

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-381

TITLE CALIFORNIA, Petitioner V. SUPERIOR COURT OF CALIFORNIA, SAN
BERNARDINO COUNTY (RICHARD SMOLIN AND GERAD SMOLIN, REAL
PARTIES IN INTEREST)

PLACE Washington, D. C.

DATE April 22, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA :
Petitioner :
v. : No. 86-381
SUPERIOR COURT OF CALIFORNIA, SAN :
BERNARDINO COUNTY (RICHARD SMOLIN, :
AND GERALD SMOLIN, REAL PARTIES IN :
INTEREST) :

- - - - -x
Washington, D.C.
April 21, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:14 o'clock a.m.

APPEARANCES:

J. ROBERT JIBSON, Sacramento, Calif.;
on behalf of Petitioner
DENNIS P. RIORDAN, San Francisco, Calif.;
on behalf of Respondent
J. ROBERT JIBSON, Sacramento, Calif.;
on behalf of Petitioner - Rebuttal

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

J. ROBERT JIBSON, Sacramento, Calif.;

on behalf of Petitioner

3

DENNIS P. RIORDAN, San Francisco, Calif.;

on behalf of Respondent

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J. ROBERT JIBSON, Sacramento, Calif.;

on behalf of Petitioner - Rebuttal

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

2 CHIEF JUSTICE REHNQUIST: Mr. Jibson, you may
3 proceed whenever --

4 ORAL ARGUMENT OF

5 J. ROBERT JIBSON

6 ON BEHALF OF PETITIONER

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

9 The issue before the Court in this case is
10 whether an Asylum State Court may block extradition on the
11 ground that the person is not charged with a crime because
12 that court concludes, based on extrinsic evidence, that
13 the person is innocent.

14 On March 9th, 1984, real parties in interest,
15 Gerard and Richard Smolin took Richard Smolin's two minor
16 children from his school bus stop in Slidell, Louisiana,
17 St. Tammany Parish, and removed them to the State of
18 California.

19 QUESTION: Mr. Jibson are you reciting facts?
20 Now, from where are you getting those facts?

21 MR. JIBSON: These facts are from the record of
22 the record of the habeas corpus hearing, Your Honor.

23 QUESTION: The record of the habeas corpus
24 (inaudible).

25 MR. JIBSON: That's correct. At the time of the

1 abduction, the children had been living with their mother,
2 in her custody for three years in the State of Louisiana.
3 Three days after the abduction, the St. Tammany Parish
4 prosecutor filed simple kidnapping charges against Gerard
5 and Richard Smolin. And their extradition from the state
6 of California was sought.

7 Two months later, in June of 1984, the Louisiana
8 Governor sent a requisition to the Governor of California,
9 requesting the extradition of the Smolin's. After two
10 more months, in August of 1984, the California Governor
11 granted the extradition request and issued his warrant for
12 the rendition of the Smolin's.

13 However, the courts of California have now
14 blocked the extradition on the basis that the Smolin's are
15 not actually charged with a crime. They reached this
16 conclusion only after the habeas corpus courts in
17 California took judicial notice of some other California
18 court records containing a decree which gave Richard
19 Smolin custody of the children.

20 Essentially, the habeas corpus court found that
21 since, in light of that decree giving Mr. Smolin custody,
22 he could not be found guilty in the state of Louisiana;
23 therefore, he and his father Gerard were not actually
24 charged with a crime in Louisiana.

25 QUESTION: (Inaudible) does the state argue at

1 all that the habeas proceeding should not have gone
2 forward at all?

3 MR. JIBSON: No, the state is not taking that
4 position, Your Honor.

5 QUESTION: So that there maybe some inquiry made
6 by the habeas court into what?

7 MR. JIBSON: the habeas corpus court may inquire
8 into four very narrow areas, Your Honor. Two of those are
9 factual, and two of those are legal.

10 QUESTION: Where do these limitations come from.

11 MR. JIBSON: They come from this Court's case in
12 Michigan v. Doran in 1978, Your Honor. The factual
13 questions that may be inquired into in habeas corpus are
14 Number 1: Whether the person before the court is, in
15 fact, the person wanted by the demanding state. Question
16 of identity as the person charged.

17 Secondly, whether in fact he is a fugitive and
18 by that I mean a legal term of art whether he was in the
19 state at the time the alleged offense took place. And
20 thereafter, is found in another state. Fugitivity if you
21 will. Those two factual questions.

22 Then the legal questions are whether the
23 extradition papers on their face are in order according to
24 the --

25 QUESTION: Well now, in order in what sense?

1 whether --

2 MR. JIBSON: Whether they meet --

3 QUESTION: Whether they're properly charged?

4 MR. JIBSON: That is actually the fourth
5 inquiry, Your Honor. The facial validity of the papers --

6 QUESTION: But the habeas Judge could look at the
7 habeas papers, all of the papers --

8 MR. JIBSON: The extradition --

9 QUESTION: -- I mean, the extradition papers
10 rather.

11 MR. JIBSON: That's correct.

12 QUESTION: And determine whether or not the,
13 what's his name, was properly charged, may it not?

14 MR. JIBSON: It may look at the extradition
15 papers, yes.

16 QUESTION: And determine whether properly
17 charged?

18 MR. JIBSON: That's correct.

19 QUESTION: And how far does that inquiry go?

20 MR. JIBSON: That inquiry, it is our contention,
21 is limited to what is included in the extradition papers.
22 Whether they, on their face, state the charge of an
23 offense in the demanding state.

24 QUESTION: Uh-huh.

25 QUESTION: (Inaudible) also have to show that it

1 is a crime in that state too?

2 MR. JIBSON: The papers must allege that it is a
3 crime in that state. That's true.

4 QUESTION: In both states.

5 MR. JIBSON: No, that is not true, Your Honor.
6 As a matter of fact, it only need be shown that the crime
7 for which extradition was sought is a crime in the
8 demanding state. It doesn't even matter if it is a crime
9 in the asylum state as a matter of fact. The criteria is
10 whether the person is charged under the law of the
11 demanding state.

12 QUESTION: I'm curious to know where that
13 requirement comes from, because one would think that the
14 Louisiana authorities would be the best judge of whether
15 the person is charged with a crime under Louisiana law.
16 Why should a California Superior Court look into the law
17 of Louisiana?

18 MR. JIBSON: Well actually, Your Honor, that
19 language "under the law of the demanding state" is
20 contained in the Uniform Criminal Extradition Act, which
21 has been adopted by both the states involved here as well
22 as all other states with the exception of two.

23 QUESTION: And the Uniform Extradition Act says
24 that the court of the asylum state may examine into that
25 question.

1 MR. JIBSON: No, it doesn't say that explicitly,
2 Your Honor. The courts --

3 QUESTION: Then why should the court in
4 California go that far? Why should it examine it where
5 the state's a claimant of Louisiana law?

6 QUESTION: I thought your position was that you
7 just looked at the face of the papers and if those papers
8 purported to state a charge under Louisiana Law that was
9 the end of it. You're not supposed to go to the statute
10 books and look about anything.

11 MR. JIBSON: Well, --

12 QUESTION: California courts don't know Louisiana
13 law.

14 MR. JIBSON: That's true. That's true. And --

15 QUESTION: Isn't that your position?

16 MR. JIBSON: It is our position that you look
17 at the face of the documents to determine whether there is
18 a charge there.

19 QUESTION: Well, Mr. Jibson, suppose (Inaudible).

20 QUESTION: I take it that means also looking at
21 the face of the affidavit's, does it not? The affidavits
22 that accompany the --

23 MR. JIBSON: The face of the affidavit's.
24 That's right.

25 QUESTION: And on the face, they do state a

1 charge.

2 MR. JIBSON: That's correct.

3 QUESTION: Let's assume. But, let's suppose the
4 Judge knows, personally knows from previous experience
5 with the case, as I gather was the case here, that those
6 affidavits do not state the facts as he recalls them
7 personally.

8 MR. JIBSON: It is our contention that he is not
9 permitted to bring to bring extraneous --

10 QUESTION: He can't do that?

11 MR. JIBSON: That's correct. In the context of
12 the extradition hearing he is not to bring in extraneous
13 facts, other than what is contained in the four corners of
14 the extradition papers. That's true. And that is our
15 contention.

16 QUESTION: Including notice, judicial notice of
17 lawful judgments and decrees of the asylum state, is that
18 right?

19 MR. JIBSON: That's correct insofar as it bears
20 upon these questions of law which are --

21 QUESTION: Well, do you concede that the
22 California custody decree granted lawful custody of the
23 children to Mr. Smolin. It appeared to. It purported to,
24 yes. And the problem that, maybe I can give a little --

25 QUESTION: Well, if so, could the Smolin's be

1 guilty of a crime in Louisiana? Of this crime, if Mr.
2 Smolin had lawful custody?

3 MR. JIBSON: If he had lawful custody, it would
4 appear that he has got a defense to the crime. But the
5 problem with going beyond the face of the documents when
6 you're inquiring into this question of whether the person
7 is substantially charged is because you just don't know
8 what else is out there.

9 We do have these decrees that were found in the
10 California court file, but as I've indicated in the brief,
11 there are grounds upon which those can be disputed. And,
12 in fact, the Louisiana authorities do dispute the validity
13 of those. They're aware of those orders. They dispute
14 their validity. And it's my position that the extradition
15 --

16 QUESTION: (Inaudible) federal law though, it
17 seems crystal clear that only California had jurisdiction.

18 MR. JIBSON: What was crystal clear under
19 federal law and I don't want to transform this into a
20 custody case, but what's clear under federal law is that
21 California retained modification jurisdiction over the
22 original order which gave Mrs. Pope custody of the
23 children.

24 That is not the same, I submit, as to whether
25 that is the only court that can deal with the custody

1 issue regarding these children.

2 As I said at the outset, these children had been
3 living with their mother for three years in the state of
4 Louisiana. They had established home state jurisdiction
5 in the state of Louisiana. And, as a matter of fact,
6 custody proceedings were pending in Louisiana at the time
7 of this abduction.

8 Now, as I said, there are areas for dispute as
9 to whether or not ultimately, Mr. Smolin had custody of
10 the children.

11 QUESTION: Well, the Federal Parental Kidnapping
12 Act would not appear to give any state other than
13 California, jurisdiction to modify the decree --

14 MR. JIBSON: If I --

15 QUESTION: As long as one of the parents remained
16 in California, as Mr. Smolin did.

17 MR. JIBSON: -- to modify the decree, that's
18 correct. If I might I could quote just a brief section of
19 that Federal Act, Your Honor, and hopefully this will help
20 to answer that particular question. This is subdivision
21 G of 1738(a).

22 A court of a state shall not exercise
23 jurisdiction in any proceeding for a custody determination
24 commenced during the pendency of a proceeding in a court
25 of another state. Or such court of that other state is

1 exercising jurisdiction consistent with the provisions of
2 this section to make custody determinations.

3 Just one ground as a possible means of attacking
4 this particular decree that Mr. Smolin is relying upon
5 would be that there were pending Texas proceedings
6 regarding the custody of these children at the time he
7 went in to the California court to get the custody decree
8 modified in his favor. He was aware of those Texas
9 proceedings.

10 Those Texas proceedings were being held in order
11 to receive a full faith and credit recognition of the
12 original California order. There was no notice to the
13 California court when Mr. Smolin went in to get his
14 modified decree. The Texas proceedings were already
15 pending; therefore, there would be a violation of this
16 section of the Federal act.

17 The point is, in these custody disputes and I'd
18 rather get back to the extradition issue, but in these
19 custody disputes the key under both the Federal act and
20 the Uniform Child Custody Jurisdiction Act is
21 communication where there might be problems with
22 concurrent jurisdiction, where more than one court might
23 have jurisdiction over the custody matters involving these
24 particular children.

25 Communication did not occur in this case;

1 therefore, we have a result of conflicting custody orders.
2 So, the point of all this is that it was not that cut and
3 dried that he could not be charged. This actually goes to
4 the merits of the case in Louisiana. And, of course, this
5 is my base line position that those have to be delved into
6 only where the charges are pending out in the asylum
7 state. That is not part of the summary executive
8 proceeding that we call extradition.

9 This Court has on numerous occasions recognized
10 that extradition is intended to be a summary executive
11 proceeding in which the courts of the asylum state play an
12 extremely limited role. In Michigan v. Doran, this Court
13 clearly stated that a court of an asylum state can do no
14 more than decide those four issues that I enumerated a
15 little bit earlier. Can do no more than. It's a matter
16 of power of the courts.

17 This Court indicated that asylum state courts
18 are without power to go further than that. And I submit
19 that what occurred in this case is that the California
20 Supreme Court.

21 QUESTION: Let me just, maybe you've already
22 answered this, but (inaudible), the Chief Justice's
23 question, and what is the source of the law that says they
24 have no power to go beyond this? What do you rely on? Do
25 you rely on the Uniform Extradition Act, the Federal

1 Statute or the Federal Constitution (inaudible)?

2 MR. JIBSON: When I say, no power to go beyond
3 those four (inaudible), --

4 QUESTION: Yes.

5 MR. JIBSON: -- I'm relying on Michigan v.
6 Doran. This Court's decision (inaudible).

7 QUESTION: You mean you're just relying on an
8 opinion of this Court?

9 MR. JIBSON: That's correct.

10 QUESTION: Which was based on what?

11 MR. JIBSON: Which was based on the extradition
12 clause in the Constitution and the Federal Extradition
13 Act.

14 QUESTION: And the Federal Statute.

15 MR. JIBSON: That's correct.

16 QUESTION: So, you don't rely on the Uniform Act
17 for this purpose?

18 MR. JIBSON: Well, the Uniform Act was
19 promulgated and enacted by the various states under the
20 auspices of the extradition clause and it supplements it.
21 But I'm not just relying on the UCEA. No, Your Honor. As
22 this Court made clear in Michigan v. Doran, these are
23 requirements that are dictated under the Constitution
24 provisions as well as the Federal Act.

25 QUESTION: And it's your position, I want to be,

1 maybe this is repetitive and I don't mean to do that but,
2 can the court in the habeas corpus proceeding at least
3 inquire as to whether there is a statute in Louisiana as
4 alleged in the charging papers? Can it look at the
5 statute books? In your view?

6 MR. JIBSON: Yes, they can take judicial notice
7 of the statute in the demanding state.

8 QUESTION: What if there is a court decision in
9 the demanding state construing the statute, can they look
10 at that? Say there's a court decision that says the
11 prosecutor in a case like this has the burden of proof
12 that the alleged kidnapper, when he's a parent, did not
13 have custody?

14 MR. JIBSON: Well, they can look at court
15 decisions that amount to the general law of the state, of
16 the demanding state. That's true.

17 QUESTION: For what purpose? I don't understand
18 that.

19 MR. JIBSON: Well, that would again go to --

20 QUESTION: It seems to me you're slipping into a
21 trial of the merits once you start looking at court
22 decisions. Well, the extent to which they can look at
23 those is very limited and it has to appear on the face of
24 the documents that the charges as set forth in the
25 charging documents clearly do not fit within the law if,

1 for example, if another state --

2 QUESTION: So the asylum state conducts sort of
3 a judgment on the pleadings kind of a call, is that
4 (inaudible).

5 MR. JIBSON: Well, I wouldn't go to that extent.
6 It has to be so clear that there is no interpretation of
7 the demanding state's law by the asylum state. They can't
8 go that far. (Inaudible).

9 QUESTION: So long as the requesting state's law
10 is clear, the asylum state can use it, is that it?

11 MR. JIBSON: That's right. If it reasonably
12 fits within the law of the demanding state. If it's clear
13 on its face that it does.

14 QUESTION: All you need is a clear defense to
15 the charge and you can't be extradited?

16 MR. JIBSON: No, no.

17 QUESTION: I thought that's what you just said.

18 MR. JIBSON: No. No. Because that would --

19 QUESTION: Well, I don't understand what you're
20 saying then.

21 MR. JIBSON: That goes, no, that goes to the
22 question of an affirmative defense to the charge that can
23 be raised only in the demanding state.

24 QUESTION: Affirmative defenses are not allowed,
25 even if they're clear?

1 MR. JIBSON: That's correct.

2 QUESTION: Even if they're in the statute?
3 Supposing the statute contains a proviso, provided that it
4 shall not constitute the crime of kidnapping if the
5 alleged kidnapper happens to be the father who has a
6 decree awarding him custody of the child? And it's all
7 spelled out in the statute? We still couldn't look at
8 that? Is that your view, because it's an affirmative
9 defense?

10 MR. JIBSON: No, you cannot look at that
11 (inaudible).

12 QUESTION: Even though it's perfectly clear on
13 the face of the statute that the man can not be convicted
14 of a crime?

15 MR. JIBSON: Well, then you're presupposing the
16 other fact and that is the fact that somehow the papers
17 show that it --

18 QUESTION: I say we're relying on Louisiana Code
19 Provision XYZ. You read it and it says in there if he's
20 the custodial parent he cannot be charged with this crime.
21 That it's an affirmative defense in the statutes and the
22 proviso. You say you can't rely on that as I understand
23 your view.

24 MR. JIBSON: No, what you cannot rely upon is an
25 asylum state court interpretation of the demanding state's

1 law.

2 QUESTION: No matter how clear?

3 MR. JIBSON: No.

4 QUESTION: Even if there's a cow case right on
5 all fours, you can't rely on it?

6 QUESTION: Well, then you're saying in effect --

7 MR. JIBSON: Not if it's the demanding state.

8 QUESTION: -- you're saying in effect that the
9 Louisiana authorities are the judge of whether he's
10 charged under Louisiana law.

11 MR. JIBSON: Exactly. That's what I'm trying to
12 say.

13 QUESTION: Well, but you're not really saying
14 that. You're saying, unless it's clear. I mean that's
15 what I'm trying, I can understand that. That a sensible
16 position, leave --

17 QUESTION: It's clear. Why not just stick with
18 the proposition that the Louisiana authorities are the
19 judge of what Louisiana law says.

20 MR. JIBSON: Well, that's my premise that they
21 are the judge of what the law says.

22 QUESTION: But --

23 MR. JIBSON: If their statute is included in the
24 papers let's say, which often is the case and clearly the
25 allegation simply does not state a crime under the law of

1 that demanding state then there might be an argument to be
2 made that he's not substantively charged.

3 QUESTION: So the asylum state courts can second
4 guess the prosecutor who wrote out the charge. He made a
5 charge under a certain statute.

6 MR. JIBSON: Well, what actually --

7 QUESTION: And the, so you can review his, you
8 can in effect grant a motion to dismiss for failure to
9 charge a crime.

10 MR. JIBSON: No, what actually happens --

11 QUESTION: Is that your position?

12 MR. JIBSON: No. No it isn't, Your Honor.

13 QUESTION: Well, it sounds like it.

14 MR. JIBSON: What actually happens in those
15 situations and believe me they do not come up in the
16 extradition context because of the communication that goes
17 on between the asylum state authorities and the demanding
18 state authorities.

19 And, if there would appear to be a question in
20 the mind of the executive people who are reviewing the
21 documents, then the matter is cleared up as a matter of
22 demanding state law. The demanding state authorities are
23 the ones who are to determine --

24 QUESTION: But that's the governor's inquiry.
25 We're talking about a habeas corpus.

1 MR. JIBSON: That's right.

2 QUESTION: A court inquiry after the kind of
3 second guessing the governor.

4 MR. JIBSON: That's right, they are second
5 guessing the governor.

6 QUESTION: Well, supposing that there's an, I
7 don't know if Louisiana has information or indictments,
8 but supposing the charge simply is that the county
9 attorney of St. Tammany County charges that this defendant
10 violated Section 11256 of Louisiana Code. Now what sort
11 of an inquiry can be made by the asylum state?

12 MR. JIBSON: Well, there wouldn't be any inquiry
13 in that particular situation because it is lawful to
14 charge simply in the language of the statute, or even
15 charges --

16 QUESTION: Well, how do you know what's lawful
17 in Louisiana? You're a California lawyer. If that comes
18 from Louisiana, don't you simply presume it's lawful to
19 charge that way in Louisiana.

20 MR. JIBSON: Yes, you do and that's why I say
21 there wouldn't be an inquiry (inaudible).

22 QUESTION: Well then you don't look at anything
23 but the paper?

24 QUESTION: Right.

25 MR. JIBSON: That's correct.

1 QUESTION: I wouldn't be too sure. Louisiana's
2 civil law and the other states are common law. So how do
3 you know what happens in a civil law state?

4 MR. JIBSON: Well, again I think goes to the
5 point that you don't presume to know. That's what
6 Louisiana authorities --

7 QUESTION: You wouldn't even look.

8 MR. JIBSON: -- to decide.

9 QUESTION: You wouldn't look. You wouldn't even
10 if there, even if you went to the Louisiana statute books
11 and you find that there is no Section 11256. It does not
12 exist, or it's been repealed. Right? You would not look
13 at that? That's none of your business. That's for the
14 executive.

15 QUESTION: Right.

16 MR. JIBSON: I'd have to agree with that. Yes,
17 Your Honor, because you don't know how far to go in the
18 extradition context. It's supposed to be a summary
19 proceeding.

20 QUESTION: Well, despite Michigan v. Doran,
21 counsel, there are a few statements in earlier opinions of
22 this Court that indicate that if it's clear there is no
23 reasonable possibility that the fugitive is guilty that
24 the asylum state court can refuse extradition. What do
25 you do about that language in the Strauss case and the

1 Drew case?

2 MR. JIBSON: No reasonable possibility --

3 QUESTION: (Inaudible) valid.

4 MR. JIBSON: I'm not familiar --

5 QUESTION: That language?

6 MR. JIBSON: -- with that particular language in
7 the Drew case. In fact, I believe in the Drew case it
8 held just the opposite. There appeared to be a very --

9 QUESTION: Well, Drew said that extradition is
10 proper, given the reasonable possibility that the fugitive
11 may have committed a crime under the other state.

12 MR. JIBSON: Well, that's true. If the
13 reasonable possibility standard would simply mean that on
14 the face of the documents it appears that it's possible
15 that he is charged with a crime. If you can determine on
16 the face of those documents that there is no such
17 possibility then that particular factor of those four in
18 Michigan v. Doran is missing. And therefore, he might be
19 entitled to habeas corpus relief in that particular
20 situation.

21 QUESTION: As I understand your position now,
22 really the only inquiry that can be made in the asylum
23 state in this proceeding, is whether the extradition
24 papers are facially valid. Is that right?

25 MR. JIBSON: Whether the extradition papers are

1 facially valid?

2 QUESTION: Facially valid, and you can't make
3 any inquiry beyond that? Now suppose this judge as I
4 understand it had had considerable experience, at least
5 some, with this very case, had he not, previously?

6 MR. JIBSON: Yes.

7 QUESTION: The habeas judge had? And suppose he
8 looks at these papers and on their face they all look very
9 proper, but he knows because he was there that the
10 affidavit is misleading. Doesn't really tell what
11 actually occurred, as he remembers how it occurred. Would
12 that be sufficient basis for him to say that to that
13 extent the papers are facially invalid?

14 MR. JIBSON: No, because then the invalidity
15 does not appear on its face to anyone reading the
16 document. This particular judge happened to have outside
17 knowledge which was irrelevant to that particular inquiry
18 at the habeas corpus hearing in the asylum state. And, --

19 QUESTION: And I suppose it appeared that indeed
20 the extradition request itself had been obtained by
21 fraudulent means? The asylum state still was helpless to
22 refuse to send --

23 MR. JIBSON: The asylum state would not be
24 helpless, Your Honor, but the court in habeas corpus
25 hearing would not have the authority to go into that

1 particular question. Again, that's where you get into the
2 executive branch. This is an executive proceeding.

3 I want to emphasize that, that there in these
4 cases there commonly is communication between two states.
5 If something looks amiss upon the executive branch
6 examination of these papers, whether it be fraud, a false
7 affidavit, any of those areas that you had been
8 discussing, the communication takes place.

9 The governor, in fact, the governor in this case
10 took two months to issue his Governor's Warrant of
11 Rendition. And there was an inquiry made into some of
12 these factors and communication was made with the state of
13 Louisiana. And that is the source, the check where these
14 types of frauds and inconsistencies ought to be brought up
15 --

16 QUESTION: Well, I suppose it's possible though
17 that the governor has no discretion either --

18 MR. JIBSON: Well --

19 QUESTION: -- to refuse extradition.

20 MR. JIBSON: I'm aware --

21 QUESTION: I think you're making an assumption
22 that may not be valid.

23 MR. JIBSON: I'm aware of the case of Branstead
24 which is before this Court. Up till now it has at least
25 been presumed that what has grown to be, or become known

1 to be discretion does lie with the governor.

2 But even if the governor doesn't have discretion
3 to deny the extradition, this communication still takes
4 place and on many occasions the governor can communicate
5 to the demanding state's governor and ask that he withdraw
6 his request after giving him all these facts. And that's
7 happened.

8 QUESTION: Mr. Jibson, your new position, or
9 your position, if it isn't a new one, that you just look
10 within the four corners of the instrument, how do you
11 square that with the language, "substantially charged?"

12 MR. JIBSON: "Substantially charged" I see --

13 QUESTION: Where is that language by the way?
14 That's in the Uniform Act, right?

15 MR. JIBSON: That's in the Uniform Act.

16 QUESTION: It's not in the federal statute.

17 MR. JIBSON: No, but it's been used --

18 QUESTION: And in it's not in the Constitution?

19 MR. JIBSON: No.

20 QUESTION: So, who made it up?

21 MR. JIBSON: It's been used by this Court in
22 several cases and I --

23 QUESTION: Before the Uniform Act was adopted?

24 MR. JIBSON: I believe so. I believe so, Your
25 Honor. The Uniform Act does use it. But it doesn't

1 change the constitutional requirement in this way.

2 QUESTION: I understand. Well, just tell me
3 what it means then if it doesn't mean that you --

4 MR. JIBSON: It simply means that the substance
5 of a charge must appear on the papers and I think what
6 that means is, we don't go into possible pleading defects,
7 whether it's charged every element of the offense or any
8 of those things. If the substance of an offense appears
9 on the papers then that satisfies the requirement. That's
10 all substantially (inaudible).

11 QUESTION: Or, what you really mean is the
12 substance of an alleged offense?

13 MR. JIBSON: That's correct. That's right.
14 Just the substance.

15 QUESTION: The governor sometimes by telegram,
16 sometimes by telephone, but many times completely
17 informally changed all of that?

18 MR. JIBSON: Well, they don't change it, they
19 communicate. They communicate --

20 QUESTION: They communicate --

21 MR. JIBSON: -- to make sure that --

22 QUESTION: -- and said this point here doesn't
23 appear to be correct because the facts are thus and so.
24 And the governor changes it. That happens every day.

25 MR. JIBSON: It does happen, yes. Free

1 communication between the two executives. I would like to
2 reserve whatever time left I have, Your Honor, for
3 rebuttal.

4 QUESTION: Thank you, Mr. Jibson. We'll hear
5 now from you, Mr. Riordan.

6 ORAL ARGUMENT OF

7 DENNIS P. RIORDAN

8 ON BEHALF OF RESPONDENT

9 MR. RIORDAN: Mr. Chief Justice and may it
10 please the Court:

11 I'd like to begin by trying to clarify what's
12 been at issue in this case. I think it's gotten a little
13 muddled because Mr. Jibson came here today looking to hit
14 a single and he's been invited to hit a home run. And I
15 think his position in response to that has changed.

16 Before we got here the following things were
17 clear. One the California decree giving Richard Smolin
18 sole custody of his child in 1981 was valid in '81, it's
19 valid in '84. The issue has been completely litigated by
20 both parties in California, that's a matter of state law.
21 He was the legal custodian of his children in 1984.

22 What was clear before we came here today was
23 that under federal law, that decree has to be respected in
24 Louisiana. It was clear, one, because that federal law
25 holding by the California Supreme Court was never

1 challenged by California before this Court, which it could
2 have been.

3 It's also clear because the plain language of 28
4 U.S.C. 1738(a) makes it absolutely apparent that Louisiana
5 will and must respect the 1981 California decree.
6 Furthermore, if you look at the case law in Louisiana
7 interpreting 1738(a), and I can cite the Court to two
8 cases, it's absolutely plain that they will hold that
9 California was the only state that could modify the
10 decree, that the '81 decree was valid.

11 QUESTION: This is Section 1738 of what, the
12 Kidnapping Act?

13 MR. RIORDAN: No, it's the Federal Parental
14 Kidnapping Prevention Act of 1980. It's a Full Faith and
15 Credit Act which is found in 28 U.S.C., which was passed
16 by Congress to make sure that there could only be one
17 valid custody at any time.

18 And under the terms of that act, the only valid
19 custody decree in 1984, when Richard Smolin picked up his
20 children, was the California decree.

21 QUESTION: I don't know, I mean, maybe that's
22 right, but really what we're talking about here is whether
23 that issue going to be fought about in California or in
24 Louisiana.

25 MR. RIORDAN: Precisely.

1 QUESTION: Now why should it be fought about in
2 California?

3 MR. RIORDAN: Well, the reason is we go tot he
4 last issue, which is, if he was the sole legal custodian
5 can he have committed kidnapping in Louisiana? And here's
6 what --

7 QUESTION: But, if you put it the other way, you
8 say you don't get to that until you decide what issues you
9 can raise in California.

10 MR. RIORDAN: Right. And here's where we get to
11 the single rather than the home run. The single is
12 relying on a hundred years of precedent. Mr. Jibson says,
13 it is true that for a hundred years you've gotten a common
14 law demur in the asylum state. That's what it comes down
15 to.

16 As Justice Scalia said, you get a motion for
17 judgment on the pleadings. That's existed since this
18 Court's decision in Roberts v. Reilly in 1885. It's
19 existed because of the use of the word, "substantially" in
20 Roberts and in the Act. Substantially has never been
21 viewed as surplusage if the act said you determined
22 whether there is a charge in Louisiana and there always is
23 in an extradition case.

24 There's always a charge that's been lodged. You
25 determine if there's a charge and that's the end of it.

1 "Substantially" has always been interpreted to mean it's
2 got to be a substantial charge.

3 QUESTION: That language isn't in the Act. It
4 isn't in the Federal Act and it isn't in the Constitution.

5 MR. RIORDAN: Right. But it is in 100 years of
6 precedent. It is in this Court's decision in Roberts v.
7 Reilly. It is in the Uniform Extradition Act.

8 QUESTION: What the justification for it?

9 MR. RIORDAN: Hum?

10 QUESTION: What's the justification for the
11 Court having read --

12 MR. RIORDAN: Well, the --

13 QUESTION: Wait till I finish my question.

14 MR. RIORDAN: I apologize.

15 QUESTION: What's the justification for the
16 Court having read the extradition clause that way in the
17 first place?

18 MR. RIORDAN: I think the justification is that
19 recognized by the concurrence in Michigan v. Doran.
20 Extradition is worse than an ordinary criminal charge
21 because you have to be processed in one state. You have
22 to be forcibly transported to another.

23 The justification is, it's not unfair to a
24 demanding state to file an indictment that passes muster
25 under their own law as a question of law. And for a

1 hundred years it's worked well to say, you get a demur.
2 That's all you get.

3 QUESTION: But how does the Superior Court of
4 California, I mean it seems that's a very wasteful
5 proceeding to have them trying to find about Louisiana
6 law.

7 MR. RIORDAN: Well, I think if you look at
8 Varona, if you look at Lewis, which is cited in our brief
9 in New York case, they say, hey, we are not going to
10 descend into the intricacies of Louisiana law or Alabama
11 law in Lewis.

12 QUESTION: Is Lewis a case from this Court?

13 MR. RIORDAN: No, Lewis is, almost all of these
14 cases with the exception of Roberts and Michigan v. Doran
15 are, these come up in state courts in extradition
16 proceedings and they are legion. You make this demur and
17 the courts have said, wait. If it depends on an
18 interpretation of Louisiana law, go to Louisiana. We're
19 not the experts in Louisiana law?

20 If it's a facial, if the judicial gloss on the
21 statute is clear, or the statute is clear by its terms
22 then you do have a right to a demur here. And no one can
23 suggest under the Louisiana Statute, the sole legal
24 custodian of his children can be guilty of kidnapping.
25 Louisiana --

1 QUESTION: How do you know who the sole legal
2 custodian is the defendant just on the face of the papers?

3 MR. RIORDAN: You know that --

4 QUESTION: You have to bring in this decree.

5 MR. RIORDAN: Hum? Yes.

6 QUESTION: You have to bring, and that would
7 ordinarily not be a demur. You would demur to the
8 pleading or the charge --

9 MR. RIORDAN: Right.

10 QUESTION: -- you don't bring in evidence
11 aliunde.

12 MR. RIORDAN: Well, that brings us, let's look
13 at that, as an example let's look at Louisiana. Let's
14 pose the question this way. If you were to demur to this
15 charge in Louisiana could you judicially notice the
16 California decree on a demur? The answer is, yes.

17 QUESTION: So then the Superior Court in San
18 Bernardino County has to not only know the Louisiana
19 Statute Law, but it has to know what grounds could be
20 raised in a demur in Louisiana. That's how you go about
21 making this decision?

22 MR. RIORDAN: No, no. I use that merely as
23 analogy. What I'm saying is that you've traditionally
24 gotten a common law demur in the asylum state. Now the --

25 QUESTION: The common law of what state?

1 MR. RIORDAN: Hum?

2 QUESTION: The common law of what state?

3 MR. RIORDAN: I use that as a term of art.

4 What, for 100 years, what you have gotten in every state
5 of the union, if someone seeks extradition, you've been
6 allowed to say, that doesn't make it on the pleadings.

7 QUESTION: And then you can bring in evidence
8 outside the pleadings is your theory, I guess.

9 MR. RIORDAN: No. No.

10 QUESTION: How do you get this California decree
11 in there?

12 MR. RIORDAN: Well, what I am suggesting is the,
13 I should qualify that. It depends what you're talking
14 about.

15 QUESTION: Then you can bring in some evidence
16 outside the pleadings?

17 MR. RIORDAN: Of questions of law. Matters of
18 law. In Louisiana as an example, and I use this as an
19 example. If Richard Smolin went into Louisiana under
20 Section 532 of Louisiana Code of Criminal Procedure, he
21 gets a demur. A modern equivalent of it. A motion to
22 dismiss for failure to state a charge.

23 Louisiana would say and does, don't bring in any
24 evidence here. Don't bring in evidence of justification
25 or so forth and so on. But if you want to use judicial

1 notice to bring before us a matter of law, i.e. a
2 California decree, you're free to do that.

3 QUESTION: What if Louisiana law provided
4 otherwise? That not only can you not bring in any
5 evidence, but you can't bring any judicial decrees in.
6 It's just a traditional, very narrow demur.

7 MR. RIORDAN: Right. I use --

8 QUESTION: Would that bind the California Court
9 under your view?

10 MR. RIORDAN: No, I use Louisiana as an example,
11 because it isn't a question of Louisiana criminal
12 procedure, it's a question of what you've been allowed
13 under federal law in the asylum state.

14 QUESTION: Well, what's the source of federal
15 law?

16 MR. RIORDAN: This Court's decision in Roberts
17 v. Reilly.

18 QUESTION: So, you think this Courts decision,
19 Roberts, laid down a whole guideline to pleading, you
20 know, what you could raise in this thing and that sort of
21 thing?

22 MR. RIORDAN: We cite probably a dozen cases in
23 our brief. We could cite 100 that say for the last 100
24 years the fourth exception in Michigan v. Doran, was
25 listed second. That is you check to see whether there is

1 the existence of a charge, has been interpreted to mean
2 you check to see whether there's a substantial charge?
3 That is, a charge that would withstand a demur? Now, this
4 Court could choose, of course, to reverse 100 years of
5 precedent.

6 QUESTION: Well, yeah, the only case we would be
7 narrowing would be Roberts, wouldn't it?

8 MR. RIORDAN: Well, no. You'd be over-ruling
9 the decisions of the supreme courts of probably --

10 QUESTION: But, we don't overrule state supreme
11 court decision. We may disapprove.

12 MR. RIORDAN: I stand clarified, corrected.
13 Yes, what you would be doing is saying that the word
14 "substantial" in Roberts and the word "substantial" in the
15 Uniform Extradition Act has always been interpreted to
16 mean that you get a demur.

17 But we're now holding that all it means is that
18 you get to check and see whether there's been an
19 indictment filed.

20 QUESTION: Well, in Michigan the claim was the
21 Michigan Court said, "substantially charged" means that we
22 look at the facts to see if there was probable cause. And
23 we said, no that isn't what "substantially" means at all.

24 MR. RIORDAN: Right. Right. But this Court
25 never dealt with --

1 QUESTION: (Inaudible).

2 MR. RIORDAN: This Court in Michigan never dealt
3 with the exception that we're talking about here.
4 Michigan didn't involve fugitivity and it didn't involve
5 the right to a demur.

6 This Court referred to the fact that, the
7 interesting thing about Michigan v. Doran is it didn't use
8 the word "substantial." And since then there are been, an
9 argument has been made that by pulling out the word
10 "substantial," this Court overruled the right to the
11 equivalent of a common law demur in asylum state.

12 If it did that would be a very strange case to
13 do it in because it didn't involve the scope of this. And
14 I use demur again as a term of art, this judgment on the
15 pleading.

16 But if you look at Roberts, if you look at all
17 of the state cases since then you get a challenge to the
18 legal sufficiency of the charge even though it's in the
19 asylum state. And the reasoning has been --

20 QUESTION: Mr. Riordan, are you sure that the
21 existence of a custody decree is a matter of law? Let's
22 say parentage, is parentage a matter of law, whether I am
23 the father or not?

24 MR. RIORDAN: Well, it is if two parties have
25 come together, litigated an issue to the highest court in

1 the state and settled it in an opinion of which a court
2 can take judicial notice. There's no more argument.

3 QUESTION: But let's assume a particular
4 indictment would be absolutely invalid if I was the
5 father, and valid if I wasn't. Would my parentage, my
6 natural parentage would obviously be a question of fact
7 not of law, right? But, what if I had adopted the child
8 and there's an adoption decree. Is that converted from a
9 question of fact in to a question of law? It would take
10 notice of an adoption decree?

11 MR. RIORDAN: If, as in this case, it's res
12 judicata, it's been fully litigated and the only court
13 that can litigate the issue --

14 QUESTION: Oh, I see.

15 MR. RIORDAN: -- and is no longer subject to
16 challenge. No one can challenge the validity of Richard's
17 '81 decree. It's happened. It's a matter of California
18 law --

19 QUESTION: I see why you're going --

20 MR. RIORDAN: initially and it's been fully
21 litigated. And all California did in doing that was look
22 at law. It didn't look at fact. Now, I will be the first
23 to concede that if this Court decides to overrule 100
24 years of tradition and say you don't get a common law
25 demur, you don't get the equivalent of a motion on the

1 pleadings, we lose. Let me make that concession.

2 If we are not allowed to challenge in the way
3 you have been for 100 years, the Louisiana charge in the
4 sense of getting a demur or judgment on the pleadings, we
5 lose. Because there is a charge in Louisiana.

6 QUESTION: Would you lose if there was any other
7 judge but this judge?

8 MR. RIORDAN: But the --

9 QUESTION: The judge that had personal
10 knowledge. If you had a judge that didn't have personal
11 knowledge would you lose?

12 MR. RIORDAN: No, we would win. If we get a
13 judgment on the pleadings conversely, we win. And we win
14 before any judge --

15 QUESTION: Would you get the judgment on the
16 pleadings before a judge that didn't know the facts?

17 MR. RIORDAN: Yes. Yes, because --

18 QUESTION: Well, how would he find the facts?

19 MR. RIORDAN: He did know the facts, but he
20 didn't say I know the facts.

21 QUESTION: The facts.

22 MR. RIORDAN: Right. We would still win because
23 the judge who didn't know the facts could take judicial
24 notice of the California decrees which were final and
25 binding. So the happenstance existed that this judge knew

1 the facts of the case. But, --

2 QUESTION: I have trouble with happenstance,
3 frankly.

4 MR. RIORDAN: That this particular judge --

5 QUESTION: Yes.

6 MR. RIORDAN: Let me make one thing clear, Your
7 Honor. This was not the judge who issued the child
8 custody decree. This was not the judge who originally
9 gave custody to Richard.

10 There is no question that there was an collusion
11 here between a judge originally giving custody and then
12 dealing with a habeas corpus matter. He was familiar with
13 the family law matter because he was the Judge that later
14 heard the challenge to the '81 decree.

15 QUESTION: Mr. Riordan, can you give us any
16 guidance on how clear the law has to be? I mean, we went
17 around and around on that with Mr. Jibson.

18 MR. RIORDAN: Right.

19 QUESTION: And I guess we eventually ended up,
20 it doesn't matter how clear it is. Now you say that we do
21 take law into account.

22 MR. RIORDAN: Well, the --

23 QUESTION: You know, you can have some very
24 refined questions of law that go to whether a motion for
25 judgment on the pleading should be granted or not.

1 MR. RIORDAN: I agree, and I think if you look
2 at a decision like Lewis, where it was a New York Court
3 act and they said, caution is called for in this
4 situation. We are not the authorities on Louisiana, in
5 that case, Alabama law. You've got to make out a very
6 clear case.

7 QUESTION: So, the test is not simply whether
8 it's an issue of law? The test is what?

9 MR. RIORDAN: No. The courts have demanded that
10 the resolution of the issue of foreign law be crystal
11 clear. In this case, there might have been quibbling about
12 the validity of the '81 California decree. That's been
13 settled in a California court. We could have an
14 interesting discussion.

15 Perhaps someone once has a complex question
16 about PKPA, but that's a federal law question on which
17 this court, and Louisiana can give this Court no guidance
18 at all. This is the Court that eventually decides exactly
19 what PKPA means.

20 But in terms of the Louisiana law question here,
21 if anyone, I will also concede we should lose the case if
22 anyone can come up with an interpretation of the Louisiana
23 statute under which the sole legal custodian of his
24 children could commit kidnapping. It would be like saying
25 that Charles Lindburgh had he gotten the kid back from

1 Bruno (inaudible) could have been prosecuted under this
2 statute. It's just not possible.

3 QUESTION: Mr. Riordan, (inaudible) his father.

4 MR. RIORDAN: Hum?

5 QUESTION: That assumes that the sole legal
6 custodian is his father.

7 MR. RIORDAN: No, I don't want to assume that.
8 I'm willing to demonstrate it as a proposition (inaudible)
9 the law.

10 QUESTION: Well, I know, but who decides that?

11 MR. RIORDAN: Hum?

12 QUESTION: Who is entitled to decide that?

13 MR. RIORDAN: Well, we can't make an argument
14 that Louisiana is better able to decide, in fact,
15 California --

16 QUESTION: I didn't say it that it would be
17 better, I wondered who was entitled to decide it under the
18 extradition clause?

19 MR. RIORDAN: Our interpretation of the
20 extradition clause is that if it's simply a matter of
21 applying federal law then California as the asylum state
22 is entitled to apply it. And I would suggest, let me
23 point out one thing. Once this case gets to Louisiana,
24 federal law --

25 QUESTION: May I interrupt you just one minute?

1 I tried to interrupt you before. I'd like to get back to
2 a fairly simple-minded question. Is it your position that
3 if one in California is found to be the custodian of a
4 particular child, that he then may by self-help, wherever
5 he may find the child, whatever the child's condition, he
6 may kidnap the child?

7 MR. RIORDAN: If --

8 QUESTION: Is that your position?

9 MR. RIORDAN: No.

10 QUESTION: Well, what is it then?

11 MR. REARDON: A state
12 could pass a statute that says if you are the sole legal
13 custodian and your child has been taken by an interloper
14 or by a parent who has no legal right, they could say
15 we'll pass a statute that requires you, that makes it a
16 civil violation or criminal violation to get the children
17 yourself.

18 QUESTION: Well, let's focus on this case.

19 MR. RIORDAN: Right. Louisiana --

20 QUESTION: Yes, here you have a California
21 decree that we assume is valid and instead of having it
22 enforced by the customary means of enforcing judicial
23 decrees the father who won in California decides he's
24 going to enforce it himself. So, he goes to Louisiana and
25 he picks the child up at a bus stop.

1 MR. RIORDAN: Uh-huh.

2 QUESTION: Suppose the child had been home in
3 bed, or in the back yard? So you don't get into a Fourth
4 Amendment situation --

5 MR. RIORDAN: Uh-huh.

6 QUESTION: -- perhaps. Or suppose a child had
7 been in a hospital? Suppose the child had been in New
8 York?

9 MR. RIORDAN: Uh-huh.

10 QUESTION: He could go anywhere he wants and
11 enforce the California judgment himself.

12 MR. RIORDAN: No. He might commit burglary if
13 he did that. He might --

14 QUESTION: He committed a law into Louisiana.

15 MR. RIORDAN: No, he didn't, whatever --

16 QUESTION: He committed a violation under
17 Louisiana law.

18 MR. RIORDAN: No, no. My position is just this.
19 That can be very unwise to do that. It could even be
20 illegal to do it.

21 QUESTION: He may lawfully do it.

22 MR. RIORDAN: He can lawfully do it without
23 violating Louisiana kidnapping statute. Because the
24 Louisiana kidnapping statute says that a legal custodian
25 can't commit kidnapping. They could say he committed

1 trespass.

2 Let's say he took a buzz saw and sawed his ex-
3 wife's car in half. He might have committed four felonies
4 by doing that, but he won't have committed kidnapping
5 which is the only charge --

6 QUESTION: Well, the lawyer for California here
7 today conceded when I asked him that question, that it
8 does not violate Louisiana law if Mr. Smolin had lawful
9 custody for him to take him. That was the first
10 concession he made. Isn't that right?

11 MR. RIORDAN: There simply --

12 QUESTION: Today.

13 MR. RIORDAN: I don't think there's any question
14 about that and I would just refer you to one thing as well
15 which is a case called Snyder v. Snyder, 474 South 2nd,
16 1374, it's a Court of Appeals decision of Louisiana in
17 1985. It involved a situation where a father in Utah got
18 a valid modification decree, came in and took the children
19 forcibly from the mother.

20 The Louisiana court in a civil action said, one,
21 the Utah decree was valid under PKPA and we have to follow
22 PKPA. Two, there's not a hint in that opinion that there
23 was anything therefore illegal under Louisiana law by him
24 taking the children once he had the valid decree.

25 I will be the first to say that if Louisiana

1 wanted to make sure that you go into court to execute on
2 these, it could pass a statute. Perhaps it would make it
3 a misdemeanor to take children even if you are the legal
4 custodian, but it's clear that under it's kidnapping
5 statute you can't violate the kidnapping statute if you're
6 the sole legal custodian, which Mr. Smolin is. And that
7 is a question of federal law that is better resolved in
8 California and the reason for that is, once this case goes
9 to Louisiana, Louisiana is barred from PKPA by 1738(a),
10 from questioning the California decree at all.

11 If there had been any defect in the California
12 decree, and there wasn't, the only place that it could
13 have been raised collaterally was in California.

14 QUESTION: Mr. Riordan, let me ask, if you are a
15 law enforcement official who gets somebody from another
16 state, you initiate the process of extradition, on an
17 indictment that is so patently invalid that it would be
18 subject to a demur as you put it, would you be liable for
19 any civil damages for false arrest or imprisonment, or
20 something don't you think? Don't you think it's pretty
21 risky business?

22 MR. RIORDAN: I've got enough trouble with the
23 questions that you've thrown at me about that.
24 (Laughter).

25 QUESTION: No, I understand. Well, I'm trying

1 to think --

2 MR. RIORDAN: I think it's clear that any such
3 officer under the decisions of this Court would have a
4 good faith defense that would render him immune from any
5 liability.

6 QUESTION: A good faith defense.

7 MR. RIORDAN: I don't know the answer to that.
8 It's in part, a question of federal law. Certainly under
9 federal law I think there would be immunity from any claim
10 of violation of a person's right if he acted on a decree
11 in that context.

12 QUESTION: Is the fact that this particular
13 judge was personally familiar with this case, is that fact
14 at all relevant to our decision of the case.

15 MR. RIORDAN: No. No.

16 QUESTION: Why not?

17 MR. RIORDAN: Because he did not say, I'm
18 familiar with the facts and I'm going to rely on my
19 personal knowledge. He said I'm going to rely on the
20 device of judicial notice, which is the device that would
21 have been available to any judge. And he did not do other
22 than take judicial notice --

23 QUESTION: Judicial notice of what?

24 MR. RIORDAN: Of the decrees in the civil case
25 which established that Richard Smolin was the sole legal

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QUESTION: And these were files, were they, of the Superior Court?

MR. RIORDAN: They were files of the San Bernardino Superior Court. Might I point out this? What is now before you is the judgment of the California Supreme Court. Prior to that decision, the entire matter had been fully litigated up to a published, an unpublished, but a written opinion of the Court of Appeal which had become final which before you in the Joint Appendix.

QUESTION: Well, hadn't the custody decree been appealed? And hadn't the former spouse of Mr. Smolin appeared and litigated it in California?

MR. RIORDAN: She had, I mean, one of the things that really put a judge on a tough spot if we were to adopt the rule that there couldn't be judicial notice. She had appeared before him and said, I want to contest his '81 decree. Let's have a hearing on it. She had a hearing. She got a ruling. She appealed that ruling and eventually got partial relief on appeal.

The court said the '81 decree was valid, but you're now free to obtain joint custody today. Yet then, that same judge looks at an affidavit that's sworn out after all of that occurs that says he had no decree. He

1 had no, I should correct that. He had no legal authority
2 at the time he took the children. That's pretty tough
3 stuff for a judge to say, I've litigated this matter --

4 QUESTION: But, Mr. Riordan, why if it's so
5 clear is Louisiana insisting on this? It's just a little
6 hard to understand, isn't it?

7 MR. RIORDAN: Well, Your Honor, I was here on
8 Monday and I saw in attorney get in trouble by making
9 assertions outside the record. I think I can answer that
10 question, but I can't do it by staying within the four
11 corners of this particular --

12 QUESTION: All right then don't. (Laughter).

13 QUESTION: Is it your position that we are bound
14 to take the Louisiana judgment and give it full faith and
15 credit and everything. I mean the California one.

16 MR. RIORDAN: Right.

17 QUESTION: But ignore the Louisiana one. Both
18 from state courts.

19 MR. RIORDAN: No, there is no Louisiana
20 judgment. The two judgments were --

21 QUESTION: What's this man --

22 MR. RIORDAN: Texas. Let me clarify this.

23 QUESTION: (Inaudible) Excuse me, was it Texas?
24 Well, why is Texas? What's wrong with Texas?

25 MR. RIORDAN: There's nothing wrong with it at

1 all. You could get a complicated conflicting decree case
2 but this isn't it. What happened is that the original
3 decree went to the wife. She got sole custody.

4 QUESTION: Right.

5 MR. RIORDAN: Fine. It was valid when it was
6 issued. She went to get Texas and got that recognized,
7 full faith and credit. The Texas judgment merely
8 recognized the rights in Texas that she had in California.
9 There is no conflict.

10 It was consonant with the California decree and
11 recognized only such rights as existed in California. And
12 under PKPA that's all it could do. So, therefore, when
13 the California decree comes down and give him sole
14 custody, modifying the original decree, it modified the
15 rights that he had, she had in California and the rights
16 that she had in Texas, cause it simply modified
17 (inaudible).

18 QUESTION: The district attorney who acted in
19 this case in Louisiana thought that the California decree
20 had been obtained by misrepresentation and fraud.

21 MR. RIORDAN: Well --

22 QUESTION: That's what the record shows, isn't
23 it?

24 MR. RIORDAN: I think its --

25 QUESTION: That's what he thought, that maybe

1 totally false but --

2 MR. RIORDAN: There's a statement somewhere to
3 that effect, but I think it's not fair of us to demand of
4 our district attorney's that they understand anything
5 about child custody law. And frequently, they don't.

6 I mean, the fact of the matter is that the
7 California decree, it's been litigated fully on, if there
8 were any fraud, any misrepresentation, any
9 unconstitutionality in it, it could have been taken to
10 this Court itself. It's full and final. It's over.
11 That's settled.

12 QUESTION: Mr. Riordan, did your client take
13 the, did he make an appearance in the Texas court?

14 MR. RIORDAN: No.

15 QUESTION: He didn't object to it in any way?
16 He couldn't have objected officially if he didn't make an
17 appearance, could he?

18 MR. RIORDAN: Right.

19 QUESTION: Well, why didn't the Texas court find
20 him?

21 MR. RIORDAN: Well, the Texas judgment is a
22 full, we don't, the Texas judgment is fine. It gives full
23 faith and credit --

24 QUESTION: What has happened so far as custody
25 was concerned following the Texas judgment?

1 MR. RIORDAN: The Texas judgment gave full faith
2 and credit to the original judgment. And all we are
3 saying about that is, you can accept it as valid at the
4 time it's issued. It can, it did purport to give no
5 rights other than those in California.

6 And therefore, when the rights in California
7 were modified, that's the whole point of PKPA. Another
8 state can recognize your rights anywhere else. But, it
9 can't give you new rights. It can't give you independent
10 rights.

11 The only state that can modify the original
12 rights is the state of the original decree. So, when
13 California modified to give him custody, it modified the
14 original California decree and the original Texas decree.

15 The Texas decree has no independent existence.
16 And this, it may take a little, have taken me a somewhat
17 circuitous route to explain it, but it's not a complicated
18 question and it's a federal law question that is better
19 litigated in California than it is in Louisiana.

20 I would suggest this to you, that the whole
21 point of PKPA was to make sure that adjudication stay in
22 the original state. Here we have a situation where
23 extradition is really being used to shift the focus away
24 from a state that under federal law should be the locus of
25 this litigation, and that is California. Let me, perhaps

1 there by --

2 QUESTION: Extradition didn't shift it, the
3 kidnapping did.

4 MR. RIORDAN: No, no. The kidnapping in --

5 QUESTION: You wouldn't of had the extradition.

6 MR. RIORDAN: The kidnapping --

7 QUESTION: Right?

8 MR. RIORDAN: The kidnapping though, Your Honor,
9 Justice Marshall, brought this case back to the locus
10 where it always supposed to be. The original decree
11 state. Let me just add this. And these are sort of
12 mundane considerations for this elevated atmosphere.

13 One thing we know is that this is not a
14 kidnapping case. Richard Smolin can never be committed of
15 kidnapping. That may be resolved in Louisiana rather than
16 California, depending on this Court's judgment. But it's
17 just the case. I mean, it's not a criminal case. It
18 never should have been a criminal case.

19 QUESTION: Mr. Riordan, you say that. Does your
20 opponent agree to that?

21 MR. RIORDAN: My opponent is not going to
22 dispute it. He's not going to dispute that this is a
23 valid California decree and he's not going to dispute, in
24 their brief they say, and they have to, that the
25 California decree here is not one they want to take issue

1 with.

2 But, it's going to be a civil case. It's going
3 to be a civil case. It should be a civil case. And these
4 two individuals for whom a lot of blame can be attributed
5 to both of them, this mother and father, are going to have
6 to work out an arrangement so they both can have their
7 children again.

8 They're going to have to finally act sensibly
9 and settle this. And it will be settled, and it can be
10 settled as a civil case. And the sooner that it stops
11 being a criminal case, an auspicious criminal case, the
12 sooner I think these children are going to for the first
13 time in ten years, enjoy the love that they should have
14 from both of their parents.

15 And I'd ask this Court to put an end to it. To
16 declare that the case, the extradition is improper because
17 the charge is --

18 QUESTION: Well, if the children, if the case
19 had gone back to Louisiana right away, it probably would
20 have been dismissed long ago, as you say.

21 MR. RIORDAN: I would like to believe that. I
22 would like to believe that.

23 QUESTION: Well, you say it's so clear that
24 nobody could possibly dispute it.

25 MR. RIORDAN: Right. But the human cost for

1 Richard Smolin of going to Louisiana in 1984, after he had
2 his children for the first time in six years, would have
3 been very substantial. And I submit he did nothing wrong
4 by challenging the action in the Courts of Louisiana.

5 QUESTION: Thank you, Mr. Riordan.

6 MR. RIORDAN: Thank you.

7 QUESTION: Mr. Jibson, you have three minutes
8 remaining.

9 REBUTTAL ARGUMENT OF

10 J. ROBERT JIBSON

11 ON BEHALF OF PETITIONER

12 MR. JIBSON: I'd just like to make a couple of
13 points. First of all, we do deem this a criminal case.
14 It is a criminal case. The charges are still pending in
15 the state of Louisiana. What brought this into the
16 criminal justice system was Mr. Smolin's exercise of self-
17 help, which is in itself, one of the things that the
18 Parental Kidnapping Prevention Act, by its very title is
19 designed to prevent.

20 And, I don't want to get into the, to make this
21 a custody case but this Court does not have to decide the
22 question of who's entitled to custody here. Suffice it to
23 say as it was stated earlier, the Louisiana prosecutor
24 does dispute this. And, I've got some knowledge about
25 him, but I'm not going to go outside the record either to

1 tell you his reasons for that.

2 But the point is, what's being attempted here is
3 simply to come in through the back door with what you
4 cannot come in through the front door with and that is a
5 defense to this charge in Louisiana.

6 This analogy to a judgment on the pleadings, I
7 think, is inappropriate because that by definition is
8 restricted to the pleadings and here they had to go
9 outside the pleadings which in this case, are the
10 extradition documents to bring in some extraneous evidence
11 to show a defense. And, we're not to inquire into the
12 prosecutor's motives in the state of Louisiana.

13 Communication has been had with authorities in
14 both states. They are anxious to go forward with this
15 case and if, in fact, there is a air tight defense for Mr.
16 Smolin, then he is to bring that in the state of Louisiana
17 where these charges are pending. Thank you very much.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jibson.
19 The case is submitted.

20 (Whereupon, at 11:14 a.m., oral argument in the
21 above-entitled case was submitted).

CERTIFICATION

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

#86-381 - CALIFORNIA, Petitioner V. SUPERIOR COURT OF CALIFORNIA, SAN
BERNARDINO COUNTY (RICHARD SMOLIN AND GERAD SMOLIN, REAL
PARTIES IN INTEREST)

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

BY Paul A. Richardson

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