

In the

Supreme Court of the United States

-----X
WALTER LITTLE, :
 :
 Appellant, :
 :
 v. : No. 79-6779
 :
 GLORIA STREATER, :
 :
 Appellee. :
 :
-----X

Washington, D.C.
January 13, 1981

Pages 1 through 47



1 IN THE SUPREME COURT OF THE UNITED STATES

2 ----- :
3 WALTER LITTLE, :

4 Appellant, :

5 v. :

No. 79-6779

6 GLORIA STREATER, :

7 Appellee. :

8 ----- :
9 Washington, D. C.

10 Tuesday, January 13, 1981

11 The above-entitled matter came on for oral ar-
12 gument before the Supreme Court of the United States
13 at 11:19 o'clock a.m.

14 APPEARANCES:

15 JON C. BLUE, ESQ., Legal Assistance to Prisoners, 340
16 Capitol Avenue, Hartford, Connecticut 06106; on
behalf of the Appellant.

17 STEPHEN J. McGOVERN, ESQ., Assistant Attorney General,
18 State of Connecticut, P. O. Box 120, Hartford,
Connecticut 06101; on behalf of the Appellee.

19

20

21

22

23

24

25

C O N T E N T S

ORAL ARGUMENT OF

PAGE

JON C. BLUE, ESQ.,
on behalf of the Appellant

3

STEPHEN J. McGOVERN, ESQ.,
on behalf of the Appellee

27

- - -

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments next
3 in Little v. Streater. Mr. Blue, you may proceed whenever you
4 are ready.

5 MR. BLUE: Thank you.

6 ORAL ARGUMENT OF JON C. BLUE, ESQ.,

7 ON BEHALF OF THE APPELLANT

8 MR. BLUE: Mr. Chief Justice, and may it please the
9 Court:

10 From time to time in the history of our country
11 technological innovations have played a decisive role in the
12 formation of constitutional doctrine. This is a paternity
13 case in which an indigent defendant was denied access to a
14 blood grouping test that conclusively exonerates more than 90
15 percent of all falsely accused putative fathers.

16 A Connecticut statute categorically restricts access
17 to this test to those defendants able to purchase it in ad-
18 vance of trial.

19 QUESTION: In your statement of facts -- and I was
20 troubled in reading the brief too -- I thought in a negative
21 way, if it exonerated putative fathers, it exonerated them
22 100 percent.

23 MR. BLUE: It exonerates 90 percent of innocent
24 putative fathers 100 percent of the time. In other words,
25 if you have 100 accused putative fathers, none of whom are the

1 actual fathers. The blood test, standard blood test available
2 everywhere, will conclusively show that 91 or 93, depending
3 on the race, of those men are not the father. With the other
4 seven to nine percent, the test will simply be inconclusive.

5 QUESTION: Well, I had thought that -- maybe the
6 technology has gone beyond my previous knowledge -- but I had
7 thought that if you showed that the putative, the accused
8 father had blood of a type different from the child, that
9 he could not be the father.

10 MR. BLUE: That is exactly correct.

11 QUESTION: It's just impossible for him to be the
12 father.

13 MR. BLUE: And when the blood test --

14 QUESTION: But if he had the same, it didn't prove
15 that he was or wasn't.

16 MR. BLUE: That is exactly correct. The capability
17 of medical science is simply that it will prove that exclusion
18 to approximately 91 or 93 percent.

19 QUESTION: Well, I thought it was 100 percent.

20 MR. BLUE: No, it is not. It is approximately 91 to
21 93 percent, but with those innocent defendants, there is no
22 doubt, it is 100. The proof with those defendants rises to
23 100 percent. But the others are simply inconclusive.

24 QUESTION: In any event, it's conceded, without
25 getting into the details --

1 MR. BLUE: Certainly, in fact --

2 QUESTION: That it's very probative and useful evi-
3 dence in this kind of case.

4 MR. BLUE: Oh, absolutely, and the State does not --

5 QUESTION: Not question this; right.

6 MR. BLUE: -- question this in its own brief.

7 QUESTION: Well, I suppose, not in the same sense
8 but with the same result, an alibi witness showing that the
9 gentleman was in Angola at the time as a war correspondent
10 would produce a favorable result for him, wouldn't it?

11 MR. BLUE: Not in the same way that a blood test
12 evidence produces the favorable result. Because when the
13 blood test evidence --

14 QUESTION: I'm talking about the consequence in
15 terms of the judgment or verdict, as the case may be.

16 MR. BLUE: No, because blood test evidence of exclu-
17 sion is tantamount to automatic acquittal of the defendant in
18 practice. It does not turn on credibility. An alibi wit-
19 ness, to use the example you chose, is only exculpatory if
20 that alibi evidence is believed. The two are not comparable
21 in fact.

22 QUESTION: Is the tryer, or the tryers, if it's a
23 jury, compelled to believe any expert testimony? This is in
24 the category of expert testimony, I take it. Are they com-
25 pelled to believe it?

1 MR. BLUE: Mr. Chief Justice, there is no Connecticut
2 state law on the subject, although the statute we are appeal-
3 ing from speaks in terms of definite exclusion. I can repre-
4 sent to you that there is simply no one case in the history of
5 Connecticut, so far as I know, in which a defendant has been
6 found guilty in the face of exculpatory blood test evidence,
7 and does in fact have this practical --

8 QUESTION: And you can't cross-examine a blood test.

9 MR. BLUE: Well, that's correct; that's correct.
10 And it's quite a different proposition than an alibi witness
11 which raises problems of credibility in virtually any case.

12 QUESTION: You can cross-examine the people who
13 make the test, can't you, and isn't there often cross-examina-
14 tion of experts who make tests?

15 MR. BLUE: Well, that is correct, because this is
16 quite a different type of evidence than ordinary expert wit-
17 ness testimony that we're inclined to think of in, for example,
18 criminal cases; in, for example, a criminal case where you
19 have psychiatric testimony indicating that the defendant is
20 or is not sane. You will have a situation in which different
21 experts might hold honestly, might honestly hold different
22 beliefs and have different observations of the same phenomena.
23 This is not the case with blood test evidence where there is a
24 showing of exclusion; there will be no doubt as to the fact
25 that the man is in fact excluded, and you simply do not have

1 the type of disagreement between expert witnesses that you
2 would, for example, in a criminal case involving psychiatric
3 testimony. It is really quite a distinct type of evidence
4 even in the universe of expert testimony.

5 QUESTION: In a marijuana case or a drug possession
6 case, for example, a typical type of evidence put on is to
7 show that the packet possessed by the defendant was the same
8 one submitted to the laboratory and is now in court. And
9 certainly the defense lawyer is permitted to cross-examine as
10 to the passage of control from one person to another in that
11 chain. I would think, in laboratory examinations, that defense
12 counsel is certainly permitted in most states, at any rate,
13 to cross-examine as to, was this blood testimony, or was
14 this blood sample the one actually taken? Was there a mixup
15 in the laboratory? And that type of thing.

16 MR. BLUE: That's correct, Justice Rehnquist. It
17 would depend on the particular state procedure. But --

18 QUESTION: But that's not attacking the evidence.
19 The evidence is --

20 MR. BLUE: That's not attacking the evidence itself.
21 It's a very tangible type of thing.

22 QUESTION: And it's never been disputed; it's never
23 been disputed.

24 MR. BLUE: That's correct. It would be a very rare
25 case where you would have actual --

1 QUESTION: I didn't say how you could get a witness
2 to say that a blood test isn't accurate.

3 MR. BLUE: That's right. It would virtually never
4 happen. I mean -- theoretically, some state laws might per-
5 mit cross-examination as to whether blood samples have been
6 switched, but in practice, the practical effect of that type
7 of allowance is de minimis because in the overwhelming number
8 of cases I think that even my opponent would concede that
9 blood test evidence does have an indisputable quality to it
10 when it yields an indication of exoneration. And it does have
11 a sweeping capability to exonerate that is simply not shared
12 by other evidence, be it testimonial evidence or for that
13 matter other scientific evidence in the ordinary cases that
14 one might think of.

15 Now, it's our position that these distinctions which
16 I have drawn make the constitutional difference, and the dif-
17 ference goes to both the truth-seeking function of the Court,
18 or of the factfinder, whichever that may be, and also because
19 the inevitable result of the distinction or the discrimination
20 that Connecticut has chosen to draw is a dual system of justice.

21 I recall, in the case of *United States v. Raddatz*
22 last term, Justice Blackmun in his concurring opinion pointed
23 out that the focus of the Due Process Clause is a practical
24 concern for accurate results, and surely few cases can be
25 imagined in which that practical concern has a greater impact

1 than in this case. This Court has particularly been concerned
2 with accuracy in the past years in Fourth Amendment cases
3 involving the exclusionary rule of the Fourth Amendment.

4 QUESTION: And is the cost of a blood test sampling
5 taxable as costs in a paternity proceeding in which the
6 defendant is acquitted?

7 MR. BLUE: In some states it's discretionary though
8 I believe I mentioned that in a footnote in my brief.
9 In Connecticut there is no reason as to why it might not be,
10 and I would simply point out in that regard that we are not
11 asking for a gratuitous subsidy. But the State could, to
12 minimize its own expenditure of costs, simply require that when
13 the blood test fails, is taken and fails to exonerate the
14 defendant, that the cost will be taxed as cost. I believe
15 that that is done specifically by statute in Kansas and
16 Wisconsin, at least.

17 QUESTION: And what is the practice in Connecticut?

18 MR. BLUE: I'm not prepared to say. I simply don't
19 know. I wanted to point out, on the fact of the impact of
20 the accuracy of the test under the Due Process Clause, not
21 only do we have Justice Blackmun's statement about --

22 QUESTION: Before you get to that, may I just ask
23 this? Have you cited any case that suggests that if properly
24 done, and the result is negative, that's the end of the case,
25 civil or criminal?

1 MR. BLUE: The Court -- I have cited a source for
2 that proposition. The Court might refer to the Schatkin
3 treatise which I cite on page 11 of my brief, which has pages
4 and pages and pages of footnotes supporting the proposition
5 cited in my brief that in the overwhelming weight of contempo-
6 rary authority, is to treat blood grouping tests as decisive
7 and conclusive --

8 QUESTION: When they're negative.

9 MR. BLUE: -- when they are negative. Because there
10 is no doubt --

11 QUESTION: Well, not even -- and you cite --
12 it's amazing; it's 31 years ago -- an opinion of mine of 31
13 years ago in New Jersey. Did that hold that --

14 MR. BLUE: I think you're thinking of Ross v.
15 Marks --

16 QUESTION: For tetanus.

17 QUESTION: I don't even recall that.

18 MR. BLUE: I would point out that there is an his-
19 torical distinction that can be made here.

20 QUESTION: Well, if this opinion, which I wrote
21 when I was on the Appellate Division in New Jersey --

22 MR. BLUE: In the Cortese case?

23 QUESTION: Yes; in 1950. Didn't that hold -- or
24 did it? -- I don't recall, it's so long ago, that if negative
25 that was decisive?

1 MR. BLUE: Yes.

2 QUESTION: It did hold that?

3 MR. BLUE: Yes.

4 QUESTION: And that the case ended there?

5 MR. BLUE: That's correct.

6 QUESTION: Either civil or criminal?

7 MR. BLUE: That's correct. In the very early years,
8 in the late '30s, early '40s, when blood tests were new and
9 people didn't really appreciate them, perhaps the tests
10 were of a somewhat cruder quality, or there was some authority
11 to the contrary; there was virtually no authority to the con-
12 trary in the last 20 or 30 years. The tests are conclusive.

13 I would point out that --

14 QUESTION: Mr. Blue, before you leave that --

15 MR. BLUE: Certainly?

16 QUESTION: Can you draw the line as to what the State
17 wouldn't be required to pay for?

18 MR. BLUE: I think that there are two --

19 QUESTION: I mean, could you say that if there is an
20 expert in the field of something who is in South Africa, that
21 the State would be obliged to bring him there?

22 MR. BLUE: No.

23 QUESTION: And the difference is?

24 MR. BLUE: The difference is two-fold. In the first
25 place, an ordinary expert witness testimony will turn, as other

1 testimony on matters of credibility, can be disputed. More-
2 over, with exotic testimony, it will require a great deal of
3 money to obtain. You are out of the situation we have here
4 where the test is readily available, and not only will you --

5 QUESTION: Well, suppose the expert could be obtained
6 for \$289. Would you have to get him? You're not going to
7 put it on money, are you?

8 MR. BLUE: Well, I would draw a distinction between
9 the type of evidence which is ordinarily obtainable by the
10 typical nonindigent defendant and the type of evidence which
11 would only be available to more wealthy people which would
12 create a somewhat different equal protection argument.
13 With the type of expert -- of course you haven't elaborated what
14 type of expert in South Africa you're referring to, if the
15 expert was an expert comparable to blood test evidence in the
16 sense that he was overwhelmingly likely to conclusively show,
17 conclusively show that the defendant was innocent if he was in
18 fact innocent, then that would present a case, obviously, very
19 similar to the case we have before us, but expert --

20 QUESTION: Expert testimony is by its nature and by
21 definition opinion testimony.

22 MR. BLUE: That is correct for the typical expert
23 testimony.

24 QUESTION: And we're not dealing here with opinion
25 testimony, are we?

1 MR. BLUE: But this is not expert opinion testimony.

2 QUESTION: No. We're dealing here with factual --

3 MR. BLUE: That's correct. This is a factual --

4 QUESTION: Only facts.

5 MR. BLUE: That's absolutely correct, and that's the
6 distinction that I'm trying to draw between the expert that
7 one might -- I'm sorry, Justice Stevens?

8 QUESTION: Isn't there another answer? If the wit-
9 ness is within the jurisdiction and subject to process, if
10 he's a \$289 expert, the defendant has a right to subpoena him,
11 doesn't he?

12 MR. BLUE: That's correct.

13 QUESTION: So he has an absolute right, even though
14 it costs a little money.

15 QUESTION: Well, who pays his fee? In these cases,
16 surely, how the test was done by the laboratory that did it
17 and by whom it was done, which has to be an expert in this
18 field, that's always open to inquiry.

19 MR. BLUE: That's correct.

20 QUESTION: Who pays the expense, even if he may be
21 subpoenaed, of the expert witness who testifies in that
22 respect? Who pays that?

23 MR. BLUE: The question rarely arises because when
24 there is a medical showing of exclusion, typically the defen-
25 dant will typically withdraw the case, or it would often be a

1 motion for summary judgment that will be granted --

2 QUESTION: Well, I know, but if you had a --

3 MR. BLUE: If the State insists that it cross-
4 examines the expert witness in a case like this where there is
5 a showing of exclusion, I would argue to the right, I'm argu-
6 ing, the right I'm arguing for would be meaningless if the re-
7 sources were not provided to bring this expert witness to court,
8 if it was the State was choosing to dispute it in the first
9 place. I would just point out --

10 QUESTION: You say the State would have to pay the
11 expense?

12 MR. BLUE: If the State chose to dispute that type
13 of evidence.

14 QUESTION: You would want to offer the result of a
15 blood test?

16 MR. BLUE: That's correct.

17 QUESTION: Or you would want to have one made?

18 MR. BLUE: That's correct.

19 QUESTION: And the State would say, well, we're not
20 so sure that laboratory does these things in the way they
21 ought to be done, and if you're going to do that, you'd better
22 be prepared to put on expert testimony to support the validity
23 of the test and the method by which it was taken. And then
24 the expert at the laboratory says, all right, for \$250 I'll
25 appear in the courtroom. Otherwise I won't. You can't compel

1 him if you don't pay him, can you?

2 MR. BLUE: No, I would think not. I would certainly
3 have no problem in that instance, which I emphasize is
4 atypical in practice, in fact, very atypical. But if it's the
5 State that's bringing it, and I'm only concerning myself with
6 actions brought by the State in the first place, that then the
7 State should have to come up with the money.

8 QUESTION: Yes, but doesn't your argument really
9 carry over to the other situation?

10 MR. BLUE: What do you mean by the other situation,
11 Justice Blackmun?

12 QUESTION: Well, take a purely private paternity
13 action, and if the blood test is so crucial and so conclusive,
14 on your theory if the putative father is indigent, shouldn't
15 the State pay for that also?

16 MR. BLUE: In due process terms I think it makes a
17 great deal of difference whether the plaintiff, the actual
18 plaintiff is the State or a purely private person. Because
19 I think that the Fourteenth Amendment, as Justice Rehnquist
20 pointed out in Jackson v. Metropolitan Edison Company, draws
21 a sharp distinction between deprivations by the State and
22 deprivations by private people, no matter how wrongful,
23 against which the Fourteenth Amendment offers no appeal.
24 In terms of equal protection, it may well not be evident who
25 is the plaintiff. The same disparity of treatment would exist

1 between indigent defendants and nonindigent defendants. But
2 the State is the plaintiff in this case and the only line
3 that I am urging the Court to draw certainly in terms of due
4 process is a line that involves the fact that the real force,
5 the real moving party in interest here was the State of
6 Connecticut.

7 QUESTION: Well, you're taking the Boddie approach,
8 Boddie v. Connecticut. That's what you really rely on.

9 MR. BLUE: That is in large part correct, because
10 the fact of the matter is that like the would-be plaintiffs
11 in Boddie, who were would-be plaintiffs, there is no alterna-
12 tive to the judicial process for the defendant in this case.
13 And I suppose, unlike Boddie, he may not be -- Mr. Little may
14 not be analogized to a defendant, he is a defendant, and
15 there's no question that he should be entitled to the appro-
16 priate level of judicial scrutiny that typically --

17 QUESTION: Well, my inquiry is really whether if we
18 go along with you here we're not on a slippery slope, wonder-
19 ing where we stop.

20 MR. BLUE: Well, I'm trying to draw -- I understand
21 your -- I appreciate --

22 QUESTION: We got on it in Boddie, didn't we?

23 MR. BLUE: Well, you quickly got off in Kras and
24 Ortwein.

25 QUESTION: Yes, indeed.

1 MR. BLUE: But the way you got off, and the distinc-
2 tion that you drew to get off, was the distinction between
3 voluntary and involuntary litigants. The Court emphasized in
4 Kras and reemphasized in Ortwein that the would-be plaintiffs in
5 those cases had alternatives to the judicial process, alterna-
6 tives which the defendant here in this case simply doesn't
7 have.

8 QUESTION: But in Cuyler v. Sullivan, last year,
9 in which this Court held that the standard for performance of
10 counsel retained was the same as the counsel appointed, be-
11 cause the resulting judgment was the judgment of a state court
12 imposing a certain penalty on a person, and therefore it was
13 state action.

14 MR. BLUE: Like in Shelley v. Kramer?

15 QUESTION: Yes. Well, wouldn't that apply here too,
16 whether it's a private plaintiff or the State is a plaintiff?
17 The resulting judgment is the judgment of a state court saying
18 that Defendant D is the father of the plaintiff?

19 MR. BLUE: Mr. Justice Rehnquist, that is a legiti-
20 mate argument, and the Court might well rightfully hold that
21 the same result should pertain to all defendants, whether or
22 not they're prosecuted by the State. But I want to point out
23 that the fact remains that the real plaintiff here, throwing
24 all its power and resources at the indigent defendant, was the
25 State. And in terms of traditional due process analysis, that

1 makes a great deal of difference.

2 QUESTION: Well, didn't the State also require this
3 suit?

4 MR. BLUE: Oh, it's absolutely mandated by state law
5 which is, in turn, mandated by federal law, although the state
6 law --

7 QUESTION: Because the mother, to get benefits, must
8 reveal --

9 MR. BLUE: That's correct.

10 QUESTION: -- the putative father and bring action.

11 MR. BLUE: That's absolutely correct.

12 QUESTION: Well, she doesn't bring it. The Depart-
13 ment of Social Services brings it.

14 MR. BLUE: That's right. She --

15 QUESTION: That's really the State of Connecticut.

16 MR. BLUE: That's right.

17 QUESTION: And this case wasn't -- the State suffered
18 some expenses which were then taxed as costs, were they not,
19 against the appellant?

20 MR. BLUE: In this case, yes. I think it's on pages
21 20 and 21 of the Joint Appendix.

22 QUESTION: You've made an extensive survey of these
23 cases, I note in your brief. Maybe you know the answer to
24 this. Suppose there's a judgment against the putative father
25 in a case like this and there has been no blood test.

1 And he's determined to be the father. And he can't afford a
2 blood test or for some -- later he has a blood test and it's
3 proved that he isn't. Can the case be reopened or does res
4 judicata bar it?

5 MR. BLUE: That's a question I would like for you,
6 very much to see you ask my colleague, Mr. McGovern. Under
7 Connecticut state law, as I have pondered the question, I be-
8 lieve that the judgment is clearly res judicata. It would
9 ease --

10 QUESTION: Well, there are limits to res
11 judicata, when there hasn't been a fair trial or something.

12 MR. BLUE: Oh, absolutely. The question has not
13 been litigated in Connecticut to the best, as best I have
14 researched it.

15 QUESTION: Well, how about around the country, or do
16 you know?

17 MR. BLUE: I don't know, and I'm not sure that the
18 question has even come up. Let me explain the practical rea-
19 son why the question probably has never come up.

20 QUESTION: I should think it would.

21 MR. BLUE: The problem is that it's not just the
22 matter of a man who has suddenly won the lottery after years
23 of indigency walking into a hospital and asking for a blood
24 test to be taken. The blood test must be taken from the child,
25 the mother, and the putative father, and in order to

1 practically arrange for that type of a blood test to be taken
2 you need a court order. And in the absence of an existing
3 open case, that type of court order is virtually impossible
4 to get. I don't know of a single case in which, at any level,
5 at which that question you raise has been decided and I sus-
6 pect that the reason is the very practical reason that I've
7 discussed, which simply points out the fact that because of
8 the fortuity that the defendant is indigent at the time the
9 case is brought, and if he is indeed found guilty without the
10 absence of blood test evidence he, so far as I can determine,
11 will never in practical or legal terms be able to reopen that
12 case. And any money that he gets subsequently that might be
13 used to pay for a blood test will in fact only be usable to
14 pay for the judgment deficiency against him.

15 QUESTION: In this case, in Connecticut, is it a
16 jury case or a court case?

17 MR. BLUE: A Connecticut statute now requires, I
18 believe, a \$60 fee for a jury. My client did not have the
19 money to pay for that jury. The case ultimately went to a
20 court trial with a trial judge.

21 QUESTION: Throughout the country, in your survey,
22 is there any preponderance of evidence, or preponderance of
23 practice as to whether these cases are tried by juries or by
24 judges?

25 MR. BLUE: It's my strong impression,

1 Justice Rehnquist, that in virtually all states the issue is
2 at least triable before a jury.

3 QUESTION: Counsel, we've taken, or you have taken
4 with us two-thirds of your time on this scientific-medical,
5 I'll just ask you one short question. Are you familiar with
6 the numerous cases of malpractice brought against laboratories
7 that do blood testing for making errors in the blood tests
8 which cause damage to the people involved because the doctors
9 relied on the tests? Are you familiar with the fact that
10 that's happened?

11 MR. BLUE: Mr. Chief Justice, perhaps through my own
12 lack of knowledge I'm not familiar with those cases in the
13 particular context of blood grouping tests in paternity cases.
14 I mean, there are a variety of blood tests. For instance,
15 tests for venereal disease --

16 QUESTION: Would you use a blood --

17 MR. BLUE: -- which might in fact be quite different.

18 QUESTION: You use it for other purposes than
19 paternity cases, do you not?

20 MR. BLUE: Yes. Different types of tests. I mean,
21 the fact of the matter is that blood test is a generic term.
22 What we are talking about here is a blood grouping test.

23 MR. BLUE: But you use blood grouping tests for
24 other purposes than paternity cases, do you not?

25 MR. BLUE: Possibly. I --

1 QUESTION: If you give the wrong blood to a person
2 in a transfusion, you're in a very serious business. That's
3 where some of these malpractice suits have developed.

4 MR. BLUE: Okay. Well, my only -- I'm not familiar
5 with that phenomenon, although I'm not disputing that the
6 phenomenon may exist. My point, Mr. Chief Justice, is not --
7 is simply the fact that blood grouping tests in the context
8 of ongoing paternity cases are treated as controlling and
9 decisive. And this fact, this indisputable fact -- I don't
10 think that the Attorney General even disputes it -- necessa-
11 rily results in, when you have a distinction like the
12 Connecticut Legislature has drawn in this case, of a gross
13 disparity between the indigent and the nonindigent inasfar as
14 the quality of justice administered or received by these
15 litigants, not just wealthy litigants, but nonindigent
16 litigants receive if they are innocent, are overwhelmingly
17 likely to receive swift, scientific, certain exoneration,
18 whereas all indigent defendants regardless of their actual
19 guilt or innocence are thrust into swearing contests in
20 which the tryer of fact will often desperately try to arrive
21 at the correct result.

22 QUESTION: This isn't a matter of guilt or inno-
23 cence, is it? Hasn't Connecticut said these are civil pro-
24 ceedings?

25 MR. BLUE: Connecticut labels them as civil but --

1 QUESTION: Well, guilt or innocence has to do only
2 with criminal proceedings.

3 MR. BLUE: In Connecticut, if you research Connecti-
4 cut law, the findings in paternity cases are specifically re-
5 ferred to as guilty or not guilty. In fact -- this was not
6 a jury case, but in a paternity jury case, the jury will be
7 instructed by the tryer of fact, by the court, to deliver a
8 finding of guilty or not guilty.

9 QUESTION: Mr. Blue, I reckon I've interrupted you.
10 Earlier I asked you a question which you accepted the premise
11 of, that the difference between this sort of evidence and
12 ordinary expert testimony is that the latter is invariably
13 opinion testimony. But the more I think about it the less
14 clear a line that is, when one begins to think about hand-
15 writing experts and ballistics experts. There can be a dif-
16 ference of opinion as to facts, can't there?

17 MR. BLUE: I would still draw a distinction between
18 this type of evidence which is --

19 QUESTION: Is it more like fingerprinting?

20 MR. BLUE: -- in practice is universally exculpa-
21 tory, and the type of ballistics evidence which is typically
22 just an indication of guilt or innocence rather than -- a
23 ballistic showing will rarely in and of itself show --

24 QUESTION: Well, maybe -- what you try to show is
25 that this is or is not this person's handwriting, and that

1 this bullet was or was not fired by this gun, or that these
2 are or are not somebody's fingerprints.

3 MR. BLUE: I'm not an expert in handwriting or
4 ballistics --

5 QUESTION: My only thought is that the distinction
6 upon which we agreed a while ago may be a blurred distinction.

7 MR. BLUE: Well, I would argue with that. I think
8 that in practice it is simply not --

9 QUESTION: I take it you say that every doctor or
10 technician who, looking at the same evidence, the same compari-
11 son, would come to the same result?

12 MR. BLUE: Where there is a showing of exclusion
13 that is in fact the case. There is no --

14 QUESTION: Well, if they would all agree that --

15 MR. BLUE: Yes, sure. It's unlike psychiatric tes-
16 timony.

17 QUESTION: All agree that this blood is or isn't the
18 same as the other blood? Everybody should agree.

19 MR. BLUE: That's right, that's right. It is not
20 like the example I used of psychiatric testimony in a criminal
21 proceeding where you will have expert witnesses on either side
22 testifying the opposite thing. That is --

23 QUESTION: Has that ever happened in any of these
24 cases you've ever seen where some incompetent person does the
25 reading of the test? And has there ever been a dispute in one

1 of these cases as to whether or not the blood is or isn't the
2 same?

3 MR. BLUE: I know of no -- I mean, obviously, the
4 example you give is a conceivable example. I simply know
5 of no such case and the courts --

6 QUESTION: Well, it's not even conceivable, is it,
7 because you just take another test if you had doubt about
8 whether you got the right one.

9 MR. BLUE: Well, that's exactly it. And the
10 important thing that I want to leave this Court with, now
11 that my time is about to expire, is that the fact that these
12 tests are universally given decisive and controlling importance
13 is the fact that creates the disparity between the nonindigent
14 and the indigent that's at issue in this case.

15 I'll reserve whatever time I have left for rebuttal.

16 QUESTION: May I ask you a question, Mr. Blue, before
17 you sit down? When you come back with your reply, if you
18 could state a limiting principle, in light of all the questions
19 that have been asked you, it would be very helpful to me.

20 MR. BLUE: With the Chief Justice's permission I'll
21 do that now, since my time has just expired.

22 QUESTION: How do you avoid the slippery slope type
23 questions that have been asked here in some abundance, as a
24 general principle the courts can apply?

25 MR. BLUE: That's right. The distinctions I would

1 draw are, one, the role of the State in this case, which I
2 think is a legitimate distinction this Court can draw. And,
3 two, the nature of the evidence which, unlike other evidence
4 either expert or other testimonial evidence, is when it yields
5 a finding of exoneration will conclusively and beyond dispute
6 show that in fact the defendant is not the father of the child
7 in question. It is that type of conclusive aspect to the
8 evidence in question that I think is a legitimate distinguish-
9 ing principle that this Court can avoid the slippery slope
10 which I know that it obviously will have in mind. But I think
11 that the Court by crafting its opinion in that way can avoid
12 the implications that the court did, you are concerned with,
13 Justice Powell.

14 QUESTION: Well, have efforts been made and rejected
15 in the great State of Connecticut to have public financing of
16 tests like this, or to receive financing for tests like
17 these from some private sources?

18 MR. BLUE: I simply don't know --

19 QUESTION: After all, there are only two states,
20 apparently, that --

21 MR. BLUE: Connecticut and North Carolina.

22 QUESTION: -- that don't have some way of paying
23 the cost.

24 MR. BLUE: As the amicus brief points out, even to
25 Connecticut, under federal regulations, the Federal Government

1 would reimburse 75 percent of the cost, but the State would
2 have to pay for it first.

3 QUESTION: Well, have there been proposals in the
4 State Legislature that have been rejected or not? Or do you
5 know?

6 MR. BLUE: If there have been those proposals,
7 and there doubtless have, at some point, they simply haven't
8 gotten very far. Thank you.

9 MR. CHIEF JUSTICE BURGER: Mr. McGovern.

10 ORAL ARGUMENT OF STEPHEN J. MCGOVERN, ESQ.,

11 ON BEHALF OF THE APPELLEE

12 MR. MCGOVERN: Mr. Chief Justice, and if it may
13 please the Court:

14 My name is Stephen J. McGovern. I'm Assistant
15 Attorney General in the State of Connecticut.

16 I think it should be pointed out in this case that
17 paternity actions in the State of Connecticut are civil liti-
18 gations. Mr. Blue's brief tries to --

19 QUESTION: Well, that's what you call them, but are
20 they really civil?

21 MR. MCGOVERN: Yes, Your Honor. I'd like to explain
22 that in the State of Connecticut a paternity action is insti-
23 tuted by a verified petitioner with a summons and an order to
24 appear at a date certain for trial.

25 QUESTION: Let me ask this. There is a judgment

1 here and support money has to be paid. Supposing he doesn't
2 pay it. Can he be incarcerated for nonpayment? Is that a
3 criminal act?

4 MR. McGOVERN: No, it isn't, Your Honor. There is a
5 state statute which provides for nonsupport. That is a crimi-
6 nal statute. However, stemming from the paternity judgment,
7 in the paternity section of our statutes there is a provision
8 for contempt citations. They are civil contempts. They're
9 remedial in nature and they're not punitive. The goal of these
10 contempts is to secure the money that is not paid. To have
11 the defendant in a paternity case be found to be in contempt
12 of court for nonpayment of support, there must be a showing
13 that he willfully failed to meet the support order. He either
14 refused or neglected to pay it. The fact the defendant is
15 indigent would certainly not be the basis for his incarcera-
16 tion as being in contempt.

17 The paternity action is brought by a regular civil
18 complaint for a date certain. As in other states -- some
19 states provide that a defendant would be arrested and have to
20 post bail. That is not the case in Connecticut. A civil
21 trial is held, there is an adjudication, possibly, of paternity.
22 That adjudication certainly doesn't subject the defendant to
23 incarceration.

24 QUESTION: Did you say that he is "guilty"?

25 MR. McGOVERN: The only aspect --

1 QUESTION: Is that right?

2 MR. McGOVERN: That is correct, Your Honor. And I
3 would say, that is the only aspect of the proceedings which
4 may make it appear to be criminal in nature. In every other
5 aspect it is civil in nature. The contempt proceeding which
6 I've alluded to is an independent action brought under another
7 statute. It does not stem from a paternity judgment itself.

8 QUESTION: Mr. McGovern, do you understand the gist
9 of your opponent's complaint in this case to be the failure of
10 the State of Connecticut to allow blood grouping tests to be
11 taxed against a state or against the private plaintiff, if it
12 were to go that far, if the blood grouping tests prove to the
13 satisfaction of the tryer of fact that the defendant is not
14 the father, or the failure to advance the money necessary to
15 get the blood grouping test?

16 MR. McGOVERN: There is no provision in the statute,
17 Your Honor, for the taxing of cost. The paternity statute
18 itself, under which judgment is entered, provides that the
19 cost of support and maintenance of the minor child, attorneys'
20 fees, sheriff's fees, may be taxed as cost. There is no pro-
21 vision under the statute that the cost of the blood grouping
22 test be paid and I have never seen a case in which a defendant
23 prevailed in the State of Connecticut in which costs were
24 taxed against the State.

25 QUESTION: Well, if you did, if you put the costs of

1 this blood test in the costs, he would have to pay it, wouldn't
2 he?

3 MR. McGOVERN: Yes, Your Honor.

4 QUESTION: Why didn't you do that? Why couldn't
5 the State do that? All the other courts do it.

6 MR. McGOVERN: I think this is --

7 QUESTION: Doesn't the state do it in all the other
8 courts?

9 MR. McGOVERN: State pays for the attorney, Your
10 Honor --

11 QUESTION: And the court, the judge, and everything,
12 didn't they? They paid for all the costs but this.

13 MR. McGOVERN: That's correct, Your Honor.

14 QUESTION: Do they pay --

15 MR. McGOVERN: That's just one piece of evidence.
16 Your Honor.

17 QUESTION: Do they pay for the lawyer for the defen-
18 dant? Say an indigent defendant is sued, does the --

19 MR. McGOVERN: The State does not pay for the
20 lawyer. It would appear in this case that Mr. Blue is from
21 Legal Aid for Prisoners. I believe the State funds that or-
22 ganization so in effect the State is --

23 QUESTION: Well, it's the essay -- the State
24 is paying the lawyer in this case, for the defendant?

25 MR. McGOVERN: Yes, it is.

1 QUESTION: And in any other case, if it goes to con-
2 tempt proceedings, would the State insure that the defendant
3 in that contempt proceedings which you say is a separate
4 matter has a lawyer?

5 MR. McGOVERN: I would say, Your Honor, if he was
6 incarcerated, as is the case here, yes. If he wasn't incar-
7 cerated, he would be directed by the court to go to a legal
8 assistance. I have not seen a case where the court will
9 appoint an attorney to represent somebody in a contempt
10 hearing.

11 QUESTION: General McGovern, do you know, in a case
12 that does not involve a nonindigent, say, a defendant had a
13 blood test made and he paid for it, could he recover the
14 cost of the blood test from the plaintiff in his cost-taxing
15 costs of litigation?

16 MR. McGOVERN: I believe it might be possible that
17 he could. I do not know.

18 QUESTION: Well, let me ask you another question
19 about costs that Justice Marshall's question prompted. Under
20 your practice, if the defendant is in jail and has no money
21 and has ten alibi witnesses that he wants to subpoena to prove
22 he was in Angola or someplace at the time of the alleged
23 incident, does he have compulsory process available to sub-
24 poena the witnesses?

25 MR. McGOVERN: I don't believe he does, Your Honor,

1 no.

2 QUESTION: So, any witnesses who would testify on
3 his behalf would be just volunteers?

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

5 QUESTION: May I ask this question also? If the
6 defendant in this case had lived a couple of hundred miles
7 away and is not in prison, would the State pay his expenses
8 to come to the trial?

9 MR. McGOVERN: The State in that situation, Your
10 Honor -- the case would have been referred to another State
11 agency to bring a reciprocal support action, reciprocal pa-
12 ternity action, and the paternity action would most likely
13 have to be brought in that state. In the compact among
14 states --

15 QUESTION: I'm not talking about a different state.
16 Connecticut is --

17 MR. McGOVERN: I know, within Connecticut itself --

18 QUESTION: You can't be 200 miles away in Connecticut
19 and not be in a different state.

20 MR. McGOVERN: Pardon me, Your Honor.

21 QUESTION: In Virginia you can be 400 miles away.

22 MR. McGOVERN: If the defendant resides in Connecti-
23 cut, yes.

24 QUESTION: You would pay his expenses? Suppose he
25 said, I'm dead broke, I can't come to Hartford or wherever

1 you're going to try me.

2 MR. McGOVERN: No, no, the State would not pay his
3 expenses. No.

4 QUESTION: What would you do? Just default, eh?
5 Default judgment?

6 MR. McGOVERN: No, default without -- he has a right
7 to counsel.

8 QUESTION: He wouldn't be there to testify.

9 MR. McGOVERN: He's served by a sheriff for him to
10 appear at a date certain under cited court order. Correct, if
11 he doesn't appear, yes, a default would enter. That's cor-
12 rect. In a paternity litigation, if a defendant does not
13 appear for trial, a default will enter against him.

14 QUESTION: That would happen --

15 MR. McGOVERN: But first he has four months to
16 reopen the judgment.

17 QUESTION: So if the proceeding were brought in New
18 Haven and he lived in Hartford --

19 MR. McGOVERN: Yes, Your Honor.

20 QUESTION: Service would be made in Hartford by the
21 sheriff of the county in which Hartford is located, is that it?

22 MR. McGOVERN: Yes, Your Honor.

23 QUESTION: And then this would call upon him to
24 respond in New Haven, appear?

25 MR. McGOVERN: That's correct, Your Honor.

1 QUESTION: And the State would not pay his, what-
2 ever the cost would be from Hartford to New Haven?

3 MR. McGOVERN: His transportation fees? No.

4 QUESTION: In this respect, it would be no different
5 from a traffic violation or a negligence case or any other
6 case, would it?

7 MR. McGOVERN: Exactly. This is a civil litigation.
8 If the State was bringing an action, some other civil action,
9 for reimbursement --

10 QUESTION: Well, it isn't exactly like civil litiga-
11 tion in a sense because the State requires that this action
12 be brought.

13 QUESTION: What other civil action does the State
14 pay for the lawyer to prosecute the action for a private in-
15 dividual?

16 MR. McGOVERN: I don't believe there's any other,
17 Your Honor.

18 QUESTION: Just this one?

19 MR. McGOVERN: Yes, Your Honor.

20 QUESTION: But it's still civil?

21 MR. McGOVERN: Yes, Your Honor.

22 MR. CHIEF JUSTICE BURGER: We resume there at
23 1 o'clock, counsel.

24 MR. McGOVERN: Thank you.

25 (Recess)

1 MR. CHIEF JUSTICE BURGER: Mr. McGovern, you may
2 continue.

3 MR. McGOVERN: Mr. Chief Justice, and may it please
4 the Court:

5 Due process requires that the defendant be given an
6 opportunity to be heard in a meaningful manner at a meaningful
7 time. It is the State's position that even without a blood
8 grouping test he has an opportunity to be heard in a meaning-
9 ful way. Defendant in this action, the appellant here, has
10 legal counsel at no cost. He has the ability to cross-examine
11 the plaintiff in the action. He has the ability to take the
12 witness stand on his own behalf, he has the ability to call
13 witnesses, he has the ability to use all the discovery tech-
14 niques available within our civil rules.

15 QUESTION: Under Connecticut law, don't I remember
16 from the briefs that the defendant in an action such as this
17 has something pretty close to the burden of proof?

18 MR. McGOVERN: That is true, Your Honor. There is
19 a burden of proof on the --

20 QUESTION: So it's not just his burden to disprove
21 the State's case, which would be what cross-examination might
22 do?

23 MR. McGOVERN: Yes, Your Honor.

24 QUESTION: He has the affirmative burden of proof.

25 MR. McGOVERN: The plaintiff has the burden of proof.

1 She must remain constant in her accusation. And that constan-
2 cy can be attacked under cross-examination.

3 QUESTION: But doesn't the defendant have some sort
4 of an unusual burden in a case like this under Connecticut
5 law?

6 MR. McGOVERN: Under Connecticut law, if the plain-
7 tiff does remain constant in her accusation, and by prepon-
8 derance of the evidence, the court may find the defendant to
9 be the father of the child.

10 QUESTION: I read these briefs some time ago --

11 QUESTION: Doesn't he have to do something other
12 than his own testimony? Doesn't Connecticut require him to
13 do more than just testify himself?

14 MR. McGOVERN: If the plaintiff remains constant in
15 her accusation, yes, Your Honor.

16 QUESTION: So he does have a burden in doing more
17 than the direct testimony.

18 MR. McGOVERN: He does have the burden of --

19 QUESTION: Well, what if all the evidence in the case
20 -- what if the judge thinks that all the evidence in the case
21 including his testimony and any other evidence is an equipoise?

22 MR. McGOVERN: I'm sorry, Your Honor?

23 QUESTION: Well, what if it's just evenly balanced,
24 does he have the burden, ultimate burden to convince the
25 judge by a preponderance of the evidence?

1 MR. McGOVERN: Yes, Your Honor.

2 QUESTION: That's what I thought; yes.

3 MR. McGOVERN: Yes, Your Honor. In this case, Your
4 Honor, the defendant filed 60 interrogatories. He has other
5 methods available to him besides the blood grouping test in
6 which to defend the action.

7 QUESTION: General McGovern, do you disagree though
8 with the general appraisal of the reliability of the blood
9 test that your opponent asserts?

10 MR. McGOVERN: No, Your Honor.

11 QUESTION: So if it's available, that really is the
12 most reliable -- ?

13 MR. McGOVERN: It is the most reliable.

14 QUESTION: Let me ask you another question in terms
15 of, we talked about slippery slopes and that sort of thing
16 here, is it possible that there's another interest that should
17 be considered in the whole equation, and that is, the interest
18 of the child makes it especially important that the correct
19 answer be given in a case like this?

20 MR. McGOVERN: Well, I would agree with that also,
21 Your Honor. There is an interest of the child to be consid-
22 ered. But there must be --

23 QUESTION: It's not typical in litigation between
24 private parties?

25 MR. McGOVERN: That's correct, Your Honor.

1 QUESTION: Well, what's the purpose of this inquiry?
2 Is it for anything other than economic purposes? Isn't it to
3 decide whether --

4 MR. McGOVERN: The Supreme Court of Connecticut has
5 stated that paternity action is nothing more than a shifting
6 of economic arrangements from one party to another. Paternity
7 legislation in Connecticut is considered to fall in social --
8 as social and economic legislation.

9 QUESTION: Is that the same whether the action is
10 initiated by the State or by the private plaintiff?

11 MR. McGOVERN: That's correct, Your Honor.

12 QUESTION: And is the burden of proof the same,
13 whether it's initiated by the State or by the private plain-
14 tiff?

15 MR. McGOVERN: Yes, it is, Your Honor. There's no
16 differentiation.

17 QUESTION: I think you've, in your answer to
18 Mr. Justice Stevens, indicated that the child has an interest
19 in this litigation. And if that's so, could it be argued
20 that the State has the duty to provide the best evidence
21 possible?

22 MR. McGOVERN: I think, if we look at the statute,
23 Your Honor, the statute is written to only allow admissibility
24 of the test to exclude the defendant. The statute does not,
25 cannot be used, to include the defendant.

1 QUESTION: So?

2 MR. McGOVERN: So, I feel, if the statute remains
3 in its current form, the rights of the child can best be pro-
4 tected by having the test paid for by the party who seeks to
5 provide the evidence.

6 QUESTION: Well, here's an indigent who can't afford
7 to pay it, and it might be that the real father is not indi-
8 gent. Wouldn't the State be better off if they could locate
9 the real father?

10 MR. McGOVERN: Well, we have to assume, Your Honor,
11 that the mother has named the real father.

12 QUESTION: Why?

13 QUESTION: Well, there's a -- I guess statistics
14 show that errors have been made.

15 MR. McGOVERN: There have been errors made, but in
16 the majority of instances, certainly --

17 QUESTION: This process would eliminate a good many
18 possible errors.

19 MR. McGOVERN: Certainly, Your Honor, and the majo-
20 rity, in most of the cases, the defendant who is named in the
21 litigation is found to be the father. It's not a case of --

22 QUESTION: Well, why have the hearing? If the
23 mother is willing, why have the hearing? The question
24 is, you said that when the mother said that this is the man,
25 that's it. My answer is, why hold the hearing? The mother says

1 -- in this particular case, is anybody certain that this man
2 is the father, as of now?

3 MR. McGOVERN: Yes, Your Honor.

4 QUESTION: How can you be certain when he's never
5 had a blood test, when there is a possibility that the blood
6 test would show that he was not the correct one?

7 MR. McGOVERN: Your Honor, this is civil litigation.
8 We're asking the State to fund a defense for a man with civil
9 litigation. We have to assume that on the facts presented
10 at the trial, that the judge weighed the evidence --

11 QUESTION: I agree with Justice Blackmun. This is
12 labeled a civil action, but it was brought by the State.

13 MR. McGOVERN: It was brought by the plaintiff, Your
14 Honor. The plaintiff's mother --

15 QUESTION: Who gave the plaintiff the lawyer to
16 bring the suit?

17 MR. McGOVERN: The state funded the attorney.

18 QUESTION: And the State asked her to bring it.

19 QUESTION: Required her to bring it, if she wanted
20 any support.

21 MR. McGOVERN: Required her? Certainly. That's cor-
22 rect.

23 QUESTION: If she wanted benefits.

24 QUESTION: And that's a private litigation.

25 MR. McGOVERN: Yes, Your Honor.

1 QUESTION: Are you going to put "private" into
2 quotes? I'm not sure I'll buy it in quotes.

3 QUESTION: Well, isn't -- going back to one of your
4 previous responses, is there any question about that the pur-
5 pose of the proceeding is purely economic, to identify the
6 person who is responsible for the future support of the child?

7 MR. McGOVERN: That's correct, Your Honor. That is
8 what the Supreme Court of Connecticut has held in the case of
9 Robertson v. Apuzzo.

10 QUESTION: Well, more accurately, it's to shift,
11 it's to shift the burden of support if they can locate the
12 father from the State, because all this is, she doesn't get
13 any assistance of any kind if in fact they can find the father
14 able to support the child. Isn't that right?

15 MR. McGOVERN: If -- that's correct. If the father
16 has the financial ability to meet the needs of the child,
17 which are greater than the amount of assistance that the State
18 gives the child, she would be removed.

19 QUESTION: Otherwise, the mother, to support the
20 child, would have the benefit of public assistance, wouldn't
21 she?

22 MR. McGOVERN: Yes.

23 QUESTION: Mr. McGovern, I'm not clear as to the
24 burden of proof. This suit was instituted by the mother.

25 MR. McGOVERN: Yes, Your Honor.

1 QUESTION: And does she have the burden of persua-
2 sion, the overall burden of proof throughout the trial?

3 MR. McGOVERN: She has the burden of showing that
4 the defendant is the father by a fair --

5 QUESTION: Well, that's at issue, isn't it? That's
6 at issue, isn't it?

7 MR. McGOVERN: Yes, Your Honor, by a fair prepon-
8 derance of the evidence.

9 QUESTION: All right.

10 MR. McGOVERN: Not beyond a reasonable doubt --

11 QUESTION: I understand.

12 MR. McGOVERN: -- as in a criminal litigation; by a
13 fair preponderance of the evidence.

14 QUESTION: She has the normal burden in a civil case?

15 MR. McGOVERN: That's correct, throughout this trial.

16 QUESTION: That isn't what you said a minute ago.
17 I thought you --

18 QUESTION: Throughout this trial.

19 MR. McGOVERN: Excuse me, Mr. Justice.

20 QUESTION: Well, I'm trying to find out your ques-
21 tion that led him to say just the opposite, I think,
22 Mr. Justice White.

23 QUESTION: Well, I didn't think it led him anywhere.

24 QUESTION: I thought something led him. I never
25 heard of a civil plaintiff not having the burden of proof,

1 not having the burden of persuasion throughout a trial.

2 MR. McGOVERN: She does have have the burden of proof
3 and the defendant can introduce evidence to rebut it.

4 QUESTION: Of course. Of course. But who has the
5 ultimate burden of persuasion at the end of the trial?

6 MR. McGOVERN: The plaintiff.

7 QUESTION: Well, you answered me just exactly the
8 reverse a little while ago. I thought you did, anyway, and
9 I thought you answered Justice Stewart that way.

10 QUESTION: He did answer --

11 MR. McGOVERN: Well, I would state --

12 QUESTION: I'll start out this way. At least his
13 own testimony is never sufficient to overcome --

14 MR. McGOVERN: His testimony alone is not as long
15 as the plaintiff remains constant in her accusation that the
16 defendant is the father of the child.

17 QUESTION: So she always prevails, as long as he
18 doesn't offer any other testimony besides his own?

19 MR. McGOVERN: As long -- that's correct, Your Honor.

20 QUESTION: Can you tell us where in the case
21 materials the statute or decision is that supports the --
22 I too sense somewhat differing answers to the questions.

23 MR. McGOVERN: No, I can't point to the statute,
24 Your Honor.

25 QUESTION: Well, how can you answer the question

1 then? I mean, it must be in a case or in a statute.

2 MR. McGOVERN: The case law of Connecticut states
3 that the mother of the child if she remains constant in her
4 accusation that defendant is the father of the child, pater-
5 nity is an issue. If she remains constant and that accusation
6 is not rebutted or torn down, yes, the defendant will be
7 found --

8 QUESTION: Well, does that mean this, that she takes
9 the stand, she said, he's the father, he's the father, he's
10 the father, he's the father. She never deviates. He's the
11 father. He takes the stand and says, I am not, I am not,
12 I am not, I am not. And the factfinder believes him and
13 doesn't believe her, you're saying --

14 QUESTION: She wins.

15 QUESTION: -- she wins. Is that right? Even though --

16 MR. McGOVERN: If that was the testimony, she
17 would win.

18 QUESTION: What case is it in Connecticut that says --

19 QUESTION: The case law begins, discussion of it
20 begins on page 33 of the appellant's brief, going back first
21 to "The Book of the General Laws for the People within the
22 Jurisdiction of Connecticut," 1673. And then discussing the
23 case of Booth v. Hart, decided in 1876. Town of Chaplin v.
24 Hartshorne, 1825. And the other cases discussed there.

25 QUESTION: Thank you, counsel.

1 QUESTION: That's at least where my impression came
2 from.

3 QUESTION: From a careful reading of the brief?

4 QUESTION: Yes.

5 MR. McGOVERN: The fact that other states have
6 chosen to fund the cost of blood grouping tests does not mean
7 that the State of Connecticut should be made to do likewise.
8 The State has certain priorities in administering its judicial
9 system. It chooses to have the litigants in civil litigation
10 bear the cost of that litigation. I think that this is rea-
11 sonably based.

12 QUESTION: Who pays for the witnesses for the
13 plaintiff?

14 MR. McGOVERN: In this action there were no witnesses
15 other than the --

16 QUESTION: But, normally, who would pay?

17 MR. McGOVERN: The party --

18 QUESTION: The State would. The State pays for the
19 lawyer, it would pay for the witnesses, wouldn't it?

20 MR. McGOVERN: The State would probably -- yes, Your
21 Honor. The State would pay for the witnesses; yes.

22 QUESTION: Mr. McGovern, the most recent case cited
23 in the appellant's brief, to which my brother Stewart has re-
24 ferred, is a case called, cited as 6 Connecticut Circuit
25 Court 516. What is the circuit court in Connecticut?

1 MR. McGOVERN: The circuit court no longer exists
2 in Connecticut. That was the court of lower jurisdiction
3 which existed in Connecticut during the early 1970s. That
4 court was abolished and became the Court of Common Pleas and
5 the courts evolved and merged into one court at this time,
6 a Superior Court. That was not a decision of the court of
7 highest jurisdiction in the State; a trial court.

8 QUESTION: And what is the most recent decision of
9 the highest court of the State of Connecticut on the subject?

10 MR. McGOVERN: Of blood grouping tests?

11 QUESTION: Yes. As to preponderance of the evi-
12 dence, burden of proof, and that sort of thing?

13 QUESTION: Could I suggest that your colleague at
14 the bottom of page 34 of his brief cites a Connecticut Supreme
15 Court case, Mosher v. Bennett?

16 MR. McGOVERN: Yes, Your Honor.

17 QUESTION: And that quote is this: "The prima facie
18 case so made out" -- that's by the plaintiff -- "places upon
19 the reputed father the burden of showing his innocence of the
20 charge, and under our practice he must do so by other evidence
21 than his own." Now, it says, "the burden of showing his inno-
22 cence." And you accept that as the law of Connecticut?

23 MR. McGOVERN: Currently that is the law of
24 Connecticut, Your Honor.

25 QUESTION: That's a 1929 case. Has the Supreme

1 Court of Connecticut --

2 MR. McGOVERN: No, it hasn't. No. That issue
3 hasn't been before the court since then.

4 Finally, Your Honor, the appellant has argued that,
5 he hasn't argued today but in his brief that this inability
6 to provide a blood grouping test violates the Equal Protection
7 Clause of the Fourteenth Amendment to the United States
8 Constitution. Normally, this Court in making equal protection
9 analysis has used either a strict scrutiny test or a rational
10 basis test. Strict scrutiny is invoked when there's a funda-
11 mental right which has been violated or a suspect classifica-
12 tion exists. I don't believe in this case, Your Honor, that
13 the right to a blood test is a fundamental right in a civil
14 litigation, and also that wealth-indigency is one of those
15 suspect classes which warrant strict scrutiny by the Court
16 and require the Court to show that there's a compelling State
17 interest in the statute.

18 The State of Connecticut should be made to comply
19 with the rational basis test and only have to show that there's
20 a reasonable basis for the statute with the cost being paid
21 only by the party who wishes to use the evidence in the
22 litigation.

23 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
24 The case is submitted.

25 (Whereupon, at 1:18 o'clock p.m., the case in the
above-entitled matter was submitted.)

CERTIFICATE

1
2 North American Reporting hereby certifies that the
3 attached pages represent an accurate transcript of electronic
4 sound recording of the oral argument before the Supreme Court
5 of the United States in the matter of:

6 No. 79-6779

7 WALTER LITTLE

8 V.

9 GLORIA STREATER
10

11 and that these pages constitute the original transcript of the
12 proceedings for the records of the Court.

13 BY: Will J. Wilson
14
15
16
17
18
19
20
21
22
23
24
25