OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ORRIN S. REED, Petitioner v. ROBERT FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL.

CASE NO: No. 93-5418

PLACE: Washington, D.C.

DATE: Monday, March 28, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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ORRIN S. REED, :

Petitioner :

v. : No. 93-5418

ROBERT FARLEY, SUPERINTENDENT, :

INDIANA STATE PRISON, ET AL. :

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Washington, D.C.

Monday, March 28, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JEROLD S. SOLOVY, ESQ., Chicago, Illinois; on behalf of the Petitioner.

AREND J. ABEL, ESQ., Deputy Attorney General of Indiana, Indianapolis, Indiana; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 93-5418, Orrin S. Reed v. Robert Farley.

Mr. Solovy.

ORAL ARGUMENT OF JEROLD S. SOLOVY

ON BEHALF OF THE PETITIONER

MR. SOLOVY: Chief Justice Rehnquist, and may it please the Court:

Congress included in the Interstate Detainer Act three legislative imperatives which are very helpful in keeping in mind to resolve this case properly. The first is that the receiving State, in this case Indiana, when it was the actant in putting the prisoner to trial, had to try the prisoner within 120 days. The second is that if the trial did not take place within 120 days, the trial court in Indiana was mandated to dismiss the case. And the third is that the courts of the United States are directed by Congress to enforce the agreement.

Now, these provisions -- if I might call the Court's attention to these provisions -- are found at pages 6a of our opening brief.

QUESTION: Mr. Solovy, you said Congress put these in the Act, but the Act really didn't apply to any State unless the State voluntarily adopted it, isn't that

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right?

MR. SOLOVY: That's correct. 48 States have voluntarily opted into the Interstate Detainer Act. Congress adopted the Act in 1970. Each of the States solemnly swear to abide by the agreement.

QUESTION: So Congress' participation in it can easily be called a Federal law, but I don't know how the Interstate Act itself qualifies as a Federal law.

MR. SOLOVY: Well, with all due respect, Justice Scalia, I think the Court treaded this ground in Cuyler and in Carchman, and, indeed, in taking the certiorari in Fex v. Michigan --

QUESTION: For this purpose?

MR. SOLOVY: For -- well, I don't see what the jurisdiction of the Court would have been to grant certiorari in Fex if this were not a Federal law.

QUESTION: Oh, I think it's one thing to say that we have jurisdiction over interstate agreements and quite another thing to say that for purposes of habeas corpus we would be enforcing a Federal law.

MR. SOLOVY: Well, with all due respect, Justice Scalia, I fail to see the distinction for -- if this Court has jurisdiction for certiorari and jurisdiction to take a case on certiorari, then I cannot see how it doesn't qualify under 2254 as a Federal law to be enforced under

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habeas corpus. That's not the Government -- position the Solicitor takes in this case.

QUESTION: Perhaps enforceable, but not necessarily to be enforced. We have discretion under habeas corpus jurisdiction, and perhaps real Federal laws that the States have to observe, whether they like it or not, may be treated differently from voluntary State agreements such as this one.

MR. SOLOVY: Again, Justice Scalia, with all due respect, this is a real Federal law. I don't see an order of law that says that the Interstate Detainer Act is a stepchild which is not entitled to be accorded habeas corpus relief. Of course, the writ is always discretionary, but Congress here has spoken very loudly, and if this Court does not exercise and adopt Federal rules as the Court did in Fex, then you're going to have havoc.

For example --

QUESTION: Can a State get out of this interstate agreement?

MR. SOLOVY: Of course. A State can opt out tomorrow.

QUESTION: Well, I don't see how -- if a State violates its own law, we don't accept habeas corpus because a State can change its law. So, also, it seems to

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me, if a State violates the interstate agreement, we shouldn't enforce it by habeas corpus because if a State doesn't like it it can simply pull out of the agreement anyway.

MR. SOLOVY: That would be a very hollow agreement indeed, and such a ruling would cause all of the States to opt out and disappear from this Act. The reason, I submit, that you decided Mauro, Cuyler, Carchman, and Fex, is to say here is a national law which we're going to adopt uniformly.

For example, Justice Scalia, in Fex you said that -- for the Court, that the 180 days ran when the receiving State received the notice. Now, if that's not a Federal law, then perhaps Iowa is going to say quite the opposite, it's going to say when the prisoner's accepted, and you're going to have havoc and chaos if you don't have one national rule.

So it doesn't -- with all due respect, it doesn't seem we should tarry very long on that position of the State of Indiana.

QUESTION: Mr. Solovy, I guess you concede there's no constitutional violation of the speedy trial clause here.

MR. SOLOVY: Well, this Court said, Justice O'Connor, in deciding Carchman, that Congress had in mind

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in passing this Act, at least in part the prisoner's speedy trial constitutional right. Now so --

QUESTION: Well, do you take the position that the Constitution was violated, the speedy trial clause, in this case.

MR. SOLOVY: I'd say the purpose of the Constitution --

QUESTION: Why don't you answer the question?

MR. SOLOVY: Yes. No, I do -- not directly, Justice O'Connor. It was not directly violated. But the implication of the Constitution --

QUESTION: Are you treating this, then, as though -- as a counterpart to the Speedy Trial Act. That is, there are firm deadlines in the Speedy Trial Act that don't necessarily coincide with what the Constitution would require absent -- just by itself.

MR. SOLOVY: That's a very helpful question to my position, Justice Ginsburg, because that's --

QUESTION: But, on the other hand, if you are equating it -- to the extent that it's implementing the same purpose that the constitutional provision implements, then if you're dealing with a constitutional violation, then mustn't you show prejudice, and where is any prejudice here?

MR. SOLOVY: Well, I don't -- well, there's a

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great prejudice to Mr. Reed because Mr. Reed has been in the penitentiary for 11 years and if the Act were enforced he would have been discharged in September of 1983. So there's great prejudice --

QUESTION: Well, that's not the kind of prejudice a violation of the speedy trial provision of the Constitution would be addressing, is it?

MR. SOLOVY: Well, but this is very much, Justice Ginsburg, like jurisdiction, that's always addressed in Federal habeas corpus.

QUESTION: Why isn't it very much like a statute of limitations, which is not jurisdictional.

MR. SOLOVY: It also is very much like a statute of limitations, and Justice Thomas said in his opinion in Doggett that the reasons for statute of limitations, statutes of repose, Speedy Trial Act, is you have a legislative determination that past that point in time the defendant shall not be tried, and --

QUESTION: But a statute of limitations is an affirmative defense that the defendant raises. It isn't, quote, jurisdictional.

MR. SOLOVY: In this -- in this -- under the Interstate Detainer Act, Justice Ginsburg, the defendant, the prisoner, does not have to assert the defense. When the prosecutor, in this case Mr. Brown, signed the request

for the detainer, he stated that he would bring Mr. Reed to trial within the provisions of section 4(c), and that is the 120-day provision.

And this case is rarely going to happen again, because the problem in this case was that Mr. Brown apparently never read section 4(c). And even though Indiana, like all the other States, have Interstate Detainer Act administrators, he, Mr. Brown, never understood that there was a 120-day limitation.

And, indeed, Mr. Reed filed three motions in which he called Mr. Brown's and the court's attention to the Interstate Detainer Act. And it wasn't until he filed his motion to dismiss at the end of August of '83 that the court said in open court -- and I quote from page 113 of the Joint Appendix. The court said: "Today is the first day I was aware that there was a 120-day limitation under the Detainer Act."

QUESTION: Mr. Solovy, if we had a case on habeas review from a decision in a lower Federal court, under the notion expressed in Hill against the United States, this might not be the kind of claim that would survive on Federal habeas review from a Federal court. We've required a complete miscarriage of justice, a fundamental defect. Do you think the same principles should apply on Federal habeas from a State court?

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MR. SOLOVY: No, I do not, Justice O'Connor. As we attempted to set forth in our brief, we think that the Hill line of cases do not pertain. Of course, in --

QUESTION: Well, we've treated, though, 2254 like 2255. We've said they're essentially the same.

MR. SOLOVY: Yes. But there is a major distinction. Of course, in Hill the defendant procedurally defaulted. As I recall, in that case he did not appeal. There is absolutely no procedural default in this case. Mr. Reed cried out quite loudly from the beginning that he wanted his rights under the Interstate Detainer Act enforced.

QUESTION: But that's a different ground of distinction. It's one thing to say that the same rules don't apply when the case comes from a State court as from a Federal court. It's another thing to say there's a procedural default in Hill and there wasn't here. Certainly, we've treated State court judgments in Federal habeas just as -- with just as much deference. In fact, we've gone out of our way to in the Davis and Francis line of cases.

MR. SOLOVY: Chief Justice Rehnquist, I think all courts are entitled to deference, State and Federal courts alike. But Congress said in 2254 that the Court should entertain a writ of habeas corpus from a State

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court if the person, here Mr. Reed, is held in violation of Federal law.

QUESTION: But doesn't the text of 2255 say the same thing about coming from a Federal court?

MR. SOLOVY: It does. But in -- the crucial distinction, in our mind, is the fact that the 2255 petitioner had his or her day before a Federal court and had his or her day for an opportunity to be heard before a Federal appellate court. Mr. Reed never had that opportunity, certainly in the courts of Indiana, and certainly we think the courts of Indiana misread the Federal Interstate Detainer Act. And certainly --

QUESTION: Why isn't that an argument for a different statute as opposed to a different definition of the terms which are common to the two sections?

MR. SOLOVY: I'm not sure, Justice Souter, I understand your question. I mean --

QUESTION: Well, you're saying that the Federal prisoner has already had certain chances for Federal review that the State prisoner doesn't, which may be a very good reason for having different -- having a different statute governing the two cases. But the two statutes that we have are textually identical on the point that you're concerned with.

MR. SOLOVY: That --

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QUESTION: And it seems to me -- why aren't you across the street making that argument, I guess is another way to put the question.

MR. SOLOVY: Well, we did make the argument, of course, across the street. We did make it in Indiana, and the question is whether that's preclusive. And there's nothing that I read --

QUESTION: I think Justice Souter means why didn't you ask Congress to amend the statute to make a distinction between 2255 and State habeas.

MR. SOLOVY: Well, because I think, if I read correctly this Court's precedent -- and certainly I've read a lot of this Court's precedents in preparation for this argument -- this Court has never adopted what the Solicitor General has suggested here, that a State prisoner who has not procedurally defaulted, who has properly preserved at every turn in the road his or her right, does not have to show --

QUESTION: Well, that's -- there you're making an assumption that I don't think is quite settled on this record. It's true that this petitioner referred to the 120-day limit, but there was a crucial time when he didn't, and usually you can't object to, say, the failure to give a charge unless you object at the moment when the judge could cure the error. This petitioner was notably

silent at the time when the judge could have cured the error by setting the trial at a somewhat earlier date.

MR. SOLOVY: Well, we don't think, Justice Ginsburg, that he was silent to a point where he should be penalized. A, at that point he was in court without counsel. Number two, under your Federal speedy trial analogy, the Federal Speedy Trial Act, you cannot waive that right save and except if you don't file a written motion for discharge prior to trial, and that's exactly what Mr. Reed did. Number two, the statute speaks in mandatory terms to the State, not to Mr. Reed.

And number three, he certainly didn't waive it because way within the time period, at the end of July and early August, he filed written motions to the court saying he should be tried within the time limits. And the court, Justice Ginsburg, also said to him: "Put everything in writing; I read better than I listen." And he instructed him to put his motions in writing, which he did. So I think under these circumstances there could be no waiver.

Now, Justice Souter, going back --

QUESTION: Mr. Solovy, before we leave this point, I had thought -- I had thought we rejected the proposal that 2255 and 2254 should be similarly interpreted. I thought we rejected that in Withrow. Indeed, I thought it was the basis for my separate writing

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in Withrow, that I thought we should treat them the same, and I thought the Court said we shouldn't.

MR. SOLOVY: Well, I certainly agree with that, Justice Scalia.

QUESTION: I'd be happy to change that.

MR. SOLOVY: No, I think you should adhere to your dissent and the reason for your dissent, and that's the way I read Sunal, Hill, Davis.

QUESTION: You don't want me to adhere to my dissent. You want the majority to adhere to its opinion in Withrow.

MR. SOLOVY: Well, your dissent helps me to show there's a distinction. At least you and I agree that the Court believes there's a distinction, and that's very important for my position.

QUESTION: I could be persuaded otherwise, I suppose.

(Laughter.)

MR. SOLOVY: Well, there -- if you can, Justice Scalia -- if you can, then there is a very good reason. Because, as I said before and as we said in our brief, the 2255 petitioner has had his or her day before a Federal court and a Federal appellate court, if they chose. Mr. Reed did not have that opportunity until he walked across the street and filed his Federal habeas corpus. And I say

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this is much akin to a jurisdictional argument.

QUESTION: We rejected that kind of argument, though, in our cases dealing with collateral estoppel and estoppel by judgment. The argument there was you have a right to a hearing once in a Federal court. And we said no, if you're stopped by judgment in the State court you don't have a second round. It's only an analogy. It wasn't habeas.

MR. SOLOVY: I agree, and I agree that that's where, Chief Justice Rehnquist, the analogy stops.

This is a very important writ. It's a very important right to a State prisoner, because we respectfully submit Indiana did not get it right. Here is a gentlemen who is now 64-years-old who is going to -- he has 11 years on a 34-year sentence for a $4,600 larceny. He's not a Cinderfella. I mean he has a record. But still, he has served there 11 years and we believe that had this Court reviewed this directly, he would be walking free, because it's clear they did not comply with this Act. Now --

QUESTION: Supposing this case had come from the Federal courts and was subject to the Hill-Davis-Timmreck line of reasoning, and you claimed a Speedy Trial Act violation, right; do you think any sort of a Speedy Trial Act violation could be raised in that situation?

MR. SOLOVY: No, I think at that point the gentlemen -- the prisoner would have been precluded because he would have presented his claim to the Federal district court and then to the appellate court, and I assume certiorari was denied. And although I think perhaps a compelling case could be made for him for miscarriage of justice, unless he overcame a very substantial hurdle, he would be stuck in prison.

QUESTION: But I don't understand -- if the reason -- the reasoning for the objection, for rejecting the objection would be that it doesn't go to the fairness of the trial and it doesn't go to guilt or innocence.

MR. SOLOVY: That's --

QUESTION: That's the same thing here; that it was some days more than 120 days doesn't go to guilt or innocence or the fairness of the trial.

MR. SOLOVY: That's exactly why I think comity, the reasons for deferring in Federal habeas corpus does not pertain here, Justice Ginsburg. Because you're not retrying whether Mr. Reed is guilty or innocent. You're trying the question of whether the Court had jurisdiction in the first place to try Mr. Reed past 120 --

QUESTION: Well, now we're going back to jurisdiction. I suggested to you that it was like a statute of limitations, which was not jurisdictional. You

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agreed it was like a statute of limitations.

MR. SOLOVY: I agreed it was like, but I did not agree that it wasn't jurisdictional, because if you look at the statute, if you look at page 6a of our appendix, it says that: "In respect of any proceeding made possible by this article." So the proceeding is made possible by the article.

Number two, if you look at 7a, section V(c), it says that once the 120th day is gone, then the trial court must dismiss the case and any retainer ceases to have effect. So he has to be immediately --

QUESTION: Are you suggesting that any time a rule is phrased in terms of "must," it becomes, quote, jurisdictional?

MR. SOLOVY: Well, in these terms it is certainly jurisdictional, because if you also look, Justice Ginsburg, at sections V(g) and (f) and (g) -- I'm sorry, section (d), (f), and (g), you will see that the prisoner remains in custody of the sending State; here the Federal court. He remained in custody for all purposes save and except for this trial.

Now, in your Alvarez kidnapping case --

QUESTION: Can you explain to me what sense it makes to say a violation of the Speedy Trial Act is not attended by this automatic rigid release but a violation

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of this Detainer Act is so accompanied? Both seem to be intended at the same thing, a backup to a speedy trial, kind of a firm line on speedy trial. But certainly in the Speedy Trial Act we know it's waivable; here you concede it's waivable, but you say it hasn't been waived. I don't understand why one would not want to interpret those two prescriptions differently.

MR. SOLOVY: Well, I think -- you know, the purposes behind both of those, Justice Ginsburg, are very much the same. Congress or the legislature says that we are going to step in the place of the Sixth Amendment. We're going to give you a bright line, and in this case it's 120 days. And all -- virtually every State has a Speedy Trial Act. Every State knows the harsh penalty that -- if you don't comply.

And in Barker, the Court said that, look, we're not going to tell you State courts what that bright line is; that's up to the legislature. And here the legislatures of the 48 States and Congress said that the 120th day is the bright line and prejudice after that is presumed, because the prisoner should be released.

And I do say it's very akin to jurisdiction, which is traditional habeas corpus. And this is a case, I say, which will very seldom be replicated because everybody is aware of speedy trial provisions, everybody

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is aware of the 120-day provision, but it so happens in this case the prosecuting attorney, although he signed that solemn agreement to try them within 120 days, never alerted the trial court, and the trial court didn't bother to read the Detainer Act and the rule was violated.

I suggest to you that that is very seldom going to happen. It does not intrude in any way upon, I think, the sovereignty of the State of Indiana because, as Chief Justice Edwards said in his dissenting opinion in Mars, every State, in signing this Detainer Act, gave up a little bit of their sovereignty. They solemnly agreed to abide by these rules, and when the rules are broken the statute says in bright lights this is what will happen.

And, Justice Souter, the question about going to Congress; here if Indiana wants not to abide by these rules, then it should go to the State legislatures and it should go to Congress and say make this a discretionary rule.

The Solicitor General and the State of Indiana attempt to make much of the fact that when Congress -- that Congress amended this Act in 1988 -- and that's set forth at the back of our appendix in our brief -- and Congress tacked onto this Act the mirror image of the Federal Speedy Trial Act. And that is when the rule is violated for a Federal -- when the Federal Government is

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the receiving State, the Federal court, district court has discretion either to dismiss the case with prejudice or without prejudice.

Now, that's a right which they chose not to give to the States. And we respectfully suggest that that shows that Congress meant what it said, and that is when the line here is crossed -- and, as I say, it'll seldom be crossed -- then the habeas corpus relief must be granted.

QUESTION: Suppose this judge were aware, this State trial judge, of the 120-day provision, he had it in his mind, and he said at that conference to set the trial date; I know about the limit, but you've papered me with motions, I think a reasonable extension is necessary, and so I'm setting the trial at X date and that is, in my judgment, a reasonable continuance in light of all the motions that you filed.

MR. SOLOVY: You would not be graced here with my presence, because that would then conform exactly with the statute. The statute, Justice Ginsburg, is so easy to comply with.

QUESTION: And it would have been so easy for that to have happened if only defendant, instead of standing silent, had said to the judge when they were setting the date for the trial --

MR. SOLOVY: Justice --

QUESTION: -- Look, you're setting it after the 120 days.

MR. SOLOVY: Justice Ginsburg, I can only repeat two things. One, if you look at 4-5 of the Joint Appendix, Mr. Brown, the prosecuting attorney, solemnly swore and promised that he would bring Mr. Reed to trial with the time -- within the time specified in article 4(c), and that was his job. And if it was Mr. Reed's job, who was told put it in writing, I read better than I listen, Mr. Reed filed three motions at the end of July and early August saying try me within the limits of the Speedy Trial Act.

QUESTION: Were the occasions on -- or the occasion on which the judge said put it in writing occasions when he was setting the trial date, or were those general motion sessions?

MR. SOLOVY: I think the -- Justice Souter, I don't have an exact memory. I may be incorrect, but I think the second such -- I think the time he said it is when he was discussing various Detainer Act motions. Mr. Reed was complaining about his Detainer Act rights from the beginning. He had an issue which is not before the Court. So I think he did say it at that time.

And unless the Court has some other questions, I'll reserve the remainder of my time.

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QUESTION: Very well, Mr. Solovy.

Mr. Abel, we'll hear from you.

ORAL ARGUMENT OF AREND J. ABEL

ON BEHALF OF THE RESPONDENTS

MR. ABEL: Thank you, Mr. Chief Justice, and may it please the Court:

Before I outline our argument, I'd like to point out one basic fact about the IAD, and that is simply that it was not imposed by Congress upon the States. Petitioner has suggested at various points that Congress decided not to give the States this or that right, or Congress said what it meant in the IAD. The simple fact is that the IAD was an agreement that the States voluntarily entered into. This Court detailed the background and history of that in United States v. Mauro, the underlying materials themselves detail that, and so I wanted to make that point clear.

That having been said, our three basic arguments are, first --

QUESTION: May I ask you about -- on that point, whether if the petitioner has sought review of the Indiana Supreme Court's decision to deny him relief under the IAD, would we have had jurisdiction to review the petition?

MR. ABEL: Absolutely, Your Honor. Both the language and the purpose of the statute governing this

Court's jurisdiction are quite different from the habeas corpus statute. And this Court has held in many cases which involved original actions, but also in cases on certiorari from the State courts, that, in essence, this Court must have the power to have the final say on --

QUESTION: But is that because the petition would have raised a Federal question?

MR. ABEL: We don't dispute that there is a Federal question involved in the IAD. Absolutely, there is a Federal -- there is -- I think in the words of one of those compact clause cases, a Federal right, title, privilege, or immunity, the Court didn't distinguish among those in that particular case. And we also believe that --

QUESTION: If we can agree to that, what, then, is the significance of the point that you made about this not being an Act of Congress?

MR. ABEL: That -- the significance of that, I think, is that the term "laws of the United States," as used in the habeas corpus statute, is, indeed, quite different from the terms of the certiorari statute. And as this Court has noted, those terms take their meaning from context.

The context of the habeas statute was reconstruction -- the reconstruction -- Congress was

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anticipating, in essence, resistance to the civil rights acts that it either had passed or was planning to pass, as well as to the post-Civil War amendments, and it wanted to provide a forum in the Federal district courts to deal with that. That is, again, wholly different from both the origin and the purpose of this Court's jurisdictional statutes.

QUESTION: So you're arguing this is not a law of the United States within the meaning of the habeas corpus statute.

MR. ABEL: Exactly, Justice Stevens.

QUESTION: Did you make that argument in your brief in opposition to certiorari?

MR. ABEL: We did not, Your Honor. We felt obligated to bring it to the Court's attention, however, because it is jurisdictional.

And, so, again, we believe that it's necessary to look at the purpose of the habeas corpus statute in construing its terms. Indeed, this Court --

QUESTION: Well, why is it jurisdictional? You say because the Federal courts shouldn't have entertained a habeas petition based on a violation of that Act?

MR. ABEL: That's correct, Mr. Chief Justice. The language of the habeas corpus statutes, and in particular 2254, says that a Federal district court "shall

entertain an application by a State prisoner only on the ground that he is custody in violation of the Constitution or laws or treaties of the United States." So that is --

QUESTION: Which is the same language that's used in Article III of the Constitution, "Constitution, laws, or treaty," so why does "laws" here mean something different than it means under the -- under Article III?

MR. ABEL: Well, again, it's because -- as this Court has recognized, the very same language can mean different things as it's used in different contexts. For example, this Court has consistently held that the language of the arising under clause in Article III of the Constitution is considerably broader than the general Federal question statute, even though their text is basically the same.

QUESTION: I take it, then, you accept your opponent's argument that what satisfies the requirement of the law under the two sections, 54 and 55, may be different?

MR. ABEL: Um --

QUESTION: And hence the standards applicable should be different, which would defeat your Hill argument.

MR. ABEL: No, I don't believe so. This Court has rather consistently treated 2254 and 2255, despite

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their somewhat differing text, as providing for equivalent relief. And, indeed, the Court noted that in some of the fundamental defect cases. Davis v. United States I believe is one of them, and the Court may also have noted that in Hill.

Also, in some of the cases applying the fundamental defect and miscarriage of justice standard, the Court has relied upon 2254 cases. Stone v. Powell itself also referred to the fundamental defect, inherent miscarriage of justice standard and, of course, Stone was a 2254 case.

So, in fact, we do believe that that standard applies under either, and there is not a reason to differentiate between the two. And to the extent there is any reason at all, it should be more difficult, rather than less difficult, to get relief from the judgment of a State court, because there is an overlay of Federalism involved that simply is absent in 2255.

In terms of our jurisdictional argument -- and I guess, by way of example of what we mean probably is a law of the United States as opposed to what is not, I think it's useful to look at some of the earlier cases under the Habeas Corpus Act. In fact, one of the first cases decided under that Act involved an alleged violation of the 1866 Civil Rights Act, and then Chief Justice Chase,

sitting as circuit justice, held that that was a violation of a law of the United States.

I think it's also significant to note that -- or at least to recognize that the drafters of the habeas corpus statutes knew what interstate compacts were, most likely, and they are certainly not listed as a ground for habeas corpus relief.

The primary argument that petitioner seems to make is that this Court's decisions in Cuyler v. Adams and Carchman v. Nash foreclose the argument that we're making here today. We don't believe that that is the case. Cuyler v. Adams was a section 1983 case rather than a habeas corpus case, but more importantly, in that case there were alleged violations of due process and equal protection, so there was never any question about the district court's jurisdiction there and the IAD was merely construed in order to avoid reaching those constitutional questions.

QUESTION: But didn't we hold in one of those cases that this was a Federal question?

MR. ABEL: That's correct. And we don't dispute that it's a Federal question, but neither 22 -- section 2241 nor 2254 indicate that wherever there is a Federal question involved, habeas corpus relief is appropriate.

QUESTION: But what language did we construe in

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whichever one of those cases it was that we decided there was a Federal question?

MR. ABEL: Well, in Cuyler, which I believe was the case with the extended analysis, the Court didn't purport to construe any particular statutory language. It simply said that the Third Circuit here has held that the IAD presents questions of Federal law which there's Federal power to construe, and we have to decide whether that's right. Again, no jurisdictional question was involved and so, of course, the Court didn't refer to any of the jurisdictional statutes.

Carchman v. Nash, another of the cases relied upon by petitioner, simply did not explicitly discuss a jurisdictional point. And as this Court has repeatedly held, where a case simply reaches the merits, as Carchman did, without discussing the jurisdictional point, it's not to be viewed as binding when the jurisdictional question is subsequently squarely raised.

Fex v. Michigan we believe, frankly, in essence proves our argument. The Court granted certiorari, but our argument basically is that the certiorari statute has much different terms and different language than the habeas corpus statutes. And so for all of those reasons, we believe that there simply was not jurisdiction to entertain the habeas corpus claim.

Secondly, even if there were jurisdiction to entertain the claim, relief should nonetheless be denied for the reasons this Court gave in Stone v. Powell and the analysis that it has followed and refined as recently as last term in Withrow v. Williams. In essence, what that analysis recognizes is that habeas corpus is an equitable remedy and it is therefore discretionary. The language of 28 U.S.C. section 2244 explicitly recognizes that the granting of relief is discretionary.

QUESTION: May I ask if you are saying in this second argument -- for present purpose, we'll assume the IAD is a law of the United States, which I understand you disagree with. But if it is a law of the United States, is it not correct that the prisoner is being held in violation of a law of the United States and you're arguing that nevertheless there should be equitable discretion not to grant relief.

MR. ABEL: That's correct. And, again, what section 2243 specifies is that the Court should dispose of the matter as law and justice require. That's a grant of equitable discretion, and we believe Stone v. Powell, which ought to apply, we think, to this case, is an example of what I think Judge Friendly called discretion hardened by experience into rule. Stone is a -- frankly, it's a discretionary rule, as the Court recognized in

Stone itself, and as this Court recognized in Withrow, what it represents is a balancing of the need for habeas corpus on the one hand and the costs of granting habeas corpus on the other.

QUESTION: Do you think in Stone the Court assumed that the State prisoner was being held in violation of the law of the United States?

MR. ABEL: To the extent that the exclusionary rule as developed by this Court, which is at least as Federal as the IAD, is a law of the United States, then I believe the Court was required to assume that.

QUESTION: But when you say equitable discretion, you don't mean a case-by-case analysis, do you? You know, in this case it seems better to let the person go and perhaps in the next case he seems to be a worse criminal so you wouldn't let him go.

MR. ABEL: No, not at all. As I said, I think it's an example of what you call discretion hardened by experience into rule. It's a -- it is discretionary in the same sense that the credential concerns that this Court sometimes recognizes in declining jurisdiction, despite the fact that a case or controversy might fall under Article III, are discretionary. It's discretionary in that sense, with the court system as a whole and on a reasoned principle basis rather than simply on a

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case-by-case basis.

QUESTION: But don't you think there's some truth to the argument made here that the Stone against Powell was based not on the extent of habeas corpus, but on the -- really, the construction of the exclusionary rule?

MR. ABEL: There's certainly language in Stone to that effect. If that were all Stone v. Powell were about, however, it certainly would not have been necessary for the Court to explore the contours of Stone on four separate occasions, none of which involved the Fourth Amendment, over a period of about 20 years. So I think Stone does represent something more than merely the scope of the exclusionary rule, and I think that is clear from the majority opinion last term in Withrow v. Williams.

QUESTION: In Withrow -- I checked it briefly -- we did not cite Davis v. the United States, unless I'm incorrect, and Davis v. United States was the case in which we said these two statutes, 2254 and 2255, are identical in scope. So do you think that Withrow was just an implied rejection of that statement in Davis?

MR. ABEL: No, I don't believe so, Justice Kennedy. I think if the Court were to take such a drastic step and overrule not only Davis' treatment of the statutes as basically equivalent, but also that treatment

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in a number of other cases, that it would have done so expressly.

QUESTION: Well, but how do you square Withrow with the statement in Davis, then?

MR. ABEL: Well, we believe, in essence, that Stone v. Powell and its rule represents a fact situation or a rule-situation specific application of the fundamental defect, inherent miscarriage of justice standard; that, in essence, what Stone represents is the Court's conclusion that an alleged violation of the exclusionary rule in which, by hypothesis, evidence that is perfectly trustworthy has been admitted, can never amount to a fundamental defect that inherently results in a complete miscarriage of justice.

So we think there's a close relationship to the two, and, in fact, Stone adverted to the fundamental defect test from Hill and Davis. So we think there is a very close relationship between the two.

QUESTION: You have alternate arguments for -- on the merits; one is Stone v. Powell and the other is the more traditional one. In the Seventh Circuit, did you argue Stone v. Powell or was that something that the Seventh Circuit developed on its own?

MR. ABEL: That was something -- we did not argue it. It was developed by the Seventh Circuit and was

the basis of the Seventh Circuit's decision.

QUESTION: But now that you have it, you are supporting it.

MR. ABEL: Well, among other things, we're supporting it because we believe the Seventh Circuit was correct. And the reason why we believe Stone v. -- the Stone v. Powell rule is more appropriate than a case-by-case fundamental defect analysis is, in essence, the factor that this Court identified as most important to its decision last term in Withrow, which is whether applying a rule like Stone v. Powell would do any good.

The Court in Withrow -- I believe the language in the opinion is that the Court had substantial -- had reason to believe that substantially all Miranda claims could simply be recast as involuntariness claims under the Fifth Amendment. That is certainly not the case with claims such as petitioner raises here. There is no reasonable prospect of even a colorable claim based on the Sixth Amendment in cases which allege nothing more than the lapse of a few extra days under the IAD.

QUESTION: I think you are right on that. The other factors, though, cut against you, don't they?

MR. ABEL: I --

QUESTION: I mean, the right is personal. It has a relationship to the truth-seeking function. The

violation is judicial, not executive. I mean, those all cut against you.

MR. ABEL: I suppose I would disagree with the notion that it does have the kind of relationship to the truth-seeking function that those rules -- in which the -- in the cases where the Court has declined to apply Stone have had. I think it's important to recognize what those are.

Of course, Withrow involved alleged Miranda violations. Kimmelman v. Morrison involved denial of effective assistance of counsel. Rose v. Mitchell involved race discrimination in grand jury selection and Jackson v. Virginia involved constitutionally insufficient evidence, which goes to the very core of the reliability of the guilt in its determination.

In fact, each of these, with the possible exception of Rose, are rights that do go to the very core of our confidence in the reliability of the outcome of the criminal trial. Rose, I think, is a slightly different case because it's based on two additional factors. Not only our confidence -- knowing, as know, that grand jury proceedings don't ultimately affect the verdict in a trial, but it's also based on society's perception and confidence in the judicial system.

And on the other side of the Stone scale, if you

will, the Court noted in Rose that there would not be new Federal-State tensions because the Court had been granting relief based on race discrimination in jury selection for approximately a century at the time Rose was decided. The IAD simply doesn't fall in the same class as those alleged rights.

QUESTION: No, but may I suggest this distinction on Stone against Powell. Can one not read Stone against Powell as saying that the defendant was held pursuant to a State court judgment that may have been obtained in a proceeding in which a procedural violation of the law of the United States occurred, rather than being held in direct violation of the law of the United States. Which is -- if one assumes that the IAD is a law of the United States, the petitioner here is being held in violation of that law because it mandatorily requires his release. Isn't that a distinction?

MR. ABEL: Well, it mandatorily requires dismissal of the charges. To say that it requires his release in the sense of habeas corpus --

QUESTION: Well, there's no jurisdiction to hold him other than pursuant to the charges that would have been dismissed.

MR. ABEL: Well, certainly, that's the basis of petitioner's detention, is the judgment of conviction.

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But I believe, as was pointed out in some of the earlier colloquy during petitioner's arguments, that the IAD represents, more appropriately, something akin to a statute of limitations than a jurisdictional rule, and a statute of limitations is generally not understood to be jurisdictional in the sense necessary to give rise for -- to collateral relief.

QUESTION: But now you're making a different argument. Now you're arguing that he's not being held in violation of a law of the United States because it's a statute of limitations which he waived. Is that basically what it is, then?

MR. ABEL: Um --

QUESTION: Why is he -- if it is a law of the United States, why is he not being held in violation of a law of the United States?

MR. ABEL: Well, among other things, because each Court that's actually reached the merits of the IAD claim has held there was no violation, and that includes the Federal district.

QUESTION: Yes, but -- I know they may have said that, but what is the explanation for that conclusion that you find satisfactory?

MR. ABEL: I believe the district court's explanation was entirely satisfactory, that periods during

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which pretrial dispositive motions were pending are periods during which the petitioner was unable to stand trial, which are expressly excluded from the calculation under the IAD. And I believe all circuits, save one, have held that expressly.

QUESTION: Let me rephrase the question and get away from the debate as to who's responsible for the delay. If one had a clear case in which the 180-day period had expired and it was clear that the defendant had repeatedly asked for trial within the 180 days and the judge said, well, I'm just not going to follow this statute, I'm not going to try you because it's inconvenient for me until the 181st day; would that person then be held in violation of a law of the United States, if you assume this to be a law of the United States?

MR. ABEL: If you assume this to be a law of the United States, then I believe, yes, he would be held in violation of it. Again, I would point out the statute does not make relief mandatory, but directs the court to dispose of the matter as law and justice shall require.

QUESTION: Were you accepting the argument a moment ago that any time a prisoner files a pretrial motion that for whatever reason would have to be disposed of prior to trial, that he, during the period that motion is pending, cannot be tried, and hence the running of the

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period is tolled?

MR. ABEL: We believe that the delay caused by such motions are periods, within the meaning of the IAD, during which the prisoner is unable to stand trial.

QUESTION: So that whenever such a motion is filed, the clock stops, is that right?

MR. ABEL: Yes. And as I've pointed out, all of the Federal circuits, except one, have indeed expressly held that.

I would also like to --

QUESTION: Have they followed the same rule when the State files motions that need to be disposed of before trial?

MR. ABEL: I'm sorry?

QUESTION: Have they followed the same rule when they're dealing with a motion filed by the State that requires disposition before trial?

MR. ABEL: I'm not aware of whether that rule has been followed for State motions.

QUESTION: Would you argue with the same result in that case?

MR. ABEL: I think that would be a plausible result. And, again, I think the flexibility built into the IAD is one of the reasons that we don't -- we think it doesn't form a proper predicate for habeas corpus relief.

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It is designed so that the trial court can continue the trial on the basis of good cause, which is one of the lowest standards that could be listed. The trial court can grant any reasonable continuance. It is not designed as a rigid set of rules.

I would like to point out, however, we don't believe the merits of the IAD are within the scope of the Court's grant of review in this case, and the merits of the alleged violation, and they weren't, in fact, passed on by the court below.

On the -- the other points, I guess, on the Stone analysis -- apart from the notion that this is, in essence, unrelated to the soundness of the trial, we also know that it's not a federally imposed obligation. And even if it technically is a Federal law of some species enough to confer jurisdiction, which we don't think it is, we believe the essentially non-Federal nature of it is an additional equitable factor counseling against the grant of habeas corpus relief.

We know it's not such a Federal requirement because it does not apply in all States. And I believe there was a statement earlier that there was some notion of a national uniform mandate. That's simply not accurate. There are two States in which it doesn't apply at all. Even in the States where it does apply, it

applies to only the tiniest portion of criminal defendants, those who are incarcerated for crimes committed elsewhere, which I might point out are -- almost by definition it applies to repeat offenders, which ups the ante on the cost side of the Withrow scale.

I guess finally on the fundamental defect point, I'd just like to note not only has this Court not distinguished between section 2255 and 2254; this Court has also rejected the notion that there's some sort of unencumbered right to litigate Federal issues in Federal courts, which seems to be what petitioner's argument is premised on. The Court rejected that, we believe, in Swain v. Pressley, and also rejected that in Allen v. McCrory.

QUESTION: I guess in our habeas cases involving Federal convictions where we will not accept habeas if there's been a full and fair opportunity to litigate the issue below, even though the outcome is incorrect, there's no doubt that in some cases, unless you believe the lower Federal courts are always right, the defendant is being held in violation of Federal law.

MR. ABEL: I believe that's correct, Justice Scalia.

QUESTION: It has to be true --

MR. ABEL: Yes.

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QUESTION: -- Unless you assume that the lower Federal courts are always right.

MR. ABEL: That -- I believe that's absolutely correct.

QUESTION: We say, in effect, he may well be held in violation of Federal law, but he has had a full and fair opportunity to litigate that, end of matter.

MR. ABEL: Exactly, Justice Scalia.

Accordingly, we request that the Court either affirm the judgment of the Seventh Circuit or remand with instructions to dismiss for want of jurisdiction.

Thank you.

QUESTION: Thank you, Mr. Abel.

Mr. Solovy, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JEROLD S. SOLOVY

ON BEHALF OF THE PETITIONER

MR. SOLOVY: Thank you, Mr. Chief Justice Rehnquist, may it please the Court:

On this tolling issue, there was simply nothing present before the trial court that would have impeded the trial. And even if you read section 6 of the Interstate Detainer Act to allow motions to toll the statute, that has to be determined by the trial court and the trial court had very speedily passed upon all pending motions and the trial court simply denied the motion in September,

1983 because he said he had never heard of the Act before, not because the motions had impeded.

Now, this Court is well aware, of course, that time limits have very important significance to lawyers. If you get on the 91st day the best certiorari petition you have ever read in your entire judicial career, unless an extension has been granted, Congress says forget that petitioner. You have no authority to -- you can read it, but you can't grant it.

In Coleman v. Thompson, a death penalty case, the Court did not consider the position of the petitioner in that case because his counsel had filed his appeal to the Virginia Supreme Court on the 33rd day rather than the 30th day. Time is important. Time constraints are important. The IAD says exactly what would happen. And for whatever significance one can draw from it, no State has filed an amicus in this case supporting Indiana because, I submit, it is clear the time limitation of 4(c) is crystal clear and these cases rarely happen, but Mr. Reed has spent 11 years in the penitentiary in violation of a law of the United States.

And, lastly, I started to mention Alvarez, and that was a kidnapping case, and to determine whether the Court had jurisdiction to try the doctor in that case, who had been kidnapped from Mexico, the Court carefully looked

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at the extradition treaty with Mexico and decided that nothing was amiss by kidnapping and bringing him here, and the Court had jurisdiction to try it.

If you look at the IAD, something is very amiss here, and that is that the treaty by which Indiana got Mr. Reed from the Federal jurisdiction said you must try him within 120 days. That didn't happen. We submit that the writ should be granted.

Unless you have any other questions, that concludes my argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Solovy.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

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ORRIN S. REED, Petitioner v.

ROBERT FARLEY, SUPERINTENDENT,

INDIANA STATE PRISON, ET AL.

CASE NO.: 93-5418
and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)