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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: DENNIS BURNHAM, Petitioner V.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF  
MARION (FRANCIE BURNHAM, REAL PARTY  
IN INTEREST)

CASE NO: 89-44

PLACE: Washington, D.C.

DATE: February 28, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS BURNHAM, :  
Petitioner :  
V. : No. 89-44  
SUPERIOR COURT OF CALIFORNIA, :  
COUNTY OF MARION (FRANCIE :  
BURNHAM, REAL PARTY IN :  
INTEREST) :

-----x  
Washington, D.C.  
Wednesday, February 28, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:42 a.m.

APPEARANCES:

RICHARD SHERMAN, ESQ., Berkeley, California; on behalf  
of the Petitioner.

JAMES O. DEVEREAUX, ESQ., San Francisco, California; on  
behalf of the Respondents.

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

2 (11:42 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 89-44, Dennis Burnham v. The Superior Court of  
5 California.

6 Mr. Sherman.

7 ORAL ARGUMENT OF RICHARD SHERMAN

8 ON BEHALF OF THE PETITIONER

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

11 The issue presented here is whether a state can  
12 exercise personal jurisdiction over a nonresident  
13 defendant who was personally served while present in the  
14 state if that defendant does not otherwise have sufficient  
15 contacts with the state to satisfy the minimum contacts  
16 test announced in International Shoe.

17 The issue arises in the following context. The  
18 parties lived virtually all their married lives in New  
19 Jersey. They split up in 1987. They had two children  
20 about ages 2 and 8 at the time, and they entered into a  
21 marital settlement agreement resolving everything in New  
22 Jersey.

23 The wife then moved to California with the  
24 children, as planned, and husband filed for dissolution in  
25 New Jersey and asked the court to incorporate their

1 marital settlement agreement. Before he served Mrs.  
2 Burnham with his petition, she filed an action in  
3 California for legal separation and filed him after he  
4 brought the children back from visiting with them to her  
5 home in Mill Valley, California.

6 Mr. Burnham moved to quash service arguing that  
7 he did not have sufficient minimum contacts under Kulko,  
8 International Shoe and similar cases and that under this  
9 Court's decision in Shaffer v. Heitner the fact that he  
10 was served in California was no longer relevant at all.

11 The trial court initially agreed with Mr.  
12 Burnham and granted his motion, in part holding that there  
13 were not sufficient minimum contacts and there was no  
14 personal jurisdiction. It reconsidered that order when  
15 Mrs. Burnham's attorney convinced it that the fact that he  
16 was served in the forum was sufficient and that  
17 notwithstanding what this Court held in Shaffer and the  
18 language in Shaffer, personal service is still sufficient.

19 The court of appeal denied the petition for a  
20 writ in a decision which, again, said that Shaffer, the  
21 language in Shaffer, had not changed the traditional rule  
22 -- it goes by the nickname of transient jurisdiction. It  
23 relied on cases such as the Supreme Court's case in  
24 Nevada, Cariaga which had said this Court has never  
25 directly held that transient jurisdiction is no good so we

1 will apply it until we are instructed otherwise.

2 We're here today to ask you to instruct the  
3 courts of this land otherwise, to give effect to what the  
4 Court said in Shaffer, that personal jurisdiction in all  
5 cases must be tested by the minimum contacts test.

6 Now, it's important to keep in mind that  
7 although the doctrine is often called transient  
8 jurisdiction or sometimes, more colorfully, gotcha  
9 jurisdiction, what's really at issue is not whether the  
10 defendant is passing through momentarily. What's at issue  
11 is whether the fact of service on a defendant while he is  
12 in the forum is alone sufficient.

13 The traditional view that it was founded on the  
14 notion that -- what jurisdiction is all about, what  
15 personal jurisdiction is all about is whether the state  
16 has power over the defendant, physical power over the  
17 defendant. And it does, according to the traditional  
18 view, when a defendant is within its boundaries.

19 That view was long criticized by the  
20 commentators and was rejected by this Court in  
21 International Shoe and then again in Shaffer. That power,  
22 physical power over the defendant is not fundamentally the  
23 basis for the exercise of state court jurisdiction.

24 QUESTION: Mr. Sherman, even if you are correct  
25 that some minimum contact is necessary for personal

1 jurisdiction, wouldn't the transitory presence within the  
2 state of someone meet that test --

3 MR. SHERMAN: Well --

4 QUESTION: -- in a good many instances?

5 MR. SHERMAN: I think not, Your Honor. And it's  
6 important to distinguish --

7 QUESTION: I would have thought so and that  
8 perhaps someone who voluntarily enters a state to transact  
9 some business or to visit there might well meet whatever  
10 minimum contacts are --

11 MR. SHERMAN: That -- that --

12 QUESTION: -- required.

13 MR. SHERMAN: On that -- on those facts, yes.  
14 If he were just passing through momentarily, say, stopping  
15 over on his way to Hawaii, not conducting any business  
16 or --

17 QUESTION: Well --

18 MR. SHERMAN: -- classically flying over --

19 QUESTION: -- yes. You have a different  
20 situation is someone is flying over the state, overhead --

21 MR. SHERMAN: Right.

22 QUESTION: -- and is served in mid-air than you  
23 do with someone in your client's --

24 MR. SHERMAN: That's correct.

25 QUESTION: -- position.

1 MR. SHERMAN: But the question that your  
2 hypothetical poses is what kinds of contacts would be  
3 sufficient under the minimum contacts test for somebody  
4 who was not in the state very long. And the answer to  
5 that would depend upon applying the minimum contacts test  
6 and typically the cause of action has to be related to or  
7 arise out of contacts that the defendant has.

8 And in your example, for instance, if somebody  
9 is -- is in the state transacting some business, even  
10 though they are there very briefly, if there is a cause of  
11 action that the plaintiff has against that defendant that  
12 arises out of his transacting that business, there's no  
13 question that under the minimum contacts test --

14 QUESTION: Mr. Sherman --

15 MR. SHERMAN: -- there would be a restriction.

16 QUESTION: This sort of points out -- points up  
17 one of the problems with -- with abandoning the gotcha  
18 test. One of the nice things about the gotcha test was  
19 that it made very simple the preliminary question of  
20 jurisdiction, which ought to be simple, it being a  
21 preliminary question.

22 It's very silly to have to litigate about that  
23 and what you're saying is by abandoning the gotcha test  
24 we're going to have to look in every single case to see  
25 whether the individual is not only served -- or -- or the



1 state courts will -- not only whether the individual was  
2 served there but whether the suit pertains to his presence  
3 there and so forth. It's a big deal.

4 MR. SHERMAN: Well, Your Honor, if there were no  
5 Fourteenth Amendment to the Constitution and we didn't  
6 have to worry about due process and we're looking for an  
7 easy test, then that might be an easy test that a court  
8 would want to --

9 QUESTION: But for 200 years --

10 MR. SHERMAN: Well, that's true. It's been  
11 around for a long time. But quasi in rem jurisdiction was  
12 around for a long time too and this Court said in Shaffer  
13 that it was fundamentally unfair and did not comport with  
14 the Fourteenth Amendment and, notwithstanding its lineage,  
15 it was consigned to the dustbin of judicial history.

16 QUESTION: Well, easy tests are not unrelated to  
17 the due process clause. There's a high degree of  
18 predictability. I think many lay people understand,  
19 without thinking about -- in terms of jurisdiction or in  
20 rem or in personam, that if you're within the borders of a  
21 state, you're subject to that state. That's all.

22 MR. SHERMAN: I think what most people would  
23 think is if you're within the borders of the state, you're  
24 subject to the power, if you will, of the state. If you  
25 do something in the state that's wrong, they can arrest

1 you. If you're injured, you can go to the hospital and  
2 get treated. And if a cause of action arises out of those  
3 activities, I think a defendant could rightfully expect to  
4 be sued on them.

5 But if you are in the state for reasons which do  
6 not give rise to the cause of action that is sued on, then  
7 I don't think you would expect to be subject to a lawsuit  
8 over them, which is what happened in this case.

9 QUESTION: Well, the minimum contacts really --  
10 test, though, really developed on when is service outside  
11 the state satisfactory.

12 MR. SHERMAN: That's true. That's true. And I  
13 think the interesting --

14 QUESTION: And International Shoe I thought  
15 seemed to recognize the validity of the so-called gotcha.

16 MR. SHERMAN: Well, I think there's kind of been  
17 a mistaken understanding of what that phrase meant. The  
18 courts -- not this Court because it hasn't addressed it,  
19 obviously, but the state courts that have addressed it --  
20 have looked at International Shoe and have said if -- the  
21 language there, if the defendant be not present in the  
22 forum.

23 But the issue is not if the defendant be not  
24 present in the form. It's if the defendant be not served  
25 while present in the forum. If I have -- say I'm -- I'm a

1 plaintiff and I -- in New York I enter into a contract  
2 with two defendants in New York and those two defendants  
3 then decide to take a trip to Hawaii and they both got to  
4 Hawaii contemplating a two-week trip. And there's a  
5 dispute between us that arose in New York over the  
6 validity of that contract and I decide to sue them in New  
7 York.

8 So I file a lawsuit in New York and I get my  
9 process server to go to Hawaii and I serve one of them who  
10 has been there for a week and then -- I'm sorry, I want  
11 this lawsuit to be in Hawaii, not in New York. I serve  
12 them -- one of them in Hawaii who has been there for a  
13 week and he calls the other fellow and he says, the  
14 process server is here, you'd better leave, and that  
15 person leaves a week later.

16 He's been there twice as long and has twice as  
17 many contacts, he's not subject to the jurisdiction of  
18 Hawaii. But the first fellow is because the process  
19 server happened to catch him. And that seems to me to be  
20 an irrational result.

21 QUESTION: (Inaudible) Pennoyer was irrational.

22 MR. SHERMAN: Well, that's correct. I think  
23 this Court said as much in International Shoe and then  
24 in Shaffer.

25 QUESTION: Well, I don't know. It seemed to

1 recognize Pennoyer. It didn't overturn -- overturn  
2 Pennoyer.

3 MR. SHERMAN: I think it overturned the  
4 theoretical underpinning of Pennoyer when it said that  
5 power was no longer the basis of jurisdiction. It's true  
6 that was in the context of out-of-state defendants, but  
7 the reasoning of the decision was to reject the notion  
8 that power was the basis of jurisdiction. That's why you  
9 can get jurisdiction over out-of-state defendants after  
10 International Shoe, because power is not the basis for  
11 jurisdiction.

12 If power is not the basis for jurisdiction, then  
13 the fact that you physically get power over the defendant  
14 no longer can be the basis for jurisdiction either.

15 But going back to the question --

16 QUESTION: May I ask you another sort of general  
17 question? Do you -- you apply the same theory to criminal  
18 jurisdiction? Unless the man committed the crime in the  
19 state he can't be apprehended when he goes through and  
20 then extradited?

21 MR. SHERMAN: I really do not know enough about  
22 criminal law --

23 QUESTION: Say -- say somebody commits a crime  
24 in Nevada and they send out an all points bulletin and  
25 he's hitchhiking through New Mexico and -- but he's not --

1 doesn't intend to stay there, had no contacts at all  
2 whatsoever, but they arrest him and extradite him. I  
3 guess that -- you'd have no power to do that.

4 MR. SHERMAN: Well, I don't know enough about  
5 criminal law to give the best answer to that.

6 QUESTION: But you --

7 MR. SHERMAN: But my off-the-cuff answer would  
8 be that although the state may have the power, because  
9 it's given the right to do so by this Court, to arrest the  
10 defendant and to ship him back to the other state,  
11 extradite him, that the analogy in the civil case would be  
12 that if the defendant is served in the law -- in the  
13 forum, that the state then can shift the lawsuit -- should  
14 shift the lawsuit back to the original --

15 QUESTION: Well, forum nonconvenience allows  
16 that. They can shift the lawsuit back.

17 MR. SHERMAN: But -- well, but the extradition  
18 is mandatory, is it not, in your hypothetical? It has to  
19 go back to be tried in the state where he was from, where  
20 he committed the act.

21 QUESTION: Yeah, but the only way you get  
22 jurisdiction over him is in the gotcha theory.

23 MR. SHERMAN: No. The only way you get  
24 jurisdiction over him in a criminal case is you actually  
25 arrest him.

1 QUESTION: That's right. You --

2 MR. SHERMAN: But the purpose of arresting  
3 him --

4 QUESTION: But your power to do it is based  
5 entirely on the fact that he's -- he happens to be passing  
6 through the state.

7 MR. SHERMAN: That's true, but --

8 QUESTION: I don't know why that's any more  
9 unfair than --

10 MR. SHERMAN: But the --

11 QUESTION: -- or any less unfair than what you  
12 say.

13 MR. SHERMAN: But the consequence of your  
14 hypothetical is that the defendant winds up being tried in  
15 the state of origin.

16 QUESTION: Well, that's true. But --

17 MR. SHERMAN: And the analogy --

18 QUESTION: -- there's a legal proceeding in the  
19 state of arrest, namely, the extradition hearing and he  
20 might conceivably win there.

21 MR. SHERMAN: Well, but in the civil case the  
22 analogy would be there's a civil proceeding in California  
23 and he is served in California and then he makes his  
24 motion to quash for lack of jurisdiction, and it's  
25 granted, and the case then goes back to New Jersey.

1 QUESTION: Yeah, but I don't know why he --

2 MR. SHERMAN: Because he doesn't have  
3 sufficient --

4 QUESTION: I don't know why the criminal --

5 MR. SHERMAN: -- contacts --

6 QUESTION: -- defendant wouldn't be entitled to  
7 have his motion granted also on your theory. I don't know  
8 why -- because the only thing -- the only basis for  
9 jurisdiction over him is he happened to be there.

10 Well, anyway, that's a different case, I guess.  
11 It seems to me it's a stronger case than -- well, anyway,  
12 go ahead.

13 MR. SHERMAN: There's no more I can say about  
14 that.

15 I'd like to advert back to Justice Scalia's  
16 question for a moment about a bright-line rule and point  
17 out that things are (a) not so simple even under Pennoyer  
18 because even under Pennoyer, with respect to out-of-state  
19 defendants, in order to allow there to be jurisdiction  
20 over out-of-state defendants all kinds of fictions and  
21 exceptions were created in -- post-Pennoyer, like in Hess.

22 I mean, if you drive in the state, you would  
23 (inaudible) consent that the registrar of motor vehicles  
24 is your agent for service of process. I mean, there are  
25 all kinds of exceptions that were created. It was not

1 simple prior -- under the Pennoyer regime.

2 Now, if it were --

3 QUESTION: It's clear that one way you -- you  
4 can place the jurisdiction in the case just beyond doubt  
5 is you serve the individual in the jurisdiction. I mean,  
6 yeah, there are a lot of refinements as to other ways that  
7 you may get him, but up until now you have known that.  
8 One way to be sure, you serve him.

9 MR. SHERMAN: Well --

10 QUESTION: That -- that would be gone?

11 MR. SHERMAN: That's true. The second -- second  
12 part of my answer to your question is that in Stanley v.  
13 Illinois and in Shaffer this Court said that due process  
14 should not be sacrificed for the sake of simplicity, that  
15 the cost is too high. And Justice Marshall in Shaffer  
16 said that quasi in rem jurisdiction, traditional though it  
17 may be, and easy to apply though it may be, is not  
18 consistent with fundamental notions of due process. And  
19 the fact that it's easy and simple and eliminates cost is  
20 not sufficient for constitutional scrutiny.

21 QUESTION: Mr. Sherman, what do you think of the  
22 amended restatement version of when jurisdiction applies?

23 MR. SHERMAN: I think there are several problems  
24 with it. It's obviously somewhat of an improvement over  
25 the traditional rule because it allows for exceptions.



1       However, I think there are three things wrong with it.

2               The first is that it starts from the notion that  
3       the service --

4               QUESTION:   That there is jurisdiction?

5               MR. SHERMAN:   There is jurisdiction.

6               QUESTION:   It starts from that premise?

7               MR. SHERMAN:   That's right.   And the basis for  
8       that, I believe, is that the restaters were unwilling to  
9       give up the notion that jurisdiction is fundamentally  
10      based on power.

11              QUESTION:   Well, it struck me as maybe a pretty  
12      good statement of what the rule might be.   That unless --  
13      that jurisdiction does attach unless it's just too  
14      attenuated.   And the notes refer to special circumstances  
15      which might include the criminal case where otherwise  
16      there will be no opportunity to arrest the defendant.

17              MR. SHERMAN:   That's true.   But in order to  
18      accept it jurisprudentially I think this Court would have  
19      to say that its prior decisions which indicated that  
20      jurisdiction is not fundamentally based upon power are  
21      incorrect, that in one sense jurisdiction is to be  
22      continually based upon power although the defendant can  
23      then show reasons why it shouldn't be exercised -- then  
24      jurisdiction will not be exercised.

25              QUESTION:   Do you think -- do you think we

1 really -- this case really -- is it really necessary in  
2 this case for us to decide this issue? It seems -- isn't  
3 it open -- isn't the issue open as whether there were  
4 plenty of contacts here anyway besides just presence?

5 MR. SHERMAN: Well, no, I don't believe so, Your  
6 Honor. The court of appeal opinion, which you are  
7 reviewing, refused to issue a petition -- refused to grant  
8 the petition for writ of mandate and compel the trial  
9 court to quash the service because it held that service on  
10 the defendant while he is present in the forum is still a  
11 basis for jurisdiction.

12 QUESTION: But here's a -- but it said in light  
13 of the evidence presented to the trial court, the  
14 petitioner's -- within California was for the dual  
15 purposes of visitation and conducting business activities.

16 MR. SHERMAN: That's correct. That is --

17 QUESTION: So the imposition of personal  
18 jurisdiction in this case will not affect -- will not act  
19 to discourage parental visitation.

20 MR. SHERMAN: That's correct. Your Honor, the  
21 reason the court of appeals said that is it was responding  
22 to our argument --

23 QUESTION: I understand. I understand.

24 MR. SHERMAN: -- as to -- so --

25 QUESTION: But nevertheless --

1 MR. SHERMAN: It was not --

2 QUESTION: -- we -- we judge this case -- as the  
3 case comes to us, he wasn't just there; he was there  
4 conducting business.

5 MR. SHERMAN: That's true. That's true. But  
6 the court of appeal opinion was not upholding jurisdiction  
7 on the ground that he was conducting business.

8 QUESTION: Well, maybe we don't have --

9 MR. SHERMAN: And it couldn't have --

10 QUESTION: -- to hold that, but I don't -- if  
11 that was -- if that's the case --

12 MR. SHERMAN: It doesn't say that --

13 QUESTION: -- maybe we made a mistake granting  
14 the case.

15 MR. SHERMAN: It doesn't say that jurisdiction  
16 was being upheld on the ground that he has sufficient  
17 contacts under the minimum contacts test, and it couldn't  
18 have because it was quite obvious that the trial court did  
19 not ground jurisdiction on that basis, and it couldn't  
20 have because under California law and under this Court's  
21 decisions there are insufficient contacts as a matter of  
22 law to uphold jurisdiction here for two reasons.

23 The first is that doing business in a state only  
24 gives rise to jurisdiction under the traditional test, if  
25 that's what the Court thought it was applying, or if

1 that's what this Court wanted to apply, for causes of  
2 action arising out of that business. And the cause of  
3 action here does not arise out of the business that Mr.  
4 Burnham did in California.

5 The wife is seeking to invalidate a marital  
6 settlement agreement that she executed in New Jersey.  
7 That has nothing to do with the husband's contacts in  
8 California.

9 Secondly, California has held in *Modlin v.*  
10 Superior Court, which is in our briefs, that if a person,  
11 a father, combines coming to a state to visit his children  
12 with doing some business, the combination of those do not  
13 meet the minimum contacts test. That's *Modlin v. Superior*  
14 *Court*, 176 Cal.App.3d 1176.

15 So, the court of appeal --

16 QUESTION: I suppose if all that the wife wanted  
17 to do was to change custody, she could have served him out  
18 of state.

19 MR. SHERMAN: That's correct because under the  
20 Uniform Child Custody Jurisdiction Act you don't need  
21 personal jurisdiction --

22 QUESTION: Yes.

23 MR. SHERMAN: -- over the defendant in order to  
24 adjudicate status of the children. But the Uniform Child  
25 Custody Jurisdiction Act explicitly says that you don't

1 then litigate support issues.

2 QUESTION: Mr. Sherman, if -- if we can't look  
3 to 500 years, or however long it is of -- of the common  
4 law as to what, you know, fundamental fairness requires --  
5 we can't really on that -- and we can't even rely on the  
6 American Law Institute, where -- where do we search --

7 MR. SHERMAN: The minimum contacts --

8 QUESTION: -- for this -- for this principle of  
9 what fundamental fairness requires?

10 MR. SHERMAN: You just -- you just apply the  
11 minimum contacts test across the board.

12 QUESTION: But this is a contact. I mean --

13 MR. SHERMAN: Well --

14 QUESTION: -- physical presence is a contact.

15 MR. SHERMAN: That's true. That's true.

16 QUESTION: I mean, everything is a contact of  
17 sorts.

18 MR. SHERMAN: That's true. And I --

19 QUESTION: And our -- our tradition would seem  
20 to show that it's -- that it's enough of a contact.

21 MR. SHERMAN: No, because --

22 QUESTION: Why not?

23 MR. SHERMAN: Because the tradition does not  
24 found jurisdiction on the fact that a person is present.  
25 It founds jurisdiction on the fact that, while present,

1 the person is served. Now, you can do away with the  
2 gotcha theory of jurisdiction and still say that if a  
3 person is present in the state, he has a contact with the  
4 state. There's no question about that.

5 The question is what significance does his  
6 contact have in assessing whether or not the minimum  
7 contacts test of International Shoe is met.

8 QUESTION: We'll resume there at 1:00, Mr.  
9 Sherman.

10 (Whereupon, at 12:00 noon, the oral argument in  
11 the above-entitled matter was recessed, to reconvene at  
12 1:00 p.m. this same day.)  
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(12:58 p.m.)

1  
2 CHIEF JUSTICE REHNQUIST: We'll resume the  
3 argument in Burnham against Superior Court.

4 Mr. Sherman.

5 MR. SHERMAN: Thank you, Mr. Chief Justice, and  
6 may it please the Court:

7 In thinking about this matter over the lunch  
8 hour it occurred to me that I ought to say that we're  
9 really not asking this Court to do anything very radical.  
10 Although it's true that the doctrine of transient  
11 jurisdiction has been around for a long time, there has  
12 been an evolution in the law which has pointed in the  
13 direction of abolishing it.

14 In fact, in Shaffer at page 213 the Court said,  
15 "We therefore conclude that all assertions of state court  
16 jurisdiction must be evaluated according to the standards  
17 set forth in International Shoe." That's been quoted very  
18 often.

19 However, there's a footnote to that sentence  
20 which has not been quoted very often, and it says, "It  
21 would not be fruitful for us to reexamine the facts of  
22 cases decided on the rationales of Pennoyer and Harris to  
23 determine whether jurisdiction might be sustained under  
24 the standards we adopt today. To the extent that prior  
25 decisions are inconsistent with this standard, they are

1 overruled."

2 So, already in Shaffer the Court had recognized  
3 that the law was moving in the direction of being  
4 concerned with fundamental fairness. And I think if you  
5 look at the old rule coming out of Pennoyer, it perhaps  
6 was fair in 1877 to say that, since you can't get service  
7 on the defendant outside the jurisdiction, if you're lucky  
8 enough to catch him in the jurisdiction, well, you've  
9 gotten him and you've got jurisdiction over him.

10 But after International Shoe liberalized the  
11 degree to which you could get jurisdiction over the  
12 defendant by service outside the forum, the rationale for  
13 saying that you can get jurisdiction over him by serving  
14 him in the forum was totally undercut.

15 Therefore, if you abolish the doctrine of  
16 transient jurisdiction in this case, all you're doing is  
17 kind of completing a trio of cases that started with  
18 International Shoe, Shaffer and now this case.

19 Unless you do something to the doctrine of  
20 transient jurisdiction, we're stuck with cases like Grace  
21 v. MacArthur where you're served if you're flying over and  
22 have no contacts. You're stuck with cases where the  
23 defendant comes into the forum and just steps over the  
24 line and is served with a piece of paper. You're stuck  
25 with cases where somebody is on the way to Hawaii and the



1 plane lands in San Francisco airport and they're served  
2 and have no other contacts with San Francisco.

3 None of those things would seem to comport with  
4 fundamental notions of fair play and substantial justice.

5 QUESTION: Well, none of those things are  
6 involved here either.

7 MR. SHERMAN: That's true. That's true. But  
8 the point of those examples is that if you don't do  
9 anything to the doctrine of transient jurisdiction, that's  
10 where the law will be left. So I urge the Court to keep  
11 the case --

12 QUESTION: (Inaudible).

13 MR. SHERMAN: That's true. It has been there.  
14 That's why Grace was decided the way it was. But the  
15 reason it was there --

16 QUESTION: So, we've been stuck with these  
17 examples for a long time?

18 MR. SHERMAN: That's true. And the time has  
19 come to liberate us from them and to make sure that they  
20 don't happen again. That was the whole point of  
21 International Shoe and Shaffer. We were stuck with the  
22 doctrine of quasi in rem jurisdiction for a long time.  
23 But it finally was recognized that it was outmoded and it  
24 was no longer necessary and the Court abolished it.

25 QUESTION: I assume that the state -- the state

1 supreme courts can deem it outmoded as far as their states  
2 are concerned or the state legislatures.

3 MR. SHERMAN: Well --

4 QUESTION: Right?

5 MR. SHERMAN: This Court presides over the area  
6 of personal jurisdiction because it interprets what is  
7 consistent with the fundamental due process --

8 QUESTION: Well, that's right.

9 MR. SHERMAN: -- protections that defendants  
10 have.

11 QUESTION: But what -- what is -- what is  
12 consistent with due process under the Federal  
13 Constitution? I mean, we -- we -- we might decide that  
14 this has been around for too long for us to say that it  
15 isn't in accordance with due process, whereas the state  
16 supreme courts, I assume, would be freer than we were.

17 MR. SHERMAN: Well, the problem I see with that  
18 is the state supreme courts have been loath to overturn  
19 the doctrine precisely because this Court has not. I  
20 mean, you have --

21 QUESTION: Well, they'd have no choice if we  
22 did.

23 MR. SHERMAN: Well, that's -- that's true. On  
24 the other hand, it doesn't seem as if any state court,  
25 high court, has been willing to, as Judge Goldberg said so

1 colorfully in Mordelt, to ferry the rule across the River  
2 Styx without instructions from this Court.

3 So, nobody seems to be willing to take that step  
4 because they feel bound by Pennoyer v. Neff.

5 QUESTION: What about -- what about state  
6 legislatures?

7 MR. SHERMAN: I don't know of any legislature  
8 that has seen fit to -- as a matter of fact, they've all  
9 gone the other way, as California has, and enacted a long-  
10 arm statute that says we have jurisdiction if it's  
11 consistent with the Constitution. And this Court tells  
12 states what's consistent with the Constitution.

13 QUESTION: Well, then -- then how do we know  
14 this is inconsistent with fundamental principles of  
15 fairness if the state -- state courts haven't thought so  
16 -- and they certainly could do it under state law.  
17 They're -- they're not bound by us on that.

18 MR. SHERMAN: Well --

19 QUESTION: I mean, I think they could say, as a  
20 matter of our state constitution, we don't think it's --  
21 it's appropriate, right? And the state legislatures  
22 could certainly decline to exercise this kind of offensive  
23 jurisdiction. And how many state legislatures have  
24 abandoned it?

25 MR. SHERMAN: Not to my knowledge any.

1 QUESTION: Nobody.

2 MR. SHERMAN: But there is --

3 QUESTION: There's -- there's a certain built-  
4 in pressure, I suppose, from the bar in every state that  
5 at least we want to be able to serve as many people as can  
6 be served in another state. So, I would think that the  
7 chances of legislatures substantially restricting the  
8 jurisdiction of state courts on their own are probably not  
9 great.

10 MR. SHERMAN: That's true. But I think the more  
11 fundamental question is that the reason that they don't do  
12 it is because they perceive that they're bound by  
13 Pennoyer. They don't perceive, I think, that they have  
14 the freedom to do it. Because if you read all of the  
15 state court decisions, they all look to this Court and  
16 say, well, what has the Supreme Court ruled?

17 QUESTION: They're not bound by Pennoyer. We  
18 didn't say that states must exercise this jurisdiction.  
19 We just said that they may exercise this jurisdiction.

20 MR. SHERMAN: That it's constitutional if they  
21 choose to do it.

22 QUESTION: That it's constitutional if they  
23 choose to do it.

24 MR. SHERMAN: And they have --

25 QUESTION: And it's constitutional if they

1 choose not to do it, too.

2 MR. SHERMAN: And they have statutes which say  
3 they may exercise jurisdiction to the full extent  
4 permitted by the Constitution.

5 There's -- there are two additional reasons why  
6 -- coming back to Justice O'Connor's question earlier  
7 today -- why I think the Court should not adopt the  
8 restatement view if the Court is willing to abolish the  
9 pure form of transient jurisdiction which makes everything  
10 turn on service.

11 The first is that it would accomplish a shift in  
12 the burden. Traditionally it's the plaintiff -- when the  
13 defendant objects to jurisdiction, it's the plaintiff that  
14 has the burden of establishing a basis for jurisdiction.

15 This would put the burden on the defendant to  
16 disprove why -- to prove why there should not be  
17 jurisdiction. And that would be an incentive for  
18 plaintiffs to lure defendants to the state and to serve  
19 them, as happened in this case, in a way that would  
20 interfere with other interests. And I think it would be  
21 better if there was one standard that is consistently  
22 applied in making the plaintiff establish jurisdiction.

23 Secondly, if you do the restatement view, the  
24 restatement says jurisdiction is served in the forum  
25 unless otherwise unreasonable. This Court would then have

1 to begin a process of deciding numerous cases to define  
2 the parameters of what's reasonable and unreasonable under  
3 the restatement test.

4 There's already a body of law from this Court  
5 under the minimum contacts test defining what's reasonable  
6 and unreasonable, and it would be much simpler for  
7 everybody if that body of law was just engrafted on to all  
8 assertions of state court jurisdiction.

9 Finally, I close my opening comments this  
10 afternoon by saying that if the Court determines that the  
11 rule has been around so long that we should keep it even  
12 though it may have unfair results, it shouldn't be applied  
13 in a case where somebody is served in the state while  
14 they're visiting their children, which is what happened in  
15 this case.

16 And the reason for that is fundamentally that in  
17 Asahi this Court -- and in World-Wide Volkswagen this  
18 Court made clear that one of the things to be considered  
19 in determining whether or not a state is exercising  
20 jurisdiction consistent with the Constitution is the  
21 degree to which it impacts upon the shared substance and  
22 policies of the states.

23 I don't think it's beyond question that the  
24 share and substantive policy of the states in the area of  
25 child custody visitation is to encourage families of

1 divorce to maintain contact between parents and the  
2 children after the divorce. That policy will be impacted  
3 adversely by allowing transient jurisdiction in a case  
4 where somebody is served while they're visiting their  
5 children.

6 Therefore, if the Court does not totally abolish  
7 the rule and if the Court does not accept the restatement  
8 formulation, or even if it does, one of the things that it  
9 should say, it's unreasonable to allow jurisdiction to be  
10 predicated upon service on somebody who is in the state  
11 when they're seeing their children.

12 I'd like to reserve the rest of my time for  
13 rebuttal, if I may.

14 QUESTION: Very well, Mr. Sherman.

15 Mr. Devereaux.

16 ORAL ARGUMENT OF JAMES O. DEVEREAUX

17 ON BEHALF OF THE RESPONDENTS

18 MR. DEVEREAUX: Thank you, Mr. Chief Justice,  
19 may it please the Court:

20 In the opinions issued by this Court over the  
21 last 45 years, starting with International Shoe, there has  
22 been a clear trend toward relaxing limits on state court  
23 jurisdiction. As Justice White observed in his opinion in  
24 World-Wide Volkswagen v. Woodson, this relaxation is  
25 largely attributable to the fundamental transformation of

1 American society that has taken place and which has been  
2 accelerated in the last few years.

3 It is ironic that in this case, today as we  
4 stand on the threshold of the 21st century at a time when  
5 technological progress in travel and communication has  
6 resulted in a shrinking of our planet to the size of a  
7 global village, and at a time when the citizens of this  
8 country, more than at any other time in our history, are  
9 more likely to travel across state borders with ease and  
10 with increasing frequency, the petitioner is arguing for a  
11 retraction of the permissible reach of state jurisdiction  
12 and a categorical rule that presence within the boundaries  
13 of a -- of the forum state should no longer provide the  
14 basis for the exercise of state jurisdiction under any  
15 circumstances.

16 QUESTION: Well, the end result of this approach  
17 is the state ought to be able to serve him anywhere.

18 MR. DEVEREAUX: Well, I don't believe that this  
19 case is limited to the mere fact that this particular  
20 defendant was served within the State of California. That  
21 is a fact in this case, but under all the facts in this  
22 case in a period of less than two and a half years, from  
23 October of 1987 until today, this particular  
24 defendant/husband has been physically present in  
25 California more than 20 times. This is simply not a case



1 of transient presence.

2 QUESTION: So you think -- you think he could  
3 have been served in New York?

4 MR. DEVEREAUX: I think --

5 QUESTION: Under a long-arm statute.

6 MR. DEVEREAUX: To be perfectly honest, I do  
7 think that that would be a reasonable rule because under  
8 this case the fact is --

9 QUESTION: But is that issue open to us in this  
10 case?

11 MR. DEVEREAUX: I'm sorry?

12 QUESTION: Is that issue open to us in this  
13 case?

14 MR. DEVEREAUX: The -- my understanding of the  
15 particular facts in this case are that this husband not  
16 only was served personally in Mill Valley, California in  
17 January of 1988, but was also served by substituted  
18 service, not personal service, in New Jersey, and that the  
19 service in New Jersey complied with New Jersey  
20 requirements relating to substitute of service.

21 QUESTION: But the rationale of the court below  
22 was personal presence is enough. That's all.

23 MR. DEVEREAUX: That is correct. I do think  
24 it's important to point out, however, that while the  
25 argument was presented to both the superior court and the

1 court of appeal in California, that in addition to actual  
2 physical service in California, the contacts here, the  
3 connection here, is -- is sufficient disclosure --

4 QUESTION: And you're arguing that that's an  
5 alternative ground for --

6 MR. DEVEREAUX: Yes, I am. And -- and what I  
7 feel I should point out is that the California courts did  
8 not reject that argument. They simply felt they didn't  
9 need to address it because they were able to resolve the  
10 case on the basis of service.

11 QUESTION: But it was raised below?

12 MR. DEVEREAUX: It was raised below in each of  
13 the courts.

14 QUESTION: Mr. Devereaux, in your view, however,  
15 it would also be sufficient if the petitioner had been  
16 served while flying across -- over California in an  
17 airplane.

18 MR. DEVEREAUX: No. That really is not my  
19 position. I -- I personally don't believe that the facts  
20 of Grace v. MacArthur are reasonable and in that case did  
21 not lead to a just result. So that I am not arguing in  
22 favor of -- of those facts. I'm not really addressing a  
23 whole --

24 QUESTION: How about someone who has to change  
25 planes in an airport to get to another destination and is

1 served while changing planes?

2 MR. DEVEREAUX: Well, those facts are not the  
3 facts in this case. I would have --

4 QUESTION: No. We know that.

5 MR. DEVEREAUX: I would have a harder time  
6 justifying jurisdiction based on those facts, but I  
7 happily don't have to specifically address those facts in  
8 this case because here we have not only the husband's  
9 repeated --

10 QUESTION: But I thought your power theory would  
11 resolve those rather unpleasant questions.

12 MR. DEVEREAUX: I believe that the power theory  
13 would resolve those.

14 QUESTION: And that's the theory you espouse.

15 MR. DEVEREAUX: No. The theory --

16 QUESTION: No?

17 MR. DEVEREAUX: -- that I espouse is that the  
18 exercise of state court jurisdiction in each case must be  
19 fair and reasonable under the standards of International  
20 Shoe and that that is the effect in this case, that the  
21 exercise --

22 QUESTION: Well, how is that different from the  
23 restatement approach?

24 MR. DEVEREAUX: I don't -- I think the  
25 restatement -- the revised restatement approach sets forth

1 an eminently reasonable approach to resolving this  
2 problem. And I think that what this case really does not  
3 call for is a sweeping pronouncement by this Court  
4 abolishing the presence rule of jurisdiction for all  
5 cases.

6 The presence rule, as the restatement has  
7 reformulated it, is eminently reasonable because it says  
8 present -- presence continues to be a proper basis for the  
9 exercise of jurisdiction as long as, under all the facts  
10 and circumstances, it's not unreasonable to --

11 QUESTION: Yeah, but I'm sorry to hear --

12 QUESTION: Yeah, but then you --

13 QUESTION: -- you say --

14 QUESTION: Just a minute.

15 QUESTION: Okay.

16 QUESTION: Then -- then you give up a certain  
17 element of certainty in the due process standard of  
18 Pennoyer that Justice Scalia referred to in his question  
19 to you -- to your opponent, that every -- in -- every  
20 jurisdictional inquiry is going to be kind of an ad hoc  
21 fact-specific one, isn't it?

22 MR. DEVEREAUX: Well, I think that, as the Court  
23 pointed out most recently in 1984 in Burger King, the  
24 physical presence of the defendant in the state can in  
25 fact enhance the affiliation of the defendant with that

1 state and can enhance the foreseeability of being sued in  
2 that state.

3 And I don't see anything inherently unfair about  
4 pinning jurisdiction on the fact that the defendant in  
5 this day and age where people do in fact travel across  
6 state borders regularly is found within the state and  
7 therefore is -- is subject to the jurisdiction of that  
8 state.

9 This Court has --

10 QUESTION: You're -- you're not disagreeing then  
11 with your -- with your opponent here. You say we should  
12 just look at each case and decide whether it's fair or  
13 not. That's what you want us to do in this case.

14 MR. DEVEREAUX: Well, I think that -- I think  
15 that --

16 QUESTION: I mean, if that's the invitation,  
17 frankly, I don't think the mere fact that -- that this  
18 person happened to be there to see his daughter -- that  
19 doesn't seem to me very fair.

20 MR. DEVEREAUX: This person didn't just happen  
21 to be there to see his daughter, however. This person  
22 comes to California regularly; he has acknowledged in  
23 papers that he's filed in the California courts that he  
24 does in fact --

25 QUESTION: Well, maybe we should remand to the

1 court of appeals to -- to decide whether -- the court of  
2 appeals didn't purport to decide it on a totality of  
3 fairness basis, did it?

4 MR. DEVEREAUX: No, it did not. It didn't reach  
5 that issue --

6 QUESTION: No?

7 MR. DEVEREAUX: -- because it felt --

8 QUESTION: Then it --

9 MR. DEVEREAUX: -- that the presence rule  
10 continued to be the law in this country, and I believe --

11 QUESTION: But you're saying it isn't. You're  
12 saying it's --

13 MR. DEVEREAUX: No, I'm saying --

14 QUESTION: -- the totality of everything.

15 MR. DEVEREAUX: No, no, no. I'm saying that it  
16 is and that it ought to continue to be, and that if ever  
17 this Court or any other court is presented with a  
18 particular factual situation where it leads to an unfair  
19 result, that is the time --

20 QUESTION: You can't have it both ways. You  
21 either want us to decide it on the basis that presence is  
22 enough, and we either decide it or don't decide it on that  
23 basis, or else you say it isn't necessarily enough and we  
24 ought to remand it to the court of appeals. But I don't  
25 see how you can -- how you can have it both ways.

1 MR. DEVEREAUX: Well, then my position is that  
2 this Court should say that the law has been that presence  
3 is sufficient and should continue to say that.

4 It is true that there is an alternative basis,  
5 if the Court chooses not to do that, to uphold this  
6 decision. And that is, by pointing out that the contacts  
7 here -- the connection here is significant.

8 I think it's important to point out that state  
9 courts always have the right to decline the exercise of  
10 jurisdiction. And in fact, probably the most relevant  
11 case where that occurred was Kulko, where in fact the  
12 California courts did decline to exercise jurisdiction and  
13 this Court upheld that judgment on their part.

14 In this case and in Kulko, of course you did not  
15 have the actual presence of the defendant, and that is a  
16 major distinguishing factor between the facts of this case  
17 and the facts of that case. But there are additional  
18 important differences as well between this case and the  
19 facts in Kulko.

20 And perhaps the most important of those are the  
21 fact that here both California and New Jersey have  
22 carefully considered the propriety of those respective  
23 states assuming jurisdiction in this matter not only on  
24 the superior court level but on every level of the state  
25 judicial system in both states.

1           And there is no conflict between the decisions  
2 of those two states. They both came to consistent  
3 conclusions that California is an appropriate state to  
4 assume jurisdiction in this case under the circumstances.

5           In addition to that, and in addition to the fact  
6 that the husband was not physically present within  
7 California in Kulko, here you have more substantial  
8 contacts, more substantial connection between the  
9 defendant/husband and the state. And on that basis, I  
10 think that the exercise of jurisdiction is eminently  
11 reasonable. In addition to all of those factors, here you  
12 have California being the state of domicile of the wife  
13 and the children.

14           I think that the decisions issued by this Court  
15 in recent years, starting with Kulko and continuing with  
16 World-Wide Volkswagen and Burger King and Keeton and Asahi  
17 Metal Industries, may reveal a shift in the analytical  
18 approach that the Court is taking toward the question of  
19 fairness and substantial justice, a shift in favor of  
20 evaluating the various interests and the other factors  
21 that are involved in the case.

22           And particularly in a family law case, the fact  
23 of domicile of one of the spouses and the children, the  
24 interests of the state of domicile in the litigation in  
25 the subject matter of the case is an extremely important



1 factor to be taken into consideration.

2 QUESTION: Mr. Devereaux, the question presented  
3 in the petition for cert. and on which I thought we had --  
4 we had granted cert. and what I thought we were here to  
5 decide or what you were here for us to decide, is this:  
6 is service of process on a nonresident defendant while he  
7 is physically present in the forum state a sufficient  
8 basis by itself for the exercise of personal jurisdiction.

9 Now, you are inviting us to decide it not on --  
10 this case not on this ground, but to decide whether in the  
11 particular facts and circumstances of this particular  
12 controversy there was enough contact. Frankly, that's not  
13 an issue that's of sufficient national importance to have  
14 -- to have warranted the attention that this Court has  
15 given to this case.

16 I thought what we accepted cert. on was whether  
17 physical presence alone is enough.

18 MR. DEVEREAUX: Well, Justice Scalia, I, of  
19 course, can't speak to the reasons for the Court's  
20 granting cert. in this case. That is an important issue  
21 and I am not trying to persuade the Court to avoid  
22 deciding that issue. I believe that the Court should  
23 uphold the decision on that basis.

24 But what I am suggesting is that this case also  
25 provides an opportunity, should the Court desire to take

1 the opportunity, to decide the case on alternative grounds  
2 as well, one of which is the question of sufficient  
3 connection or contacts, another of which is an evaluation  
4 of California's interest as a state of domicile and the  
5 interests of the wife and children in this case.

6 The Court, of course, has no obligation to  
7 decide those issues and can limit its decision to the  
8 issue of the continued viability of the presence basis.  
9 But the -- the case does involve -- commend itself to  
10 these additional alternative grounds, should the Court  
11 desire to address them because they were raised below in  
12 the state courts and have been preserved. They are in the  
13 record, and depending upon the approach that the Court  
14 would like to take, those issues are available for a  
15 decision.

16 But if the Court desires to limit its decision  
17 to the issue of whether or not the presence of the  
18 defendant within the state and service of process upon him  
19 while he was present continues to be a sufficient  
20 jurisdictional basis, then my position is that the answer  
21 to that is yes.

22 It has not only been -- that principle has not  
23 only been established in *Pennoyer v. Neff*, but it has in  
24 fact been acknowledge by this Court in more modern  
25 decisions, including *International Shoe*, where the Court

1 expressly acknowledged that the minimum contacts analysis  
2 related to service outside the state where the defendant  
3 was not present but at least by implication recognized  
4 that if a defendant is present within the state, that is a  
5 valid jurisdictional basis.

6 The O'Neill v. New York case was also an  
7 application of the presence rule where the Court clearly  
8 said, the defendant being present in Florida, Florida had  
9 jurisdiction over him.

10 So that all I'm suggesting is that based on the  
11 precedent established by this Court in more than one case  
12 over the last 100-plus years, an upholding of the judgment  
13 of the California courts can be accomplished simply by  
14 recognizing that the rule continues to be in effect.

15 And I think it's particularly significant that  
16 when the commentators argued that Shaffer v. Heitner  
17 required at least a reevaluation of the presence rule, if  
18 not an outright abolishing of it, the American Law  
19 Institute did reexamine that rule and concluded that it  
20 was not appropriate to abolish the rule but instead  
21 retained the rule in a slightly modified version.

22 And I think this is an indication that the  
23 presence rule is valid, it's not unfair and unreasonable  
24 and it does lend certainty and predictability to the  
25 jurisdictional equation.

1           So, to the extent that this Court wants to limit  
2 its decision to that narrow issue, I would urge the Court  
3 to uphold the judgment of the California courts.

4           Thank you very much.

5           QUESTION: Thank you, Mr. Devereaux.

6           Mr. Sherman, you have two minutes remaining.

7           REBUTTAL ARGUMENT OF RICHARD SHERMAN

8           ON BEHALF OF THE PETITIONER

9           MR. SHERMAN: Yes. I think that counsel kind of  
10 concedes that Grace v. MacArthur is unfair. It offends  
11 our traditional notions of what's fair.

12           The next step is to say that that means that  
13 since it's a question of fairness, it has to be fact-  
14 specific to each case. And that's the nature of due  
15 process. That's the nature of the inquiry into due  
16 process. It has to be, and that is why in Kulko the Court  
17 said in this area the grays predominate.

18           And they have to because otherwise, if you're  
19 stuck with this absolute notion that physical power is  
20 what jurisdiction is about, then you're stuck with Grace  
21 v. MacArthur and nobody seriously defends that.

22           QUESTION: Do you think the state has physical  
23 power of somebody flying overhead in an airplane?

24           MR. SHERMAN: Well --

25           QUESTION: Physical power over that --

1 MR. SHERMAN: Well, if the --

2 QUESTION: -- over that person?

3 MR. SHERMAN: If the territory of the state  
4 extends to the air space, then apparently they do. But  
5 it's not, as I started to say before the lunch bell rang,  
6 it's not because they're present in the state; it's  
7 because they were served while present in the state.

8 You see, service while present is what  
9 accomplished transient jurisdiction. I'm not contending  
10 that if somebody is present in the state that should not  
11 be counted in the minimum contacts analysis. If a person  
12 is present, he has a contact. But then he's only subject  
13 to specific jurisdiction for causes of action relating to  
14 his presence. If he is served under the traditional rule,  
15 he's subject to general jurisdiction for anything, and  
16 that's what makes it unfair.

17 With respect to the options open to this Court,  
18 it seems to me that the court of appeal clearly decided  
19 this case on the bounds -- grounds of transient  
20 jurisdiction being okay. I think that issue is directly  
21 presented here by virtue of the petition for cert. and the  
22 court of appeal opinion.

23 In Shaffer v. Heitner, when this Court rejected  
24 quasi in rem jurisdiction even though the Delaware court  
25 had not reviewed the matter of well, but are there minimum

1 contacts, the Court went on to do so, concluded not and  
2 reversed.

3 I think that's what the Court should do here.  
4 But at worst for husband, the Court should abolish the  
5 doctrine of transient jurisdiction in its pure form, and  
6 then, if it adopts the restatement analysis or if it  
7 replaces it with minimum contacts, at worse for husband,  
8 simply remand that part of the case to the court of appeal  
9 to consider whether, now that it can't base it simply on  
10 service while present in the forum, what should it do?

11 I'm quite confident that under California law it  
12 will reach the result which it reached in this case.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Sherman.

15 The case is submitted.

16 (Whereupon, at 1:24 p.m., the case in the above-  
17 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. 89-44 - DENNIS BURNHAM, Petitioner V. SUPERIOR COURT OF CALIFORNIA,  
-----  
COUNTY OF MARIN (FRANCIE BURNHAM, REAL PARTY IN INTEREST)

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