In the

Supreme Court of the United States

MARJORIE LEHMAN, ETC.,

Petitioner,

v. : No. 80-2177

LYCOMING COUNTY CHILDREN'S SERVICES AGENCY

Washington, D. C.

Tuesday, March 30, 1982

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

MARTIN GUGGENHEIM, ESQ., New York, N.Y.; on behalf of the Petitioner.

CHARLES F. GREEVY, III, ESQ., Williamsport, Pa.; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Lehman against Lycoming County.

Mr. Guggenheim, I think you may proceed when you're ready now.

ORAL ARGUMENT OF MARTIN GUGGENHEIM, ESQ.

ON BEHALF OF PETITIONER

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

The issue before the Court today is whether there is federal habeas corpus jurisdiction to challenge a termination of parental rights order where the challenge is based upon the claim that the state court lacked constitutional power to order the children into state custody because the statute under which it purported to act is federally unconstitutional.

A related question is whether the Petitioner, as the mother who gave birth to the children who are now wards of the state and nurtured them through their formative years, has standing to challenge on their behalf the allegedly unconstitutional order in this case.

QUESTION: The question is a little narrower, I thought: whether she can do it by way of habeas corpus in a federal court. Is it not that narrow?

MR. GUGGENHEIM: Yes, related to the first question of whether there is federal habeas corpus jurisdiction, whether the Petitioner as the mother before the final order of the Pennsylvania courts has standing in the federal habeas action to bring this case on the children's behalf.

This case does not present any question respecting the scope of federal review in such a habeas corpus action or concerning the relitigation of facts or the best interests of the children.

The court below, the en banc Third Circuit, ruled in a split decision, two plurality decisions of that court, against Petitioner; four interlocking, interweaving, but we would submit mistaken bases for the conclusion that jurisdiction does not lie in this case.

The first is that the mother does not have legal capacity to bring the action on behalf of their children. The second is that the children are not in custody within the meaning of the federal habeas corpus statute. The other two grounds are policy grounds: the fear that according such jurisdiction would necessarily lead to including intra-family disputes, such as child custody disputes in the ordinary separation of a family divorce context; and the fourth, general federalism concerns and implications respecting the appropriate

role of a federal court in determining constitutional norms in this area.

We submit that there clearly is jurisdiction in this case, that that jurisdiction derives from the literal language and the purpose and meaning of Sections 2241 and Section 2254 of Title 28.

The first issue for the court is whether the children are in custody within the meaning of the statute. We submit that this Court has resolved that question numerous times in the past. Historically, of course, it was the Act of 1867 which broadly expanded the scope of federal habeas jurisdiction to all persons in custody of the state in violation of the laws, treaties or Constitution of the United States.

In 1886 this Court in Wales against Whitney recognized that the term habeas, that the term custody, is a term that applies to a great variety of restraints for which it is used to get relief. Confinement under civil and criminal process may be so relieved. Indeed, wives restrained by husbands, children withheld from their proper parent or guardian, persons held under arbitrary custody by private individuals, may all become proper subjects of habeas corpus.

Now, of course the question respecting the definition and breadth of custody does not address

solely or conclude finally whether or not federal habeas corpus lies. But it clearly shows that the term "custody" in the statute is easily met by children in this case who are wards of the state.

QUESTION: What were you just reading from?

MR. GUGGENHEIM: I am reading from the Court's opinion in Wales against Whitney --

QUESTION: Is that in the brief?

MR. GUGGENHEIM: -- at 114 U.S.

That exact language is not in the brief, but the quote, the cite to Wales against Whitney is in the brief.

QUESTION: Mr. Guggenheim, what was the exact position of the children at the time the habeas corpus action was brought? Were they in the physical custody of the state or were they in a foster home?

MR. GUGGENHEIM: Both. They were in the physical custody of foster parents. They were in the legal custody of the state. They were temporary wards of the state prior to the final order of the probate court which made them permanent wards of the state, at least until they might be adopted in the future.

QUESTION: Would you say that habeas corpus extended to the recovery of custody of children who were already adopted?

MR. GUGGENHEIM: In the brief we make the point that there may well be equitable reasons to limit habeas. I think -- it's a complicated answer. I think that jurisdiction does exist to make the challenge, but I think that a court may determine that the children are no longer in custody in violation of the Constitution.

QUESTION: That would be a ruling on the merits.

MR. GUGGENHEIM: No, no, not on the merits. Even on the jurisdiction, after it made an inquiry into where the children were at that moment. And the reason is, Wales against Whitney, of course, as broad as the language is that I've just cited back in 1886 was, if not reversed by this Court in Jones against Cunningham, clearly broadly expanded in Jones against Cunningham, and that the test in the twentieth century has been that a person must be subject to restraints not shared by the public generally.

There can be no question that children who are state wards, children who are parentless, children who don't have relatives, children who are subject to the discretion of the state to be moved about within the state's care, as this Court recognized in the Smith against OFFER case, are persons who are restrained of their liberty in a manner which is not shared by the

public generally.

However, Justice Rehnquist, it may be -- and this case does not raise that question -- that once the children have been adopted they no longer meet the test of Jones against Cunningham, because they are no longer subject to these peculiar restraints. It may also be that they do still meet the test, and I would commmend to this Court the Eighth Circuit's opinion in Syrovatka against Erlich, which is cited in the brief, in which that court ruled that children who had been adopted already were not within custody --

QUESTION: Mr. Guggenheim, aren't all children subject to restraint?

MR. GUGGENHEIM: Yes, they are. There's no question that they are.

QUESTION: Where do you draw the line here? I mean, why is it more restraint to be in a foster home than to be in your own home, on the word "restraint"?

MR. GUGGENHEIM: The restraint that is peculiar here is not merely that they're in a foster home. Unfortunately, in this society today that's not as peculiar as it once was. But it is combined with the fact that they are permanent wards of the court. They don't have parents. They aren't related to parents.

QUESTION: I'm just working on the word

"restraint."

MR. GUGGENHEIM: It is the quality of the restraint that one must look to.

QUESTION: And what is the difference in the quality?

MR. GUGGENHEIM: They are prohibited from visiting --

QUESTION: Well, let's start with a one year old child. What is the difference in the restraint in a foster home from the restraint of a one year old child in his own parents' home? I mean, he's not free to go any place, is he?

MR. GUGGENHEIM: No. But that's not the only question within the meaning of the term "restraint." As Justice Blackmunn for this Court only last week in the Santosky case recognized, children who never get to know their parents are subject to a peculiar, if not restraint, at least deprivation.

QUESTION: I don't think he said restraint.

MR. GUGGENHEIM: He did not say restraint. That wasn't the issue in that case.

QUESTION: Well, that's what I'm talking about.

MR. GUGGENHEIM: The restraint here is the prohibition from being visited by one's parents, from

being connected by roots with one's home.

QUESTION: Well, suppose you don't even know your parents?

MR. GUGGENHEIM: Well, the question then is --

QUESTION: I'm just worried about -- I'm worried about you relying on the word "restraint."

MR. GUGGENHEIM: Well, there is an alternative reliance, which is the technical word. The clear word in the statute is "custody." The one year old who is in custody of the court in violation of the Constitution meets the test.

QUESTION: Well, on your theory if a husband and a wife, divorced or separated, get into an argument over the children, you could have -- one could bring a habeas case in federal court against the other.

MR. GUGGENHEIM: I think not. I think not, and I think that this Court has answered that question several times. In In re Burrus and in Matters against Ryan --

QUESTION: Didn't the Court answer it in Wales against Whitney? Since you didn't discuss it in your briefs, I hadn't looked at it until now. What I see there from a quick look is that in order to make a case for habeas in the federal court, you've got to show an

actual confinement of some kind.

Now, where is the actual confinement here?

MR. GUGGENHEIM: Well, the actual -- but that language follows from the very language which I read. The Court has recognized that there is no satisfactory definition --

QUESTION: What page of the opinion was that, if you have it?

MR. GUGGENHEIM: Unfortunately, I'm reading from the Lawyer's Edition volume, and it's 279 of that volume. But --

QUESTION: Well, that case was a wholly different case, in any event. It was a naval officer --

MR. GUGGENHEIM: That's right, and the Court found he was not confined. This Court has really overruled Wales in Jones against Cunningham. But my point is that where it found the naval officer was not confined, it found that wives and children were confined.

The very language used by Representative Lawrence --

QUESTION: Well, but this came out of the District of Columbia, didn't it, Wales? I mean, it didn't rely on the habeas statute of 1867.

MR. GUGGENHEIM: No, it did not.

QUESTION: So it's a totally different analysis. The District of Columbia had full municipal jurisdiction and this Court simply sat to review its decision.

MR. GUGGENHEIM: I'm not relying on the Wales case to indicate that that naval officer was -- had his rights violated or vindicated, but only that this Court has recognized in Jones against Cunningham again, that at the common law both in English and American usage the term "custody" -- and I must emphasize that that's not dispositive of this case, but only that the term "custody" has always included children being held wrongfully by third parties.

QUESTION: Do you think Congress in 1967 intended to give the federal courts authority to review court custody degrees?

MR. GUGGENHEIM: Not ordinary court custody decrees, because -- but yes, I do think Congress gave the federal courts authority to review this case. As this Court recognized in Ex parte McArdle and again in cases within the last two decades, the breadth of federal habeas corpus was expanded by the 1867 Act as far as constitutionally permissible to include -- and what's the test? -- all persons held in custody in

violation of the Constitution, laws and treaties of the United States.

What -- and this now answers both your question, Justice Rehnquist, and Chief Justice Burger's question. Ordinary court custody decrees in the ordinary intra-family dispute are not cognizable under this statute, not because the children are not in custody within the meaning of the law, but because the children are not in custody in violation of the Constitution.

That's what this Court held in In re Burrus and that's what this Court held in Matters against Ryan. In both cases, the Court recognized plainly that the custody requirement was met. That's not what was lacking.

But there is within the Jones against Cunningham test yet another reason to conclude that children who are subject to one parent rather than another's custody is not in custody -- are not in custody within the meaning of the statute, because of the Jones test, that they are not subject to restraints not shared by the public generally.

Children must live with one or another of their parents. If one parent to the dispute died, the other parent would get custody automatically, and

certainly the children would be hard-pressed to claim that the custody is in violation of the Constitution.

This is entirely different from court wards, as these children are, entirely different.

QUESTION: Well, what if there were an allegation that the custody decree were entered without due process of law?

MR. GUGGENHEIM: Well, the kind of due process of law that may raise the question might be the Culco type case, where the court actually did not have jurisdiction. I can see that that --

QUESTION: Or no fair hearing?

MR. GUGGENHEIM: Well, no fair hearing -- we have the Court's analysis in the Flagg Brothers case, where the Court recognized that private parties acting pursuant to a statute -- every state has a statute that says --

QUESTION: I'm talking about a judicial proceeding which ends up with awarding a child to one parent or the other, and the one who didn't get the child says that the proceeding was conducted in violation of the United States Constitution.

MR. GUGGENHEIM: Several federal courts have allowed that jurisdiction, have found jurisdiction exists in such a case, but summarily find that the claim

is frivolous. In almost every case --

QUESTION: What I'm trying to find out is, does the theory of your case encompass that claim?

MR. GUGGENHEIM: The Court could interpret the Jones against Cunningham test of restraints not shared by the public generally to find that even where -- and the difference is that we're not focusing on the in violation of the Constitution clause. Let's go back to the custody. Maybe they're not in custody within the meaning of the federal statute, because the Court in Jones defined that test in a way that fits very nicely with this case.

If a colorable claim were made that they are something in violation of the Constitution, I suppose that's for a federal court to determine. But there are very few types --

QUESTION: Well, take -- suppose in this very case this had proceeded all the way to an adoption, but determination of rights, in violation of what we held last week in Santosky, was based on a preponderance rather than a clear and convincing evidence test. Would habeas lie in that case, if the adoption now has been completed? It's gone -- here I gather it's pending adoption, isn't it?

MR. GUGGENHEIM: Yes. The same question has

already been posed, and I think the answer is a hedged answer: maybe, maybe not. The Eight Circuit in Syrovatka said, we're going to find that the parents waited too long to bring the case, the children are no longer -- the case cannot be brought.

I think that the answer may be, because the custody is of a very different type, the answer may well be no.

QUESTION: In the -- would a 1983 suit lie in that circumstance?

MR. GUGGENHEIM: We don't know, except that Allen against McCurry --

QUESTION: It's a civil suit for violation -- it's a civil suit for violation of constitutional rights, if the termination was on the basis of preponderance, rather than clear and convincing.

MR. GUGGENHEIM: Well, if the parents are seeking the return of their children --

QUESTION: Suppose they're not. They want damages.

MR. GUGGENHEIM: Prizer might require -- Prizer against Rodriguez might require --

QUESTION: That involved prisoners.

MR. GUGGENHEIM: Well, but if fact or duration of custody was being challenged, is the test. We don't

know if it only involved prisoners. We certainly know it did involve prisoners. There is a Prizer box here that may require 1983 not to be used, that may require habeas to be used.

But if we get beyond that, if the parents sued for damages only, habeas corpus is the inappropriate remedy. Habeas is our ideal remedy, Congressionally imposed on the federal courts to change custody. But Allen against McCurry is involved, too, because this Court has ruled that res judicata and collateral estoppel are applicable in Section 1983 cases.

In a case like the one before the Court today, the issues were fully exhausted in the state court. Indeed, we're proud of that. Within the framework of the federal habeas law, that's what we're supposed to do.

QUESTION: What is the conditional custody of these children that brings it within the Jones against Cunningham, where you had a prisoner who was paroled from prison? What's the relevance of that case to your case?

MR. GUGGENHEIM: I might turn the question around and ask, how could we seriously claim that a person who is merely on parole, that periodically has to make a visit with a parole officer -- or if we move on

to Carafas against LaVallee or the other cases where this Court has broadly expanded the term "custody" -- in Strait against Laird, the reservist who has to report for some future armed services duty.

In Carafas the Court found that the disabilities of engaging in a type of business, of voting, of serving as a labor official or a juror was a sufficient restraint. The answer is, how are the children restrained of their liberty: the state and not the parent is empowered to consent to their marriage by the statute. 23 Consolidated Pennsylvania Laws, Section 2521, provides that the parent -- that the state and not the parent shall consent to the enlistment in the armed forces, that the state and not the parent shall consent to the major medical, psychiatric and surgical treatment, and that the state and not the parent shall exercise such other authority concerning the child as a natural parent should exercise.

In short, as Justice Marshall indicated, it is the totality of restraint, of conditions on the child imposed by the state, which makes that person's liberty different from that which the public shares generally, even other children.

QUESTION: There's one other difference, that in all of the cases you mentioned, including Jones, the

party involved wanted the change.

MR. GUGGENHEIM: Yes, that's a difference. But children may not waive constitutional rights. We know that from In re Gault. We know that from a host of cases. Parham against J.R. is certainly an excellent example.

QUESTION: You can go in any book and pull out little statements like that.

MR. GUGGENHEIM: Well, the point, Justice Marshall, is that we don't give children -- in a case like Gilmore against Utah, we allowed the mother to come to this Court and say --

QUESTION: There's a lot of difference between the death penalty and child custody.

MR. GUGGENHEIM: This has been described as the death penalty of parents. As this Court recognized last week in Santosky, there are few more irreversible or formidable actions the state can take than the permanent destruction --

QUESTION: Well, murder is one.

MR. GUGGENHEIM: I agree, Your Honor.

QUESTION: I hope you do.

MR. GUGGENHEIM: And this Court recognized that in Gilmore the reason the mother could not come forward is because, as a knowing and intelligent adult,

Mr. Gilmore waived his constitutional rights. I suggest it would be standing this Court's jurisprudence on its head --

QUESTION: You compare that case with this, and then we'll start comparing rocks with peanuts.

MR. GUGGENHEIM: I am only making the analogy to the limited extent that this Court has never recognized in its jurisprudence the principle that children who are under the age of -- at least not yet mature minors, in the Baird and Bellotti, and Planned Parenthood and Danforth context -- have the discretion to waive constitutional rights on their own.

It is the presumption of the parent and child identity of interest that this case goes to. If the mother's rights were permanently severed unconstitutionally, she is the one to speak for them because of this Court's presumption of identity of interests. To presume that that presumption does not continue to exist --

QUESTION: Then she can sue under 1983, can't she?

MR. GUGGENHEIM: Not after Allen against McCurry. And probably -- that's the interesting thing, that this Court in Moore against Sims said, don't come into court beforehand. In Allen against McCurry it

said, you can't come in afterwards, because of collateral estoppel effect.

QUESTION: Maybe we wanted you to litigate in the state courts.

MR. GUGGENHEIM: We did, Your Honor. That's exactly what Congress wants.

QUESTION: I mean, you didn't petition for certiorari here.

MR. GUGGENHEIM: We did.

QUESTION: Was it denied?

MR. GUGGENHEIM: With three Justices dissenting, and if Justice --

QUESTION: Why didn't you appeal?

MR. GUGGENHEIM: We didn't appeal for a couple of reasons. The first is, we don't have to. We know that. Brown against Allen and many cases have indicated that you never have to exercise the appeal, even though it exists.

The second is that the risk that this Court would, in the parlance of this Court, DWFSQ without full consideration of the case was a risk that was concerning. But beyond that, there was the concern for an as-applied and a facial attack of the statute that, frankly confused me as the attorney in whether a full appeal existed or whether it should be a hybrid appeal

and cert petition. And so the conservative route taken was to file the certiorari petition.

QUESTION: You took your risk on the certiorari and lost.

MR. GUGGENHEIM: We lost, but never made clear to us that that was the final resolution of the matter, and unclear to me that it was clear to any Justice of this Court, when only three Justices voted to hear the case. Indeed, Justice White only the next -- later that same term, in a case cited in the brief, Brown Transportation Corp. against Atcon, cited this very case as an example of this Court's overburdened docket, something that Justice --

QUESTION: Well, along with a lot of other cases.

MR. GUGGENHEIM: Along with a lot of other cases. But it goes to this policy question.

And the answer to Justic Blackmunn's suggestion that we took our chance and lost is, does this Court want to make as a matter of policy that the only avenue of federal review ever will be an appeal to this Court?

Justice White in this very case --

QUESTION: Oh, I didn't imply that by any means.

MR. GUGGENHEIM: Well, when you say we took our chances and lost --

QUESTION: Well, sure.

MR. GUGGENHEIM: We took our chances and didn't get review then, and now we're still struggling.

QUESTION: It's a lot easier, I would think, to get a note of probable jurisdiction here than to get a grant of certioriari.

Well, let me ask a practical question. This probably has nothing to do with your case, but your client surrendered these three boys eleven years ago?

MR. GUGGENHEIM: Yes.

QUESTION: And do we know what they would want to do at this point?

MR. GUGGENHEIM: No, we don't. But we know that Frank is now 18 and unless a federal court reinstates his parental rights he's going to be, if we know of a Tale of Two Cities, a stateless person. He is an orphan made only by the state for no good purpose. We don't know.

QUESTION: Well, under Pennsylvania law is he an adult?

MR. GUGGENHEIM: He's probably an adult now. But certainly under the collateral consequences doctrine, he still has a colorable action in this Court,

in a federal court.

We don't know their views, but that is, I think to answer your suggestion, irrelevant to the limited point that that's the merits.

QUESTION: Under state law would your client have the right to custody of him after age 18?

MR. GUGGENHEIM: No.

QUESTION: And the other two are how old?

MR. GUGGENHEIM: 16 and 12. And the oldest boy was in four different foster homes, another was in three, and one was in only one.

This Court in a variety of types of cases has recognized that habeas jurisdiction exists in other than the criminal context, in other than the prisoner context. This is clearly one where the Court should accept jurisdiction. It is not for the Court in policy grounds to consider whether or not to hear a case.

As Justice Brennan in the Fair Assessment in Real Estate Association recognized, this Court through policy and comity grounds may delay, but never deny, permanent review. And in the Moore against Sims and Allen against McCurry problem, this is the last possibility for federal review at any level other than appeal in this Court. And we submit that there are sound reasons for allowing it in this way.

If there are no further questions, I'll reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Greevy?

ORAL ARGUMENT OF CHARLES F. GREEVY, III, ESQ.

ON BEHALF OF RESPONDENT

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

As Justice Adams stated in his concurring opinion in the Third Circuit, this present appeal compounds the delicate nature of parent-child relationship with the intricacies of federal-state court comity. I might add to that also the historic statutory and present decisional -- decisional balance of federal habeas corpus.

Initially, I'd like to address several of the questions or thoughts addressed by my brother Mr. Guggenheim. The question was asked as far as Frank's status now. The status of Frank now, who was 18 this past December, he can consent to his own adoption now without the consent of his parent, a right which the court gave six years ago when they took the parental rights from Marjorie Lehman.

MR. GUGGENHEIM: Could he consent to the adoption by his mother?

MR. GREEVY: I wouldn't know why he could not do that, Your Honor. Certainly he could consent to the adoption by his mother.

The second question was as far as a direct appeal. The basic foundation that Mr. Guggenheim is seeking is a hearing again on the merits in this matter. I would submit to the Court that if he indeed wanted a hearing on the merits, he had that right back in January of 1978 by pursuing his right to a direct appeal to this Court.

He gave up that right. In fact, he acknowledged in the Third Circuit that it was a strategic decision of theirs to not seek a direct appeal. It was sort of taking a second -- getting a chance at a second bite at the apple. They were going to try cert. If that didn't prevail, then they would file the habeas corpus.

The question could be raised whether or not that same strategy might have been looked to in the Santosky case. As I see it there, the New York court definitely did rule on the constitutional issue. I'm wondering whether he was looking for a second bite at the apple in Santosky if this Court had not accepted cert.

Of the seven Circuit Courts of Appeals who

have addressed this jurisdictional issue directly, five have directly found no jurisdiction, those being: the First Circuit in the Sylvander case; the Third Circuit obviously in this Lehman case; the Sixth Circuit in Anh versus Levi; the Eighth Circuit in Syrovatka versus Erlich; and the Fourth Circuit in the Doe versus Doe.

All of these above cases involved termination and adoption matters. One circuit has vacillated, that being the Ninth Circuit in the Yen versus Kissinger. Where they did find jurisdiction where the federal government was involved, where it involved Vietnamese children who were here on what was known as a parole status, the Tree Top versus Smith case in the Ninth Circuit found no jurisdiction in an adoption case.

One Circuit, the Fifth, has said basically okay in custody matters. Indeed, one of those is the pending petition in this Court in the Chastain versus Davis case, which also addressed the Lassiter issue of lack of representation.

Mr. Guggenheim noted the question of standing. I believe it's a very important issue for the Court to look to. Here we have Marjorie Lehman, who has alleged to be filing her petition as the next friend.

Goldstein in his book "Beyond the Best Interest of the Child" states that a parent standing in

court as the real party -- a parent standing in court is the real party in interest; however, they're liable to be defeated by their own unfitness, and the demand from society is that the child's interests prevail over the natural rights of an unworthy parent.

Certainly children have a right to a number of things --

QUESTION: But as I understand your law, you don't really require a finding of unworthiness, do you?

MR. GREEVY: No, we do not. We --

QUESTION: So how does this line of cases --

MR. GREEVY: -- by clear and convincing evidence had to show that there was an incapacity and that incapacity would not be remedied.

Children require several things. They require security, they require stability long-term and of a continuous nature, and includes also physical care, adequate food, shelter and clothing, emotional security, and certainly sound intellectual and perhaps even religious training.

The state has the responsibility to assure and oversee these various rights of a child. As stated in Santosky, a state's goal is to provide the child with a permanent home.

A child has no voice in the continuing -- the

continuation of litigation in a termination matter. Before termination there is an interest that the parent and child, and even the state, shares --

QUESTION: Well, may I ask, does that mean, Mr. Greevy, that -- here, of course, it's a permanent termination. Therefore you say that the parent can't assert any rights for the children. Would that be true if it were only a temporary custody, she were deprived temporarily of custody? Would she have standing then?

MR. GREEVY: Your Honor, certainly she would have standing --

QUESTION: She would?

MR. GREEVY: -- because she would stand in the stead of a natural parent at that point. That natural parent would have that right. Here there was a decision by the court --

QUESTION: So you make the distinction -- you make the distinction, based on the fact that here there was a permanent termination of parental rights?

MR. GREEVY: That is correct.

After grounds for termination are established under state law, the child has a primary interest in not only stability, but also finality of the litigation, and the state has that same right in the well-being of the child, looking not only to physical and emotional

well-being, but perhaps even efforts to foster good citizens.

QUESTION: Well, Mr. Greevy, I gather that your brother is arguing that if we decide this on the basis of standing and say that she has none, then we've assumed the validity of the very state court adjudication that they're challenging.

MR. GREEVY: That is correct, Your Honor.

QUESTION: How do you answer that?

MR. GREEVY: I think that it brings up a question that certainly after a termination there's a realignment of interests, and in a real sense perhaps a child needs a voice in that termination decision. The argument we would make is that in delinquency cases, which certainly the Court has recognized through habeas corpus, the parent and the child would share an interest either in a release from probation or release from even the supervision of a probation officer, or in an extreme case the child being held in an institution.

The child's need of continuity conflicts with this absence of finality when a termination is questioned and, as in this case, appealed.

Now, in Pennsylvania under the new 1980 statute representation through a guardian ad litem is given to a child in an involuntary termination matter.

Heretofore, and certainly in this case, the agency was overseeing the interests of the child in stability and a long-term foster care.

The second question would deal, of course, directly with habeas corpus. The stamp of criminal sanctions certainly pervades the overwhelming majority of habeas corpus petitions which are filed in the federal courts. Indeed, Attorney General William French Smith noted that last year alone there were 7800 habeas petitions filed in the federal courts.

These issues in regards to state criminal matters indicate the judicial and social perception of the scope of the great writ, sweeps aside, of course, the doctrine of res judicata, with no restriction or perhaps even a statute of limitation in which the petition can be filed. The statute looks to the protection of individuals against the erosion of their private rights. Certainly, it provides relief from unlawful custody, as was noted in the several criminal cases discussed by Mr. Guggenheim.

Simply stated, a single federal judge can overturn the highest court of a state as it relates to constitutional issues and the direct facts of the case. The question is whether the restraints are suffered by the public generally, which was discussed in the Hensley

case.

Congress found it appropriate to tailor this present habeas corpus statute to meet an existing need and concern back in 1867. It can be justifiably argued that a major shifting in interpretation such as advocated by Marjorie Lehman perhaps should await some Congressional thought on the matter. Indeed, I think there's been some suggestions made by Attorney General Smith that the habeas corpus area should be approached and discussed by Congress and decided what direction they opt for here in our common age.

Justices Brennan, Marshall and O'Connor in the Fair Assessment case talked about that, subject only to constitutional restraints, Congress exclusively determines the jurisdiction of federal courts. The Pennsylvania statute was found not -- was found constitutional back in 1978, and that has been embedded in the law since.

Simply put, the wrongful restraint which is talked about in habeas corpus is simply not the circumstance when we're dealing with rights termination matters. Parents' interests remain most strong in preserving the family relationship after termination. As we've talked, the child's right is in an end to that litigation, the right to then be accepted into a stable

home.

The Lehman boys have stood in much the same status as other children. They are looking to -- they are subject, of course, to parental guidance, care, control, which is necessary for their physical or mental well-being.

Habeas corpus by its very nature is intrusive in nature in a dual system of state and federal courts and is uninhibited by traditional rules of finality and federalism, and should be confined to cases of special urgency, such as Hensley talked.

QUESTION: Mr. General Greevy, may I ask you a question about -- if you're correct that the child is -- that there's no custody here and therefore the habeas corpus statute does not apply, what will your view be as to the availability of a 1983 action?

MR. GREEVY: I believe that that is a proper remedy here. That was discussed very thoroughly by Justice Garth in the Third Circuit. Certainly it would require a choice of courts. They would have to determine that the constitutional issues would be reserved for the 1983 and perhaps not submitted in the state court through their procedures.

So it does not throw the litigant out of court. It simply makes them --

QUESTION: You would not take the position there's no such remedy. At least your view is 1983 is definitely available?

MR. GREEVY: That would be my view.

QUESTION: If it is not time-barred.

MR. GREEVY: Excuse me?

QUESTION: If it is not time-barred.

MR. GREEVY: If it is not time-barred, that is correct. Here certainly there was -- the essence of time was looked at here, that they immediately upon the Pennsylvania Supreme Court decision filed the writ of certiorari within the time limitation. But 1983 could have been pursued after an appeal.

Certainly they had contested all the constitutional issues from the orphans court on up.

QUESTION: What makes you think -- if it had been appealed in the state system and the judgment affirmed, why wouldn't it be res judicata in a 1983 suit?

MR. GREEVY: It would, because the same issues would be raised. They have raised the --

QUESTION: Well, it wouldn't be available, then. 1983 wouldn't.

MR. GREEVY: 1983 would not be, in this particular case.

QUESTION: Did you mean it was a choice of remedies at the outset?

MR. GREEVY: It was a choice of remedies that they had back --

QUESTION: Oh, I see.

QUESTION: They made their choice and that foreclosed 1983.

MR. GREEVY: That foreclosed the 1983. It certainly would not have foreclosed the direct appeal which they could have pursued.

QUESTION: Well, they didn't choose the remedy in the sense of initiating the original proceeding. You chose to bring --

MR. GREEVY: We chose that, that is correct.

QUESTION: And are you suggesting that they could have -- could they or could they not, in your view, have filed a 1983 case before they appealed? Could they have proceeded simultaneously with the two?

MR. GREEVY: It would be my position that they could not have, unless they had another constitutional issue that they were going to raise against the Pennsylvania statute.

QUESTION: Well, then the only way they could rely on 1983, if I understand you correctly, is to limit all factual defenses and merely put their entire case on

the claim that the statute was unconstitutional.

MR. GREEVY: That is correct.

QUESTION: But if they're not willing to take that chance, then they really had no federal remedy, under your view.

MR. GREEVY: Other than the direct appeal to this Court.

QUESTION: Right, yes. So really, then, the answer is in your view 1983 wouldn't really be an adequate remedy.

MR. GREEVY: Remedy in this matter --

QUESTION: No.

MR. GREEVY: -- it would not be.

QUESTION: Certainly in a number of cases, such as Huffman against Pursue and Younger against Harris, we've held that it's a perfectly adequate federal remedy to have the right, ultimate right of review here from a state proceeding.

MR. GREEVY: That is correct.

Another issue raised by Mr. Guggenheim is that the granting of jurisdiction under the habeas corpus would not open the gates to a full range of other cases. It is my strong belief that it would open the case for private litigants in particular fact circumstances where the federal court would be looking

to constitutional issues, that we would have private litigating parties continuing to fight while there was still a forum that would hear their argument, which is easily borne out in this Lehman matter.

Certainly, a core issue as recognized by the Third Circuit and herein would be the question of federal-court relationships. As recognized this term, the principle of comity refers to the proper respect for state functions that organs of the national government, most particularly the federal states, are expected to demonstrate in the exercise of their own legitimate powers.

Justice Rehnquist last week in Santosky stated that family law has been left to the states since time immemorial, and not without good reason.

QUESTION: Well, you're not apt to get very far if you rely on dissenting opinions.

(Laughter.)

MR. GREEVY: But certainly it -- but note, Your Honor, that --

QUESTION: It depends on whose dissent.

(Laughter.)

MR. GREEVY: The issues here certainly are very close, and certainly it is a matter that the Court has to look to. Certainly, it's been often cited that

the whole subject of domestic relations belongs with the state courts. They have the historic -- they've historically decided the issues, they've developed well-known expertise, and they have a strong interest in disposing of the issues.

I think that Santosky does note --

QUESTION: Then you want Santosky overruled?

MR. GREEVY: I'm not saying that it should be overruled. In fact, Your Honor, I was very happy to see that the Lehman case was cited in the Santosky decision. I believe that what Santosky does, does state to us, is that this Court has given some guidelines. They've indicated that there is concern when the family is involved, not only natural parents but foster parents.

You said last term in Lassiter that the question of lawyers can be decided on a case by case, but very firmly said that when you're looking to the burden of proof look to clear and convincing, put the presumption with the parents.

Pennsylvania has used the clear and convincing. Examination of the -- even the orphans court decision back in June of '76, Judge Roupt very strongly stated that he was -- in fact, the only case cited at the case is a case cited in my brief, In re

Geiger, which holds the clear and convincing burden necessary.

Now that this Court has spoken to these issues regarding family matters, I believe that this Court can step back, perhaps is the word, and let the states administer these cases, see how the states do with it. There is certainly an overview by this Court, not only through the direct appeal but through 1983 in appropriate circumstances.

Let's give the states a chance to determine how they are going to administer their statutes. Don't impose the intrusive nature of habeas corpus into this area.

I'd like to conclude that if this case was ripe for decision on its merits, then it was in 1978 when this Petitioner chose not to exercise her direct right of appeal. She should not be given a second bite at that apple through the collateral remedy by establishing federal habeas corpus jurisdiction.

This Court has the opportunity to speak very firmly to the balancing of parental and child interests in this matter by retaining the present basis of habeas corpus jurisdiction. Affirmation of the Third Circuit decision will promote finality and stability in the realm of children's rights.

QUESTION: Mr. Greevy, I suppose you can lose on the custody argument and still win this case, couldn't you? That is, if the Court were to assume there was habeas corpus jurisdiction, you could still win the case?

MR. GREEVY: In what manner, Your Honor?

QUESTION: Well, as a matter of --

MR. GREEVY: Yes, we could. Custody is one of the issues here. But this Court can decide that, regardless of the literal interpretation of this statute, that there are other reasons why this Court should refrain from extending the habeas corpus statute.

QUESTION: Prudential reasons.

MR. GREEVY: Right. Policy, as Mr. Guggenheim noted.

The Court can help to guard against the preservation of a child's uneasy status quo and the limbo of foster care. We submit that, based upon the very thorough and strongly held First and Third Circuit positions, this Court should reject this extension of habeas corpus statutes into the parental rights termination area of family law, which is controlled and administered by the states.

QUESTION: Mr. Greevy, Justice Blackmun's

question prompts me to ask you this. I guess you have another defense, even though you lost here, on the ground that the statute is in fact constitutional. So if we ruled against you and sent the case back, I suppose it's going to start it's way back up on the basic constitutional issue.

So that I guess maybe the children will all be in their thirties by the time --

MR. GREEVY: I would believe so, Your Honor. Certainly the youngest boy, Mark, was less than one year of age when this case -- when he was put into a foster home. He was a little over the age of seven when the court decided that he could be adopted by his foster parents.

Certainly you've noted the exhibit attached to my brief, where there was discussion as far as visitation with these children pending the decision in the Pennsylvania Supreme Court. Therein, all three boys expressed a desire not to visit. Indeed, the two youngest boys, Mark and William, were very anxious for an adoption by their foster parents.

This interest and this desire has continued to the present time. Certainly, as discussed initially, Frank is too old at this point. In fact, the middle boy has been in the same foster home since the day he was

put into foster care. And this is the real meaning of the denial of federal habeas corpus, and that's to get children like William and Mark and Frank Lehman out of the limbo of foster care and into stable continuity and stable homes.

CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Guggenheim? You have two minutes remaining.

REBUTTAL ARGUMENT OF MARTIN GUGGENHEIM, ESQ.,
ON BEHALF OF PETITIONER

MR. GUGGENHEIM: Thank you.

This case is the paradigm of state action. It's state-initiated proceedings which result in ongoing state custody. It may be that the prudential concern of this Court is in defining custody so it does not include people already adopted. But there are strong policy reasons for a boy like Frank, whose rights were terminated for no reason, who never was going to be adopted and never has been adopted, to have the opportunity for federal review at some level.

This Court, however, has never countenanced --

QUESTION: He had it, did he not, in '78?

MR. GUGGENHEIM: Had what?

QUESTION: Direct appeal here.

MR. GUGGENHEIM: He had the opportunity for it and it was only a cert petition.

QUESTION: For strategic reasons, you decided to forego that.

MR. GUGGENHEIM: Basically, and for the complication that there was an as-applied and a facial attack in the case, and only one of them would be cognizable on direct appeal.

This is a challenge to the constitutionality of a state statute. It is, in Justice Powell's words in Stone against Powell, going to the heart of guilt or innocence. It's not an extra question. In Justice Stevens' words in Rose against Lundy, this is his fourth kind of habeas claim. It goes to the validity of the judgment.

This Court has never countenanced the denial of Congressionally imposed jurisdiction for policy or prudential reasons. Stone is the limit of this Court interpreting what the meaning of "in violation of the Constitution" was, to say that the illegal search didn't meet that test. But it has never gone beyond that.

And finally, this Court -- the court below, the majority of the Third Circuit judges believed that federal review was appropriate and was necessary, but peculiarly, thought it was better to reserve the federal

issues, contrary to Congress' desire of exhaustion in the England type context, to reserve; in the first place, litigate through the state court, then go into federal court in 1983 and say the statute's unconstitutional.

I submit that is not respecting basic principles of comity. That is showing a greater disregard for the intelligence and concern of state judges than to require, as the habeas statute does, full exhaustion of the remedies in the first place.

And finally, although I won't refer to a dissent to rely on it solely, all of the Justices of this Court in the Santosky case recognized that federal courts should not and may not blink at unconstitutional statutes. We submit that this is one and that this Court should remand to the federal court for a full hearing.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted. We'll resume at 1:00 o'clock with California against Grace Brethren Church.

(Whereupon, at 11:58 p.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:

Marjorie Lehman, Etc., Petitioner, v. Lycoming County Children's Services Agency -- No. 80-2177

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BY Irene Hammond