped, yes, your Honor.

Q And do you say now, when can he raise the question of speedy trial?

MR. FAMULARO: We are saying that if he is to raise this argument, under existing law, he may seek relief in the district of confinement which I'll get to later but he may raise this argument at the expiration of his sentence. Now, I realize that this may seem like a harsh

result, Mr. Justice Marshall, but it is no more harsh than the expulsion of a defendant from the courtroom by his conduct and this court has held that this is no violation of his Sixth Amendment right to confrontation.

Q I would assume that you would get your uniform agreement that while he is not in custody, he cannot raise the speedy trial point when he is not available. I would assume a lot of people would agree with you on that. But he is available and he has been available for how many years?

MR. FAMULARO: For approximately three years in Alabama, your Honor, four years.

Q And at any time, Alabama could try him?

MR. FAMULARO: Kentucky could try him, your Honor.

Q I mean Kentucky -- at any time.

MR. FAMULARO: Yes, your Honor, but we think this remedy also overlooks the fact that Kentucky has fulfilled its speedy trial obligation. We submit that by bringing the Petitioner back, we have fulfilled our Smith versus Hooey obligation. Petitioner has cited no authority for the proposition that we must afford him a speedy trial as often as he can escape and we are certainly aware of none.

Q Well, he hasn't escaped but once.

MR. FAMULARO: Well, we submit, your Honor, that that factual distinction is very relevant in this proceeding --

Q It would make no difference to you if he escaped from Alabama, would it?

MR. FAMULARO: No, your Honor.

Q Would that total it for six more years?

MR. FAMULARO: I don't know as it would total it for six more years because under our argument, it is totalled at least now, at demand, under our theory, until the expiration of his sentence and certainly he would probably be extradited to Alabama to serve that sentence, the remainder of that portion.

Q Do you mean that even at the expiration of his sentence and then Kentucky brings him back and puts him on trial, do you say he has waived his speedy trial claim entirely?

MR. FAMULARO: No, your Honor, he would still have his due process rights which he is always going to have. The requirements which this court set forth in Barker versus Wingo would certainly be capable of being raised at that time.

Q You mean he has only waived it during this time?

MR. FAMULARO: He waived his right to demand a speedy trial at this time and at state expense, your Honor. He had not waived his right to a fair trial. We are not submitting that at all. He certainly always has his right to

a fair trial and he can attack that detainer -- I mean, attack that indictment at that time, at the time that Kentucky brings him back.

Q Is this the claim that Kentucky made when he asked for a speedy trial in Kentucky and and then the denial was appealed?

MR. FAMULARO: This is true, your Honor. We made this argument in the Sixth Circuit and the United States Court of Appeals for the Sixth Circuit did not decide it upon this issue. They decided it on the jurisdiction.

Q Yes, but in the state courts, I understood from counsel that he had asked for a speedy trial. It had been denied in the state courts and he had appealed it to the highest court of Kentucky.

MR. FAMULARO: My recollection is, your Honor, that that was not brought up in the district court. Now, I was not on the case at that time but in looking at our response to the show cause order filed in the district court, I do not recall seeing that we raised the argument of the waiver. In fact, it was not until I got the case in the United States Court of Appeals for the --

Q Yes, but I am not talking about the district court. I am talking about the state courts.

MR. FAMULARO: No, this has not been raised in the state court. The waiver has not specifically been considered

by the Kentucky Court of Appeals. Kentucky has taken the view that this defendant, this petitioner, is precluded or foreclosed from asserting this right at this time.

Q Yes, but what did your state courts do?

MR. FAMULARO: Our state court --

Q As we understand it, when he had tried in the trial court to get a speedy trial and it was denied, he took an appeal to some Kentucky appellate court. Now, what appellate court was that?

MR. FAMULARO: What he did in that proceeding, your Honor, was brought a mandamus action against the circuit court.

Q He brought that in what court?

MR. FAMULARO: In the -- well, first in the Jefferson Circuit court and then that was denied. He appealed that denial of the writ of mandamus.

Q Well, now, why -- what was the basis of the denial in the circuit court?

MR. FAMULARO: I am certain, your Honor, that it was summary and I am certain that the Jefferson County officials were probably of the opinion that they had brought this man back once and that they were --

Q What was the ground of the denial of his applicaion for mandamus by the court?

MR. FAMULARO: It was summary. There were no --

Q Then he took an appeal from that denial to what court?

MR. FAMULARO: to the Kentucky Court of Appeals, which is our highest court.

Q And what was the basis upon which it denied?

MR. FAMULARO: Again, it was a summary order.

Q What claims did he make in that court?

Speedy trial? I'm sure it must have been, that he had a federal right to a speedy trial.

MR. FAMULARO: I'm certain it was, your Honor.

Q And what was the Kentucky -- whether they read an opinion or not in the court -- what did your office or what did the Attorney General of Kentucky, what was his claim in the Kentucky court?

MR. FAMULARO: I think we filed a general response, your Honor and --

Q And took the same position as you are taking here?

MR. FAMULARO: Took the same position as we are taking here and that in addition to this, we thought this court was without jurisdiction to -- well, at that point we did not raise the habeas corpus, but we did --

Q Let's assume that he had filed the petition for certiorari from that denial?

MR. FAMULARO: That would have been an appropriate --

Q The day after we decided Smith against Hooey?

MR. FAMULARO: I think, your Honor, that that may have indeed avoided many of the conflicts with which we are faced today.

Q Well, would Kentucky have made the argument then that he was not entitled to mandamus because he had escaped once?

MR. FAMULARO: Yes, your Honor, I think we would have made that argument because we do --

Q If they had asked for cert and it had been granted in argument here, you would have said Smith against Hooey notwithstanding, you don't get the same result here because he has escaped once?

MR. FAMULARO: I think -- yes, your Honor, we submit we would have raised that argument because we consider it an extremely important equitable consideration in this regard. As I stated, the Petitioner has cited no authority that a state must go through the administrative burden, must go through the possiblility of escape, which always looms in the background of a multi-state habeas corpus, and in addition to this, must go through the costs of transportation which are indeed, today, being thrown upon states in an abundance.

Q He'll go to court someday, won't he?

MR. FAMULARO: Yes, your Honor, he will, but it is

our contention that at that point it will at least, in all likelihood, if there is a conviction returned, it would be a one-way sentence, a one-way trip.

Q Wouldn't it cost you more then than it does now, the way prices are going up?

Wouldn't you save money if you bring him back now?

Q There is some confusion up here about being brought back. You have used this term three or four times. He was brought back from where?

MR. FAMULARO: From the State of California, Mr. Justice.

Q And was that were he was arrested originally?

MR. FAMULARO: He was arrested in California, apparently subject to the return of our indictments. He was, at the time of the return of our indictments, a fugitive. But he was brought back to Kentucky after being found in California on the Kentucky indictments.

Q You mean the California arrest was after his escape?

MR. FAMULARO: No, it was before.

Q It was before?

MR. FAMULARO: It was before his escape, yes.

Q So when you say he was brought back you merely mean that he was brought back for ultimate trial?

MR. FAMULARO: That's right.

Q And thereafter he escaped.

MR. FAMULARO: That's right, your Honor.

Q Where did he escape to?

MR. FAMULARO: That's when he escaped to Alabama, Mr. Justice Rehnquist, and was subsequently apprehended there.

We submit that in a proceedings such as this, there must be a balancing of interest.

Q Before you go to that, counsel, I realize you can't speak for the State of Kentucky on every aspect of this, but why isn't every consideration, whether you take fairness or practical matters, why don't they all dictate the swiftest trial possible while the witnesses are available for both the prosecution and the defense?

MR. FAMULARO: I think that argument is very valid, your Honor. At the same time, as I pointed out to Mr. Justice White, the Petitioner has not waived his right to demand a speedy trial -- I mean, his right to demand a fair trial and at that time, at the time of Kentucky's subsequent trial efforts, if, in fact, we do try him, it could work to his advantage as well as ours. He has not waived his right to a fair trial.

Q Well, doesn't the public interest suggest that he should be tried --

MR. FAMULARO: Public interest does dictate --

Q -- laying aside what your Constitutional

rights are, doesn't the broad public interest suggest that he be tried as swiftly as possible?

MR. FAMULARO: Yes, your Honor, this is true, but in light of the unique facts of this case, the public must also raise the question of governmental officials, how many times must we try to try the man? At some point it must become no longer feasible to even try to try this man and, certainly, by his subsequent --

Q Of course, that isn't getting any better by the day, is it?

MR. FAMULARO: No, it's not, your Honor. I realize this and I realize that the constitutional rights certainly are clear in the regard of a speedy trial. But at the same time, we clearly submit that the factual distinction between this case is something that cannot be overlooked.

Q But is this correct, that he just started last March serving another ten-year sentence in Alabama?

MR. FAMULARO: Petitioner has cited that. Certainly he will make reference, I presume, and answer that question in his rebuttal.

Q I wonder if this -- does that bear on it? I don't know how long an Alabama ten-year sentence means in terms of actual service, but probably seven or eight years, still.

MR. FAMULARO: I would presume it would, your

Honor, that is about the --

Q In Kentucky --

MR. FAMULARO: In Kentucky it would be --

Q So you wouldn't have to try him until then, seven or eight years from now.

MR. FAMULARO: This is true, your Honor.

Q Has Alabama refused to bring him back? I suppose you haven't asked.

MR. FAMULARO: No, your Honor, we haven't asked pending the deciding of this court of the Ahrens versus Clark case which I would now like to get into at this time.

Q Do you have any reason to think Alabama would object to having him taken to Kentucky for trial?

MR. FAMULARO: I have no reason to think that Alabama would object, your Honor. At the same time --

Q Are you both parties to the Uniform Act?

MR. FAMULARO: No, we are not. If we were, I presume this problem would not exist.

Q Mr. Famularo, you keep saying that this man is going to get a fair trial. My question is, can he get a fair trial thirteen years after indictment?

MR. FAMULARO: Your Honor, under the requirements --

Q Fair trial.

MR. FAMULARO: -- set forth in Barker versus Wingo, if the state has not met its requirements, then it

will not be tried anyway.

Q But you keep emphasizing, whatever comes, he is going to get a "fair trial." Then I assume you mean that he would not be tried?

MR. FAMULARO: I assume in that case, your Honor, he would not be tried.

Q Well, why hold the retainer?

MR. FAMULARO: We submit that on the unique factual considerations of this case and in light of the fact that they are both still valid indictments and have not been declared to the contrary by any court of law. Until they were or until he raised his right to a fair trial at the appropriate time --

Q Well, he has raised the speedy trial point twice.

MR. FAMULARO: But he has not raised any attack upon his right to a fair trial and he could do that at the time that we subsequently attempted to try him.

If I may at this point get into my second reason for not overturning Ahrens versus Clark.

Congress has vested authority in it under the article three, sections one and two of the United States Constitution to ordain and establish courts and with this is the power to fix and limit jurisdictions. This court has so held. We submit that Ahrens versus Clark interpreted that

the the district of confinement was the proper district in which to bring any habeas corpus petition as presented in the instant case. Congress has clarly set jurisdiction in the district of confinement and this court so held in Ahrens versus Clark.

The majority opinion in that case was concerned with where the petitioner is. That was the place of importance. Both the majority and the minority recognized the various evils of an unlimited type jurisdiction where a disinterested judge in Florida might call before him a Vermont prisoner serving time on a Vermont sentence in a Vermont jail and this was the evil that Congress sought to remedy and at the same time, Congress considered the various policy considerations which are present in the habeas corpus and that is the possibility of escape, the burden and costs of transportation.

Now, we recognize that this court in Nelson versus George left open its judgment on the question of the continuing vitality of Ahrens and in that case, it commented upon the propriety of a legislative amendment to remedy this situation.

We wish to point out to the court that a legislative amendment is presently pending in Congress. We are also aware of the case of Schlanger against Seaman which stands, apparently, in opposition to Ahrens. However, we submit that

Schlanger was decided on an erroneous premise and that premise was that Ahrens had decided that there was a territorial limitation upon the person of the respondent.

We submit that Ahrens did not make this decision because it was not called upon to decide it. It was brought into the District of Columbia District Court. The Attorney General was the respondent. Certainly he was within the jurisdiction of the court. There was no need to make this decision if they had jurisdiction over him. It was only the question as to whether or not he was a proper custodian and as we pointed out in Ahrens, the place of confinement was felt to be the proper jurisdiction under the limitation which Congress had in fact imposed upon section 2241.

There are also other factual differences between Schlanger but the problem is brought to a head in Strait versus Laird, where a dissenting opinion of this court stated that in fact the doctrine set forth in Schlanger had truly been emasculated in the Strait opinion.

Therefore, it is our firm belief that jurisdiction is fixed in the court of confinement. The Petitioner claims that this places him in a situation of having a remedy with no relief. However, we think that this overlooks a federal declaratory judgment action. It overlooks his Civil Rights action under 1983 and it overlooks his rights --

Q Well, what would the declaratory judgment

action be under, if not 1983?

MR. FAMULARO: This is true, your Honor, it would be brought under 1983 in all likelihood to declare the rights and interests involved.

Q Are you sure that you would prefer a 1983 -- welcome a 1983 action as compared with an habeas corpus action?

MR. FAMULARO: Well, there are practical problems involved in both of those, your Honor, but we submit that based upon the intent of Congress in fixing jurisdiction and based upon the policy considerations which Congress considered at that time and which this court considered in Ahrens versus Clark, then jurisdiction is fixed there and until Ahrens is overruled, which we submit it should not be done because to do such would be to allow an adjudicatory expansion of the legislative restrictions imposed in this area by Congress.

We also wish to point out that the Fifth Circuit does not, in essence, say that the district of confinement is not a proper form. The case cited by the Petitioner, May versus State of Georgia , only remanded for a reconsideration as to whether or not a sufficient demand had been made upon the Georgia authorities.

Q But if he turns around and brings a 1983 action where prisoners may, in this situation, sue under 1983,

there would be no requirement for exhaustion. The state courts of Kentucky would not get first crack at it, would they?

MR. FAMULARO: This is also true, your Honor.

We submit, therefore, that if this court decides that jurisdiction truly resides in the district of confinement, the Petitioner will obtain his relief. He will have his detainer quashed if, in fact, the federal judge sitting there assumes that there is jurisdiction of an in rehm proceeding, which we submit there are both logical and legal reasons for allowing the district court to treat this there.

Just as a divorce proceeding may proceed in the absence of a spouse, so, too, a federal judge sitting in Alabama determine the status of the Petitioner insofar as it is affected by the actions of Kentucky and the status of his rights insofar as they are affected by the Commonwealth of Kentucky and render a decision even to the extent of nullifying the prosecution if, in fact, Kentucky has not made good faith efforts and, under the Federal Supremacy Clause -- Kentucky --

Q Mr. Famularo, does this contemplate Kentucky would be a party to that proceeding?

MR. FAMULARO: It would not be a party in the in persona sense, your Honor, but we think that it would be a

party in the sense that --

Q In some sense it would be concluded although not appearing, by the result?

MR. FAMULARO: Your Honor, in the nature of an in rehm proceeding, we submit that it would mean this, yes.

Q Where do you get your in rehm analogy here?

MR. FAMULARO: We found no cases specifically in point in this, Mr. Justice Rehnquist. However, we think there are both logical reasons found in this.

This case involves the speedy trial situation. It is unlike the postconviction proceedings where Kentucky law may have to be applied and where there may be numerous witnesses. This is a speedy trial case. That federal court sitting in Alabama can certainly determine if Kentucky has made good faith efforts to secure him. They can determine if this Petitioner had in fact made good faith efforts to secure his trial and they can render a ruling.

We submit that there is legal basis for this contention found in the broad language of section 2243 of Title 28 and we submit that that language is broad enough so as to enable us to construe it so as to authorize extra-territorial jurisdiction in this regard.

Q It seems to me that the contention that you are urging in that sort of statutory construction would be a far more sweeping tampering with the language of Congress

than our taking another look at Ahrens against Clark.

MR. FAMULARO: We submit that it would not, your Honor, because it would not work in a dual way. The expansion would not be in Kentucky but would be in the district of confinement, which this court had interpreted in Ahrens versus Clark that that is the place of jurisdiction and, certainly, I think it would fulfill the intent of Congress.

2243 does not speak of terms of territorial limitations upon the respondent but is broad and we submit that it would not be tampering as much as trying to overrule Ahrens. Certainly, Ahrens needs its continuing vitality.

We submit that this court in Nelson commented upon the propriety of the legislative amendment. Congresses inaction in this regard certainly may be deemed as a tacit approval of the interpretation given by this court in Ahrens versus Clark. This court has recently recognized Congresses tacit approval by its inaction in the Baseball Antitrust situation.

Q That was fifty years or more and it is only a year since the legislation on the Nelson George case has been --

MR. FAMULARO: This is true, your Honor, but Congress has at least been aware of the problem which has existed since Peyton versus Rowe.

Q Well, it would be more accurate to say maybe two or three members of Congress are aware of it. It is in the Judiciary Committee in a subcommittee.

MR. FAMULARO: This is true, your Honor.

But, certainly, some portion of Congress must have been aware of it since 1967 because that is when the problem has become critical, and 1968 in light of Peyton versus Rowe and Smith versus Hooey.

Q Well, you don't suppose all 531 members were aware of it in the case of the baseball situation?

MR. FAMULARO: They probably were not, your Honor, and certainly that is not a dispositive argument, but we think it at least is analagous in this regard.

Thus we submit the jurisdiction clearly lies in the place of confinement. If this court so finds, the Petitioner will receive his relief, the intent of Congress will be met, the policy considerations will be met and at the same time there will be no expansion of the limitations which Congress has placed upon the jurisdiction in this regard. Rather, there will be a proper relief in a proper form in a proper manner.

Q Could I ask you if the state has anything to say about the proceeding that he brought in the Court of Appeals of Kentucky for mandamus to force a speedy trial? Is there any objection by the state that that was not the

proper remedy to be sought there? Or is that the way a person goes about trying to get a speedy trial in the State of Kentucky?

MR. FAMULARO: That is not normally the way, I don't think, your Honor, because the writ of --

Q Well, he filed a motion first in the trial court, didn't he?

MR. FAMULARO: This is true.

Q And then he brought the writ of mandamus in the State Supreme Court?

MR. FAMULARO: No, he brought it first in the circuit court, whic is the lower level.

Q And then he appealed the denial?

MR. FAMULARO: He appealed that denial --

Q Oh, he did?

MR. FAMULARO: -- to the state's highest courts. I think that will bear it out, Mr. Hood.

Q It wasn't then a motion in a criminal case?

MR. FAMULARO: No, it was not,your Honor. It was the extreme relief of mandamus.

Q It is on page 8 of the record.

Q Well, in any event --

Q It cites the opinion. It says, "appeal to the court of appeals of Kentucky, both demands were denied." That is in the district court.

Q Well, in any event, my question is, does the State of Kentucky here, it doesn't contend that he has any other remedy in Kentucky courts that he has not exhausted?

MR. FAMULARO: No. No, your Honor. He has exhausted his remedies insofar as Kentucky is concerned.

Q Until and unless he is brought to trial.

MR. FAMULARO: That's right.

Q Under Kentucky law, if the motion were made now demanding an immediate trial or dismissal, would Kentucky trial court have the power under Kentucky law to dismiss the indictment if it was not tried within thirty days thereafter?

MR. FAMULARO: There is no -- it certainly would have the power, your Honor -- there is no written timespan involved. We have no cases in this regard. I think that the requirements as set forth by this court in Barker would certainly be considered and upon a consideration of them, the trial court could dismiss the indictment.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hood.

REBUTTAL ARGUMENT OF DAVID R. HOOD, ESQ.,

ON BEHALF OF THE PETITIONER

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

I rise only to a few factual matters. First of all,

pertinent to the question last under discussion, I think that I can report and I think that the record reflects that the Petitioner has exhausted all of his state remedies. He has exhausted it in a way which not only is appropriate to Kentucky procedures, but which has never been objected to by the State of Kentucky.

Q And I gather it is true, Mr. Hood, that no opinions have been written, no reasons stated why the denials?

MR. HOOD: In every instance he has urged his right to a speedy trial and in every instance he has relied upon the teaching of this court in Smith against Hooey and in every instance he has received a summary denial.

The second factual matter is yes, indeed, it is true, Mr. Justice Brennan, that he does yet have ten years to serve. He just began this spring to serve a ten-year Alabama sentence.

Third, with regard -- I think it was to your question, Mr. Justice White -- both Kentucky and Alabama have signed the Uniform Extradition Act. The Act that they have not signed is the Uniform Agreement on Detainers. There would be no problem in returning the Petitioner from Alabama, if Kentucky made such a request and, indeed, as Kentucky concedes, it made no such request.

Finally, with regard to the assertion that this matter will soon be cured by Congressional action. As near

as we are able to determine, to try and follow the history of HR3804, it has been referred to subcommittee, subcommittee three of the House Judiciary Committee has taken no action on the bill and therefore it appears to be dead.

I don't think that we should and I don't think we need to wait for that kind of relief. I think there is too much judicial business to be done and too many petitions to be disposed of and to be disposed of in what we contend is a vastly more efficacious way if the strict rule of Ahrens against Clark is relaxed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Thereupon, at 2:41 o'clock p.m, the case was submitted.)