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Section 7: Criminal Law

Institute of Bill of Rights Law, William & Mary Law School

HIGH COURT AFFIRMS SEIZURE LAWS

Critics Say Ruling Will Penalize Many Property Owners Unfairly

Los Angeles Daily News

Tuesday, March 5, 1996

Aaron Epstein, Knight-Ridder Tribune News Wire

The Supreme Court, in a 5-4 ruling Monday that provoked outrage from dissenters, bolstered the government's power to seize property linked to a crime - even if the owner is blameless.

The loser in the case was Tina Bennis, a Michigan mother of five who was unaware that her husband, John, would use their jointly owned car to pick up a prostitute and commit an illegal sex act in the front seat. Officials confiscated the Bennis' 11-year-old Pontiac and sold it under a tough Michigan public-nuisance statute.

Chief Justice William H. Rehnquist, writing the majority opinion, cited "a long and unbroken line of cases" since 1827 holding that "an owner's interest in property may be forfeited" even though the owner did not know it would be put to illegal use. Those cases, he declared, "are too firmly fixed . . . to be now displaced."

In a blistering dissent, Justice John Paul Stevens said the seizure of Tina Bennis' car was blatantly unjust. "Fundamental fairness prohibits the punishment of innocent people," he observed.

Most federal forfeiture laws do furnish protection to innocent owners. Some legal experts said police and prosecutors in some states now may become more aggressive in seizing crime-linked property, even when owners or co-owners did nothing wrong. Others predicted that the ruling would encourage legislative reforms.

Stevens said he feared that Rehnquist's logic would permit states "to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts." For example, Stevens said, the chief justice's ruling would "justify the confiscation of an ocean liner just because one of its passengers sinned while on board."

None of the court's precedents allow forfeitures to go that far, Rehnquist replied.

Tina Bennis, who lives with her husband and five children in Royal Oak, north of Detroit, could not be reached for comment because, her lawyer said, she was embarrassed by the publicity surrounding the case and had obtained a private telephone number. But the lawyer, Stefan B. Herpel of Ann Arbor, Mich., said, "She is stunned by the result and cannot understand how in America a court could hold it is constitutional to punish an innocent person. "This opinion comes as a tremendous shock to me, too," Herpel added. "I fear this opinion may unleash a terrible tyranny in this country. Forfeiture has already been abused, and this opinion could lead to even greater abuses."

Rehnquist's majority opinion was signed by Sandra Day O'Connor, Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg. The ruling was a victory for Michigan and the Clinton administration, which joined forces to preserve the full impact of forfeiture laws. Such laws have become a powerful law-enforcement weapon in the war on drugs, alcohol abuse, prostitution and gambling.

Supreme Court rulings in the 19th century upheld seizures of vessels despite the innocence of the owners. Later, the high court allowed boats and cars to be seized, even though the owners were unaware that their property was used to transport drugs and liquor illegally.

In recent years, though, reports of flagrant abuses led Congress to consider reform legislation and the courts to become more skeptical. The Supreme Court ruled in 1993 that forfeitures could be challenged as an unconstitutionally excessive fine. On Monday, Justice Stevens accused the court of retreating from that decision.

The confiscation of an entire car "simply because an illicit act took place once in the driver's seat . . . is plainly excessive," said Stevens, who was joined by David Souter and Stephen Breyer. Anthony Kennedy dissented separately.

CRITICS: FORFEITURE RULING CERTAIN TO SPUR REFORM

The National Law Journal, Volume 18, Number 29

Monday, March 18, 1996

Marcia Coyle

The U.S. Supreme Court's recent rejection of an "innocent owner" defense to forfeiture actions will have little practical impact in the law enforcement field but could reinvigorate forfeiture reform efforts on Capitol Hill, some experts say.

The high court's March 4 decision in *Bennis v. Michigan*, 94-8729, surprised forfeiture proponents and opponents. Until this term, the justices had taken the lead in curbing government overreaching in the forfeiture area through a series of decisions that applied the Eighth Amendment's excessive fines clause to forfeitures and due process requirements of notice and hearings.

The *Bennis* case was viewed by many as the next big step by the high court - an opportunity to protect the completely innocent owner of property used by another for illegal purposes. Tina Bennis' husband John had used their jointly owned 1977 Pontiac to pick up a prostitute in a Detroit suburb. He was arrested for gross indecency after a police officer saw him engaged in a sex act in the car's front seat. The state sought to have the car forfeited under a Michigan law that allows forfeiture of buildings, vehicles, boats and aircraft used so as to constitute a nuisance. Mrs. Bennis unsuccessfully fought the forfeiture by arguing that she had no knowledge her husband used the car to solicit a prostitute.

In her high court appeal, Mrs. Bennis argued that punishing someone who is blameless is a violation of due process and that the forfeiture was a taking without just compensation.

DIVIDED COURT

In a 5-4 decision, Chief Justice William H. Rehnquist, writing for the court, said a "long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not known that it was to be put to such use." Those cases, primarily drawn from admiralty law, are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," he added.

Justice John Paul Stevens, in a dissent joined by Justices David H. Souter and Stephen G. Breyer, said, "Fundamental fairness prohibits the punishment of innocent people." Mrs. Bennis, he said, was in no way negligent in her use or entrustment of the family car. "Even assuming that strict liability applies to 'innocent' owners, we have consistently recognized an exception for truly blameless individuals," he wrote.

The *Bennis* decision is "so out of touch with the times and political currents that most prosecutors are simply not going to take advantage of it," said forfeiture expert David B. Smith, of English & Smith, in Alexandria, Va. "They don't want to because they know it's unfair and they don't want to create a backlash that feeds the fires of reform. If anything, the decision may have a positive impact; it may energize the reform people on Capitol Hill."

The most disappointing aspect of the decision is that it signals the high court, for whatever reason, is no longer interested in forfeiture reform, said Mr. Smith, author of a treatise on forfeiture. "They were the leaders, but now it's a different court, and I have no idea why."

Mrs. Bennis' high court counsel, Stefan B. Herpel, of Ann Arbor, Mich., predicted that the decision would generate more abuse "unless the public demands that civil forfeiture be repealed, or at least criminalized." Given how widely criticized the decision has been, he added, "It can undermine confidence in the court. The law, in its fundamental sense, is made to protect innocent persons, and the average man can't understand why the court has abdicated its responsibility as guardian."

The decision is a setback, but not a major one, added John J. Byrne, senior counsel at the American Bankers Association, which filed an amicus brief supporting Mrs. Bennis. There is reform activity at the state level, he said, and the decision may revive a dormant federal bill.

"I think it's encouraging the decision was 5-4 and no one suggested Mrs. Bennis had any responsibility here," Mr. Byrne added. "We consider ourselves innocent third parties. It could happen to us."

PROPERTY SEIZURE RULING SHOULD GIVE US PAUSE

The News Tribune, Tacoma, WA

Sunday, March 10, 1996

George Will, Syndicated Columnist

WASHINGTON - In 1827, in a case concerning the forfeiture of a Spanish ship used for piracy, the U.S. Supreme Court held that the owner could lose his ship even if he was not even aware of the use of the ship for piracy: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing." That, and a long line of cases in that vein, is why the court says Tina Bennis has no right to compensation for her half-interest in the car she co-owned with her husband John and which was forfeited after he was convicted in Detroit of engaging in sexual activity with a prostitute in the car.

The court was divided five to four in rejecting Tina Bennis' contention that the forfeiture violated her 14th Amendment right to due process and her Fifth Amendment right not to have property taken without just compensation. Justice Stevens, joined in dissent by Souter and Breyer (Kennedy dissented separately), condemned the "blatant unfairness" of punishing an innocent person.

And Justice Thomas, although concurring separately in the opinion written by Chief Justice Rehnquist and joined by O'Connor, Scalia, Ginsburg and Thomas, said that what was done to Tina Bennis by Michigan law was "intensely undesirable."

Because many governments are increasingly aggressive in their use of forfeiture as punishment for prostitution, drug and other offenses, this decision, although supported by the most conservative justices, should trouble conservatives. It involves conflicts among three things they value - deference to states' legislative judgments, fidelity to precedent and respect for property rights.

John Bennis made his mistake in 1988 in an 11-year-old Pontiac he and his wife had recently purchased for $600. The trial court judge had discretion to order payment of half the sale proceeds to "the innocent co-titleholder," but commented that "there's practically nothing left" after deduction of police, prosecutorial and court costs. Justice Ginsburg noted that the question at issue was not whether compensating Tina Bennis would have been fair but whether compensation was a constitutional right. And Ginsburg's concurring opinion suggests that she would have affirmed such a right had not the car belonged as much to John Bennis as to Tina Bennis.

Although Tina Bennis neither consented to nor knew of the misuse of the car, Rehnquist cited the court's language in a 1926 case, that it is common "for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it." That practice, the court had said five years earlier, is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."

Certainly the court should not casually unsettle what it has firmly fixed. Nor should the court relieve Congress of its role in correcting dubious legal practices. The chairman of the House Judiciary Committee, Rep. Henry Hyde of Illinois, has drafted the Civil Asset Forfeiture Reform Act that would, among other things, strengthen protection of innocent property owners.

Still, sometimes the court has had to say, in effect, "Well, come to think about it. . . ." It took four years of carnage and then the 13th Amendment to correct what the court did in 1857 in *Dred Scott v. Sanford*. But in other cases the court has tidied up after itself.

In 1896 in *Plessy v. Ferguson* the court held that "separate but equal" public facilities segregated by race were compatible with the 14th Amendment's guarantee of equal protection of the laws. Later, the court conducted a protracted retreat from that position.

In 1905 in *Lochner v. New York*, as in similar cases, the court held that a New York law limiting bakers to a 10-hour workday violated the Due Process clause. By 1963 Justice Hugo Black could assert that the *Lochner* doctrine of "substantive due process," that the court can overturn laws it considers unwise, "has long since been discarded." (Actually, it has long since been smuggled into liberal jurisprudence to support a different social policy agenda.)

In his obviously uneasy concurring opinion in the court's decision about Tina Bennis' car, Justice Thomas says the case "is ultimately a reminder that the federal Constitution does not prohibit everything that is intensely undesirable." Quite so. So it is time for the political branches of state governments and the federal government to act on the clear signals from Thomas and others concerning the need to protect innocent persons who cannot reasonably be considered culpably negligent concerning the misuse of their property.

(George Will, a Ph.D. graduate of Oxford and former professor of political philosophy, is a columnist for *The Washington Post.*)

GIVE AND TAKE ON TAKINGS

High Court Approves of Stealing Property From Innocent People

The Charleston Gazette

Monday, April 15, 1996

Charles Levendosky

The Supreme Court has given its stamp of approval to states that steal property from innocent people.

Such a forfeiture doesn't violate the constitutional protections of due process, the high court said.

Chief Justice William Rehnquist wrote the decision last week for a 5-to-4 majority in the *Bennis vs. Michigan* case.

The chief justice writes opinions as if he were writing algebraic formulas - they make no reference to the lives they affect.

Bloodless. Callous. And in this case, brutally wrong-headed.

Tina Bennis sued the state of Michigan to recover her half-interest in the 1977 Pontiac that was seized when Detroit police caught her husband in the car having sex with a prostitute.

The state declared the Pontiac a public nuisance and "abated' it - meaning the state sold the car and kept the proceeds.

Tina Bennis claims she was an innocent party. She testified that she had no idea her husband was going to use the car to have sex. If she had known, could she have stopped him? How?

If she had called the police, would they have done anything prior to the misdemeanor? I doubt it. Detroit police have more to do than to follow a "potential" John.

Tightwad Michigan couldn't spring for half the sale of the Pontiac they confiscated and then sold. They could have given Tina Bennis the trivial amount to cover her half ownership. What might that have been - $400, more or less?

The state said the sale of the old car just covered the court costs of the civil forfeiture action the prosecutor took against the car.

Instead the state paid its attorneys and paid for the enormous paperwork to go through years of appeals when Tina appealed. Years. People in the real world - except, apparently, the chief justice - know why.

So the state can continue to steal property from the innocent.

The high court just issued Michigan and other states a license for theft.

The majority opinion rests its argument on precedence - on "a long and unbroken line of cases," according to the court, dating back to Justice Story's opinion in 1827.

That case dealt with the forfeiture of the privateer, the Palmyra, which had been commissioned by the King of Spain. It attacked a U.S. vessel and was later captured. The high court held that "the thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."

The U.S. military could hardly have seized the King of Spain or the owner of the privateer, therefore, it seized the vessel.

So, the chief justice reasons, the Pontiac is the thing. Seize the Pontiac.

But the state of Michigan caught the man who committed the misdemeanor.

Nevertheless, using the car once in such an act makes it a "public nuisance' and thus subject to forfeiture.

Would a motel used for sex with a prostitute be subject to forfeiture? Suppose Mr. Bennis had taken the woman to his home when he wife was absent, would Tina Bennis lose half-ownership in her home, too? The chief justice wouldn't seem to have a problem with that.

What does a sex act in a car have to do with a privateer that attacks a U.S. vessel? What does admiralty law have to do with a car parked on a Detroit street?

Tina Bennis didn't commission her husband to go out with their car and have sex with a prostitute. So what is the legal connection?

Ask Chief Justice Rehnquist. He wrote the archaic formula.

Justices Sandra Day O'Connor and Antonin Scalia joined the majority opinion without comment.

Justice Ruth Bader Ginsburg wrote a concurring opinion that in effect apologizes for the decision - yet supports it.

Don't worry, she assures us, Michigan's nuisance abatement law is fair and "the state's Supreme Court stands ready to police exorbitant applications of the statute."

Justice Ginsburg seeks to mollify outraged citizens who might be concerned for their constitutional rights.

She continued, "Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment."

She ends her concurrence by saying Michigan is only trying "to deter Johns from using cars" to contribute to the "blight" of prostitution.

Is it deterrence to take property away from an innocent wife of that John?

So much for property rights and for the innocent victims of greedy law enforcement officials.

Justice Clarence Thomas agreed. "This case is ultimately a reminder that the federal Constitution does not prohibit everything that is intensely undesirable," he wrote in his concurring opinion.

More revealing, he wrote "The limits on what property can be forfeited as a result of wrongdoing - for example, what it means to 'use' property in a crime for purposes of forfeiture laws - are not clear to me."

Justice Thomas apparently hated it, isn't clear about it, yet he voted to deny Tina Bennis her half of the worth of the old Pontiac.

His motto: When in doubt, vote against innocence.

The amount of money involved may be insignificant, but the principle here remains one of great consequence: Should a state be allowed to confiscate property without due process of law?

This is one of the most abysmal decisions to come of this court in years.

It smacks of rigid thinking and a dismal kowtowing to law enforcement.

Justice John Paul Stevens wrote a dissent, which Justices David Souter and Stephen Breyer joined. Justice Stevens points out that the 1977 Pontiac isn't contraband, isn't a weapon, and isn't an instrument of crime, like burglar's tools - and shouldn't have been subject to forfeiture.

He ends his dissenting opinion by calling the seizure blatantly unfair and unconstitutional.

Justice Anthony Kennedy, in his one-and-a-half-page dissent, wrote curtly, "This forfeiture cannot meet the requirements of due process."

Nonetheless, a majority of the court with weak and perfidious arguments supported a ruling that will undoubtedly impact the lives of many innocent citizens.

Sadly, the high court might have used this case to restrain the runaway use of property seizures by law enforcement officials.

No, Tina, there is no justice regarding forfeiture laws. And apparently there won't be until the Supreme Court gets a new chief.

(Levendosky is the editorial page editor for the Casper (Wyo.) Star-Tribune.)

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Tina B. BENNIS, Petitioner,

v.

MICHIGAN.

Supreme Court of the United States

116 S. Ct. 994

Argued Nov. 29, 1995.

Decided March 4, 1996.

Rehearing Denied April 22, 1996.

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner was a joint owner, with her husband, of an automobile in which her husband engaged in sexual activity with a prostitute. A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband's activity. We hold that the Michigan court order did not offend the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.

Detroit police arrested John Bennis after observing him engaged in a sexual act with a prostitute in the automobile while it was parked on a Detroit city street. Bennis was convicted of gross indecency. The State then sued both Bennis and his wife, petitioner Tina B. Bennis, to have the car declared a public nuisance and abated as such under §§ 600.3801 and 600.3825 of Michigan's Compiled Laws.

Petitioner defended against the abatement of her interest in the car on the ground that, when she entrusted her husband to use the car, she did not know that he would use it to violate Michigan's indecency law. The Wayne County Circuit Court rejected this argument, declared the car a public nuisance, and ordered the car's abatement. In reaching this disposition, the trial court judge recognized the remedial discretion he had under Michigan's case law. He took into account the couple's ownership of "another automobile," so they would not be left "without transportation." He also mentioned his authority to order the payment of one-half of the sale proceeds, after the deduction of costs, to "the innocent co-title holder." He declined to order such a division of sale proceeds in this case because of the age and value of the car (an 11-year-old Pontiac sedan recently purchased by John and Tina Bennis for $600); he commented in this regard: "[T]here's practically nothing left minus costs in a situation such as this."

The Michigan Court of Appeals reversed. . .

The Michigan Supreme Court reversed the Court of Appeals and reinstated the abatement in its entirety. [T]he court then announced that, in order to abate an owner's interest in a vehicle, Michigan does not need to prove that the owner knew or agreed that her vehicle would be used in a manner proscribed by § 600.3801 when she entrusted it to another user. The court next addressed petitioner's federal constitutional challenges to the State's abatement scheme: The court assumed that petitioner did not know of or consent to the misuse of the Bennis car, and concluded, in light of our decisions in *Van Oster v. Kansas* and *Calero-Toledo v. Pearson Yacht Leasing Co.*, that Michigan's failure to provide an innocent-owner defense was "without constitutional consequence." The Michigan Supreme Court specifically noted that, in its view, an owner's interest may not be abated when "a vehicle is used without the owner's consent." Furthermore, the court confirmed the trial court's description of the nuisance abatement proceeding as an "equitable action," and considered it "critical" that the trial judge so comprehended the statute.

We granted certiorari in order to determine whether Michigan's abatement scheme has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, or has taken her interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment. We affirm.

The gravamen of petitioner's due process claim is not that she was denied notice or an opportunity to contest the abatement of her car; she was accorded both. Rather, she claims she was entitled to contest the abatement by showing she did not know her husband would use it to violate Michigan's indecency law. But

a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.

Our earliest opinion to this effect is Justice Story's opinion for the Court in *The Palmyra* (1827). *The Palmyra*, which had been commissioned as a privateer by the King of Spain and had attacked a United States vessel, was captured by a United States war ship and brought into Charleston, South Carolina, for adjudication. On the Government's appeal from the Circuit Court's acquittal of the vessel, it was contended by the owner that the vessel could not be forfeited until he was convicted for the privateering. The Court rejected this contention, explaining: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing". . . .

"It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it". . . .

The dissent argues that our cases treat contraband differently from instrumentalities used to convey contraband, like cars: Objects in the former class are forfeitable "however blameless or unknowing their owners may be," but with respect to an instrumentality in the latter class, an owner's innocence is no defense only to the "principal use being made of that property." However, this Court's precedent has never made the due process inquiry depend on whether the use for which the instrumentality was forfeited was the principal use. If it had, perhaps cases like *Calero-Toledo*, in which Justice Douglas noted in dissent that there was no showing that the "yacht had been notoriously used in smuggling drugs . . . and so far as we know only one marihuana cigarette was found on the yacht," might have been decided differently.

The dissent also suggests that *The Palmyra* line of cases "would justify the confiscation of an ocean liner just because one of its passengers sinned while on board." None of our cases have held that an ocean liner may be confiscated because of the activities of one passenger. We said in *Goldsmith-Grant*, and we repeat here, that "[w]hen such application shall be made it will be time enough to pronounce upon it."

Notwithstanding this well-established authority rejecting the innocent-owner defense, petitioner argues that we should in effect overrule it by importing a culpability requirement from cases having at best a tangential relation to the "innocent owner" doctrine in forfeiture cases. She cites Foucha v. Louisiana, for the proposition that a criminal defendant may not be punished for a crime if he is found to be not guilty. She also argues that our holding in *Austin v. United States*, that the Excessive Fines Clause limits the scope of civil forfeiture judgments, "would be difficult to reconcile with any rule allowing truly innocent persons to be punished by civil forfeiture". . . .

. . . . But, putting aside the extent to which a forfeiture proceeding is "punishment" in the first place, *Foucha* did not purport to discuss, let alone overrule, *The Palmyra* line of cases.

In *Austin*, the Court held that because "forfeiture serves, at least in part, to punish the owner," forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines. There was no occasion in that case to deal with the validity of the "innocent-owner defense," other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is "punitive" in motive. In this case, however, Michigan's Supreme Court emphasized with respect to the forfeiture proceeding at issue: "It is not contested that this is an equitable action," in which the trial judge has discretion to consider "alternatives [to] abating the entire interest in the vehicle."

In any event, for the reasons pointed out in *Calero-Toledo* and *Van Oster*, forfeiture also serves a deterrent purpose distinct from any punitive purpose. Forfeiture of property prevents illegal uses "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." This deterrent mechanism is hardly unique to forfeiture.

Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

At bottom, petitioner's claims depend on an argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners. This argument, in the abstract, has considerable appeal, as we acknowledged in Goldsmith-Grant. Its force is reduced in the instant case, however, by the Michigan

Supreme Court's confirmation of the trial court's remedial discretion and petitioner's recognition that Michigan may forfeit her and her husband's car whether or not she is entitled to an offset for her interest in it.

We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." The State here sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets. The Bennis automobile, it is conceded, facilitated and was used in criminal activity. Both the trial court and the Michigan Supreme Court followed our longstanding practice, and the judgment of the Supreme Court of Michigan is therefore affirmed.

Justice THOMAS, concurring.

I join the opinion of the Court. . . .

As the Court notes, evasion of the normal requirement of proof before punishment might well seem "unfair." One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless--a violation of due process. . . .

This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable. As detailed in the Court's opinion and the cases cited therein, forfeiture of property without proof of the owner's wrongdoing, merely because it was "used" in or was an "instrumentality" of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments. . . .

Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.

Justice GINSBURG, concurring.

I join the opinion of the Court and highlight features of the case key to my judgment. The dissenting opinions target a law scarcely resembling Michigan's "red light abatement" prescription, as interpreted by the State's courts. First, it bears emphasis that the car in question belonged to John Bennis as much as it did to Tina Bennis. At all times he had her consent to use the car, just as she had his. And it is uncontested that Michigan may forfeit the vehicle itself. The sole question, then, is whether Tina Bennis is entitled not to the car, but to a portion of the proceeds (if any there be after deduction of police, prosecutorial, and court costs) as a matter of constitutional right. . . .

[T]he State's Supreme Court stands ready to police exorbitant applications of the statute. It shows no respect for Michigan's high court to attribute to its members tolerance of, or insensitivity to, inequitable administration of an "equitable action."

Nor is it fair to charge the trial court with "blatant unfairness" in the case at hand. That court declined to order a division of sale proceeds, as the trial judge took pains to explain, for two practical reasons: the Bennises have "another automobile,"; and the age and value of the forfeited car (an 11-year-old Pontiac purchased by John and Tina Bennis for $600) left "practically nothing" to divide after subtraction of costs.

Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment. Michigan has decided to deter Johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this Court's disapprobation.

Justice STEVENS, with whom Justice SOUTER and Justice BREYER join, dissenting. . . .

The logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts. Some airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes. The State surely may impose strict obligations on the owners of airlines, hotels, stadiums, and vehicles to exercise a high degree of care to prevent others from making illegal use of their property, but neither logic nor history supports the Court's apparent assumption that their complete innocence imposes no constitutional

impediment to the seizure of their property simply because it provided the locus for a criminal transaction. . . .

The State attempts to characterize this forfeiture as serving exclusively remedial, as opposed to punitive ends, because its goal was to abate what the State termed a "nuisance." Even if the State were correct, that argument would not rebut the excessiveness of the forfeiture, which I have discussed above. But in any event, there is no serious claim that the confiscation in this case was not punitive. The majority itself concedes that " 'forfeiture serves, at least in part, to punish the owner.' " At an earlier stage of this litigation, the State unequivocally argued that confiscation of automobiles in the circumstances of this case "is swift and certain 'punishment' of the voluntary vice consumer." Therefore, the idea that this forfeiture did not punish petitioner's husband--and, a fortiori, petitioner herself--is simply not sustainable.

Even judged in isolation, the remedial interest in this forfeiture falls far short of that which we have found present in other cases. Forfeiture may serve remedial ends when removal of certain items (such as a burglar's tools) will prevent repeated violations of the law (such as housebreaking). But confiscating petitioner's car does not disable her husband from using other venues for similar illegal rendezvous, since all that is needed to commit this offense is a place. The remedial rationale is even less convincing according to the State's "nuisance" theory, for that theory treats the car as a nuisance only so long as the illegal event is occurring and only so long as the car is located in the relevant neighborhood. The need to "abate" the car thus disappears the moment it leaves the area. In short, therefore, a remedial justification simply does not apply to a confiscation of this type.

II

Apart from the lack of a sufficient nexus between petitioner's car and the offense her husband committed, I would reverse because petitioner is entirely without responsibility for that act. Fundamental fairness prohibits the punishment of innocent people.

The majority insists that it is a settled rule that the owner of property is strictly liable for wrongful uses to which that property is put. Only three Terms ago, however, the Court surveyed the same historical antecedents and held that all of its forfeiture decisions rested "at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence." According to Austin, even the hoary fiction that property was forfeitable because of its own guilt was based on the idea that " 'such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by the forfeiture.' " It is conceded that petitioner was in no way negligent in her use or entrustment of the family car. Thus, no forfeiture should have been permitted. The majority, however, simply ignores Austin 's detailed analysis of our case law without explanation or comment.

Even assuming that strict liability applies to "innocent" owners, we have consistently recognized an exception for truly blameless individuals. The Court's opinion in *Calero-Toledo v. Pearson Yacht Leasing Co.* established the proposition that the Constitution bars the punitive forfeiture of property when its owner alleges and proves that he took all reasonable steps to prevent its illegal use. The majority dismisses this statement as "obiter dictum," but we have assumed that such a principle existed, or expressly reserved the question, in a line of cases dating back nearly 200 years. In other contexts, we have regarded as axiomatic that persons cannot be punished when they have done no wrong. I would hold now what we have always assumed: that the principle is required by due process.

The unique facts of this case demonstrate that petitioner is entitled to the protection of that rule. The subject of this forfeiture was certainly not contraband. It was not acquired with the proceeds of criminal activity and its principal use was entirely legitimate. It was an ordinary car that petitioner's husband used to commute to the steel mill where he worked. Petitioner testified that they had been married for nine years; that she had acquired her ownership interest in the vehicle by the expenditure of money that she had earned herself; that she had no knowledge of her husband's plans to do anything with the car except "come directly home from work," as he had always done before; and that she even called "Missing Persons" when he failed to return on the night in question. Her testimony is not contradicted and certainly is credible. Without knowledge that he would commit such an act in the family car, or that he had ever done so previously, surely petitioner cannot be accused of failing to take "reasonable steps" to prevent the illicit behavior. She is just as blameless as if a thief, rather than her husband, had used the car in a criminal episode.

While the majority admits that this forfeiture is at least partly punitive in nature, it asserts that Michigan's law also serves a"deterrent purpose distinct from any punitive purpose." But that is no distinction

at all; deterrence is itself one of the aims of punishment. Even on a deterrence rationale, moreover, that goal is not fairly served in the case of a person who has taken all reasonable steps to prevent an illegal act. . . .

The absence of any deterrent value reinforces the punitive nature of this forfeiture law. But petitioner has done nothing that warrants punishment. She cannot be accused of negligence or of any other dereliction in allowing her husband to use the car for the wholly legitimate purpose of transporting himself to and from his job. She affirmatively alleged and proved that she is not in any way responsible for the conduct that gave rise to the seizure. If anything, she was a victim of that conduct. In my opinion, these facts establish that the seizure constituted an arbitrary deprivation of property without due process of law. . . .

While I am not prepared to draw a bright line that will separate the permissible and impermissible forfeitures of the property of innocent owners, I am convinced that the blatant unfairness of this seizure places it on the unconstitutional side of that line. I therefore respectfully dissent.

Justice KENNEDY, dissenting. . . .

This forfeiture cannot meet the requirements of due process. Nothing in the rationale of the Michigan Supreme Court indicates that the forfeiture turned on the negligence or complicity of petitioner, or a presumption thereof, and nothing supports the suggestion that the value of her co-ownership is so insignificant as to be beneath the law's protection. For these reasons, and with all respect, I dissent.

95-9075 HENDRICKS v. KANSAS

Sexual predators—Double jeopardy—Ex post facto laws—Equal protection.

Ruling below (Kan SupCt, 912 P.2d 129, 58 CrL 1513):

Kansas' Sexually Violent Predator Act, Kan. Stat. Ann. Section 59-29a01 et seq., which provides for civil commitment and long-term care and treatment of person who is found beyond reasonable doubt both to be suffering from mental abnormality that has resulted in that person's commission of sexually violent offense and to present continuing danger to society through likelihood of repeating such offenses, violates substantive component of Fourteenth Amendment's Due Process Clause, as interpreted in *Foucha v. Louisiana*, 504 U.S. 71, 60 LW 4359 (1992), by failing to require that person sought to be confined have mental illness; "mental abnormality," as defined in statute, is not equivalent to mental illness; defendant's claims that act violates constitutional prohibitions against double jeopardy and ex post facto laws and fails to provide equal protection need not be addressed.

Questions presented: (1) Is Kansas law providing for long-term, indefinite confinement of sexually violent predators, even though labeled civil proceeding, so punitive either in purpose or effect as to require that it must be considered criminal? (2) Does Kansas Sexually Violent Predator Act violate constitutional prohibition against double jeopardy? (3) Does Kansas Sexually Violent Predator Act violate constitutional prohibition against ex post facto laws? (4) Does Kansas Sexually Violent Predator Act fail to provide equal protection under law as guaranteed by Constitution?

Petition for certiorari filed 5/13/96, by Thomas J. Weilert, of Wichita, Kan.

95-1649 KANSAS v. HENDRICKS

Mental patients—Commitment of "sexually violent predators"—Substantive due process.

Ruling below (Kan SupCt, 912 P.2d 129, 58 CrL 1513):

Kansas' Sexually Violent Predator Act, Kan. Stat. Ann. Section 59-29a01 et seq., which provides for civil commitment and long-term care and treatment of person who is found beyond reasonable doubt both to be suffering from mental abnormality that has resulted in that person's commission of sexually violent offense and to present continuing danger to society through likelihood of repeating such offenses, violates substantive component of Fourteenth Amendment's Due Process Clause, as interpreted in *Foucha v. Louisiana*, 504 U.S. 71, 60 LW 4359 (1992), by failing to require that person sought to be confined have mental illness; "mental abnormality," as defined in statute, is not equivalent to mental illness.

Questions presented: (1) Does Kansas' Sexually Violent Predator Act violate substantive due process principles? (2) What level of constitutional scrutiny applies to claim that civil confinement of sexually violent predator for care and treatment deprives such persons of liberty interest in violation of substantive due process principles?

Petition for certiorari filed 4/12/96, by Carla J. Stovall, Kan. Atty. Gen., Stephen R. McAllister, Spec. Asst. Atty. Gen., and Bernard Nash, James vanR. Springer, Laura B. Feigin, and Dickstein, Shapiro & Morin L.L.P., all of Washington, D.C.

SEXUAL-PREDATOR CASE FROM KANSAS WILL GUIDE NATION

The Kansas City Star

Tuesday, June 18, 1996

Tony Rizzo, Staff Writer

The U.S. Supreme Court announced Monday that it would use a Kansas case to decide the constitutionality of sexual-predator laws throughout the country. The 2-year-old Kansas law, which the state's high court ruled unconstitutional in March, is the first of its kind to be addressed by the U.S. high court.

Sexual-predator laws generally allow officials to imprison certain offenders indefinitely if they have mental problems that make them likely to offend again. The Kansas law is applied even after an offender finishes a prison sentence.

Critics say such laws unfairly punish people twice for the same crime and incarcerate them for crimes they may never commit. Proponents, however, say the laws protect society from dangerous repeat offenders while providing treatment for them.

Officials from 34 states and territories joined Kansas in asking the high court to address the law, said Kansas Attorney General Carla Stovall. State supreme courts have so far been split on the constitutionality of the laws. "This whole area is not going to settle down until the U.S. Supreme Court tells us yea or nay," said Johnson County District Attorney Paul Morrison.

Nancy Orrick, an Olathe lawyer who opposed Morrison in the county's first predator case, agreed.

"Ultimately, this is a decision they are going to have to make," she said. "Everybody has known that from day one."

The supreme courts in Washington and Wisconsin have found predator laws to be constitutional, and the Minnesota Court of Appeals upheld that state's law. The Kansas law was modeled on the state of Washington's statute, which has been in effect since 1990.

The Kansas Legislature passed the law in the wake of the murder of Stephanie Schmidt, a Pittsburg State University student. She was killed by a sex offender who had been released from prison. Her parents, Peggy and Gene Schmidt of Leawood, are strong advocates of the law. "We think it's a good law and should stand up to the constitutional challenge, " Gene Schmidt said.

Seven men in Kansas have been found to be predators under the law. They are being held in maximum security at the Larned Correctional Mental Health Facility. By law they must be kept separate from other inmates. Monday's action means that they will be kept in custody until the U.S. Supreme Court rules.

Kansas officials also said they would continue to file predator actions. One was filed Friday in Johnson County against an Olathe man, Jerry Inman, who was to be released from prison in July. A predator case is pending against Michael Abrams, a Leawood man who was scheduled to be released from prison in March. Abrams and Inman are being held in the Johnson County Jail. Inman's attorney, Robert Morse, said he would go forward with the case while the appeal progresses. A hearing for Inman is July 11. Abrams' attorney, Loren Moll, said Monday's decision was disappointing because it prevented Abrams from going free.

The first man in the state committed under the law, Leroy Hendricks of Wichita, brought the appeal that led the case to the U.S. Supreme Court. His attorney, Tom Weilert, raised many constitutional issues in the appeal, but the Kansas Supreme Court in its March 1 decision ruled on only one. The court voted 4-3 that the law violated the due process clause to the 14th Amendment of the Constitution.

The majority ruled that the predator law contradicted a 1992 U.S. Supreme Court case that said people cannot be committed involuntarily unless they are found to be both mentally ill and dangerous. Under the Kansas law predators do not have to found to be mentally ill; they must only suffer a personality disorder or a mental abnormality.

Stovall appealed the Kansas court's decision to the U.S. court, and Weilert asked the court to address all of the constitutional issues, not just the one decided by the Kansas court. In Monday's announcement the court agreed to address all the issues. "I think it's going to be real interesting," Weilert said. "It will encompass a lot of important constitutional issues."

Some of the issues Weilert raised include claims that the law constitutes double jeopardy and that it is applied retroactively, to offenders who were convicted before the law was passed. Stovall said she planned to argue the case for the state. Weilert

said he had not decided whether he would argue the case.

Both sides have 45 days to file briefs. They then have an additional 30 days to answer each other's briefs. Oral arguments probably will take place in the fall or the winter. A Supreme Court clerk said a schedule of argument dates would be released in mid-July. Attorneys estimated that a decision could come six to eight weeks after oral arguments.

HOLDING OF VIOLENT SEX OFFENDER WHO SEEMS LIKELY TO REPEAT CRIMES WILL BE ARGUED

The New York Times

June 18, 1996

Linda Greenhouse

WASHINGTON: The Supreme Court agreed today to decide whether a state can continue to confine a violent sexual offender who is considered likely to repeat his crimes, but who has served his sentence and does not meet the ordinary criteria for being committed as mentally ill.

The case, an appeal by the State of Kansas, reaches the Court at a time of growing concern over how the legal system should handle sexual predators who continue to present a danger beyond the immediate reach of the criminal justice system. Last month, President Clinton signed a new Federal law requiring the states to notify localities when a convicted sex offender settles nearby.

The Supreme Court case grows out of a different, and increasingly popular, approach to the same problem. The Kansas Sexually Violent Predator Act, which the State Supreme Court declared unconstitutional earlier this year, requires civil commitment in a mental hospital for a sex offender who has served his sentence and is then found by a jury in a separate proceeding to be still dangerous and suffering from a "mental abnormality" that has resulted in his criminal behavior. The continued confinement is open-ended, with re-evaluation every year.

Arizona, California, Minnesota, Washington and Wisconsin have similar laws, which are in various phases of legal challenges. The Wisconsin and Washington laws have been upheld by those states' Supreme Courts. But in the Washington State case, a Federal District Court subsequently ruled the law unconstitutional in a habeas corpus proceeding that the state has appealed.

Washington was the first state to enact such a law, in 1990. Kansas enacted its law in 1994. Other states have been paying close attention, and New York, New Jersey and Connecticut joined 30 other states in signing a brief urging the Justices to hear the Kansas appeal.

The Kansas Supreme Court, dividing 4 to 3 in a challenge brought by a 60-year-old man being held in a state hospital for the criminally insane, ruled that the law violated the constitutional guarantee of due process, as defined by the United States Supreme Court in a 1992 decision. In that ruling, *Foucha v. Louisiana,* the Justices held that once a person found not guilty by reason of insanity is no longer mentally ill, the state may no longer confine him.

The Kansas Supreme Court reasoned that because the phrase "mental abnormality" was not an accepted psychiatric diagnosis, the sexual predator law impermissibly operated to confine people who were not mentally ill. The court noted that the state could, without a constitutional problem, increase criminal sentences for sex crimes and insure through long sentences that dangerous offenders would not be released.

The defendant in this case, Leroy Hendricks, has been convicted of a series of sex crimes against young children beginning in 1955 and has served about half the time since then in prison or mental hospitals. He has committed new crimes every time he has been released. In August 1994, as his latest sentence was ending, the state sought his commitment under the new law, and after hearing psychiatric testimony during a three-day trial, a jury found that he was likely to prey upon young children again if he was released.

This spring, the Supreme Court granted a stay permitting continued confinement of Mr. Hendricks and five other men after the Kansas Supreme Court struck down the law. The case, *Kansas v. Hendricks*,No. 95-1649, will be argued in the fall.

SEXUAL PREDATOR LAW IN KANSAS IS STRUCK DOWN

The Kansas City Star

Saturday, March 2, 1996

Tony Rizzo, Staff Writer

The Kansas Supreme Court on Friday struck down the state's 2-year-old sexual predator law in a split decision that reflected the law's controversial nature. By a 4-3 vote, the court found that the law is unconstitutional because it indefinitely commits sexual offenders who are not mentally ill.

The decision means Leroy Hendricks, a Wichita man with a 40-year history of child molestation who brought the appeal, and the six other men confined under the law could soon go free. "The hard fact is that sometimes we make decisions we do not like," Justice Tyler Lockett wrote for the majority. "We make them because they are right, right in the sense that the law and the Constitution as we see them compels the result."

Attorney General Carla Stovall vowed to appeal the decision to the U.S. Supreme Court and said she will ask the Kansas court to hold up the men's release while the decision is being appealed. "I'm certainly disappointed that the U.S. Constitution was construed in a way that doesn't allow the state of Kansas to adequately protect the public from these offenders," she said.

The law, which took effect in April 1994, was designed to keep the state's most dangerous sex offenders locked up for treatment even after they completed prison sentences. Critics have complained the men were being "warehoused," not treated, and that the law unfairly punished the men twice for the same crime. The law applies to offenders who suffer a personality disorder or mental abnormality that makes them likely to commit future acts of predatory sexual violence.

By definition, they were people who did not qualify as being mentally ill. If they were mentally ill, they could have been confined under existing state law pertaining to involuntary mental commitments. And that's the problem, the court ruled Friday.

Justices cited a 1992 U.S. Supreme Court case that says a person cannot be committed against his will unless it is shown he is both mentally ill and dangerous. As a result, the predator law violates the due process clause of the 14th Amendment, the Kansas court ruled.

But the three dissenters in Friday's decision said Kansas should follow the lead of the supreme courts of Washington state and Wisconsin, which upheld nearly identical laws. They quoted the Washington Supreme Court in their dissent:

> "It is irrefutable that the state has a compelling interest both in treating sex predators and protecting society from their actions."

They were agreeing with the majority of the Washington court, even though that court's decision has since been overturned by a federal judge.

Justice Edward Larson said there were a number of differences between the Kansas law and the Louisiana statute ruled on in the earlier U.S. Supreme Court decision.

Seven men are currently committed as sexual predators in the Larned Correctional Mental Health Facility. In each case, a jury found them to be sexual predators. The law allows them to petition the court for release on a yearly basis. They can be held until doctors determine they are no longer likely to re-offend.

One case, filed last week in Johnson County, is pending. Johnson County District Attorney Paul Morrison said Friday's decision means that the case against Michael L. Abrams probably will have to be dropped. Abrams, who has twice been convicted of sex crimes involving children, is scheduled to be paroled after March 19.

Another Johnson County man, Kenneth Hay, was ruled to be a sexual predator in April 1995. He was about to be released after serving several years in prison for exposing himself to children.

In October 1994, Hendricks became the first person committed under the law. His attorney, who argued the case in front of the Supreme Court in September, was pleased by the decision Friday. "This restores my faith in the overall judicial process," Tom Weilert said. He agreed with the justices that the state has other ways of dealing with such offenders.

Hendricks could have received a maximum sentence of 45 to 180 years when he was prosecuted in Sedgwick County in 1984, Weilert said. But in a plea agreement, Hendricks received a five-to-20-year sentence.

"Without violating the Constitution, the state could have incarcerated Hendricks until he exhaled

his last breath and his spirit departed the earth, but it did not," Lockett wrote.

The Kansas Legislature is now considering legislation that would significantly increase prison sentences for repeat sex offenders.

"It becomes all the more important now," Stovall said Friday.

The Washington legislature on Thursday passed a similar measure, according to Todd Bowers, an assistant Washington attorney general. The Kansas predator law was based on Washington's, which went into effect in 1990.

The Washington Supreme Court upheld the law in 1993, but last summer a federal judge found the law unconstitutional on the same grounds used by the Kansas court Friday. The Washington attorney general is now appealing to the U.S. Court of Appeals. Bowers said that either way the appeals court rules, the law probably will reach the U.S. Supreme Court. "The Supreme Court has never defined what mentally ill is," he said.

Missouri legislators also are considering a sexual predator measure. Officials have attempted to structure it so they won't see the problems the Kansas and Washington laws have encountered, said Missouri Attorney General Jay Nixon. "We feel that the framework of our measure is much more constitutionally defendable," Nixon said.

Kansas Sen. Robert Vancrum, an Overland Park Republican and a major sponsor of the sexual predator law, said he was disappointed but not surprised by the Kansas court's decision.

"When Washington's law was found unconstitutional we thought we might have a problem," he said. The legislature now has two options, Vancrum said. In addition to looking at stiffer penalties, it could look at ways to amend the predator law.

Morrison said the legislature needs to carefully consider any possible changes in the law. "We need something that will serve the public and be constitutionally sound," he said. Morrison said it is an important enough concern that some action will be taken. "This issue not dead," he said.

In the Matter of the

CARE AND TREATMENT of Leroy HENDRICKS, Appellant.

912 P.2d 129

Supreme Court of Kansas.

March 1, 1996.

Stay Granted April 22, 1996.

ALLEGRUCCI, Justice:

Leroy Hendricks appeals from a jury finding that he is a sexually violent predator as defined in the Sexually Violent Predator Act (the Act), K.S.A. 59- 29 a01 et seq., and from the district court's order of commitment, which was issued pursuant to that finding. The Act establishes a procedure, which is stated to be civil, for involuntarily committing sexually violent predators for long-term care and treatment. Hendricks challenges the constitutionality of the Act and also raises various other grounds for reversing the finding and order of the district court.

This case was initiated by the district attorney's filing on August 17, 1994, of a petition in the district court seeking commitment of Leroy Hendricks as a sexually violent predator under the Act. The petition recited that it anticipated Hendricks' release from confinement on September 11, 1994, and stated [Hendricks'] criminal history. . .

The petition further alleged that Hendricks "suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence."

At the time the petition was filed, Hendricks was serving a sentence of 5 to 20 years imprisonment. The sentence had been imposed in accordance with the State's recommendation pursuant to a plea agreement . . .

A jury trial was conducted October 3-5, 1994. Hendricks was called as a witness by the State. He testified that he was 60 years old, that his history of sexual involvement with children began with his exposing himself to two girls in 1955, and that he had spent approximately half the time since then in prison or in psychiatric institutions. He explained that when he gets "stressed out," he is unable to control the urge to engage in sexual activity with a child. Hendricks agreed that he is a pedophile and that he is not cured of the condition.

The State also called Charles Befort, the chief psychologist at Larned State Hospital. He testified that a pedophile is predisposed to commit sexual acts with children and that pedophilia in and of itself is not considered to be a personality disorder. Dr. Befort testified that during the previous week he had performed an evaluation of Hendricks. Dr. Befort believed it likely that Hendricks would engage in predatory acts of sexual violence or sexual activity with children if permitted to do so. The factors upon which he based this opinion were the aphorism that "behavior is a good predictor of future behavior," his professional knowledge that pedophiles tend to repeat their behavior, and Hendricks' poor understanding of his behavior. He testified that he did not believe Hendricks was mentally ill or had a personality disorder but that, as he interpreted the Act, pedophilia was a mental abnormality. He agreed that his interpretation of the statute was open to debate.

The jury found that Hendricks is a sexually violent predator. He was committed to the custody of the Secretary of Social and Rehabilitation Services (SRS).

Hendricks challenges the constitutionality of the Act on various grounds, alleging the Act violates both the United States and Kansas Constitutions. He argues the Act violates the prohibition against double jeopardy and ex post facto laws, fails to provide equal protection and procedural or substantive due process, and is void as overly broad and vague.

We first consider Hendricks' substantive due process challenge. In so doing, we must presume the Act is constitutional and resolve all doubts in favor of the Act's validity. If there is any reasonable way to construe the Act as constitutionally valid, we must do so.

Hendricks contends that his substantive due process liberty interest is violated by indefinite confinement under K.S.A. 59-29 a01 et seq. He relies on *Foucha v. Louisiana.* He represents the case as holding that due process prohibits a person's being involuntarily committed by a civil proceeding absent a finding that

the person is both mentally ill and dangerous. It is his contention that the Act's requirement of a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence falls short of a finding of mental illness. He points out that "[t]he express purpose of the statutory scheme . . . is to confine persons 'who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons. . . ..'"

It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 et seq. If there is nothing to treat under 59-2901, then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous. . . .

It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment. Protecting the public is a legitimate exercise of the State's police power. Although the Act is a well-intentioned attempt by the legislature to accomplish that objective, it cannot be done in a constitutionally impermissible manner. Having said that, we need to point out that the legislature has provided the State with other options to achieve that objective and, in addition, has the authority to increase the penalty for sex crimes committed against children.

The record indicates that Hendricks had at least three felony convictions prior to being charged in the present case. Under the Habitual Criminal Act, Hendricks' sentence could have been tripled. Also, Hendricks could have been sentenced to the maximum rather than the minimum sentence. Additionally, the sentences could have been ordered to run consecutively rather than concurrently. The State chose not to pursue any of these options. Instead, the State opted to enter into a plea bargain with Hendricks. The State agreed to dismiss one count, to recommend the statutory minimum sentence of 5 to 20 years, and to not seek imposition of the Habitual Criminal Act.

The State now chooses to pursue the option under the Act to continue Hendricks' incarceration. The State contends that commitment under the Act requires "a finding of mental illness and dangerousness . . . consistent with *Foucha*". . . .

We find no support in the Act that a finding of mental illness is required. . .

The State's principal evidence concerning Hendricks' mental state was the testimony of Charles Befort, the chief psychologist at Larned State Security Hospital. He testified that he did not believe Hendricks was mentally ill or had a personality disorder. . . .

We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined in K.S.A. 59-2902(h) as meaning any person who: "(1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others." Here, neither the language of the Act nor the State's evidence supports a finding that "mental abnormality or personality disorder," as used in 59-29 a02(a), is a "mental illness" as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. Justice White, speaking for the majority of the United States Supreme Court in *Foucha*, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.

In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of Addington and *Foucha* is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights.

We hold that the Kansas Sexually Violent Predator Act violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Having so held, we need not consider the other issues raised by Hendricks in this appeal. We note that the dissenters have chosen to consider and decide those issues, notwithstanding that they have not been addressed or decided by the majority. That part of the dissent is dicta and for that reason does not warrant a response.

The judgment of the district court is reversed.

LOCKETT, Justice, concurring: . . .

The dissent disagrees with the basic premise, the underlying reasoning, and the decision of the majority that the Act violates the due process clause of the Fourteenth Amendment to the United States Constitution. The dissent bases its reasoning on the decisions of the Supreme Courts of Washington and Wisconsin "which are almost identical and substantially similar legislation in their respective states." The dissent failed to note that a United States District Court disagreed with the decision of the Washington Supreme Court and declared the similar Washington sexual violent predator act an unconstitutional violation of the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the federal Constitution when the same offender later petitioned the district court for a writ of habeas corpus. . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that before an individual may be involuntarily committed for control, care, and treatment, the State must prove by clear and convincing evidence that the individual is both mentally ill and dangerous. . . .

Leroy Hendricks has an antisocial personality. He is not mentally ill and could not be committed for treatment to protect society. Hendricks committed sex crimes against children. He was sentenced and imprisoned for those crimes. Without violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not. Hendricks has now served the criminal sentence imposed by the

State and under the law must now be released, even if he has an antisocial personality.

In an effort to protect society from individuals, such as Hendricks, who are antisocial and will in all probability commit other sex crimes when released from prison, the Act was enacted. The Act reclassifies persons to be mentally ill who are antisocial, a danger to others, and have been convicted of a specific sex crime. The effect is that the criminal is reclassified as a mentally ill person. The Act permits the State to civilly commit the criminal for treatment as a mentally ill person because of a past criminal act and the fact that the individual has an antisocial personality. . . .

The United States Supreme Court in *Foucha v. Louisiana* noted that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: The person sought to be committed is mentally ill, and the person requires hospitalization for his or her own welfare and the protection of others. . . .

The Supreme Court held that a convicted criminal, such as Hendricks, may not be held as a mentally ill person because of criminal dangerousness.

Because the Washington act, which is almost identical and substantially similar legislation to the Kansas act, was declared unconstitutional by the federal court, and the reasoning of the majority follows the prior decisions of the Supreme Court of the United States, I must join the majority.

LARSON, Justice, dissenting:

I disagree with the basic premise, the underlying reasoning, and the conclusion of the majority that the Kansas Sexually Violent Predator Act (the Act) violates the substantive aspect of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Kansas should join the decisions of the Supreme Courts of Washington and Wisconsin in upholding the validity of almost identical and substantially similar legislation in their respective states. . . .

The opinion of this court relies on substantive due process to declare the Act unconstitutional. However, the majority fails to address directly what test should be used to measure the constitutionality of a legislative act attacked on the basis of substantive due process. It appears to assume that if substantive due process is implicated, the legislative act is ipso facto unconstitutional.

Where no fundamental right is involved, a statute attacked as violative of due process is subject to only minimal scrutiny. This standard is functionally equivalent to the rational basis test in the context of equal protection challenges. "Under the 'rational basis' test, if there is any rational relationship between the act and a legitimate governmental objective, the act passes muster. Under this test one challenging the constitutionality of the act bears the burden of showing no rational relationship exists between the means and the end."

Thus, when considering whether a statute violates substantive due process, the first step in the analysis is to determine whether it involves a fundamental right. If it does not, a rational basis for the enactment will be sufficient to allow it to pass constitutional muster. If a statute involves a fundamental right, the statute is then subject to strict scrutiny. . . .

There is no doubt that the civil commitment of sexually violent predators involves so significant a deprivation of liberty that the protections of due process are invoked. This clearly requires that we apply the strict scrutiny test and the analysis it involves. The question therefore becomes whether the State has shown a sufficiently compelling interest to warrant the statute's undeniable intrusion on Hendricks' liberty and whether the commitment scheme it has adopted is narrowly tailored to serve that compelling interest. . . .

Therefore, our analysis is based on a strict scrutiny test, beginning with the premise that the State of Kansas has a compelling interest both in treating sexually violent predators and in protecting society from their actions. The ultimate question then becomes whether the Act is sufficiently narrowly tailored to serve those interests without unduly burdening individual rights. . . .[T]he limited authority available suggests the Act is a legitimate exercise of the legislature's power. . . .

*Addington*tells us little more than that one may not be involuntarily committed as mentally ill without "something more serious than is demonstrated by idiosyncratic behavior." What is that "something more"? *Addington* is unequivocal: That is a question reserved largely to the states. Therefore, since our Act requires a higher degree of proof than the constitutional minimum, the Act appears to be "narrowly tailored" to restrict its application to contexts where the interests of the State are most compelling. . . .

The question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit a legislative classification that is more than mere idiosyncratic behavior "within a range that is generally acceptable."

Consequently, the substantive due process analysis reduces to this: Has the State shown a compelling interest to which its statutory scheme for involuntary commitment is narrowly tailored? As discussed above, the State interest in confining and treating sexual predators is the protection of the public from random violent sexual attack by persons known to the State to be likely to carry out such attacks. "[I]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions."

Is the Sexually Violent Predator Act sufficiently narrowly tailored to achieve the State's compelling interest? I would answer this question with a ringing "yes." The Act is narrowly tailored in a number of particulars. First, it does not apply to sex offenders generally, or even to all sex offenders suffering some ailment of the mind, but applies only to those persons with an ongoing mental condition rendering them likely to commit acts of sexual violence. Second, it does not apply to those susceptible to less restrictive treatment, but only to those who require secure confinement to prevent such violence. Third, to reduce the risk of erroneous detention it does not apply to all persons accused of sexually violent offenses, but only those previously charged or convicted. Fourth, it does not apply in the face of meager, or even clear and convincing evidence, but requires the State to prove beyond a reasonable doubt that a person qualifies for confinement. Fifth, consistent with its narrowly focused goals, it requires treatment outside the Department of Corrections. Sixth, it has adequate provisions for continuing reviews to ensure that only those persons representing a continuing danger are confined and treated. These are not all the reasons but are more than sufficient to require us to uphold the constitutionality of the Act.

For all of the reasons stated, I would hold that under established substantive due process analysis, the Act is narrowly tailored to serve a compelling State interest and therefore passes constitutional muster.

Although this dissent has answered the grounds for constitutional invalidity relied on by the majority, I write further, although not in great depth, about each additional issue raised by Hendricks which I would hold to be insufficient to require the reversal of his adjudication as a sexually violent predator.

Equal Protection . . . .

[T]he test for determining the constitutionality of a statute under due process and equal protection weighs almost identical factors.

The Act focuses on the narrow problem of mental abnormality and violent, predatory sex crimes. Equal protection of the law does not require the State to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. A statute does not violate equal protection just because it does

not go as far as it might have gone. The Act does not violate equal protection principles for the same reason it does not violate substantive due process--it is narrowly tailored to deal with a compelling State interest.

Civil or Punitive Nature of Act

Hendricks appeals the trial court's finding that the Act is civil in nature and remedial, contending it is criminal and punitive. If the Act is criminal, Hendricks contends it is unconstitutional because it violates the constitutional prohibitions against double jeopardy and ex post facto laws. The legislature's purpose was the protection of society from those rendered sexually dangerous by a mental ailment and the treatment of such people. Together, these are permissible goals of a civil commitment scheme and do not convert the Act into a criminal statute. I would hold the Act to be civil in nature; thus, it should be evaluated by the standards applicable to such statutes.

Double Jeopardy. . . .

As noted above, the legislative purpose of the Act is public safety and treatment of those committed, not retribution or deterrence. Since it is remedial in nature and seeks neither punishment nor retribution, it does not constitute a double jeopardy violation.

Ex post facto

Since the Act, as a civil statute, neither criminalizes conduct legal before its passage nor imposes punishment for a crime, it does not violate the Ex Post Facto Clause. Its concern is the current mental condition of the person subject to commitment and his or her present dangerousness, not any past behavior except as relevant to show current condition.

Procedural Due Process

Hendricks' argument that the Act violates procedural due process must also fail. Hendricks has failed to overcome the presumption of the constitutionality of the Act on the grounds of double jeopardy, ex post facto, and procedural due process largely because the Act is not punitive but remedial, not criminal but civil.

. . .

Conclusion

For all of the reasons hereinbefore set forth, I dissent from this court's opinion and would hold that the Kansas Sexually Violent Predator Act is constitutional. The trial court should be affirmed.

McFARLAND, C.J., and SIX, J., join in the foregoing dissenting opinion.

95-891 OHIO *v.* ROBINETTE

Vehicle stops—Consent to search—Voluntariness—Requirement that officer inform motorist that traffic stop is over before officer requests permission for search.

Ruling below (Ohio SupCt, 73 Ohio St.3d 650, 653 N.E.2d 695, 64 LW 2183, 57 CrL 1591):

Law enforcement officer's attempt to obtain motorist's consent to search or to interrogate about matters unrelated to traffic offenses that prompted stop violates guarantees of Fourth Amendment and Ohio Constitution against unreasonable search and seizure unless officer first informs motorist that he or she is free to leave; once police officer had issued warning to defendant for speeding, officer lacked justification to continue to detain defendant; defendant's consent to search vehicle given during period of illegal post-stop detention was invalid; drugs discovered during officer's search of defendant's vehicle are inadmissible at defendant's trial for drug abuse.

Question presented: Does Fourth Amendment require police officers to inform motorists, lawfully stopped for traffic violations, that legal detention has concluded before any subsequent interrogation or search will be found to be consensual?

Petition for certiorari filed 12/5/95, by Mathias H. Heck Jr., Pros. Atty. for Montgomery Cty., Ohio, and Carley J. Ingram and Arvin S. Miller, Asst. Pros. Attys.

95-1268 MARYLAND v. WILSON

Vehicle stops—Ordering passengers out of lawfully stopped vehicle.

Ruling below (Md CtSpecApp, 106 Md.App. 24, 664 A.2d 1, 64 LW 2207, 57 CrL 1560):

Unlike police officer's order for driver to exit vehicle during traffic stop, which Supreme Court said, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), does no more than shift location of prior detention, officer's order for passenger to exit vehicle during traffic stop creates new detention; accordingly, passenger's Fourth Amendment privacy interest in avoiding detention outweighs interest in police officer's safety while conducting traffic stop during which passenger "appeared nervous"; order suppressing evidence of crack cocaine that fell to ground when police officer ordered defendant to exit vehicle in which he was passenger is affirmed.

Question presented: When police officer makes lawful traffic stop, does officer's automatic right to order driver to exit vehicle, pursuant to *Pennsylvania v. Mimms*, extend to passengers in stopped vehicle?

Petition for certiorari filed 2/9/96, by J. Joseph Curran Jr., Md. Atty. Gen., and Gary E. Bair, Mary Ellen Barbera, and Kathryn Grill Graeff, Asst. Attys. Gen.

COURT CASES MAY HELP DEFINE RIGHTS OF MOTORISTS

The Las Vegas Review-Journal

Tuesday, May 28, 1996

James Kilpatrick

Probably it's happened to you. Certainly it has happened in our family. One minute we are tootling down the road, listening to a little Mozart, and the next minute there's a flashing blue light in the rearview mirror. My wife says, "Uh-oh." She says, "Pull over, honey, it's a cop." In this universal situation, what are the rights of the motorist? What are the powers of the cops?

More by design than by coincidence, four separate cases now are pending in the U.S. Supreme Court that present substantially these questions. The court heard argument April 17 in the first of them, *Michael A. Whren vs. U.S.*

It turned out to be a remarkably fuzzy argument, with the fuzziness divided equally among the justices and the lawyers. At bottom, the issue was "pretext." First the facts, then the law. On the night of June 10, 1993, District of Columbia vice officers, riding in unmarked cars, were patrolling for drug operations in southeast Washington. They saw a late-model Nissan Pathfinder commit three minor traffic violations: 1) The driver, James L. Brown, stopped overly long at a stop sign, 2) Brown made a right turn without signaling, and 3) Brown drove toward Minnesota Avenue at "unreasonable speed."

The plainclothes officers swooped down and stopped the car. As Officer Efrain Soto approached, he saw a front-seat passenger, Michael A. Whren, holding a plastic bag of what appeared to be crack cocaine in each hand. Soto opened the door, dived across the seat and grabbed one of the bags from Whren's hand. Other officers joined in. They found additional crack cocaine and two tinfoils of marijuana.

The defendants naturally moved to suppress the evidence, on the grounds that the cops had violated their constitutional right to be free from unreasonable searches and seizures. The trial court denied the motion, a jury convicted both defendants, and the judge gave them 16 years in the slammer. The D.C. Circuit affirmed.

Everyone agrees that the police cannot stop a motorist just because they don't like his looks. They must cite some objective reason for turning on the blue lights. Otherwise the reason, such as a failure to signal a turn, becomes a mere pretext. Were the minor offenses in this case "pretextual"? Put another way, were the offenses the kind of offenses for which a reasonable police officer "could have" stopped the car or "would have" stopped it?

You might not believe the difference between "could have" and "would have" could have absorbed the court's attention for an hour, but so it developed. The argument wandered into departmental policies. In Washington, the police department's written rule is that plainclothes officers in unmarked cars are not to enforce traffic laws "except in the case of a violation that is so grave as to pose an immediate threat to the safety of others." Is it material or immaterial that the vice squad violated this policy?

Another case, *Ohio vs. Robert D. Robinette*, presents a different question. A Montgomery County deputy sheriff, Roger Newsome, stopped Robinette in August 1993 for driving 69 mph in a 45-mph construction zone. The deputy was working a drug interdiction project. After giving Robinette a warning, Newsome asked if he had any drugs in the car. *Robinette* said no. Newsome then asked if he could search the car. Robinette said yes. The deputy found drugs. Motion to suppress: denied. Verdict: guilty.

The Ohio Supreme Court reversed. After he had warned Robinette for speeding, Newsome had failed to say to Robinette, "At this time you are legally free to go," or words to that effect. This made the search unconstitutional.

A third case, *Maryland vs. Jerry Lee Wilson*, dates from a night in June 1994 when a state trooper stopped a new Nissan Maxima for not having a proper license plate. The driver, one McNichol, seemed unduly nervous. His passenger, Wilson, was visibly sweating. The trooper ordered McNichol to exit the car. Then the trooper ordered Wilson to step out of the car. Crack cocaine dropped to the ground.

Beyond question, the trooper had a right to order the driver to step out. A 1977 Supreme Court case is directly in point. But what about the passenger? Maryland's Special Court of Appeals said, no, nervous perspiration is not enough; the order was unreasonable.

The fourth case, *Enrique Ruvalcaba vs. Los Angeles*, came out the other way. Police stopped a car for failure to stop at a stop sign and ordered Ruvalcaba, a passenger, to step out. A fight ensued. Ruvalcaba was hurt. He sued the cops, charging that the order violated his rights. The 9th U.S. Court of Appeals said no way. The order was reasonable.

There the law stands, or at least there the law wobbles. As a driver, what are your rights? What are your passengers' rights? We will know by the time term ends in late June.

(James J. Kilpatrick writes a syndicated column about the court system.)

JUSTICES TO CONSIDER WHEN POLICE CAN ORDER MOTORISTS TO EXIT CARS

The Associated Press

Monday, June 17, 1996

Richard Carelli

WASHINGTON (AP) - You're a passenger in a car that gets stopped for a routine traffic violation. May the police order you and the driver to get out?

The Supreme Court agreed Monday to answer that question, arising from a Maryland confrontation repeated hundreds or thousands of times across the nation each day. The case pits privacy rights against police safety.

Maryland prosecutors want the justices to use the case to extend a key 1977 high court ruling in which the justices said motorists stopped for routine traffic violations may be ordered by police to exit their cars. Such a rule "reduces the likelihood that the officer will be the victim of an assault," the court said 19 years ago.

Maryland prosecutors said that ruling should apply to a car's passengers as well. Maryland state trooper David Hughes stopped a car along Interstate 95 in Baltimore County one June evening in 1994. He had clocked the car's speed at 64 mph in a 55-mph zone and noted it had no license tag.

The car had three occupants, and Hughes spoke briefly to the driver while both men stood between their cars. While speaking to the driver, Hughes said he noticed that Jerry Lee Wilson, a passenger in the front seat, seemed very nervous. Wilson balked when first asked by Hughes to get out of the car. When he opened the door and took one step out, crack cocaine dropped to the ground. Hughes arrested Wilson.

Wilson sought to have the cocaine suppressed as evidence, contending that Hughes had violated his Fourth Amendment right to be free from unreasonable searches and seizures when he ordered him out of the car. Maryland courts agreed with him.

State prosecutors said that most courts considering such cases elsewhere have allowed police automatically to order all passengers from a car. Maryland courts and others that do not, the state's appeal said, "endanger the hundreds, if not thousands, of police officers who stop vehicles each day for traffic violations."

SUPREME COURT AGREES TO CLARIFY POLICE AUTHORITY IN TRAFFIC STOPS

Md. Case Brings Up Issue Of Officers' Safety

The Baltimore Sun

Tuesday, June 18, 1996

Lyle Denniston

WASHINGTON -- The Supreme Court, heeding a plea by the state of Maryland, agreed yesterday to spell out the authority of police to order all passengers out of cars they have stopped, to control occupants' movements.

At issue is the constitutionality of a police order, after a car is stopped for a traffic violation, that all the passengers get out -- a move that the state contends is required to assure police safety.

Maryland's highest court, the Court of Appeals, ruled in August that the Constitution's Fourth Amendment does not allow police to routinely order passengers out of vehicles. Only if police have reason to think that "extra caution" is required may they order all passengers to exit, the appeals court said.

That ruling, Maryland Attorney General J. Joseph Curran Jr. said in a statement yesterday, could take away "one of an officer's most effective tools in a potentially dangerous situation -- being able to legally control the actions of a driver and passengers during a traffic stop. We must convince the Supreme Court to give the police this tool back."

Curran said he would argue the case himself when it comes up in the Supreme Court for a hearing, probably in January. A ruling is expected before next summer.

The issue has split lower courts. The New Jersey Supreme Court, like Maryland's highest court, has ruled against routine police orders for passengers to get out. But a federal appeals court ruled that police could require that in all traffic stops.

The Supreme Court voted last month to leave that appeals court ruling intact. It gave no explanation. Yesterday, however, when the Maryland case came up, the justices granted review.

The Maryland case is a sequel to a 1977 Supreme Court ruling. Then, the justices ruled that no constitutional rights were violated when police ordered the driver of a stopped vehicle to get out. That decision, however, applied only to the driver, not to passengers.

The Maryland case stems from an incident on Interstate 95 in Baltimore County in June 1994. David Hughes, a Maryland state trooper, saw a car moving at high speed and took up a chase.

The officer, with lights flashing on his patrol car, chased the vehicle for 1 ½ miles, into Baltimore City, before it pulled over. The driver got out on his own, and Hughes noticed that he seemed nervous. The passenger in the front seat, Jerry Lee Wilson, was sweating and appeared nervous, too, the officer said later.

The officer told Wilson to get out of the car. When he did, a packet of crack cocaine fell to the ground. Hughes drew his gun and arrested Wilson. Later, the officer said that movement in the vehicle had raised a suspicion that a gun could be in the car.

HIGH COURT TO RULE ON
POLICE SAFETY VS. CAR-PASSENGER RIGHTS

The Washington Times
Sunday, April 28, 1996
Frank J. Murray

The U.S. Supreme Court appears anxious to decide if the civil rights of passengers required to step from automobiles during routine traffic stops are more important than a police officer's life. Justices have requested filings on that point by May 2 in two cases - a drug bust by an inexperienced Maryland state trooper and a civil lawsuit against Los Angeles officers who beat passengers in a car that ran a stop sign.

A coalition of 25 other states led by Ohio asked the court to review and reverse a Maryland Court of Special Appeals decision that "devalued the state's interest in protecting its law enforcement officers."

"The very fact that you've got two appellate courts arguing about it suggests to me the cop on the scene is the best judge of what is best for the cop on the scene's safety," said Bill Johnson, a former policeman who is general counsel of the National Association of Police Organizations. "They should not have to take the chance that the answer is a bullet," Mr. Johnson said.

The case being appealed in *Maryland vs. Wilson* attacks suppression of crack cocaine evidence that fell on the street when a passenger got out of the car.

Attorney General J. Joseph Curran Jr. said such police orders intrude minimally on a passenger but are vital to the officer, so they should apply to everyone in a car. "I'm really troubled by the decision that police safety is not a factor when making a legitimate traffic stop," Mr. Curran said in an interview.

In the Los Angeles case, the 9th U.S. Circuit Court of Appeals decided officer safety justified ordering passenger Enrique Ruvalcaba out of the car. Mr. Ruvalcaba said his civil rights were violated by Officers David Jacoby and John Backus, who enforced their order with nightsticks in the Feb. 28, 1991, incident.

"The 9th Circuit decision . . . is based upon unproven and probably erroneous assumptions of appellate judges about what enhances officer safety and what detracts from it," said Mr. Ruvalcaba's attorneys.

In addition to civil attorney John C. Burton of Pasadena, Mr. Ruvalcaba is backed by Robert Mann of the Police Misconduct Lawyers Referral Service. "Police decisions unreasonably to order people about - like ordering Mr. Ruvalcaba out of the car into the rain - are most often directed at ethnic minorities and others who have the least power to do anything about it," said Mr. Mann, whose legal brief minimized claims of danger by saying four times as many officers kill themselves as are killed by criminals.

Drivers have no option under the Supreme Court's 1977 *Pennsylvania vs. Mimms* decision allowing officers to order them to get out or to remain inside during the most minor stops, without requiring suspicion they may be armed. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety," the court said in that case.

Two federal courts and state courts in 13 states apply that to passengers as well. Maryland and three other states do not.

Citing murders of state Troopers Theodore Wolf in 1990 and Edward Plank in 1995 during traffic stops, Mr. Curran said all officers need full leeway.

"It's important because police officers need to protect themselves when they make a traffic stop and, oftentimes, what appears to be a routine traffic stop ends up not being routine," said Assistant Attorney General Gary E. Bair.

"One of the ways officers can protect themselves is to deal with a driver and passengers one at a time in a way that gives them some control over the situation," Mr. Bair said.

The Maryland case involves crack cocaine charges against Jerry Lee Wilson of Florence, S.C., a passenger in a car stopped on Interstate 95 for doing 64 mph in a 55 mph zone on June 8, 1994. Trooper David Hughes said the three men in the car

acted "furtively," but the appeals court upheld the trial judge ruling that the officer had no suspicions, justified or unjustified. The state wants the Supreme Court to say Trooper Hughes needed no suspicion to order Mr. Wilson out.

In a related Maryland case, Mr. Curran asked the state appeals court to reconsider its order that police cannot stop a passenger from leaving the scene when a car is stopped for traffic violations.

"The passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab." the court said.

COURT TO HEAR TRAFFIC STOP CASE

Montgomery Prosecutor Appeals

Dayton Daily News

Tuesday, March 5, 1996

Rob Modic, Dayton Daily News

The U.S. Supreme Court on Monday accepted a Montgomery County prosecutor's request to review an Ohio case that requires police to tell motorists they are free to go before pressing them about illegal drugs or firearms. The case could impact thousands of cases throughout the country where similar practices have become routine.

The Ohio Supreme Court ruled 4-3 on Sept. 6 that traffic officers who routinely stop drivers for traffic offenses must tell them they are "free to go" before making any additional inquiries about whether their car contains any contraband. Failure to speak those words automatically forfeits any evidence that may be subsequently detected, the court ruled.

The court majority drew on a decision by the Ohio 2nd District Court of Appeals in Dayton that decided 2-1 on April 15, 1994, to throw out a conviction of Robert D. Robinette. He was stopped on Aug. 3, 1992, on Interstate 70 for driving 69 mph in a 45 mile per hour construction zone at Diamond Mill Road.

The sheriff's deputy who made the stop, Ronald Newsome, later testified at a hearing that he had already decided to give Robinette only a warning before he spoke to him. However, before returning Robinette's driver's license, Newsome turned on a video recorder on his cruiser and asked Robinette if he could search his car for drugs. Robinette said "yes." Newsome found a small amount of methamphetamine.

Newsome was part of a unit directed to interdict potential drug couriers on highways in and around Dayton. Robinette's stop was one of more than 780 made by Newsome in 1992. That compared with about 1,522 requests for searches by all of Ohio's 1,427 troopers in 1993. The state highway patrol reported that of the 1,410 searches that drivers agreed to in 1993, only 213 resulted in finding contraband.

Writing for the majority in the Ohio Supreme Court case, Ohio Supreme Court Justice Paul E. Pfeifer said that the case demonstrated the need for the court to clear up the haziness of when a driver is able to freely give consent to a continuing, unsubstantiated police inquiry.

Upholding the right of police to obtain consent from willing drivers, "we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for unrelated criminal activity," Pfeifer said.

The Ohio court said the "bright line" to determine that a driver knows his rights becomes the officer's announcement that he is free to go, Pfeifer said. Chief Justice Thomas J. Moyer and Justices J. Craig Wright and Justice Alice Robie Resnick joined Pfeifer.

Writing for the dissenters, Justice Francis E. Sweeney objected, saying the U.S. Supreme Court had decided many a long line of cases that made the crucial legal test one of "taking into account all of the circumstances surrounding the encounter" between the citizen and the police. That's what prosecutors are seeking from the U.S. Supreme Court.

Carley J. Ingram, chief of the Montgomery County prosecutor's appeals division, and defense attorney James D. Ruppert said this will be their first appearance before the nation's highest court. Ingram said it has been about 10 years since a Montgomery County criminal case was argued before the U.S. Supreme Court.

DRIVERS MUST YIELD A FEW RIGHTS TO POLICE IN WAR AGAINST CRIME, COURT DECIDES

The Columbus Dispatch, Editorial & Comment

Monday, July 1, 1996

Richard Cordray

The most frequent contacts between police officers and many citizens stem from occasional stops made for routine traffic violations or minor infractions of the voluminous motor-vehicle laws. Over the years, as automobile travel has become ubiquitous, the Supreme Court has confronted many constitutional issues involving the extent of police authority in such encounters. Some of its decisions have been quite controversial. For example, in a case decided in 1970 - but still debated today - the court decided that when the occupants of a vehicle are arrested for any reason, the entire vehicle can be searched without a warrant.

The court's positions on these issues have been greatly influenced by an overriding concern about the mobility of criminal suspects, contraband and other evidence of crime. The court has understood that the automobile (and now also the telephone and computer) has greatly enhanced criminal enterprises. In response, the court has been willing to allow a correspondingly greater latitude to police officers in fighting crime.

But even as more criminals use cars and trucks in their operations, more law-abiding citizens are using them in their daily lives. As a result, aggressive police tactics aimed at identifying lawbreakers can inconvenience ordinary people, as well as intrude upon their privacy. Two examples that have been considered by the Supreme Court in recent years are random stops to check for proper license and vehicle registration, which the court invalidated in 1979, and roadside sobriety checkpoints, which the court upheld in 1990.

Two new cases - one from Ohio - also illustrate these tensions. In the first, the court considered whether it is constitutional for police officers to stop a motorist and warn him about alleged traffic violations that are so minor that a "reasonable officer" would not have done so, in order to look for evidence of other criminal activity.

In this case, *Whren vs. United States*, plainclothes police officers were patrolling a "high-drug area" in Washington in an unmarked car. They observed a truck that waited at a stop sign for an unusually long time while the driver looked down into the lap of his passenger, then turned suddenly without signaling and sped away. The police followed the truck and eventually pulled up alongside it at a stoplight. One of the officers got out and approached the vehicle. He later testified that he did so to give the driver a warning about possible traffic violations. He identified himself as a police officer and instructed the driver to put the truck in park. He saw two bags of crack cocaine in the truck, whereupon he arrested its occupants.

The driver and the passengers were convicted on federal drug charges. They appealed, contending that the traffic stop and resulting seizure of the drugs were improper because the alleged traffic violations were used as a mere pretext for the officers to detain and investigate them. Last month, the court unanimously rejected their claims and upheld their convictions. In essence, the court made it clear that it was not willing to second-guess the subjective motivations of police officers in any circumstances where they actually had probable cause to stop a vehicle. In this case, the officers had probable cause to believe that traffic laws had been violated.

This decision gives police a powerful tool to combat crime, but it also enables police to interfere (whether deliberately or not) with ordinary citizens. Because the use of automobiles is so heavily and minutely regulated, it is almost impossible to obey perfectly every traffic and equipment regulation. This decision will thus permit the police to single out almost anyone they wish to stop. While not denying this point, the court observed that it does not have the authority or the inclination to say that the traffic code has become so expansive that police officers can be prevented from enforcing it. And this decision, though not without its troubling aspects, is almost surely right.

The second case - *Ohio vs. Robinette* - will be argued before the Supreme Court later this year. It concerns the constitutionality of a new law-enforcement practice that has become common in many places, including Montgomery County. An officer who stops a vehicle for any legitimate purpose is instructed to ask the driver for consent to search the vehicle, if it seems useful for any reason, at the end of the detention. The Supreme Court has generally treated consent searches as purely voluntary transactions: The officer is free to ask

permission, and citizens are free to grant or withhold it as they see fit. Although a heated debate has long raged over whether this is a realistic view of most police encounters, the court has held that such "consent searches" are constitutional in any setting where a reasonable citizen would feel free just to end the conversation and walk away.

The issue in the Robinette case is whether a reasonable person in the motorist's position would feel free to leave. Concerned about the pressures inherent in this situation, the Ohio Supreme Court held that in order for the consent to be valid, the officer must expressly instruct the motorist that he or she is free to leave before seeking permission to search. The Ohio Supreme Court was particularly concerned about the fact that the officer's motivations in asking for permission to search the vehicle were essentially unrelated to the legitimate purpose for the traffic stop - a concern that apparently cannot bear as much emphasis in the wake of the recent *Whren* decision.

It is certainly plausible that a motorist might give permission for a search simply because he or she feared that a refusal would cause the officer to retaliate by taking harsher measures with respect to any alleged traffic violations. Nonetheless, the U.S. Supreme Court has construed the notion of "voluntary consent" very broadly (to include, for example, consent given in situations where the officer has made some show of authority). It is thus likely that the court will reverse the Ohio ruling next year.

If so, this case will confirm once again the current Supreme Court's strong feeling that ordinary citizens must make an increasing number of small sacrifices of their liberty and privacy in order to arm our police more effectively to combat crime.

(Richard Cordray, formerly the Ohio state solicitor, is an attorney in private practice.)

The STATE of Ohio, Appellant,

v.

ROBINETTE, Appellee

73 Ohio St.3d 650, 653 N.E.2d 695

Supreme Court of Ohio.

Submitted May 24, 1995.

Decided Sept. 6, 1995.

On August 3, 1992, appellee, Robert D. Robinette, was driving his car at sixty-nine miles per hour in a forty-five miles per hour construction zone on Interstate 70 in Montgomery County. Deputy Roger Newsome of the Montgomery County Sheriff's office, who was on drug interdiction patrol at the time, stopped Robinette for a speeding violation.

Before Newsome approached Robinette's vehicle, he had decided to issue Robinette only a verbal warning, as was his routine practice regarding speeders in that particular construction zone. Robinette supplied the deputy with his driver's license, and Newsome returned to his vehicle to check it. Finding no violations, Newsome returned to Robinette's vehicle. At that point, Newsome had no intention of issuing Robinette a speeding ticket. Still, Newsome asked Robinette to get out of his car and step to the rear of the vehicle. Newsome returned to Robinette, issued a verbal warning regarding Robinette's speed, and returned Robinette's driver's license.

After returning the license, Newsome said to Robinette, "One question before you get gone [sic]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Newsome testified that as part of the drug interdiction project he routinely asked permission to search the cars he stopped for speeding violations. When Robinette said that he did not have any contraband in the car, Newsome asked if he could search the vehicle. Robinette testified that he was shocked at the question and "automatically" answered "yes" to the deputy's request. Robinette testified further that he did not believe that he was at liberty to refuse the deputy's request.

Upon his search of Robinette's vehicle, Newsome found a small amount of marijuana . . . [and] "some sort of pill" inside a film container. The pill was determined to be methylenedioxy methamphetamine ("MDMA") and was the basis for Robinette's subsequent arrest and charge for a violation of R.C. 2925.11(A).

Robinette filed a motion to suppress the evidence found in the search of his vehicle. The trial court overruled the motion on March 8, 1993, finding that the deputy made clear to Robinette that the traffic matter was concluded before asking to search the vehicle. The court ruled that Robinette's consent did not result from any overbearing behavior on behalf of Newsome.

Robinette appealed. The Court of Appeals for Montgomery County reversed the trial court, holding that Robinette remained detained when the deputy asked to search the car, and since the purpose of the traffic stop had been accomplished prior to that point, the continuing detention was unlawful and the ensuing consent was invalid.

This matter is before this court upon an allowance of a discretionary appeal.

PFEIFER, Justice.

The issue in this case is whether the evidence used against Robinette was obtained through a valid search. We find that the search was invalid since it was the product of an unlawful seizure. We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation. . . .

In this case, Newsome certainly had cause to pull over Robinette for speeding. The question is when the validity of that stop ceased. Newsome testified that from the outset he never intended to ticket Robinette for speeding. When Newsome returned to Robinette's car after checking Robinette's license, every aspect of the speeding violation had been investigated and resolved. All Newsome had to do was to issue his warning and return Robinette's driver's license.

Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's driver's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette regarding whether he was carrying any contraband in the vehicle.

When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.

Newsome asked Robinette to step out of his car for the sole purpose of conducting a line of questioning that was not related to the initial speeding stop and that was not based on any specific or articulable facts that would provide probable cause for the extension of the scope of the seizure of Robinette, his passenger and his car. Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle.

However, . . . Robinette consented to the search of his vehicle during the illegal seizure. Because Robinette's consent was obtained during an illegal detention, his consent is invalid unless the state proves that the consent was not the product of the illegal detention but the result of an independent act of free will. . . .

In this case there was no time lapse between the illegal detention and the request to search, nor were there any circumstances that might have served to break or weaken the connection between one and the other. The sole purpose of the continued detention was to illegally broaden the scope of the original detention. Robinette's consent clearly was the result of his illegal detention, and was not the result of an act of will on his part. Given the circumstances, Robinette felt that he had no choice but to comply.

This case demonstrates the need for this court to draw a bright line between the conclusion of a valid seizure and the beginning of a consensual exchange. Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues. Robinette is never told that he is free to go or that he may answer the question at his option.

Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

We are aware that consensual encounters between police and citizens are an important, and constitutional, investigative tool. However, . . . [a] "consensual encounter" immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all.

Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

While the legality of consensual encounters between police and citizens should be preserved, we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for unrelated criminal activity. Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., and WRIGHT and RESNICK, JJ., concur.

DOUGLAS, FRANCIS E. SWEENEY, Sr. and COOK, JJ., dissent.

FRANCIS E. SWEENEY, Sr., Justice, dissenting.

I am disturbed by the majority's requirement that police officers must now recite certain words before a consensual interrogation may begin. This "bright-line" test appears unique to Ohio and vastly undercuts

our law enforcement's ability to ferret out crime. Furthermore, the majority's test is contrary to well-established state and federal constitutional law. . . .

Indeed, courts from around the nation have had no problem in upholding the validity of consensual searches where consent was obtained after a traffic stop. . . .

I would instead apply the totality-of-the-circumstances test to this case. Here, appellee was properly stopped and detained for speeding. After the traffic matter was concluded, the officer returned appellee's license. Appellee testified that he believed he was free to leave. At this point, the encounter between appellee and the police officer became an ordinary consensual encounter between a private citizen and a law enforcement officer. Since appellee's liberties were not curtailed and since he understood that he could leave, there was no "seizure" implicating state or federal constitutional guarantees. Appellee's consent should not be invalidated solely because it followed a traffic stop and simply because the police officer failed to warn appellee that he was free to go. The utterance of these "magic words" is but one factor for the fact-finder to consider when making the determination as to whether consent was voluntarily given.

This technique of requesting consent following an initial valid detention is employed on a daily basis throughout this nation to interdict the flow of drugs. The majority's bright-line test undercuts police authority and severely curtails an important law enforcement tool that is sanctioned by state and federal constitutional law.

For all these reasons, I would reverse the court of appeals and reinstate the trial court's judgment.

DOUGLAS and COOK, JJ., concur in the foregoing dissenting opinion.

95-1717 U.S. v. LANIER

Civil rights—Criminal prosecutions—State judge's sexual assault of employees and litigants.

Ruling below (CA 6 (en banc), 73 F.3d 1380, 58 CrL 1437):

Constitutionally necessary limiting construction given by plurality in *Screws v. U.S.*, 325 U.S. 91 (1945), to federal statute that prohibits deprivation of constitutional rights under color of law, 18 USC 242, requires that constitutional right allegedly violated by state actor be one that has been specifically established by decision of U.S. Supreme Court in factual circumstances similar to those charged; U.S. Supreme Court has not established that state actor who sexually assaults or sexually harasses someone violates that person's substantive due process right to be free from interference with bodily integrity that shocks conscience, and, therefore, state judge's sexual assaults and harassment of court employees and litigants do not qualify as constitutional crimes for purposes of Section 242.

Questions presented: (1) Does *Screws v. U.S.* prohibit defendant from being convicted under Section 242 for willful violation of right secured by Fourteenth Amendment's Due Process Clause unless that right has previously been made specific by decision of this court in factually similar circumstances? (2) For purposes of Section 242, has right, secured by Due Process Clause, to be free from interference with bodily integrity by sexual assault by state official acting under color of law been "made specific" within meaning of *Screws v. U.S.*?

Petition for certiorari filed 4/22/96, by Drew S. Days III, Sol. Gen., Deval L. Patrick, Asst. Atty. Gen., Paul Bender, Dpty. Sol. Gen., Paul R.Q. Wolfson, Asst. to Sol. Gen., and Jessica Dunsay Silver and Thomas E. Chandler, Dept. of Justice attys.

JUDGE CONVICTED OF SEXUAL ASSAULT WINS REVERSAL

Chicago Daily Law Bulletin

Volume 142, No. 30, February 12, 1996

Margo L. Ely

In a case that may be on its way to the U.S. Supreme Court, the full 6th U.S. Circuit Court of Appeals reversed the conviction of a Tennessee state judge charged with sexually assaulting and harassing employees and litigants in his chambers.

In *U.S. v. Lanier*, the majority in the en banc ruling held that the constitutional right to bodily integrity, recognized under substantive due process, does not encompass sexual assaults. Tennessee Judge David Lanier was prosecuted under the same federal law that former Los Angeles police officers Stacey Koon and Laurence Powell were prosecuted under for the March 3, 1991, beating of Rodney King. Those guilty verdicts were upheld in 1994 by the 9th Circuit in *U.S. v. Koon*.

The 6th Circuit's ruling in *Lanier* conflicts with *Koon* and other cases, presenting a compelling reason for Supreme Court review. David Lanier is from a politically prominent family, which for generations has occupied positions of power in Dyer County, Tenn., a rural community. He served as alderman and mayor of Dyersburg before being elected a chancery court judge in 1982. As the only chancellor and Juvenile Court judge in both Dyer and Lake counties, all employees of the area courts were hired and fired at Lanier's discretion.

One employee, Sandy Sanders, was hired by Lanier in 1989 to supervise the Youth Service Office of the Dyer County Juvenile Court. According to Sanders, she sat beside the judge during a meeting in his chambers, and he grabbed and squeezed one of her breasts. Sanders tried to rebuff Lanier, who told her to not be afraid. She raced out, but did not tell anybody about the episode because of Lanier's stature in the community.

Sanders later confronted Lanier, and he apologized. However, Lanier soon began complaining about Sanders' work performance and eventually removed her supervisory authority.

In the fall of 1990, Patty Mahoney was hired by Lanier to be his secretary, but quit after two weeks. According to Mahoney, during that time, Lanier hugged her and touched her breasts and buttocks. Lanier allegedly told Mahoney, "If you will sleep with me, you can do anything you want to. You can come in to work any time you want to; you can leave any time you want to." On one occasion, Lanier allegedly lifted Mahoney off the floor and pressed his pelvis against her. When Mahoney objected, Lanier told her that if she reported it, she would be hurt more than him.

Vivian Archie grew up in Dyersburg, and in 1989 Judge Lanier presided over her divorce proceedings and awarded her custody of her daughter. A year later, when Archie was out of work and living with her parents, she learned of a job opening at the courthouse. She applied for the job and met with Lanier in his chambers.

Lanier allegedly led Archie to believe she might lose custody of her child and told her he promised the job to someone else. Archie claimed that after she pleaded for a job, the judge grabbed her and forced her to perform oral sex on him.

Archie did not scream or report the incident because, she said, she was afraid Lanier would revoke the custody order.

A few weeks later, Lanier called Archie's house and told her mother of another job. Her mother urged her to find out about the job, and she went back to Lanier's chambers. She said the judge again sexually assaulted her.

In March 1991, Lanier hired a new secretary, Sandy Attaway, who claimed that she too became a target of Lanier's sexual advances. According to Attaway, after Lanier terminated her, he told her they would have gotten along fine if she had liked oral sex.

Later that year, Fonda Bandy went to see Lanier about her work for a federal program, Drug Free Public Housing, and solicit his support. According to Bandy, the judge assaulted her, too. Bandy never returned.

On May 20, 1992, a federal grand jury indicted Lanier on 11 counts of the willful deprivation under color of law of the civil rights of various women in violation of 18 U.S.C. § 242. At the time of the indictment, eight women had leveled charges against Lanier.

A jury found Lanier guilty of seven counts, two of which were felonies, five of which were misdemeanors. Lanier was sentenced to 25 years in prison. The episodes above represent the counts that yielded convictions.

Unlike Koon and Powell, Lanier was not prosecuted in a state tribunal before his federal prosecution: Lanier's brother had been elected district attorney, thus having control of criminal prosecutions in the area.

During the trial, Lanier testified that he never assaulted or harassed any of his accusers. He did concede, however, that he and Sanders hugged and kissed as a greeting gesture until she told him it made her uncomfortable. Similarly, Lanier testified that he and Mahoney hugged every day. Likewise, he testified that Bandy hugged and kissed him when they met in his chambers.

Lanier also admitted that he told Archie about potential custody problems, but denied forcing himself on her. The man behind the second job Archie inquired about testified that Lanier told him that Archie might be willing to provide sexual favors if he hired her.

Lanier appealed to the 6th Circuit, and a three-judge panel affirmed. In the en banc rehearing, a majority voted to reverse Lanier's convictions, holding that the law "as applied in this case, does not specifically mention or contemplate sex crimes, and including sexual misconduct within its coverage stretches its meaning beyond its original purpose."

Section 242 criminalizes the willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" by persons acting "under color of law."

Adopted in 1874, the law was part of a codification of federal civil rights acts, including the Ku Klux Klan Act. Several famous cases that involved prosecutions of public officials for murdering blacks in the South were brought by the federal government under section 242.

In *Lanier*, the prosecution asserted that sexual assault is a constitutional crime under the 14th Amendment defined as "interference with bodily integrity that shocks the conscience of the court and the jury."

In reversing Lanier's conviction, the majority reached five conclusions. First, the majority held that when Congress passed section 242, it did so by accident. According to the majority, in 1870 Congress hired a codifier, one Mr. Durant. Although he "was charged with making no substantive changes, in fact, [section 242] dramatically expanded criminal liability for civil rights violations . . . and created a new crime that had not previously existed. Congress adopted the new compilation of laws apparently without realizing that any substantive change had been made." Therefore, the legislative history favored reversal.

Second, the majority considered the absence of a Supreme Court case explicitly holding that sexual assault by state officials is a constitutional tort to be particularly significant. In this regard, the majority rejected the suggestion that the case law establishing an "abstract general right to 'bodily integrity' " encompasses a "general constitutional right to be free from sexual assault." The majority also rejected a 5th Circuit decision affirming a conviction under section 242 of two border patrol officers who conditioned entry into the United States upon sexual favors.

Third, the majority found the 14th Amendment's "shocks the conscience" standard to be too indefinite, requiring the jury to "make an essentially arbitrary judgment. . . . The language as applied in different cases will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors." The majority's reasoning, however, would likewise render unconstitutional the contemporary community standard of decency used in pornography prosecutions, the "brutal and heinous" requirement for death penalty eligibility and, arguably, the "beyond a reasonable doubt" requirement for criminal guilt.

Fourth, in accordance with the principle that criminal statutes must be strictly construed, the majority concluded that Lanier could not be held criminally liable for his conduct because of a lack of notice: "No language of the statute and no holding of the Supreme Court suggest that such behavior constitutes a federal constitutional crime."

Finally, the majority pointed out that the Supreme Court's 5-4 decision in Screws v. U.S., which upheld the constitutionality of section 242, referred to the wrong as racial discrimination and to the "original purpose of the act . . . [as] an anti-discrimination measure . . . framed to protect Negroes in their newly won rights."

The five dissenting opinions criticized the majority on several fronts. Many of the dissents deferred to the "eloquent" and persuasive dissent by Judge Martha Craig Daughtrey.

"The majority," Daughtrey wrote, "finds that the right to freedom from a willful sexual assault at the hands of a sitting judge has not been made specific by prior court decision solely because no Supreme Court case has yet explicitly involved a factual situation with a judge who so dishonored his profession or who sunk to such levels of depravity as has the defendant in this case."

After providing an analysis of pertinent case law, Daughtrey stated, "All circuit courts that have addressed this or similar issues have . . . recognized

the seemingly axiomatic principle that a citizen's right not to be deprived of life, liberty or property without due process of law encompasses the right not to be intentionally and sexually assaulted under color of law."

Judge Damon J. Keith provided a sobering and pointed conclusion: "In a country where the average person may go to jail for stealing a loaf of bread, the majority releases back into the community a judge who has used the power of his office and his position in society to repeatedly victimize women. If federal law is not to protect women from being forced to sexually gratify a judicial officer at his request under threats of losing their jobs or children, whom is it to protect?"

WOMEN'S CIVIL RIGHTS AT ISSUE IN LANIER CASE

The Commercial Appeal Memphis, TN

Tuesday, June 18, 1996

James W. Brosnan, Washington Bureau

The Supreme Court Monday agreed to decide whether to send former West Tennessee Judge David Lanier back to prison in an important test of whether federal civil rights law protects women from sexual assault.

The underlying issue is whether a person has a constitutional right to "bodily integrity." By taking the Lanier case, the court "has taken a very important step by agreeing for the first time really to decide whether the Constitution protects a woman victim of sexual assault," said Judith Lichtman, president of the Women's Legal Defense Fund.

Lanier, 61, a Chancery Court judge in Dyer and Lake counties, was sentenced to 25 years in prison after a federal court jury in 1992 convicted him on seven charges of assaulting five court employees or job applicants. He was convicted under an 1874 law making it a crime for government officials to use their official authority to willfully deprive someone of rights "protected by the Constitution."

One former deputy clerk testified Lanier put his hands between her legs in the courtroom. A job applicant said Lanier forced her to perform oral sex on him by suggesting an adverse ruling in her child custody case. A fired secretary said Lanier told her she could have kept her job if she liked oral sex.

But Lanier's conviction was thrown out Jan. 23 by the Sixth Circuit Court of Appeals, which ruled 9-6 that sexual assault was not covered by the main civil rights law used historically to prosecute white officials who denied rights to minorities.

The court said Lanier should have been brought up on state charges, ignoring the fact, federal prosecutors said, that his brother James was the local state prosecutor. Lanier's father, James P. Lanier, also had been the Dyer County chief executive.

Neither Lanier nor Nashville attorney Alfred Knight, who is representing him in his appeals, could be reached Monday for comment.

On behalf of the Clinton administration, Solicitor General Drew Days III, in his brief to the Supreme Court, said that reversing the Lanier decision is necessary to ensure that federal civil rights law "will be able to continue to play its central role in the protection of fundamental civil rights."

He noted that the law has been used to prosecute policemen and prison guards who beat up prisoners and to curb excessive corporal punishment by school officials.

In asking the court not to hear the case, Knight said in a brief that the charges should not be allowed under the civil rights law because Lanier's sexual conduct was not part of his actions as a judge. "These were personal, private actions which bore no resemblance to and had no connection with the performance of his official duties," he said.

But a gender law expert, M. C. Sungaila of Newport Beach, Calif., said it is important for the Supreme Court to recognize that rape and sexual abuse is about the misuse of power by men over women, not sex.

The court granted Sungaila the right to file her own brief on behalf of the Southern Poverty Law Center, the National Association of Human Rights Workers and the California Women's Law Center.

She noted that since 1989 at least 17 judges, police officers, prison guards and border patrolmen have been convicted under the same law on similar charges.

Monday's action "gives the court an opportunity to reverse a clearly wrongheaded decision that not only imperils the civil rights of women but the civil rights of everyone in the nation," said Sungaila.

Sungaila said she believes that the case will be argued before the court about December. The Justice Department does not comment on pending cases except through court pleadings.

U.S. Rep. Ed Bryant (R-Tenn.), who was the U.S. attorney when Lanier was prosecuted, said through a spokesman he is "confident that the Supreme Court will carefully review the evidence of this case and the testimony of the victims and continue to uphold the law under which the defendant was prosecuted."

U.S. Atty. Veronica Coleman of the Western District of Tennessee said, "Obviously I'm pleased they would consider that this case merits their attention and review."

"Isn't that great?" Sandy Sanders, one of the women who testified against Lanier at his trial, said on hearing Monday that the Supreme Court would

hear the case. Sanders, hired by Lanier as supervisor and youth service officer for Dyer County Juvenile Court, said the Supreme Court decision "was an answer to prayer."

"I have really been praying hard about this because I had lost all faith in the system. . . . Now that the Supreme Court has agreed to hear this case, I'm beginning to have a little trust in the system."

(Staff reporter Shirley Downing contributed to this story.)

WOMEN'S FAITH IN SYSTEM RESTORED

The Tennessean

Tuesday, June 18, 1996

Gail Kerr, Staff Writer

Sandy Sanders said she never knew when her boss called her into his office whether she would be confronted with paperwork or his grabbing hands and unwanted kisses.

Vivian Archie said she went to the same man's office to interview for a job she needed because she was terrified her parents would win custody of her 18-month-old daughter.

She later told a federal jury in Memphis that the boss Dyer County Chancellor David Lanier forced her to perform oral sex on him. While it was happening, she said, Lanier threatened to take her child away if she told anyone.

Both said they had nowhere to turn. Lanier was a powerful judge in the county, from a powerful political family, and his brother was the prosecutor.

Federal prosecutors, after receiving anonymous tips, gave them a place to air their complaints. They stepped in and investigated the Dyersburg, Tenn., judge and sent Lanier, now 62, to prison for 25 years for violating the women's right to be free from willful sexual assault. He was freed after serving 27 months.

Yesterday, the U.S. Supreme Court agreed to decide whether the federal government had any business getting involved. The court could order the conviction reinstated.

The two victims said the decision helps them believe again in a justice system that badly let them down. Ten of 15 judges on a federal appeals court had held that freedom from sexual attacks by public officials is not a constitutional right.

In 1989, Sanders was working for the man considered to be the most powerful in the little rural town near Memphis, population 14,000. Lanier had been the mayor. As judge, he presided over 80% of the divorce and family custody cases and acted as the Juvenile Court judge in two counties.

He is the son of the late James P. Lanier, who was elected county court clerk in the 1930s and reigned over area Democrats for the next few decades.

Sanders testified that Lanier grabbed her breast in his office. Weeks later, he fondled her buttocks and pinned her to the wall while forcing kisses on her.

"I was a little bit ignorant as to what to do," she said yesterday. "Now, our county handbook has in there about sexual harassment, but then it wasn't."

Archie went to Lanier in 1990 to apply for a job. He had handled her divorce. She testified that he exposed himself, pinched her jaws and pulled her hair to force her into oral sex.

"His brother was the DA. Who was I going to tell, my mother? There was nobody," she said.

Sanders, Archie and seven other woman testified that Lanier routinely and repeatedly sexually assaulted them. One courtroom clerk testified she had to pile legal papers in her lap to stop Lanier from fondling her while he was on the bench presiding over court.

Lanier said they all lied, and that the charges stemmed from political enemies.

The General Assembly stripped him of his judgeship in 1993, but he still receives a $1,700 monthly pension. He was serving his time at a federal prison in Talladega, Ala., when the 6th U.S. Circuit Court of Appeals in Cincinnati overturned his conviction.

Lanier's attorney, Al Knight of Nashville, could not be reached for comment yesterday. He argued before the appeals court that even if Lanier did what his accusers say, he did not violate the women's civil rights unless he acted officially as a judge, "under color of law."

Darcy O'Brien, an Oklahoma author who wrote a book about the case called Power to Hurt, said yesterday that the issue before the Supreme Court is whether it is appropriate for the federal government to intervene in a criminal case when the local officials either cannot or will not act.

"This is the reason we have the federal government," O'Brien said. "It is not only appropriate, it is essential. It's a state's rights issue, but it is also a human rights issue."

Today, Sandy Sanders is 36 and works for Dyer County Juvenile Court.

"I am really happy, because I had lost faith in the system," Sanders said. "I was angry with Lanier, then my anger went from him to the court of appeals. Now, I have put a little bit of trust back.

"My son asks me when it will all be over. It is not ever going to be over. We will remember it for life."

Archie, now 30, works as a legal secretary in Florida and said mental problems caused by the attacks led to her mother gaining temporary custody of her child.

"It's been a roller coaster. I am no longer ashamed of being a victim. There were many women before me. If they had stopped him, he wouldn't have gotten to me."

BALLOT ISSUE?

The U.S. Supreme Court's decision to answer whether the Constitution protects women from sexual assault by state judges, police officers or jailers may play out as a national political issue before the legal question is decided next year.

It's a civil rights debate already capturing attention. Republican presidential nominee-apparent Bob Dole has criticized Clinton-appointed liberal judges for trying to make new law by arguing that women should have that federal protection.

"It would be a very important principle to have established," said Judith L. Lichtman, president of the Women's Legal Defense Fund.

"It is a way federal law can protect women from the horrific, abusive behavior like that which Judge [David] Lanier was convicted of."

But the conservative Free Congress Foundation argued it is not necessary to elevate sexual assault to a federal civil rights abuse.

Freshman Republican Rep. Ed Bryant, who was the U.S. attorney who prosecuted Lanier in Memphis, was pleased by the Supreme Court's decision.

"Federalizing crimes is always a legitimate concern for those of us who don't want to see a larger federal judiciary," he said. "But when you are dealing with a situation where someone who was using that position to his advantage to sexually harass and molest people . . . then that certainly is a federal civil rights issue."

SEX CONVICTIONS OF JUDGE VOIDED

The Tennessean

Wednesday, January 24, 1996

Jim East, Staff Writer

His accusers said former Dyer County Judge David W. Lanier grabbed the breasts or buttocks of four female employees and exposed his genitals in his courthouse chamber.

But yesterday, the 6th U.S. Circuit Court of Appeals overturned Lanier's eight sexual coercion convictions and dismissed his 25-year prison sentence because Lanier did not violate the federal civil rights statute under which he was convicted.

A 1992 jury also decided that on two other occasions, Lanier forced another woman to perform oral sex on him when she went to his office to ask him about a job. That woman had a child custody case in Lanier's court.

"No matter how outrageous a defendant's actions may be, he has to be charged with the appropriate offense created by federal law," Chief Judge Gilbert Merritt Jr. of Nashville wrote in the 73-page opinion handed down in Cincinnati.

The 9-6 decision means the court believes Lanier, 64, should have been tried in state court and not in federal court in Memphis because his actions may have violated Tennessee sexual assault laws, but not federal statutes.

He was the first sitting Tennessee judge sent to prison for civil rights violations involving "sexual coercion."

At the time of his conviction, Lanier had final say over more than 80% of the divorce cases and child custody proceedings in Dyer and Lake counties. He also sat as juvenile court judge in both counties, was a former Dyersburg mayor and is the brother of a former district attorney.

During his trial, Lanier acknowledged he had sex on the floor of his office with one of the women, but he said it was her idea. The jury acquitted him of that charge. Lanier also said the nine women who testified against him lied, and he blamed the charges on hometown political enemies and overzealous federal prosecutors.

Lanier, who was unavailable for comment last night, has been free since June 15, when the appeals court ordered the jurist released from a federal prison in Talladega, Ala.

However, Lanier's attorney, Al Knight of Nashville, said that under the prosecution's theory "if you happen to be employed by the state in some capacity, particularly if you're an official of some kind, if you injure somebody in a severe and shocking sort of way that automatically is a constitutional violation and a federal crime.

"There's some feeling that because some people don't like what Judge Lanier did, that means he ought to be convicted under this statute, and I think the Court of Appeals' basic position is, if you have a government of laws you have to apply the law, no matter how you feel about the facts."

Dyer County District Attorney Phil Bivens, told of the decision yesterday afternoon, reserved comment until after he had read the opinion. Bivens also would not say whether Lanier might be tried on state charges.

"The right not to be assaulted is a clear right under state law known to every reasonable person," Merritt wrote. "The defendant certainly knew his conduct violated the law. But it is not publicly known or understood that this right rises to the level of a 'constitutional right.'

"It has not been declared as such by the Supreme Court. It is not a right listed in the Constitution, nor is it a well-established right of procedural due process like the right to be tried before being punished."

But in a scathing 23-page dissent, Judge Martha Craig Daughtrey of Nashville wrote that Lanier's actions were so outrageous they "shocked the conscience" of ordinary citizens and should have shocked the conscience of the appeals court.

"At least since the sealing of the Magna Carta in 1215, Anglo-American jurisprudence has recognized the right of citizens to be free from interference with their bodily integrity, except under the clear authority of law," Daughtrey wrote.

"Today, however, the [appeals court] majority turns its back on 780 years of history on this subject."

At the least, Daughtrey added, the decision denied federal due process to the victims.

"It seems obvious to me as it did to the prosecution, the district court, the federal jury and the original panel that heard this appeal that federal case law establishes that interference with an

individual's bodily integrity under circumstances similar to those involved in this case is in fact so repulsive and deviant as to fall within the category of substantive due process violations."

The Tennessean Copyright 1996

95-1605 U.S. v. GONZALES

Sentencing—Mandatory term for using or carrying firearm in relation to drug or violent offense—Order that sentence run concurrently with state sentence.

Ruling below (CA 10, 65 F.3d 814, 57 CrL 1600):

Prohibition in 18 USC 924(c), which establishes mandatory five-year sentence for using or carrying firearm during and in relation to drug trafficking crime or crime of violence, against such sentence's being concurrent "with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried" relates only to other federal sentences, and, therefore, such sentence may run concurrently with previously imposed state sentence, which defendant has already begun to serve, for same conduct.

Question presented: May sentence imposed under Section 924(c), which requires mandatory terms of imprisonment for defendants who use or carry firearms during and in relation to certain narcotics or violent offenses and provides that "[n]otwithstanding any other provision of law" those prison terms "shall [not] run concurrently with any other term of imprisonment," be ordered to run concurrently with state-law sentence that defendant is already serving?

Petition for certiorari filed 4/4/96, by Drew S. Days III, Sol. Gen., John C. Keeney, Acting Asst. Atty. Gen., Michael R. Dreeben, Dpty. Sol. Gen., and Miguel A. Estrada, Asst. to Sol. Gen.

UNITED STATES of America, Plaintiff-Appellee,

v.

Miguel GONZALES, Defendant-Appellant

65 F.3d 814

United States Court of Appeals, Tenth Circuit.

Aug. 30, 1995.

McKAY, Circuit Judge.

STATEMENT OF THE FACTS

This case began as a "reverse sting" operation by the Albuquerque Police Department. In a reverse sting, police officers assume the role of drug dealers in order to infiltrate drug rings. At approximately 6:30 p.m. on April 22, Officer Torres met Luis Leon at a Circle K in Albuquerque and was introduced to two of Mr. Leon's co-conspirators, Miguel Gonzales and Orlenis Hernandez-Diaz. Detective Gloria later joined Officer Torres and the three appellants at the Circle K and showed the appellants a 35-pound bale of marijuana that was in the trunk of his undercover vehicle. After examining the marijuana, the appellants agreed to buy 100 pounds of marijuana for $60,000. The transaction was to occur the next day at 9:00 a.m.

At approximately 9:30 a.m. the next morning, Officer Torres met Mr. Leon and Mr. Gonzales at the Circle K. Mr. Leon took Officer Torres to his apartment to view the purchase money. When he entered the apartment, Officer Torres met co-conspirator Mr. Perez. Messrs. Perez, Hernandez-Diaz, and Leon were all in the apartment at that time. The three dealers wanted to see the marijuana again before handing over the $60,000, so Officer Torres took Mr. Leon back to the Circle K so he could again view the drugs. Officer Torres telephoned Detective Gloria and instructed him to bring the marijuana to the Circle K. Upon reaching the store, Appellant Leon once more examined the drugs, then took Officer Torres back to his apartment to complete the transaction. On the way back to the apartment, Mr. Leon told Officer Torres to circle the area to make sure there were no police cars in the vicinity. The officer did as he was instructed and passed two marked patrol cars on the way. Mr. Leon became concerned and asked Officer Torres if he were a police officer. Officer Torres replied that he was not and that he just wanted to complete the deal.

Once in the parking lot, Appellants Gonzales and Leon again said they wanted to see the marijuana, so all four of them--Officer Torres, Detective Gloria, Appellant Gonzales, and Appellant Leon--went to the back of the undercover vehicle to view the 100 pounds of marijuana. Then, Appellant Leon and Officer Torres went upstairs to Mr. Leon's apartment to count the money.

Once inside the apartment, Mr. Hernandez-Diaz pulled a gun on Officer Torres. Mr. Hernandez-Diaz then relieved Mr. Leon of his weapon, a handgun which was concealed in his waistband. Officer Torres was taken hostage at gunpoint by Mr. Hernandez-Diaz, who apparently intended to steal the marijuana without paying for it. Officer Torres was then taken into an adjacent bedroom and his hands and feet were taped together and his mouth was taped shut.

It was at this point that the other officers came running up the stairs, kicked in the door, and arrested Appellants Hernandez and Leon. Appellant Perez fled, but was later captured.

As Officer Torres was being held at gunpoint upstairs, Detective Gloria likewise was being held at gunpoint by Appellant Gonzales downstairs. After seeing Officer Torres and Mr. Leon go to the apartment, Mr. Gonzales tapped on the window of Detective Gloria's car and asked to see the marijuana again. Once the trunk was open, Mr. Gonzales pulled out a handgun and pointed it at Detective Gloria, ordering him to go upstairs. Detective Gloria ignored the orders and tried to slam the trunk shut. He then raised his hands in the air, enabling Mr. Gonzales to see the gun in his holster. As Mr. Gonzales reached forward and took the gun, a siren went off. Mr. Gonzales immediately fled the area. Detective Gloria then joined the other officers who were running upstairs to rescue Officer Torres.

STATEMENT OF THE CASE

The defendants were all convicted of conspiracy to possess and distribute marijuana, 21 U.S.C. § 846 and 18 U.S.C. § 2; possession with intent to distribute marijuana, 21 U.S.C. §§ 841(a)(1) and (b)(1)(D); and

the use or carrying of a firearm during a drug trafficking crime, 18 U.S.C. § 924(c)(1). They received sentences ranging from 120 to 147 months.

In addition, the defendants had previously received substantial state sentences for convictions arising out of the same conduct. The defendants, aside from Mr. Perez, have not directly challenged their conspiracy or firearm convictions, but all have appealed their convictions for possession. They also each raise several other issues.

DISCUSSION

. . . . All of the appellants received five-year sentences for using a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). While the appellants do not dispute the sufficiency of the conviction, three of the appellants (Messrs. Gonzales, Perez, and Hernandez-Diaz) claim that the district court erred in ruling that they are to serve their sentence for this crime consecutive to the completion of their state sentences arising out of the same conduct. The question we must answer is whether § 924(c)'s mandatory five-year sentence may run concurrently with a previously imposed state sentence that a defendant has already begun to serve. We hold that it can.

At sentencing, the district court ruled that each defendant's sentence for the underlying substantive federal offenses should run concurrently with the sentence previously imposed by the state court for the identical offenses. The district court then ordered that the five-year term imposed under § 924 (c) should run consecutively to both the federal and the state charges, obviously reading § 924 (c) as barring the imposition of a sentence concurrent with any prior state sentence. In so ruling, the district court joined good company--every circuit to have considered the issue has held that § 924(c)'s plain language prohibits sentences imposed under that statute from running concurrently with state sentences, although most of these opinions have not been published.

In general, the choice between imposing concurrent and consecutive prison terms is left to the sound discretion of the sentencing court.

The following language of § 924(c)(1) was in effect at the time of the relevant offenses:

> "Whoever, during and in relation to any . . . drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . ., be sentenced to imprisonment for five years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried."

There are two plausible ways in which the phrase "any other term of imprisonment" could be read. Taken most literally, "any other term of imprisonment" would encompass not only all federal sentences but state sentences as well. However, since this is a federal statute, with presumed concern for the treatment of federal crimes, the language could be read more narrowly to apply only to federal sentences, excluding state sentences from its scope. The Senate Report that accompanied the 1984 amendment to § 924(c) reads:

> In either case, the defendant could not be given a suspended or probationary sentence, nor could any sentence under the revised subsection be made to run concurrently with that for the predicate crime or with that for any other offense. In addition, the Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense.

Both Courts of Appeals that have been aware of this stated congressional purpose have honored it. [N]one of these opinions dealt with the anomaly that follows from combining the incorrect "consecutive to" approach with an all-inclusive reading of "any other term of imprisonment."

The result for these defendants of such a combined reading, under which the five-year sentence on the s 924(c) gun count would have to follow a previously imposed state sentence and would have to precede a corresponding federal sentence, would be . . . more than double the custodial price that Congress and the Guidelines have set for committing the total criminal conduct engaged in by these defendants.

The adoption of a reading that § 924(c)'s prohibition against concurrent sentences refers only to federal sentences does not at all depreciate the severity of the crimes involved. Under such a reading, in which the gun-charge sentence would begin immediately upon the district court's imposition of sentence (thus running

concurrently with the pre-existing state sentence), and would be followed immediately by the other federal sentences for any other substantive offenses, every defendant would be required to serve at least the combined term for the gun offense and the underlying federal offense. Where, as here, a state sovereign has previously viewed the same criminal conduct more seriously than Congress and the Sentencing Commission have decreed, the defendant would therefore have to remain in prison until the longer state sentence had expired.

Our conclusion that the phrase "any other offense" encompasses only federal offenses is required if we are to follow Congress' stated intent that § 924(c) sentences be served prior to "any other offense," for if a defendant is sentenced in state court first, there is no way in which a later-sentencing federal court can cause the mandatory five-year § 924(c) sentence to be served before a state sentence that is already being served. Our interpretation is also entirely consistent with the Guidelines. . . .

CONCLUSION

The convictions of Messrs. Gonzales, Hernandez-Diaz, Perez and Leon for possession of drugs with intent to distribute, 21 U.S.C. § 841(a)(1) and (b)(1)(D), are REVERSED. The sentences imposed on the defendants for the conspiracy and firearm convictions are VACATED, and these matters are REMANDED to the district court for resentencing in accordance with this opinion. The conviction of Mr. Perez for conspiracy is AFFIRMED.

AFFIRMED in part, REVERSED in part, VACATED and REMANDED.

CRIME, THE CONSTITUTION AND THE 'WEAKER' SEX

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Cathy Young

Bob Dole touts it as evidence of his support for women's issues. The National Organization for Women's president calls it "the most important advancement of women's civil rights since the 1964 Civil Rights Act." This summer one federal judge upheld it; another found it unconstitutional. The Violence Against Women Act is in for a lengthy legal battle likely to go all the way to the Supreme Court.

The act, passed as part of the 1994 Crime Bill, includes many noncontroversial items such as a national domestic violence hot line and funds for better lighting in parking lots. But it also has a controversial civil rights provision allowing victims of "gender-motivated violence" to sue their attackers in federal court. This statute was struck down last month by Judge Jackson Kiser in Brzonkala v. Virginia Polytechnic Institute when he dismissed VPI student Christy Brzonkala's federal suit based on an alleged sexual assault by two members of the college's football team. Just a few weeks earlier in Connecticut, Judge Janet Arterton came to the opposite conclusion in Jane Doe v. John Doe, in which the plaintiff claims that her husband, whom she is divorcing, beat her and treated her like a slave throughout 17 years of marriage.

Judge Kiser found that Congress had exceeded its authority in passing the Violence Against Women Act, since there is no basis for the federal judiciary to have jurisdiction over sexual assault and spousal abuse, crimes that properly belong in the state courts. According to Judge Arterton, however, the law was "a proper exercise of congressional power under the Commerce Clause" because "crimes of violence motivated by gender" adversely affect interstate commerce through the victims' medical costs, diminished productivity, and even the fear that deters potential victims from taking certain jobs and traveling on business.

In fact, the language of the law is extremely vague as to what constitutes "gender-based violence" -- "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." In Brzonkala, the "evidence" of the misogynistic bias of one of the defendants is that after the alleged attack he told the young woman, "you'd better not have any f---ing diseases" and that on another occasion he reportedly made a crude remark expressing a preference for sex with intoxicated women.

What is it, then, that supposedly makes rape and domestic abuse different from any other violent offenses? The Violence Against Women Act is based on the premise that these crimes are often rooted in antifemale bias, take such a toll on women as to effectively rob them of equal rights, and are not taken seriously by state courts and law enforcement agencies because of sexism.

The first of these notions belongs in the realm of ideology, reflecting the radical feminist theory that rape and battering are part of a terrorist campaign by men against women. The other two are based on distorted statistics, cited in abundance in the congressional findings that accompany the act and, more recently, in Judge Arterton's ruling.

Take the findings' assertion that "violence is the leading cause of injury to women ages 15-44, more common than automobile accidents, muggings, and cancer deaths combined." The 15 to 44 figure is from a study of emergency room patients in a high-crime inner-city area -- hardly representative of the population at large. The comparison to auto accidents, muggings and cancer deaths, as Newhouse News Service reporter Joe Hallinan demonstrated in a 1994 story, was made up out of thin air by feminist "advocacy researchers."

Another factoid from the congressional findings -- "About 35% of women visiting hospital emergency rooms are [there] due to injuries sustained as a result of domestic violence" -- also belongs in the Phony Statistics Hall of Fame. A 1995 Denver study found that of 648 women surveyed in emergency departments, 11 -- fewer than 2% -- were seeking treatment for a beating by a male partner. Besides, if being a victim of a violent crime constitutes civil rights deprivation, then men, who make up three-quarters of homicide victims and two-thirds of victims of robbery and aggravated assaults, should be the sex in need of federal protection.

Nor is it true, at least today, that crimes that predominantly affect women are treated as "second-class crimes." When feminist criminologist Kathleen Ferraro analyzed 1987-88 data from one Arizona county, she found, contrary to her expectations, that men who assaulted their wives or

girlfriends were treated no more leniently than those who attacked anyone else. Numerous other studies confirm this pattern.

There is clearly no constitutional basis for creating a special class of crimes defined by nebulous ideological criteria. Yet some defenders of the Violence Against Women Act are candid about their indifference to constitutional niceties. "We can look at it as lawyers and consider the fine points of the law," Ms. Brzonkala's lawyer, Eileen Wagner, declared on TV, "but we can look at it from the point of view of the women of this country."

Actually, there is no evidence that many women will benefit from the civil rights statute of the act. For most victims of rape or domestic violence, civil litigation makes little sense since most of the perpetrators have no assets to go after. Norman Pattis, the attorney for the defendant in the Connecticut case, argues that the law is "a litigation weapon for upper middle class and wealthy women in divorce cases" -- a way to bring a divorce case before a jury instead of simply a judge and put pressure on the husband to offer a more favorable settlement.

In cases such as *Brzonkala*, the Violence Against Women Act is being used for political symbolism and publicity. In her brief, Ms. Wagner cites the media coverage the case has received and asserts that the plaintiff's goal is nothing less than to initiate "a wide national debate about why the 'no means yes' myth still persists." Of course this very same case was too weak to get to first base in the criminal justice system; a Virginia grand jury refused to indict the alleged assailants.

In the legal battle to come, defenders of the act are heartened by the fact that Judge Kiser is the same judge who has just been overruled by the Supreme Court on the issue of opening the Virginia Military Institute to women. Whatever one thinks of the VMI case, this one is fundamentally different: It is not about equal treatment but about special privilege for female victims of certain crimes. Justice Ruth Bader Ginsburg, who played a key role in the VMI decision, has been often described as a feminist of the old "equality" school who reportedly dislikes the newer brand of protectionist "victim feminism." Before long, we may get a chance to see just how she will apply these principles to the Violence Against Women Act.

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