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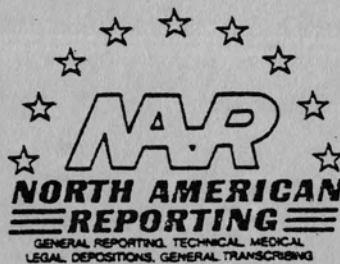
Supreme Court of the United States

ELIE JONES, WARDEN, STONE MOUNTAIN)	
CORRECTIONAL INSTITUTION,)	
)	
APPELLANT,)	No. 80-850
)	
V.)	
)	
BOBBY H. HELMS)	

Washington, D.C.
April 28, 1981

Pages 1 thru 40

ORIGINAL



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IN THE SUPREME COURT OF THE UNITED STATES

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: ELIE JONES, WARDEN, STONE MOUNTAIN :
CORRECTIONAL INSTITUTION, :
: Appellant, :
: No. 80-850 :
v. :
: BOBBY H. HELMS :
- - - - - :

Washington, D. C.
Tuesday, April 28, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:18 o'clock p.m.

APPEARANCES:

MS. CAROL ATHA COSGROVE, ESQ., Assistant Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334; on behalf of the Appellant.

JAMES C. BONNER, JR., ESQ., Prisoner Legal Counseling Project, University of Georgia School of Law, 475 Lumpkin Street, Athens, Georgia 30601; on behalf of the Appellee.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

MS. CAROL ATHA COSGROVE, ESQ., on behalf of the Appellant	3
JAMES C. BONNER, JR., ESQ., on behalf of the Appellee	18

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COTTON CONTENT

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next Jones v. Helms. Ms. Cosgrove, you may proceed whenever you are ready.

ORAL ARGUMENT OF MS. CAROL ATHA COSGROVE, ESQ.,

ON BEHALF OF THE APPELLANT

MS. COSGROVE: Mr. Chief Justice, and may it please the Court:

This case comes to the Court today on appeal from the United States Court of Appeals for the 5th Circuit. The question presented is whether, under the Equal Protection Clause of the United States Constitution, a state in furtherance of its interests in protecting its children and enforcing its criminal law may enact a statute which provides that a person who commits the crime of child abandonment and leaves the state is guilty of a felony, whereas a person who commits the crime of child abandonment without leaving the state is guilty of a misdemeanor. Appellee's challenge --

QUESTION: Does it make any difference under this statute whether the particular person left the state three hours after the commission of the act or three years?

MS. COSGROVE: No, sir, there is no time element specified on the face of the statute. Appellee's challenge and the court of appeals decision is predicated on the ground that the statute distinguishes between two classes of abandoning parents,

1 based upon the exercise of their constitutional right to travel,
2 and that therefore the statute is void under the Equal Protec-
3 tion Clause.

4 Appellee is a father who was ordered by a Georgia
5 court to make child support payments but who never did, who sim-
6 ply went to Alabama. He testified that he did not go to Alabama
7 for the purpose of avoiding his child support obligations but
8 rather to attend school. When he returned to Georgia to visit
9 his child he was arrested on the warrant for the felony of abandoning
10 his child and leaving the state, and received a three-year sen-
11 tence suspended on condition that he make child support pay-
12 ments, which he never did. Instead he just left the state again.
13 again. He eventually became a resident of Florida.

14 Upon his wife's death he regained custody of his
15 child, but he had some problems with the Florida authorities and
16 moved back to Augusta, Georgia, where the child had to be placed
17 in the Department of Family and Children Services custody,
18 basically a welfare agency. And thereafter, the appellee was
19 arrested on an outstanding bench warrant and sentenced to serve
20 three years.

21 After having exhausted his state remedies, the appel-
22 lee filed a petition for habeas corpus in the United States
23 District Court for the Middle District of Georgia alleging that
24 the statute violated his constitutional right to travel and was
25 void under both the Equal Protection and the Privileges and

1 Immunities Clause of the Constitution. The district court ruled
2 against the appellee but upon appeal to the 5th Circuit the
3 district court's order was reversed and judgment entered for
4 appellee.

5 QUESTION: Ms. Cosgrove, I have some difficulty inter-
6 preting the 5th Circuit's opinion, perhaps because of its short-
7 ness. It seems to rely at some length on the Morissette case
8 from this Court, which was simply as I had understood it a hand-
9 book of how this Court would interpret federal statutes with
10 respect to intent and was not a constitutional doctrine at all.
11 What would you say was the rationale of the 5th Circuit, if
12 there is one?

13 MS. COSGROVE: Your Honor, I believe the 5th Circuit
14 saw our statute as not having the requisite specific intent
15 which would make it pass muster.

16 QUESTION: But why would it have to have requisite --
17 why does it have to have any specific intent?

18 MS. COSGROVE: It was the 5th Circuit's opinion that
19 without the specific intent the statute would be overly broad.
20 It's our contention, of course, that it is not necessary to
21 have a specific intent for that element of the crime.

22 QUESTION: Well, unless you're talking about free
23 speech you don't have an overbreadth challenge here, do you?

24 MS. COSGRAVE: That's correct. I believe only in the
25 First Amendment area has there been a chilling and an overbreadth

1 problem addressed by this Court. The court of appeals reasoned
2 that inasmuch as the appellee did have a fundamental right to
3 travel, that the statute was the subject of strict scrutiny;
4 and secondly, since Georgia has no compelling state interest
5 involved, that the statute would be violative of equal protec-
6 tion.

7 The court of appeals also reasoned that the statute
8 was overly broad in that we had the Uniform Reciprocal Enforce-
9 ment of Support Act, URESA, which was available to vindicate any
10 of Georgia's interests. Appellant appealed that decision on
11 September 19, 1980, and this Court noted probable jurisdiction
12 on January 26, 1981.

13 There are two issues before the Court today. First,
14 whether parents who commit the crime of child abandonment do
15 have a fundamental right to travel in this instance. And
16 secondly, if such a right does exist, whether Georgia's child
17 abandonment statute impermissibly penalizes that right without
18 being justified by compelling state interest.

19 Now, turning to the first issue, it is Georgia's posi-
20 tion that the fundamental right to travel, to migrate, to settle in
21 other states, was never intended to encompass and protect the
22 criminal's right to avoid the consequences of his own misdeeds.
23 Whatever the constitutional rights of criminals in other con-
24 texts may be, their rights to full and free travel are attenuated.
25 For example, if a person commits a crime, just leaves the

1 jurisdiction, even without intent to avoid prosecution, he is
2 nevertheless subject to mandatory extradition proceedings. And
3 in addition, many states including Georgia have statutes of
4 limitations which are tolled the instant a person leaves the
5 state, thus dramatically increasing the time period during which
6 a person may be punished for a crime. So, since we do not be-
7 lieve that there are any fundamental rights involved in this
8 case, we submit that it is the rational basis test that should
9 be applied to this statute and that the statute easily passes
10 that test. As this Court has noted, it is the state legislature
11 which is preeminently responsible for defining, and punishing
12 crimes. And we submit that the state legislature could ration-
13 ally have decided that a person who commits a crime, in this
14 instance the crime of child abandonment and leaves the state
15 makes it much more difficult for the state to bring him to jus-
16 tice, that that person deserves a more stringent punishment.

17 However, even if strict scrutiny test were to be ap-
18 plied, as appellee urges, we submit that the statute would also
19 pass muster under this more exacting standard, for it is not
20 every constitutional infringement, of course, that is barred,
21 it's only those which rise to the level of penalty. It's our
22 position, of course, that this statute in no way penalizes the
23 right to migrate. Indeed, if it has any effect at all upon the
24 right to migrate and settle in other states, that effect is
25 purely incidental and remote. For under the statute a parent is

1 free to move to any state he wishes, stay as long as he wishes,
2 and the statute has absolutely no impact upon him at all unless
3 he has committed the crime of child abandonment.

4 So this statute is unlike provisions which this Court
5 has struck down in, for example, Crandall v. Nevada, a taxing
6 provision that reached everyone who left the state. This stat-
7 ute is narrowly tailored to reach only those persons who have
8 committed a crime.

9 QUESTION: Or intend to in the course of leaving the
10 state, or intend to abandon the child later?

11 MS. COSGROVE: There is --

12 QUESTION: This applies whether you abandon after
13 you've left the state or before?

14 MS. COSGROVE: On the face of the statute it does,
15 Your Honor. However, it's our position that the appellee
16 really would have no standing to raise that second prong -- the

17 QUESTION: I understand.

18 MS. COSGROVE: -- of the statute since in the facts in
19 this case, he pled guilty.

20 QUESTION: I understand.

21 MS. COSGROVE: Secondly, I might mention that,
22 unlike some of the cases, for example Maricopa County and
23 Shapiro, where this Court was concerned with provisions which
24 addressed themselves primarily to indigents, that this statute
25 does not impact on those persons who are in the blameless but

1 unfortunate situation of poverty. Rather, this statute impacts
2 on the most blameworthy persons, those parents who abandon their
3 helpless children. So we feel that this statute no more penalizes
4 parents who simply wish to go to another state than does the
5 existence of an extradition law or an indefinite statute of
6 limitations.

7 QUESTION: Of course, this whole problem could be
8 solved, I suppose, if the Georgia Legislature simply made child
9 abandonment a felony.

10 MS. COSGROVE: Well, Your Honor, of course the Georgia
11 Legislature certainly could have done that and many states have,
12 but I think that in not doing so they have recognized the
13 difference in the type of crime, in that the impact upon the
14 child is greater because the likelihood of ever recovering any
15 support is much less when the parent --

16 QUESTION: This is not a support statute; this is a
17 criminal statute.

18 MS. COSGROVE: Well, sir, there are two elements in
19 child abandonment. First, one has to desert the child.

20 QUESTION: Yes, but this is a criminal statute. There
21 is nothing in this statute that requires the parent to support.
22 It only punishes the parent for not supporting.

23 MS. COSGROVE: For not supporting. That's correct,
24 Your Honor. Of course, even if the Court were to see this as
25 somewhat of a penalty upon the constitutional right to travel,

1 it's Georgia's position that the statute is more than justified
2 by our compelling interest in protecting our children and en-
3 forcing our criminal laws. And this interest in protecting our
4 children appellee does not even dispute, and it is manifested
5 in at least two other statutes which make this same felony-
6 misdemeanor distinction.

7 For example, we have a statute which makes it a felony
8 for a husband to abandon his pregnant wife and leave the state,
9 whereas if he stays in the state, it is a misdemeanor. And
10 similarly, we have a statute which makes it a felony if one is
11 to interfere with the custody of a child who is committed to
12 the legal custody of another, and then to take that child out
13 of the state. And again, interference with the custody of a
14 child within the state is only a misdemeanor.

15 So, I think the Court can see that Georgia is fairly
16 consistent in this design to protect its children.

17 Turning to the interest in protecting our criminal
18 laws, practically speaking, when a criminal leaves the jurisdic-
19 tion, Georgia, just like every other state, is dependent upon
20 extradition to get that person back to face trial or to serve
21 his punishment.

22 QUESTION: Do you have a general statute that makes it
23 a crime to flee from justice, or to abscond, or to leave the
24 state? What if you're under indictment and you leave the state?
25 Is that a separate crime?

1 MS. COSGROVE: Not to my understanding, Your Honor.

2 QUESTION: But isn't that -- that's not unheard of,
3 though, around the country, is it?

4 MS. COSGROVE: There are many statutes, including
5 federal statutes that --

6 QUESTION: It could be a breach of a bail condition,
7 I suppose.

8 MS. COSGROVE: Yes, sir, I think it could be.

9 QUESTION: How about -- is that a crime in your state,
10 to violate your bail?

11 MS. COSGROVE: I'm not at all sure, Your Honor. The
12 felony provision of Georgia's child abandonment statute greatly
13 enhances extradition for -- although I'm sure this Court is
14 aware that, technically speaking, it is possible to extradite
15 for misdemeanors under both state and federal law, as a practi-
16 cal matter, the discretion to refuse to extradite for misdemea-
17 nors is totally within the governor of the responding state.

18 QUESTION: Of course, if Georgia made this a felony
19 across the board, all these problems would disappear, wouldn't
20 they?

21 MS. COSGROVE: Perhaps our problems with extradition
22 would disappear, Your Honor. But again, I would say that the
23 Georgia --

24 QUESTION: As would this case disappear.

25 MS. COSGROVE: Yes, sir. The appellee would not

1 contend that there was anything wrong with a felony across the
2 board. It's simply our position that the Georgia Legislature
3 need not make that across-the-board distinction.

4 As I was saying, the discretion to refuse to extra-
5 dite for misdemeanors is totally within the purview of the
6 governor of the responding state. But the court of appeals
7 has said that Georgia really does not even need to use extradi-
8 tion to satisfy our interest in this case, that we have the
9 provisions of URESA, the Uniform Reciprocal Enforcement of
10 Support Act, which can vindicate any of our interests, mainly
11 that we can obtain support for the child, or return the parent
12 to the state.

13 We submit that the court of appeals was in error in
14 this regard for several reasons. I need to explain that all
15 50 states have in fact adopted some sort of reciprocal enforce-
16 ment act.

17 QUESTION: May I ask, Ms. Cosgrove, if we agree with
18 the argument to this point with you, we don't have to reach
19 this question, do we?

20 MS. COSGROVE: I beg your pardon, Your Honor?

21 QUESTION: If we agree with what you have said up to
22 date, supporting the constitutionality of the statute as not
23 violative of the right to travel, then we don't have to
24 reach this alternative?

25 MS. COSGROVE: That's correct, Your Honor. This is a

1 less drastic means, argument which the court of appeals --

2 QUESTION: But you don't have to rely on it if we
3 agree with your initial argument.

4 MS. COSGROVE: That's correct, Your Honor.

5 QUESTION: Because then you're just -- need a rational
6 basis.

7 MS. COSGROVE: That's correct, Your Honor. But the
8 court of appeals used as an example of the overbreadth that we
9 did have this alternative means available to us, and I think,
10 quite honestly, that this alternative means simply is not effec-
11 tive for under the version of URESA which has been adopted by
12 approximately 10 states, there is a provision by which an
13 absent parent can totally avoid extradition. He simply submits
14 himself to the jurisdiction of the court of the responding
15 state and agrees to pay some child support. And he never comes
16 back to Georgia, he never sees the inside of a jail.

17 For the remaining states which do not have that auto-
18 matic avoidance of extradition, many of them nevertheless have a
19 discretionary section which says to the governor of the respond-
20 ing state, basically, if there has not been a URESA petition filed,
21 you don't have to extradite this person. You can require a
22 URESA petition to be filed first. And secondly, if there is an
23 outstanding order of some type in existence and the absent
24 parent is complying with that order, then the governor can also
25 just refuse to extradite that person.

1 I think if we were to follow the court of appeals deci-
2 sion in this case, we could conceivably have a situation where
3 a person abandons his child in Georgia, goes to another juris-
4 diction, and even if the custodial parent -- and I might add, it
5 is usually the custodial parent which files a URESA petition --
6 even if that custodial parent were successful in getting that
7 absent parent into the court of the responding state, it is more
8 likely than not that he could totally avoid extradition by sim-
9 ply agreeing to pay child support.

10 And the difficulty with that -- you know, one might
11 say, well, he's paying child support, that ought to settle the
12 problem -- the difficulty is that the duty of support which
13 URESA contemplates is not the duty of support which obtains in
14 the demanding state, in Georgia, for example. It would be the
15 duty of support imposable under the laws where the absent parent
16 was, and that's presumed to be the responding state. So we can
17 have a situation where the absent parent comes into court, he
18 agrees to pay child support, he may well be a respected member
19 of the community by now, and the court simply will not impose
20 a large amount of support on that absent parent, and thus really
21 defeating the order of the Georgia court, and also not meeting
22 the needs of the child.

23 QUESTION: Well, again, this is a criminal statute
24 we're dealing with here. And the law that you're discussing
25 and that was discussed by the court of appeals is not a criminal

1 statute, is it? It's a statute to enforce the duty of
2 support by making the parents supporters of the child?

3 MS. COSGROVE: Yes, Your Honor, and it was the court
4 of appeals opinion that we could simply use this civil statute
5 as a substitute for our criminal statute. It is our position,
6 of course, that the state has a right to define and punish
7 anti-social conduct such as child abandonment and that we have
8 a right, if the need be, to put this person in jail or at least
9 to make him think that he is going to.

10 QUESTION: Are you interested in support for the child
11 or putting him in jail?

12 MS. COSGROVE: Well, sir, they're dual interests. Of
13 course we want support for the child. I think the problem with
14 the URESA petition is --

15 QUESTION: I thought that was the whole purpose.

16 MS. COSGROVE: Well, it's the whole purpose if the
17 person complies with court orders. But as Your Honor is probab-
18 ly aware, a person can say, of course I'm going to comply.

19 QUESTION: Well, I understand you that if somebody
20 goes to another state and sends the money back, would you still
21 bring him back?

22 MS. COSGROVE: I beg your pardon?

23 QUESTION: If a man is giving \$25 a month support and
24 he goes to Alabama and he sends back \$25 a month, you still
25 would make him come back and go to jail?

1 MS. COSGROVE: Not in that particular instance.

2 QUESTION: That's right.

3 QUESTION: He's not guilty of this offense.

4 MS. COSGROVE: No, he would not be guilty of child
5 abandonment because he --

6 QUESTION: No, I'm telling you, he says he has aban-
7 doned the child.

8 MS. COSGROVE: Well, there are two prongs, Your Honor.

9 QUESTION: Yes, that's what I thought.

10 MS. COSGROVE: You have to abandon your child, desert
11 your parental duties, and then leave the child in a dependent
12 condition. So if he were complying with a court order regard-
13 less of how --

14 QUESTION: He violated a support order and he went
15 away and he changed his mind and sent the money back but he
16 didn't come back. Would you still want him?

17 MS. COSGROVE: I think he would still be susceptible
18 to this charge, Your Honor, because he needs to follow --

19 QUESTION: He needs to be taught a lesson?

20 MS. COSGROVE: Well, sometimes, Your Honor.

21 QUESTION: It's sometimes called a pound of flesh.

22 MS. COSBROVE: Well, Your Honor, sometimes it's called
23 a typical drifting absentee father who comes into one court and
24 says, of course, I'll pay, and he pays for a few months and
25 then goes on. And I think --

1 QUESTION: You don't ever catch them.

2 MS. COSGROVE: It's very difficult, Your Honor, it
3 really is, and I think that is one of the crucial reasons that
4 Georgia needs this felony provision of the child abandonment
5 statute, simply in order to be able to get this type of person
6 back if need be. I think if we were to follow the court of
7 appeals decision in this regard, our right to define and punish
8 antisocial conduct such as child abandonment would be defeated
9 because our right to enforce our laws is simply meaningless
10 without an effective method of bringing the criminal back to
11 trial.

12 QUESTION: Now, Ms. Cosgrove, this statute says that
13 the felony shall be reducible to a misdemeanor. How, under
14 Georgia practice, is it reduced?

15 MS. COSGROVE: Your Honor, this can either be by the
16 recommendation of the jury and then has to be approved by the
17 judge, or the judge on his own motion can reduce the felony.

18 QUESTION: The prosecutor can't do it?

19 QUESTION: Prosecutor can't do it?

20 MS. COSGROVE: Not to my understanding. And that
21 provision, I might note, is not unique just to child abandonment,
22 it applies to everything but capital felonies.

23 QUESTION: Shall be reducible to a misdemeanor. And
24 that's in the discretion of the jury or the judge?

25 MS. COSGROVE: Basically, in the discretion of the

1 judge, Your Honor, because the jury can recommend it but the
2 judge has to approve.

3 QUESTION: Has to do it.

4 MS. COSGROVE: That's correct. In sum, Your Honor,
5 we think that the Georgia child abandonment statute, particularly
6 ly the felony division, is absolutely crucial to the enforce-
7 ment of Georgia's interests in protecting her children and in
8 enforcing her criminal laws. We submit that the court of ap-
9 peals decision in this case was clearly erroneous and should be
10 reversed. Thank you.

11 MR. CHIEF JUSTICE BURGER: Mr. Bonner.

12 MR. BONNER: Yes, sir.

13 ORAL ARGUMENT OF JAMES C. BONNER, JR., ESQ.,

14 ON BEHALF OF THE APPELLEE

15 MR. BONNER: Thank you, Mr. Chief Justice and may it
16 please the Court:

17 I want to get one thing straight, I guess, at the out-
18 set, and that is that we don't necessarily contest the opening
19 principle, I think, that the state started its argument with,
20 that is that there is nothing in the right to travel which pro-
21 tects a parent or an accused from the consequences of his misdeeds.
22 That's not our argument at all, and that's a mischaracterization
23 of it. I will concede at

24 I will concede at the outset that there is probably,
25 in fact there is certainly a valid area here, a general area

1 here of application of the state's police power. The state can
2 reach fugitive parents, it can proscribe that conduct, it can
3 reach parents who use their right to travel across a state line
4 to frustrate the state's interest, to compound an offense. But
5 this isn't that kind of statute, and the existence of a valid
6 area for operation of that kind of statute don't save this one.
7 We need to look at the -- if this were that kind of statute,
8 then what she said about there being a reasonable connection
9 and this being subject to the rational connection test would
10 probably be valid. But this is not such a statute.

11 The question before this Court as a preliminary matter
12 is how this statute by its terms, on its face, affects travel.

13 QUESTION: I think the question before the Court,
14 before you get to that, is, what does the 5th Circuit's opinion
15 mean? Do you understand why they cited Morissette?

16 MR. BONNER: Not completely, Your Honor. I don't
17 think, I don't think Morissette necessarily has any basis here,
18 but I think I can answer your question if you can let me get
19 my next thought out.

20 QUESTION: By all means.

21 MR. BONNER: Revive it. As I say, our question here
22 is how this statute affects the right of travel. And if you
23 look at it, any travel triggers the statute. The reason -- as
24 the state has conceded, the reason for the travel is totally in-
25 significant. The time of the travel is totally insignificant.

1 It doesn't make any difference whether the man is accused before
2 he crosses the state lines or whether he becomes accused subse-
3 quently, although for that subsequent class, obviously, you have
4 that privileges and immunities problem, which we don't have
5 any standing to raise. But it's important to look at that as-
6 pect of the statute because it shows what the statute does.

7 This isn't a fugitive statute. Bobby Helms could
8 have crossed the state line to visit his sick mother in Alabama
9 and as long as he was subject to being charged before or after
10 with child abandonment, he would fall under this special felony
11 jeopardy. There is not even any requirement in this --

12 QUESTION: What's the matter with that?

13 MR. BONNER: Well, quite a bit is the matter with that,
14 Your Honor, because the right to travel is a constitutionally
15 secured right.

16 QUESTION: Well, but certainly someone who is subject
17 to not leaving the state under conditions of bail can't exercise
18 his right to travel to visit his sick mother in Alabama.

19 MR. BONNER: Yes, sir, that's correct, but that person
20 is accused, the restriction on his right to travel, for example,
21 could be relieved by a court, it could be relieved -- there are
22 adjustments.

23 QUESTION: There are all sorts of restrictions on
24 right to travel.

25 MR. BONNER: Yes, sir. But this, again, is not a

1 statute which applies to someone who stands accused. Bobby
2 Helms when he left the state was not accused. At least -- the
3 record is not clear on that, but he certainly wasn't arrested
4 and he certainly didn't know he was accused until he came back
5 and was arrested.

6 QUESTION: Yes, but the crime isn't committed unless
7 he's already abandoned the child.

8 QUESTION: Well, no, sir, it can be committed subse-
9 quently. He could migrate.

10 QUESTION: Well, I know, I know, but in this case,
11 the claim is that he abandoned the child and then left the
12 state.

13 MR. BONNER: That's true.

14 QUESTION: Well, that's what we're talking about,
15 whether that's unconstitutional, to make the abandonment a
16 felony if he's left the state.

17 MR. BONNER: In effect, what you are doing is inferring or
18 raising, the statute I should say is doing, is making a presumption,
19 erecting a presumption that any parent who leaves the state for
20 any reason without even any nexus to the offense of abandonment --

21 QUESTION: Well, do you think it would be -- I suppose
22 you would say it would be just as unconstitutional if they made
23 it a misdemeanor to abandon the child and another misdemeanor
24 to leave the state after having abandoned the child?

25 MR. BONNER: No, sir, there would be no equal question

1 protection problem there.

2 QUESTION: Why?

3 MR. BONNER: It would be the same difference.

4 QUESTION: It would certainly bear on the right to
5 travel, wouldn't it? If you left the state you've committed
6 another misdemeanor.

7 MR. BONNER: Oh, I see what you mean. You're talking
8 about a flight type of thing. Yes, sir, that's true. But ob-
9 viously you couldn't have that kind of statute without some intent
10 intent element, you couldn't -- Georgia could not say who --

11 QUESTION: Why would you have to have an intent ele-
12 ment?

13 MR. BONNER: Well, you've got to at least have some
14 connection. Intent is one way of connecting the exercise --

15 QUESTION: The statute says, if you abandon the child,
16 you have committed a misdemeanor. Then it says, and if you
17 leave the state after having abandoned the child, you've com-
18 mitted another misdemeanor. Period.

19 MR. BONNER: ~~Actually~~ -- ~~Actually~~, Your
20 Honor, the statute said, a misdemeanor to abandon your child,
21 and/if the parent leaves the state it's a felony. So it's not --

22 QUESTION: Well, I know, but you wouldn't make the same
23 argument if there were two misdemeanors.

24 MR. BONNER: Well, no, I don't believe we would.
25 Obviously, if you had a separate statute dealing with flight to

1 avoid prosecution --

2 QUESTION: Yes?

3 MR. BONNER: -- that's an encumbrance on the right to
4 travel, and admittedly.

5 QUESTION: But a valid one.

6 MR. BONNER: That's a valid one. And there are valid
7 ones. And there are invalid ones.

8 QUESTION: But you insist that there be an intent
9 requirement -- ?

10 MR. BONNER: No, sir, no. All I'm saying is that in-
11 tent is one way to confine the intrusion on the right to
12 travel. Purpose would be another way. Some sort of nexus --
13 I believe that Arkansas statute or the Rhode Island statute
14 that says he commits the offense by leaving the state. But
15 here what you've got is the exercise of a constitutionally
16 secured right which for any reason, for any purpose, and,
17 frankly, any time, triggers the special felony jeopardy. It is
18 like -- I don't think you'd have any trouble with a state
19 statute here which said, burglary is a felony carrying a ten-
20 year sentence but if the defendant doesn't confess, it carries
21 20 years. Obviously, that's an extreme example, but what you've
22 got here --

23 QUESTION: Let's alter that a little bit. Instead
24 of what you've suggested, that if he flees the state for the
25 purpose of avoiding prosecution, the penalty will be doubled?

1 MR. BONNER: No problem whatsoever, Your Honor.
2 None whatsoever. I don't think, frankly, that there would be
3 any problem if you had a Rhode Island-type statute where it says,
4 commits child abandonment by leaving the state. But the problem
5 here is that you've just simply got an exercise of the right to
6 travel which triggers it, and it's triggered even before the
7 defendant --

8 QUESTION: How does this affect his right to travel?
9 He could go to Russia.

10 MR. BONNER: Well, now, it might not --

11 QUESTION: But if he took care of those children.
12 Isn't that right?

13 MR. BONNER: Yes, sir.

14 QUESTION: And he wouldn't violate any statute of
15 Georgia?

16 MR. BONNER: That's right.

17 QUESTION: So how does this case involve the right to
18 travel?

19 MR. BONNER: Same way Aptheker did. Mr. Aptheker
20 could have traveled anywhere too. All he would have had to do
21 is renounce his associations.

22 QUESTION: Come on. There's no connection.

23 MR. BONNER: Well, let me back up, too, because
24 you've got to, you've raised what is really the next issue,
25 whose right to travel is affected here?

1 QUESTION: But it doesn't affect it. As a matter of
2 fact, this man traveled twice.

3 MR. BONNER: Well, Your Honor --

4 QUESTION: So, he didn't -- the first one didn't even
5 bother him.

6 MR. BONNER: You're assuming --

7 QUESTION: Didn't he travel twice?

8 MR. BONNER: You're assuming a couple things.

9 QUESTION: Do I assume that he traveled twice?

10 MR. BONNER: Oh, he traveled abundantly.

11 QUESTION: Yes, he was a traveling man.

12 MR. BONNER: Even more when he was in the Army. But
13 the question is, whose right to travel is affected here? Where
14 you've got this kind of bald intrusion on a constitutionally se-
15 cured right, it's everyone's right to travel, or at least every
16 parent in this particular case. ~~and in case?~~

17 QUESTION: It doesn't involve my right to travel be-
18 cause I haven't abandoned any children.

19 MR. BONNER: No, sir, but if you were a poor mill
20 worker in Griffin, Georgia --

21 QUESTION: But I'm not.

22 MR. BONNER: No, but I'm trying to tell you who's --
23 I'm trying to answer the question of whose right to travel it
24 affects. Where you're living on a marginal income, you separate,
25 there's a real question of whether or not there's adequate support

1 being given. That particular person's right to travel is
2 chilled by this statute. He's under a special jeopardy. He
3 may want to visit --

4 QUESTION: Is it because he's poor?

5 MR. BONNER: That's true. The poor are particularly --

6 QUESTION: Do you think a poor man would be traveling twice?

7 MR. BONNER: Poor and he traveled twice.

8 QUESTION: Yes, he's poor.

9 MR. BONNER: This is exactly the situation --

10 QUESTION: Did he borrow the money or something?

11 MR. BONNER: I'm sorry. What, Your Honor?

12 QUESTION: Could he have used that money he used to
13 travel to pay for his children?

14 MR. BONNER: He didn't go far. It was a Greyhound bus
15 ticket. I suppose he could have. But this is comparable to the
16 situation you had in Zablocki, with its bald intrusion
17 upon the right to marry. This Court didn't stop to look into
18 the depth of this fellow's pocketbook or into the justifications
19 he had. Your own opinion, Justice Marshall, went ahead and
20 talked about the people who dwelt on the margin, whose rights
21 to travel were chilled -- I mean, whose rights --

22 QUESTION: Well, if my opinion said what you think it
23 says, why in the world do you think I'm asking these questions?

24 MR. BONNER: I don't know. I was --

25 QUESTION: Mr. Bonner, can I ask you?

1 MR. BONNER: Yes, sir, Justice Stevens.

2 QUESTION: I'm not sure I understand your position on
3 one thing. Assume this statute said, if a person abandons a
4 child, and thereafter, for the purpose of avoiding prosecution,
5 leaves the state, it would be a felony; otherwise, a misdemeanor.
6 Would you say that was constitutional?

7 MR. BONNER: I don't see any problem whatsoever with
8 that.

9 QUESTION: So, if your whole argument turns on the
10 absence of intent?

11 MR. BONNER: Not necessarily. This is echoing what
12 Justice Rehnquist asked. Not necessarily on the absence of in-
13 tent; on the promiscuous use this statute makes of the right to
14 travel, the fact that it is --

15 QUESTION: Well, it's promiscuous in the sense that
16 it applies when there's no intent.

17 MR. BONNER: No intent, no purpose, no connection
18 with the offense. In pure happenstance.

19 QUESTION: It would be just as though a state should
20 make it criminal offense to travel?

21 MR. BONNER: I'm sorry, Justice Stewart?

22 QUESTION: Well, if a state made it a criminal offense
23 for anybody to leave Georgia, that would be an extreme example
24 of what you find invalid about this case?

25 MR. BONNER: And it would not analytically be different

1 from this case.

2 QUESTION: That's correct.

3 MR. BONNER: That's it exactly.

4 QUESTION: Except that it would be after having com-
5 mitted an offense?

6 MR. BONNER: That's what we've got here. Of course,
7 every parent is subject, theoretically --

8 QUESTION: But the reason this is a felony, not a
9 misdemeanor, is because your client left the State of Georgia.

10 MR. BONNER: Because he exercised a right the Consti-
11 tution gave him.

12 QUESTION: That's all he did.

13 QUESTION: After having committed an offense.

14 MR. BONNER: Well, it happened. But you see, they
15 had to drag him back and establish his guilt of that offense.

16 QUESTION: After having committed the first element
17 of a two-element offense?

18 QUESTION: But the reason it's a felony, not a mis-
19 demenor, is because he left the State of Georgia. Had he not
20 left the State of Georgia, it would be a misdemeanor.

21 MR. BONNER: If he had run from Phenix City down to
22 Tybee Light and hidden out in the dunes down there, he'd be
23 guilty of a misdemeanor.

24 QUESTION: I thought you had previously conceded that
25 if he'd committed any crime and then left the state to avoid

1 prosecution, they could double the penalty?

2 MR. BONNER: Yes, sir. But that's not this kind of
3 statute. Let me -- I'm sorry.

4 QUESTION: Not the precise statute, but you tell me
5 what's the distinction -- ?

6 MR. BONNER: I'm sorry, Your Honor. Maybe, if I did
7 say that, I somewhat misunderstood the hypothetical thrown at
8 me. I think, even in that situation, you would have to have
9 some nexus between leaving the state and intent or purpose --

10 QUESTION: To avoid prosecution.

11 MR. BONNER: No problem. That's a nexus that's suffi-
12 cient, there, again. This isn't that kind of statute. This
13 says nothing about why he leaves the state. If it did, we
14 wouldn't be here. We would not get by the rational connection
15 test here.

16 QUESTION: What if a statute said that it shall be
17 a crime to escape from prison; shall be a misdemeanor, say, to
18 escape from prison? And if after escaping, if, for any reason,
19 you leave the state, even if not for the purpose of avoiding pro-
20 secution, that shall be a felony. Would that be constitutional?

21 MR. BONNER: That's a much tougher question, Your Honor.

22 QUESTION: Why different?

23 MR. BONNER: One thing that makes it different is -- as a
24 matter of fact, maybe that's a welcome question for me. In that particu-
25 lar case you've got somebody whose liberty interests have been

1 circumscribed because he's been convicted. And that's the dif-
2 ference between Bobby Helms and your hypothetical. You've got
3 -- our situation, this particular statute, has an impact upon
4 parents who, at the very least, are presumptively innocent of
5 abandonment, who may not even have been charged with abandon-
6 ment.

7 QUESTION: Yes, but the reason they may not have
8 been prosecuted is that they left the state and couldn't be
9 reached.

10 MR. BONNER: Oh, well, Your Honor, I think later the
11 problem of their being reached is going to dissipate. That's
12 not necessarily so.

13 QUESTION: Do you think Georgia could enact a "blue
14 sky" law making it a criminal offense to misrepresent something
15 in a prospectus about a security and completely omit any require-
16 ment that the misrepresentation be intentional??

17 MR. BONNER: Yes, sir. If you're asking me whether
18 you can have strict liability offenses, you certainly can.
19 But you can't when you are triggering that offense on a consti-
20 tutionally secured right. I suppose here you're vaguely talking
21 about a right to free speech or something like that, but I don't
22 think that's really quite comparable. I don't see any problem.

23 QUESTION: Well, there are an awful lot of crimes that
24 have emerged in the past 50 years that don't require any intent
25 at all.

1 MR. BONNER: Yes, sir. But I don't think, Your Honor,
2 that you're going to have an easy time finding some which turn
3 on constitutionally secured right without this Court primarily
4 coming in and saying that when you've got it turning on a con-
5 stitutionally secured right, you've got it -- have a narrowly
6 drawn statute that's got to be carefully tailored to address
7 the specific governmental interest.

8 QUESTION: You'd have no case at all, Mr. Bonner,
9 would you, if people who abandon their children and didn't leave
10 the state were also guilty of felonies?

11 MR. BONNER: No problem at all. The state can make
12 that judgment --

13 QUESTION: You'd have no case at all?

14 MR. BONNER: No case at all. We wouldn't be here.

15 QUESTION: So your case depends upon the fact that
16 other people are treated more leniently?

17 MR. BONNER: That's right. In effect, Georgia has
18 made a judgment that for the same offense people who would
19 happen to exercise their rights to travel are guilty of a great-
20 er offense, regardless of whether they in fact are, regardless
21 of whether they are in fact trying to flee the jurisdiction and
22 not visit their sick grandmother or to seek educational bene-
23 fits in Alabama.

24 QUESTION: Do you suppose it would be constitutional
25 for Georgia to pass a statute that said, if a parent abandons

1 a child, that parent may not leave the state?

2 MR. BONNER: Let me run that by. I think that would
3 -- yeah, I suppose Georgia probably could.

4 QUESTION: What they've done here is something less
5 extreme. They've said, if you leave you get a more severe
6 penalty. Or if a parent abandons a child, he may not leave the
7 state. If he violates this restriction he shall be guilty of a
8 felony.

9 MR. BONNER: Our problem here with this particular
10 statute is its impact upon a broad group of people. I think if
11 you've got, if you had a statute that's saying one who is charged
12 with anything may not leave the state, that would be perfectly
13 valid, and that's sort of what I understood your question to
14 say. But here we --

15 QUESTION: No, he's not charged. One who abandons his
16 child -- and I guess there's an intent element in the abandon-
17 ment offense itself -- may not thereafter leave the State of
18 Georgia.

19 MR. BONNER: Okay, I'll back up. No, Georgia couldn't
20 couldn't.

21 QUESTION: Georgia couldn't do that?

22 MR. BONNER: No.

23 QUESTION: That's not an equal protection problem,
24 that's just a flat violation of the right to travel, to impose
25 that restriction on a person who is guilty of a misdemeanor.

1 But you say he could do it if he escapes from prison. You'd
2 say, well, you'd say, he can't leave the state.

3 MR. BONNER: But there you've got -- one who escapes
4 from prison knows he escaped from prison.

5 QUESTION: Well, by hypothesis, here, one who aban-
6 dons a child knows he's abandoned the child.

7 MR. BONNER: Not necessarily, Your Honor. There's a
8 great difference there. But the other thing is that at least
9 you've got a --

10 QUESTION: Well, he's not guilty unless he willfully
11 and voluntarily abandons the child.

12 MR. BONNER: In your hypothetical, you've got a care-
13 fully circumscribed group on which the statute impacts, and
14 we don't have that here.

15 QUESTION: Those who willfully abandon their children.

16 MR. BONNER: Well, here you've got --

17 QUESTION: Same group in this case.

18 MR. BONNER: You've got parents. Any parent who's
19 presumptively innocent, who hasn't been convicted, is subject to
20 jeopardy under this particular statute.

21 QUESTION: This is true of a person under indictment
22 who flees the state. He carries the presumption of innocence
23 right with him across the state border.

24 MR. BONNER: And the restrictions on him are reason-
25 able, but what you've got --

1 QUESTION: Why are they more reasonable or less rea-
2 sonable than with the misdemeanor that Justice Stevens postu-
3 lated to you?

4 MR. BONNER: Well, because that's a reasonable intru-
5 sion onto the right to travel, vis-a-vis the state's interest
6 in having him there and prosecuting him. I don't really see any
7 analogy there. But this, again, is the same situation as if
8 Georgia had isolated, say, the right to trial by jury and made
9 that there be a special penalty of death, as in Jackson v.
10 United States; or attaching a poll tax to voting in a federal
11 election, as in Harman v. Forssenius. This is what Georgia has
12 done, and the reason that this case falls in the shadow of those
13 authorities is again basically because of the wanton use Georgia
14 makes of interstate travel as an element of this offense.
15 Wanton, because it has no nexus, has no intent, is not confined
16 by any kind of purpose, need not have any relationship at all under
17 that statute to the state's interest.

18 QUESTION: Do you question at all the authority of the
19 state to criminalize the failure to support a child?

20 MR. BONNER: No, sir, none at all.

21 QUESTION: Even though it's criminalizing not
22 paying a debt, in a sense? In order to --

23 MR. BONNER: Well, I have no qualms about that.
24 I'm here because my client's been branded a felon and not a
25 misdemeanorant.

1 QUESTION: Yes, I know, but no part of your case ques-
2 tions at all the authority of the state to criminalize?

3 MR. BONNER: No, sir, I think there are a lot of
4 policy reasons why not, and I think that's why you've got URESA,
5 because of the judgments that the state made that this kind of
6 problem is better approached civilly.

7 QUESTION: You agree that the jury could have made it
8 a misdemeanor?

9 MR. BONNER: Yes, but that's just entirely discre-
10 tionary.

11 QUESTION: Oh, I see, you agree to that? They could
12 have done that?

13 MR. BONNER: Yes, sir, they could have done it. But
14 it would be a judgment that would be made without any guidance,
15 without any --

16 QUESTION: But they could have done that in your
17 case?

18 MR. BONNER: Yes, sir. They certainly could.

19 Let me jump ahead to the strict scrutiny analysis
20 which I hope we reach somewhere. But if you figure that we've
21 got a constitutionally protected right to travel here, then
22 under the familiar formulas of this Court, it would fall under
23 strict scrutiny, and I don't mean to repeat it for your edifi-
24 cation, but for mine, that would mean that the state would have
25 to show that it's reasonably necessary to promote a compelling

1 state interest. The state basically, their interest here comes
2 down to extradition. When you look behind everything they can
3 say about the welfare of the child and about the enforcement of
4 the criminal law, on both avenues it boils down to aiding
5 extradition.

6 But the only -- the thing is that that's not neces-
7 sarily compelling interest because we've got the Extradition
8 Clause of the Constitution, we've got the Federal Extradition
9 Act, we've got URESA, we've got uniform reciprocal -- whatever
10 it is -- uniform criminal extradition act. All of these serve,
11 they completely serve that interest. As a matter of fact, under
12 the last two, Bobby Helms need not ever have even been in
13 Georgia, much less have been a fugitive from Georgia. Under all
14 law, the caliber of the crime, the fact that it's a misdemeanor,
15 not a felony, doesn't prevent extradition. He's extraditable
16 under all of them. Elevating it to a felony doesn't apparently
17 aid the state's interest one bit except for the argument they
18 make that governors will treat this offense more seriously and
19 everything if it's a felony, which is a pretty good argument if
20 you want to make the whole crime a felony, but it's not a pretty
21 good argument for the distinction.

22 The state fails on the necessity aspect of that strict
23 scrutiny test. Looking at it simply under URESA and everything
24 else, it's just not necessary, and it can't promote it. Even
25 if it were a felony and the state proceeded under URESA, they

1 would still encounter those relief provisions that the state
2 talked about. A judge in Alabama could still -- or, a judge in
3 another state, by entertaining an action brought by the father
4 over there, could completely bar extradition under URESA,
5 regardless of whether it's a felony or misdemeanor.

6 But in any event URESA is designed to be a supplemen-
7 tary kind of extradition procedure, not one that necessarily
8 preempts. I forget exactly what section of URESA it is, but
9 the state's perfectly free to proceed under all its other extra-
10 dition powers. And again, under all of those extradition powers
11 whether the thing's a felony or a misdemeanor, they still run
12 into the governor's discretion. And making it a capital felony
13 is not necessarily going to elude that governor's discretion.

14 QUESTION: Well, what about the initial interest of
15 the state in keeping the fellow within reach so that they can
16 collect child support? Why isn't that a compelling interest in
17 itself?

18 MR. BONNER: Well, because in effect it attaches a
19 special penalty to any parent's right to travel --

20 QUESTION: Well, the right to travel --

21 MR. BONNER: -- whether he's going to come back, whe-
22 ther he's not going to come back.

23 QUESTION: All right, accepting for the moment the fact
24 that it burdens the right to travel, then there must be a com-
25 pelling interest to justify it, and what's wrong with keeping him

1 around so that support may be collected?

2 MR. BONNER: Oh, maybe I should back up. Nothing
3 would be wrong with that. That would be --

4 QUESTION: Well, I know. Why isn't that a compelling
5 interest?

6 MR. BONNER: Well, that might be how the Chief Jus-
7 tice's question a minute ago makes sense about one under indict-
8 ment can't leave the state. I'm sorry. I'm sure if anyone's
9 not making sense that it comes from here, not from there.
10 No, I mean, that's how his example is explicable, because, you
11 know, that kind of restriction would completely and carefully
12 serve that particular interest.

13 QUESTION: Although Georgia, surely Georgia could not
14 make it a criminal offense for any Georgia parent to leave the
15 state?

16 MR. BONNER: No, it couldn't. And as a matter of
17 fact, it couldn't -- you can carry it somewhat further, and
18 say, any parent who wants to leave the state's got to stop at
19 the state border and post bond for the support of his children.

20 QUESTION: On the other hand --

21 MR. BONNER: And then you'll have Alabama on the
22 other side saying, if he brings his children in, he's got to
23 post bond to make sure they don't become public charges.

24 QUESTION: Are you suggesting the state couldn't adopt
25 a felony statute that they couldn't leave the state if they left

1 dependent minor children behind them?

2 MR. BONNER: I don't think the state could.

3 QUESTION: Well, what's the statute except that?
4 That's what this statute is, isn't it?

5 MR. BONNER: That's exactly why the statute is wrong.

6 QUESTION: Yes, but you say they can't --

7 MR. BONNER: Is bad.

8 QUESTION: That's your reason for saying it's bad?

9 MR. BONNER: Yes, sir. That Georgia couldn't do that.
10 This is a different degree of intrusion, but it's exactly the
11 same kind of pattern of intrusion. Here, essentially, Georgia
12 has taken a constitutionally secured right, the right to travel,
13 and they've made the degree of an offense turn upon it. They've
14 made the difference between a felony and a misdemeanor turn upon
15 it, and they've made it turn upon it. Bobby Helms couldn't come into
16 court and say my sick grandmother was over there and I had to visit her.

17 QUESTION: Mr. Bonner, do I understand your argument
18 really doesn't rest on the fact that it's an abandonment case?
19 Say it was a case involving it's a misdemeanor to shoot wildlife,
20 shoot a bird or a deer or something like that, but if one does
21 that and thereafter leaves the state it's a felony. You'd make
22 the same argument with that kind of statute?

23 MR. BONNER: Yes, sir.

24 QUESTION: Same thing? Yes.

25 MR. BONNER: Exactly. I think while it's silent

1 I'll sit down.

2 MR. CHIEF JUSTICE BURGER: Do you have anything fur-
3 ther?

4 MS. COSGROVE: I don't have anything further.

5 MR. CHIEF JUSTICE BURGER: Thank you, counsel. The
6 case is submitted.

7 (Whereupon, at 2:06 o'clock p.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATE

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

No. 80-850

ELIE JONES, WARDEN, STONE MOUNTAIN
CORRECTIONAL INSTITUTION

V.

BOBBY H. HELMS

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

BY: Will S. Wilson

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