In the ORIGINAL

Supreme Court of the United States

JAMES M. MURPHY, DISTRICT JUDGE, FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA, DOUGLAS COUNTY,
Appellant,

v.

EUGENE L. HUNT,

NO. 80-2165

Washington, D. C.

January 18, 1982

Pages 1 thru 56

ALDERSON REPORTING

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EUGENE L. HUNT

Washington, D. C.

Monday, January 18, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

TERRY R. SCHAAF, ESQ., Assistant Attorney General of Nebraska, Lincoln, Nebraska; on behalf of the Appellant.

BENNETT G. HORNSTEIN, ESQ., Assistant Public Defender, Douglas County, Omaha, Nebraska; on behalf of the Appellee.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Murphy against Hunt.

Mr. Schaaf.

ORAL ARGUMENT OF TERRY R. SCHAAF, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SCHAAF: Mr. Chief Justice, and may it please the Court, in June of 1977, an individual raped a young lady at a resort in central Nebraska. One day later, that individual was arrested and bond was set at $10,000. In September of that year, that individual pled guilty. Bond was continued pending sentencing. Three days later, that same individual, while free on bond, raped again, and this time killed his victim.

In January of that very next year, in 1978, the Nebraska Lesiglature proposed an amendment to Article I, Section 9 of the Nebraska Constitution. Prior to the time of the proposal of that amendment, Article I, Section 9, had withheld from persons charged with murder and treason the right to demand bail pending trial. The amendment proposed the addition of the crime of forcible rape.

At the general election in November of 1978, the people of the state of Nebraska, by a vote of 356,000 in favor to 80,000 opposed, adopted this amendment.

In May of 1980, Mr. Hunt, the appellee herein, was

arrested and charged with multiple counts of forcible rape, and the commission of that crime with the use of a firearm. In September of 1980, he was convicted of a number of those charges, and sentenced to consecutive terms of confinement of a maximum of 50 years and a minimum of 29.

In June of 1980, he filed in the Federal District Court of the District of Nebraska a habeas corpus action naming the judge as the -- excuse me, the sheriff as the respondent, and at the same time filed in that court a civil rights action naming Judge Murphy, the appellant herein, as the defendant.

In October of 1980, the United States District Court for the District of Nebraska unanimously or -- excuse me -- in both cases, one judge held that that Nebraska constitutional provision was constitutional in all respects.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit, and in May of 1981, the United States Court of Appeals for the Eighth Circuit found that in the habeas corpus action the matter was moot, and with reference to the civil rights action, reversed the lower court, and held that the Nebraska constitutional provision violated both the Eighth and Fourteenth Amendments to the United States Constitution.

This appeal was thereafter taken. In October, this Court noted probable jurisdiction.

QUESTION: Mr. Schaaf, what is the status, if you know, of the appeals in the state court on the convictions themselves?

MR. SCHAAF: Your Honor, the convictions themselves were appealed in both -- in all three cases to the Nebraska Supreme Court, and all three of those appeals are currently pending. Briefs have not yet been filed by the appellant. It would be expected that that case would not be resolved probably in the next 12 months.

Your Honors, a violent crime occurs --

QUESTION: Does the Nebraska Supreme Court not clear its appellate dockets each term?

MR. SCHAAF: Not necessarily, Your Honor. They do try to give priority to criminal appeals.

QUESTION: Would it be normal and usual for it to take 12 months to hear this case?

MR. SCHAAF: It would not be normal and usual for it to take another additional 12 months from this date to hear this case.

QUESTION: That is what I mean.

MR. SCHAAF: This is a bit irregular, although I do suspect that the Nebraska Supreme Court is extremely anxious to learn of this Court's opinion of the constitutionality of our constitutional amendment. It may be that that has some bearing on the rapidity with which they are reaching this

particular case.

Your Honors, a violent crime occurs in this country every 24 seconds.

QUESTION: Before you leave the Nebraska Supreme Court opinion, the merits don't involve this provision, do they?

MR. SCHAAF: Not at all, Your Honor.

QUESTION: Then why would they possibly be waiting for us?

MR. SCHAAF: It very well might be that if they ruled against the appellee in this case, we might have a question of mootness, Your Honor. The Eighth Circuit struggled with that problem. Under Nebraska Press Association versus Stewart, it is our position that so long as Mr. Hunt stands in a position where this matter is capable of repetition, that being if the Nebraska Supreme Court would reverse his convictions and put him back in a position where he was at the inception, he would still be subject to this constitutional amendment, and therefore it is not moot.

QUESTION: Does the record tell us whether he would be entitled to bail if there were no such constitutional provision?

MR. SCHAAF: I don't know that --

QUESTION: How do we know the constitutional

provision has any effect on his bailability or whatever you might call it?

MR. SCHAAF: I am not certain that the record reflects whether or not he has the financial means to meet a reasonable bail.

QUESTION: Well, even apart from financial means, are there other grounds on which Nebraska might deny someone who is convicted, or is charged with an offense such as this bail?

MR. SCHAAF: No, Your Honor. Article I, Section 9, only permits the withholding of the right to bail in cases of murder and treason.

QUESTION: And there are no provisions in any case if a man is known to be extremely dangerous, or that he still gets bail automatically in every case, unless it is treason or murder?

MR. SCHAAF: Well, unless that amount of bail is set beyond his reach. It very well may be in the case of an extremely dangerous individual, an extremely high bail could be justified, effectively thereby restraining him from being dangerous.

QUESTION: Are you telling us that if a defendant is brought before the court in whatever preliminary process you have in the state of Nebraska, and it is clear that he is awaiting trial on five indictments, let us say, all

serious felonies, violent crimes, that the judge may not take that into account in denying bail totally?

MR. SCHAAF: Without the assistance of this constitutional provision --

QUESTION: Without this.

MR. SCHAAF: -- I do not believe that he could. Not under Nebraska's constitutional scheme nor statutory scheme. There again, it may be that a $1 million bond would be entirely reasonable in such a situation, and it may be that a particular defendant could not make that bond. But absent this statute, this constitutional provision, persons charged with heinous crimes such as forcible rape are entitled under our constitution to demand bail. With this constitutional provision, the judge is still free to grant bail.

QUESTION: Are you representing, entitled to be released on a reasonable bail?

MR. SCHAAF: I am suggesting, Your Honor, that in our situation the constitutional amendment merely withholds the right to demand bail. It does not prohibit the trial judge from granting bail in certain circumstances.

QUESTION: In other words, bailable in your constitutional amendment, where applicable, not bailable. That is not an irrebuttable presumption, you are telling us?

MR. SCHAAF: No, Your Honor. We are suggesting --

QUESTION: Has your Supreme Court held this?

MR. SCHAAF: The Nebraska Supreme Court has not directly considered that question. I can suggest to the Court that that is in fact the practice. I suggest to the Court that the constitutional provision covers murder, not first degree murder, not murder where capital punishment is appropriate, and with great regularity, and for scores of years, persons charged with lesser degrees of murder have been entitled to bail under the same constitutional provision. There is some suggestion in the amicus briefs that the decision in Parker versus Roth somehow holds against this position.

Parker versus Roth was the first test of this constitutional provision that was taken to the Nebraska Supreme Court. The Nebraska Supreme Court unanimously upheld the constitutionality of this constitutional amendment. An appeal was -- petition for a writ of certiorari was taken to this court which was not granted.

QUESTION: Now I gather you are telling us we should decide this case on the premise that for any offense, there is always judicial discretion to admit the bail?

MR. SCHAAF: That is correct, Your Honor. Whether we are talking murder, treason, or one of the degrees of first degree sexual assault, forcible rape. It is not an irrebuttable presumption. I would direct this Court's

attention to the concurring opinion of Justice McCowan in Parker versus Roth, wherein I think it makes it very clear that it is not an irrebuttable presumption. I would also direct the Court's attention to the actual language of Chief Justice Krivosha, some of the language that has been cited to you by the amicus, and in that situation we believe that all the Chief Justice is speaking there is indicta. He is talking about ineligibility for bail, not a prohibition against bail. I think that is a critical element of this case.

QUESTION: Well, has the Nebraska Supreme Court reviewed any cases where bail is denied? If there is discretion to grant it, has it reviewed any cases where it is denied, and said that the discretion was abused by not granting it? Or is it just a -- is it ever reviewed?

MR. SCHAAF: Well, bail certainly could be reviewed.

QUESTION: Has it been?

MR. SCHAAF: It has been in the context of excessive bail, and it has been in one instance in the context of whether or not the court is free to exercise some discretion, and I guess the citation to that would be Partin, P-a-r-t-i-n, versus Jensen, 203 Nebraska 441. Partin versus Jensen, 203 Nebraska 441, wherein the Nebraska Supreme Court held the inherent power of a court may be exercised as to bail although it is not specifically vested

by statute.

QUESTION: But has it said what factors go into the denial of bail?

MR. SCHAAF: Well, Your Honor, where --

QUESTION: If the Court has got discretion to grant it, I would suppose there may have been some law grow up down through the years, at least on the murder.

MR. SCHAAF: No, Your Honor, not with reference to that. Now, of course, we do have a statutory scheme for setting bail once bail is to be set. In other words, to determine, once we have cleared the hurdle of whether or not --

QUESTION: As far as we know, the decision of the trial judge is final with respect to whether bail should be allowed at all or not.

MR. SCHAAF: It is not final, Your Honor. In this particular case, bail was originally denied by a municipal judge.

QUESTION: Right.

MR. SCHAAF: And that was reviewed by a trial level district court judge.

QUESTION: Yes.

MR. SCHAAF: And thereafter, an appeal is possible to the Nebraska Supreme Court, and that is what happened in Parker versus Roth.

QUESTION: But in the course of -- was an opinion written anywhere in this appeal on bail and whether bail was --

MR. SCHAAF: There was an opinion written in --

QUESTION: -- was improperly denied?

MR. SCHAAF: There was an opinion written in Parker versus Roth which upheld the constitutionality of withholding the bail in this case.

QUESTION: Did they also say that bail was properly denied?

MR. SCHAAF: Yes, Your Honor.

QUESTION: For what reason?

MR. SCHAAF: Because he was charged with first degree sexual assault.

QUESTION: Well, is that just the end of it?

MR. SCHAAF: Well, of course -- yes, Your Honor, presuming that the finding could be made that the proof is evident and the presumption is great.

QUESTION: Then that is the end of it.

MR. SCHAAF: That is the end of the constitutional scheme. Yes, Your Honor.

QUESTION: And also the decision to deny bail is then affirmed.

MR. SCHAAF: As far as the requirement of a trial judge articulating his reasons for denying bail even

thereafter, I am aware of no authority which requires him to articulate those reasons. If, on the other hand, he elects to make bail available, there is a statutory scheme wherein he must determine what kind of bail, if bail at all is to be imposed.

QUESTION: Yes.

QUESTION: I understood you to say earlier, however, that the trial judge could have granted bail as a matter of discretion in this case.

MR. SCHAAF: Yes, Your Honor, as well as in cases of murder.

QUESTION: Well, may I ask, is there an individualized determination then in every case?

MR. SCHAAF: No -- well, I presume so, Your Honor. There is no statutory --

QUESTION: One makes an application for bail. I gather the state would come in, would it --

MR. SCHAAF: Yes, Your Honor.

QUESTION: -- or perhaps I should ask the question -- and say, this individual won't show up for trial, or may be a danger to the community, something like that. Does the state have that burden?

MR. SCHAAF: When we are talking about persons charged with either murder or forcible rape, the first obligation is to establish that the proof is evident and the

presumption is great.

QUESTION: What does "presumption is great" mean? Presumption of guilt is great?

MR. SCHAAF: Yes, Your Honor. I suspect it means something considerably more than a preponderance of evidence and something less than beyond a reasonable doubt. We suggest to this Court that what the trial judge must find is that the evidence is clear and convincing, and that the defendant will probably be convicted.

QUESTION: And the question is whether or not the accused is one who will or won't show up for trial, or whether or not if released he will be a danger to the community? Neither of them, then, is inquired into?

MR. SCHAAF: Both of those are factors which the judge may or may not make an actual inquiry into.

QUESTION: Well, suppose he makes the determination, presumption is great, as you tell it, meaning that the evidence of guilt is very strong. Does he then bother going on into whether or not the accused may show up?

MR. SCHAAF: There is no constitutional or statutory requirement that he do so.

QUESTION: And he doesn't --

MR. SCHAAF: It is impossible to know what he may articulate mentally in determining whether or not to exercise his discretion --

QUESTION: Well, really what I am trying to get at is whether the state makes any effort in addition to showing that the presumption of guilt is satisfied.

MR. SCHAAF: On a case by case basis, they no doubt do. They may bring to the court's attention that this man has a long previous criminal record. They may bring to the attention of the court that he has not responded -- returned from bond on previous occasions. There is no requirement that they make such a showing. If they wish to impose bond, they must establish that his guilt is evident and the presumption of his guilt great to the trial judge's satisfaction. With regard to the irrebuttable presumption, even if they do, the judge may still exercise his discretion to grant bail. If he makes that election, then there is a statutory procedure he must follow to determine the kind of bail and the amount of bail which would be appropriate. There is no requirement that he articulate the decision-making process of whether or not he will exercise that discretion.

QUESTION: And no requirement expressed, at least, that he inquire into whether or not he has had a past record of not showing up when he has been admitted to bond, or that he is a danger to the community?

MR. SCHAAF: If he feels that he can find that the proof is evident, the presumption is great, without doing

so, from the face of the evidence, he need not inquire further.

Your Honors, in this --

QUESTION: Counsel, before you go on, I want to go back to your first point, if I may. The defendant was convicted of two of three counts, or --

MR. SCHAAF: Three of four, Your Honor.

QUESTION: Three out of four. Was that after jury trials?

MR. SCHAAF: Yes, Your Honor.

QUESTION: Factual trials on each of the counts?

MR. SCHAAF: Yes, Your Honor. I believe that he did actually confess to the crimes, but he then pled not guilty. There was a jury trial. He was ultimately only brought to trial on three of the four rapes. The reason he was not brought to trial on the other, I understand, is that the prosecutrix lived out of state. The prosecution was satisfied that they could get convictions on the three, and didn't bother reporting that prosecutrix for that fourth trial.

He was also charged in each one of those three rapes with the use of a firearm in the commission of a felony. He was only found guilty of one of those charges. Of course, those charges would not have been non-bailable charges in any event. But he was found guilty of three

first degree sexual assaults, one upon a child, two upon adults, and one count of use of a felony in the commission of a firearm. He was given consecutive sentences that total a maximum of 50 years, a minimum of 29. He will be eligible for parole after 15 years.

QUESTION: And he filed appeals in each? Is that correct?

MR. SCHAAF: There were -- Actually two of the cases were combined on appeal. One was not. There are two appeals pending before the Nebraska Supreme Court. And of course at the same time he filed these two actions in the United States District Court for the District of Nebraska. Actually, before he was even found guilty, he filed these actions.

QUESTION: So is there one conviction from which he has not appealed at all?

MR. SCHAAF: No, ma'am. All of his convictions are presently on appeal before the Nebraska Supreme Court.

QUESTION: All right.

QUESTION: Did I gather from an earlier comment, counsel, that you don't agree with Judge Arnold's opinion on mootness in the Eighth Circuit?

MR. SCHAAF: I don't have any question about it with reference to the habeas corpus action, just for no other reason than Mr. Hunt is no longer in the custody of

the sheriff of Douglas County, but with reference to -

QUESTION: How about the 1983?

MR. SCHAAF: Yes, with reference to the 1983 action, we believe that the standards of Nebraska Press Association versus Stewart can be met, that it is capable of repetition, and therefore it is not moot.

QUESTION: Well, is it very likely to repeat itself?

MR. SCHAAF: No, Your Honor, it is not extremely likely. The convictions in my opinion are sound.

QUESTION: Well, then you get beyond Nebraska Press Association, don't you?

MR. SCHAAF: Well, of course, I am not the Nebraska Supreme Court. They very well may find errors that have been committed there. It is still theoretically possible. It is still theoretically possible that Mr. Hunt can be placed back in the same position he was at the inception of these actions. Of course, this certainly is something that is capable of evading review, if there were ever an issue that would evade review, it would be an issue such as this.

QUESTION: Well, but it has to be, under Weinstein against Bradford, it has to be the same person on each side that has suffered from the inability to have a review.

MR. SCHAAF: We suggest in this case that it is. Mr. Hunt is perfectly capable of being placed -- legally capable of being placed back in the same position that he

was, and that would result from a finding of any kind by the Nebraska Supreme Court of any kind of a deficiency in those convictions requiring a remand and the potential for recharge.

QUESTION: But you would agree that is very unlikely, would you not?

MR. SCHAAF: Well, the success rate before the Nebraska Supreme Court is extremely low in all cases.

QUESTION: And this was not filed as a class action.

MR. SCHAAF: No, Your Honor.

QUESTION: How about, counsel, after conviction in a criminal case, is anyone entitled to bail while his case is on appeal?

MR. SCHAAF: Yes, Your Honor.

QUESTION: Well, I suppose that this statute would prevent bail while the case is pending on appeal.

MR. SCHAAF: Yes, Your Honor.

QUESTION: So why is it moot until it is decided?

MR. SCHAAF: We suggest that it is not.

QUESTION: In this case. It doesn't need repetition, does it?

MR. SCHAAF: Well, if he made application tomorrow --

QUESTION: If this statute, if this constitutional amendment was declared unconstitutional, he could apply for

bail now.

MR. SCHAAF: Yes, Your Honor, and he could be denied bail independent of this constitutional provision

QUESTION: Yes.

QUESTION: But in theory, at least, it could be granted now by the same judge who denied by before on the basis of perhaps the evidence that was submitted at the trial.

MR. SCHAAF: Yes, Your Honor.

QUESTION: Mr. Schaaf, is there not a different statutory provision covering bail after someone has been convicted of a crime and pending appeal?

MR. SCHAAF: There is a --

QUESTION: Are you telling me that you would go back to this same provision, or would there not be other provisions in Nebraska law that govern that --

MR. SCHAAF: You could go back to this same provision, or you could go back to a separate statutory scheme. This, I would remind you, is a constitutional provision, a constitutional provision granting an affirmative right to bail in all cases, but withholding that grant of the right to bail in some cases.

QUESTION: There are separate statutory provisions, however, dealing with bail pending appeal. Is that correct? Or release pending appeal?

MR. SCHAAF: I would be of the opinion that the same statutory scheme dealing with bail generally would be applicable to bail pending appeal. The same criteria would remain applicable. It is not a separate section of our law. The kinds of considerations, if there were bail application made at the time of appeal, would be equally applicable to those -- to applications made prior to conviction.

QUESTION: Well, then, Mr. Schaaf, let me be sure I understand you. Apart from the constitutional provision, there is a statute governing the allowance of bail in most cases. Are there exceptions in the statute itself? There are some situations other than capital cases and the sex offense cases in which the trial judge may pursuant to that statute deny bail?

MR. SCHAAF: No, Your Honor. That statutory scheme only deals with the amount of bail and the manner in which bail would be imposed. For instance, the judge is free to --

QUESTION: Then I don't understand your answer to Justice O'Connor earlier, then. I thought you said there was a statute that was not limited to cases where people had been convicted, which might operate to deny this man bail entirely apart from the Constitution. Did I misunderstand you?

MR. SCHAAF: Apparently we are not understanding

each other, Your Honor --

QUESTION: I guess not.

MR. SCHAAF: -- because that is not the case. If bail is to be denied Mr. Hunt or anyone else, it must be done pursuant to this constitutional provision. Period. There are no other provisions of law which would permit the denial of bail in any case, except --

QUESTION: Well, what about a person convicted of robbery who appeals? Does he automatically get bail?

MR. SCHAAF: No, Your Honor.

QUESTION: Why not?

MR. SCHAAF: There has to be some scheme there on the judge's discretion to not release -- we are still not communicating. When we get beyond the conviction stage, then the statutory provision would permit the declination of appeal pending -- bail pending appeal.

QUESTION: But that is a statute dealing only with people who have been convicted.

MR. SCHAAF: The portion of that statute would deal only with persons who have been convicted. It is one statute dealing with the question of bail. One portion of it deals with what criteria to be determined when we are determining the amount of bail. Another section of it deals with after conviction, what criteria might be considered when determining whether bail should be granted while on

appeal once it has been denied or not met. In many instances, it is a question of bail reduction applications.

QUESTION: But that is the statute that would provide the basis for denial of bail to this man if we disregarded the constitution?

MR. SCHAAF: Yes, and or the constitutional provision that is before you today.

QUESTION: Let me sure I track that now, counsel. A man is brought in, charged with embezzlement from a bank. Could the judge on making appropriate findings with respect to the likelihood of flight, assume that there was some evidence, and he made findings that because of the likelihood of flight for whatever reasons he describes, he is denying bail. Could he do that?

MR. SCHAAF: No, Your Honor, not on a bank robbery charge. We are talking about prior to conviction? Is that correct?

QUESTION: I beg your pardon?

MR. SCHAAF: Prior to conviction?

QUESTION: Prior to conviction, yes.

MR. SCHAAF: No, he might not deny bail on a bank robbery charge. He might set bail at $1 million, if he concluded that he was a dangerous individual or that he was likely not to return.

QUESTION: Well, why can't he set bail?

MR. SCHAAF: He can, Your Honor.

QUESTION: Why?

MR. SCHAAF: Because there is no -- Article I, Section 9, says all persons shall be bailable except murder, treason, first degree sexual assault.

QUESTION: All are bailable. That is the section you are relying on.

MR. SCHAAF: Yes, Your Honor. That is the only withdrawal of the right to demand bail. Once a person is entitled to the right to demand bail, there is a statutory scheme to determine what kind, if any, bail is to be required. Once there is a conviction, then there is the ultimate -- the other consideration. Now we are not talking about a person accused, we are talking about a convicted individual. His rights to liberties, et cetera, are entirely different.

QUESTION: If it were not for that section, all are entitled to bail, then a judge could deny bail.

MR. SCHAAF: There is no -- other than this constitutional provision, there is no prohibition in our constitution or our statutes to the denial of bail. The judge would be free to do that which he wished. Our constitution, however, takes that discretion from the judge and gives all persons the right to bail except a select group charged with certain crimes. So without that select

group being withheld, a trial judge would have no power to withhold bail for anyone. He would have the power to set it extremely high, but not to deny or refuse to set it in any event.

What we have before the Court today is the effort by the people of the state of Nebraska to balance the rights of the society to be free from crime and the fear of crime against an individual's right to liberty, and the people of the state of Nebraska suggest that the people's right to liberty -- that this means of doing that is reasonable, especially in light of the fact that we are only withholding the right to demand trial from those accused of heinous crimes, where the proof of their guilt is evident, and the presumption of their guilt is great.

If I may, Your Honor, I would prefer to reserve the remainder of what time I have for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Hornstein.

ORAL ARGUMENT OF BENNETT G. HORNSTEIN, ESQ.,

ON BEHALF OF THE APPELLEE

MR. HORNSTEIN: Mr. Chief Justice and may it please the Court, Eugene Hunt was held without bail for a period of four months and three days between the time of his arrest and the commencement of his first trial. He was held solely because he was charged with the crime of forcible first

degree sexual assault, and upon a finding that the proof was evident and the presumption great by two trial judges.

We have a survey that is contained in the joint appendix that reflects the disposition of these no bail cases during the first year that the constitutional amendment was in effect. It reflects that there were 32 defendants held without bail during the first year that we were able to identify, 20 of whose cases had been disposed of. Two of these defendants were acquitted by juries after having spent a total of 120 days in jail. Only one defendant out of those 20 was convicted of the original non-bailable offense. The remainder had their charges dismissed, or they pled guilty to reduced bailable misdemeanors or felonies.

We think this reflects the injustice of this law, the unfairness of this law, the overinclusiveness of this law.

The central issue in this case, we think, is not whether the state of Nebraska has a legitimate governmental interest in preventing the crime of rape, which we concede it does, but whether Eugene Hunt and other defendants charged with rape have a fundamental right or otherwise constitutionally protected interest in pretrial liberty, which we argue that they do, or even whether preventive detention in general is constitutionally permissible, which

we believe is an issue that need not be reached in this case, because Nebraska in fact has not provided for any individual determination of dangerousness by a trial judge. It is simply presumed dangerousness from the nature of the charge, and the weight of the evidence at the time of the initial charge.

The central issue is whether the means chosen by the state to promote its legitimate interest. The means, being denial of pretrial bail to all defendants merely charged with rape where the proof is evident and the presumption great, is substantially related to the effectuation of the state's legitimate purpose. In other words, does it closely fit, is it tailored, does it provide for rebuttal --

QUESTION: What is the form of the proceeding at which the determination is made that the proof is evident or the presumption great?

MR. HORNSTEIN: There is no statutory procedure that is completely clear. The --

QUESTION: What happened here?

MR. HORNSTEIN: Okay. What happened here is typical of what happens. Nebraska's evidence code, which was enacted a few years ago, provides that bail hearings or summary proceedings to which the rules of evidence are not applicable, the proceeding is contained in about five pages

of a transcript which is contained in the joint appendix. The proceeding that is contained in the joint appendix was an appeal from the initial denial of bail by a magistrate.

The typical proceeding is that the defendant appears with his counsel and the prosecutor before a magistrate initially. The charge is read. The court makes -- sometimes the prosecutor will say a few words about the nature of the case. The defense attorney may say a few words about the background of the defendant. The court summarily fixes bail.

According to the statutory scheme, our bail reform statutes, which were enacted in the early seventies, and are similar to the Federal Bail Reform Act, the defendant, if he is unable to make the fixed bail within 24 hours after it is initially set has a right of review to another judge, a district judge. That was done in this case, and that hearing is contained in the joint appendix.

At that time, I attempted -- I told the court that the defendant had roots in the community. At that time we told the court that he had a minimal criminal history, and according to the statute, the only factor to be considered in fixing bail is the risk of flight. The statute says nothing about dangerousness. It says nothing about any other factors to be considered other than the risk of non-appearance. And those were the background factors that

I attempted to provide to the court.

The court ignored those, and said, according to the constitutional amendment that was passed in 1978 and Parker versus Roth, which was the Nebraska Supreme Court case upholding the constitutionality of that provision, bail is denied. That was the end of the hearing.

QUESTION: Well, counsel, here there was a stipulation, was there not --

MR. HORNSTEIN: That's right.

QUESTION: -- that the proof was evident and the presumption great?

MR. HORNSTEIN: That's correct. That's right.

QUESTION: Are those different things, proof evident and presumption great?

MR. HORNSTEIN: Well, the argument that we make is that that is a meaningless standard, if not unconstitutionally vague under the rule under that we, you know, we stipulated to. We concede that. But our position is that the Nebraska Supreme Court has never defined that standard. That is not a recognized, easily defined standard. This Court in Addington v. Texas defined the three ordinary burdens of proof.

QUESTION: Well, if you stipulate to something, are you in any position to attack it later?

MR. HORNSTEIN: Well, I am aware of that rule, Your

Honor, but our position is, there are three different rules in this country as to what that standard means, one of which is that the charge itself constitutes an irrebuttable presumption of proof evident and presumption great. The Nebraska Supreme Court has never defined that standard.

QUESTION: But if you agree to it, by definition, you have understood it, haven't you?

MR. HORNSTEIN: Even assuming -- well, again, I think the Court still has the dilemma of determining what does it mean. I mean, if it means that it is an irrebuttable presumption that the proof is evident and presumption great, whatever that means --

QUESTION: If you didn't know what it means --

MR. HORNSTEIN: -- of what effect was the stipulation?

QUESTION: -- how do you account for having agreed to it?

MR. HORNSTEIN: Well, there were several --

QUESTION: What did you think it meant when you --

MR. HORNSTEIN: There were several reasons for stipulating, Your Honor. We did feel at the time that there was a fairly strong case against the defendant. In fact, he had four charges against him where the likelihood of acquittal on all charges was not very great. We were fearful of a federal abstention problem, to be honest. Our

office has the largest criminal defense case load in the state. We have the largest number of defendants who are being held without bail. We felt these cases become moot very quickly, as happened in the Parker case, which became moot after the Nebraska Supreme Court ruled on it. We had to wait for another defendant to come along to raise this issue, and it has taken three years to get it to this Court since we started, exactly three years ago this month.

QUESTION: Counsel, are you representing the defendant in the appeal to the Nebraska Supreme Court?

MR. HORNSTEIN: Yes. Yes, Your Honor.

QUESTION: And have you delayed filing the briefs there so that this Court can determine it in an effort to keep it from being moot?

MR. HORNSTEIN: The Nebraska Supreme Court delayed it for that purpose, Your Honor.

QUESTION: Okay.

QUESTION: You referred to the fact that you represented to the judge on the bail hearing that he had a minimal prior criminal record. What did that constitute?

MR. HORNSTEIN: At the time, the evidence that we had available -- this was shortly after he was initially -- and I was not his trial lawyer, I only function in an appellate capacity, but the information from our office file reflected that he had a misdemeanor record. He had lived in

Omaha for more than ten years, and that was the extent of the record that was available. We have since learned that he previously had a statutory rape conviction in another state that had occurred 12 or 13 years before this. But that information was not given to him by us, and we had no criminal history record available to reflect that.

We think that that is really irrelevant, Your Honor.

QUESTION: Well, Mr. Hornstein, I can understand your wanting to get a test case, which I guess motivates the stipulation, but supposing this constitutional standard is the equivalent of saying there is proof beyond a reasonable doubt that the man is guilty? It may mean that, for all we know.

MR. HORNSTEIN: Well -- okay. Our position is -- I am glad you raised that question, because that leads to the next step. Even assuming that it means high probability --

QUESTION: No, beyond a reasonable doubt. Then couldn't they detain him if it means that?

MR. HORNSTEIN: I don't think any state has defined it that way.

QUESTION: Well, but they haven't excluded the possibility that that is what it means, and it seems to me if that is what it means, you have no valid objection to having the man held in custody.

MR. HORNSTEIN: Well, our position that we have

taken in the brief is that it means -- if it means high probability of guilt -- let's assume it means beyond a reasonable doubt --

QUESTION: You mean the presumption or the proof is evident? Which?

MR. HORNSTEIN: Proof evident presumption, whatever that --

QUESTION: But the language is, where the proof is evident or the presumption great. Are they different things?

MR. HORNSTEIN: I don't know. I mean, the cases that have -- there are three different definitions that have been adopted by the states, and to my knowledge they had not split that down the middle and tried to define it independently. It is defined together.

QUESTION: The problem with stipulating so you get a test case in a hurry is that you ask us to decide something before we know what it means, whereas if you litigated these issues, then your courts would have to decide what this means. You have rushed to get us a test case, is what you have done here.

MR. HORNSTEIN: It has taken three years.

QUESTION: And we still don't know what this standard means.

MR. HORNSTEIN: I am not sure -- you know, our experience --

QUESTION: Has there ever been a contested hearing in Nebraska at which the issue has been whether or not there was this kind of proof?

MR. HORNSTEIN: No, to my knowledge that issue has never been decided by the Nebraska Supreme Court.

QUESTION: How often could it --

MR. HORNSTEIN: The only time it could have been decided before would be in a murder case or a treason case, and to my knowledge we have never had a treason prosecution. We've got a relatively small state. Even the number of murder prosecutions is relatively small. And the chance of a bail issue ever --

QUESTION: Well, in this very case, though, on the review by the district court of the denial or whatever it was by the magistrate, could you not have insisted that he was entitled to bail because the state had not proved either that the proof was evident or the presumption great, whatever those things mean?

MR. HORNSTEIN: I suppose we could have tried. My experience in these cases has been that they won't listen.

QUESTION: Well, but then you would have framed the issue --

MR. HORNSTEIN: It is a summary hearing, and I have never seen anybody -- in fact, I have never seen witnesses called in a bail hearing. It is just unheard of. It just

doesn't happen. I mean, it is a summary proceeding. You walk up in front of the judge and you say a few words --

QUESTION: Any legislative history where this came from?

MR. HORNSTEIN: Absolutely -- where the constitutional amendment --

QUESTION: No, where that, where the proof is evident or the presumption great. Certainly those are not novel. I have seen those other places. I don't know what they mean, but I have seen them.

MR. HORNSTEIN: To my knowledge, I don't know the exact source. I know that it appears in the Northwest Ordinance of 1787. It appears in the Judiciary Act of 1789. It has been adopted. Practically every state constitution has that language in it. And we have got a summary of the different state rules in the brief, and there are three different rules, one of which is that you can't even put on any evidence because it is an irrebuttable presumption arising out of the charge that it is. Another is that the burden is upon the defendant to show that it is not evident and great. And the third is that the burden is upon the state to show some high probability of guilt.

QUESTION: How many states follow that interpretation?

MR. HORNSTEIN: As I recall, the majority rule is

the middle one that I mentioned, the one that the burden is upon the defendant. The other two rules are minority. I don't know the number of states.

Now, our position is that even if it means high probability of guilt, there is no logical or empirical data to support the presumption by the state that all or even a significant number of defendants who are probably guilty of rape would commit rape if released on bail. Now, that is the -- the legislative purpose of this legislation is to prevent the crime of rape during the period of pretrial release on bail.

QUESTION: Counsel --

QUESTION: Yes, but what if at the hearing the defendant testified that he would if he were let go?

MR. HORNSTEIN: Well, under this amendment, there is no need to inquire into that.

QUESTION: Would it be unconstitutional to say, well, we won't let you go then?

MR. HORNSTEIN: It is assumed.

QUESTION: No, no, but supposing you did have a hearing, supposing you had a hearing --

MR. HORNSTEIN: Under this amendment.

QUESTION: -- under this amendment, and the man denied his guilt as to this crime, but said, if I go free, I intend to commit a rape as soon as I walk out the door.

MR. HORNSTEIN: I think it is irrelevant, because they don't need -- I mean, it is presumed. They have to deny him bail. Now, that is another issue. I don't want to deviate from the question here, but our position, contrary to the state's, is that once a finding is made of a charge of rape, and the proof evident and the presumption great, there is no discretion to deny bail.

QUESTION: Has that been determined by the Nebraska courts?

MR. HORNSTEIN: Yes, and I quoted it at Footnote 18 on Page 37 of my brief. Chief Justice Krivosha, who wrote the Parker opinion for what was a unanimous court, and I hesitate to quote, but I will quote a little bit here. He says, "It should be clearly recognized that the 1978 bail amendment does not prohibit bail in every case where an individual is charged with a sexual offense. In order for one so charged to be ineligible for bail, it must appear," et cetera. And then he goes on, and he says, "In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail."

And in the next paragraph he says that we are therefore left with the question whether the legislature and the people thereafter acted rationally and reasonably in concluding that where the proof is evident or presumption

great, that an individual had committed a sexual offense, "such person should not be free on bail pending trial."

We think that commits the state to the position that once such a finding is made, there is no discretion, and our survey, we think, reflects that, and the bail hearing in this case reflects it. There was no inquiry made into individual factors bearing on dangerousness. It is a presumption --

QUESTION: Well, I gather your basic position is that your 1978 amendment violates the federal Constitution.

MR. HORNSTEIN: That's right.

QUESTION: Tell me, you mentioned earlier the 1789 capital crimes exception in the 1789 statute. Do you think that, under your submission as to the Nebraska provision, do you think that also is unconstitutional?

MR. HORNSTEIN: No, our position is, the capital crimes exception has existed since prior, even, to those provisions that were adopted at the time of the Bill of Rights, well, at the time of the Judiciary Act. Blackstone is quoted in the circuit court opinion below in 1770 in his Commentaries on The Laws of England, stating that the rationale for that rule was that a defendant facing the penalty of death could not be assumed to -- or he would not appear regardless of what amount of bail was fixed, because the penalty itself would deter his appearance, and that is

the rationale for that rule, which does not apply to non-capital offenses.

QUESTION: It wasn't then the idea that he would go out and commit another murder?

MR. HORNSTEIN: Absolutely not. Now, there is some language in a Law Review article that John Mitchell wrote in the late sixties where he claims that that was one of the purposes, but I have read a lot of literature and I cannot find any justification for that language.

QUESTION: Doesn't that cut in a little bit to your idea that the forcible rape addition has to be justified by a finding that the person would go out and commit another rape?

MR. HORNSTEIN: Well, we are assuming here only for purposes of argument that the -- in other words, we don't think it is necessary to decide the preventive detention issue here, because this law is so overbroad that even assuming for purposes of argument that it is constitutional, it can't stand. We don't think the thin facts of this case present the punishment issue that you discussed in Bell v. Wolfish, and that that would be more appropriately heard in a case like United States v. Edwards, which is pending on certiorari from the District of Columbia Court of Appeals.

QUESTION: But your client is one step beyond the pretrial detention stage. He is now in the post-conviction

appeal stage.

MR. HORNSTEIN: That's correct.

QUESTION: Do you agree with your opposing counsel that there is a separate system of setting bail for people who have already been convicted?

MR. HORNSTEIN: It is unclear in Nebraska. My recollection of the bail reform statute is that it does not draw any distinction between pre- and post-conviction standards for fixing bail. The only permissible consideration is risk of non-appearance, and I don't recall that there is any distinction between pre- and post-conviction.

QUESTION: Wouldn't this constitutional amendment be a basis for denying bail pending appeal?

MR. HORNSTEIN: Oh, I agree with that. Certainly.

QUESTION: However the factors might sort out under the other statute, this would be independently a reason for denying bail?

MR. HORNSTEIN: I think it mandates a denial of bail.

QUESTION: Yes, and as long as the case is pending, this case isn't moot, is it?

MR. HORNSTEIN: No, our position is that it is not moot. I mean, I think both sides agree that it is not moot.

QUESTION: Well, I know, but we don't necessarily

take your word for that.

MR. HORNSTEIN: I realize that.

QUESTION: Mr. Hornstein --

MR. HORNSTEIN: I mean, under the Nebraska Press Association standard, as I understand it, if it is capable of repetition --

QUESTION: You don't even need to get to Nebraska Press.

MR. HORNSTEIN: Okay. If -- right. I mean, he can be denied bail as long as the --

QUESTION: If we overturned the statute, he could apply for bail, pending appeal.

MR. HORNSTEIN: That's right. That's right.

QUESTION: He may not get it, but at least the constitutional barrier to bail would be removed.

MR. HORNSTEIN: That's right. My recollection of the statute is that he would be entitled to bail if you overturn this law, subject to the flight consideration.

QUESTION: Yes.

QUESTION: Even though you stipulated that the proof is evident or the presumption great?

MR. HORNSTEIN: Well, that only applies if it is one of --

QUESTION: If we turned that over, that would be gone.

MR. HORNSTEIN: Yes, that only applies if it is a non-bailable offense. If you decide that it is unconstitutional to make rape non-bailable, then he automatically becomes -- the proof evident, presumption great is an irrelevant factor, because it has to go together with the charge of rape.

QUESTION: So even if he has been convicted, then, if we overturn this provision, he is out on bail. Is that right? Is that your position?

MR. HORNSTEIN: No, I can't say that. I mean, the court -- I think the court could find that -- I mean, the flight risk, I think, increases following conviction.

QUESTION: Well, how about the danger to the public?

MR. HORNSTEIN: To my knowledge, there are no Nebraska cases that say that that is a factor that can be considered. The statute totally --

QUESTION: Do you think it should or shouldn't be?

MR. HORNSTEIN: Well, I don't think that is really relevant to the determination of this case. I mean, the man has been convicted of three sexual assaults, and one weapons use charge, and he has got long sentences. I think that increases the flight risk. Traditionally, the sole purpose or one of the few purposes of bail has been to ensure appearance. I think that risk increases. But, you know, I suppose a court could find that he might qualify.

QUESTION: In terms of the discretion that the judge had on this record is it any different from what it would be if he had three outstanding indictments, separate indictments not being tried together for forcible rapes?

MR. HORNSTEIN: These were not tried together. They were all -- there were three separate trials.

QUESTION: If he had had convictions of three before he came before the court.

MR. HORNSTEIN: Oh. Under the amendment, I think it would be irrelevant, if I understand the question. I mean, if he has got any charge of forcible first degree sexual assault, the proof is evident, and presumption great, our position is, bail has to be denied, if there were a conviction.

QUESTION: Mr. Hornstein, may I ask you another question that relates to the Chief Justice's question? Suppose there were no constitutional provision, again, you merely have your bail statute, which as I understand you says that there is an inquiry into the probability of flight.

MR. HORNSTEIN: That's right.

QUESTION: Supposing the judge had a bail hearing without the constitutional provision before him at all, said this man has been indicted on four serious charges, I think he is sure to flee if he can, and the guy testifies he is going to flee. Does he still get bail?

MR. HORNSTEIN: My understanding is that they cannot deny bail. They have to fix bail. Now, I know what would happen.

QUESTION: The way they prevent him from fleeing is by fixing excessive bail? Is that what you do?

MR. HORNSTEIN: Yes. That is the standard --

QUESTION: Then you would be up on another constitutional basis.

MR. HORNSTEIN: Well, that is an issue that has yet to be decided, I suppose. I mean, that would present a pure excessive bail.

QUESTION: It certainly violates the Eighth Amendment.

MR. HORNSTEIN: What?

QUESTION: To give excessive bail.

MR. HORNSTEIN: Right. But we know that that is the standard practice.

QUESTION: You know it, and you go right ahead and do it.

MR. HORNSTEIN: We don't do it. The judges do it.

QUESTION: Mr. Hornstein, may I just get back to the question I asked you? Do I understand now, based on what you said about pre-Revolutionary history and Blackstone and everything else, that you do think the capital crimes exception in the 1789 statute is constitutional?

MR. HORNSTEIN: Yes. Our position is that that has got deep historical roots. It has got a rationale that is reasonable, and there is another exception for, you know, defendants who threaten witnesses, juries. That is another traditional exception. Other than those two --

QUESTION: Since you concede that, what real difference is there between this Nebraska provision and that one, in terms of constitutionality?

MR. HORNSTEIN: Well, the difference is that that -- the rationale for that is the threat of capital punishment causing a flight risk which doesn't exist in a non-capital crime. This crime in this case, the charges carry penalties of one to 50 years, and the weapons charge, I think, was a consecutive one, 20. But we have a number of other crimes in Nebraska that carry equal or higher penalties, yet they are all bailable.

QUESTION: So in a state which has abolished capital punishment, it would be your view that then there could be no denial of bail.

MR. HORNSTEIN: That's right. Our position is that that rationale does not apply except in the case of a capital crime.

QUESTION: Is it your view that the Eighth Amendment is applicable to the states?

MR. HORNSTEIN: Yes. Now, we haven't really

touched on that issue. We spend half our brief discussing that, because that determines the standard of review to be applied.

QUESTION: I guess I am pushing you to get to those issues.

MR. HORNSTEIN: I appreciate that, Your Honor. Our position is that bail under the standards that were set down in Duncan v. Louisiana in Justice White's opinion, which sets out the test to be applied in determining whether a criminal bill of rights protection is applicable to the states, is equally applicable in this case here. The essential test was whether the right that is being considered as fundamental in the context of the criminal process is maintained by the American states, and the court has applied a number of criteria to determine that.

The state argues here that the excessive bail clause should not apply, and does not mean that there is a right to bail guaranteed against legislative abuse, because it doesn't say that. Well, we cite a number of the decisions which have found rights to be fundamental and applicable to the states which aren't even mentioned in the bill of rights, such as travel, appropriation, voting, privacy, association, and in the criminal area, the presumption of innocence, proof beyond a reasonable doubt. None of those are mentioned in the Bill of Rights, and yet

they have been found applicable to the states.

One of the most recent rights in the Richmond newspaper, the Virginia case that was written by Chief Justice Burger, holding that the right of -- that there was a fundamental right to public access to criminal trials that was implicit in the First Amendment. Our position is that if a right to bail guaranteed against legislative abuse is not found to be implicit in the Eighth Amendment, then it becomes meaningless, because if the legislature can take away a right that the cause says bail cannot be excessive, and yet if it can be denied by a legislature, that right becomes eviscerated. If the legislatures are left free to render any crime non-bailable, they can -- theoretically they can choose misdemeanors like petty larseny, drunk driving; any other charge could be rendered non-bailable, which would totally eviscerate the Eighth Amendment excessive bail clause.

QUESTION: May I ask you this, Mr. Hornstein? If you are right that your constitutional amendment creates an irrebuttable presumption as to people who fell between them, wouldn't you argue, or do you argue that under a due process analysis in any event the provision is unconstitutional, without reaching the question of whether the Eighth Amendment extends the excessive bail --

MR. HORNSTEIN: Well, I -- yes, we -- in fact, I

discussed it from sort of an intermediate scrutiny analysis, assuming that the court finds that bail is not a fundamental right. Now, we strongly urge that bail is a fundamental right, a right to bail guaranteed against unreasonable legislative denial under the Eighth Amendment is an implicit, fundamental right that is applicable to the states. However, if the Court finds that it is not, you can still apply a due process or equal protection intermediate scrutiny analysis.

In fact, it has been suggested to me that even under a rational basis minimal scrutiny argument, you might be able to invalidate this on the ground that the legislature has offered absolutely no data to support its position that all or most people charged with rape will commit rape if released on bail.

QUESTION: Mr. Hornstein, doesn't that analysis make the Eighth Amendment meaningless in this context?

MR. HORNSTEIN: Well, our preferred position is that the Eighth Amendment itself can be used to invalidate this, but --

QUESTION: What about Carlson and Landon?

MR. HORNSTEIN: The language in Carlson v. Landon -- well, the circuit below distinguished that case on the ground that that involved an administrative denial of bail by the Attorney General to alien communists facing

deportation. It was not a criminal context. The excessive bail clause appears in the context of an amendment that --

QUESTION: It addressed the Eighth Amendment, though, as to how broad it was. And it said expressly that it did not prevent the denial of bail.

MR. HORNSTEIN: That's right. Our position --

QUESTION: Just as clear as it could be.

MR. HORNSTEIN: Well, our position is that it is dictum. It relied upon the --

QUESTION: Why is it dictum? It was a holding, wasn't it?

MR. HORNSTEIN: A holding, and the case was --

QUESTION: Well, it was -- one of the submissions was that the Eighth Amendment prevented the denial of bail.

MR. HORNSTEIN: The language in the opinion says that they were limiting the holding of the circumstances of that particular case.

QUESTION: Well, I know, but if the Eighth -- it could be the circumstances, but if the Eighth Amendment -- but nevertheless in those circumstances the Eighth Amendment permitted the denial of bail.

MR. HORNSTEIN: That's right, in a non-criminal --

QUESTION: And not just excessive bail, denial of bail. It permitted making a non-capital case non-bailable.

MR. HORNSTEIN: In a non-criminal context.

QUESTION: Well, nevertheless, it did.

MR. HORNSTEIN: Well, we think that is an important distinction. The court there -- there were four vigorous dissents in that case. The court relied on --

QUESTION: How many of them took issue with the Eighth Amendment dictum or holding? Only two. Justice Frankfurter --

MR. HORNSTEIN: Burton and Black.

QUESTION: Burton and Black did. Douglas didn't address it.

MR. HORNSTEIN: That may be right.

QUESTION: And if there is a difference, if there is a difference between an administrative grant or denial of bail and a judicial grant or denial, as to which do you think the standards would be the higher?

MR. HORNSTEIN: I would assume that a stricter standard would -- well, traditionally. I mean, I don't think in a criminal context the individual rights would be subject to more protection than they would be in an administrative, civil situation. If I understand -- I am not sure I understand the question, but --

QUESTION: An administrative denial of bail is more readily granted than judicial denial of bail?

MR. HORNSTEIN: I would think so. I mean, I would think the standards that protect the individual rights in a

civil situation would be lower than those in the criminal situation, especially here where the Eighth Amendment was directed at criminal cases.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Schaaf?

ORAL ARGUMENT OF TERRY R. SCHAAF, ESQ.,

ON BEHALF OF THE APPELLANT - REBUTTAL

MR. SCHAAF: If I may, Your Honor.

QUESTION: General, you have argued that Section 9 does not create an irrebuttable presumption. Is there any authority for that in Nebraska cases?

MR. SCHAAF: I cite you to the concurring opinion of Justice McCowan in Parker versus Roth. Parker versus Roth is the closest case that we have on that point. It is cited in our brief. It is found at 202 Nebraska 850. If you will read Chief Justice Krivosha's remarks, those remarks that have been quoted to you by Mr. Hornstein, I think you will find, first of all, that that is purely dicta, and secondly, if you actually read the language used, I don't think you can conclude from reading that that he is establishing an irrebuttable presumption.

Then when you read Justice McCowan's concurring opinion, I think he makes it exceptionally clear that this is not an irrebuttable presumption.

Mr. Hornstein would have us believe that this

non-capital exception has been historically recognized, that being that there has always been a fundamental constitutional right to bail. We suggest that as early as the Petition of Right in 1628, going through the Habeas Corpus Act of 1679 and the Bill of Rights in England in 1689, that those provisions were merely enacted to guarantee the right to bail where it otherwise exists. It was not meant to create a fundamental right to bail. It was being abused in England, and thereafter provision was made so that excessive bail could not be required where it was otherwise permitted.

At the time of the adoption of our federal Constitution, this particular provision was well known. Many of the states at that time, at the enactment of the Eighth Amendment, also had statutory rights to bail. The inconsistency could not have been missed by the colonial states at that time. The federal Judiciary Act --

QUESTION: What is your view of the applicability of the Eighth Amendment, of this provision of the Eighth Amendment to the states?

MR. SCHAAF: Your Honor, we have no quarrel with the concept that that clause of the Eighth Amendment that says excessive bail shall not be required is applicable to the states, but merely the literal language contained therein, excessive bail shall not be required, period,

comma, on with the clause. We have no quarrel with that provision as being applicable to the states.

QUESTION: Do you think the Fourteenth Amendment, if we were reviewing it from that aspect, imposes any requirement for an individualized determination, apart from the Eighth Amendment considerations?

MR. SCHAAF: No, Your Honor, we do not. If in fact it does, however, then we call your attention to the numerous states that have, I believe there are 43 in number, that provide for the withdrawal of the right to bail in capital offenses, yet there is no individualized determination as to the likelihood of their return in many, if not all of those states. If in fact we are required to determine the likelihood of the recommission of the crime, then are we also required to determine the likelihood of non-return?

One point that should be brought out here is that the capital differentiation here, the idea that because it is a capital offense persons are not likely to return, in the state of Nebraska alone no one has been executed in the state of Nebraska since 1959. The idea that the very fact that it is a capital offense does not serve much of a deterrent or provide much of a reason for fleeing when we haven't put anyone to death since 1959.

QUESTION: How many do you have on Death Row?

MR. SCHAAF: I believe we have somewhere between 10 and 12 on Death Row at this time.

QUESTION: Then what is the significance of your comment?

MR. SCHAAF: My comment is that it has not been exercised. The most significant part of that comment is, if we are required to have criteria for determining dangerousness, I think it would also be incumbent, it would follow necessarily then under the same constitutional provision, we are still talking about the same criteria, to have criteria for determining likelihood of return, and I think most states' constitutional provisions would fail if subjected to that analysis if in fact that analysis is adopted by this Court.

Once again, we are balancing the rights of society under the Fourteenth or any other federal Amendment with the rights of individuals, and we suggest that at this point in time that it is reasonable to conclude, we can examine -- the best indicator of activity, the best indicator of conduct is past conduct, and in closing, Your Honor, I would like to quote from the remarks that you made in the --

QUESTION: May I ask you one question before you give us you final quote, so it won't take it out of order? Do you agree with the suggestion that I get from both of you, or do I correctly understand now that if in this case

the trial -- say there had been a bail hearing, and we didn't have the constitutional provision, and the trial judge had determined that this man had been charged a number of serious times with a substantial risk of flight, that he could have prevented him from being released on bail by setting a very high bail that he knew the man could not meet? That would be something that would be done from time to time in Nebraska?

MR. SCHAAF: Yes, Your Honor.

QUESTION: So that we don't really know, do we, whether, although this man might have formally been entitled to bail, say, $10 million or something, we really don't know apart from this stipulation whether this man would have been released, do we?

MR. SCHAAF: No, Your Honor.

QUESTION: So we don't know if we have a live case here.

MR. SCHAAF: Well, I suspect that any bail to certain defendants could have been excessive bail. That is --

QUESTION: So we don't know about this particular man. Really, from what we have heard about it, he has been convicted of four crimes, or three crimes, very serious in nature. The judge might well, apart from this stipulation, have followed a procedure which would have denied him

release entirely apart from this constitutional provision.

MR. SCHAAF: He couldn't have denied him bail. He very well might have set bail --

QUESTION: No, he could have granted him a bail, but denied him release, because he --

MR. SCHAAF: Effectively denied him release.

QUESTION: Yes.

MR. SCHAAF: That is theoretically possible, yes, Your Honor.

But in closing, Your Honor, last year in your State of the Judiciary comment, you mentioned that states which -- states and governments exist merely to protect people, and while it may be admirable to attempt to do whatever we can to protect the rights of accused, states fail in their mission if they don't also protect the people of their states from the fear of crime and from crime itself.

We suggest in closing that Nebraska has done what it can.

QUESTION: Your friend has quoted the same material in support of his position.

(General laughter.)

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

(Whereupon, at 11:06 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JAMES M. MURPHY, DISTRICT JUDGE, FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA, DOUGLAS COUNTY V, EUGENE L. HUNT # 80-2165

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

BY Sharon Ryan Connelly