

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-5576

TITLE JEFFREY LEE PICKETT, ETC., ET AL.,
v. Appellants

BRAXTON BROWN, ET AL.
PLACE Washington, D. C.

DATE April 27, 1983

PAGES 1 thru 46



(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY LEE PICKETT, ETC., :

4 ET AL., :

5 Appellants :

6 v. : No. 82-5576

7 BRAXTON BROWN, ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Wednesday, April 27, 1983

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:03 a.m.

14 APPEARANCES:

15 HAROLD W. HORNE, ESQ., Memphis, Tennessee,

16 (appointed by the Court); on behalf of the Appellants

17 SUSAN SHORT, ESQ., Assistant Attorney General of

18 Tennessee, Nashville, Tennessee;

19 on behalf of the Appellees

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1	<u>C O N T E N T S</u>	
2	<u>ORAL AGRUMENT OF</u>	<u>PAGE</u>
3	HAROLD W. HORNE, ESQ. on behalf of Appellants	3
4	SUSAN SHORT, ESQ. on behalf of Appellees	22
5		
6	HAROLD W. HORNE, ESQ. on behalf of Appellants -- Rebuttal	39
7	---	
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Pickett against Brown.

4 Mr. Horne, you may proceed.

5 ORAL ARGUMENT OF HAROLD W. HORNE, ESQ.

6 ON BEHALF OF APPELLANTS

7 MR. HORNE: Mr. Chief Justice, and may it
8 please the Court.

9 The issue in this case is whether Tennessee's
10 two-year statute of limitations governing paternity and
11 child support actions for illegitimate children violates
12 the Fourteenth Amendment to the Constitution of the
13 United States.

14 In Gomez v. Perez, this Court held that once a
15 state posits a judicially enforceable right of children
16 to support from their natural fathers, that the
17 Fourteenth Amendment prohibits the state from denying
18 the same right to illegitimate children.

19 Last year this Court, in the case of Mills v.
20 Habluetzel considered Texas's response to Gomez and
21 found that Texas's one year statute of limitations was
22 unconstitutional. In Mills the Court considered two
23 criteria, the first being that any period for obtaining
24 support must be sufficiently long in duration to present
25 a reasonable opportunity for those with an interest in

1 the child to assert the child's right to paternal
2 support and second, that any period of limitation on
3 that opportunity must be substantially related to the
4 state's interest in avoiding the litigation of stale and
5 fraudulent claims.

6 This Court found that in the Mills case, the
7 Mills statute, the one year statute of limitations
8 failed on both criteria. And the same reasoning which
9 applied in Texas's case applies in Tennessee's, or to
10 Tennessee's two-year statute of limitations.

11 But in addition, in Tennessee, we have three
12 additional factors which further the conclusion that
13 Tennessee's two-year period of limitations is nothing
14 less than invidious discrimination toward illegitimate
15 children.

16 The first is that in Tennessee's two-year
17 statute of limitations the statute applies only to
18 illegitimate children who are not receiving support from
19 the state or who are not, in terms of the statute, a
20 public charge. Thus, a two-year, nonwelfare,
21 illegitimate child whose mother fails to file an action
22 before the child reaches his second birthday will find
23 his right to legitimation and to receive paternal
24 support forever terminated, unless the child sometime in
25 the future goes on welfare, receives AFDC or any other

1 form of state assistance, and becomes a public charge,
2 at which time the statute which purportedly had run,
3 then terminates and the child can then, on behalf of any
4 person, have an action filed, or any person can file the
5 action on behalf of the child to seek the paternal
6 support.

7 Thus, the Tennessee legislature itself has
8 considered that claims involving paternity and paternal
9 support do not, in and of themselves, become stale prior
10 to 18 years, or the reign of 18 years.

11 The second item, and it comes out of a number
12 of cases this Court has previously decided, this Court
13 has held that involving the death of a father, that the
14 claim of a state or the right of a state to legislate
15 discriminatory treatment can be rationally related or
16 substantially related to the state's interest in the
17 orderly disposition of estates.

18 However, in Tennessee, were the defendant
19 Braxton Brown to die today, young Pickett could go into
20 the Tennessee court and sue his father's estate and if
21 he could meet the heightened standard of proof, being
22 now more than preponderance of the evidence and less
23 than beyond a reasonable doubt, that his father had, in
24 fact, the defendant or the decedent was his father, he
25 could proceed -- could get a judgment and could be

1 allowed to receive part of his father's estate.

2 Now if the issue in today's case were the
3 right of young Pickett to proceed against a decedent's
4 estate, I would have to agree with the Court that
5 perhaps the claim could be stale and certainly would
6 possess the potential for being fraudulent, yet again,
7 the Tennessee legislature, or the Tennessee courts have
8 decided that the mere death of the father, of the
9 purported father, does not cause a claim to be stale or
10 so possessed with the problems of being fraudulent as to
11 terminate that cause or right of action.

12 Third additional consideration is that in
13 Tennessee the statute itself says that the purpose is to
14 provide for the support, education and welfare of
15 illegitimate children. On the front end of Tennessee's
16 statute, they again say that the fathers are responsible
17 for the welfare and support of their illegitimate
18 children.

19 Now obviously, one of the purposes of this
20 statute is to prevent the likelihood that the
21 illegitimate child will be placed upon the -- or placed
22 in need of support from the taxpayers of the state of
23 Tennessee.

24 QUESTION: Mr. Horne, why did the mother wait
25 so long in this case to bring her suit?

1 MR. HORNE: You won't find it in the record,
2 Your Honor, because I didn't come into this case until
3 the statute of limitations issue has already been raised
4 and we went straight from that issue to the Supreme
5 Court, but in this case, Mrs. Pickett, when she became
6 pregnant was so embarrassed, she told me, that she
7 immediately left the town that she was living in,
8 Memphis, moved down into Mississippi with her child to
9 give birth in a community where nobody knew her and
10 where she could hide her shame.

11 She told me that she filed this lawsuit when
12 her child reached about nine years of age, he started
13 saying well, who's my father and how come I don't have
14 his name and why isn't his name on my birth certificate
15 and it was at the request of her son that he be given an
16 opportunity to have his father's name that she filed
17 this lawsuit.

18 QUESTION: Is it your position that no statute
19 of limitations can be applied to an illegitimate child
20 during the minority for establishment of paternity?

21 MR. HORNE: Well, certainly in Tennessee I
22 would agree that that is my position because of the
23 other factors, but I would argue, likewise, that in any
24 state irrespective of what factors were considered, that
25 there is no logical reason for denying an illegitimate

1 child the right to seek paternal support where the
2 legitimate child is provided that right. And I would go
3 further and say, if a state were to say, well,
4 legitimate children don't have the right to support from
5 their fathers, I would find constitutional flaw with
6 that argument as well.

7 QUESTION: Well, Mr. Horne, what about a state
8 which doesn't toll any statute during minority? That
9 is, the statute runs against minors, not just on
10 legitimation claims, but on contract claims, tort claims
11 and the like.

12 MR. HORNE: Well, I haven't given as much
13 consideration to that possibility as I have in this
14 case, but my initial reaction, Your Honor, is to say
15 that any statute of limitations which affects a child's
16 right to know his father, to have his father's name, the
17 name on the birth certificate, and the right to receive
18 support from both parents would be an unconstitutional
19 deprivation of both equal protection -- equal rights,
20 rather and due process. The reason, the only --

21 QUESTION: It wouldn't be a equal protection
22 violation, would it, if all causes of action of minors
23 are treated the same?

24 MR. HORNE: I think it would, Your Honor,
25 because in the context of paternity, and let me say I'd

1 have more difficulty with it, it's something I haven't
2 thought about in great depth, but in the context of
3 child support, the only purpose for which a state can
4 pass a limitations period on an illegitimate child's
5 right to support would be the prevention of stale and
6 fraudulent claims.

7 I think that was the position taken by both
8 opinions in the Mill case. And I see no potential for
9 stale claims, or I don't see a child support claim
10 becoming stale during the minority of the child. It
11 certainly doesn't become stale for a child that's
12 presumed to have a father.

13 One way of looking at it is this, perhaps. If
14 a couple is married, and this happens all the time
15 nowadays, they get a divorce and the father's trying to
16 avoid his obligation of support, he disclaims the child
17 and says this isn't my child anyway, even though it was
18 born during the course of this marriage. He takes an
19 HLA blood test. The blood test comes back and says he's
20 not the father.

21 He then has a right to avoid the child support
22 obligation there. The child is, in essence, bastardized
23 by that process and if you have a period of limitations
24 on the child's right to seek support from whoever his
25 true father turns out to be, you've afforded a man a

1 right to avoid supporting his illegitimate children
2 without affording the illegitimate child an opportunity
3 to locate his real father and seek support from the real
4 father.

5 QUESTION: Well, that's not an equal
6 protection claim, though, I wouldn't think. Well, at
7 any rate, does Tennessee have a general tolling statute
8 for causes of action accruing to minors until they come
9 of age?

10 MR. HORNE: Yes, sir. Every action which a
11 minor child has during his minority is tolled for the
12 period of the minority plus the period of limitations
13 after the child reaches minority so that, in Tennessee,
14 this was going to get toward the end of my argument, but
15 the only action which is terminated for the illegitimate
16 child, or for any child rather, is the action of
17 paternity or seeking paternal support.

18 QUESTION: What is the practice or law in
19 Tennessee regarding the leukocyte antigen test for
20 paternity actions?

21 MR. HORNE: There is a bill presently before
22 the state legislature which I understand two weeks ago
23 made it out of committee to the floor, but has not been
24 passed yet, last I heard, which provides that the
25 Department of Human Services in contested paternity

1 cases, is to provide to defendants an HLA blood test,
2 which would be paid for by the state initially, with
3 cost to be allocated based upon the abilities of the
4 parties to pay for it thereafter, and the results of the
5 blood test would be made admissible in the court
6 proceedings either to exclude paternity or to prove a
7 probability of paternity.

8 QUESTION: Are those blood tests admissible
9 today in evidence in Tennessee?

10 MR. HORNE: It is admissible to disprove
11 paternity. It is not admissible to prove a likelihood
12 or plausibility of paternity.

13 Now Tennessee's statute -- two-year statute of
14 limitations, which purportedly has for its purpose, the
15 intent to prevent the child from becoming a public
16 charge to the state, actually has the reverse effect. A
17 mother such as Miss Pickett, in this case, who finds
18 that her cause of action is terminated by the two-year
19 statute of limitations need only swallow her pride a
20 little bit and go down to the welfare office and apply
21 for state assistance to find that her child then has a
22 right. The state will then pay for the litigation, file
23 a lawsuit and proceed for her child without a statute of
24 limitations.

25 So the effect is to encourage women who find

1 that the statute has already run to place their children
2 on the welfare roles and seek additional support from
3 the state, which is the opposite intent of the statute.
4 The intent of the statute is to see to it that fathers
5 support their offspring.

6 The Tennessee Supreme Court's response to this
7 was also somewhat surprising. Relying upon an old New
8 York case in the matter of Mores v. Feel, the
9 legislature -- Tennessee Supreme Court, relying upon
10 their opinion, found that the legislature's only
11 interest was to see to it that some one person supported
12 an illegitimate child, as opposed to what the statute
13 purportedly claims on the front end, that there is an
14 intent that both parents should be equally responsible
15 for the support of their illegitimate offspring.

16 This amounts to an open declaration and
17 acknowledgment, I believe, of invidious discrimination
18 flying in the face of Gomez. Tennessee is saying, on
19 the one hand, well, both parents are responsible for the
20 support of their illegitimate children, but on the other
21 hand, illegitimate children must be supported only by
22 some one person, that's all we're really concerned
23 about, and if that one person can't provide the support,
24 then we'll set the statute of limitations aside and
25 allow the state to proceed to litigate the claim.

1 What Tennessee, in reality, is saying is that
2 it's the woman's fault she became pregnant. Let her
3 take care of the problem. The man didn't have anything
4 to do with it. It's a blatant declaration of male
5 supremacy and I believe it's a throwback to the days
6 when state laws were made by male legislatures to and
7 for the protection of male legislatures.

8 As I mentioned just a moment ago in response
9 to your question, and the same as in the Texas case,
10 Mills v. Habluetzel, in Tennessee this is the only cause
11 of action which is not tolled for the minor illegitimate
12 child. Every other cause of action will be -- the
13 period of limitations will be tolled and the child will
14 be allowed to proceed after it reaches its minority.

15 The only apparent answer then, I think, is
16 that in child support cases is concerned, and we've got
17 to ask that why is it only in child support cases that
18 we have the statute not tolled in Tennessee and I
19 believe the response is, it's the legislature's
20 intention to visit society's condemnation for the
21 illicit relationship outside the bonds of marriage upon
22 the child.

23 It's a statement of policy that we do not
24 approve of you fathering children, or mothering children
25 outside the bonds of wedlock and lacking an ability,

1 perhaps, to punish either of the parents, the
2 legislature determined that it's the child that should
3 bear the brunt of society's disapproval.

4 All considered, then, I argue that the
5 two-year statute of limitations cannot be justified as
6 being substantially related to the state's interest in
7 preventing stale and fraudulent claims and, in fact,
8 even under the reasonable relationship test, there is no
9 reasonable relationship -- or reasonable support for the
10 argument that the two-year statute of limitations is
11 going to prevent stale or fraudulent claims.

12 One last point is that in a number of this
13 Court's opinions, I've noticed references to a state has
14 a right to make some legislation to take care of the
15 problems, the difficult problems of proof in paternity
16 cases, I think that's the way it's referred to. I've,
17 in the past five years, handled probably a little better
18 than 2,500 paternity cases and I've failed to understand
19 what the difficult problems in proof of paternity cases
20 is really referring to.

21 In those cases where we're referring to the
22 purported father having passed away, I acknowledge that
23 there are some difficult problems of proof. The man
24 ought to be given an opportunity to come in and defend
25 himself.

1 But where the man is around, there is only two
2 people that know whether relations occurred. It's the
3 man and the woman and they're always going to be around
4 in the context of the paternity case and it's the woman
5 who has to prove her case. She's got to prove by the
6 greater weight of the evidence that this man is the
7 father of the child.

8 If the passage of time is going to cause a
9 liklihood that witnesses have disappeared, memories have
10 faded, the same thing's going to happen to the woman.
11 And I've tried cases where 16 years after the birth of
12 the child, the woman gets up there, she can't remember
13 dates, times and places, and it affects her cases, it
14 affects her ability to carry the burden of proof and it
15 helps the defendant in his claim that he's not the
16 father of the child. So, the difficult problems of
17 proof, I would argue, apply to the woman more than they
18 do to the man.

19 QUESTION: Doesn't the legislature, quite
20 apart from the conduct of paternity suits, have an
21 interest, or isn't it legitimate for the legislature to
22 say we don't want that kind of a case to be tried 16
23 years after the events in which it happened.

24 Sure, it's going to hurt both parties, but the
25 judicial determination on the evidence 16 years later is

1 just not sufficiently reliable to allow the case to
2 proceed.

3 MR. HORNE: Well, it would be as reliable and
4 actually, considering HLA blood testing nowadays, it
5 would be more reliable than an automobile accident or
6 contract case that was brought by the child 20 years
7 after the child was born. Because the period of
8 limitations in those cases would be 18 years plus the
9 original period of limitations so the problem --

10 QUESTION: That's an equal protection argument
11 and you may well be right on that, but I think a
12 legislature, or would you disagree with the observation
13 of a legislature, if it acted even-handedly, could say
14 that there are just some passages of time that are too
15 long to allow for an accurate determination of facts.

16 MR. HORNE: I would have to agree with Your
17 Honor and make one exception and that's because of the
18 statutory structure in Tennessee. The legislature,
19 having determined that it can be 18 years for a child
20 who is or is about to become a public charge is
21 determined at 18 years is not too long in Tennessee for
22 the prosecution of paternity claims.

23 If the statute had been written, much as the
24 Maryland statute was, I think at two years for a child,
25 well, two years is too short anyway, I'd argue, but

1 let's say it was ten years for a child who is about to
2 become a public charge or who has never received
3 welfare, so it's the same all the way across the board,
4 I think my argument would be more difficult.

5 I would still argue that ten years is too
6 short for the child, but Your Honor's point is, on the
7 whole, accurate that a legislature does have a right to
8 determine what period of time is just too long for a
9 case to be prosecuted in the courts.

10 QUESTION: Mr. Horne, can I ask you a question?

11 MR. HORNE: Yes, sir.

12 QUESTION: Perhaps it's not appropriate, but
13 I'm sure, you say you tried 2,500 of these cases.

14 MR. HORNE: Well, I've handled over 2,500.
15 I've specialized, of course in Tennessee we're not
16 allowed to specialize, but I have specialized in the
17 prosecution of paternity cases. Not all 2,500 have gone
18 to trial, but there's some weeks where I tried six,
19 seven cases in the same week.

20 QUESTION: Are these -- are part of these for
21 the welfare situation, or are they all private?

22 MR. HORNE: A large majority of them are, I'm
23 on a contract with the state Department of Human
24 Services to prosecute on a case by case basis cases that
25 they turn over to me for investigation. They just hand

1 me a claim and allegation on behalf of the mother that
2 the child has a father and this is the father and it's
3 my obligation to locate the father and make the
4 determination whether he acknowledge his child or not
5 and if not, to prosecute the claim in court.

6 If, upon investigating the mother's claim, I
7 find that there's a reasonable basis for presuming that
8 the --

9 QUESTION: I take it this is a fairly
10 substantial percentage of the total number of such
11 cases, or is it, I'm just not familiar with the volume
12 of this litigation.

13 MR. HORNE: Well in 19 -- my recollection is
14 that Memphis, Tennessee has the highest birth rate per
15 capita of illegitimate children, varying month to month,
16 with Atlanta, Georgia. We're sort of in a neck and neck
17 contest.

18 [Laughter]

19 MR. HORNE: And in that respect, in 1975 when
20 we started -- 1976 when we started this program, we had
21 20,000 paternity cases backlogged on the welfare roles.

22 QUESTION: I see.

23 MR. HORNE: So, my firm has handled a little
24 better than 5,000 of those cases. We've done more than
25 any other group of attorneys put together, but it's

1 still just a dent in the bucket.

2 QUESTION: How many do you suppose there are
3 in Memphis?

4 MR. HORNE: I've provided some statistics in
5 the back of my brief indicating the percentage, I
6 believe 51 or 53 percent of children born to black
7 parents are illegitimate and something like 14 to 15
8 percent of children to whites are illegitimate. The
9 total number, I can't recall. It seems like something
10 like 16,000 in the state of Tennessee a year, but I
11 can't recall.

12 It's a substantial and it's a growing, growing
13 phenomenon, not only in Tennessee but across the
14 nation. The birth of illegitimate children has been on
15 the increase throughout the last 20 years and the
16 argument that was put forward in some previous cases
17 that the state legislature can limit the period of
18 proving paternity because a state has a policy of
19 fostering family relations is just shown not to be true,
20 that, in fact, family relations are breaking down. We
21 have more and more one parent families, not only
22 illegitimate but from marriages that are breaking up.

23 QUESTION: Mr. Horne, in what percentage of
24 the cases is the HLA test employed, in your experience?

25 MR. HORNE: In Tennessee, relatively few. My

1 guess would be maybe seven or eight percent at the very
2 highest. By and large, I have found that when I offer
3 to a male defendant the opportunity for an HLA blood
4 test which will show a likelihood that he is the father
5 but at the same time not be admissible, he has no desire
6 to submit to the examination.

7 QUESTION: Who bears that expense in Tennessee?

8 MR. HORNE: Initially, it's the defendant's
9 response, the court's, in response to the Connecticut
10 case out of this Court, have held that where the
11 defendant can show the court that he has no means of
12 income, that he has no property and no ability to
13 properly defend himself other than by using the HLA
14 blood test, the circuit courts have been ordering the
15 Department of Human Services to pay for the blood test
16 for such a person.

17 QUESTION: Is the expense very substantial in
18 your state?

19 MR. HORNE: Four-hundred and fifty dollars in
20 Memphis. That's if you do not use the enzyme-protein,
21 protein-enzyme testing. The only lab we can use that
22 type of testing in is Minneapolis and that's only proved
23 of some benefit where the claim is that one of two
24 brothers or an uncle and a father, or something like
25 that, are potentially the father of the child and we're

1 trying to eliminate which one of them might be and might
2 not be.

3 QUESTION: Isn't that a little out of line
4 with the general expense over the country?

5 MR. HORNE: Some places it's \$750. Some
6 places it's a little cheaper. I think it is a little
7 out of line. The problem is we have virtually a
8 monopoly in Tennessee. There's only one lab now that
9 will perform the HLA blood testing and Tennessee's
10 legislature passed a law that said that blood testing
11 must be performed in the state of Tennessee, has some
12 logic behind it. It's to make sure that you can get the
13 doctor who performed the examination into court to
14 testify as to chain of custody and all. If you send it
15 to California, you've got a chain of custody problem.

16 But if we were allowed to send it outside of
17 the state, we could get it done cheaper and I think that
18 if the legislature passes the bill that's before it now
19 requiring the Department to pay for the test in all
20 cases where you can order the man to and the woman to
21 submit, that we'll be able to work out an agreement with
22 the hospital to mass produce them at a much, much
23 cheaper expense.

24 QUESTION: Where is this lab? In Memphis?

25 MR. HORNE: Baptist Memorial Hospital in

1 Memphis. There was a test being performed by Dr. James
2 Mason at the University of Tennessee hospital but his
3 primary responsibilities are the training and education
4 of pathologists and he found that it was just taking up
5 too much of his time to have to perform the tests,
6 respond to attorney's questions and appear in court from
7 time to time to justify his findings.

8 QUESTION: Sound like you have a little state
9 parochialism in Tennessee, isn't there?

10 MR. HORNE: We've had that for awhile, Your
11 Honor.

12 [Laughter]

13 MR. HORNE: Thank you. I'll reserve my time.

14 QUESTION: Apparently they don't even need
15 outside lawyers, do they?

16 CHIEF JUSTICE BURGER: Ms. Short.

17 ORAL ARGUMENT OF SUSAN SHORT, ESQ.

18 ON BEHALF OF APPELLEES

19 MS. SHORT: Mr. Chief Justice, and may it
20 please the Court.

21 The appellant's challenge to the
22 constitutionality of Tennessee's paternity statute and
23 the two-year limitation limiting the opportunity to
24 establish the duty of the father to support illegitimate
25 children relies substantially upon this Court's recent

1 decision in Mills v. Habluetzel.

2 I would point out to the Court that this is
3 litigation between private litigants. Mrs. Pickett and
4 Mr. Brown have no relationship at all to the state. The
5 Attorney General of Tennessee has intervened in this
6 action for the sole purpose of defending the
7 constitutionality of this statute.

8 Under Tennessee law, when a state statute is
9 challenged, a party is required to give notice to the
10 Attorney General and the Attorney General then has the
11 option of either defending the constitutionality of the
12 statute or certifying to the legislature that he cannot
13 so defend that statute.

14 We, of course, have chosen to defend the
15 constitutionality of this statute, because we believe
16 that, based upon this Court's analysis in Mills v.
17 Habluetzel, that it is, in fact, constitutional.

18 Last year, this Court considered a one-year
19 statute of limitations on the case of Mills. That
20 statute in Texas is substantially different from the
21 Tennessee statute. Tennessee statute which is
22 challenged on this appeal provides that an action to
23 establish paternity must be initiated within two years
24 after the birth of the child.

25 There are several exceptions provided to this

1 general two-year limitation. These exceptions include
2 if the father has acknowledged the paternity of the
3 child in writing, the action may be brought at any
4 time. If the father has furnished support to the child,
5 the action may be brought at any time.

6 QUESTION: Would that be true, for example, if
7 the father had made some small contribution to the child
8 during its first year and then not again? Would the
9 statute be tolled during the entire minority of the
10 child?

11 MS. SHORT: Yes, Your Honor. I believe that
12 the Supreme Court of Tennessee in Reynolds v. Richardson
13 addressed that issue. They have stated that there need
14 not be substantial or continuous support payments by the
15 father in order to toll the statute under Tennessee law.

16 QUESTION: It's hard to see how that furthers
17 the state's goal then to eliminate stale claims if
18 something like that could occur.

19 MS. SHORT: I would submit, Your Honor, that
20 when, in fact, support has been provided that there is a
21 greater likelihood that you can produce additional proof
22 other than the testimony of the parties. There's likely
23 to be a check, there's likely to be some receipts.
24 There's likely to be other witnesses who have evidenced
25 this act on behalf of the defendant.

1 The other exceptions to Tennessee's general
2 two-year statute of limitation include the public charge
3 exception. An action may be brought on behalf of any
4 child under the age of 18 who is or is liable to become
5 a public charge. Also --

6 QUESTION: In other words, the state has the
7 statute of limitations, the period of limitations nine
8 times longer than the mother has.

9 MS. SHORT: The state is allowed to bring that
10 action as long as the child is dependant upon the state
11 for support and that is 18 years. That is during the
12 minority of the child.

13 QUESTION: Even though the mother -- even
14 though the child is dependant on the mother for support.

15 MS. SHORT: No. At that point, Your Honor,
16 the state --

17 QUESTION: No, in the mother's case however.

18 MS. SHORT: I'm sorry.

19 QUESTION: I'm just drawing the parallel. If
20 the mother is supporting the child exclusively, she has
21 two years.

22 MS. SHORT: That's correct.

23 QUESTION: So the state has nine times the
24 length of time.

25 MS. SHORT: That's correct.

1 QUESTION: Do you think that's fair?

2 MS. SHORT: Yes, Your Honor, I believe that
3 there are differing state interests which compel the
4 different limitations on these actions.

5 QUESTION: Would that be true for the state,
6 as well, if the period of time that the child was on
7 welfare was very brief, the state would still have up to
8 18 years to bring an action?

9 MS. SHORT: If, in fact, the child was on
10 welfare, Your Honor, that action would be brought by the
11 Department of Human Services at the time when they are
12 on welfare. After that time the mother can take
13 advantage of the establishment of paternity that took
14 place on behalf of the state in the interest of that
15 child.

16 I believe it's necessary for me to clarify --

17 QUESTION: What happens to the difficulties of
18 proof argument where the state is involved.

19 MS. SHORT: Your Honor, I believe that counsel
20 has acknowledged that there continues to be a difficulty
21 of proof, notwithstanding the longer limitation of the
22 state. We submit --

23 QUESTION: Why shouldn't it bar the state from
24 suing then?

25 MS. SHORT: We believe that the state has a --

1 that the state's interest in those actions where
2 children are public charges is different.

3 QUESTION: The state should be -- you should
4 be quicker to excuse the state in making a mistake?

5 MS. SHORT: No, what we're saying, Your Honor,
6 is that society --

7 QUESTION: Well, the argument is that there's
8 a great possibility of making a mistake after a period
9 of time.

10 MS. SHORT: I believe that --

11 QUESTION: Isn't that right? Isn't that the
12 argument against the mother? This is liable to be an
13 unreliable proceeding if you take too long to bring the
14 suit.

15 MS. SHORT: That's correct.

16 QUESTION: And yet that doesn't bar the state?

17 MS. SHORT: We believe that society's interest
18 in insuring that children are supported by those who --

19 QUESTION: You can make all the mistakes you
20 want to, but if the mistakes -- the chance that the
21 mistake is really existent, the state can nevertheless
22 override it.

23 MS. SHORT: I think that in light of this
24 Court's opinions with respect to the protection which
25 must be afforded or defended when the state is a party

1 clearly addressed the point which you've raised, Your
2 Honor.

3 QUESTION: In these cases, about 15 or 16
4 years later, is there a dispute over paternity or merely
5 a dispute in most of them over whether the person should
6 or can pay?

7 MS. SHORT: The dispute is -- the issue there
8 is paternity, Your Honor.

9 QUESTION: Beg pardon?

10 MS. SHORT: Paternity. Paternity is the issue.

11 QUESTION: Well, do you know, has an
12 examination been made of these records to find out in
13 how many of those of cases had run a long time -- ten,
14 12, 14 years, the real dispute is merely over the
15 support and the ability to pay or whether there is a
16 dispute over the responsibility.

17 MS. SHORT: Your Honor, in the actions which
18 I've had an opportunity to participate in, the denial is
19 of paternity at that point and not of support. I
20 believe the issue of support arises only after paternity
21 has been established. I would like --

22 QUESTION: Ms. Short, in your -- going back to
23 the question that we were addressing, under the
24 Tennessee scheme, if the child received welfare for a
25 brief interval, let's say in the first year, then goes

1 off welfare, under the Tennessee scheme the mother has
2 18 years to bring a paternity action for the child.

3 MS. SHORT: I would submit to Your Honor
4 that --

5 QUESTION: Is that right?

6 MS. SHORT: -- during that one year period of
7 time the state has likely established paternity at that
8 time.

9 QUESTION: Well, if that isn't done, as I
10 understand the Tennessee scheme, the mother would then
11 have the full 18 years in which she could bring the
12 action.

13 MS. SHORT: If the child is a public charge,
14 yes.

15 QUESTION: If the child was ever a public
16 charge.

17 MS. SHORT: Yes.

18 QUESTION: And so the stale claim argument
19 isn't made in those circumstances, and yet the
20 circumstances are identical to the situation if she had
21 never gotten welfare.

22 MS. SHORT: Your Honor, we concede that the
23 claims are just as stale when they're brought two years
24 or 18 years. We simply submit to this Court that the
25 state has additional interests which must be served by a

1 shorter period of limitation when these actions are
2 between private litigants. When the state becomes a
3 party in these actions, then society is burdened with
4 the support of these children. We believe that society
5 has the interest in allowing their public funds to be
6 used for the public and not for the support of
7 illegitimate children.

8 QUESTION: Yes, but you've just acknowledged
9 that it would be waived also for the mother if the state
10 didn't bring the claim after the brief welfare episode.

11 MS. SHORT: Your Honor, I find it hard to
12 believe that if a mother is, in fact, on welfare within
13 her first year, that paternity will not be established
14 on her behalf by the Department of Human Services. At
15 that point the mother can then collect support based
16 upon that prior establishment of paternity.

17 If I may, I'd like to address the tolling
18 issue, which has been raised by appellant, both in his
19 argument and in the brief. Under Tennessee law, if a
20 minor plaintiff in a paternity action has a child, she
21 has until two years after she reaches her age of
22 majority to bring that action.

23 Unlike the appellant's statement, this is not
24 a statute which operates in favor of -- against the
25 interests of the child. We attempt to protect the

1 interests of minor plaintiffs by allowing them the
2 additional time within which to bring those actions.

3 QUESTION: But I think perhaps that argument
4 was directed also to the independent right of the child
5 to bring an action for support, or does Tennessee law
6 recognize an independent action for the child?

7 MS. SHORT: Under our paternity statute, Your
8 Honor, the action to establish support lies with the
9 mother, unless the mother is disabled or is deceased, at
10 which time, the action may be brought by the child
11 through a guardian or next friend or I would submit, if
12 the action is not brought on behalf of the child during
13 its minority, then he may bring that action thereafter.

14 QUESTION: And in this case, was the mother
15 the only person who could have brought the action at the
16 time it was brought under Tennessee law?

17 MS. SHORT: I think that under the facts, Your
18 Honor, that the mother was not -- the child was not a
19 public charge and the mother, or her personal
20 representative, could have brought this action on behalf
21 of the child. The child could not bring this action and
22 I think the Tennessee Supreme Court acknowledged that in
23 its opinion, determined that it was harmless error for
24 the juvenile court to allow the amendment of appellant's
25 petition in juvenile court -- to allow the action to be

1 brought on behalf of a minor child.

2 QUESTION: Let's see if I understand this.
3 From what you've just said, the Tennessee statute is
4 more restrictive than the Texas statute in Mills.

5 MS. SHORT: No, Your Honor. I think quite the
6 contrary.

7 QUESTION: Well, in this respect, the child
8 can't bring its own action. In Texas it could. And the
9 mother's posture sometimes can be in conflict with the
10 child's.

11 MS. SHORT: Your Honor, I find it difficult to
12 imagine a situation where the mother would not be the
13 proper person to bring the action to establish paternity.

14 QUESTION: What if she may have a crush on the
15 father and doesn't anticipate he's going to be a good
16 boy after all and when he grows up he'll take care of
17 the child and just not bring the action?

18 MS. SHORT: Well, in those instances, I would
19 assume that the mother is providing support for that
20 child and perhaps the mother's affections for that
21 father are that great you would think that he would also
22 be providing support for that child. So, the child's
23 interests are being protected in that instance. And
24 that is our concern.

25 QUESTION: May I repeat my observation. I

1 think your statute, in this respect, is more restrictive
2 than Texas.

3 MS. SHORT: Perhaps so, Your Honor. I was not
4 aware, based on this Court's opinion in Mills, that the
5 child had the right to bring the action, but I assume
6 that that provision of the statute which allowed the
7 action to be brought by any person certainly could
8 include the child.

9 We would submit that the mother is the proper
10 person to bring an action to establish paternity and
11 that she is in a better position than most to determine
12 what is in the best interests of the child and whether
13 or not paternity -- the establishment of paternity is,
14 in fact, in that child's best interest.

15 I think the facts of this case -- the facts of
16 this case are particularly relevant to this Court's
17 decision. The appellant Frances Pickett brought this
18 action on behalf of her ten-year-old son.

19 The record will reflect that the defendant
20 Braxton Brown had never acknowledged the child in
21 writing, nor had he provided support. He denied that he
22 had ever had any relations at all with the appellant.
23 The child was not a public charge and yet the appellant
24 sought to bring this action some eight years after the
25 statute of limitations has run.

1 As appellant has acknowledged, there are
2 difficult problems with proof, faded memories in these
3 actions. He's tried all of these cases and he's
4 acknowledged that that is the one problem. We submit
5 that the two-year limitation is substantially related to
6 the state's interests in avoiding the loss of memory and
7 the loss of witnesses.

8 QUESTION: Maybe this is just repetitive, but
9 how can you make that argument if she could go on
10 welfare and then the action could be brought tomorrow.

11 MS. SHORT: I'm sorry, Your Honor.

12 QUESTION: But how does that argument deal
13 with the problem if she goes on welfare tomorrow, she
14 could -- you could then bring the action. Why don't the
15 faded witnesses -- why isn't that problem still right
16 there?

17 MS. SHORT: I believe that the problem still
18 exists. However, what I hope to convey to this Court is
19 that the state's interest at that point is superior to
20 the interest of --

21 QUESTION: The state's interest in getting
22 some money is superior to the child's interest in
23 establishing his relationship with his father. That's
24 your position.

25 MS. SHORT: The state's interest in insuring

1 that these --

2 QUESTION: Do I state it fairly?

3 MS. SHORT: -- are supported.

4 QUESTION: What you're saying is that the
5 state's interest in getting its money back is superior
6 to the child's interest in establishing the relationship
7 with his father?

8 MS. SHORT: With respect to the stale and
9 fraudulent claims, we would say yes, Your Honor.

10 We would also submit that there are additional
11 interests of the state which must be considered by this
12 Court. As this Court has acknowledged this morning, the
13 state also has an interest in limiting litigation,
14 having litigation end at some point. And we believe
15 that two years is a reasonable time within which
16 litigation should end in paternity actions.

17 Also, the state has an interest in the welfare
18 of its children and we believe that two years -- within
19 two years the relationship which can be established
20 between the mother and the child is significant. If
21 paternity is established within two years, the mother is
22 then afforded the financial assistance which she can
23 gain from the father of the child. Thus, the child
24 is -- gets the benefit of those financial advantages.

25 In addition, the child is not forced to endure

1 the emotional and psychological difficulties which are
2 often associated with the illegitimate status. We
3 believe that two years is a reasonable time within which
4 that relationship should be established and that that,
5 in fact, is in the interests of the child.

6 I believe the Tennessee statute, based upon
7 this Court's analysis in Mills, is reasonable. In
8 Mills, this Court stated that procedures by which
9 illegitimate children are afforded an opportunity to
10 obtain paternal support need not be coterminous with
11 those afforded legitimate children.

12 This Court held that limitations on paternity
13 actions would be upheld as constitutional if they are
14 sufficiently long in duration to afford persons with
15 valid claims a reasonable opportunity to assert them.
16 We believe that two years is a reasonable time. This
17 Court addressed several concerns which were raised by
18 the Texas one-year limitation which we believe are
19 alleviated by the Tennessee two-year limitation.

20 Within two years, a woman is likely to have
21 sufficiently recovered from the physical and emotional
22 difficulties associated with childbirth and be in a
23 position where she can assess she and her child's
24 situation reasonably and realistically. Within two
25 years after the birth of a child, a mother is not likely

1 to endure the same financial difficulties which she may
2 face within one year after the birth of the child.

3 It's not unreasonable to assume that within
4 two years after the birth of the child the mother has
5 returned to work and can afford to seek legal advice
6 with respect to her responsibilities and obligations and
7 those of the father.

8 We also believe that two years is a reasonable
9 time within which to require the establishment of the
10 relationship of the father and the child.

11 I also believe that Tennessee's two-year
12 limitation addresses the practical obstacles which were
13 raised by this Court in the concurring opinion of
14 Justice O'Connor. These concerns included the emotional
15 and psychological difficulties. As I've just stated,
16 these are sufficiently alleviated by the two-year
17 limitation and the financial difficulties which were
18 raised by this Court.

19 We would also submit that the pressures from
20 family and the community which may affect the mother's
21 bringing an action within one year are sufficiently
22 alleviated by Tennessee's statute. I would submit that
23 these pressures would bear more heavily upon a minor
24 child than upon an adult. Under Tennessee statute the
25 two-year limitation is tolled for minor plaintiffs.

1 Thus she has two years after reaching her majority
2 within which to bring those actions.

3 Counsel has alluded to the fact that his
4 client is encouraged to seek welfare. I would submit
5 that it is not so easy to go on welfare, Your Honor. I
6 believe that the record before this Court will show that
7 the plaintiff has substantial assets. She owns
8 property. I believe that she earns approximately \$1,000
9 a month. It would be very difficult for her to qualify
10 under the welfare laws.

11 We would also submit that the scheme of our
12 welfare benefits -- the scheme of our welfare system is
13 such that we could easily detect any fraud which may be
14 perpetuated or encouraged by these actions.

15 In summary, I would just like to state that we
16 believe the Tennessee statute affords a reasonable
17 opportunity within which persons with valid claims may
18 assert them.

19 Further, that the two-year limitation is
20 substantially related to several legitimate state
21 interests. These include the state's interest in
22 avoiding stale and fraudulent claims; the state's
23 interest in repose; and the state's interest in the
24 welfare of the child. The practical obstacles to
25 bringing an action which were applicable to the Texas

1 statute are not present under Tennessee statutory scheme.

2 We would submit that this Court should affirm
3 the decision of the Supreme Court of Tennessee.

4 CHIEF JUSTICE BURGER: Do you have anything
5 further, Mr. Horne?

6 ORAL ARGUMENT OF HAROLD W. HORNE, ESQ.

7 ON BEHALF OF APPELLANTS -- REBUTTAL

8 MR. HORNE: Yes, Your Honor.

9 Respondent's last comment that it's not so
10 easy to get on welfare, that's one of the amazing parts
11 of our welfare system in this country. All a mother has
12 to do is, the simplest routine is to turn her child over
13 to a welfare agency, say I can no longer handle or take
14 care of my child. She will be required by the courts to
15 furnish support herself for the child but then the child
16 then becomes a public charge. Whoever takes custody,
17 which could be a grandmother, will be able to receive
18 welfare benefits and the child is thus eligible to pass
19 over on the two-year statute of limitations.

20 On the question you asked, Chief Justice
21 Burger, which was what is the real reason for the
22 denial, is that paternity or support, in the vast
23 majority of these cases, the issue is a man just doesn't
24 want to be placed under a court order to provide support
25 on a regular, weekly basis or semi-weekly or monthly,

1 because he knows that if he fails to make his payments,
2 he's subject to criminal prosecution and jail time and I
3 really think --

4 QUESTION: It's an economic question.

5 MR. HORNE: In a vast majority of the cases,
6 it's economic.

7 Counsel for the state argues that I have
8 conceded that there are difficult problems of proof. I
9 do not by any means concede that there are difficult
10 problems of proof.

11 My statement was I do not understand some of
12 the references to it in the past, because if there are
13 problems, the problems will belong to the mother more
14 than they will for the man, and it does not lend to the
15 argument that this two-year statute, in Tennessee at any
16 rate, supports the state's intention of preventing
17 fraudulent or stale claims.

18 The counsel argues, also, that if a woman gets
19 on welfare that within one year, should she get on
20 welfare for one year and then get back off, the child
21 will become legitimate. It normally takes the welfare
22 department a year to prosecute their paperwork just to
23 get it down to my level.

24 And if there's a denial of paternity, in
25 Tennessee courts, it's taken five to eight years to get

1 a case through the court which, although there's no
2 written literature, I can refer the Court to to support
3 that claim, it's from my experience. And you've got to
4 wonder, at the same time, if it takes eight years to get
5 a case through the courts, it's going to get just as
6 stale going through eight years. Memories are going to
7 fade during that eight year period just as much as they
8 will if there were no period of limitations.

9 QUESTION: Fading memories in an appellate
10 proceedings are not very important. It's at the trial
11 level.

12 MR. HORNE: Yes, sir. I'm talking about the
13 trial level

14 QUESTION: You mean it takes eight years to
15 get on to trial?

16 MR. HORNE: To get into the Circuit Court
17 before a jury, it takes five to eight years in the
18 courts of Shelby County. I think this, there's a
19 reference in my brief, to legislative findings in the
20 Congress of the United States that child support
21 matters -- child support matters in general are an area
22 that the courts, judges and lawyers in this country
23 cannot be proud of. That this is an area that judges do
24 not like to get into. They hate to get involved in
25 domestic squabbles about support and they do any excuse

1 to continue the case and it gets put off.

2 We've got a rule in the Circuit Court of
3 Shelby County that only so many cases will be heard per
4 term. What it amounts to is five paternity cases will
5 be heard every two months for ten months out of the
6 12-month year. And that's all they will hear, where
7 we've got 2,000 to 3,000 cases backlogged before the
8 Circuit Court waiting for jury trials.

9 QUESTION: Would the equal protection problem
10 be equally solved here by holding the Tennessee statute
11 on 18 years unconstitutional?

12 MR. HORNE: I don't think -- the state has a
13 right to make a period of limitations and by the very
14 nature of a statute of limitations, the period is left
15 up to the discretion of the legislature and it is
16 arbitrary and capricious by its very nature. The
17 legislature, having determined that 18 years is
18 appropriate for support cases, is entitled to make that
19 decision and I think the court's bound to stick by the
20 decision.

21 The question is whether they can then limit it
22 to two years for the very limited group that do not
23 apply for welfare on the pretext that it prevents
24 fraudulent or stale claims.

25 QUESTION: Mr. Horne, maybe I missed it, but

1 what statute of limitations would you be satisfied with?

2 MR. HORNE: Well, frankly, Your Honor, I would
3 be satisfied with the period of minority plus the period
4 after minority which would, in this particular case in
5 Tennessee, be the age of 20 for the child, giving the
6 child the right to, once he reaches 18 --

7 QUESTION: No, I'm talking about the mother.

8 MR. HORNE: For the mother, 18 years.

9 QUESTION: On what basis?

10 MR. HORNE: On the basis that --

11 QUESTION: She reaches a certain age? Suppose
12 she's 55. You don't think that's mature?

13 MR. HORNE: Well, from the state's
14 perspective, Your Honor --

15 QUESTION: I thought the 18 years was because
16 the child was not mature. Was that the reason?

17 MR. HORNE: I don't understand Your Honor's
18 question. I'm sorry.

19 QUESTION: That you give a child two years
20 plus 18 because an infant is not mature enough to
21 maintain a lawsuit.

22 MR. HORNE: Yes, sir.

23 QUESTION: Well, is that true of a 45-year-old
24 mother?

25 MR. HORNE: Yes, sir, in a context --

1 QUESTION: She's not mature?

2 MR. HORNE: You mean a mother who gives birth
3 to an illegitimate child?

4 QUESTION: Yes. She's not mature?

5 MR. HORNE: Your Honor, from the perspective
6 of the state, there's two reasons for granting to the
7 mother the right to make that important decision. The
8 first is that she will, as Your Honor indicates, have
9 the capacity for maturity and the ability to make a
10 judgment on behalf of the child which the child can't
11 make.

12 And the second is that, and this is important,
13 the second is that she will act in the best interest of
14 the child. And I think when either of those two premises
15 is undermined, the right of the state to make the
16 assumption that she is the best person falters.

17 Here, if Your Honor will take a look at the
18 case of Reynolds v. Richardson, which is cited in both
19 briefs, and is right on point, the mother in that case
20 accepted a \$500 payment from the father of the child in
21 exchange for release of the child's right to
22 legitimation and future support. And, according to
23 Pickett v. Brown out of the Supreme Court of Tennessee,
24 that release is now effective. She has terminated for
25 \$500 payment the child's right to support.

1 I would question, Your Honor, in response to
2 your question, whether that is a rational decision,
3 whether that decision is in the best interest of the
4 child.

5 QUESTION: I'm not talking about that
6 decision.

7 MR. HORNE: And let's say that she was 45
8 years old. Her interests are going to be still a
9 fondness for the purported father, perhaps, a desire not
10 to get into a conflict with him or his family by
11 dragging him into court knowing that if she takes him to
12 court that he's going to be subject to possible --

13 QUESTION: I'm talking about this case. I'm
14 not talking about any case about somebody dragging
15 somebody in courts, or any of your 2,500 cases.

16 MR. HORNE: Yes, sir.

17 QUESTION: I'm talking about this one.

18 MR. HORNE: In this particular --

19 QUESTION: Why does this woman here, this
20 mother, have 18 years to make up her mind?

21 MR. HORNE: Well, Your Honor, she has 18 years
22 because --

23 QUESTION: Plus two. She has 20 years to make
24 up her mind.

25 MR. HORNE: Well, I'm saying that she should,

1 but she has only 18 years in Tennessee to make up her
2 mind because if the child were a public charge, then
3 that child would have 18 years to -- she would have 18
4 years there to make up her mind as well.

5 If she applied for welfare on the 17th
6 birthday of her son, the son would be entitled to have
7 an action brought, either by her, or by any other person
8 in the state of Tennessee and what you have is
9 discrimination between what amounts to two sub-classes
10 or illegitimate children. You have illegitimate
11 children on welfare and illegitimate children not on
12 welfare and there's discriminatory treatment by the
13 state of Tennessee. This group is allowed to prosecute
14 a claim. This group is not and there's not a rational
15 basis for that differentiation, let alone a substantial
16 basis.

17 Did I answer your question?

18 QUESTION: I heard what you said.

19 MR. HORNE: Thank you.

20 CHIEF JUSTICE BURGER: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 10:52 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

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:

#82-5576 - JEFFREY LEE PICKETT, ETC., ET AL., Appellants v.
BRAXTON BROWN, ET AL.

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