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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TYRONE VICTOR HARDIN, Petitioner V. DENNIS
STRAUB

CASE NO: 87-7023

PLACE: WASHINGTON, D.C.

DATE: March 22, 189

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IN THE SUPREME COURT OF THE UNITED STATES

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TYRONE VICTOR HARDIN, :
 :
 : Petitioner :
 :
 : v. : No. 87-7023
 :
 DENNIS STRAUB :
 :
-----x

Washington, D.C.

Wednesday, March 22, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:54 o'clock a.m.

APPEARANCES:

DOUGLAS RYAN MULLKOFF, ESQ., Ann Arbor, Michigan; on
behalf of the Petitioner.

LOUIS J. CARUSO, ESQ., Solicitor General of Michigan,
Lansing, Michigan; on behalf of the Respondent.

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P R O C E E D I N G S

(10:54 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-7023, Tyrone Hardin v. Dennis Straub.

Mr. Mullkoff, you may proceed whenever you're ready.

ORAL ARGUMENT OF DOUGLAS RYAN MULLKOFF
ON BEHALF OF THE PETITIONER

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

The question in this case is whether a federal court hearing a state prisoner's Section 1983 claim must apply that state's prisoner tolling statute. We claim that the tolling statute must apply in light of this Court's previous decisions and in light of the plain language of the Civil Rights Act.

The record below in this case is scant. In 1986, Petitioner Hardin filed a Section 1983 action claiming a due process violation by a Michigan prison official who ignored Michigan Department of Correction rules which required a hearing be held before he could be confined in a solitary segregation unit. Almost six months were spent in segregation without any hearing, much of the time in his cell 24 hours a day. This segregation ended in 1981.

1 The federal lawsuit was filed in 1986. The
2 district court below dismissed this case sua sponte
3 prior to service on the defendant finding that it was
4 barred by Michigan's three-year general statute of
5 limitations. Petitioner argued on appeal to the Sixth
6 Circuit that the statute of limitations was tolled under
7 Michigan statute of limitations law since there is a
8 particular Michigan tolling provision which allows an
9 inmate whose cause of action accrues during imprisonment
10 until one year after the imprisonment ends to file any
11 civil suit which has accrued during that imprisonment.

12 The Sixth Circuit rejected this argument and
13 said that the Michigan statute of limitation tolling
14 rule for prisoners does not apply to Section 1983
15 claims. We believe that the Sixth Circuit was wrong and
16 should be reversed.

17 The particular tolling rule in question was
18 rewritten by the Michigan legislature in 1972. It was
19 amended from a five-year tolling period after
20 incarceration ended to a one-year period. It was
21 reviewed again in 1981 by the Michigan legislature and
22 upheld.

23 This Court has made unambiguous pronouncements
24 on the use of state statute of limitations tolling law.
25 In *Tomanio*, a 1980 -- 1980 decision of this Court, you

1 said that federal courts hearing actions under Section
2 1983 must borrow the relevant state statute of
3 limitation and tolling rules unless they're inconsistent
4 with federal law. In Chardon v. Fumero Soto in 1983,
5 this Court said that application of interrelated tolling
6 rules, when state statute of limitations law is
7 borrowed, are appropriate and must -- must be used in
8 that manner unless they're inconsistent.

9 This Court has in total since 1980 reviewed
10 the application of specific state limitation statutes to
11 civil rights cases six times. That body of law has
12 established that state statute of limitations and their
13 interrelated tolling rules must be applied unless the
14 state statute interferes with or unduly burdens
15 assertion of the civil rights claim.

16 The Michigan tolling rule in question here
17 does not interfere with assertion of Section 1983
18 claims. In fact, it's our position that it accommodates
19 Section 1983 claims. Borrowing a state's tolling rules
20 is -- is the rule; not borrowing would be an exception.
21 And under the procedural statute which applies to
22 Section 1983, that being 1988, it must be borrowed
23 unless inconsistent.

24 The central issue raised by the Respondent is
25 that Michigan's tolling rule is inconsistent with

1 Section 1983 because it does not foster deterrence of
2 official misconduct.

3 I'd first like to point out that this Court in
4 *Felder v. Casey* last year said that compensation is the
5 primary goal of Section 1983, the central objective.
6 Compensation is well-served by a rule which extends a
7 victim's time to file a civil rights claim, like the
8 rule in this case. To date, this Court has not rejected
9 any state law which made access to the courts easier for
10 persons who claim to be victims of civil rights
11 violations.

12 The second objective, deterrence, is not
13 interfered with or impeded by a statute of limitations
14 tolling rule. Our position is that the greater period
15 of time a victim has to file, the greater the deterrence
16 --the deterrent effect will be. If we believe that
17 giving prisoners access to court will actually deter
18 Section 1983 claims, then it only follows that giving
19 greater access to prisoners will foster greater
20 deterrence.

21 QUESTION: You're not really talking about
22 deterring 1983 claims. You're talking about --

23 MR. MULLKOFF: I'm sorry.

24 QUESTION: -- deterring the conduct on which
25 1983 claims are based, aren't you?

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MR. MULLKOFF: That's correct, Your Honor.

We disagree with the idea that you can deter official misconduct, that -- that it is not possible to deter official misconduct with a tolling provision or a lengthy period of time. Respondents argue that promptness and a promptly filed claim fosters deterrence and that the opposite is not true. We -- we don't believe that that necessarily follows.

In criminal law, for instance, tolling provisions are used in statute of limitations systems using criminal codes. It wouldn't be argued that we should abandon statute of limitations tolling provisions in criminal law because it wouldn't foster deterrence. I think the opposite is more persuasive, that the greater the period of time for bringing charges, the greater the deterrent effect would be.

Presumably the greatest deterrence in a civil rights case occurs when a victim prevails in a court of law. We think that there are other reasons based on this Court's past decisions which should support our view.

The Congress has made clear in Section 1988 that it was willing to rely on a state's judgment regarding statute of limitations law. The concept of federalism would be supported by applying Michigan's

1 tolling law.

2 The State of Michigan has considered and
3 reconsidered this law written and rewritten the law, and
4 the Michigan Court of Appeals has reviewed it. In 1981
5 there was a constitutional challenge to this particular
6 tolling law, and the Michigan Court of Appeals found it
7 to be supported by valid governmental interests.
8 Respecting the legislature's wishes here would promote
9 federalism.

10 It isn't disputed that the Michigan courts
11 would apply this tolling law to a civil rights claim
12 were it brought in their courts.

13 QUESTION: That's -- that's settled by
14 decision.

15 MR. MULLKOFF: That -- that appears to be
16 settled by the case of Hawkins v. Justin that the
17 Michigan Court of Appeals decided, and it was also
18 acknowledge in Higley v. Michigan Department of
19 Corrections, the Sixth Circuit case that Respondents
20 rely on.

21 The final --

22 QUESTION: When -- Mr. Mullkoff, when the
23 legislature revisited the tolling statute, was there any
24 discussion or anything in the reports, if there are
25 reports in Michigan, that dealt with -- there's a

1 seeming incongruity where the person is in solitary
2 confinement and claims to be wrongfully there, and he
3 presumably isn't there by the time he brings his
4 action. Did the legislature discuss that at all?

5 MR. MULLKOFF: The legislative committee
6 report in the 19 -- to the 1972 amendment to Michigan's
7 tolling statute indicated a recognition that prisoners
8 in modern times have increased access to courts. They
9 acknowledge the fact that lawsuits can be filed, counsel
10 can be obtained, and that although prisoners may not be
11 permitted to actually appear in court, they can file
12 their actions. The committee said, nonetheless, we
13 still think that restrictions obviously exist and that
14 it would be prudent to leave a one-year window. That
15 was the legislature's comment in that amendment.

16 A final point I think that should be made is
17 that statute of limitations provisions and their tolling
18 exceptions have to be read and viewed in context.
19 They're inseparable. This Court has said in the past
20 that one cannot understand a statute of limitations
21 system without understanding its -- its exceptions and
22 those circumstances that suspend it from running against
23 a particular cause of action. It is problematic to
24 separate a tolling provision from a parent statute of
25 limitations, and again I think deference should be paid

1 to the state and what the state's wishes were.

2 We think that application of Michigan's
3 tolling law seems mandated by this Court's past
4 decisions in Tomanio and In Chardon, and we urge you on
5 this basis to reverse.

6 Thank you.

7 QUESTION: Thank you, Mr. Mullkoff.

8 Mr. Caruso?

9 ORAL ARGUMENT OF LOUIS J. CARUSO

10 ON BEHALF OF THE RESPONDENT

11 MR. CARUSO: Mr. Chief Justice, and may it
12 please the Court.

13 Although the statutes of limitations and their
14 tolling rules are part of the judicial process, the
15 state legislatures do not design their statutes of
16 limitations and tolling provisions with the national
17 interest in mind. When statutes of limitations are
18 borrowed from the state pursuant to 1988, as here, the
19 courts must determine whether they are inconsistent with
20 the national interest.

21 Although the federal courts in Michigan have
22 not looked with disfavor upon the policy of repose of
23 the state, the Sixth Circuit -- they have -- they have
24 rejected, however, the open-ended tolling statute with
25 the Sixth Circuit approval as being inconsistent with

1 the underlying remedial policies and purposes of the
2 Civil Rights Act which are identified as both deterrence
3 and compensation.

4 The Sixth Circuit decided the case based on
5 Higley, which is an earlier decision by the Sixth
6 Circuit, in which they placed a strong emphasis on the
7 court's perceived substantive policy of early
8 enforcement of the Civil Rights Act. The court reasoned
9 that because deterrence of the civil rights violation is
10 the Act's objective -- one of the Act's objectives, such
11 claims should not be allowed to long -- languish long
12 after the best opportunity for resolution and deterrence
13 is past. And I also suggest to the Court that
14 compensation in and of itself has a deterrent effect in
15 this area.

16 The court considered this perception of early
17 resolution not in light of fixed tolling statutes such
18 as six, eight or ten years, but rather under a tolling
19 statute allowing varying claim viability periods that
20 are dependent upon -- upon claimant prisoner's duration
21 of sentence, which in some cases could extend for
22 decades, and found it unacceptable in view of its
23 perceived need for prompt enforcement of the Civil
24 Rights Act.

25 Now, the Petitioner asserts the longer the

1 statute of limitations, the greater the deterrent value.
2 While it may be true that permitting litigation of stale
3 claims has a more -- has more deterrent value than
4 prohibiting them, it cannot be realistically denied nor
5 -- and it's equally true that prompt litigation
6 increases the likelihood of success and deterrence.

7 Petitioner analyzes deterrence and isolation --

8 QUESTION: Mr. Caruso, may I ask you a
9 question?

10 MR. CARUSO: Yes.

11 QUESTION: Do you think this same rationale
12 would support a federal court's holding if a state
13 statute of limitations ran with, say, a 15-year statute?
14 It didn't have tolling, but just had a 15-year statute.
15 Do you think the federal court would be justified in
16 saying we just think that's much too long? If you're
17 going to have effective deterrence, you got to sue
18 within three years.

19 MR. CARUSO: The court would have to make that
20 judgment. They would have to balance the need for early
21 decision against the -- the period of 15 years. In
22 other words, they'd have to determine whether the
23 interest in protecting the claim for a 15-year period is
24 outweighed by the federal policy of repose. And if it's
25 15 years, it's -- it's a value judgment --

1 QUESTION: So, you'd say the court could under
2 your theory -- could in effect shorten -- if the state
3 had said 15 years, say, well, for federal purposes
4 that's too long. We want to shorten.

5 MR. CARUSO: That could be determined by the
6 court as being too long, and if that's the case, they
7 would -- pursuant to 1988 and the Tomanio analysis, it
8 should not be applied.

9 QUESTION: One thinks of the statute of
10 limitations analysis though as, you know, a long statute
11 benefits the plaintiff and a short statute benefits the
12 defendant generally. And here -- here the Michigan
13 --the State of Michigan, which is the defendant in these
14 actions, or Michigan officials who are defendants -- the
15 legislature has it within its own power to -- to change
16 that.

17 MR. CARUSO: It had within its own power to
18 change that. I agree with -- I agree, Mr. Chief
19 Justice. But they chose not to do that.

20 However, when we -- when we borrow such a
21 statute, I think we have to consider it in light of the
22 federal interests as required by 1988 and Tomanio. And
23 I suggest to the Court that the federal interest of
24 repose and finality would indicate -- could conclude
25 that the statute does not comport with the federal

1 interest on -- in repose simply because the Michigan
2 tolling statute could permit claims -- a viability
3 period to exist for a period, as I say, of decades, 40
4 years or 50 years in some cases.

5 QUESTION: But, Mr. Caruso, what you describe
6 as a federal interest in repose --

7 MR. CARUSO: Yes.

8 QUESTION: -- as the Chief Justice indicated,
9 also could be described as a state interest in repose.
10 And the ironic thing about your argument is that
11 Congress hasn't found a sufficient interest in repose
12 even to draft any statute of limitations.

13 MR. CARUSO: Yes, (Inaudible).

14 QUESTION: It's kind of hard to find an
15 overwhelming federal interest when they keep letting us
16 decide all these questions that they could solve for all
17 of us in 10 minutes by just adopting a federal statute
18 of limitations.

19 MR. CARUSO: That's, indeed, unfortunate.

20 QUESTION: And their failure to do so is a
21 little hard to understand.

22 MR. CARUSO: But as I suggest that while the
23 state claim have -- has -- the question is not whether a
24 state claim has any deterrent effect or whether a
25 deterrent effect of the state claim outweighs the

1 federal interest in repose, as I suggest. In making
2 this judgment under the Michigan statute, it becomes
3 very difficult, and because of the varying claim of
4 viability periods. And the court, the Sixth -- the
5 Eighth Circuit in the South -- in South -- in dealing
6 with the South Dakota tolling statute concluded that
7 five years plus three-year statute of limitations are
8 not inconsistent with the federal policy.

9 In that particular state, that Eighth Circuit
10 decided that eight years is all right. But in deciding
11 that the eight-year period is acceptable under the
12 federal considerations, it did contrast the eight-year
13 statute they have with the open-ended tolling statute
14 similar to that of Michigan, and conclude -- concluded
15 that that type of statute is inconsistent with the
16 federal interest.

17 Now, if the claim viability period is
18 extended, the interest in protecting claims lessens and
19 the interest in repose increases. The reference made by
20 Petitioner to Hawkins v. Justin is a Michigan Court of
21 Appeals decision wherein they dealt with the
22 constitutionality of the tolling statute on an equal
23 protection basis, and the court held that to be
24 constitutional under a rational basis test.

25 But that isn't the issue. That's where the

1 analysis begins. If it is constitutional, a reference
2 to a claim such as involved in that case was a libel
3 claim under a one-year statute, that -- that is fine for
4 -- for the -- for the state's interest. But under the
5 1988 provision and under -- under the decision of
6 Tomanio, that has to be considered in light of the
7 federal interests.

8 And as I state, that the Court of Appeals
9 decided that the underlying policies of deterrent and
10 compensation are not being served by allowing these
11 claims to languish for such a long period of time that
12 the best opportunity for deterrence is past.

13 Now, a reference is also made to the criminal
14 law context. Petitioner analogizes to criminal law
15 context where -- where the more serious offenses have
16 longer statutes of limitation and murder has none. But
17 a similar balance must be done in that case too. The
18 balancing of the interest of repose and finality, as
19 well as the interest in preventing possible prejudice to
20 defendants to defense, must be weighed against society's
21 interesting -- interest in punishing and rehabilitating
22 offenders and deterring other crimes.

23 If these latter interests are sufficiently
24 strong, it could justify longer periods than in the
25 civil context, but even in the criminal context in

1 Michigan, they are set periods of time and not the
2 open-ended provisions as we see and observe in the
3 Michigan tolling statute.

4 And I think that this comports with what the
5 Court had said in Wilson v. Garcia. In Wilson v.
6 Garcia, the Court made quite a significant statement
7 with reference to the policy, the federal policy of
8 repose. It said a federal cause of action brought at any
9 distance of time would be utterly repugnant to the
10 genius of our laws, and they quoted from an 1835 case.
11 Just determinations of fact cannot be made when, because
12 of the passage of time, the memories of witnesses have
13 fade -- faded or evidence is lost. In compelling
14 circumstances, even wrongdoers are entitled to assume
15 their sins may be forgiven.

16 QUESTION: Of course, the fading witnesses --

17 MR. CARUSO: (Inaudible) take an example, for
18 --

19 QUESTION: Of course, witnesses' memories
20 applies to the other side, as well as to the state.

21 MR. CARUSO: To both sides, that's right. And
22 I say that adds to the burden of the court in trying
23 these cases and -- because the court duty is to search
24 for the truth, and it makes it very difficult. And
25 that's one of the bases for applying a sound policy of

1 repose.

2 I think that if you would consider, for
3 example -- in one of the cases an example was given
4 where a prison guard make -- would make 100 or 200
5 searches in a period of six months to a year. And one
6 of those searches or two of those searches, any one, may
7 give rise to a 1983 claim. And the person in -- under
8 the Michigan tolling provision could wait 20 or 30 years
9 to bring that action. And I think that that would
10 unduly burden the court in its truth-seeking process, as
11 well as burden the defendant in responding to the
12 charges that are made.

13 QUESTION: Mr. Caruso, surely there are some
14 policies in both directions. I mean, I could make an
15 argument precisely the opposite of what you say. I
16 could make an argument to say that it -- it really -- it
17 expects a lot of a prisoner to suggest that he should
18 bring a suit against his prison guard, for example, when
19 he is still incarcerated and subject to the authority of
20 that guard. I -- I think it's just the opposite of what
21 you're saying could -- could -- could be the rule; that
22 is, you have to allow him some time after he gets of
23 prison to bring this claim because otherwise you're not
24 sure the claims would be brought at all. Don't you
25 think there's some sense in that?

1 MR. CARUSO: Well, the claim may not be
2 brought -- the claim may not be brought at all. That's
3 very possible, but that's his choice not to bring it all.

4 QUESTION: Well, do you want to have to sue
5 somebody who's -- who's the -- the guard on your
6 corridor? You want to haul him into court while you're
7 still in prison?

8 MR. CARUSO: Well, I think --

9 QUESTION: Wouldn't you rather have the option
10 to wait until you get out and then sue him?

11 MR. CARUSO: I don't think it's essential. I
12 don't think it's necessary to do that. And I think to
13 give him the option to wait until he gets out of prison,
14 if he has a 20-year prison sentence, Justice Scalia,
15 would not comport or bode well with the federal policy
16 in repose.

17 QUESTION: Well, it's at least an argument,
18 isn't it? I --

19 MR. CARUSO: Pardon? Pardon?

20 QUESTION: Mr. Caruso --

21 MR. CARUSO: Yes.

22 QUESTION: -- what case in this Court do you
23 rely upon?

24 MR. CARUSO: Pardon?

25 QUESTION: What case -- what decision of this

1 Court do you rely upon?

2 MR. CARUSO: I rely on the decision in Tomanio
3 which calls --

4 QUESTION: What?

5 MR. CARUSO: -- in the U.S. -- or the Board of
6 Regents of NYU v. Tomanio which requires a -- an
7 analysis be made of the borrowed statute of limitation
8 with reference to the federal laws and federal
9 policies. And if they're inconsistent, they should not
10 be borrowed. They should not be applied.

11 QUESTION: Do you think --

12 MR. CARUSO: And that's what we're suggesting
13 here.

14 QUESTION: Do you think the Okura case applies
15 at all?

16 MR. CARUSO: It applies to all cases in which
17 the statutes of limitations of the states are borrowed,
18 yes, all federal cases.

19 QUESTION: Doesn't that apply to this case?

20 MR. CARUSO: It applies to this case. I
21 suggest --

22 QUESTION: And it puts you out of court,
23 doesn't it?

24 MR. CARUSO: No, it does not put us out of
25 court because I suggest that the analysis that must be

1 made, which many of the courts did not do in the cases
2 cited by Petitioner, and that is make the analysis to
3 determine whether the tolling statute is inconsistent
4 with the -- the -- the federal laws and the policies of
5 the federal government. And one of those policies is a
6 policy of repose. And the Court has said many times
7 they cannot allow claims to languish for such long
8 periods of time. That would be an undue burden on the
9 court, as well as well as in the defense, in seeking --

10 QUESTION: But you don't have any trouble with
11 the Okura case saying that you're bound to follow the
12 state statutes.

13 MR. CARUSO: Well --

14 QUESTION: You don't have any trouble with
15 that at all, do you?

16 MR. CARUSO: I'm not having trouble with that.

17 QUESTION: You just ignore it.

18 MR. CARUSO: I'm not having trouble with that,
19 Justice Marshall, but what I am suggesting is that under
20 1988 In a borrowing situation such as we have here, the
21 borrowed statute has to be viewed in light of the
22 federal law and federal policies. And if it doesn't
23 comport with those policies, then it should not be
24 employed even though it is a state law. And I --

25 QUESTION: The Okura case was after 1988. It

1 was 1989.

2 MR. CARUSO: Pardon?

3 QUESTION: The Okura case didn't have any
4 trouble with 1988 because it was decided in 1989.

5 MR. CARUSO: But 1988 is the section of the
6 Civil Rights Act I have reference to which requires the
7 deterrence to be made.

8 Now, as I say, in some of these cases -- it
9 might be interesting to point out too in connection with
10 the statute of limitations, and -- there are 26 states
11 that have no tolling provision for prisoners, and there
12 are 10 states that have a limited, fixed tolling
13 provision. There are 14 states that have tolling
14 provisions open-ended like that of Michigan.

15 What I suggest here is that the court looked
16 at the problem realistically and acted reasonably by
17 limiting the prisoner Section 1983 claim to Michigan's
18 three-year residual personal injury statute and ask that
19 that decision be affirmed.

20 I've not made any reference in my argument to
21 access to the courts. Access to the courts was never
22 raised in the court below. We were not in the
23 proceedings at any point in the -- in the courts below.
24 But it was not raised. However, it did appear in
25 Petitioner's brief that there is a great disability

1 here. And I suggest that that disability really does not
2 exist because since the decision in *Bounds v. Smith*.

3 And also I call the Court's attention to
4 considering the Civil Rights Attorney Award Fee Act of
5 1976 that became codified into 42 U.S.C. 1988 which this
6 Court said in *Hensley v. Eckart* insures effective access
7 to the -- to the judicial process for persons with civil
8 rights grievances. Certainly in non-frivolous cases, a
9 prisoner should not have any difficulty in obtaining the
10 service of counsel today. So, that really is not an
11 impediment.

12 I ask that the Court consider affirming the
13 Sixth Circuit court decision.

14 QUESTION: Thank you, Mr. Caruso.

15 Mr. Mullkoff, do you have any rebuttal?

16 REBUTTAL ARGUMENT OF DOUGLAS RYAN MULLKOFF

17 MR. MULLKOFF: Brief rebuttal.

18 We disagree with the Respondent's contention
19 that there is a federal policy of repose. Repose is a
20 purpose of statutes of limitations systems. Congress
21 hasn't enacted a statute of limitations system. They
22 can if they choose to. Statute of limitations issues
23 have been deferred in 1983 cases to the states. That's
24 Congress' decision. Repose is a state interest, not a
25 federal interest. It can't be fairly characterized as

1 one of the purposes of Section 1983.

2 Virtually all of the reasons urged for
3 affirmance by Mr. Caruso would require the Court to
4 undertake a state-by-state, case-by-case review of
5 tolling statutes to see if the statutes conflict with
6 the purpose of Section 1983. We believe that this
7 Court, through its decisions in Okura in January of 1988
8 and in Wilson v. Garcia, has moved in the opposite
9 direction to simplify the rules relating to application
10 of a statute of limitations to avoid that unnecessary
11 litigation on collateral matters.

12 We urge the Court to continue this policy
13 approach set out in Wilson and Okura and to reverse the
14 lower courts.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Mullkoff.

18 The case is submitted.

19 (Whereupon, at 11:21 o'clock a.m., the case in
20 the above-entitled matter was submitted.)
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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:

No. 87-7023 - TYRONE VICTOR HARDIN, Petitioner V. DENNIS STRAUB

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

BY alan friedman

(REPORTER)

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