

ORIGINAL

In the
Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD WILLIAM DORAN,

Respondent.

No. 77-1202

Washington, D. C.
October 4, 1978

Pages 1 thru 40

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IN THE SUPREME COURT OF THE UNITED STATES

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HAROLD WILLIAM DORAN, :
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Respondent. :
- - - - - X

Washington, D. C.
Wednesday, October 4, 1978

The above-entitled matter came on for argument at
11:42 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT A. DERENGOSKI, ESQ., Solicitor General of
the State of Michigan, 760 Law Building, 525 West
Ottawa Street, Lansing, Michigan 48913, on behalf
of the Petitioner.

KATHLEEN M. CUMMINS, ESQ., Assistant Defender,
State Appellate Defender Office, Third Floor, North
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on behalf of the Respondent.

C O N T E N T SORAL ARGUMENT OF:PAGE

Robert A. Derengoski, Esq.,
on behalf of the Petitioner

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In Reply, Please Refer to:

Kathleen M. Cummins, Esq.,
on behalf of the Respondent

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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. 77-1202, Michigan against Doran.

Mr. Derengoski, you may proceed.

ORAL ARGUMENT OF ROBERT A. DERENGOSKI, ESQ.,

ON BEHALF OF THE PETITIONER

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

I first address the question in this cause of the motion for dismissal on the grounds of mootness, which has been filed by counsel for the Respondent herein. This is an extradition case. Exactly one year ago today the Michigan Supreme Court handed down its decision setting aside Mr. Doran's incarceration and turning him free on the basis that the extradition papers, the warrant and complaint from Arizona, did not, on their face, show probable cause, and that it was an argument and question and objection which could be raised in a habeas corpus proceeding in the asylum State of Michigan.

The motion for mootness indicates that counsel has searched diligently for Mr. Doran and has been unable to find him and that, therefore, any action by this Court could not be effectively implemented.

I say to this Court, in opposition to the motion for dismissal on the basis of mootness, that we, the State of

Michigan, with probably somewhat greater resources, have not attempted to locate Mr. Doran. There is no reason for it. After all, we couldn't do a thing to him. It would only be harassment if we did go out and look for him, I presume. He is free by mandate of the Michigan Supreme Court.

Now, admittedly, at the moment, we do not know where he is. However, I would hate to say that precedent should be that an appeal to this Court can be thwarted, indeed, a party may prevail by merely not showing up.

I would say to Your Honors that this is not the concept which would evoke an order of this Court dismissing on account of mootness this cause.

Now, except for this order of the Michigan Supreme Court which we herein seek to set aside, there is a viable Michigan Governor's warrant for the arrest of this man. And once this Court does set aside the Michigan decree, it will be pursued and pursued diligently. Otherwise, the very thing that we are so fearful of as a result of the Michigan Supreme Court's decision would, indeed, come true, namely, just keep yourself absent, step over the boundaries into another state and you are home free.

I have little doubt, Michigan being the home of Mr. Doran and his family, or remnants thereof, are still there, that in all likelihood he is in Michigan. Why shouldn't he be --

QUESTION: Would it make any difference whether he is in Michigan or in Cuba, for the purposes of this case?

MR. DERENGOSKI: That's right, sir.

QUESTION: Well, it would make a difference if he were in Arizona, would it not?

MR. DERENGOSKI: Yes, sir.

At the moment, I would suggest to Mr. Doran, Michigan. After all, he is safe there. He has the mandate of the Michigan Supreme Court keeping him free.

Now, the matter -- I will proceed to the merits of the cause. We do not take exception to the claim and the assertion that the provisos of the Fourth Amendment, namely, probable cause for a warrant, are applicable to cases of extradition. Are big thrust is --

QUESTION: You do concede --

MR. DERENGOSKI: Yes, we do.

QUESTION: This simplifies the case considerably.

MR. DERENGOSKI: We say that these are matters which are to be examined in the courts of the demanding state. The concept of probable cause, I suggest to the Court, can be somewhat gossamer. What is, maybe, probable cause in the mind of the Governor and the judge in Arizona may fall shy of probable cause in the mind of the Michigan courts. Obviously, it did.

On the other hand, this case went through four

Michigan courts before they found a court which said, "This does not show probable cause within the concept that we have, and therefore it must fail, it can be raised in an ancillary proceeding in habeas here and we will discharge this man."

QUESTION: Would you say that the asylum state may at least demand that the demanding state, when it presents its papers to the Governor of the asylum state, -- must the demanding state at least show that probable cause has been determined in that state before a warrant was issued?

MR. DERENGOSKI: Yes, sir. And we believe that that has been done here.

QUESTION: Do you think the asylum state may demand not only that the demanding state demonstrate that probable cause has been judicially determined in the demanding state, but that the demanding state demonstrates the basis for that determination? I know you say that it cannot be redetermined in the asylum state.

MR. DERENGOSKI: Yes, sir. I think that what we have here is Michigan's examination of what Arizona found to be probable cause.

QUESTION: Reexamination.

Why do you concede that with respect to probable cause? You are dealing with a provision of the Constitution that was adopted in 1787 about the Interstate Rendition of Fugitives and you are dealing with a Fourth Amendment provision

that was held applicable to the states only in 1961.

MR. DERENGOSKI: Yes, sir.

We, of course, rely nearly completely and wholly on Article 1. It is so clear.

QUESTION: Article 1 of what?

MR. DERENGOSKI: Of the United States Constitution, which says that upon demand of the Governor of one state a fugitive shall be rendered up to the demanding state.

QUESTION: I thought that was Article 4, Section 2.

MR. DERENGOSKI: I stand corrected, Article 4, Section 2.

QUESTION: Well, if you rely on that, why do you get to the issue of probable cause under --

QUESTION: Why did you concede just what you did, that the asylum state may at least demand that the -- a showing that the demanding state passed on probable cause?

MR. DERENGOSKI: I do not know that I made that concession, sir. If I did, I certainly retract it.

QUESTION: Were you undertaking to tell us that all the demanding state need to show is their prima facie case of probable cause, by its papers?

MR. DERENGOSKI: Yes, sir.

The big complaint, as I get it, here is that the affidavit in complaint pursuant to which the warrant of arrest was issued merely stated the crime in the, quote,

"conclusory," end quote, language of the statute, but it showed who, what, where, when --

QUESTION: Mr. Attorney General, doesn't a warrant show that Arizona said that this man stole a car in Arizona on the same day he was under arrest in Michigan?

MR. DERENGOSKI: Yes, sir.

QUESTION: Is that possible?

MR. DERENGOSKI: No, sir, it was sent back and returned. It was a stenographic error in the original warrant. It was corrected to show December 3, 1975, instead of the same date on which he was picked up in Michigan.

QUESTION: But when was the warrant issued? How long after the crime?

MR. DERENGOSKI: Let's see. We picked him up on December --

QUESTION: I am talking about the Arizona --

MR. DERENGOSKI: The Arizona, I think, it was issued in the middle of January.

QUESTION: It wasn't issued until after he was picked up in Michigan?

MR. DERENGOSKI: Yes, sir.

QUESTION: And after Michigan notified Arizona, that was when it was issued?

MR. DERENGOSKI: Yes, sir.

QUESTION: Real cooperation.

MR. DERENGOSKI: Yes, sir.

QUESTION: When did you pick him up?

MR. DERENGOSKI: We picked him up December 18, 1975..

QUESTION: And when did the Arizona warrant issue?

MR. DERENGOSKI: Arizona issued 1/7/76; less than a month later, the Arizona warrant issued, sir.

QUESTION: Well, then, may it be said that the Arizona authorities were relying on the Michigan arrest for probable cause?

MR. DERENGOSKI: No, sir, there was a complaint made by the prosecutor in the Arizona court.

QUESTION: When?

MR. DERENGOSKI: It was sometime between December 18th and --

QUESTION: Was it before or after the Michigan arrest?

MR. DERENGOSKI: It was after, sir.

QUESTION: And it was after Michigan notified Arizona.

MR. DERENGOSKI: Yes, sir.

QUESTION: And so far as the record shows, Arizona didn't know anything about it.

MR. DERENGOSKI: That is right, sir. They didn't know where this man was until Michigan said, "We have him."

QUESTION: It doesn't say that. They could have

issued the warrant without knowing where he was; couldn't they?

MR. DERENGOSKI: I suppose, but to what avail, sir?

QUESTION: Don't they usually do that?

MR. DERENGOSKI: Not to my knowledge, no, sir.

QUESTION: Can you give me any case where this happened, where a warrant was issued after the man was arrested in another state?

MR. DERENGOSKI: Most of the extraditions that I have dealt with did that, yes, sir, after the asylum state advised the ultimate, demanding state that, "We have one of your people."

QUESTION: That's when they issued the warrant?

MR. DERENGOSKI: Yes, sir.

QUESTION: For arrest.

MR. DERENGOSKI: Yes, sir.

QUESTION: Often they don't know who he is.

MR. DERENGOSKI: That's right, yes, sir.

QUESTION: Until he is apprehended in the asylum state.

MR. DERENGOSKI: That's right. And how this happened, sir, he was driving this allegedly stolen vehicle in Bay City, Michigan, and was making too much noise, as I understand it and there was a complaint and officers came and they checked through the lien and found that this was a

stolen vehicle from Arizona. And he was charged in Michigan with receiving and concealing stolen property, which charge was ultimately dismissed upon the arrival of the Arizona requisition.

QUESTION: And you kept him in jail two years.

MR. DERENGOSKI: Oh, yes, sir. That would be a --

QUESTION: What is the amount of time you get for stealing a vehicle in Arizona?

MR. DERENGOSKI: I suppose it is less than five years, sir.

QUESTION: It could be two, couldn't it?

MR. DERENGOSKI: It could, yes, sir. But you have to recall, sir, that during the time that he was incarcerated in Bay City, he was attempting these habeas actions through the Michigan courts. And you know, sir, it takes very little imagination to know why this man would rather molder in a Michigan jail than assert himself to his constitutional right to a speedy trial in Arizona.

QUESTION: He just wanted you to abide by the law, that's all.

MR. DERENGOSKI: Now, historically --

QUESTION: It takes very little imagination, but I don't even have that minimal amount of imagination. Why did he --

MR. DERENGOSKI: Obviously, he did not want to run

the risk of conviction and sentence in Arizona.

QUESTION: He couldn't be any worse off than being in prison, could he?

MR. DERENGOSKI: Yes, sir. I can't understand that.

QUESTION: You say it takes very little imagination to see why he did what he did.

MR. DERENGOSKI: Obviously, he believed the risk of conviction and sentencing in Arizona was so very probable that he would rather sit in a Michigan jail.

QUESTION: Well, that's a certainty, when you are in jail, not a probability.

QUESTION: He was there then pending the possession charge in the State of Michigan, was he not?

MR. DERENGOSKI: Yes, sir.

QUESTION: When was that charge dismissed?

MR. DERENGOSKI: It was dismissed in January of 1976, when the Arizona requisition arrived and the Governor of Michigan issued his warrant of arrest, pursuant to --

QUESTION: So it was promptly dismissed, as soon as the people from Arizona arrived; is that right, or the requisition arrived?

MR. DERENGOSKI: Yes, sir.

QUESTION: So the two years was after that.

MR. DERENGOSKI: Yes, sir.

QUESTION: You are suggesting he was following

Hamlet's advice that, "We would rather bear those evils we have than flee to others that we know not of"?

MR. DERENGOSKI: Perhaps, sir, perhaps.

QUESTION: Or are you suggesting that Michigan jails are warmer than Arizona ones, or something like that.

I share Mr. Justice Stewart's confusion about it doesn't take much imagination to know why.

MR. DERENGOSKI: Obviously, he did not want the Arizona conviction and probable sentence that would follow.

QUESTION: And he correctly anticipated that if he stuck it out in the Michigan courts he might ultimately get free, which he did.

MR. DERENGOSKI: Oh, yes, sir. It took four courts, but he made it.

QUESTION: He is probably happier now than he would have been after a trial in Arizona.

MR. DERENGOSKI: Yes, sir.

QUESTION: Did you ever think that there is a good possibility that this man is innocent?

MR. DERENGOSKI: Well, sir, yes, but --

QUESTION: Your assumption is that he was going to be convicted in Arizona.

MR. DERENGOSKI: Oh, no, sir, I would never subscribe to that.

QUESTION: Didn't you just say that the reason he

did it was because if he went to Arizona he would be convicted? Didn't you say that?

MR. DERENGOSKI: He was obviously afraid of that, yes, sir.

QUESTION: Well, then, you don't assume that the man is innocent.

MR. DERENGOSKI: I will always assume. Evidently, he didn't.

Historically and under the rulings of this Court, in the asylum state you may question the fugitivity, the identity of the accused -- in this case, we had his picture -- and whether what he did was a crime, under the laws of the demanding state, and whether he, indeed, was in the demanding state at the time of the alleged crime.

QUESTION: You say that is the end of the inquiry by the asylum state?

MR. DERENGOSKI: Yes, sir, just to make sure that this man who is charged, that he was in the demanding state and that you have the right person.

Now, the Michigan Supreme Court went off very heavily on the District Circuit decision by Judge Skelley Wright in Kirkland. They also -- I would like to point out to the Court that Justice Skelley Wright, with all deference to him, much of his opinion was based on compassion. I say that is a proper ingredient in the administration of our laws, but

should not be so weighted as to frustrate a constitutional provision. Judge Wright mentioned "hauling these people away from their home to a foreign jurisdiction," and all the problems that could come in that regard. While, actually, in most of these cases, these people merely are being sent back home. And in this particular case, we are not sending these fugitives off to some primitive state, some nether region. We are sending them off to a sister sovereign state of this Union, whereby all of the constitutional rights will be given to him.

QUESTION: Well, the Governor of Michigan can exercise compassion, under Kentucky v. Dennison, if he wants to, can't he?

MR. DERENGOSKI: Oh, yes, sir. I am not sure that Kentucky v. Dennison says that.

QUESTION: It says that duty can't be enforced by mandamus.

MR. DERENGOSKI: That's right, sir. I seriously question the propriety of these governors in the exercise of executive clemency doing by indirection and frustrating Article 4.

QUESTION: We don't have that here, though.

MR. DERENGOSKI: No, sir.

QUESTION: It wasn't the governor who did this.

MR. DERENGOSKI: No, sir, it was not. It was the

Michigan Supreme Court.

So I say to the Court all of these protections, these arguments should be raised in the demanding state, where the evidence is there, where the witnesses are there. Unless we can have that as the law of this land, you could have 48 states which become havens for every bail bond jumper in the country.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Derengoski.

MR. DERENGOSKI: I would like to reserve the remainder of my time for any rebuttal that may be necessary.

MR. CHIEF JUSTICE BURGER: Very well.

Miss Cummins.

ORAL ARGUMENT OF KATHLEEN M. CUMMINS, ESQ.,

ON BEHALF OF THE RESPONDENT

MISS CUMMINS: Mr. Chief Justice, and may it please the Court:

First of all, I will address myself to the memorandum suggesting mootness, which we filed. I, by no means, intended that this memorandum be taken as my assertion that this case was definitely moot. It was filed because I felt that Mr. Doran's continuing absence compelled me to inform the Court of a set of facts that might well render the case moot.

MR. CHIEF JUSTICE BURGER: It was entirely appropriate, Miss Cummins, for you to do so.

MR. CUMMINS: I do have one additional fact to relate

to the Court which came to light after the memorandum was filed, however. Our investigator had contacted a Deputy Sheriff in Bay County who knew Mr. Doran and had asked him to look for Mr. Doran. Shortly after we received the Attorney General's response to our memorandum, this Deputy informed us that he had seen Mr. Doran in a local hotel about two months before last week. However, he was unable to give us any further information and our efforts to check out this lead didn't reveal any further information.

QUESTION: That was a local hotel in the State of Michigan?

MISS CUMMINS: In Bay City.

We argued before the Michigan Supreme Court and they took the position that where a request for rendition is based on a mere charge, such as here, an untried charge, and where the request is supported solely by a complaint and warrant and/or additional supporting affidavits, that such charging documents must facially reflect probable cause.

Secondly --

QUESTION: Miss Cummins, is there any explanation in the record as to the original Michigan arrest?

MISS CUMMINS: Well, the record is somewhat murky as to the details surrounding Mr. Doran's original --

QUESTION: What was he arrested for?

MISS CUMMINS: He was arrested on a charge of

possession of a stolen vehicle in Bay City on December 18th --

QUESTION: This is the same vehicle?

MISS CUMMINS: Yes.

QUESTION: How do you know it is the same vehicle?

MISS CUMMINS: It was a vehicle in which he had driven from Arizona. There is no dispute about that.

QUESTION: He was arrested because he was driving a car without a state license?

MISS CUMMINS: Apparently, a check -- and I am not sure of this and the record does not really clear up this question.-- Apparently a check was run on the plates and this check revealed that it was a stolen vehicle.

QUESTION: But that was after he was arrested.

MISS CUMMINS: Yes, Your Honor.

QUESTION: If you will back up a little, I want to know when he was arrested, they said, "You are arrested" for what?

MISS CUMMINS: I don't believe that was ever made certain, Your Honor.

QUESTION: We don't know, do we?

MISS CUMMINS: No.

He was, shortly thereafter, charged with receiving and concealing a stolen vehicle. However, after the Arizona warrant and complaint were issued and a fugitive warrant was issued in Michigan to hold Mr. Doran for extradition, the local charge

was dropped on February 5, 1976.

The Michigan Supreme Court was faced with a real dilemma here. They had to decide whether or not they could extradite an accused fugitive, not a person convicted of crime or a person who had violated parole or who had jumped bond, but a person charged with crime in another state.

QUESTION: Isn't that what most extraditions are, Miss Cummins? The overwhelming majority are relating to persons merely charged.

MISS CUMMINS: Yes, Your Honor, I don't know what the statistics are on that. However, it is significant in this case --

QUESTION: Doesn't the Constitution say that, "A person charged in any state with treason, felony or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up"?

MISS CUMMINS: Yes, Mr. Justice Rehnquist.

QUESTION: Where is the dilemma then?

MISS CUMMINS: I don't dispute the fact that extradition may be had on a mere charge. However, here the Michigan Supreme Court was provided -- or the Michigan Governor, originally, was provided with documents in support of this charge which did not contain any particulars supporting the charge, whatsoever.

QUESTION: Does the Michigan Supreme Court review the Governor's exercise of discretion or do they review under the Constitution and the Federal Act?

MISS CUMMINS: They are acting as a habeas corpus court that has traditionally been provided to accused fugitives.

Now, what they had before them were a warrant, a complaint and an affidavit that were framed entirely in conclusions, not only --

QUESTION: They certainly indicated that a charge had been made.

MISS CUMMINS: Yes, they indicated that a charge had been made.

QUESTION: And held that despite the Constitution something -- some papers indicating something besides a charge was necessary.

MISS CUMMINS: No, Your Honor. What they said was that papers -- a complaint and warrant were submitted in support of an extradition request, that that complaint and warrant and other supporting affidavits, or whatever, had to reflect on their face sufficient details to support a probable cause finding.

QUESTION: So your answer is yes they must show something besides the charge?

MISS CUMMINS: Yes, they must show something besides a mere conclusion that probable cause has been found in the

mere name of the charge.

QUESTION: Suppose he had been indicted by a grand jury. Could the Michigan courts reexamine the basis upon which the grand jury indicted?

MISS CUMMINS: No, Your Honor, and the Michigan Supreme Court distinguished that situation. They said, "We are not dealing here with an indictment."

QUESTION: That's all. They said, "We are not" dealing with it, but could they?

MISS CUMMINS: No, they couldn't reach that.

QUESTION: And what's the reason for that, because the Constitution uses the word "shall" surrender up?

MISS CUMMINS: I believe the reason for the distinction was that a grand jury indictment imports a finding of probable cause or at least a finding that is equivalent, that the law views as equivalent to finding probable cause.

QUESTION: What if just a charge, without any supporting papers, had been furnished to the Michigan authorities? Would the Michigan Supreme Court have come out the same way, in your view?

MISS CUMMINS: I think more so. They would have come out more emphatically.

QUESTION: So that, it isn't a question of the Arizona authorities having furnished too much. It is a question that any demanding state must furnish not only

evidence of a charge, but evidence of probable cause.

MISS CUMMINS: Yes, Your Honor.

QUESTION: How do you reconcile that with the statement in Matter of Strauss, the opinion of this Court by Justice Brewer, where he says that, "Who would doubt that an information is sufficient"?

MISS CUMMINS: I think what Matter of Strauss is really dealing with was at what stage does the criminal prosecution have to be advanced before extradition can be had upon that charge? In Matter of Strauss, the Petitioner was arguing that since the prosecution had not advanced beyond a mere charge, had not advanced to the stage where he had been bound over for trial, that extradition couldn't be had on this basis.

QUESTION: But in Strauss the Court does say information would be sufficient, which is what was involved in Gerstein v. Pugh and this Court held was not sufficient for probable cause.

MISS CUMMINS: Yes, Your Honor, but perhaps, at least as far as that proposition is evident in Matter of Strauss, that case should be reexamined in the light of Gerstein.

But we don't have any dispute with Strauss' basic proposition that a mere charge is enough and that the meaning of the word "charge" is to be construed liberally.

QUESTION: What, in fact, Miss Cummins, was furnished

by the demanding state, by Arizona, in this case?

MISS CUMMINS: The demanding state furnished a warrant supported by a complaint. The warrant and complaint were virtually identical in their language. They recited the charging language of the Arizona statutes for theft of an automobile, or, in the alternative, embezzlement of an automobile. The complaint was sworn out by a police officer. It was made expressly on information and belief.

QUESTION: Sworn to?

MISS CUMMINS: Sworn to before a magistrate.

QUESTION: So, it would be -- The constitutional provision says a person charged in any state, and that's the extent of what it says in that respect, and the statute says that if the demanding state produces a copy of an indictment found or an affidavit made before a magistrate.

Would you concede that the complaint fits that description, an affidavit made before a magistrate? Fits the statutory requirement, the language?

MISS CUMMINS: Yes, Your Honor.

QUESTION: It wasn't an insufficient demand so far as the statutory language goes?

MISS CUMMINS: No, Your Honor.

QUESTION: The Solicitor General said that date of December was changed. Where is that in the record?

MISS CUMMINS: Well, the complaint was amended to

change the date of the offense from December 18th --

QUESTION: Is that in the Appendix?

MISS CUMMINS: I don't believe the amended complaint is in the Appendix.

QUESTION: How does it get before us?

MISS CUMMINS: Well, I was under the impression that the Court had at its disposal the complete record.

QUESTION: We do.

QUESTION: Well, didn't you work on this Appendix?

MISS CUMMINS: Yes, I did.

QUESTION: And you left two documents in here that were corrected and you didn't put the corrected ones in.

MISS CUMMINS: Yes, Your Honor. However, I did mention in my brief --

QUESTION: You want me to rule with you and you didn't give me the documents to go with it.

MISS CUMMINS: I am sorry for that oversight, Your Honor. However, I did bring this up in the brief and I referred the Court to the record in this case.

QUESTION: And the complete record has been filed with the Clerk in this case, hasn't it?

MISS CUMMINS: Yes, Your Honor.

QUESTION: Miss Cummins, may I ask: An arrest warrant issued in Arizona in this case, did it not? An arrest warrant.

MISS CUMMINS: Yes, a warrant accompanied the complaint.

QUESTION: Yes, but it was an arrest warrant?

MISS CUMMINS: Yes, it was.

QUESTION: I wondered -- My brother, Rehnquist, asked you about Strauss earlier. There is another excerpt from Strauss: "Doubtless the word 'charged' was used in its broad signification to cover any proceeding which a state might see fit to adopt, by which a formal accusation was made against an alleged criminal. In the strictest sense of the term, a party is charged when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest."

And this is true whether a final trial may or may not be had upon such charge.

Now, wasn't that test of Strauss satisfied by the papers that were filed in Michigan in this case, by Arizona?

MISS CUMMINS: Yes, Your Honor, papers were filed which charged a crime.

QUESTION: My question is: There was a charge, a sworn charge of a crime in Arizona, together with an arrest warrant that issued. Doesn't Strauss suggest that that is enough to satisfy the requirement?

MISS CUMMINS: Strauss merely -- In my interpretation, Strauss takes a liberal view of the meaning of the word

"charged," not as to the substance of the charge, but as to how advanced the charge has to be, how advanced the prosecution has to be.

QUESTION: My real question was: Wasn't everything that was submitted by Arizona to the Governor of Michigan in this case -- Did not those papers together satisfy what Strauss said would satisfy?

MISS CUMMINS: Yes, Your Honor, definitely.

QUESTION: Then why doesn't Strauss cover this -- and call for a reversal?

MISS CUMMINS: Because I think that Strauss has expanded, or at least further clarified by other holdings of this Court, extradition cases, which state upon habeas corpus review of the demanding state's charging documents, an accused may raise the question of the substantiality of the charge, and that this is a question of law and that it is limited to the face --

QUESTION: An issue that Strauss didn't deal with, that's your point, isn't it?

MISS CUMMINS: Yes.

QUESTION: That was not an issue in Strauss

MISS CUMMINS: Yes, Your Honor.

QUESTION: This warrant also recited, however, that a magistrate had found reasonable cause to believe. They didn't just recite a charge, but he affirmatively recited in

the warrant that he had found reasonable cause to believe that the accused committed the crime.

MISS CUMMINS: Yes, Your Honor, but that --

QUESTION: And you suggest that there must be some facts to support that, is that it? Not only some facts, but enough facts to satisfy the asylum state that there really is probable cause.

MISS CUMMINS: Yes, Your Honor.

QUESTION: The other document filed gives the name -- the motor number of the vehicle, describes the vehicle, the registered owner of the vehicle, and says he took it from that person on such and such a date. Wouldn't that be enough substantiation of the fact that there was probable cause, together with the conclusory statement of the magistrate that "I have found probable cause"? Why do you need more? How much more do you need?

MISS CUMMINS: Well, these details that you mention are really not facts. They are conclusions.

QUESTION: Didn't the arresting officers in Michigan verify that this was a vehicle and they arrested him because he was thought to be in possession of a stolen vehicle? Didn't they know this?

MISS CUMMINS: They knew no more than the complaint, which was eventually issued, which was stated on information and belief.

QUESTION: Are you suggesting that the charge in Michigan had no basis, the Michigan criminal charge against this man that was dismissed? Are you telling us that that had no basis in law and fact?

MISS CUMMINS: It is quite possible. The details surrounding that charge, as I mentioned, are extremely murky. The important point here is that the details surrounding the Arizona charge are also extremely murky. We have the owner's name, we have the vehicle number, we have the defendant's name, we have the names of the relevant statutes involved, we have a conclusion stated on information and belief that --

QUESTION: Didn't Justice Brewer, in Strauss, emphasize that this was not the time and place to be trying out the facts of the case and the evidence.

MISS CUMMINS: Oh, yes, Your Honor.

QUESTION: You seem to be calling for some evidence, rather than ultimate facts.

MISS CUMMINS: Mr. Chief Justice, we are not calling for evidence. The Michigan Supreme Court was careful to point out we do not suggest that we inquire into the underlying facts. What they were attempting to do was make a confirmation of probable cause, based only on the face of the documents, not inquiring into the merits of the criminal prosecution. Because, as this Court has noted, the question of probable cause is viewed as extraneous to the question of

guilt or innocence. And what the Michigan Supreme Court was compelled to find was that these papers, on their face, were factually deficient to show probable cause and, hence, could not provide a factual basis for a magistrate's independent finding of probable cause.

QUESTION: Didn't some official in the State of Michigan make a determination of facts that are essentially consistent with the determination made by the magistrate in Arizona?

MISS CUMMINS: The Governor of the State of Michigan

QUESTION: I am not speaking of the Governor, I am speaking of whatever judicial or other officer caused to be filed a charge against Doran in Michigan courts. That was for possession of the stolen car, wasn't it?

MISS CUMMINS: Yes, Mr. Chief Justice.

QUESTION: Suppose there is a deficiency, for the moment, in the conclusions that you object to. Aren't they supplied to the State of Michigan by Michigan's own action? Michigan has found that this man has a stolen car in his possession, and it happens to be the same car that Arizona said he took out of the State of Arizona.

MISS CUMMINS: Yes, Mr. Chief Justice, but the issues in a case of receiving and concealing a stolen vehicle are different from the issues involved in a charge of larceny.

And, further, as I said before, I am not willing to concede that the charge in Michigan was founded. And, even if it were, the papers that Michigan was presented with -- even if there were additional details that could have been brought to Michigan's attention, what was brought to Michigan's attention was not sufficient to permit an independent assessment of the question of probable cause by Michigan. The Michigan Supreme Court held that they have that right not to hold an evidentiary hearing in the asylum state to determine whether or not probable cause existed, but merely to confirm the question of probable cause.

QUESTION: Well, the Michigan Supreme Court really didn't hold that they had that right in the sense that Governor Milliken had that right. They said that Governor Milliken couldn't execute the extradition warrant because the Federal Constitution prohibited from doing so, until they made that determination, didn't they? This wasn't a question of Kentucky v. Dennison type thing, where Michigan voluntarily says, "We won't do it until we are satisfied."

MISS CUMMINS: No, the Michigan Supreme Court stated categorically, "This state cannot extradite unless provided with sufficient details," in a case like this to confirm a showing of probable cause.

QUESTION: And the reason was the Federal Constitution.

MISS CUMMINS: Yes.

QUESTION: Miss Cummins, I have before me the record which consists of a certification of the record, the briefs and appendixes and opinions of the Court. Now, where is the material that is going to show me what you relate?

MISS CUMMINS: Well, Mr. Justice Marshall, perhaps this confusion is resulting from my ignorance of this Court's procedural rules about whose responsibility it is to bring up the entire record. It was my -- When I received the rules from the Clerk, instructing us on how to prepare an appendix, the rules seemed to state --

QUESTION: All I am saying, Madam --

MISS CUMMINS: -- the appendix need not be complete because the Court would have the whole record before it.

QUESTION: All I am saying is that you told me it was here, a few minutes ago.

MISS CUMMINS: I assumed it was here, Your Honor.

QUESTION: Thank you.

QUESTION: Miss Cummins, I suppose it is completely irrelevant, but does the record show whether the Arizona Justice of the Peace who issued the arrest warrant was a lawyer?

MISS CUMMINS: No, Your Honor, as a matter of fact, the record does not show that. In Arizona, I believe, justices of the peace are not required to be lawyers.

QUESTION: Secondly, is there any evidence in the record that the justice of the peace had before her the

nine-page report that is referred to in the supporting affidavit of February 3?

MISS CUMMINS: There is an indication that she didn't have it before her, because that affidavit was issued February 3rd, and the warrant and complaint were issued January 7th.

QUESTION: But we don't really know that -- the totality of what was before the justice of the peace. They might have been personal statements.

MISS CUMMINS: There might have been. The Arizona procedure, as pointed out by the Attorney General, does provide for an additional investigation. As a matter of fact, it makes it the magistrate's duty when faced with a complaint based solely on information and belief, such as here. However, here there is no indication that such an additional investigation ever took place. And the facts of the complaint and warrant, and just the way that they are framed, such as the amendment of the date of the offense and the fact that the offenses are stated in the alternative, seem to indicate that Arizona did not have additional facts. But if they did have additional facts, it would have been of little imposition on them and very little imposition on the extradition process to have included those additional facts in the face of their extradition supporting documents. And that's all we are requesting here. We never suggested that

the scope of extradition habeas corpus should be expanded beyond an analysis of the face of the documents. All we are suggesting is that this is really a minimal safeguard to impose in light of the very, very serious threat to personal liberty caused by extradition.

QUESTION: I suppose you would permit the demanding state to participate in the hearing?

MISS CUMMINS: If they had expressed any interest in doing so, yes.

QUESTION: Would you permit them to present evidence of probable cause?

MISS CUMMINS: Yes, Your Honor, although we are not suggesting that habeas corpus review be expanded beyond a legal review of the sufficiency of the documents. And I think that if that were proposed that that would present a serious question of whether or not the extradition process was being encumbered and whether or not that would thwart one of the aims of the extradition clause.

QUESTION: You mean if the asylum state determined that the papers were insufficient, that it would really expedite extradition to say the demanding state couldn't even supplement the information?

MISS CUMMINS: Oh, no, Your Honor. I don't want to be interpreted as saying that. What I am suggesting here is just the minimal requirement, the bottom line, that if they

don't wish to make a factual presentation in the asylum court, and certainly they are not required to do so, that they at least provide papers showing probable cause, or at some later date provide additional facts upon which probable cause can be confirmed, and that was never done here.

QUESTION: But no matter how probable cause is determined in the demanding state or had been determined, you would say the asylum state has a constitutional obligation to review that determination?

MISS CUMMINS: Yes, Your Honor, because if confirmation of probable cause is not had in the asylum state prior to rendition, then the accused will have no Fourth Amendment remedy for extradition, once extradition takes place.

QUESTION: All Gerstein said is that there must be a probable cause determination, isn't it?

MISS CUMMINS: Yes.

QUESTION: If the demanding state says there has been, and you have no reason to doubt that that event took place, why doesn't Gerstein satisfy?

MISS CUMMINS: Because Gerstein requires probable cause determination by a neutral and detached magistrate.

QUESTION: I know, but the papers here show that there was one in the demanding state.

MISS CUMMINS: Your Honor, this Court has always held that a probable cause finding by a neutral and detached

magistrate may be subject to review to determine if there were facts before the magistrate, which really indicate that he made an independent assessment of probable cause.

QUESTION: Not in the asylum state.

MISS CUMMINS: But in the situation of a conventional arrest or conventional search warrant. And here extradition poses arguably an even more significant restraint than a mere arrest or search. And since the accused will have no Fourth Amendment remedy for extradition, once he returns, it is essential to require that the asylum state be able to act as a reviewing court and make the determination of probable cause, based on facts sufficient to show that the magistrate acted independently and was not merely rubber stamping the conclusions of the police. And if there was ever an example of rubber stamping, it exists in the Arizona documents here.

QUESTION: In Gerstein, that's exactly what was alleged had been done. The people were arrested and picked up simply on information filed by the prosecutor and they were in confinement and the court didn't question that original confinement, did it, in Gerstein? It simply said that those people were entitled to a prompt review and it was incumbent upon the prosecution to show probable cause. Isn't that right?

MISS CUMMINS: Yes.

QUESTION: Now, your person would have all these

Gerstein rights when he was returned to Arizona, wouldn't he?

MISS CUMMINS: No, Your Honor.

QUESTION: If he says he didn't have them.

MISS CUMMINS: Gerstein afforded the right to interpose a probable cause determination between arrest and the point where restraint becomes significant.

QUESTION: But that was a point after some confinement, wasn't it?

MISS CUMMINS: Yes, but in an extradition case, the restraint becomes significant when the person is extradited. And after he is extradited, he has no remedy.

QUESTION: He has all the remedies that Gerstein has in the State of Florida, and that he would have had had he not left Arizona.

MISS CUMMINS: But there are two phases to an extradition arrest. It is not merely detention, in the demanding state. It is also forced travel. Once back in Arizona --

QUESTION: Forced travel back home.

MISS CUMMINS: No, Your Honor. I believe the Attorney General conceded that Mr. Doran's home was Michigan. Even so, once back in Arizona, he would have redress, Fourth Amendment redress from extended pretrial restraint, but not from the forced travel. He would have lost his remedy for that.

QUESTION: Miss Cummins, may I correct you and I together. Starting at page 86, there is a full discussion in the Appendix of the changing of the dates. It is in the Appendix. You are right.

MISS CUMMINS: Thank you, Your Honor.

QUESTION: Could I ask you, suppose an information is filed, but the defendant isn't in custody and then the officer goes before a magistrate, an independent magistrate, and wants to get an arrest warrant. And he gets it on a determination of probable cause. Then he is arrested. Now, Gerstein doesn't require another determination of probable cause?

MISS CUMMINS: Gerstein merely --

QUESTION: Does it, or not?

MISS CUMMINS: No.

QUESTION: Well, in this case, the officer who swore out the charge also got out a warrant from a magistrate. Now, why isn't Gerstein on the face of the paper satisfied?

MISS CUMMINS: Because Gerstein required determination by a neutral and detached magistrate, not a mere --

QUESTION: How do you know this wasn't a neutral and detached magistrate? This was a justice of the peace.

MISS CUMMINS: Because there is no indication of the facts upon which the neutral and detached finding of probable cause could have been made.

QUESTION: Well, that's saying she acted wrongly, not that she was not neutral and detached.

MISS CUMMINS: Part of the neutral and detached requirement extends to whether or not the facts are sufficient to convince -- a) to support an independent finding, a detached finding; and b) to satisfy the reviewing court that such a detached finding was made.

QUESTION: In Chadwick v. City of Tampa, which Justice Powell wrote for the Court some years ago, we held that city clerks of Tampa were neutral and detached magistrates, and I don't think we felt it incumbent to review all the probable cause determinations they had made in the course of six months or a year, to decide whether they were neutral and detached. It is just a question of whether you are separate from the prosecuting arm.

MISS CUMMINS: Yes, that's one aspect of the neutral and detached requirement that was reviewed in Chadwick v. Tampa, and the question there was whether or not clerks of the court could be judicial officers. We are not even contending that the magistrate here was not a judicial officer.

QUESTION: Suppose this warrant had been signed by a judge of a court of general jurisdiction in Arizona, but it had exactly the same recitation in it, "I have determined that there is reasonable cause to believe," etcetera.

Would you say the same thing, you are entitled to go behind that determination?

MISS CUMMINS: We would make exactly the same claim we are making here, which is not to go behind a determination but merely to confirm the determination on the basis --

QUESTION: Confirm it or disagree with it, either one.

MISS CUMMINS: Or disagree.

QUESTION: So you really want two bites at the apple, both in Arizona and in Michigan.

MISS CUMMINS: Not necessarily, Your Honor, but in an extradition case, not a renewed finding, not a rehearing, but a confirmation of the existence of probable cause must be made if the accused rights are to be protected.

QUESTION: Of course, as a practical matter, this man had spent more than two years in a Michigan jail when he might have had this whole matter resolved, by simply responding to the extradition. So the hardships cut both ways, don't they?

MISS CUMMINS: He might have. He wished to avail himself of his habeas corpus remedy.

QUESTION: Which he had a right to do, of course.

MISS CUMMINS: And that was to not entail admission by him of guilt.

MR. CHIEF JUSTICE BURGER: Very well, Miss Cummins.

Do you have anything further, Mr. Derengoski?

MR. DERENGOSKI: Mr. Chief Justice, I forego the remainder of my time, but I would like to say this, sir. I bear a heavy responsibility, as the Petitioner, for the preparation of the Appendix and the amended complaint and the warrant are at 62A and 64A.

Thank you.

QUESTION: Is the entire transcript of the habeas corpus hearing in --

MR. DERENGOSKI: No, sir, it is not in here.

QUESTION: I mean, is it available any place?

MR. DERENGOSKI: Yes, sir, I believe it is.

QUESTION: Is there any way you could get it for us and file it with the Clerk?

MR. DERENGOSKI: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 1:34 o'clock, p.m., the case was submitted.)