OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1248 & 82-1278

TITLE ELLEN SCHALL, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE, Appellant v. GREGORY MARTIN, ET AL., and ROBERT ABRAMS, ATTORNEY GENERAL OF NEW YORK, Appellant v. GREGORY MARTIN, ET AL.

PLACE Washington, D. C.

DATE January 17, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

ELLEN SCHALL, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE,

Appellant

v. No. 82-1248

GREGORY MARTIN, ET AL.; and

ROBERT ABRAMS, ATTORNEY GENERAL OF NEW YORK,

Appellant

v. No. 82-1278

GREGORY MARTIN, ET AL.

Washington, D.C.

Tuesday, January 17, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:02 p.m.

APPEARANCES:

MRS. JUDITH A. GORDON, ESQ., Assistant Attorney General of New York, New York, New York; on behalf of the Appellant.

MARTIN GUGGENHEIM, ESQ., New York, New York; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mrs. Gordon, I think you may proceed when you are ready.

ORAL ARGUMENT OF MRS. JUDITH A. GORDON, ESQ.

ON BEHALF OF THE APPELLANT

MRS. GORDON: Mr. Chief Justice, and may it please the Court:

The principal question presented is whether a New York State Family Court judge violates the due process clause when he detains an accused juvenile delinquent after he has conducted a detention hearing and after he has found, based on facts and reasons elicited at that hearing that there is a serious risk that the juvenile, if released, will commit a pre-trial crime.

When the judge acts in this premise, he relies on specific statutory authority, namely, Section 320.5(3)(b) of New York's Family Court Act, which is the statute involved in this appeal.

The appeal is from the United States Court of Appeals for the Second Circuit and it arises in the proceedings brought by detained juveniles for a class writ of habeas corpus and for a declaratory judgment.

I will address Section 320.5(3)(b) and related provisions of Article 3 initially and I do so both to inform the Court about the procedural constraints that New

York imposes on the judicial decision to detain an accused delinquent prior to trial and to rebut at the same time several alleged deficiencies in this procedures which were assigned to it in the opinions below and are noted by Appellees.

I will then turn to Appellees' two principal arguments under Mathews versus Eldridge, namely, that some crimes must be excluded from Section 320.5(3)(b) and that some guidelines for judicial decision making must be added so that the statute would survive scrutiny under the due process clause

QUESTION: What are the conditions on which an adult offender, given all the same factors, could be detained before a trial?

MRS. GORDON: In New York, Your Honor?

QUESTION: Yes, in New York.

MRS. GORDON: In New York -- New York provides bail for adults and does not have a preventive detention statute. It has been noted, however, that New York's bail law generally does take at least some account of future crime in the community if that is your point.

Of course Your Honor is aware that the District of Columbia itself does have a preventive detention statute which was cert denied in United States versus Edwards. I believe it was the term before last. And, we

suggest -- we contend -- that our statute is identical in all material respects to Edwards and, accordingly, would pass muster in the same manner.

Appellees do make one other argument other than their Mathews argument and that is that pre-trial detention to prevent crime as distinguished from pre-trial detention to assure appearance at trial is constitutional punishment and we have addressed that argument in our reply brief at pages 1 through 11.

Turning to the --

QUESTION: In your view what constitutional limits are there on a state's authority to detain people who are not accused of any crime to prevent them from committing future crimes?

MRS. GORDON: People who are accused of a crime to prevent them from committing a crime?

QUESTION: Who are not. Can you detain somebody if they are not?

MRS. GORDON: No, Your Honor, you cannot detain somebody that has not been accused of a crime --

QUESTION: All right. And, if they have been accused of a crime, what constitutional limits are there in your view?

MRS. GORDON: We would suggest, Your Honor, that there are two separate constitutional limits. One is

quite important and one you have heard a great deal about today and that the Fourth Amendment and probable cause. That is not quite -- Well, probable cause is noted by Appellees in the course of their discussion. They have not really made a separate Fourth Amendment challenge.

QUESTION: Do you think that is a requirement, probable cause?

MRS. GORDON: I think that probable cause in the sense of Gerstein, which we believe is met under this statute, and in the sense of New York's further requirement that there be an adversarial probable cause hearing for these juvenile, which the prosecution has the burden, that that probable cause requirement is well met in this case. We do not suggest that an affirmative finding of probable cause must be present at the time of detention.

In other words, it is sufficient in our view that it is provided and the child be given an opportunity to negative it at the time of detention and that it is there after found based on the prosecutor's burden.

In other words, it need not be simultaneously affirmatively found.

QUESTION: Is there any other constitutional limitations?

MRS. GORDON: Yes, Your Honor, absolutely, and

that arises from the existence of the detention or perhaps if you want to call it conversely, the release statute itself. And, that statute has a due process relation in the same sense as any other statute that creates an interest in property or liberty would have a due process relation.

And the appropriate test for that statute is the Mathews versus Eldridge test and it involves both considerations of it permissibility under the due process clause and the appropriate measure of the process that is due which is exactly the issue we addressed in this case, the principal issue we addressed in this case.

Returning to the statutory scheme, I think it is significant that we know, first of all, who the person is or who the child is that is involved. And, the juvenile, according to New York law is -- the juvenile delinquent under New York law is an individual who commits an act between the ages of 7 and 16 which, if done by an adult, would be a crime.

Under Section 302.2 of the Family Court Act, the Family Court's jurisdiction is not quite so confined. A juvenile who has done that conduct within the 7 to 16 age range may be prosecuted in the Family Court until he is 20 if a designated felony is involved or until he is 18 if another felony or misdemeanor is involved. A designated

felony is -- We provide a list of them for you at page 6 of our brief in the second footnote. It is essentially a list of crimes allocated by age which permit a Family Court judge sitting at disposition, which is the analog of sentencing, to give an initial placement period of three to five years which is somewhat higher than the 12 to 18 month initial placement period that is available for other crimes.

The place at which -- The proceeding at which detention may be considered is called an initial appearance and if a child has been detained on an emergency basis by an admitting detention authority, who is represented here today by the New York City Department of Juvenile Justice which is administered by Appellant, if he has been admitted to such an agency on an emergency basis, this initial appearance where detention may be considered, must be on the next court day and never set more than 72 hours later.

If the child has not been detained, in other words he has been released by the police after his arrest, his initial appearance is within ten days.

And, I call your attention to a new provision of the statute, noting parenthetically that this juvenile delinquency procedural code was recently amended and all the amendments became effective last July. And, there are

some differences between the new law and the old law and this is one of the differences.

QUESTION: Is the probable cause standard the same?

MRS. GORDON: The probable cause standard is exactly the same, Your Honor.

There is one difference, however, the police, on releasing the child, must give him an appearance ticket and the appearance ticket now must provide that in a designated felony he must return to court within 72 hours and in other cases, crimes charged, he must return within 14 days.

This makes some difference in looking at the opinions below and in noting Appellees' brief, because one of the assignments of error in this case is that somehow the police decision to release a child rather than detain him or bring him directly to the court, made, according to the district judge and Appellees, the judge's decision, who was sitting in that court later, error because he decided to detain him and the gap in time between the time the child was originally arrested and released and ultimately appeared in court and when detained was pointed out as an inadequacy in the statute, although, of course, it relies on the police decision and not on the judge's decision.

In any event, the new provision of the law now restricts the time limit the child could possibly be on the street if the police arrest him.

QUESTION: Do you think there are stronger reasons to apply this restraint on juveniles than on adults?

MRS. GORDON: Absolutely. I don't know whether they are stronger, Your Honor. I think they are different.

And, essentially they are as follows: Let us assume that a state has an interest, a preventing crime interest, which is universal. It applies to adults, it applies to juveniles. The state has, with respect to that juvenile, another interest which I would submit to you it does not have, at least in the same form that it has with respect to the juvenile, and that is child protective interest. It is concern that a child at the formative stages of his life not be engaged in a series of criminal acts, lest that kind of anti-social behavior harm him normative development. And, related to that, that he should not be engaged in those criminal acts lest he actually become physically harmed by them, namely, a police officer shoots him. The liquor store that he is holding up, the individual, the owner, not realizing that he is only 14, thinking he is 18, acts immediately and

harms him. New York has those interests in the child. In that sense, it has its parents' patria interest which --

QUESTION: You are suggesting that liquor store owners shoot people, I think, who are 18 but not 14?

(Laughter)

MRS. GORDON: I am sorry, Your Honor.

The point I was trying to make was that the state has an interest in keeping the child harm free, and while it may have some interest in that with respect to adults, it has a stronger interest with respect to the child. That is the only point.

In addition, Your Honor, we would also say that the child's pre-trial interest in liberty is not the same as an adult. The essence of being a child, of being an unemancipated minor is dependence and custodial status. Obviously, an adult does not have an absolute right to freedom, that is certainly true, but he certainly has a higher right than the child. So, those interests in relation make what I would submit to you is a match in favor of the state interest in preventive detention, pre-trial preventive detention for juveniles, which match might not turn out to be the same if one carried the analog to the adult, to adult pre-trial --

QUESTION: But, the trouble is if you have got a

hardened criminal, you can deny him bail. But, the infant doesn't get any benefit. He can be the most decent child and committed one mistake and he goes.

MRS. GORDON: No, Your Honor, not quite.

QUESTION: I said he could go.

MRS. GORDON: Could go, right. It is true under New York statute any --

QUESTION: Well, why that difference? Why not give the child a chance, the same chance you give a grown person?

MRS. GORDON: Well, it is equally true, Your Honor, that a first offender, if that is the point, who comes up for bail may be denied bail. At least in New York that is true. Denied bail is a discretionary matter.

QUESTION: A first offender can be denied bail?

MRS. GORDON: A first offender may be denied bail --

QUESTION: In New York?

MRS. GORDON: In New York except for --

QUESTION: For petty larceny?

MRS. GORDON: No.

QUESTION: Well, all right.

MRS. GORDON: Petty larceny --

QUESTION: But, an infant can be held in jail for petty larceny, first offense.

MRS. GORDON: That is correct.

QUESTION: There is a difference, isn't there? Why the difference?

MRS. GORDON: That is correct. Whether --

QUESTION: On that one hypothetical.

MRS. GORDON: There is a further difference which I think follows from my elaboration to the Chief Justice and that is New York has a stronger interest, I think, in preventing that juvenile from committing any further crime than it perhaps has in the adult. The risk to the juvenile from committing that crime is higher than the adult charged with petty larceny.

And, perhaps more importantly --

QUESTION: Are you sure that a juvenile in the average juvenile home is better off on not committing another crime and not learning how to commit another crime?

MRS. GORDON: Do you mean --

QUESTION: The average juvenile home is not as conducive to good living as a home is, the average home.

MRS. GORDON: It depends a lot, as our detention specialist said, and indeed the detention expert for the City of the trial below, it depends a lot on the home, Your Honor. If you are a child living on the streets, then perhaps any home is better, and that is not to

suggest that there is anything wrong with the detention facilities that we have.

I would call one other fact to your attention, Your Honor. When I say that a juvenile accused of petty larceny may be considered for detention, I say that advisedly, because in the juvenile case histories that are presented to you by the Appellees, there is at least -- I believe at least two petty larcenists. None of them were first offenders, Your Honor. They had records of seven, six, five prior contacts with the Family Court.

QUESTION: Well, I do assume that in the City of New York you have found at least one first offender juvenile.

MRS. GORDON: Who was detained?

QUESTION: Well, are there any?

MRS. GORDON: These are Appellees' exhibits. They were Petitioners' below. They --

QUESTION: Do you say there are no -- How do you get the second offenders up there if you don't have any first ones?

(Laughter)

QUESTION: Are you able to shed any light -- What is the practice if you know with respect to first offenders? Are they detained for shoplifting?

MRS. GORDON: First offenders are considered for

detention. For any detention, there must be facts and reasons on the record that are developed at this hearing.

If we look at these hearings, at least so far as we have them in the record, and we only have 34, we find not merely criminal -- the commission of a crime, but as Appellees' witness below, the psychiatric witness below, Dr. Zinn testified, a pattern, associated characteristics -- In other words we find a child who is charged with committing a crime who is also not being supervised at home, who, when he was arrested, lied to the police, who is a truant at school. In other words, you find a combination of associated characteristics which are called a delinquent pattern.

Now, we do not have in this record, and so far as we know from the information that we have, Mr. Chief Justice, we don't have a single petty larcenist detained. That is all we can say because the data is not assembled any other way and Appellees, who are attempting to prove their point, I assume, in showing us that there were minor criminals who were detained who did not have records, did not provide us with that information.

Just returning briefly to the statutory scheme, at this initial appearance, the juvenile has all due process rights that this Court has heretofore elaborated. He is for a preliminary stage of a proceedings and indeed

some others. He is present, he is represented by counsel, he has the right to remain silent, he has the right to oppose any information offered against him, and he has the right to offer information on his own behalf.

The judge, if he comes to the detention decision at all, must pass through two release options, options for conditional and unconditional release, much like the Federal Bail Statute, one must pass through some unconditional release options, much like the District of Columbia Preventive Detention Statute where the judge must also pass through some release options.

Judge Quinones, who testified below for the state, indicated, I think quite eloquently, exactly how a judge comes to this concludion and that is -- He said, and this a point of the application of the statute, Chief Justice, he starts with absolutely no detention. In other words, he starts essentially opposed to detention. If then facts and circumstances are developed at this hearing, then those facts and circumstances overcame or may have overcome what Judge Quinones called the strong presumption against detention.

QUESTION: I guess there are no statutory requirements in that require under the New York scheme, is that right, for what the judge has to consider?

MRS. GORDON: No. There are no additional

criteria, as Appellees call them, or guidelines for decision making other than the standard itself which is precise, serious risk of pre-trial crime.

QUESTION: What review is there of the Family Court decision to detain a juvenile?

MRS. GORDON: The decision is reviewable by several routes, generally by writ.

Now, Appellees say that this really is a non-reviewable situation omitting to point out that most of the appellate law with respect to juvenile delinquency has been made by the progress of these writs up through the courts and that New York takes a relaxed or quite liberal view of the doctrine of capable of repetition, yet evading review, and renders these decisions.

Indeed, the New York Court of Appeals decision which upheld this very statute was on a writ.

And, they omit one other thing. In the juvenile case histories that they brought to bear and introduced as evidence, one, Tony Gomez, was released from pre-trial detention by the writ that they suggest to you is not available. So, there is a thorough going review.

QUESTION: Does the New York -- Go ahead.

QUESTION: I just wanted to know, you said there were several mechanisms. What are the others?

MRS. GORDON: There is an appeal by commission

to the Appellate Division. There are motions for reconsideration and I believe --

QUESTION: What about the probable cause hearing? Won't that occur before anything else could happen and it has to happen within six days, doesn't it?

MRS. GORDON: Correct.

QUESTION: That is reviewable.

MRS. GORDON: That is reviewable.

QUESTION: Wouldn't that always be -- If probable cause isn't found, there is a release, isn't there?

MRS. GORDON: That is correct.

QUESTION: So, really what is going to be reviewed in all these proceedings by a writ is the finding of probable cause, isn't it?

MRS. GORDON: No.

QUESTION: Well, why -- I would think by then the probable cause -- By the time you can get a writ, the probable cause hearing will go on.

MRS. GORDON: Well, that is exactly what Appellees are saying. They are saying, well, this is really non-reviewable because the issue of my detention become moot, not necessarily a probable cause but a fact-finding when the child is arguably convicted, which, in New York if you are detained, it proceeds very quickly.

QUESTION: Well, by the time you could get a writ wouldn't the probable cause hearing have been held?

MRS. GORDON: Yes, but the probable cause --

QUESTION: And, then there would have been a release if there isn't probable cause.

MRS. GORDON: Yes, Your Honor, but as I was indicating, these are two separate notions, one the Fourth Amendment notion, and the other the detention standard. The fact that there was probable cause found would not necessarily mean that the detention was appropriate, that the pre-trial detention was appropriate.

But, in any event, even if it were so construed, New York --

QUESTION: But, it would mean that it couldn't happen without probable cause.

MRS. GORDON: Certainly that is true. He certainly couldn't stay in without the probable cause hearing, but an affirmative finding of probable cause doesn't necessarily cure a bad detention.

But, the New York State courts --

QUESTION: But, it helps.

MRS. GORDON: Yes, it does.

The New York State courts have not viewed the detention issue as moot, thus we have in the Court of Appeals the very case we have before you.

QUESTION: Right. But, when they review it, at least for all practical purposes, there already has been a finding of probable cause?

MRS. GORDON: Yes.

QUESTION: Okay.

MRS. GORDON: And, often a fact-finding, a conviction.

QUESTION: Yes. Do you mean they will still review if there has been a conviction?

MRS. GORDON: Yes.

QUESTION: For what purpose?

MRS. GORDON: To establish the appropriate detention --

QUESTION: Just for the guidance for the future?

MRS. GORDON: Pardon me?

QUESTION: Because of the guidance for the future?

MRS. GORDON: Exactly, guidance for the future and because it is an issue capable of repetition, yet evading review.

The child in People ex rel. Wayburn versus Schupf was long convicted when the Court of Appeals decided the issue.

There are relatively few remaining minutes and I would like to come to -- I think we have at least touched

upon the first Mathews argument that Appellees advance which goes to this balancing of interest that I was elaborating for the Chief Justice before.

We believe that there are at least -- In addition to their failure recess the second child protective interest that is involved in the statute, and their failure to note that there is a distinction between a juvenile's interest in pre-trial liberty and an adult's interest in pre-trial liberty.

When Appellees press this analaysis they get to a third error which is perhaps the most pervasive. And, that is since they hypothecate that some group of crimes must be excluded from this prevention detention statute and they characterize them as trival crime, but they never define what kinds of crimes they mean. Their weighing of the state interest and the juvenile's interest in these crimes that are to be excluded is, in fact, a false weighing.

In other words, without knowing what kinds of crimes Appellees have in mind, they never can assess the importance of the state's interest in including them in a detention standard, nor from the juvenile's interest in pre-trial liberty in excluding them from the standard. So, that when they say that the juvenile's interest outweights the state's interest, they really have not made

the requisite comparison or the one that Mathews requires.

In addition, the suggestion that some group of crimes should be excluded from the statute turns out to be, on the testimony of their own witness, the criminologist below, to yield a worse statute than the statute that is now on the books. It yields a worse statute because, as their witness testified, the more you qualify crimes, the more you require that somebody predict a specific crime, which you would necessarily have to do to exclude crime, the worse your prediction becomes.

In other words, your error rate increases with every adjective or modification and with every particularization. And, indeed, the easiest thing to predict is the eventuation of crime and not particular crime.

QUESTION: Attorney General, may I ask this question?

MRS. GORDON: Surely.

QUESTION: What do we do about the fact that both courts below found as a fact that the law was carried out with unfettered discretion by the Family Court judges and they decided against you on due process grounds?

MRS. GORDON: Well, that I don't find a problem with.

QUESTION: You do?

MRS. GORDON: Because there was a question of law. It is a question of law. In other words, they did not find as a matter of fact that the law was administered with unfettered discretion.

QUESTION: Well, they -- If I may interrupt you again, it seemed to me that they concluded that whatever might be said under Gerstein against Pugh which was a Fourth Amendment probable cause case --

MRS. GORDON: Right.

QUESTION: -- that under the Fourteenth Amendment there were no standards so that the Family Court judges, in their own unfettered discretion, determined when to detain these young people.

MRS. GORDON: I was about to -- Let me turn to that argument and pick up with you and Justice O'Connor. And that is that we have said, said at the outset of this case that it is not guidelines for the decision making that will make this statute constitutional. It is the facts and reasons requirement and the stenographic record which is the requirement that takes a standard and translates it to a particular case. And, that is the standard here. In other words, the stenographic record and the facts and reasons requirement.

We said that Kent versus the United States established that proposition and we adhere to it.

The converse proposition that Appellees are arguing, namely, that guidelines for decision making, as opposed to the facts and reasons requirement, somehow are the thing that makes the statute constitutional, finds no warrant in the law, and they cite us to no case which says that guidelines, whether administrative or judicially -- quasi judicially created in a legislative capacity of a judiciary body, are what make the law constitutional. There is no case like that.

Now, I think if we follow in terms of logic exactly what results from guidelines as opposed to from facts and reasons we have to conclude that what the court said in Kent, namely, it is facts and reasons and not guidelines, that that is the appropriate standard.

And, I point out the following: We cited in our opening brief the prefatory nature of guidelines for bail decisions, not the Federal Bail Statute and the New York Bail Statute. Appellees don't challenge us on that at all. They agree apparently that these are prefatory. What is prefatory, Your Honor, seems to me cannot possibly be constitutionally mandated.

Second, the existence of guidelines in no way translates itself into the decision making process. For example, if I were to take the seven general considerations that Judge Quinones testified were common

in making these decisions and distribute them widely to every judge -- every Family Court judge in New York State, I would nonetheless be unable by that distribution to guarantee that any judge would not write on his record, to use the classic law school example, the boy was wearing a red tie. In other words, the guidelines themselves don't make the judge do anything.

Now, certainly the facts and reasons requirement can result in an error here and there, but certainly that requirement, the translation of the standard to the record, is what protects the juvenile from unfettered discretion.

Indeed, the guidelines allows exactly the same kind of subjective decision making that Appellees are arguing against because they don't won't the judge to do anything. The facts and reasons requirement, in contrast, do.

QUESTION: How can you measure due process without guidelines?

MRS. GORDON: What do you mean, Your Honor, guidelines? If I give you --

QUESTION: How can you -- Any kind of guidelines, written, oral. Don't you have to have guidelines to have due process?

MRS. GORDON: I have to have a relatively

certain standard.

QUESTION: Well, don't you have to have a standard?

MRS. GORDON: I have to have a standard and I have a standard here.

QUESTION: What is the standard?

MRS. GORDON: Risk, serious risk of pre-trial crime. It is not suggested -- At least Appellees bring no authority --

QUESTION: Is that all?

MRS. GORDON: That is -- And in the context, you must understand, a post-arrest context where the conduct is regulable in and of itself.

QUESTION: What else?

QUESTION: Is protection of the child a guide?

MRS. GORDON: Protection of the child certainly is a guide. It is the state interest in the statute and it does obviously guide the decision making.

But, for example -- Let me call your attention to one example. The Judiciary Act of 1789, Your Honor, had a provision in it that said defendants accused shall be admitted to bail. That -- And that statute was constitutional, Your Honor, and that didn't have any more guidelines than that.

Now, the Kent statute --

QUESTION: Do you want me to give you some cases where this Court said in due process you do have to have guidelines? Do you need those?

MRS. GORDON: Your Honor, the question is what is --

QUESTION: You don't, do you?

MRS. GORDON: No, I don't think so, Your Honor, but I am not --

QUESTION: Do you know of any other case that the answer to the lack of due process is answered by you don't need any guidelines?

MRS. GORDON: I -- To go to Mathews, Your Honor, the weighing process and the risk of error analysis that Mathews requires, the risk of error analysis -- I think, as I have been trying to point out to you, that the additional of guidelines in this case, just like the addition of prefatory guidelines in a bail statute, no more make that risk of error analaysis better or worse. In fact, they do almost nothing.

QUESTION: Well, let's put it this way. Does it help?

MRS. GORDON: I don't know especially in light of the fact that Judge Quinones --

QUESTION: I give up.

MRS. GORDON: -- that Judge Quinones testified

that there were common considerations, that the Second Circuit found that there were common considerations, and that Appellees now concede at page 67 and page 21 and 22 of their brief that there are common considerations that are used --

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MRS. GORDON: Thank you.

CHIEF JUSTICE BURGER: Mr. Guggenheim?

ORAL ARGUMENT OF MARTIN GUGENHEIM

ON BEHALF OF THE APPELLEES

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

The issue in this case in an important one which permits the Court to answer the question left open In re Gault, whether the Constitution has a role to play in protecting juveniles from inappropriate depravation of liberty before their trials.

To ask the question is to answer it. In this case the decision to detain before trial is an important one in any criminal justice system, but it is especially important in the juvenile system.

The time between arraignment and trial has been recognized by this Court to be the most critical time in the trial process. Detention for juveniles, as this

record amply supports, is even worse for young offenders.

QUESTION: Why is it worse for young offenders?

MR. GUGGENHEIM: As the record supports, it can traumatize them -- Actually I used the wrong phrase when I said offenders -- young persons accused of crime. It is the needless detention. If they didn't need to be detained in the first place, it is worse for them than for adults. It is their first experience very often away from their home and loved ones. It can disrupt their school setting and their opportunity for advancement. This record shows it has done that to prejudice individuals.

QUESTION: Does the record show how many first offenders or at least persons brought for the first time before the juvenile court are detained on that basis?

MR. GUGGENHEIM: There were two kinds of record, two parts of the record that are relevant. One are the 34 case histories. Of them, nine juveniles had never before been arrested and brought before the court. Seventeen -- Twenty-three of the juveniles had never had any prior adjudication whatsoever. So, there is a powerful record to demonstrate that this is applied to people arrested for the first time.

QUESTION: Is there a report in the nature of probation report presented before the decision is made?

MR. GUGGENHEIM: Yes. There was testimony at

trial by Hubert Benjamin, a probation officer of 30 years experience, who testified that the juvenile will be interviewed for from ten to forty-five minutes prior to the initial appearance. And, during that interview, the probation officer will ask the juvenile questions, including what were you doing at the time you were arrested, what got you involved in this offense. And, based on that interview, ten to forty-five minutes, make a recommendation to the court whether to parole or to detain the juvenile pre-trial.

It has been applied countless times to juveniles who have never before been arrested, to juveniles who have never before been convicted, and, as the record demonstrates, to juveniles overwhelmingly the number of times who are accused of only minor offenses.

And, detention along with adults --

QUESTION: When you say minor offenses, Mr. Guggenheim, can you give us some example of what specifically you are talking about?

MR. GUGGENHEIM: Yes. In the record one example was a juvenile who was playing a game called "Three Card Monte," a gambling game in violation of the New York gambling law. He was detained before trial. Another was a juvenile --

QUESTION: What was the character of the New

York offense which he violated?

MR. GUGGENHEIM: Gambling law.

QUESTION: What, a misdemeanor?

MR. GUGGENHEIM: Yes, a misdemeanor.

The record also shows that 33 percent -- New York, of course, categorizes by Felony A to E and then Misdemeanor A and B. Misdemeanor is punishable by one year for A's and B's six months. Thirty-three percent of the Vera Justice study of accused juveniles were accused -- Thirty-three percent of those brought on charges of the misdemeanors were detained before trial.

QUESTION: Now, what is the upper limit of the punishment of an adult on a B misdemeanor?

MR. GUGGENHEIM: Six months.

QUESTION: Six months.

QUESTION: And, your clients were detained for what crimes?

MR. GUGGENHEIM: Well, my clients is the whole class.

QUESTION: The named class representatives.

MR. GUGGENHEIM: They were accused of more serious offenses, but they were only --

QUESTION: Armed robbery and what else?

MR. GUGGENHEIM: One was armed robbery. One was attempted murder.

QUESTION: Yes.

MR. GUGGENHEIM: But, of course, they only represent the class -- The class, as the briefs clearly show, are all juveniles in the state who were eligible for detention and all juveniles in the state who were accused of being delinquent are eligible for detention.

QUESTION: One wouldn't have to reach out to the unnamed class member, the "Three Card Monte" defendant, to adjudicate the cases of your clients, would they, an armed robber potentially and an attempted murder?

MR. GUGGENHEIM: One would not have to reach out to them to what end? The question in this case is whether this statute is constitutional.

QUESTION: But, underlying the presentation of your case to the Second Circuit, I gather, was the assumption that there couldn't be any sort of an individualized consideration or whether this statute as applied to certain people might be constitutional and unconstitutional as to others. What is unconstitutional about applying this statute to the particular named people in this case?

MR. GUGGENHEIM: Several things, but before I give an answer, I would like to point out that that is only a third or a half of the question about the case, because the case --

QUESTION: Why don't we try it with that third or that half?

MR. GUGGENHEIM: The broadest issue raised before this Court is whether detaining and individual accused of even serious offenses before he or she has had a day in court, presumptively innocent, because of a belief that the individual will commit more crime if released, thereby assuming the individual has already done something wrong, violates the due process clause.

QUESTION: The Second Circuit didn't answer that question.

MR. GUGGENHEIM: That is right. The Second Circuit --

QUESTION: So, why is it before this Court?

MR. GUGGENHEIM: It is before this Court, in answer to your question, because it is an issue in the case which goes to this point. Even if this statute contained the kind of standards and criteria which might permit a court to detain an individual before trial, comporting with the due process clause in the Mathews and Eldridge test, the question would still remain, may a court detain an individual before trial or is that punishment before trial?

QUESTION: Well, you are saying then that because the standards may be unsuitable or perhaps

unconstitutional for a "Three Card Monte" defendant, your clients were armed robbers and attempted murders can't be detained under it because of some overbreadth concept?

MR. GUGGENHEIM: No. With all respect, my client is the "Three Card Monte" accused as much as to the same extent as --

QUESTION: Who are the named parties in the case?

MR. GUGGENHEIM: Martin, Rosario --

QUESTION: What are they charged with?

MR. GUGGENHEIM: Justice O'Connor identified charges correctly, but --

QUESTION: Okay.

MR. GUGGENHEIM: -- they are not my only clients.

QUESTION: Well, you are saying that the named parties can't be held under this statute because it is unconstitutional as to a "Three Card Monte" defendant. Is that what you are saying?

MR. GUGGENHEIM: No. I am saying that we have proven that the Appellees class has had its rights violated under the Constitution.

QUESTION: What rights of the named plaintiffs in this case have been violated?

MR. GUGGENHEIM: Well, if this were not a class

action, the question would be could Mr. Martin challenge this statute because arguably it could be invoked or permits detention for crimes that he hasn't been accused of.

I don't believe though that the law of class action limits the Court in any way to that inquiry.

QUESTION: Well, it certainly doesn't prevent us from addressing the question of the standing of the named plaintiffs to represent the rest of the class and to at least determine -- I would think you at least start out with the status of the named members of the class. The class action may be a good deal broader, but certainly you don't ignore the status of the named members of the class.

MR. GUGGENHEIM: Well, I think that once a class --

QUESTION: Let me put the question to you another way. Your suggestion, it sounds to me, is that because a class has been certified, the Court must adjudicate the statute on its face rather than as applied to A, B, C, or D. I would think the class action certification wouldn't prevent the Court from saying, well, this statute is perfectly all right as applied to the named plaintiffs. It is unconstitutional as to this lawyer's other clients.

MR. GUGGENHEIM: That may be right, Justice

White.

QUESTION: Well, is it right or not?

MR. GUGGENHEIM: Well, my point is that the inquiry as applied includes the as applied in this record. It would be moot for this Court to consider the question of whether the statute was applied fairly to Martin --

QUESTION: Well, we might --

MR. GUGGENHEIM: -- who is already over 16.

QUESTION: Well, we might come out with completely different answers as to how -- as to its constitutionality as applied to the named plaintiffs and as applied to the "Three Card Monte" plaintiff.

MR. GUGGENHEIM: But, both were detained under the same statute, so I --

QUESTION: Oh, all right.

MR. GUGGENHEIM: -- would now answer --

QUESTION: Then you are attacking the statute on its face.

MR. GUGGENHEIM: And, that is exactly the action.

QUESTION: We don't have to do that.

QUESTION: We don't have an overbreadth doctrine for criminal procedural statute. The overbreadth doctrine, facial attacks, involve only First Amendment situations.

MR. GUGGENHEIM: This isn't an overbreadth attack in the way that it is in the classic First Amendment case. This is an attack on a statute which says that the depriving individuals of liberty in the absence of any standard, not because of absence of notice to the accused, but because the statute has been and can be applied inappropriately is unconstitutional.

QUESTION: Well, that argument goes just as well to your clients as to the other members of the class. I agree with that.

MR. GUGGENHEIM: I can finally answer the question Justice Rehnquist put to me by saying that even the named plaintiffs have a proper attack on this statute by arguing that the absence of standards in this scheme render the statute unconstitutional on its face and as applied to them.

But, this is not an as applied case. This record was an attempt to show, as the New York Court of Appeals agreed, although finding it constitutional, that this statute contains no criteria that would require a court to make a finding one way or another. It is up to the court's unfettered discretion each and every time. That is true for Martin.

QUESTION: Okay. But, apart from adjudicating the case of Martin, the court may not be required to make

a finding, but it makes perfectly sensible findings that he is apt to commit another crime. Now, the statute may be unconstitutional as applied to somebody else with respect to whom different findings have been made. What is unconstitutional about that?

MR. GUGGENHEIM: This statute contains no precisely drawn standards.

QUESTION: Well, so what? What case says you have to have precisely drawn standards when you can examine the way a statute is administered on a case-by-case basis?

MR. GUGGENHEIM: Well, okay. That leads to another infirmity in this statute. Its very existence permits the depravation of liberty without meaningful review.

Martin couldn't obtain. The "Three Card Monte" offender couldn't obtain it.

QUESTION: Well, Martin is getting it right now.

MR. GUGGENHEIM: I would respectfully disagree. If that is the Court's view, the case is moot. Martin has been convicted, he is no longer under 16, the statute is no way capable of repetition as to him. The very nature of this case is that it is an on-going problem.

QUESTION: You used the word "convicted." Has he been convicted as an adult or as --

MR. GUGGENHEIM: No. Adjudicated, sentenced, sentence fully served, and he is now 19 years of age and his particular facts, I respectfully submit, are not dispositive in any way respecting the broad reach of this statute or its unconstitutionality.

QUESTION: Well, I suggest to you you may not want an adjudication. If all you want is an adjudication on space and we find that in some circumstances this statute is perfectly constitutionally applied, you lose your entire case. It just isn't unconstitutional on its face. Then I would think you would want us to say, well, it is unconstitutional as applied to other people in your class, other members of your class.

MR. GUGGENHEIM: But, they are part of the record in every sense.

QUESTION: I understand that part of your argument certainly goes to a facial challenge even with respect to the named plaintiffs and everybody else like them. I understand that. But, we may not agree with you on that.

MR. GUGGENHEIM: This statute is a textbook example of a statute without standards. Any juvenile is eligible for detention. The record shows that most juveniles detained not only were accused of minor offenses --

QUESTION: What if a state -- What if the federal government or the state, in order to implement its constitutional requirements of bail, says unreasonable bail shall not be required? Now, what kind of a standard is that?

MR. GUGGENHEIM: The --

QUESTION: Sometimes you just adjudicate individual cases under that standard. No standards other than reasonableness.

MR. GUGGENHEIM: The question of bail is a very different one. With respect to the standards, there is an overlap, but with respect to the basis for detention, what goes to the heart of the infirmity of this scheme is that the prediction or the reason for the detention is not that someone won't return to court, which is the bail basis, but that someone will commit a crime if released. That goes to the heart of what the court has to find or presume in order to detain.

We claim that this statute has no standards in several respects, but among them is that the court is not limited in a finding of substantial probability that the individual committed the offense of which he or she is accused, no finding of probable cause, no finding of probable conviction or sentence.

QUESTION: With your argument I would take it

would go to adults as well as juveniles, to the same statute, the same vagueness.

MR. GUGGENHEIM: Not with bail but with preventive detention.

QUESTION: Yes.

MR. GUGGENHEIM: It is inconceivable to me, as this Court said in Kent against the United States, that a court of justice dealing with adults with respect to a similar issue would proceed in this manner. There is no such state --

QUESTION: Kent wasn't a constitutional case, was it?

MR. GUGGENHEIM: No. I am simply making the point of the language of the opinion. It was inconceivable to this Court that the District of Columbia would deal with adults, that any state would the way they dealt with juveniles. That is the argument here. Inconceivable that a state would deprive an individual of liberty on the unfettered, open-ended discretion that it can do so in this case.

QUESTION: You mean you don't know of any jurisdictions around that are considering prevention statutes for adults?

MR. GUGGENHEIM: Yes, I do, but to contrast that --

QUESTION: What do you mean you do? You do know some?

MR. GUGGENHEIM: I know of one in this district, for example. And, in Hunt against Roth, although the Court struggled with the meaning of the phrase, proof is evident and presumption great, in both schemes the legislature required as a sine qua non that there be a finding that the individual probably committed the crime, a substantial likelihood, that it be limited to very serious offenders.

QUESTION: Well, wouldn't you be here making the same argument if the judge or the officer in the first instance before he had to make a finding of probable cause? That is a great standard too.

MR. GUGGENHEIM: Well, yes, it is. Yes, it is, Your Honor.

QUESTION: Well, would you be here making exactly the same argument?

MR. GUGGENHEIM: I would for this reason. The Mathews and Eldridge test --

QUESTION: The answer is, yes, you would be making the argument.

MR. GUGGENHEIM: But, only in this sense. It is a flexible test. What is due process? The question is is the mere finding of probable cause enough? I would be

here saying no. Add to that, limited to the Martin fact pattern, accused of attempted murder, limited to a showing of substantial probability of ultimate placement, clear and convincing evidence of the ultimate fact that the person is likely to have committed a crime, raise the standard of proof. Add them together and I think Mathews is met and detention is not arbitrary assuming the second argument would be reached adversely to our case which is that detention before trial itself is punishment for that purpose.

I clearly put that argument aside to say I would be here if the only thing New York did was add probable cause. But, New York not only doesn't have probable cause, it has no standard of proof. It is applied to everybody.

QUESTION: But, very quickly it has it.

MR. GUGGENHEIM: Yes, but the limit of detention in no way mitigates the massive curtailment of liberty that this Court finds to be at the heart of the due process clause. It interferes with preparation for trial, it increases the probability of conviction, it increase the probability of ultimate placement. The record demonstrates all of those things overwhelmingly and in an undisputed way. So, the mere 17-day detention is only the tip of the iceberg in its effect adverse to the person's

liberty interest.

QUESTION: But, there is no possibility of conviction here.

MR. GUGGENHEIM: I am using the word not in its technical sense. Adjudication and placement. There is no possibility of conviction.

One of the other irrational aspects of this case -- and I could answer this in another way, Justice Rehnquist, to the Martin and Rosario fact pattern, although I frankly think the case is much broader than that -- that juveniles accused of the most serious offenses from 13 to 16 are prosecuted in New York as juvenile offenders in the adult court. For them preventive detention may not be applied.

Similarly, juveniles -- Persons 16 to 18, which in most states are juveniles, but not in New York, are not eligible for preventive detention.

QUESTION: Well, the first example may simply vindicate your opponent's view that New York regards its parents' patria role with the children as being involved to a certain extent in the detention.

MR. GUGGENHEIM: I cannot explain the irrationality of the scheme I have just described. But, the record is plain, from Judge Quinones to every piece of datum in this record, that the purpose of this detention

is singular. It is to protect the community from crime in the interim. That is its only purpose and there is not dispute about that.

Now, one of our claims in this case is that it is punishment before trial and I would very briefly like to explain that argument.

This constitutes an affirmative restraint imposed by the state for a purpose historically regarded as punishment, incapacitation. In United States against Brown and Kennedy against Mendoza-Martinez this Court has plainly held that.

This comes into play only because the individual is accused of wrongdoing and it is applied to behavior which is already a crime.

The state may not detain individuals before trial because of a belief that they will commit a crime in the interim before their conviction. But, if they may, it is plain that any exception to the general rule that incarceration follow rather than precede adjudications of guilt can be justified, if at all, by a compelling state interest. There is none in this case. The only and lame justification for the scheme presented by the state is that the facts and reasons requirement of this statute make up for all of the absences of procedural due process protections.

That requirement of facts and reasons was put into this statute by the legislature, as the Attorney General in his brief at page 36 points out, solely so that the legislature could see how the statute was operating. There is no question that there is no meaningful opportunity to review the detention decision made by the judge even with the facts and reasons.

QUESTION: How about habeas?

MR. GUGGENHEIM: Habeas is available as a theoretical remedy, but when a judge has before him or her a case in which the other side, the state, says, Your Honor, the statute says that the court may detain when it finds a serious risk and it has found so in this case and stated its reasons and facts on the record, that ends the inquiry. Not a single case has been uncovered by the state or by the Appellees to show release of a juvenile for violation of the statute of detention when the facts and reasons were given on the record.

I have litigated countless habeas corpus cases, a decision in the record, but one does not win unless the violation was that the court said go to jail without --

QUESTION: What happens in the counties outside of New York where the judge is not a juvenile court judge, he is a regular judge?

MR. GUGGENHEIM: No, he is a juvenile court

judge. He is sometimes what they call a three hatter and sits as judge of three courts. But, when he is sitting a juvenile court judge, that is his role.

QUESTION: Is that the judge that is going to get a writ of habeas?

MR. GUGGENHEIM: I don't know --

QUESTION: Against himself? Against himself?

MR. GUGGENHEIM: I doubt that, but I frankly don't know.

But, certainly in New York different judges sit, but the point is it is an illusory -- And, as the legislature said, we want to see a review of the scheme, but it doesn't meaningfully protect.

Justice White is quite right, as the process moves along, the individuals in detentions, that is the way it works.

QUESTION: Mr. Guggenheim, you made an equal protection claim below as well.

QUESTION: Oh, yes.

MR. GUGGENHEIM: We believe as a basic point that if this Court does not find that this statute violates due process of law, it almost certainly does not violate equal protection of the law. We have abandoned that claim at this time.

We think that the heart of our case is that this

statute cannot withstand scrutiny. We think as a bottom-line point detention before trial for the purposes envisioned by this statute offend for other reasons the due process clause. It is not necessary for the the Court to decide this case to reach that other issue. But, if it is to reach that other issue, we submit that this is a classic example of utilizing the statute in the wrong way.

Most of the juveniles who are detained are ultimately released home. The vast bulk are released home and half are never even convicted.

QUESTION: Is it possible also that a class action was not the appropriate way to approach this problem?

MR. GUGGENHEIM: Frankly, Your Honor, it is the only way to approach this problem.

QUESTION: Not a case by case?

MR. GUGGENHEIM: There is no Article 3 case or controversy. I have litigated this case in different manner since 1973 in the state courts. Now, when you come into the federal court to challenge this, if you don't have a class action, your clients group up and they grow out of the age -- This isn't even a Hunt v. Roth case where you can say, well, when you are released from prison, you may ultimately be rearrested assuming you don't get life.

Here, when they are 16, they are out of the jurisdiction. It is incapable of repetition. It is only by the device of class action that we can litigate it. And, the identity of the plaintiff is relevant only to the inquiry, I submit, of whether a class action is properly certified. Once it is properly certified, and in this case it would be all juveniles eligible for detention, then the "Three Card Monte" detainee is as important an example as the Martin example.

We have evidence in this record that judges base their decision to detain on the political climate of the situation, of how much media attention a case gets. One judge's policy, perfectly lawful under this statute, reviewable by writ or otherwise, to detain all juveniles who are accused of an offense in which a gun was involved. That is in the record.

Now, that may be lawful with a statute which has a showing of a standard of proof and a probable cause and likelihood of conviction and other protections. This statute lacks all of the essential protections which the Constitution requires in the due process clause.

What is nice about this case, if I may, is that affirmance is going to improve a system of justice which this Court on numerous occasions has condemned for its failure to live up to its ultimate promise. What is wrong

with juvenile justice in part, this Court has noted on many occasions, is that it fails to deter and it often fails to rehabilitate. Every major study of juvenile justice shows in full conformity with this record that the vast majority of juveniles are punished, if at all, before their trial.

QUESTION: Could bail be required, reasonable bail be required?

MR. GUGGENHEIM: Yes. New York, in its wisdom, has not imposed such a requirement and we think frankly that that is sensible in many ways because there are laws that --

QUESTION: It may be that my question is would it be constitutional to require bail before there is release?

MR. GUGGENHEIM: I think it would be constitutional.

QUESTION: Reasonable bail?

MR. GUGGENHEIM: Well, now you are asking me the same question as before. Is that standard itself constitutional?

QUESTION: I thought you were making an argument that -- bordering on an argument that you shouldn't be able to detain juveniles at all.

MR. GUGGENHEIM: No, I am not making that

argument. I am saying that this Court can comfortably affirm in the knowledge that it will result in fewer juveniles being punished before their trial, but not in fewer juveniles being detained when there is a need to bring them to court for their trial when there is a risk of flight because they are elibilbe for detention under a statute not being charged.

Since 1981, in June, this statute has been enjoined in New York. It hasn't been operating, and yet arrest statistics show that the arrest rate is down. There is not compelling state reason to justify this statute. There is a strong policy reason to overrule this statute so that juveniles will be detained in conformity with the Constitution after they have been proven guilty beyond a reasonable doubt and not before.

If there are no further question --

CHIEF JUSTICE BURGER: Thank you, counsel, the case is submitted.

(Whereupon, at 3:02 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:

#82-1248-ELLEN SCHALL, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE, Appellant v. GREGORY MARTIN, ET AL.; and #82-1278-ROBERT ABRAMS, ATTORNEY GENERAL OF NEW YROK, Appellant v. GREGORY MARTIN, ET AL.

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

BY Diane Hammond

(REPORTER)