REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-98

TITLE GREGORY L. RIVERA, Appellant V. JEAN MARIE MINNICH

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY L. RIVERA, :

Appellant, :

V. : No. 86-98

JEAN MARIE MINNICH :

- -x

Washington, D.C.

Wednesday, March 25, 197

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

APPEARANCES:

WILLIAM WATT CAMPBELL, ESQ., Lancaster, Pennsylvania: on behalf of the Appellant.

MARY LOUISE BARTON, ESQ., Assistant District Attorney of Lancaster County, Lancaster, Pennsylvania; on behalf of the Appellee.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No, 86-98, Gregory L. Rivera versus Jean Marie Minnich.

Mr. Campbell, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM WATT CAMPBELL, ESQ.,
ON BEHALF OF THE APPELLANT

MR. CAMPBELL: Mr. Chief Justice, and may it please the Court, the issue in this case is whether a man can be determined to be the father of an illegitimate child with the associated stigma and impact on himself and his family by the same quality of proof as is used in the ordinary civil case.

The paternity case is not like an ordinary civil case about money, as my opponents would have you believe. A paternity case is not like a collection case or a slip and fall case. If you look at the effects of the judgment entered and the parties involved, you will see the difference.

First of all, this judgment is enforced by jail. This is not a judgment which is enforced just against the debtor's property, but it is enforced against him. Once the order is entered, the court monitors his address and his employment for the

remainder of the effect of that order.

There is a wage attachment provision, and this is a provision that does not exist in any other civil judgments in Pennsylvania. Week to week, paycheck to paycheck, the effect of this judgment is felt. There is no relief in bankruptcy. The defendant loses the freedom to change his employment based on a court's perception of his earning capacity. He can't go from a salaried position to self-employment. He can't bankrupt out of this judgment, but none of these deal with the most important effect of this judgment.

This judgment makes a permanent decision as to who is the father of this child. The parties involved -- I will get back to that. The parties involved are entirely different. Plaintiff's interest, as my opponents concede, is purely economic, getting money. But the child has what has been termed in Little versus Streeter as a compelling interest in the accuracy of the determination and so does the defendant.

The government weighs in heavily on the side of the plaintiff in every support and paternity case, not just the welfare cases, as here, but through the 4D program, this plaintiff and all plaintiffs in support actions have been afforded postponed and reduced filing fees, streamlined pleading systems, subsidized costs of

prosecution, and there are two examples in this case which are of particular interest.

In this case the government provided the plaintiff with an attorney and the government flew in the blood test expert for the trial at no cost to the plaintiff.

QUESTION: What do the four D's stand for, Mr. Campbell?

MR. CAMPBELL: Chief Justice Rehnquist, the 4D program is the popular name for the provision of the Social Security Act through which the Federal Government funds the child support enforcement programs in the 50 states.

QUESTION: Oh, it refers to a section of the statute?

MR. CAMPBELL: It is a title of the statute, Chief Justice Rehnquist.

QUESTION: It is not like 4R?

MR. CAMPBELL: No. No, sir. No, sir. And finally, with reference to the difference in the nature of the parties in a civil action, the child, who is the one who is supposed to be the beneficiary of the money, and the one who bears the effect of the decision of paternity, is not even a party.

This welfare support case was begun under

government compulsion. Jean Marie Minnich was required to name a father and cooperate in a prosecution of someone in order to get welfare benefits, so these cases aren't just like the ordinary money case. It may start as a case seeking money, but where paternity is at issue the defendant's freedom of personal choice in family matters is implicated.

Now, this Court has dealt with this freedom of choice most usually in terms of an existing family unit, but for two reasons, logically and otherwise, that freedom must include the freedom not to become a parent by a judicial determination. Furthermore, whatever the merits of the ultimate issue of abortion, in Roe versus Wade this Court recognized the freedom of someone, in that case a pregnant woman, not to continue to term, not to become a parent because --

QUESTION: You don't really -- you are putting it too strongly. I wouldn't want someone to make me a parent without my consent, but you are just saying you bear some of the consequences of parenthood. If this individual is not in fact the father he still knows he is not the father and he feels none of the moral obligation of fatherhood. It is not making somebody a father against his consent. It is just subjecting him to some of the economic consequences that he would be

subjected to if he were a father. So it is still money you are talking about.

MR. CAMPBELL: Justice Scalia, I would respectfully disagree with that. There is the harm of the unwanted relationship. Our society does not take the label of father lightly. We do not want to assume that in every case where someone is determined to be the father you pay the money, you don't have to do anything else. Society does expect people who are named as fathers to be fathers.

QUESTION: Can society enforce that upon him except financially?

MR. CAMPBELL: Justice Scalia, it is correct that a lot of those expectations cannot be enforced, but legally enforceable expectations aren't the only considerations that have been taken into account. In Santosky versus Kramer, the Court considered many interests of parents which are not judicially enforceable. You cannot make a parent raise their children morally or make sure they go to school after high school if that is appropriate for them, but still the court considered the role of a parent as our society, as our society expects, and not -- the Court doesn't just look to money.

The other family matters which are implicated

in a paternity case are, as I have said, the harm of an unwanted relationship, and the harm of this judicially determined relationship on an existing family. In this case my client is married and has a child of that marriage. Through this determination he can be labeled as an adulterer. The Pennsylvania Supreme Court in considering the state law noted that he would have a responsibility for the health, wealth, and education of the child, which may go beyond legally enforceable money considerations.

Most important, perhaps, is that this is a final and irreversible determination of who this child's father is, and for the child there are interests in terms of determining what is the heritage of the child, what is the medical and genetic history, and finally the emotional and psychological impact. It defies common sense and common experience to try to tell this Court that saying someone is the father will only result in the payment of money. That child is going to have someone identified to them as the father. That is why the child has that compelling interest in the accuracy. It will have lifelong consequences far beyond any $20 per week.

QUESTION: Now, as far as the child is concerned I don't know how this cuts either way. Do you

think you are likely to get a more accurate determination as far as the child is concerned by requiring a higher burden of proof?

MR. CAMPBELL: Yes, I do.

QUESTION: That means that unless you prove beyond a mere preponderance that this individual is the father, although he may be the father, you come out with a verdict by a Court that he is not the father, right?

MR. CAMPBELL: It is true --

QUESTION: Even though he is and you know, if you went on a preponderance he would have been found to be.

MR. CAMPBELL: It is true that there are risks of error in either direction, but a child will be harmed by an erroneous -- a child will be harmed either way, but when --

QUESTION: The risk is greater when you require more of a preponderance.

MR. CAMPBELL: The kind of evidence the plaintiff must use to prove their case calls for an increased burden of proof in order to instruct the factfinder to proceed more cautiously so that we may have more confidence in the decision. The three kinds of evidence I am about to discuss were all used in this case, because if the plaintiff loses they lose money.

If the defendant loses, there are lifelong ramifications.

QUESTION: It doesn't tell the factfinder to proceed more cautiously. It tells the factfinder even though you believe that this person is the child's father, you should come back with a verdict that he is not the father.

MR. CAMPBELL: Absolutely not, Justice Scalia. The preponderance standard says that if you look at the evidence and you decide that the plaintiff has proved her claim more likely than not by weight to the slightest degree then you must find in favor of the plaintiff. You have said they would find against even though they believed it. That is not right. The clear and convincing standard would tell them you may find him to be the father if you are clearly convinced of the truth of her claim, and let's look at the kinds of evidence that is used in paternity cases to make this claim. The blood tests. In this case the blood test results were 18 to 1, 94.6 percent. Now, what this means is that if I walked out of the Lancaster County Courthouse, turned down Duke Street, and picked up 19 Hispanic males at random, one of them could be the father, and if I went further and picked up 38, there could be two of them. In a group of 57 Hispanic males

just in that town alone there could be three biologically possible fathers.

This statistical evidence is very difficult to understand for lawyers. I suggest it is much more difficult for juries. That is why, as Chief Justice Rehnquist pointed out in Mills, the traditional evidence becomes more important. When we look at that evidence, that --

QUESTION: Is the blood test evidence that you have just described, is that admissible no matter how little probative it may be of the defendant's paternity? I mean, is it like a drunken driving statute where you have to have a certain minimum before it is admissible?

MR. CAMPBELL: No, Chief Justice Rehnquist. I believe that may be the practice in some states, but in Pennsylvania these probability results in the HLA blood test are admissible in any case.

QUESTION: I would think you would be -- on reasonable doubt standard if it is -- 19 to 1, you say?

MR. CAMPBELL: Eighteen to one, that's right.

QUESTION: Eighteen to one.

MR. CAMPBELL: Well, the reason I have not asked for the beyond the reasonable doubt standard, I think there is some language in Addington versus Texas

which would explain why it would not be appropriate for me to do that because of the use of scientific evidence.

QUESTION: So should the jury be told that under your standard clear and convincing, and that means that proof that it is 18 to 1 that he is the father isn't good enough?

MR. CAMPBELL: Well, all the probability, all the probability results do is supposedly help the jury consider the rest of the evidence. As Chief Justice Rehnquist pointed out in Mills, once you get into cases where there is a probability where the man is not excluded, you are in trial, and you look --

QUESTION: What did the blood test show?

MR. CAMPBELL: The blood tests results were expressed in two fashions.

QUESTION: I may not have -- go ahead.

MR. CAMPBELL: An 18 to 1 odds that he was the father.

QUESTION: That he was the father.

MR. CAMPBELL: Right.

QUESTION: One chance out of 18?

QUESTION: No, 18 --

MR. CAMPBELL: One out of 19. There was one out of every group of 19 Hispanic males capable of impregnating a woman, one of them could be the father

based on blood samples taken from the three parties.

QUESTION: Yes, but the odds were 18 to one that he was the father?

MR. CAMPBELL: Eighteen to one--

QUESTION: That he was the father.

MR. CAMPBELL: Not that he was the father, but that a person with his blood characteristics was the father.

QUESTION: Exactly. Exactly.

MR. CAMPBELL: Therefore you go over into the traditional evidence, who did what to whom and what happened nine months later, and I think it is a statement that has been often repeated, it is a statement that is about 30 years old, but it is very accurate. There are not eye witnesses in paternity cases, and that statement is that social pressures conspire to produce silence or deliberate falsity in these kinds of cases.

QUESTION: What was the other test? What was the other way the blood tests were --

MR. CAMPBELL: 94.6 percent, which only means that 94.6 percent of Hispanic males aren't the father, 5.4 percent could biologically be the father, and as this AMA-ABA report that everybody talks about, all the opinions of this Court discussing blood tests have cited

this, as they point out, there are a lot of statistical assumptions in this case which raise possible due process issues, and I submit that this is one such issue.

The third kind of evidence, something that was done in this case and something that according to my research can be done around the country, the plaintiff was permitted to bring my client up in front of the jury, put the baby and the mother next to him, and ask the jury to look to see if they could see a resemblance.

QUESTION: Isn't that required by Pennsylvania law?

MR. CAMPBELL: Justice Marshall, that is not required by Pennsylvania law.

QUESTION: It used to be.

MR. CAMPBELL: Well, it is not permitted -- it is not done any more. These three kinds of evidence each contain opportunities to snow the jury, to confuse the jury. What is the best way to tell the jury to proceed with caution? The best way is to set the basic rule, and the basic rule should be contained in the burden of proof.

QUESTION: You made this argument to the Pennsylvania legislature?

MR. CAMPBELL: No, I have not.

QUESTION: I mean that may well be. It may well be a very good idea, but is it so clearly so that it is a matter of Federal constitutional law? I mean, that is the issue we confront, right?

MR. CAMPBELL: I think it is. Whenever there is -- a burden of proof can -- a burden of proof may be set by the legislature but as each of the burden of proof cases here have said, only within the confines of the due process clause. I suggest they didn't think about it when they took it from a criminal prosecution to a civil prosecution and I was unable to locate any legislative history whatsoever on the point.

Now, my opponents say that this case just reduces to money and urge the Court only to see the dollar sign in this paternity order. They distinguish Santosky as protecting a family unit, and that this just concerns one person. Constitutionally there is just as much at stake here as there was in Santosky because Santosky was not written to protect Ozzie and Harriet. Santosky was written to protect John and Annie Santosky, who were two people whose children had already been taken away from them based on allegations and some preliminary findings of abuse and neglect. What this Court protected was general concept of parenting, what

is is to be a parent, and what it is to be a parent is just as much at stake in a paternity case as it is in a termination case. To say otherwise would diminish society's expectation of what is it to be a father.

I ask this Court to caution the factfinder to proceed in these cases with great deliberation and to use the clear and convincing standard.

I will reserve my remaining time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Campbell.

We will hear now from you, Ms. Barton.

ORAL ARGUMENT OF MARY LOUISE BARTON, ESQ.,

ON BEHALF OF THE APPELLEE

MS. BARTON: Mr. Chief Justice, and may it please the Court, the interest of the states in family matters has well be respected by the court in both theory and precedent. As to the evidentiary standard in a paternity proceeding 41 states have seen fit to choose the preponderant standard of evidence to prove paternity.

QUESTION: How many states, Ms. Barton?

MS. BARTON: Forty-one, Mr. Chief Justice. This Court is required to correct clear constitutional violations in state statutes in order to ensure constitutional fairness. An analysis of the due process

clause as it relates to the preponderant standard of proof in a paternity proceeding demonstrates that there is no clear constitutional violation in the state's choice of this particular evidentiary standard.

Furthermore, the preponderance standard of the evidence in this context assures fairness to all the parties. Appellant's main contention is that his rights are the same as the parents in Santosky versus Kramer. Appellant argues that his lack of parental ties are as deserving of the same constitutional protection at those parents who had formed a parent-child relationship with their children. This is incorrect as a general proposition. Fully developed familial relationships involving the assumption of parental duties with mutual love and affection are entitled to a significantly greater level of due process protection than the inchoate relationship at issue in this case.

No court can impose a parent-child relationship. The only thing a court can impose is a support order, and that would mean monetary support. Practically, the interests at stake in a paternity suit are economic on the parts of all the parties. To distinguish Santosky from the case at bar, in Santosky the court was clearly speaking about, as I have already stated, an already established familial relationship

with mutual love and affection and a day to day caretaking role on the part of the parents with their children.

In Santosky the state was pitted against the parents. The state came in with both feet upon those parents, I will grant you that. In this case, I submit that these interests deal with private parties. The state is there to facilitate. The state is there to give a mother an attorney should she need one, if she is on welfare.

The state in Pennsylvania is also there to give an indigent father an attorney via the public defender system. As far as the HLA blood tests, no one any more since Little versus Streeter is denied that opportunity to be heard. Anyone in the United States can get HLA blood tests regardless of their financial or their economic status.

The liberty interest at stake in Santosky, as this Court said, could be extinguished forever as a result of this termination proceeding. Here there is no liberty interest at stake. Here there are no familial ties. The only interests at stake are economic. In Santosky the Court said the child will lose the right of support and maintenance from their parents forever upon the termination of parental rights. So what the Court

did was, they raised the standard in order to prevent this, in order to protect the child's interests.

What the appellant is asking you to do here, they are asking for the child to lose the rights to support and maintenance forever, and they are asking you to raise the standard to cause this result. I submit to you that that result would be unfair and inapposite to what Santosky holds.

In Santosky the Court balances the parents' and the child's interests against the state. It decided that the parents' and the child's interests were served by a higher standard. In this case the parents, the father in particular, comes in as an adversary to the child. The Court is asked to balance these interests as adversaries. In Santosky for the majority of the Court the issue was familial bonds. For the dissent in Santosky, the issue was the safety of the child.

I submit that the concerns of both the majority and the dissent in Santosky were for the child. I would ask this Court to take this case on those terms as well and to consider the child's interests as you did in Santosky. The issue in this case, I will repeat, is the monetary support. In Santoksy the issue was imprecise substantive standards which left determinations open to the subjective values

of one particular judge. In Santosky you mentioned the issues of cultural bias because most of these parents happened to come from poor economic statuses. You mentioned the issue of -- there were other issues that you mentioned, the state being able to form the case from the very beginning against the parents and how you as a Court felt that was unfair.

In this case the decision is left to either one judge or to a jury of 12. In this particular case the decision was left to a jury of 12. It as civil proceeding. We did not need to have a unanimous decision. However, we did. The HLAs were provided. That is not an imprecise substantive standard. That is empirical medical evidence which is based on the evidence as it comes into the case.

Another important issue in Santosky was this Court's concern that the significant prospect of an erroneous termination existed. I submit that in this case there is a small prospect of an erroneous decision due to the medical advancements that we have made in genetic testing, and one of those tests happens to be the HLAs.

I would also like to distinguish Little versus Streeter because I feel that is a very important case when it comes to our case here. You used the word, this

Court used the word "compelling interests" of both the father and the child in Little versus Streeter, and I believe that the interests were in the accuracy of the determination. I submit that your decision to allow the HLAs to have them accessible to everyone involved cleared up the problem, and I submit it is just one piece of the problem in this case.

The HLAs provide empirical scientific evidence they reduce an erroneous determination greatly. There is no longer one person's word against another. If the red blood cell tests are run and the man is excluded, the state does not even bring any kind of a paternity suit. No suit is filed. If the HLAs are then run, if the man is not excluded by the red blood cell tests an HLA test is run and then the father would be included to a greater percent.

QUESTION: In this 18 to 1 and 19 to 1 findings, isthat considered a high probability as these things run, or medium, or what?

MS. BARTON: Your Honor, I hesitate to answer that question. I have seen them based on different genetic factors to be very high if the parties involved have very rare genetic characteristics. In this case evidently the genetic characteristics were not all that rare. I also understand that because the mother was a

white Caucasian and the father was of Hispanic dissent that the statistical tables that were used did not allow the PhDs that figure out the statistical results to come up with as high perhaps a standard as they might have had there been two white people involved or two black people involved or something like that, Your Honor.

In Little versus Streeter I submit that the father, the putative fate was denied due process. I think it was a horrendous denial of due process. The odds were stacked against that father. That is not the facts here, I submit. The facts here, as far as fairness in procedure, this father as well as the mother and child were given the right to a hearing before a domestic relations hearing officer at which time paternity could be acknowledged or denied if paternity was denied the HLA blood tests become a standard procedure then. They are automatically ordered. The parties appear for HLA blood tests. After the HLA blood tests are returned the father has another hearing before a domestic relations hearing officer, an officer of the court. At that time once again he may deny or acknowledge. If he continues to deny after the HLA blood tests have included him to a large percentage he has the choice of a jury trial or a bench trial.

That choice may be made by the mother as

well. She could have opted for a jury or bench trial as well. Also at that time, of course, the public defender system exists for the father to use, and I represent the district attorney's office. The district attorney's office exists for the mother to use. I submit that as far as fairness of procedure both sides are given exactly the same procedural safeguards.

I will restate it. the issue in Streeter was accuracy, and I believe that your decision was absolutely correct. I also believe that the burden of proof as Justice Scalia mentioned earlier does not make a decision more accurate. I believe what it does, it shifts the risks of an erroneous decision. In this case the appellant asks you to shift the risk to the child. I submit that that is fundamentally unfair to the children.

The issue then is whether the preponderant standard fairly allocates the risk of an erroneous factfinding between the parties.

QUESTION: In the vast majority of cases as a practical matter what you are talking about is shifting the risk from the man to the state, no? I mean what most of these cases involve are whether the state is going to get reimbursed for some payments that the states had to make?

MS. BARTON: That's correct.

QUESTION: Isn't that generally what is going on?

MS. BARTON: Justice Scalia, in my -- if I understand it correctly, when the fundamental liberty interests, of course, are at stake then it is a private party versus the state and then, of course, in all fairness the risk should be shifted more towards the state so that an individual cannot be deprived of what is a fundamental liberty interest. In this case I submit that the risk will be shifted to the child, and that is illogical and unjust.

QUESTION: You did mistake my question. As a practical matter, the money that is collected is that likely to go to the child or is it likely to go to the state to reimburse the state for support payments?

MS. BARTON: I am sorry, I did misunderstand your question. If the mother and the child are on welfare, Justice Scalia, then the money goes into the state coffers. If the child is not on welfare, then the money goes directly to the mother and the child.

QUESTION: And what percentage of these cases in your experience involve that situation where the real party in interest is the state?

MS. BARTON: Since I only get involved in

those interests where the state is involved I can't answer that question fairly.

QUESTION: Probably the vast majority of them, though, isn't it?

MS. BARTON: I believe that's correct, because I believe the women, the mothers that are not on welfare are then of the next socioeconomic level where they cannot afford to have an attorney. Therefore paternity suits on behalf of their children are never brought. I believe that as the economic scale goes up that more paternity suits would be brought, Your Honor.

QUESTION: Do you think these blood tests showed that the odds were 18 to 1 that this particular person was the parent? If not, what does the 18 to 1 mean?

MS. BARTON: I believe --

QUESTION: You have said the blood test reduces the risk of error terrifically and it does -- if they exclude him, why, he is excluded. Is that the only way that it reduces the risk of error? Does it just show that he could be the father? Or does it make it more likely than not that he is the father?

MS. BARTON: If the odds would be 18 to 1?

QUESTION: Well, were they? Is that what these blood tests showed?

MS. BARTON: I believe they did, Your Honor. The other factor that has to be factored in here is access, and of course that come in as part of the other evidence. Of course, if --

QUESTION: I should say --

MS. BARTON: Yes, and if only one person had access, and that person happened to be a person with an 18 to 1 probability of paternity --

QUESTION: That is the only direct evidence there was here anyway.

MS. BARTON: Well, that's correct. There was only one person with access. This young woman was 15 years of age, Your Honor, and that is an extremely important part of a case.

QUESTION: We are not passing on that. We are just passing on the standard of proof. But do you think that the blood tests showed that the odds were 18 to 1 that this particular defendant was the father?

MS. BARTON: In all honesty I understand that that is how it is done, and as I tried to explain earlier, I believe the statistical tables that are used at this time when it comes to parents of two different nationalities are not as highly refined as they may be once more of these kind of relationships come forward and we are able to do statistical tables based on more

of these kind of relationships as far as genetic markers go, Your Honor.

QUESTION: I didn't understand that that is how the 18 to 1 works. I thought what it was, that if this young woman had 36 people that she had had contact with two could possibly have qualified. That is not it?

MS. BARTON: Well, really, in all fairness, I --

QUESTION: That is something quite different from saying that the odds are 18 to 1 that this was the father.

MS. BARTON: To me what you have said would be the same as 18 to 1, but that is why I was to a mathematics major in college.

(General laughter.)

QUESTION: I am not sure it has anything to do with math. I just think it isn't 18 to 1 that that person was the father. It is just out of any random group of 36 people, or maybe it is out of 36 Hispanics. I don't know how the testified done. Two would qualify. That is quite different from saying 18 to 1 this was the father.

QUESTION: Only two would qualify out of 36? I thought it was just the reverse.

MS. BARTON: No, that would be correct, but you know, in my brief I have cited several forensic medical articles that deal with HLAs and how the statistical -- it is all based on Mendel's theory of probability and Mendel's theory of genetics, and in those articles it is much better explained by medical people who know what they are talking about and in all honesty when it comes to these statistical theories I am not the person to ask.

QUESTION: If you are right about that, doesn't it mean, I mean a clear and convincing standard surely doesn't require 18 to 1 odds? Doesn't it mean you would win no matter what the standard is if this is a typical case? If this is a typical case I wonder if the standard really make much difference.

MS. BARTON: Well, Justice Stevens, I believe that it does because I believe that when you go into a suit just because one side has better evidence or more evidence than another, we don't automatically raise the ante on them, and that is what you would be doing here. You would be saying to the child, since you have very good scientific evidence, therefore we require you --

QUESTION: No, you would be saying if you are going to win anyway once you have told the child that we had a trial on this father, we didn't -- we don't think

there is just a 51 percent chance this is your father. The evidence was clear and convincing that this really your father.

MS. BARTON: Well, I believe that one could say that. However, I don't believe, as I said before, that is how the standard of proof should be decided. I also think, as the other evidence is just as important, and we would never base our whole case on one piece of evidence.

QUESTION: I understand. You have the other evidence. And of course I doubt if you ever have any of these cases where you have nothing but blood test evidence. Don't you always prove access?

MS. BARTON: Absolutely.

QUESTION: Well, you have to, because blood test evidence is just not that strong. All it means is that if there are 18 million Hispanics, 1 million Hispanics could have been the father. That is not an 18 to 1 shot that this individual is the father. It is a good deal away from an 18 to 1 shot, isn't it?

MS. BARTON: Yes. I do know if this will help at all that when they do transplants, kidney transplants, that they rely on these HLA tests, so I do know that they are very reliable as far as genetic markers go. As far as the probability of paternity goes

I can't explain that to you. I apologize.

The issue then is whether the preponderance standard fairly allocates the risk of an erroneous factfinding between the parties. The answer is yes. The interests of the father are economic. The interests of the child are economic. The interests of the mother are economic. The interests are therefore of equivalent constitutional significance. The mandate for placing a greater burden on one party stems from the recognition that the other party has a constitutionally protected interest of greater import at stake. The mandate therefore is negated. The interests are of equal significance and are the same.

Since the interests are the same how would the due process clause have the risk of error allocated? A higher burden of proof serves no useful constitutional purpose. Any advantage accorded to one party by changing the standard of proof imposes a corresponding disadvantage on the other parties, in this case the child and the mother and the state somewhat. This would accomplish only this. It will visit the condemnation of the parent--

QUESTION: Ms. Barton, I probably shouldn't interrupt you because I have another mathematical question. You argue from the fact that the interests

are equal and therefore you should have a 51 percent standard. Supposing I thought the interests of the child were greater, therefore I suppose less than preponderance would be enough to justify prevailing because you want the child to win in as many cases as possible.

MS. BARTON: Correct, but I also want the decision to be fair in as many cases as possible.

QUESTION: That is not the right response. The response is, Justice Stevens, that is precisely what my opponent is arguing. Since the interest of the father is so great, he wants the father to win with less than a preponderance, in a way.

MS. BARTON: And if I may borrow a quote from one of this Court's cases, if you would shift the risk to the child, all it would accomplish would be to visit the condemnation of the parents' irresponsible liaison upon the child. This result is illogical and unjust. Moreover, placing this standard of proof disability upon the child is contrary to the basic concept of our system that legal burdens should bear some relationship to the individual responsibility for wrongdoing.

QUESTION: (Inaudible.)

MS. BARTON: I think Webber. Webber. There is no principle basis for contending that the child is

better served by decreasing the risk of erroneous findings of paternity at the cost of increasing the risk of erroneous findings of nonpaternity.

I will go through again, the appellant has been afforded generous process by the State of Pennsylvania, and I went through those before. I think they are important enough that perhaps I should reiterate. The Rules of Civil Procedure require that appellant receive proper notice upon the filing of a paternity suit. He is afforded a hearing. He is afforded the right to counsel. He is afforded the right to a public defender should he be indigent. He is afforded the right to blood tests. He is afforded the right to a bench or a jury trial and then 12 of his peers would sit to hear the evidence. He is afforded full appellate review as this case well demonstrates.

Appellant therefore is afforded the essence of due process, the opportunity to be heard at a meaningful time and in a meaningful way. The suit is comparable to a negligence suit. The bottom line is monetary. The parties here are more private than state. In fact, not all paternity suits have state involvement. Only those in which the child is on welfare have state involvement. Some would argue, as appellant has, that the state is putting pressure on the mother to put the

finger on someone. Perhaps that is how some people view it. I submit, however, a fairer way to view it is, the state is watching out for the child's best interests. In some instances the child and other may assume somewhat of an adversarial role. The mother may still care for the father and not wish to jeopardize that relationship. The father may be paying some voluntary support and the mother may not wish to jeopardize that relationship. The father may be paying some voluntary support and the mother may not wish to jeopardize that support. The mother may be very young and intimidated by the legal proceeding or the legal system, precluding her from taking any steps to establish the civil legal relationship between the child and the father.

Furthermore, the state does have a responsibility to the taxpayers of the state to recoup some of the money that is being used to support a child that is born out of wedlock.

I would therefore ask that for the state of Pennsylvania that this Court affirm the Supreme Court of Pennsylvania and hold that the preponderance of evidence standard of proof chosen by Pennsylvania and 41 other states to be used in paternity suits does not violate the due process clause of the Fourteenth Amendment of the United States Constitution.

QUESTION: Thank you, Ms. Barton.

Mr. Campbell, you have 14 minutes remaining.

ORAL ARGUMENT OF WILLIAM WATT CAMPBELL, ESQ.,

ON BEHALF OF THE APPELLANT - REBUTTAL

MR. CAMPBELL: Thank you, Mr. Chief Justice.

A few brief remarks in rebuttal. First of all, the quote from Webber was very nice, but what is at question here is not an irresponsible liaison. The question is, did it ever happen, and did it result in a parent. So those cases have nothing to do with this case. Those cases and the adoption cases involve people who say they are the father and the children's rights and the fathers' rights. That has nothing to do with the determining whether or not someone actually is the father of a child.

Chief Justice Rehnquist, you asked whether an 18 to 1 odds was a low likelihood or a high likelihood or what could it be, and as I pointed out there is no statute saying below a certain result you can't admit the results, but in the AMA-ABA study which I believe this Court is familiar with due to the numerous times it has been cited there is a table showing degrees of likelihood, and starting with practically proved, extremely likely, very likely, and in the 90 to 95 percent range, which is where the 18 to 1 falls, it says

likely. I think the Court should be aware of that.

QUESTION: Of course, you are at 94.6, so you are fairly close to 95.

MR. CAMPBELL: That's right, but in this case, just another example of why there is tough evidence in this case, in this case I tried to show that Gregg's, my client's brother, had opportunity and access to have sex -- this was one of the contentions we were trying to show -- that he had sex with her, so he could be the father, and as indicated in the reporter cases and could have been in this case, blood test results don't mean anything else if somebody else had sex with the woman who was related.

QUESTION: Aren't you arguing to a jury now?

MR. CAMPBELL: Excuse me?

QUESTION: Aren't you making a jury argument? Wasn't all this argued to the jury?

MR. CAMPBELL: Yes, the jury rejected it but --

QUESTION: All of what you are telling us was argued to the jury.

MR. CAMPBELL: That's right, and by a preponderance --

QUESTION: (Inaudible.)

MR. CAMPBELL: That's correct. Just to make

absolutely sure --

QUESTION: You still think you are right.

MR. CAMPBELL: I am sorry, Justice Marshall?

QUESTION: You still think you are right.

MR. CAMPBELL: That is why I am here, Justice Marshall.

The 18 to 1 again, that only means that out of 19 randomly selected Hispanic males one could be the father. It means nothing more. Finally, as to the state's involvement in nonwelfare case, although this is a welfare case, I want to point out again the state is heavily involved in each and every support case as the AMA-ABA guidelines point out.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Campbell. The case is submitted.

(Whereupon, at 2:41 o'clock p.m., the case in the above-entitled matter 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:

#86-98 - GREGORY L. RIVERA, Appellant V. JEAN MARIE MINNICH

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BY Paul A. Richardson

(REPORTER)