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Ruling Below: (Martinez v. City of Oxnard, 9th Cir. 270 F.3d 852, 2001 U.S. App. Lexis 23401, 2001 Cal. Daily Op. Service 9265, 2001 Daily Journal DAR 11637)

The court held that a reasonable police officer in a situation where the officer interviewed a wounded suspect during medical treatment without reading Miranda warnings could not believe that the interrogation of the suspect would comport with the Fifth and Fourteenth Amendments, thus qualified immunity was not available to that officer.

Question Presented: Whether a police officer who conducts a coercive, custodial interrogation of a suspect who is being treated for life-threatening, police-inflicted gunshot wounds may invoke qualified immunity in a civil suit for damages under 42 U.S.C. § 1983 (2001)?

Oliverio MARTINEZ, Plaintiff-Appellee

v.

CITY OF OXNARD; Oxnard Police Department; Art Lopez, Chief; Maria Pena; Andrew Salinas; Ron Zavala, Defendants, and Ben CHAVEZ, Defendant-Appellant.

United States Court of Appeals
For the Ninth Circuit

Decided October 30, 2001

TALLMAN, Circuit Judge:

We must determine whether a police officer who conducts a coercive, custodial interrogation of a suspect who is being treated for life-threatening, police-inflicted gunshot wounds may invoke qualified immunity in a civil suit for damages under 42 U.S.C. § 1983 (2001). Under the circumstances of this case, we hold he may not.

I

On November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating narcotics activity near a vacant lot in a residential area of Oxnard, California. While questioning one individual, they heard a bicycle approaching on the darkened path that

traversed the lot. Officer Salinas ordered the rider, Oliverio Martinez, to stop, dismount, spread his legs, and place his hands behind his head. Martinez complied.

During a protective pat-down frisk, Officer Salinas discovered a knife in Mr. Martinez's waistband. Officer Salinas alerted his partner and pulled Martinez's hand from behind his head to apply handcuffs. Officer Salinas claims that Martinez pulled away from him. Martinez alleges that he offered no resistance. Either way, Officer Salinas tackled Martinez and a struggle ensued.

Both officers testified that during the struggle Martinez did not attempt to hit or kick them; Officer Salinas struck the only blow. The officers maintain that Martinez drew Officer Salinas's gun and pointed it

at them. Martinez alleges that Officer Salinas began to draw his gun and that Martinez grabbed Officer Salinas's hand to prevent him from doing so.

All parties agree that Officer Salinas cried out, "He's got my gun." Officer Pena drew her weapon and fired several times. One bullet struck Martinez in the face, damaging his optic nerve and rendering him blind. Another bullet fractured a vertebrae, paralyzing his legs. Three more bullets tore through his leg around the knee joint. The officers then handcuffed Martinez.

The patrol supervisor, Sergeant Ben Chavez, arrived on the scene minutes later along with paramedics. While Sergeant Chavez discussed the incident with Officer Salinas, the paramedics removed the handcuffs so they could stabilize Martinez's neck and back and loaded him into the ambulance. Sergeant Chavez rode to the emergency room in the ambulance with Martinez to obtain his version of what had happened.

As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting Miranda warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Chavez turned off the tape recorder each time medical personnel removed him from the room. The transcript of the recorded conversation totals about ten minutes and provides an incontrovertible account of the interview.

Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in

pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "during the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more." Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

Martinez filed a complaint under 42 U.S.C. § 1983 alleging that the officer defendants violated his constitutional rights by stopping him without probable cause, using excessive force, and subjecting him to a coercive interrogation while he was receiving medical care. He moved for summary judgment on each of his claims. The district court denied Sergeant Chavez's defense of qualified immunity and granted summary judgment for Martinez on his claim that Chavez violated his Fifth and Fourteenth Amendment rights by coercing statements from him during medical treatment.¹ In this interlocutory appeal, Chavez argues that the district court erred by holding that he was not entitled to qualified immunity.

II

We have jurisdiction over Sergeant Chavez's interlocutory appeal of the purely legal question whether he is entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). We review de novo the

¹ The district court denied summary judgment on Martinez's claims that he was improperly stopped by the police and that they used excessive force against him. Those claims will be tried to a jury.

district court's determination on summary judgment that Chavez cannot invoke qualified immunity as a bar to civil litigation. *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir. 2001). For the purposes of this interlocutory appeal, we must accept as true the facts alleged by Martinez and determine whether Chavez is nonetheless entitled to qualified immunity as a matter of law. *Id.* at 866.

Section 1983 permits an individual whose federal constitutional or statutory rights have been violated by a public official acting under color of state law to sue the official for damages. Public officials are afforded protection, however, "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Qualified immunity shields them "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Only conduct that an official could not reasonably have believed was legal under settled law falls outside the protective sanctuary of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991) (*per curiam*).

To determine whether Sergeant Chavez is entitled to qualified immunity, we must first determine whether Martinez has stated a *prima facie* claim that Chavez violated one of his constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2155 (2001). If we determine that Martinez has stated a *prima facie* case, then we must determine whether the right allegedly violated was clearly established by federal law. *Id.* We hold that Chavez violated the Fifth and Fourteenth Amendments by subjecting Martinez to a coercive, custodial

interrogation while he received treatment for life-threatening gunshot wounds inflicted by other police officers.

In *Brown v. Mississippi*, 297 U.S. 278, 286, 80 L. Ed. 682, 56 S. Ct. 461 (1936), a unanimous Supreme Court condemned police officers' use of violence to coerce confessions from criminal suspects as "revolting to the sense of justice" embodied in the Constitution. Although the coercive tactics employed by the police in *Brown* involved physical violence, the Court clarified in subsequent opinions that the Fifth and Fourteenth Amendments also proscribe more subtle forms of police coercion. [Citations omitted]

Chief Justice Warren observed in *Blackburn v. Alabama*, 361 U.S. 199, 206, 4 L. Ed. 2d 242, 80 S. Ct. 274 (1960), that "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." A police officer's extraction of a confession is unconstitutional if, "considering the totality of the circumstances, the [officer] obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000) (quotations and citation omitted); see also *Withrow v. Williams*, 507 U.S. 680, 689, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993).

Martinez argues that, considering the totality of the circumstances, Sergeant Chavez's interrogation was coercive and that it therefore violated the Fifth and Fourteenth Amendments. Chavez's coercive, custodial questioning violated the plaintiff's substantive Fifth Amendment right against compulsory self-incrimination. *Cooper*, 963 F.2d at 1235. Under *Cooper*, a Fifth Amendment violation occurs when a police officer

coerces self-incriminating statements from a suspect in custody. *Id.* at 1236-37, 1242-44. The plaintiff in that case stated a cause of action under § 1983 for violation of his Fifth Amendment right against self-incrimination by alleging that police officers used deception and psychological coercion to extract statements from him. *Id.* at 1242-43. Sitting en banc, we held that the officers' conduct violated the Fifth Amendment even though the plaintiff was never prosecuted, noting that the Fifth Amendment's purpose is to prevent coercive interrogation practices that are "destructive of human dignity." *Id.* at 1239 (quoting *Miranda v. Arizona*, 384 U.S. 436, 457-58, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)). We echoed the Supreme Court's holding in *Miranda* that this animating purpose was adequately achieved only if the Fifth Amendment cast its protection against coerced self-incrimination not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement authority was invoked to curtail a criminal suspect's freedom of action in any significant way. 963 F.2d at 1239.

Here, as in *Cooper*, a police officer's conduct "actively compelled and coerced" a plaintiff to utter statements that the plaintiff could reasonably believe might be used in a criminal prosecution or lead to evidence that might be so used. *Id.* at 1243; [citations omitted]. We affirm the district court's holding that Officer Chavez cannot invoke qualified immunity as a defense to Martinez's Fifth Amendment claims.²

² We recognize the existence of Supreme Court dicta to the contrary. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law

Likewise, a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial.

The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.

* * *

We must now determine whether the rights that Martinez alleges Chavez violated were clearly established by federal law.

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) (internal citations omitted). We must determine, in other words, whether a reasonable officer in Sergeant Chavez's position would have known that his conduct violated Martinez's Fifth and Fourteenth Amendment rights to be free

enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."). Where the two are at odds, however, we are bound to follow our own binding precedent rather than Supreme Court dicta. See *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir. 1977) (holding that Supreme Court dicta is not binding).

from coercive interrogation. Because "whether [a] confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances," Haynes, 373 U.S. at 513, our holding will necessarily be a narrow one confined to the specific facts of this case...

The record before us reveals that Sergeant Chavez doggedly pursued a statement by Martinez despite being asked to leave the emergency room several times. He ignored Martinez's pleas to withhold questioning until he had received medical treatment. A reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received Miranda warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation.

The Supreme Court held a virtually indistinguishable interrogation unconstitutional in *Mincey v. Arizona*:

[The officer] ceased the interrogation only during intervals when [the suspect] lost consciousness or received medical treatment, and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

437 U.S. 385, 401, 57 L. Ed. 2d 290, 98 S. Ct. 2408, 1978 U.S. LEXIS 115 (1978); but cf. *United States v. George*, 987 F.2d 1428, 1430-31 (9th Cir. 1993) (holding that interrogation in the hospital of a

coherent suspect who has received Miranda warnings is not unconstitutional); *United States v. Lewis*, 833 F.2d 1380, 1384 (9th Cir. 1987) (holding voluntary a statement elicited from a suspect just after she returned from surgery and emerged from the effects of general anesthetic where the suspect was alert, responsive, and unresisting).

To the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious. Sergeant Chavez did not read Martinez his Miranda warnings. See *Davis v. North Carolina*, 384 U.S. 737, 740, 16 L. Ed. 2d 895, 86 S. Ct. 1761 (1966) ("That a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation . . . is a significant factor in considering the voluntariness of statements later made."); *Miranda*, 384 U.S. at 467 ("Without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."). Chavez persisted in questioning Martinez during, not after, medical treatment. Although Martinez did not, like *Mincey*, affirmatively request counsel, he repeatedly requested that Sergeant Chavez refrain from interviewing him until his medical treatment was complete and his life was no longer in danger.

In light of the extreme circumstances in this case, a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments. Accordingly, the district court did not err by holding that on these facts qualified immunity was not available to Chavez to insulate him from Martinez's civil rights suit for damages.[...]

**Justices Take Up Police Interrogation Case;
Law: The Supreme Court Will Consider Whether an Oxnard Officer Had the Right to
Pressure a Badly Injured Man for a Statement**

Los Angeles Times

June 4, 2002

David G. Savage and Tracy Wilson

The Supreme Court, taking up an appeal from the Oxnard police, agreed Monday to decide whether officers are shielded from being sued if they pressure a badly wounded victim of a police shooting to confess his wrongdoing in a hospital emergency room.

Oliverio Martinez, a 32-year-old farm worker, was left blind and paralyzed after a run-in with Oxnard police on a November evening in 1997.

Martinez was riding a bicycle home and took a shortcut across a vacant lot. Two officers, investigating a tip about drug dealing nearby, ordered him to stop and dismount, which he did. When an officer grabbed a knife in his waistband, the two struggled. Martinez allegedly reached for the officer's gun, and a policewoman shot him five times, including once in the temple. Taken to a hospital, Martinez said he was dying. Sgt. Ben Chavez, suspecting the same, went along in the ambulance in hopes of getting a tape-recorded statement that would exonerate the officers.

In pain, Martinez repeatedly asked the sergeant to leave, as did hospital workers.

"I am choking. I am dying," Martinez said in a taped conversation.

"OK, yes. Tell me what happened," Chavez said. "If you are going to die, tell me what happened."

But Martinez survived, and he sued Oxnard police for violating his constitutional rights by stopping him illegally, for using excessive force and for seeking to force a confession from his hospital bed.

A federal judge in Los Angeles and the U.S. 9th Circuit Court of Appeals cleared the case to go to trial, but the Supreme Court intervened Monday, saying it will first hear the city's claim that Chavez is immune from being sued for his effort to extract a statement from the wounded man.

A ruling in Chavez vs. Martinez, 01-1444, due next year, will decide whether the police can use coercive methods to obtain statements, as long as the person's words are not used against him in a criminal case.

Alan E. Wisotsky, the city's attorney, argued that the constitutional ban on coercive questioning by the police applies only to suspects who are in custody. Moreover, it covers only incriminating statements that are used in a criminal case, he said.

"First, [Martinez] was not in custody. If he had had a miraculous recovery, he was free to leave," Wisotsky said in a telephone interview. "Second, at no time did Martinez ask for an attorney. And third, Miranda only applies to statements introduced at a criminal trial."

His appeal to the high court says the civil suit against Chavez should be thrown out because the city had no criminal case against Martinez.

Martinez "was never charged with any crime," the appeal said. So the hospital-bed statements were not "sought to be introduced against him in any criminal proceeding."

Cities routinely defend their police officers in civil suits and are ultimately responsible for paying damages that might result.

The hospital conversation loomed large in pretrial discussions, lawyers on both sides said.

Oxnard's lawyers wanted to tell a jury that Martinez admitted he had grabbed the officer's gun and pointed it at an officer and therefore was largely responsible for the shooting.

Lawyers for Martinez deny he made such an admission. They argue that it is unconscionable to use comments from a shooting victim who is in intense pain.

Under Supreme Court precedent, police officers are immune from being sued unless they violate a constitutional right that is clear and well-established.

In November, the 9th Circuit rejected Chavez's claim of immunity.

Judge Richard Tallman said the sergeant

stayed in the emergency room area for 45 minutes and refused repeated requests to leave. He also did not give Martinez the so-called Miranda warnings.

"A reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect, despite repeated requests to stop, violated his [constitutional] right to be free from coercive interrogation," Tallman wrote for a unanimous court.

Los Angeles attorney R. Samuel Paz, who is representing Martinez, had urged the high court to deny the city's appeal so the case could go to trial.

"This is a tragic case. [Martinez] is blind and paralyzed. He is living with his father, but he needs physical therapy and regular care," Paz said

While sympathizing with Martinez's condition, Wisotsky said the city and its officers are not responsible. "Sure, it's tragic, but he made a huge mistake.... When you grab a gun and point it at a police officer, they have a right to act in self defense," he said.

Savage reported from Washington and Wilson from Ventura.

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01-1231 Connecticut Dept. of Public Safety v. Doe

Ruling Below: (Doe v. Dept. of Public Safety, 2nd Cir., 271 F.3d 38, 2001 U.S. App. Lexis 22517)

The court held that sex offenders are entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry.

Question Presented: Does the Due Process Clause of the Fourteenth Amendment prevent a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

John DOE, et al., Plaintiff-Appellee-Cross-Appellant,

v.

DEPT. of PUBLIC SAFETY on behalf of Henry C. Lee, Comm., Office of Adult Probation, on behalf of Robert Bosco Director, John Armstrong, Comm., Defendants-Appellants-Cross-Appellees

United States Court of Appeals
For the Second Circuit

Decided October 19, 2001

SACK, Circuit Judge:

In this appeal, we address the constitutionality of Connecticut's version of "Megan's Law," Conn. Gen. Stat. §§ 54-250-261 (2001), amended by 2001 Conn. Legis. Serv. 01-84 (West), which requires people convicted or found not guilty by reason of mental disease or defect of designated crimes to register with the State, and mandates disclosure of the information contained in the registry to the public in printed form and through the State's Internet website. The United States District Court for the District of Connecticut (Robert N. Chatigny, Judge), in a thorough opinion, held that the law violates the plaintiff's right to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution but does not constitute an ex

post facto law in violation of Article I, § 10 thereof. Doe v. Lee, 132 F. Supp. 2d 57 (D. Conn. 2001) ("Doe v. Lee")...

We are keenly aware of the legitimate and pressing importance that the Connecticut legislature attaches to the State's ability to disseminate information about former sex offenders, principally in order to protect the health and welfare of the State's children. The particular legislative instrument it has chosen to employ, however, is too blunt properly to achieve that end. It fails to accommodate the constitutional rights of persons formerly convicted of a wide range of sexual offenses who are branded as likely to be currently dangerous offenders irrespective of whether or not they are. We therefore affirm.

BACKGROUND

I. The Connecticut Law

Connecticut's version of [Megan's] law requires registration of people who have been convicted of crimes that fall within four statutorily defined categories: criminal offenses against a victim who is a minor, nonviolent sexual offenses, sexually violent offenses, and felonies committed for a sexual purpose. See Conn. Gen. Stat. §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a).

A. Registration

Registration requirements vary depending on the type of crime for which a particular person is convicted and thereby becomes subject to the registration law. A person convicted of a criminal offense against a minor or of a nonviolent sexual offense must register with the Connecticut Department of Public Safety ("DPS") for ten years beginning within three days following his or her release into the community. See id. § 54-251(a). In addition, a person convicted of a felony committed for a sexual purpose can also be required to register for ten years at the discretion of the sentencing court. See id. § 54-254(a). Finally, a person convicted of a sexually violent offense must register for the remainder of his or her life. See id. § 54-252(a).

Each registrant must provide the DPS with his or her name, "identifying factors" including fingerprints, a photograph, a list of other identifying characteristics, and a blood sample for DNA analysis, see id. § 54-250(3), criminal history record, and his or her residence address, see id. §§ 54-251(a), 54-252(a), 54-254(a), which must be verified once a year, see id. § 54-257(c). Certain additional obligations apply to all registrants regardless of their underlying

conviction. Anyone subject to the law who moves to a new residence must inform the State of his or her new address within five days. See id. §§ 54-251(a), 54-252(a), 54-254(a). If a registrant regularly travels into or temporarily resides in another state, he or she must register with the responsible agency there and comply with whatever additional duties that state imposes on sex offenders. See id. Each registrant must abide by the statute's address verification requirements by completing and returning to the State within ten days of receipt a nonforwardable verification form. See id. § 54-257(c). Finally, anyone subject to the law must submit to having his or her photograph taken at a specified location whenever the State so requests, see id. §§ 54-251(a), 54-252(a), 54-254(a), at least once every five years, see id. § 54-257(d). Failure to comply with any of these duties constitutes a class D felony, punishable by up to five years in prison. See id. §§ 54-251(d), 54-252(d), 54-253(c), 54-254(b).

B. Disclosure and Public Notification

The statute also obligates DPS to compile the information gathered through the registration process in a central registry and to share that information with local police departments, state police troops, the Federal Bureau of Investigation, and coordinate agencies in other states in which registrants reside. See id. § 54-257(a).

The DPS must also make the registry available to the public "during normal business hours." Id. § 54-258(a)(1). And the DPS is required to post registry information on the Internet, see id. § 54-258(a)(1), something it did until the practice was enjoined by the district court in this litigation...

* * *

C. Exclusions and Restrictions

Certain people who would otherwise fall within the scope of the law are eligible for relief from these provisions. Two narrow categories of offenders need not register at all if a court so orders upon a finding that "registration is not required for public safety": anyone who was convicted of engaging, while under nineteen years of age, in sexual intercourse with a victim who was between thirteen and sixteen years old but at least two years younger than the perpetrator; and anyone who was convicted of subjecting another person to sexual contact without the victim's consent. See Conn. Gen. Stat. § 54-251(b), (c).

A court has discretion to order the DPS to restrict public dissemination of information about two other classes of registrants -- those who were convicted either of sexual assault in a spousal or cohabiting relationship or of any crime involving a victim under the age of 18 to whom the offender is related -- if the court finds that publication is not required for public safety and would reveal the identity of the victim. See *id.* § 54-255 (a), (b)...

* * *

III. Procedural History

[Procedural history omitted.]

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. See *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999), cert. denied, 529 U.S. 1098 (2000).

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c)...

II. Procedural Due Process Claim

We first address the defendants' appeal from the district court's judgment with respect to the due process claim.

The parties agree, as do we, with the district court's conclusion that the "stigma plus" test, first set forth in *Paul*, governs the defendants' appeal. In *Paul*, the Supreme Court held that in order to state a claim under 42 U.S.C. § 1983 for a violation of the Due Process Clause, a plaintiff who complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement. See *Paul*, 424 U.S. at 701-02, 710-11. This requirement is known in this Circuit and elsewhere as the "stigma plus" test. [citations omitted]

A. The "Stigma"

A "stigma" is "[a] mark or token of infamy, disgrace, or reproach" The *American Heritage Dictionary of the English Language* 1702 (4th ed. 2000). Publication of the Connecticut Sex Offender Registry plainly "stigmatizes" the people listed on it insofar as it asserts that they are persons convicted of crimes characterized by the State as sexual offenses. But those assertions are concededly true. The gravamen of "stigma" as part of a due process violation is the making under color of law of a

reputation-tarnishing statement that is false. [Citations omitted.] The plaintiff therefore asserts not merely stigma, but false stigma: that the Connecticut law "violates [his] due process rights by stigmatizing [him] as [a] presently dangerous sex offender[]," which he maintains is false and gives him a right to a hearing comporting with due process requirements to provide him with an opportunity to prove that he is not in fact a present threat to public safety...

To meet the stigma element of his claim, then, the plaintiff is required to show a stigmatizing statement about him made or to be made under color of law that is capable of being proved true or false. He has only to allege, not prove, that the statement is false in order to establish a due process right to the hearing he seeks. See *Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 43 (2d Cir. 1987). It is at such a hearing that the plaintiff would have the opportunity to have his name cleared and the false stigma thus avoided...

* * *

The sexual offender registry conveys the message that some of the persons listed on the registry are currently dangerous; disclosing the identity of persons who are currently a threat to public safety is the sole avowed and legitimate purpose of the registry. Even the disclaimer itself, by asserting that the DPS "has made no determination that any individual included in the Registry is currently dangerous," clearly implies that some may be. But the list is undifferentiated; it does not say which registrants are or may be currently dangerous and which are not.

* * *

The State of Connecticut contends that by enjoining the publication of the

information on the registry, the district court was doing no more than enjoining the dissemination of truthful information about the criminal history of the registrants. That would be troubling if it were so... We conclude, however, that the district court's order does not target truthful speech. Publication of the registry in its present form implies that persons listed on the registry are particularly likely to be currently dangerous. Unless everyone on the registry is particularly likely to be dangerous, a proposition that the State neither asserts nor embraces, that implication is not true.

The listings alone, true or false -- the "stigmatizing" by the State -- are not, under Paul, actionable as due process violations. But if "plus" factors are present, the plaintiff is entitled to due process to establish whether the implication of likely dangerousness, as applied to him, is false and to prevent its communication to the public until he has had that opportunity and has failed.

B. The "Plus" Factors

Having isolated the "stigma" that the Connecticut sexual offender registry law visits on registrants, then, we must inquire whether there is a "plus" factor that gives rise to a liberty interest under the Due Process Clause.

* * *

Prior to Paul, the concept of "liberty" in the Due Process Clause of the Fourteenth Amendment appears to have been widely understood to encompass a person's interest in his or her good name and reputation, without more. See Laurence H. Tribe, *American Constitutional Law* § 10-9 (2d ed. 1988). That principle seemed to be established by the Supreme Court's decision in *Wisconsin v. Constantineau*,

400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971). At issue there was a Wisconsin statute that allowed local officials to post in liquor stores a list of persons who became dangerous after heavy drinking and to forbid persons on the list from purchasing alcohol for one year. The officials were not required to notify targeted persons or allow them to be heard on the issue of whether they deserved the "badge of infamy" that the list imposed upon them. *Id.* at 437. The Court invalidated the statute, stating that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* At the heart of the Court's reasoning was the recognition that inclusion on the posted list may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one...

* * *

In its 1976 decision in *Paul*, the Court revisited the issue of government-imposed stigma and reoriented this precedent. The Court addressed a municipal police department's practice of circulating to local merchants flyers displaying photographs of persons deemed to be "active shoplifters." See *Paul*, 424 U.S. at 695. One such suspected shoplifter filed suit under 42 U.S.C. § 1983, alleging that under *Constantineau* the distribution of a flyer containing his photograph violated the Due Process Clause because it damaged his reputation without affording him the necessary procedural protections. See *id.* at 696-97.

Writing for the majority, then-Justice Rehnquist rejected this claim, declaring that contrary to the plaintiff's view of *Constantineau*, an individual's "interest in

reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Paul*, 424 U.S. at 712. The Court acknowledged that it had "in a number of . . . prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts." *Id.* at 701. But in each such case, the *Paul* Court reasoned, a liberty interest was implicated only because the state had not only stigmatized the plaintiff, but had also impaired or altered some other "more tangible interest[]," such as "a right or status previously recognized by state law." *Id.* at 701, 711. Thus, the Court observed, the deprivation in *Constantineau* was stigma plus the loss of the right, previously recognized under state law, to purchase alcohol; in *Roth*, the Court would have found a liberty interest implicated by stigma only if it was combined with termination of government employment; and in *Goss*, "liberty" was involved only because there was stigma plus the extinguishment of the state-law right to public education.

* * *

Applying this holding to the case before us, we agree with the district court that the statutory registration duties imposed on the plaintiff constitute a "plus" factor. Those obligations (1) alter the plaintiff's legal status, and (2) are "governmental in nature," cf. *McClary*, 786 F.2d at 89, insofar as they could not be imposed by a private actor in a position analogous to the state defendants, and therefore differentiate the plaintiff's complaint from a traditional defamation claim brought under state law.

The registration duties imposed by Connecticut's sex offender law are extensive and onerous. With a few

exceptions, a person who is required to register because he or she was convicted of a criminal act against a minor, a nonviolent sexual offense, or a felony with a sexual purpose must verify his or her address annually for ten years. See Conn. Gen. Stat. §§ 54-251(a), 54-253(a), 54-254(a), 54-257(c). Anyone who was convicted of a sexually violent offense must do so every ninety days for the rest of his or her life. See *id.* §§ 52-252(a), 54-253(a), 54-257(c). To conduct this verification, the state mails to a registrant's last known address a nonforwardable form that the registrant must complete and return within ten days of receipt. See *id.* § 54-257(c). "In the event that a registrant fails to return the address verification form, the Department of Public Safety shall notify the local police department or the state police troop having jurisdiction over the registrant's last reported address, and that agency shall apply for a warrant to be issued for the registrant's arrest" *Id.*

Whenever any registrant changes his or her address, he or she must notify the Commissioner of Public Safety within five days. See *id.* §§ 54-251(a), 54-252(a), 54-254(a). If he or she "regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling," he or she must notify the Connecticut Commissioner and register with the appropriate agency in the other state. *Id.* The registrant must also provide blood samples for purposes of DNA analysis when he or she is first registered and must appear at a specified location to have his or her photograph taken whenever the Commissioner requests, see *id.* §§ 54-250(3), 54-251(a), 54-252(a), 54-253(b),(c), 54-254(a), but at least once every five years, see *id.* § 54-257(d). Failure to abide by any of these obligations constitutes a class D felony,

punishable by up to five years in prison. See *id.* §§ 54-251(d), 54-252(b), 54-253(c), 54-254(b).

We think that these obligations, taken together, easily qualify as a "plus" factor under Paul. The imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a "change of [that person's] status" under state law. Paul, 424 U.S. at 712. Such action is quintessentially "governmental in nature." McClary, 786 F.2d at 89 (citation and internal quotation marks omitted). Moreover, the presence of such an alteration of the registrant's legal rights and duties serves the federalism-based function of the "plus" factor: to ensure that the plaintiff cannot convert a state-law defamation claim into a § 1983 action because of the mere fortuity that he or she is suing a state defendant. The injury that the plaintiff alleges in this case -- stigma plus an alteration in his or her state-law duties and status -- could not have been inflicted by a private person in a position analogous to that of the state. Only a defendant employing his or her "power as a state official" could impose and enforce the duties inherent in Connecticut's sexual offender registry law and then publish the information obtained by those state-imposed duties. *Id.* (emphasis in original).

* * *

The defendants challenge the conclusion that the Connecticut sexual offender law satisfies the "plus" requirement on two grounds. First, they allege that the registration requirements constitute only a "minimal burden" on registrants, an intrusion no more onerous than that which the federal and state tax laws impose on all citizens and no more inconvenient than the type of obligations one encounters when completing census

questionnaires or renewing a driver's license. The notion that meeting the burdens of the Connecticut registry law, which we have described in some detail, is comparable to paying taxes or complying with census and driving registration regulations is breathtaking. But in any event, as we have explained, the dispositive issue is neither the degree of burden inherent in the proffered "plus" factor nor the substantiality of the interest, right, or status affected thereby. Rather, at least when the governmental action is not trivial, the inquiry turns on the character of the action on which the plaintiff seeks to establish the "plus" component. Where, as here, that action is "governmental in nature" -- a characterization supported by the defendants' comparison of the registration requirements to other obligations only the government can impose -- it constitutes a "plus" factor that triggers constitutional protection.

Second, the defendants argue that the registration requirement's relation to the stigma is too attenuated to constitute a "plus" factor. The defendants point out that the stigma arises not from the registration requirement but rather from the publication of the registration information. They contend that the harm of stigma and the additional tangible burden of the "plus" factor must arise from the same government act. In a similar vein, the defendants point out that a hearing permitting the plaintiff to establish that he is not dangerous would remedy only the stigma while leaving the registration requirement intact. According to the defendants, this demonstrates that the "plus" factor in this case is insufficient.

We are unpersuaded by this argument. Our cases have not required the plaintiff to seek a remedy for both the stigma and

the "plus" factor. [Citations omitted.] And we have never required that the stigma and the "plus" factor arise from a single government act. Indeed, in the government employment context, we have required only a "concurrent temporal link" between the separate acts of termination and defamatory statements...

We think that the temporal nexus between the stigma and the "plus" factor in this case is sufficiently close to support a liberty interest. The information published by the State is obtained by means of the registration requirement, and a person can be stigmatized by publication of the registry only if he or she is first subjected to that requirement. The "plus" factor is thus a necessary condition for the stigmatization. Cf. Valmonte, 18 F.3d at 1002 (finding a liberty interest implicated where the state's stigmatizing charges of suspected child abuse were "coupled with a statutory impediment mandating that employers justify hiring" an individual so charged).

* * *

III. Ex Post Facto Claim

[The court notes that Connecticut's Megan's Law, while not intended to be punitive, is punitive in fact and therefore cannot survive the Pataki Ex Post Facto test. Even so, the court refrained from deciding on these grounds and only affirmed the trial court's finding of a due process violation.]

IV. The Injunction

* * *

We hold only that the plaintiff and the members of the due process class are entitled to the opportunity to have a hearing consistent with due process

principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry. We make no judgment as to what form that process should take. And we make none as to what the State may do once such a process is complete if, pursuant thereto, a particular offender is determined not to be currently dangerous or as to whether or to what extent the State may publicly disseminate information about such an offender.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Ruling Below: (Otte v. Doe., 9th Cir., 259 F.3d 979, 2001 U.S. App. Lexis 16586)

The court held that Alaska's sex offender registration and notification statute constituted an ex post facto law under U.S. Const. art. I, § 10. The statute required that the names and addresses of the registrants' places of employment were to be posted on the state's sex offender internet site, and thus created a substantial probability that registrants would not be able to find work. Although the legislative intent of the Act was non-punitive, the Act furthered the fundamental aims of punishment – retribution and deterrence – because convicted sex offenders who had completed their sentences were likely to be made completely unemployable. Because the Alaska Sex Offender Registration Act increased the punishment for sex offenses, the Ex Post Facto Clause requires the act be applied only to those sex offenders whose crimes were committed after its enactment.

Question Presented: Does a State law which requires registration of sex offenders in a publicly disseminated registry impose punishment in violation of the Constitution's ex post facto clause, as applied to sex offenders whose crimes were committed before the statute's enactment?

JOHN DOE I, JANE DOE, and JOHN DOE II, Plaintiffs-Appellants

v.

RONALD O. OTTE and BRUCE M. BOTELHO, Defendants-Appellees.

United States Court of Appeals
For the Ninth Circuit

Decided April 9, 2001

REINHARDT, Circuit Judge:

This case involves an extremely sensitive and difficult question, both from a social and legal standpoint. How may society deal with convicted sex offenders after they have been punished for their crimes? How can society protect itself against future offenses and at the same time safeguard the constitutional rights of persons who have fully paid the price imposed by law for their crimes? The issues treated in the Alaska Sex Offender Registration Act we consider here differ only in degree from a host of other issues the citizens of this country regularly face in trying to resolve the inherent tensions

between safety and freedom that exist in any democracy.

* * *

The plaintiffs in this action are convicted sex offenders who have completed their sentences. They claim that Alaska's sex offender registration and notification statute, enacted after their convictions, both constitutes an ex post facto law and violates their due process rights. U.S. Const. Article I, § 10; Amend. 14. Because we conclude that, as to defendants whose crimes were committed before its enactment, the Alaska statute violates the Ex Post Facto Clause, we do not resolve

the question whether it also violates the Due Process Clause.

* * *

The Ex Post Facto Clause expresses our commitment to constrain the manner in which legislatures can address intense fears of the type evoked by the return to the community of convicted sex offenders. However, its check on legislative power is quite limited -- it merely requires that punishment be prospectively imposed. Because the Alaska Sex Offender Registration Act does not comply with this minimal protection, we hold that it may not be applied to persons whose crimes were committed before its enactment.

I. BACKGROUND

A. Factual background

On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act (sometimes referred to in this opinion as "the Act" or "the Alaska statute"), which requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of information in the sex offender registry. 1994 Alaska Sess. Laws 41. In its implementing regulations, Alaska provides that it will, in all cases, post the information from the registry for public viewing in print or electronic form, so that it can be used by "any person" "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000). Upon passage of the Act, two men required to register, John Doe I and John Doe II, as well as John Doe I's wife, immediately brought a 42 U.S.C. § 1983 action against the state commissioner for public safety and state attorney general to enjoin its enforcement.

In 1985, nine years before the Alaska statute was enacted, Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter for two years while she was between the ages of nine and eleven. He was sentenced to twelve years incarceration, of which four years were suspended; he was released from prison in 1990. After being released, Doe I was granted custody of his daughter, based on a court's determination that he had been successfully rehabilitated. In making its determination, the court relied, in part, on the findings of psychiatric evaluations concluding that Doe I has "a very low risk of re-offending" and is "not a pedophile." Also, since his release, Doe I married Jane Doe, who was aware of Doe I's conviction for a sex offense.

Jane Doe is a registered nurse in Anchorage, and is well known in the medical community there. She alleges that disclosure of her husband's criminal background will "undermine [her] professional relationships," and her ability to obtain and care for patients.

The third plaintiff, John Doe II, entered a plea of nolo contendere on April 8, 1984 to one count of sexual abuse of a minor for sexual abuse of a 14-year-old child. He was sentenced to eight years in prison, released in 1990, and subsequently completed a two-year program for the treatment of sex offenders.

* * *

The Alaska statute has two main components: it requires sex offender registration, with criminal penalties for failure to register, and it authorizes full disclosure of information about all offenders to the public. The registration provisions require persons convicted of a

broad range of offenses against children and adults to register in person with local police authorities. Such offenses include, for example, sexual assault and possession of child pornography. Alaska Stat. § 12.63.100(1)(B)...

* * *

II. EX POST FACTO CLAIM

The Ex Post Facto Clause prohibits states from enacting any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 1 L. Ed. 648 (1798). There is no question that the Alaska statute, by its terms, applies to the plaintiffs even though their crimes were committed before its enactment...

Whether a statute should be classified as imposing punishment involves a two-step inquiry. We must first consider whether, when enacting the Act, the Alaska legislature "indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980). If we conclude that the legislature's intent was punitive, our inquiry is at an end. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963). If we conclude that the legislature did not intend the statute to be considered punitive, or that its intent is ambiguous, then we must inquire whether the statute is "so punitive either in purpose or effect" that it should be considered to constitute punishment. *Ward*, 448 U.S. at 249. This two-step inquiry is known as the "intent-effects test." *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir. 1997).

* * *

A. Intent of the Alaska Sex Offender Registration Act

To determine the legislature's intent when enacting the Alaska Sex Offender Registration Act, we consider the body's declared purpose, the structure of the statute, and its design. *Russell*, 124 F.3d at 1087. Section 1 of the Alaska statute states:

"The legislature finds that

- (1) sex offenders pose a high risk of reoffending after release from custody;
- (2) protecting the public from sex offenders is a primary governmental interest;
- (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
- (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety."

1994 Alaska Sess. Laws 41, § 1.

The court in *Patterson* held that these findings demonstrate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information, and we agree...

* * *

Thus, we now turn to the "effects" prong to determine whether, notwithstanding the legislative intent, the statute should be treated as punitive for Ex Post Facto Clause purposes.

B. The Alaska Statute's Punitive Effect

When considering a statute's effect, we rely on an analysis of seven factors set forth by the Supreme Court in *Mendoza-Martinez*. Russell, 124 F.3d at 1087 They are:

- 1) whether the sanction involves an affirmative disability or restraint;
- 2) whether it has historically been regarded as a punishment;
- 3) whether it comes into play only on a finding of scienter;
- 4) whether its operation will promote the traditional aims of punishment -- retribution and deterrence;
- 5) whether the behavior to which it applies is already a crime;
- 6) whether an alternative purpose to which it may rationally be connected is assignable to it; and
- 7) whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69.

Here, the application of the seven factors leads us to the conclusion that Alaska's statute... is so punitive in its effect as to offend the Ex Post Facto Clause.

1. Affirmative disability or restraint

The Alaska Sex Offender Registration Act imposes an affirmative disability on the plaintiffs. First, its registration provisions impose a significant affirmative disability by subjecting offenders to onerous conditions that in some respects are

similar to probation or supervised release... [Alaska's statute] requires sex offenders such as the plaintiffs to re-register at police stations four times each year every year of their lives. Alaska Code § 12.63.010(d). Moreover, in order to do so, they must appear in person at a police station on each occasion, and provide, under oath, a wide variety of personal information, including address, anticipated change of address, employer address, vehicle description, and information concerning mental health treatment for any "mental abnormality or personality disorder." § 12.63.010(b).

Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally...

Considered as a whole, the Alaska statute's registration and notification provisions impose substantial disabilities on the plaintiffs... When the applicable provisions of the Alaska statute are considered together, the first *Mendoza-Martinez* factor clearly favors treating the Act as punitive.

2. Historical treatment

Sex offender registration and notification statutes are of fairly recent origin. Other courts considering such statutes consider whether they are analogous to historical shaming punishments. In *Russell*, we concluded that the provisions of the Washington statute were not. *Russell*, 124

F.3d at 1092. We reach the same conclusion here. Accordingly, the second factor favors treating the statute as non-punitive.

3. Finding of scienter

The third Mendoza-Martinez factor is whether the statute's provisions come into effect only upon a finding of scienter [... While the Alaska statute generally requires a finding of scienter, its provisions do not become applicable only in such circumstances. Accordingly, like the second Mendoza-Martinez factor, this factor supports the conclusion that the Act is not punitive.]

4. Traditional aims of punishment

When a statute promotes the traditional aims of punishment -- retribution and deterrence, its effect is more likely to be considered punitive. *Id.* This court has previously held that Washington's statute, which is substantially less onerous than Alaska's, "may implicate deterrence," *Russell*, 124 F.3d at 1091, and the *Patterson* court reached the same conclusion with regard to the Alaska statute. *Patterson*, 985 P.2d at 1012. Accordingly, we conclude that the Act may provide a measure of deterrence; the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders.

While the Alaska statute may have some deterrent effect, it even more directly serves the other traditional aim of punishment -- retribution. It is primarily this objective that causes us to weigh the fourth factor on the side of finding the Act punitive. The Act's onerous registration obligations appear to be inherently retributive...

* * *

Finally, that the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed, indicates that the requirement is retributive. Those convicted of "aggravated" sex offenses must register four times each year for the rest of their lives, while those convicted of other sex offenses need only register annually for a period of 15 years. See Alaska Stat. § 12.63.020(a)... This difference appears clearly to be related to the degree of wrongdoing, not the risk of recidivism.

* * *

5. Applies to criminal behavior

That a statute applies only to behavior that is already criminal is an additional factor supporting the conclusion that its effect is punitive. *Mendoza-Martinez*, 372 U.S. at 168. As the state concedes, the Alaska statute applies only to those "convicted" of specified offenses. Alaska Stat. § 12.63.100(5).

* * *

Unlike other states' sex offender registration laws, the Alaska statute's harsh requirements can be imposed only on individuals who have suffered an actual criminal conviction in a court of law. Thus, this factor also provides support for the conclusion that the Act's effect is punitive.

6. Non-punitive purpose

The appellants concede, as they must, that there is a non-punitive purpose that can rationally be connected to the Act. That purpose, of course, is public safety, which is advanced by alerting the public to the

risk of sex offenders in their communities. The existence of a non-punitive purpose for the Alaska statute, protecting public safety, unquestionably provides support, indeed the principal support, for the view that the statute is not punitive for Ex Post Facto Clause purposes.

7. Excessiveness

The final, and, in this case, a highly significant, factor in the Mendoza-Martinez analysis is whether the Alaska Sex Offender Registration Act "appears excessive in relation to the alternative purpose assigned": public safety. *Mendoza-Martinez*, 372 U.S. at 169. The appellants claim that the Act is excessive in relation to its public safety purpose because it is sweeping and overbroad in several respects. They emphasize that the scope of the statute is not limited to those who the state determines pose a future risk to the community: they point out specifically that, once convicted, it does not matter whether a defendant can prove that he has been rehabilitated and that he poses no threat of future criminal conduct. Under the statute, a judicial determination of rehabilitation (such as made in *Doe I*'s case) is irrelevant, and even law enforcement authorities are powerless to limit the widespread public distribution of the injurious, and possibly outdated, information that the statute provides for.

* * *

With only one exception, every sex offender registration and notification law that has been upheld by a federal court of appeals has tailored the provisions of the statute to the risk posed by the offender.¹ [Citations omitted.]

¹ The only exception to this rule is found in an opinion that was filed after oral argument in this

* * *

In contrast, as we have noted, the Kansas Supreme Court considered a sex offender registration and notification statute that, like the Alaska statute, allowed unrestricted access to the registration information regardless of risk. *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (Kan. 1996). It concluded that the statute had a punitive effect, and therefore was an unconstitutional ex post facto law, because it was "excessive and beyond that necessary to promote public safety." 923 P.2d at 1043...

* * *

8. Conclusion

We conclude that the effects of the Alaska Sex Offender Registration Act are unquestionably punitive. The impact upon the lives of those affected by the Act's requirements is drastic indeed. The Act imposes more substantial burdens on those subject to its registration and notification requirements than does any legislation enacted by any other state, the provisions of which have been considered by a federal court of appeals.

In sum, the Mendoza-Martinez test leads us to hold that the effects of the specific provisions of the Alaska Act provide the "clearest proof" that, notwithstanding the

case, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). That case concerned the Utah sex offender registration and notification statute, which, like the Alaska statute, makes the state's entire sex offender registry accessible on the internet. *Id.* at 1247-48. Unlike the Alaska statute, however, the Utah database does not include employer names and addresses, and thus does not place the sex offenders' current employment in direct jeopardy. See *id.* at 1247 (reciting information contained in Utah database). In any event, we respectfully disagree with the conclusions espoused by the Tenth Circuit in *Femedeer*.

legislature's non-punitive intent, the statute must be classified as punitive for Ex Post Facto Clause purposes. *Hendricks*, 521 U.S. at 361. Four of the seven factors favor this result.²

* * *

No one *Mendoza-Martinez* factor is determinative, and excessiveness, standing alone, would not be dispositive under the *Mendoza-Martinez* test. *Hudson v. United States*, 522 U.S. 93, 101, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997). Still, we place substantial weight on the fact that the Act is far more sweeping than necessary to serve the purpose of promoting public safety. This is so not only with respect to the undifferentiated scope of the Act but also with respect to the severity of the disabilities it imposes. Accordingly, we conclude that, weighing all of the *Mendoza-Martinez* factors together, the effects of the Act provide the clearest proof that it is punitive.

Because the Alaska Sex Offender Registration Act increases the punishment for sex offenses, the Ex Post Facto Clause limits its application to those sex offenders whose crimes were committed after its enactment. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 504-05, 131 L. Ed. 2d 588, 115 S. Ct. 1597 (1995). Doe I was convicted in 1985, and Doe II was convicted in 1984. The Alaska legislature enacted the Act in 1994. Therefore, the Alaska statute's application to the appellants violates the Ex Post Facto Clause.

III. APPELLANTS' OTHER CLAIMS

[The court notes that their failure to address the procedural and substantive due process claims should not be viewed as a commentary on their merit.]

IV. CONCLUSION

We conclude that the Alaska Sex Offender Registration Act violates the Ex Post Facto Clause. We therefore REVERSE the district court's orders granting summary judgment for the state officials, and REMAND for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

² We note that our conclusion is not based on a simple equation in which each factor is given equal weight. Rather, we consider the importance of each factor in relation to the legislative scheme we are examining.

Megan's Laws to Undergo Scrutiny

USA Today

May 21, 2002

Joan Biskupic

The U.S. Supreme Court agreed Monday to consider the constitutionality of so-called Megan's laws, which publicize the names and addresses of convicted sex offenders.

The laws began sweeping the nation after the rape and murder of Megan Kanka, a 7-year-old from New Jersey, by a convicted sex offender in 1994.

A key question in a case from Connecticut is whether states can put the names of sex offenders on a registry without giving them a hearing. A U.S. appeals court ruled last year that due process of law requires states to assess whether a person is a danger to society and likely to repeat his or her crimes.

The Supreme Court's decision to take Connecticut's appeal sets up arguments next fall that will pit state efforts to warn communities that a predator might be in their midst against the rights of convicts who have served their time and want to avoid new legal requirements and stigma. A ruling is likely in 2003.

All 50 states have some version of Megan's Law, but about half do not require assessments of the risks posed by those on the convict lists, the U.S. Justice Department says.

Justice is siding with the Connecticut Department of Public Safety in its appeal. The U.S. government notes that its own rules, which direct federal funds to states that set up sex-offender databanks, do not

require a hearing before convicts' names are included.

"It is not an exaggeration to state that the constitutional question presented in this case will impact directly upon the Megan's laws of 50 states or upon the choices those states have in further refining existing Megan's laws," Connecticut officials said in their petition.

Connecticut Civil Liberties Union lawyers, representing an unidentified sex convict who sued the state in 1999, say the state law deprives the convict of reputation and imposes legal obligations without a chance to be heard.

Connecticut law requires sex offenders to provide their names and addresses and identifying information, such as photographs and blood samples for DNA analysis. The requirement lasts for 10 years, although those convicted of violent sex offenses must register for life. A key provision that has been suspended because of the litigation requires the public safety department to publicize registrants' whereabouts on a Web site.

A U.S. appeals court ruled that automatically putting all convicted sex offenders on a registry without individual hearings violates due process of law. It found that the Web site, which says the state "has made no determination that any individual . . . is currently dangerous," suggests that some of those listed might be dangerous.

Connecticut, joined by 23 states, says a mandate to hold hearings would be cumbersome and costly. It also says it is difficult to assess a past offender's risk.

This year, the justices said they would use an Alaska case to decide whether registration laws can be applied to people who committed their crimes before the laws took effect.

The Connecticut case cuts closer to the heart of the laws that stemmed from Megan's murder in Hamilton, N.J. Her killer, Jesse Timmendequas, twice had been convicted of sex offenses, but the Kanka family was unaware of their neighbor's history. He is on death row.

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States Push for Sex Offender Laws to Apply Retroactively

USA Today

February 20, 2002

Joan Biskupic

The Supreme Court said Tuesday that it would decide whether sex offender registration laws, intended to notify the public of potential predators on children in a community, can be applied to people who committed their crimes before the laws took effect.

The Supreme Court agreed to hear an appeal from the state of Alaska of a lower-court decision that said the state's version of the so-called Megan's Law violates the Constitution's protection against new penalties being applied retroactively.

Twenty-four states signed a "friend of the court" brief backing Alaska, telling the justices that all states now have some form of registration and community-notification laws. Many of the registries are posted on the Internet.

Such laws spread after the sexual assault and murder in 1994 of 7-year-old Megan Kanka in Hamilton, N.J. Her killer, who lived across the street from the Kanka family, had been convicted twice of sex offenses, but the family was unaware of his past.

If the lower court's reasoning in the Alaska dispute were to become law, the states say, it would hamper their ability to notify the public about sex offenders.

The Alaska law, passed in 1994 and twice amended, requires those convicted of child kidnapping, abuse or sex offenses to register their address, place of employment and other personal data with the state, which then makes the

information available to the public via the Internet.

In finding that the law violates the Constitution's *ex post facto* clause, which prohibits states from increasing penalties for a crime beyond those on the books when it was committed, the U.S. Court of Appeals for the 9th Circuit cast the Alaska law as more burdensome than other statutes.

It said some offenders might have to report four times a year to a police station, and said the posting of the information on the Internet exposes convicts to widespread scorn.

Alaska officials say the purpose of the law is not additional punishment but rather to alert the public to potential threats. Its appeal will be heard by the high court next fall. A ruling is likely in 2003.

The justices also agreed to take up a dispute closely watched by the publishing industry over whether Congress had the power to extend copyright protections for authors and artists by 20 years.

The 1998 law was challenged by a group of individuals and businesses that operate Internet libraries and other services based on works in the public domain. They say the law violates the First Amendment and the Constitution's copyright clause by keeping songs, books and other elements of "our common culture" from the public.

The U.S. Court of Appeals for the District of Columbia Circuit upheld the law.

In the challengers' appeal, Stanford University law professor Lawrence Lessig says that because of the law, "an

extraordinary range of creative invention will be blocked from falling into the public domain until at least 2019."

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Sloppy 'Megan's Laws' Hinder Goal of Boosting Public Safety

USA TODAY

May 12, 1998

Last month, three Wesleyan University students, alerted by e-mail warnings, spotted a convicted rapist wandering the halls of their dormitory. He was promptly arrested and charged with parole violation -- a triumph for Connecticut's "Megan's Law," which assures that neighbors are warned when a sexual predator is released.

That is how people expect such laws to work. But four years after the murder of New Jersey 7-year-old Megan Kanka by a released child molester, few work so well. Every state has such a law, but in more than half, there is no community notification. Instead, people must call state hot lines or dial up Internet sites and submit names of people they suspect.

Many other states err in the other direction. Notification encompasses such a broad range of sex crimes that they create more panic than protection. And virtually every state has passed laws with little or no funding.

The result is a mishmash of programs that do far less to protect the public than they could, while raising numerous problems that needn't exist, such as discouraging the reporting of some sex crimes, distracting public attention from more dangerous defendants, stigmatizing some who might otherwise return to a law-abiding life and opening states to lawsuits.

Louisiana, for example, includes incest among crimes requiring notification, even though those guilty of incest pose almost no danger to the wider community. Notification can include having offenders' pictures published in local newspapers.

As a result, prosecutors report that teenage girls are less willing to turn in family members who molest them for fear their friends will find out, according to a National Criminal Justice Association study.

Statutory rape and contributing to the delinquency of a minor are other crimes confusing the Louisiana law.

California was even sloppier in its version of "Megan's Law."

It put the names of 64,000 sex offenders on a CD-ROM and made it available to the public. The list of names included dead people and dozens of homosexuals who were rounded up in police sweeps of gays in the 1940s and 1950s. In addition, nearly two-thirds of the addresses and ZIP codes given for offenders were wrong.

The spread of the information, including dissemination at the California State Fair, embarrassed many who had become family men. It also led police in some jurisdictions to waste their time tracking down many minor offenders rather than keeping tabs on truly dangerous predators.

The law finally was changed last fall to make it easier for men convicted of homosexual acts to remove their names from the files. The state, though, still can't guarantee that the information it provides is accurate, a real problem considering that a New Jersey man was beaten up in his home by a neighbor who'd been inaccurately notified that a sex offender lived there.

Ironically, the state that seems to have struck the right balance is one that acted four years before Megan's murder.

Washington state enacted its "Megan's Law" in 1990, after a brutal sex crime by a sexual predator there. The law has three key components:

-- It limits community notification to offenders most likely to endanger the community. Thus, communities are notified about only the 11% of paroled sex offenders who pose the greatest threat. Schools and certain other community organizations receive notice about less dangerous offenders. Local police are told about all offenders. This tiering of sex crimes keeps the focus on the most dangerous offenders where it belongs.

-- It encourages education. While notification may take place by flier, three-fifths of communities have police go door to door, and half hold community meetings. This allows authorities not only to inform people about the pattern a particular offender follows but also to increase awareness about other sexual crimes. And people are directly warned against harassing a paroled offender. The state learned early to issue such warnings after an offender's home was burned down. Since 1993, even verbal harassment has been rare.

-- Finally, unlike other states, Washington evaluates the effectiveness of its program. One important study found that while recidivism rates didn't change with notification (about one in five were returned to prison), those rearrested were caught three years earlier on average. That suggests notification laws can reduce the number of people predators may victimize.

Ultimately, it is that kind of protection that "Megan's Laws" are supposed to be about.

Wesleyan University students were able to protect themselves from a dangerous predator last month because they knew about him -- and because they weren't inundated by information that would have rendered the warning meaningless.

That doesn't seem so hard. It just requires that legislators hungry to attract votes by attacking crime think before they act.

Getting the word out

All states require convicted sex offenders to register with law enforcement agencies. The agencies must notify schools, day-care centers and parents that offenders are in their area. Degrees of public notification:

- States that provide information to the general public -- Alabama, Alaska, Arizona, California, Delaware, Florida, Louisiana, Massachusetts, Minnesota, Montana, Nevada, Oregon, Rhode Island, Tennessee, Texas, Washington state and Wyoming.
- Provided to individuals and organizations at risk -- Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, Vermont, West Virginia and Wisconsin.
- Available on request -- Colorado, Hawaii, Idaho, Kansas, Missouri, North Dakota, South Dakota, Mississippi, Michigan, Ohio, North Carolina, South Carolina, Utah and Virginia.
- Restricted to law enforcement agencies - Kentucky, Nebraska and New Mexico.

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States Search for Fairness in Implementing Megan's Law

The Washington Post

March 7, 1998

Dale Russakoff

Virginia Doyle's 6-year-old was emptying out his backpack the other day -- hockey team schedules, fliers from school clubs, lunch menus -- when out came a sealed, official-looking envelope that he handed her with purpose. "They said to make sure you see this," he said.

Doyle expected to find a letter from a teacher or perhaps a report card when she pulled out what resembled a wanted poster saying, "SEX OFFENDER RELEASE NOTICE," in inch-high letters. Underneath were a photograph, name and description of a convicted sex offender living near her children's school. Even before the U.S. Supreme Court's decision Feb. 23 to let stand New Jersey's "Megan's Law," the template for sex-offender notification statutes in effect in 47 states, authorities here and nationally began moving aggressively to alert communities to sex offenders in their midst -- and tapping an ever-expanding array of communications networks to do so.

As a result, thousands of children, parents, employers, landlords and neighbors find themselves in a new, information-drenched world in which names of sex offenders are being delivered to their front doors by police, posted on the Internet, e-mailed across campuses, displayed on telephone poles, published in newspapers and, in New Jersey's latest variation on the theme, sent home like a report card in a child's backpack.

Differences in laws from one state to the

next are raising widely varying issues -- from Louisiana, where newspapers are required to publish photographs of released child sex offenders, to New Jersey, where residents are explicitly warned of prosecution for leaking notices to the press.

At the Doyle household 25 miles east of Philadelphia, the entry into this new world went fairly smoothly, despite warnings from the law's critics that it will incite panic and vigilantism. Doyle said she and her three children sat down for a long, difficult talk about 7-year-old Megan Kanka of central New Jersey, the law's namesake, who was kidnapped, raped and murdered in 1994 by a released sex offender who had moved in across the street.

Doyle and several other parents interviewed said they welcome the chance to reinforce safety precautions with children. "I feel more comfortable, knowing they'll be aware," Doyle said. But several said they would have been horrified if children had read the notices on their own.

New Jersey is one of 18 states sending pictures and addresses of all high-risk sex offenders directly to area homes and businesses, usually via police officers.

In other states, notification is more passive. In California, for example, residents can go to sheriffs' offices and view a data base of more than 60,000 sex offenders by zip code. In New York, a

900 number soon will offer residents information for \$ 5 on sex offenders living nearby. Florida, Kansas, Alaska, Indiana, Georgia, Michigan and Oregon have World Wide Web sites with offenders' names, addresses and photos.

In Maryland, people and organizations are notified only as authorities deem necessary. In Virginia, access to offender information is limited, but the legislature is moving to establish a Web site. The District is still formulating a notification system.

New Jersey passed its Megan's Law in October 1994, four months after Megan's murder, and in 1996 Congress passed a federal version requiring states to pass sex-offender notification laws or risk losing federal law enforcement money. Only Kentucky, New Mexico and Nebraska have yet to enact laws, but legislatures there are considering them.

New Jersey's system, revised by several court rulings, is unique, according to Todd Mitchell of the National Center for Missing and Exploited Children in Arlington, Va., because it joins the most aggressive notification technique with the most aggressive privacy protections for offenders.

The unusual combination reflects the collision of a powerful parents' right-to-know movement with a state supreme court long known as a civil liberties bastion. It requires that notifications go only to those "likely to encounter" high-risk offenders. Notices are hand-delivered by police to homes and businesses in a court-approved radius -- from a few blocks to two miles -- but also are sent outside it to parents whose children attend school within it.

Offenders designated by prosecutors as

"high risk" -- which triggers a door-to-door notification -- or "moderate risk" can challenge the designation before a judge, as well as the scope of the notification. Moreover, every notice comes complete with warnings that anyone who leaks them to the press or even "beyond your immediate household" could be prosecuted.

The limits already have raised First Amendment questions. In January, the Home News Tribune in East Brunswick, N.J., published a front-page picture and article on the first sex offender in the area whose neighbors were notified. Local prosecutors immediately launched an investigation to find the leak, so far without result, and Attorney General Peter Verniero summoned newspaper executives to warn against "abuse" of the law.

"After all the court challenges we've had, I felt they could have jeopardized our law," said Maureen Kanka, Megan's mother, who also spoke out.

The Home News Tribune stood firm. "Megan and Megan's Law are huge stories in New Jersey, and this was the first notification and in our opinion that made it news," said managing editor Teresa Klink. "We take the position it is not up to prosecutors to decide what news is. That's what editors are for."

More recently, WPVI-TV of Philadelphia obtained a leaked notice about the Pemberton Township flier and aired it Feb. 25.

The experience here is significant because the Center for Missing and Abused Children, which helped the Kanka family campaign for notification laws, views New Jersey's law here as "a model for other states to emulate," Mitchell said, because it

is "battle-tested" by state and federal courts and "looks like it balances" interests of children and parents with rights of offenders.

Critics of the laws say, however, that the incidents here raise questions about whether the balancing act can work.

"How do you have a uniformed officer show up at the door to tell people about a high-risk person and then say, 'Don't let us catch you talking to the press or neighbors'? " asked Ed Martone of the American Civil Liberties Union of New Jersey. "I think we're in the early stages of seeing this just isn't something government can do."

A Pemberton mother, who insisted on anonymity for fear of being prosecuted for even talking to a reporter, said she supports Megan's Law but feels "very uneasy about this order not to talk. So

much has changed since I was a child. You never locked doors; now you lock every door. Maybe this is just something else we have to learn to live with."

The New Jersey system is proving to be extremely labor-intensive. All 21 New Jersey counties have a "Megan's Unit" in the prosecutor's office to coordinate registering released offenders, assessing their risk, litigating their court challenges to risk rankings and notification plans and then overseeing police, schools and community leaders who disseminate notices.

"We have a five-person unit, three lawyers, a detective and a secretary, and this is all we do, full time," said assistant Union County prosecutor Maureen O'Brien in central New Jersey.

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Clinton Signs Sex Offender Law

Chicago Sun-Times

May 17, 1996

Lawrence L. Knutson

Adding to his election-year defense of his record on crime, President Clinton today signed legislation that requires telling neighbors when sex offenders move in.

The measure is called "Megan's law," named for a slain New Jersey youngster. Surrounded by families who have lost children to violence, Clinton said, "The law named for one child is now for every child." He said the new law will "tell a community when a dangerous sexual predator enters its midst. There is no greater right than the right to raise children in peace and safety."

The bill was passed by the House earlier this month 418-0.

The measure strengthens requirements in the 1994 crime bill by requiring states not only to notify local law enforcement officials when a convicted sex offender moves into a neighborhood but also to make that information available to the community.

The bill was sponsored by Rep. Dick Zimmer (R-N.J.) following the 1994 rape and murder of Megan Kanka, a 7-year-old New Jersey girl. A convicted sex offender who lived across the street from her -- whose record was unknown to the Kanka family -- was charged with the crime.

Standing near Clinton in the Oval Office as he signed the bill were Megan's parents, Richard and Maureen Kanka, and their daughter, Jessica, 13, and son, Jeremy, 10.

Also present were Marc Klaas, whose 12-year-old daughter, Polly, was kidnapped from her bedroom in Petaluma, Calif., and murdered in 1989; and Patty Wetterling, whose son, Jacob, was kidnapped from his home in St. Joseph, Minn., in 1989 and has never been found.

Clinton said all three families have worked to protect other children from the violence that claimed theirs.

"They have suffered more than any parent should ever have to," Clinton said. "And they took up the cause of all families and all children."

"This gives parents the information every parent has the right to know, which is whether there is somebody who can hurt their children living in their neighborhood," Zimmer said in an interview Thursday.

"It's a common-sense workable way to reduce the incidence of crime," he said. "It is Megan Kanka's legacy, and is a real legacy for her parents . . . who experienced the worst thing that can happen to any parents."

States could lose federal aid if they fail to comply with the terms of the law, but they will be allowed to decide how dangerous an offender is and what type of notification is required.

The initial version of the law is under challenge in a U.S. District courtroom in New Jersey, where a judge has barred

community notification. The plaintiffs,
2,000 released sex offenders, contend
notification represents additional
punishment in violation of the
Constitution.

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Whitman Approves Stringent Restrictions on Sex Criminals

The New York Times

November 1, 1994

Joseph F. Sullivan

Convicted sex offenders in New Jersey will now be subject to lifetime supervision under a package of laws signed today by Gov. Christine Todd Whitman. Critics, particularly civil libertarians, say that the bills, among the nation's toughest, contain more symbolism than substance and are heading for a certain constitutional challenge.

Even as she signed the nine-bill package, known as Megan's Law, Mrs. Whitman acknowledged that keeping a tight rein on sex offenders after they have completed their sentences presents legal problems. But she added: "It would be hollow justice if we wrote laws to protect families and communities only to have those laws struck down in the courts. I am confident this package will pass constitutional muster." The Governor also warned that "government cannot legislate away the problem of sexual offenses."

The legislation was spurred by the sexual assault and killing last July 29 of Megan Kanka, a 7-year-old from Hamilton. Jesse K. Timmendequas, a twice-convicted sex offender who lived across the street from Megan's family, has been charged with the killing.

Megan's parents and neighbors, who were not aware of Mr. Timmendequas's sex convictions, urged New Jersey lawmakers to require the authorities to notify communities when a child-sex offender moved in.

The bills, signed at a ceremony attended

by the young girl's parents and the parents of another young sex-crime victim, have already had an impact far beyond New Jersey's borders. When President Clinton lobbied for the Federal crime bill last summer, he mentioned Megan and the need for a community-notification provision. That provision is now part of Federal law.

The New Jersey bills go even further than the Federal law, which also establishes a registry of sex offenders. The New Jersey package would require sex offenders to provide blood for genetic testing and a DNA database. They would also have to submit to lifetime community supervision, similar to parole, and involuntary hospital commitment if they are judged by the authorities to be dangerous.

Representative Richard A. Zimmer, Republican of New Jersey, said the new Federal law required all states to enact such statutes within three years or lose some Federal funds.

A handful of states have already struck down community notification statutes as unconstitutional. The executive director of the American Civil Liberties Union of New Jersey, Edward Martone, said that courts in five states -- California, Illinois, Arizona, New Hampshire and Alaska -- had struck down the laws. But the registries, which enable the police to track sex offenders' whereabouts, have been upheld in those states, he said.

Washington is the only state that has

upheld both a registry and a modified community-notification law pertaining to violent and repeat offenders. "Only 5 percent of the sex offenders would be affected" by such a community-notification law, Mr. Martone said.

Mr. Martone, who called the package "more symbolic than substantial," said that the retroactive nature of the registry left it open to challenge, adding that the A.C.L.U. would test the New Jersey laws in court. He noted that a committee of the New Jersey State Bar Association had recently opposed both registration and community notification on privacy grounds.

"What really is needed is quality treatment and education while the offender is incarcerated and the creation of facilities and programs to continue treatment and supervision after release," he said. "Unfortunately, New Jersey doesn't offer any of these things."

John S. Furlong, a lawyer from West Trenton, said he was planning to challenge the registry law because it applied to everyone ever convicted of a sex crime, even those convicted before the law was enacted.

"My primary class of clients are guys who pleaded guilty many years ago, went to jail, sought and received treatment and were released and have had no other contact with the system," he said. "That class of citizen should not have to register under the new law."

In her remarks, Mrs. Whitman said she recognized the need for education and treatment and acknowledged that none of the bills includes any money for such programs. She said she would include an unspecified amount of money for them in next year's budget despite her efforts to

cut spending. "This is too important," she said.

"Let these bills remind us that our work is just beginning," the Governor said. "We have to make Megan's Law work. And we must honor the spirit of this legislation by getting to the root causes of the problem - by stressing prevention and early intervention and pursuing education and treatment before tragedy strikes."

Megan's mother, Maureen Kanka, said she was heartened by the outpouring of support from families across the country after her daughter's death. "When good people come together for the right reasons, they can accomplish anything," she said.

She said she was pleased by the new bills, but said that if the bills had been in place years ago her daughter might still be alive. People touched by the photograph of a smiling Megan that often accompanied news accounts of the case have sent money to the Kankas, who have established a foundation to promote enactment of similar laws in other states.

The Hamilton Township Rotary Club is collecting money to buy and raze the house across the street from the Kankas where Mr. Timmendequas lived. Mrs. Kanka said that looking at the house every day was a traumatic experience for her family, and that she would be glad to see it destroyed. Mayor Jack Rafferty of Hamilton said that the township planned to turn the property into a small park in Megan's memory.

Karen Wengert, the mother of 6-year-old Amanda Wengert of Manalapan Township, who was sexually assaulted and killed in March, also spoke briefly. The neighbor charged in Amanda's killing had

a record of sex abuse as a juvenile, but those records were closed under state law.

"We need to change our juvenile justice laws and to get tough on juveniles," she said. "A juvenile criminal right now becomes an adult criminal later because we just slap them on the wrist and let them go."

SORTING IT OUT 'Megan's Law' and More

A package of legislation dealing with sex offenders was signed into law yesterday by Gov. Christine Todd Whitman. One measure, which has become known as "Megan's Law," requires the police to provide notification to a neighborhood, nearby schools and other institutions when a convicted sex offender intends to move in. It is named for 7-year-old Megan Kanka of Hamilton, who was killed this summer.

Here is a summary of what each of the other bills would do:

- Establishes longer, minimum prison terms for violent sex offenses against victims under age 16, including the possibility of life without parole.

- Makes murder of a child under age 15 an aggravating factor adequate for a jury to consider the death penalty.

- Requires convicted sex offenders, including those convicted before prior to the implementation of this law, to report their address to local police or to state authorities every 90 days. The police must periodically verify the items in the notice.

- Eliminates prison-sentence reductions, known as "good behavior credits," for inmates at the state treatment center for sex offenders, the Adult Diagnostic and

Treatment Center at Avenel, if they do not participate in psychotherapy or treatment.

- Expands the powers of the attorney general and county prosecutors to seek civil confinement in psychiatric hospitals for sex offenders who are about to be released from prison.

- Requires lifetime supervision for sex offenders as part of any conviction, which makes it possible for parole officers to track them after normal prison and parole terms would expire.

- Requires convicted sex offenders to provide blood samples to allow a DNA record to be kept for future investigations. As with community notification, this law applies to offenders who have been convicted in the past, who must provide blood samples prior to release from prison.

- Makes it a law that the Department of Corrections notify county prosecutors 30 days in advance when a sex offender from their jurisdiction is coming out of prison. The department has been doing this since 1989 as a matter of policy. Law also requires prosecutors to inform police and victim advocate agencies.

The Legislature also passed a special resolution establishing an investigative task force to study the treatment of sex offenders at Adult Diagnostic and Treatment Center, and to recommend changes. This resolution did not require the Governor's signature.

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Ruling Below: (Abdur'Rahman v. Bell, 6th Cir., 226 F.3d 696, 2000 U.S. App. Lexis 22978, 2000 Fed App. 0319P)

The court held that Abdur'Rahman was not prejudiced at his trial by the deficient performance of his counsel during death penalty sentencing, because the state court found that although his counsel did not investigate to obtain information about his mental health and background, the information that would have been brought forth would not have benefited Abdur'Rahman. The court denied him a writ of habeas corpus.

Question Presented: Should a criminal defendant whose lawyer was found to have performed deficiently during death penalty sentencing by not providing evidence of mitigating background and mental health evidence be granted a writ of habeas corpus if the state court found that this deficiency did not prejudice the defendant?

Abu-Ali ABDUR'RAHMAN, Petitioner-Appellee/ Cross-Appellant,
v.
Ricky BELL, Warden, Respondent-Appellant/ Cross-Appellee.

United States Court of Appeals
For the Sixth Circuit

Decided September 13, 2000.

SILER, Circuit Judge:

Respondent, Ricky Bell, Warden ("State"), appeals the issuance of a writ of habeas corpus to Petitioner, Abu-Ali Abdur'Rahman ("Petitioner"), vacating Petitioner's sentence of death for first-degree murder on the grounds of ineffective assistance of counsel at the sentencing phase of Petitioner's trial. Additionally, Petitioner cross-appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for first-degree murder. We reverse the district court's finding that Petitioner was prejudiced by his trial counsel's deficient performance at the sentencing stage and vacate the portion of the district court's judgment granting the petition for a writ of habeas corpus as to the death sentence. Additionally, we affirm the portion of the

district court's judgment denying the petition for a writ of habeas corpus as to the conviction.

I. BACKGROUND

[Abdur'Rahman was convicted of first-degree murder for which he was sentenced to death. The death penalty was imposed based on jury finding that he had previously committed a felony, the murder was especially cruel, and it was committed while he was engaged in another serious crime.

Abdur'Rahman entered the home of a man from whom he had bought marijuana under the pretext of buying drugs. Armed with a shotgun, he bound the man and his girlfriend, robbed them, then stabbed both with a butcher knife, killing the man and wounding his girlfriend.

Abdur'Rahman argued at trial that he was motivated by his membership in a "quasi-religious paramilitary group" that sought to cleanse the black community of undesirable elements.

His first lawyer ceased representation because of the possibility that the leader of the religious group, who was paying the legal fees, was involved with the crime. His second lawyer did not inquire about the source of the fees, but refused to do any work because the full retainer had not been paid. Abdur'Rahman claims this led to ineffective representation because the lawyer failed to investigate, present potentially exculpatory evidence, or present mitigating evidence during sentencing.

On appeal, his conviction was affirmed and the U.S. Supreme Court denied certiorari.]

* * *

II. DISCUSSION

A. State's Appeal Challenging the Judgment Granting the Petition for a Writ of Habeas Corpus as to the Death Sentence

[Even though the district court erred in not giving a presumption of correctness to the findings of the post-conviction court, this error did not require a remand because the district court properly ordered an evidentiary hearing and properly considered that evidence pursuant to its discretionary powers.]

* * *

[3. Ineffective Assistance of Counsel]

The post-conviction trial court concluded that Petitioner's trial counsel's performance was deficient during the

sentencing phase due to the failure to investigate and obtain information about Petitioner's background and mental health. However, it went on to hold that Petitioner suffered no prejudice at the sentencing stage because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and that it would not have been a prudent strategy to present the evidence.

* * *

Strickland set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside. First, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Strickland*, 466 U.S. at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different [...]" *Id.* at 694.

* * *

The post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed:

If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not

have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

* * *

Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. Thus, the decision of the district court that Petitioner was prejudiced at the sentencing stage due to his counsel's deficient performance is reversed.

4. Heinous, Atrocious, or Cruel Instruction

[The court found that vagueness challenges to jury instructions in death penalty sentencing are analyzed under the Eighth Amendment, which requires that juries are not left with open-ended discretion, but rather are adequately informed as to what must be found to impose death.]

* * *

We decline to pass on the constitutionality of the instruction in this case because any error therein was harmless. "Whenever an aggravating factor has been invalidated in a weighing state, the sentence must be reweighed or analyzed for harmless error if the sentence is to be affirmed." *Coe*, 161 F.3d at 334.

• * *
•

"We turn, therefore, to analyze this error for harmfulness. The question we must ask is whether the error "had substantial

and injurious effect or influence in determining the jury's verdict." [*Id.*], 161 F.3d at 334-35. In *Coe*, the error was deemed harmless because the jury made the narrow finding that "the murder was especially heinous, atrocious, or cruel and involved torture," when it had been charged to find that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 335.

Unfortunately, the jury's verdict form in the instant case was not preserved. However, the Supreme Court of Tennessee made the factual finding that the jury had found the three aggravating circumstances as set forth above in the Background section. See *State v Jones*, 789 S.W.2d 545, 550 (Tenn. 1990). These factual findings are accorded the presumption of correctness under 28 U.S.C. § 2254(d)[...]

As the State correctly points out, there was ample evidence to support the aggravating circumstances that Petitioner had been previously convicted of one or more felonies involving the use or threat of violence to the person and that the instant murder was committed while the Petitioner was engaged in committing, or attempting to commit, any first degree murder or robbery. See *State v Jones*, 789 S.W.2d at 550. [...] Thus, even if the heinous, atrocious, or cruel aggravator is removed from the calculus, there is no mitigating evidence to weigh against the remaining prior felony conviction and felony murder aggravators. Therefore the error was harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict.

5. Petitioner's Unanimity Objection to the Sentencing Instructions

[The court found that the lack of instruction specifically stating that the jury did not have to unanimously find mitigating circumstances would not lead jurors to believe the opposite.]

B. Petitioner's Cross-Appeal Challenging the Denial of his Petition for the Writ of Habeas Corpus as to his Conviction

On cross-appeal, Petitioner argues that the district court's conclusion that he suffered no prejudice from his trial counsel's deficient performance at the guilt stage was erroneous. First, Petitioner argues that due to his trial counsel's conflict of interest and wholly inadequate representation, prejudice can be presumed and therefore need not be shown. Second, Petitioner argues that he did in fact suffer prejudice by trial counsel's delay in preparing for his trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history. In response, the State argues that there was no actual conflict of interest and that Petitioner suffered no prejudice because he cannot show a reasonable probability that the result of the proceeding would have been different in the absence of trial counsel's deficient performance.

* * *

[1. Conflict of Interest]

Petitioner fails to show that his trial counsel was actively representing conflicting interests. At most, Petitioner's trial counsel delayed the preparation of his case for too long in anticipation of receiving the balance of his retainer fee. Though Petitioner argues that he was

adversely affected by the conflict of interest, he does not allege that his trial counsel was actively representing conflicting interests. Additionally, Petitioner could not make such a showing because as the district court noted, "even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing." *Abdur'Rahman*, 999 F. Supp. at 1091. The district court noted that Barrett elicited testimony about the SEGM from Beard on cross-examination, mentioned the Petitioner's connection with the group during his closing argument, and issued subpoenas for Boyd and Beard to appear at the trial. Thus, it cannot be said that Barrett was actively representing conflicting interests.

* * *

2. Prejudice

Petitioner argues that the district court erred in concluding that he did not suffer any prejudice by his trial counsel's deficient performance of delaying his preparation for trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history.

First, Petitioner argues that Barrett's decision not to work on the case until he received the balance of the retainer prejudiced him by the lack of any meaningful work being performed and by depriving him of representation during his psychological evaluation. However, Petitioner points to no specific evidence that would raise a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt in the absence of this delay.

Second, Petitioner argues that he was prejudiced by his trial counsel's failure to investigate and present a lab report showing that no blood was found on the clothes he was allegedly wearing during the offense. The district court correctly held that such evidence would not have created a reasonable doubt about guilt because although there was testimony that Petitioner was wearing a long dark coat on the night of the offense, there was no evidence that at the time of the homicide Petitioner was wearing the clothes seized later from his apartment. See *Abdur'Rahman*, 999 F. Supp. at 1096.

Finally, Petitioner argues that trial counsel's failure to investigate his mental history, especially his diagnoses of Post-Traumatic Stress Disorder and Borderline Personality Disorder, prejudiced him at the guilt stage of his trial. The district court held that this was not prejudicial because there was no evidence that Petitioner could have produced an expert to testify that he was insane at the time of the stabbings, or even if one did so testify that testimony would have been effectively countered by evidence from the Middle Tennessee Mental Health Institute from an examination authorized prior to trial that there was no basis for Petitioner to invoke an insanity defense. [...]

III. CONCLUSION

The district court's finding of prejudice at the sentencing stage is REVERSED and the judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence is VACATED. The district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

ALICE M. BATCHELDER, R. GUY COLE, JR, Circuit Judge, concurring in part:

[The concurrence agreed with the majority opinion except on the issue of the properness of the evidentiary hearing granted by the habeas court. The federal court did not have the discretion to retry the state court decision.]

* * *

COLE, JR., Circuit Judge, concurring in part, dissenting in part:

Because I would affirm the district court's determination that Abdur'Rahman's counsel was constitutionally ineffective at sentencing and that the writ should be granted as to this issue, I respectfully dissent from that portion of Judge Siler's opinion.

* * *

Abdur'Rahman's counsel was constitutionally ineffective at sentencing due to counsel's utter failure to investigate or present available mitigating evidence. In order to prove ineffective assistance of counsel, Abdur'Rahman must fulfill the familiar two-prong requirement of *Strickland v Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [...] As noted by

the majority, we review this mixed question of law and fact de novo. See *Id.* at 698; *McQueen v Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

The district court and both Tennessee post-conviction courts that examined this case determined that Abdur'Rahman's counsel's performance was deficient. The state does not challenge this determination.

* * *

The majority suggests that [. . .] defense counsel could have made a legitimate tactical decision not to present the evidence, which is now in the record but was not presented to the jury, and that we should defer to this decision. Unfortunately, defense counsel's "tactical decision" in this case was to not prepare for the capital sentencing hearing of their client. "Our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v Zart*, 941 F.2d 1449, 1462 (11th Cir. 1991).

Further, and more importantly, I disagree with the majority's finding that Abdur'Rahman was not prejudiced by counsel's failure. To demonstrate prejudice, Abdur'Rahman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that counsel's performance more likely than not affected the outcome of the case. See *Id.* at 693-94. Instead, "when a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to

the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 696.

Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase. Despite counsel's assertion in his opening statement that he would put on other witnesses, Abdur'Rahman and his wife were the sole witnesses at sentencing and their testimony related to the circumstances of the offense for which he was found guilty. It did not address Abdur'Rahman's history of abuse, his mental health treatment, or other relevant aspects of his life. This is so despite the fact that the jury should "'not be precluded from considering, as a **mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Perry v Lynaugh*, 492 U.S. 302, 317, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (quoting *Lockett v Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (emphasis in original)).

[The dissent enumerates the mitigating evidence.]

* * *

While acknowledging that some of this evidence would have been mitigating, the majority adopts the rationale of the state court of appeals that the evidence that defense counsel failed to investigate or present also contained instances of violent conduct and anti-social actions by Abdur'Rahman. This treatment of the evidence by the majority contradicts the emphasis by the courts that evidence considered mitigating by the person facing

a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury. See, e.g., *Eddings v Oklahoma*, 455 U.S. 104, 110, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982). Further, the majority overlooks that the jury already had much of this evidence of violent or prior criminal conduct before it and that the presentation of available, relevant evidence at sentencing would not have subjected Abdur' Rahman to additional statutory aggravating factors. The mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing the very purpose of a capital sentencing hearing [...]

[...] Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S. Ct. at 1513. Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; see also *Austin*, 126 F.3d at 848; *Glenn v Tate*, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

Before the High Court: Abdur'Rahman Case Could Clarify Issue of Effective Counsel for Poor Defendants

The Knoxville News-Sentinel

April 30, 2002

A Tennessee capital punishment case will be among several the U.S. Supreme Court will examine to determine major constitutional questions about how the death penalty in the United States is being applied.

The central question in the case of Abu-Ali Abdur'Rahman, on death row at the state's Riverbend Maximum Security Institution, is one that for years has troubled justices of the Supreme Court as well as those in state and federal appeals courts: whether accused killers who are poor are being adequately represented at their criminal trials.

Abdur'Rahman was sentenced to die on April 10 but was spared when the justices blocked his execution to determine if he is entitled to additional appeals.

If any case appears to fit the court's need to look at how indigent defendants are represented at their trials, the case of Abdur'Rahman stands out. He was convicted in the 1986 stabbing death of Patrick Daniels of Nashville, an action Abdur'Rahman said he took to stop the alleged drug dealer from selling narcotics to children.

Abdur'Rahman's current attorneys argue that his trial attorneys failed him by not providing a better defense. For one of his trial attorneys, it marked his first capital case. That trial attorney said recently that he and the other lawyers representing Abdur'Rahman never discussed a defense

strategy for the trial or for the sentencing phase.

Moreover, they acknowledged they relied on information from the Davidson County prosecutors, including evidence of blood on Abdur'Rahman's clothing. That later was determined to be paint. And they did not mention their client's history of sexual and physical abuse and his mental problems.

All of these issues should be plenty for the justices to ponder. Other cases offer the questions of whether states can execute persons who are mentally retarded and whether it is constitutional for a judge -- not a jury -- to decide a death sentence.

An adage has it that good constitutional law does not always come from the best cases, and a brutal murder case in which no one is arguing for complete innocence might fall into that category.

Nevertheless, the U.S. Constitution and numerous decisions by the Supreme Court over the years have guaranteed defendants the right to effective counsel in their trials. That guarantee should be just as important as the assurance that the accused is innocent until proved guilty. Abdur'Rahman's case before the high court could go far in ensuring those long-cherished standards remain intact.

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Life of Violence, Abuse Set to End Early Wednesday

The Commercial Appeal

April 8, 2002

Amber McDowell

Abu-Ali Abdur'Rahman stabbed a drug dealer six times in the chest and left the man's girlfriend with a butcher knife wedged in her back.

He said he wanted to make Nashville a safer place for children when he brutally killed Patrick Daniels and stabbed Norma Jean Norman as the woman's two daughters cowered in a room next door.

Sixteen years later, Abdur'Rahman, 51, faces execution by lethal injection for the murder, the second he has committed.

Early Sunday morning he was moved to a special "death watch" cell at Riverbend Maximum Security Institution.

His attorneys continued to prepare for today's hearing in Davidson County Circuit Court, where they hope to convince Judge Walter Kurtz that they need more time to consider claims that their client's trial was unfair.

If all appeals fail, he will die at 1 a.m. Wednesday, becoming only the second person executed in Tennessee since 1960.

On Friday, Gov. Don Sundquist denied Abdur'Rahman executive clemency, and the Tennessee Supreme Court denied a stay of execution over claims of racial discrimination during jury selection.

An appeal remains in U.S. Supreme Court alleging prosecutorial misconduct.

Abdur'Rahman was known as James Lee Jones Jr. until he was sentenced to death row in 1987 and converted to Islam.

His spiritual adviser, Vanderbilt psychologist Linda Manning, said Abdur'Rahman's life has been filled with violence since he was child. She says he suffered horrible physical and mental abuse from his father, a military policeman, and he and his brother and sister all suffered mental problems as a result. His brother, Mark, committed suicide in 1996.

Abdur'Rahman began getting into trouble as a boy and had a juvenile crime record by 14. He joined the Army in 1968 at 17 but received an undesirable discharge a year later because of emotional problems. He went AWOL three times and twice attempted suicide.

The day after his discharge, he was arrested for armed robbery on the Army post. He was convicted and sentenced to four years to a federal prison in Virginia.

While there, prison records show, Abdur'Rahman was raped numerous times, and doctors described him as "highly disturbed."

In 1972, he stabbed to death a fellow inmate and was convicted of second-degree murder. He said he killed the man because he was tired of forced sex. He received a life sentence but was paroled in 1983.

After his parole, he moved to Chicago, where he worked as a janitor and with children living in housing projects. He moved to the Nashville area two years later to be closer to his brother, then a soldier at Fort Campbell, Ky.

For a year, he stayed out of trouble. He married and got a job loading boxes at the National Baptist Publishing Board, where he made friends with Devalle Miller.

Their boss, Allen Boyd, told them about the Southeastern Gospel Ministry, a quasi-religious paramilitary group in Nashville whose goal was to cleanse the black community of drugs.

Abdur'Rahman took the group's ideals to heart, even though he used drugs. On Feb. 16, 1986, after buying drugs from Daniels, he decided to scare Daniels from ever selling to children.

The next day, Abdur'Rahman, armed with a shotgun, and Miller, with an unloaded pistol, returned to Daniels's apartment under the guise of buying more drugs.

Once inside, the men confronted Daniels and Norman. Sleeping in another room were Norman's two daughters, 8-year-old Katrina and 9-year-old Shawana. They awoke when they heard Abdur'Rahman's shouting.

"He told me to my face, if I didn't get my kids back in the room, he would snap one of their necks," Norman testified this month during a clemency hearing for Abdur'Rahman.

Abdur'Rahman then forced Norman and Daniels to the floor, bound their hands and feet with duct tape, and taped shut their eyes and mouths.

Abdur'Rahman claims he remembers nothing after that, although at the sentencing phase of his trial he admitted to the attacks.

Miller, who testified against Abdur'Rahman as part of a plea agreement, said the motive for the attack was not religion but robbery.

He said Daniels cried and begged the men not to hurt anyone. He said Abdur'Rahman grabbed a butcher knife from the kitchen and began his attack. He stabbed Daniels six times, puncturing his heart four times.

The two men fled. Norman, the knife still in her back, struggled to her daughters, who called for help.

A day later, Abdur'Rahman was arrested at work. Miller was captured a year later in Pennsylvania. Miller pleaded guilty and was released on parole in 1993.

Abdur'Rahman's current attorneys label his sentence unjust. The original trial attorneys never told jurors about the violent abuse Abdur'Rahman suffered as child or his mental problems, which they contend may have made a difference in their sentence decision.

Eight of the original trial jurors now say they would have chosen a life sentence if they had known Abdur'Rahman's history.

"The issue isn't whether he should have gotten the death sentence, it's a question of whether the execution should be carried out," attorney Brad MacLean said at the clemency hearing. "It's an issue of mercy."

MacLean and his colleagues point to how Abdur'Rahman changed in the last 15 years.

He is the longest-serving elected representative on the inmate council and the warden's designated mediator for inmate disputes. He has earned a paralegal degree and another for constitutional litigation, his attorneys say.

For 10 years, Abdur'Rahman has been a regular guest on Nashville radio station WFSK's Positive African-American Men and Women United, helping counsel troubled children and teens.

"Abu-Ali has been a constant assistance to children who don't take advice from people like me," WFSK's Sydney Windfield said at Abdur'Rahman's clemency hearing. "When we say we've got Abu-Ali on the radio live from Death Row, that has an impact."

If he is executed, Abdur'Rahman will become the first black man put to death in Tennessee since William Tines was electrocuted Nov. 7, 1960, for beating and raping a woman in Oliver Springs.

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Abu-Ali's Date with Death Called 'Utter Failure' of Entire System

The Commercial Appeal

February 13, 2002

David Waters

The Davidson County jury never heard a word about Abu-Ali's history of being abused, neglected, assaulted, and mentally ill all relevant factors when considering the death penalty. [...]

"Had counsel presented the other evidence of (Abu-Ali's) background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty," U.S. Dist. Judge Todd Campbell said.

Campbell's ruling was overturned by one vote by the Sixth U.S. Circuit Court of Appeals.

Last year, eight of 12 jurors signed affidavits saying they would have rejected the death penalty for Abu-Ali if they had known about his history of mental illness.

"Given all the history of mental illness (Abu-Ali) has, I would have voted for a life sentence. I believe people with problems can be helped," juror Loretta Simpson wrote.

Five jurors said they also would have rejected the death penalty if they had known Abu-Ali's 1972 murder conviction was related to homosexual attacks on him in prison.

"I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death," juror James Wimberley wrote.

"I don't want (Abu-Ali) to be put to death. I would like the governor to spare his life," juror Jimmy Swarner wrote.

One juror said she misunderstood the sentencing instructions.

"I thought that it was the jury's duty to try to reach a unanimous decision on the sentence, and if a unanimous decision was not reached then it would be a mistrial. I did not know or understand that if the jury was not unanimous on the death penalty then the defendant would receive a life sentence," wrote juror Bonnie Meyer, one of the last jurors to vote for death.

"If I had understood this then I probably would not have changed my mind and I would have continued to vote for a life sentence." [...]

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The Changing Debate Over the Death Penalty

The New York Times

June 22, 2002

Stuart Banner

The Supreme Court's ruling Thursday that it is unconstitutional to execute mentally retarded people was good news for opponents of the death penalty. They hailed it as a landmark decision that signals a fundamental shift in the court's stance toward capital punishment.

Their celebration is understandable. But it will almost certainly be temporary. History shows that public opposition to capital punishment vacillates over time. And though the Supreme Court is less responsive to shifts in popular opinion than state lawmakers, Congress or the president, it is not immune to them. In the past few years, opponents of the death penalty have won several victories. The governors of Illinois and Maryland have declared moratoriums on conducting executions until flaws in those states' criminal justice systems are eliminated. A federal district judge in New York has announced that he intends to find the federal death penalty statute unconstitutional on the ground that innocent people are too likely to be executed. Meanwhile, the annual number of executions has been declining, from 98 in 1999 to 66 in 2001.

But throughout American history, support for the death penalty has risen and fallen with the times. In periods when Americans have tended to think of crime as the product of the criminal's free will, the criminal justice system tilts toward retribution, and capital punishment has grown more popular. In periods when they have paid more attention to causes

other than the criminal's free will -- the criminal's social context, for example -- the system has emphasized rehabilitation, and the popularity of the death penalty has waned.

The past 30 years were a period of strong support for capital punishment, as part of a trend toward retribution in criminal sentencing. (This trend is also evident in other sentencing measures like "three strikes" laws.) For the past 250 years, however, such periods have always been followed by times of growing opposition to the death penalty.

There is certainly nothing inexorable about this pattern. But we may well be seeing the beginning of the next long swing away from the death penalty. In the past, the early signs have been the abolition of capital punishment for those criminals for whom the death penalty seemed disproportionately severe. In the 18th century minor criminals like counterfeiters and horse-stealers were the first to be spared the death penalty; in the 19th century, it was rapists and robbers who were spared. Today it's the mentally retarded, and tomorrow it may be 16- and 17-year-olds, who are still eligible to be executed in some states.

In the relatively short time that the Supreme Court has considered capital punishment to raise constitutional questions, it has followed the oscillations of public opinion. *Furman vs. Georgia*, the 1972 case that found existing death-sentencing schemes unconstitutional, was

decided near the peak of opposition to the death penalty, as measured by public opinion polls. For the next 30 years, as capital punishment gained support, the court gradually watered down the restrictions against capital punishment in the Furman case. And now, just when that support is showing signs of weakening, the court has imposed the first important new constitutional restriction on capital sentencing in many years.

There is nothing unusual or improper about this link between public opinion and the court's decisions. The justices are chosen by an elected president and confirmed by an elected Senate, of course. And just as important, they are not hermits; they are influenced by the same trends in thought that influence us all.

Unlike legislators or executives, however, judges cannot simply rewrite, repeal or veto laws they do not like. The Supreme Court must place each ruling it makes in the context of its past decisions; it must follow precedent. But it is not as difficult for the court to change course as is commonly thought. Indeed, its conclusion that executing mentally retarded offenders

now is cruel and unusual punishment directly contradicts a decision it issued only 13 years ago.

Claims of cruel and unusual punishment have long been evaluated according to "evolving standards of decency." In such cases, the court must ask what those standards are and, as it acknowledged in its decision Thursday, the ongoing public debate "informs our answer."

This kind of analysis by its very nature calls on the court to consider broadly held public views. If in the future public opinion evolves in favor of executing retarded people, states will likely adopt definitions of mental retardation that are more restrictive, encompassing fewer and fewer defendants. It would not be surprising then to see the court approve those restrictions until the principle stated in this week's case gets narrowed, perhaps into irrelevance.

[Stuart Banner is a professor of law at UCLA.]

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Shouldn't We, the People, Be Heard More Often by This High Court?

The Washington Post

June 30, 2002

Akhil Reed Amar

Among the several landmark decisions handed down by the Supreme Court as its latest term was drawing to a close, there's one whose enduring significance may well lie not in what the justices did, but in how they did it.

In its June 20 decision in *Atkins v. Virginia*, which banned the capital punishment of mentally retarded convicts, the justices explicitly relied on broad popular opinion outside the court to determine a question of constitutional law. The ruling came as a welcome shift. Under Chief Justice William Rehnquist, the court has generally not been known for its humility or its deference to the opinions of others. But it is worth remembering that the Constitution itself begins with the words "We the People," not "We the Court."

There have been other recent cases involving the Eighth Amendment, which bans "cruel and unusual punishments," in which the court has consulted public views and practices as it considered what counts as "unusual." But in the *Atkins* decision, the court, by a 6 to 3 vote, took this idea two steps further. Citing public opinion polls and recent votes in state legislatures, the justices discerned "a national consensus" to prohibit the execution of low-IQ convicts. This persuaded the court to overturn a 1989 decision in which it had upheld such executions.

The landscape has changed considerably since '89, the court noted. Back then, 16

states prohibited the death penalty in such cases; today, that number is 30. Indeed, since '89, only five states have executed convicts known to be mentally retarded. The court also cited "polling data" showing "a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong."

So what does any of this have to do with constitutional law? Doesn't the court's decision to overrule precedent on the basis of opinion polls and current trends in state practice mock the idea of enduring principles of constitutional law immune from gusts of public opinion and passing legal fads?

Well, no. The majority's straight-forward argument was that executing the mentally retarded had indeed "become truly unusual" in America today. In effect, the Eighth Amendment was written with a built-in escalator clause. Over time, harsh punishments that were once common have become less common as society has turned against them; and when these punishments become truly unusual, they thereby become ripe for constitutional invalidation. Through the words "cruel and unusual," the founders in effect told modern judges to pay attention to contemporary penal patterns and contemporary popular attitudes about punishment.

This was precisely the analytic framework used by the court in the earlier case, *Penry v. Lynaugh*, which held that, 13 years ago,

death for the mentally retarded was not an unusual sanction when measured by actual practice and public sentiment. By noting dramatic trends since 1989, the court's decision in *Atkins* was faithful to its logic in *Penry*, even as it overruled *Penry*'s result. Indeed, two of the members of the *Penry* majority, including its author, Justice Sandra Day O'Connor, joined the *Atkins* majority. Chief Justice Rehnquist and Justice Antonin Scalia were also members of the *Penry* majority, but they issued sharp dissents in *Atkins*, joined by Justice Clarence Thomas, who only came onto the court in 1991. (Interestingly, none of the *Atkins* dissenters challenged the basic idea that punishments that were clearly permissible at the country's founding and throughout most of American history could at some later time become cruel and unusual because of changed sentiments of ordinary citizens and elected lawmakers. Rather, the *Atkins* dissenters simply denied that death sentences for mentally retarded inmates have indeed become so unusual as to be unconstitutional.)

The dissenters pooh-poohed public opinion polls as soft and unreliable, highly dependent on the precise wording of a given pollster's question and other subtleties. But the very polls discussed by the dissenters themselves reveal a striking pattern: No matter who conducted the poll, or where it was conducted, or the precise wording of the question, strong majorities of ordinary citizens opposed these executions. And given that actual patterns of current punishment help define what is considered "unusual," shouldn't actual sentiments of current Americans likewise help define what is considered "cruel"?

As a legal scholar (and an optimist) I would love to see this decision help redefine the relationship between the

people and the Supreme Court. Many Americans today look to the court as the ultimate -- perhaps the only real -- interpreter of the Constitution. In this, they are mistaken. Yet in its rhetoric and results, the court itself has encouraged this view, especially in the three decades since Watergate and Vietnam, which besmirched the political branches while leaving the judiciary relatively unscathed.

Earlier generations of Americans had a more democratic and participatory view of constitutional interpretation. Nowhere does the Constitution proclaim the Supreme Court as the ultimate arbiter, or even first among equals (Congress, in fact, is mentioned first); and many early presidents -- including Jefferson, Madison, Jackson and Lincoln -- viewed the judiciary as simply one of three equal branches, each of which had a key role in constitutional interpretation. Early justices often showed great deference to the views of the public and the political branches.

From the very first words of its preamble, the Constitution aimed to create a democracy founded on ordinary citizens. Unelected judges would help enforce constitutional provisions, but the provisions themselves came from ordinary people who ratified the document and from mass movements that periodically mobilized for democratizing amendments.

Much of the Constitution evinced more confidence in citizen jurors than in insulated judges; indeed, the Eighth Amendment itself reflected uneasiness about tasks that judges might perform unchecked by citizen juries, such as setting bail and imposing criminal sentences. The founders expected that popular juries would temper the hardheartedness of some professional judges.

The point may well remain true today: Juries have proved more merciful than judges in imposing the death penalty; and in a case decided only four days after *Atkins*, *Ring v. Arizona*, the court overruled yet another death penalty precedent. This one had allowed judges to bypass juries in capital sentencing. Like *Atkins*, the *Ring* decision admirably seeks to integrate the perspectives of ordinary citizens into the punishment process.

The decisions represent an important shift for the Rehnquist court. In the last eight terms, the court has invalidated congressional statutes in more than 30 cases -- four times the rate of the Warren Court. The Rehnquist Court also pointedly refused to overturn *Roe v. Wade*, which legalized abortion, in part because so many ordinary citizens had questioned the decision, and the justices preferred not to encourage such criticism of the court.

The dissenting justices in *Atkins* claimed that, once again, the court was acting imperialistically. But by banning a practice that only five states have recently engaged in, and that most citizens across the country oppose, *Atkins* can be read to fit a more restrained vision of judicial review. (Given that one of the particular concerns of the Fourteenth Amendment, adopted after the Civil War, was to prevent former Confederate states from imposing harsh

punishments out of sync with national norms, it's worth noting that all five of these states come from the old Confederacy.)

The *Atkins* decision exemplifies an interpretive method with broad potential application beyond the Eighth Amendment. If the justices are willing to credit the views of the public and elected officials on the question of which punishments are cruel and unusual, the court might likewise pay more heed to democratic deliberations about which searches and seizures are reasonable and which unenumerated rights are truly fundamental in modern America.

Finding ways to consult broader public sentiment when interpreting the Constitution is often a good thing, and one that need not jeopardize individual rights. If the justices are truly interested in listening to their fellow citizens -- as all nine claim to be -- they will find that We, the People, have a lot of ideas worth hearing.

Akhil Amar is a professor of constitutional law at Yale and author of "*The Bill of Rights: Creation and Reconstruction*" (Yale University Press).

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Judge Says Executions Violate Constitution

The Washington Post

July 2, 2002

Charles Lane

A U.S. district judge in New York ruled yesterday that the federal death penalty is unconstitutional because it creates "undue risk" of executing innocent defendants, the latest sign that DNA exonerations of death row inmates have begun to affect the way courts and legislatures think about capital punishment.

In telling federal prosecutors that they may not seek the death penalty for two heroin dealers accused of murdering a government informant, Judge Jed S. Rakoff wrote that wrongful death sentences are more common than Congress believed when it passed the death penalty law in 1994.

Now, he wrote, it is "fully foreseeable that in enforcing the death penalty, a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence."

And that, said Rakoff, an appointee of President Bill Clinton, is "tantamount to foreseeable, state-sponsored murder of innocent human beings." The ultimate impact of Rakoff's decision is highly uncertain. It would appear to run counter to the last quarter-century's worth of Supreme Court precedent, which has sought to regulate the death penalty but consistently treated it as a constitutional form of punishment. However, anti-death penalty organizations greeted Rakoff's order as more evidence that their cause is gaining momentum, at least symbolically.

The Bush administration said yesterday it is reviewing Rakoff's ruling, but legal analysts regarded an appeal as a near-certainty.

"The determination of how to punish criminal activity within the limits of the Constitution is a matter entrusted to the democratically elected legislature, not to the federal judiciary," said Justice Department spokeswoman Barbara Comstock. "Congress passed the Federal Death Penalty Act to save lives, and the Supreme Court of the United States has repeatedly said the death penalty is constitutional."

Kent Scheidegger of the Criminal Justice Legal Foundation, a Sacramento-based nonprofit group that supports capital punishment, said Rakoff is "essentially saying the Constitution requires certainty of guilt before we can execute anyone, and that is not the law."

Rakoff implied his decision could be overturned, either by the New York-based U.S. Court of Appeals for the 2d Circuit, or by the Supreme Court. "[N]o judge has a monopoly on reason," he wrote, noting that he "fully expects [my] analysis to be critically scrutinized."

The decision comes soon after the Supreme Court abolished capital punishment for the mentally retarded -- in part, the high court said, because retarded defendants may be particularly susceptible to wrongful conviction or sentencing.

The ruling also follows death penalty moratoriums in Illinois and Maryland, and comes as the Senate Judiciary Committee is preparing to vote on a bill sponsored by Sen. Patrick J. Leahy (D-Vt.) that would promote access to DNA evidence and legal counsel for both state and federal death penalty defendants.

"These decisions spotlight various flaws in the death penalty system, and the flaws add up to a system that is broken," Leahy said yesterday.

"More so than at any other time since the early '80s, there are people of all stripes in legislatures and courthouses thinking about the fact that we've got a problem here," said George Kendall, assistant counsel of the NAACP Legal Defense and Education Fund, which opposes capital punishment.

Though the wrongful convictions it cited were in state cases, Rakoff's order applies only to the federal system. There are 27 convicted murderers on federal death row.

Attorney General John D. Ashcroft has been aggressive in seeking the death penalty in federal cases, having ordered prosecutors to ask for capital punishment in 20 of 45 possible cases through March 1, frequently overruling prosecutors.

Rakoff, who said in his 1995 Senate confirmation hearings that he would follow Supreme Court capital punishment precedent and that the death penalty "does not in any way offend my personal feelings," announced on April 25 his intention to strike down the federal death penalty, but gave Justice Department lawyers one last chance to persuade him not to.

The government argued that DNA testing is now available to defendants prior to trial, thus reducing the future risk of wrongful convictions; that there was no evidence that any of the federal defendants convicted so far was actually innocent; and that the Supreme Court had ruled in 1993 that death row inmates raising last-minute claims with new evidence of their innocence should face an "extraordinarily high" burden of proof.

Rakoff countered that not every case turns on physical evidence; that federal cases were as vulnerable to error as state cases; and that most of the justices involved in the Supreme Court's 1993 ruling had agreed that executing the innocent would violate the Constitution.

In recent days, the Supreme Court rebuffed a case based on another common criticism of the federal death penalty -- that it is racially biased.

A 2000 study by the Clinton administration's Justice Department found that 80 percent of federal death penalty prosecutions involved minority defendants.

But in a two-page unsigned opinion issued Friday, the court, without published dissent, ruled that an African American facing capital punishment in a federal case in Michigan could not press a racial bias claim because these statistics do not prove that federal prosecutors had shown any differential treatment toward defendants in cases similar to his.

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Ruling Below: (United States v. Recio, 9th Cir., 258 F.3d 1069, 2000 U.S. App. Lexis 38589, 57 Fed. R. Evid. Serv. (Callghan) 813)

The court held that, as a matter of law, there was insufficient evidence to convict the defendants of conspiracy to possess with intent to distribute drugs. Due to government intervention, only the pre-seizure involvement of the defendants was relevant to the charges. The court upheld a conviction on possession with intent to distribute. The court denied a rehearing en banc. U.S. v. Recio, 270 F.3d 845 (9th Cir. 2001).

Question Presented: Whether conspiracy ends as a matter of law when the government has frustrated its objective?

UNITED STATES of America, Plaintiff-Appellee

v.

Francisco Jimenez RECIO, Defendant-Appellant,
Adrian LOPEZ-MEZA, Defendant-Appellant.

United States Court of Appeals
For the Ninth Circuit

Decided September 27, 2000.

BROWNING, Circuit Judge:

[Recio and Lopez-Meza were arrested for driving a truck carrying \$12 million of cocaine and marijuana. They had been called to pick up the truck after the original driver had been arrested and agreed to call for replacement drivers. Both Recio and Lopez-Meza were convicted of conspiracy to possess with intent to distribute controlled substances. Recio was convicted of possession with intent to distribute.

On appeal they argued that they should have been acquitted based on United States v. Cruz, 127 F.3d 791, 795 (9th Cir. 1997), in which the court held that defendants could not be charged with conspiracy when brought into the scheme only after law enforcement had become

involved and that involvement was caused by that intervention.]

* * *

Viewing the evidence in the light most favorable to the government as we must, see United States v. Yossunthorn, 167 F.3d 1267, 1270 (9th Cir. 1999), we must determine whether any rational jury could find, beyond a reasonable doubt, that Jimenez Recio and Lopez-Meza were involved in the conspiracy prior to the initial seizure of the drugs on November 18, 1998. We focus on the evidence presented at their second trial.

The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court

stated that "Lopez's and [Jimenez Recio]'s words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jimenez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using prepaid calling cards.

This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jimenez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the prepaid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls on Lopez-Meza's card were made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations. The phone numbers called are not probative of a conspiracy. The Idaho calls were to "Nu Acres," where the drugs were apparently destined, but the number called was a communal telephone at a migrant camp where Lopez-Meza lived. The Chicago calls were all to different telephone numbers.

The other evidence of Defendants' pre-seizure involvement in the conspiracy is also insufficient. The government argues that Jimenez Recio's renewal of his "nonowner" driver's insurance shortly before his arrest demonstrates his anticipation of driving the drugladen truck; yet, the government expert testified that Jimenez Recio would not have been

involved in the delivery the following day absent the government "sting," and thus could not have anticipated being called on to drive. As for the pagers they carried, one would expect whoever recruited them to have outfitted them with the standard equipment used in the trade. Indeed, in light of the strange turn of events this drug shipment had taken, the main conspirators would want to stay in especially close communication with their drivers

On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers hired at the last minute. Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jimenez Recio retrieved the truck -- the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendants were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.

The government also relied on an additional broader conspiracy theory to circumvent Cruz on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. Cf. *United States v. Umagat*, 998 F.2d 770, 773-774 (9th Cir. 1993) (minor role of defendants in single transaction does not permit imputed liability for the broader conspiracy). Therefore, this theory too hinges on proof of prior involvement.

The strongest evidence that Defendants might be repeat players in drug trafficking were the multiple receipts for expired non-owner insurance policies found on Jimenez Recio. This suggests he habitually drove vehicles he did not own, from which a jury could further infer that Jimenez Recio regularly drove drug trucks for the conspiracy. It is a close question as to whether this inference, in conjunction with the other circumstantial evidence, could suffice to eliminate reasonable doubts among rational jurors as to Jimenez Recio's guilt (and by extension, perhaps Lopez-Meza's as well).

Ultimately, however, we remain unpersuaded. The insurance can also be accounted for by alternative explanations. For example, Jimenez Recio might work as a driver for legitimate businesses. The trafficking conspirators might naturally have turned to such an individual once Sotello was arrested (assuming alternate drivers within the conspiracy were unavailable). Jimenez Recio was also an illegal immigrant. As such, he would be reluctant to testify as to his legitimate work, lest he jeopardize his employers and

his own future employment; this could explain the defense's silence on the matter.

As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

[The court went on to address Recio's conviction on the possession charges. The court found that the district court did not err (1) in allowing evidence of the odor of marijuana in his car, (2) in denying a motion for a mistrial because the government called their destination a "stash house" as it did not effect the jury, nor (3) in allowing the expert testimony of a special agent.

The court found that Recio's counsel's failure to move for acquittal on the charge of possession with intent to distribute constituted ineffective assistance of counsel, because the judge granted such a motion to Recio's co-defendant.]

* * *

The conspiracy convictions are reversed and dismissed with prejudice because of insufficient evidence.

AFFIRMED IN PART, REVERSED IN PART.

FLETCHER, Circuit Judge, concurring:

* * *

I concur in the majority opinion but write separately to make the point that even if the evidence presented at the second trial, when taken in the light most favorable to the government, could (in the view of the dissent) suffice to convict the defendants on the broader conspiracy charge, their convictions should be overturned based on the insufficiency of the evidence at the first trial. At the first trial, the government argued and presented evidence relating solely to the single load conspiracy. It was only after a mistrial was declared that the government argued and presented additional evidence at the second trial relating to the alleged existence of a broader conspiracy.

* * *

GOULD, Circuit Judge, dissenting:

I. PROCEDURAL BACKGROUND

* * *

I respectfully dissent because I take a different view of the evidence, under the proper legal standards. This case poses an important issue concerning the scope of reasonable inferences that may be drawn by a jury from evidence of criminal conspiracy. I respectfully dissent because I would hold that there was unmistakably more than sufficient evidence in the second trial to uphold the jury's verdict. The majority today errs on this crucial issue, and then does not reach the other issues presented by the parties regarding the second trial. Having also reviewed these other issues, I would affirm the district court's decision to deny the defendants' motions for a judgment of acquittal after the second trial, and let the jury verdict stand.

[III. DISCUSSION

A. Sufficiency of the evidence]

Once a conspiracy exists, evidence establishing beyond a reasonable doubt defendant's connection with the conspiracy, even though the connection is slight, is sufficient to convict defendant of knowing participation in the conspiracy. " United States v. Bautista-Avila, 6 F.3d 1360, 1362 (9th Cir. 1993) (citations and quotation marks omitted).

* * *

When we view the evidence here in the light most favorable to the government, a reasonable jury could have found, beyond a reasonable doubt, that there was sufficient evidence linking Jimenez Recio and Lopez-Meza to a conspiracy that ended when police officers seized the drugs from Arce and Sotelo at 1:18 a.m. on November 18, 1997. Moreover, a reasonable jury could have found evidence sufficient to show constructive knowledge on the part of Jimenez Recio and Lopez-Meza of a broader conspiracy involving more loads than that seized on November 18, 1997.

[The dissent recounted all the evidence against both parties and in both conspiracies.]

* * *

B. Other alleged errors

[The dissent went on to address the claims of the defendants not reached by the majority. It found the defendants' assertions of error in jury instruction unpersuasive. Nor did it find any merit in the defendants' arguments against the

admission of certain evidence. The dissent also rejected the defendants' motion for mistrial because of prosecutorial misconduct. Finally, the dissent was not persuaded that expert testimony had been improperly admitted.]

IV. CONCLUSION

The majority correctly is concerned that proof be made of criminal conspiracy beyond a reasonable doubt, but the majority incorrectly invades the province of a jury when it holds that evidence in the second trial was insufficient. The legal test to determine if a second trial was permissible requires us to assess the boundaries of permissible inferences that a jury reasonably could have drawn when viewing all of the evidence in the light most favorable to the government. In this light, the evidence was sufficient to permit the jury to determine, beyond a reasonable doubt, that there was a serious criminal conspiracy in which Jimenez Recio and Lopez-Meza were involved before the

drugs were seized. Moreover, the evidence was sufficient for a jury to conclude beyond a reasonable doubt that there existed a broader conspiracy -- involving more than one load -- in which Jimenez Recio and Lopez-Meza had actual or constructive knowledge and for which Jimenez Recio and Lopez-Meza took deliberate steps. Jimenez Recio and Lopez-Meza sought to advance the conspiracy's unlawful aims by their own unlawful acts.

The majority addresses only a part of the evidence, ignoring key proof considered herein. The majority takes no heed of the fact that a jury was properly instructed to find guilt only if proven beyond a reasonable doubt. In returning its verdict, the jury said that it had no reasonable doubt. The evidence in the second trial is sufficient to support the jury's decision. I would affirm the district court's correct decision to let the jury verdict stand after the second trial.

Court Asked To Define Limits of Conspiracy

United Press International

May 28, 2002

Michael Kirkland

The Supreme Court agreed Tuesday to decide when a conspiracy ends. At issue in the Idaho drug case, which will probably be heard next fall, is whether those who join an illegal conspiracy after the government frustrates its purpose are guilty of the crime of conspiracy.

In asking that the high court review the drug case, the federal government told the justices that an eventual decision would have a profound effect on a variety of investigations, from violent crime to terrorism.

In the early morning hours of Nov. 18, 1997, a Nevada police officer stopped a northbound flatbed truck occupied by Manuel Sotelo and Ramiro Arce.

The truck turned out to be carrying 369 pounds of marijuana and nearly 15 pounds of cocaine. Police placed a street value of between \$10 million and \$12 million.

The men told police they were supposed to drive the truck to Nampa, Idaho, and leave it at a mall.

Arce agreed to cooperate with a police sting. Once officers had parked the truck at the Nampa mall, Arce called an Arizona pager number.

When a caller returned the page, Arce told him the truck's location and was told the caller would send "a muchacho to come and get the truck."

About three hours later, Francisco Jimenez Recio and Adrian Lopez-Meza drove up to the parked truck.

Recio got out of the car and into the truck, and he and Lopez-Meza drove west on different back roads.

Eventually, police decided to stop them.

A federal grand jury in Idaho indicted the two men for conspiracy to possess with intent to distribute cocaine and marijuana, and with conspiring to possess cocaine and marijuana.

Both men were found guilty on both counts. A federal judge refused motions that the men be acquitted because of lack of evidence.

Eventually, a divided appeals court panel reversed the judge, ruling 2-1 that the government had presented no evidence the two men were involved in a conspiracy before the drugs were seized in Nevada.

The panel majority said the men appeared to have been hired at the last minute, and downplayed evidence that both had pagers when they were arrested.

When the full U.S. Court of Appeals for the Ninth Circuit refused to hear the case, the Justice Department asked for Supreme Court review.

The department pointed to a 1957 Supreme Court precedent that said a conspiracy agreement "determines the duration of the conspiracy."

As long as the agreement lasts, the department said, the conspiracy lasts.

The appeals court ruling "discourages legitimate law enforcement methods that

can be of vital importance not only in drug cases, but also in violent crime, terrorism and other contexts in which prosecution of the conspirators and frustration of their goals are both critical objectives."

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International

Court to Hear Case Involving Drug Smuggling and Terrorism

Associated Press

May 28, 2002

Gina Holland

The Supreme Court agreed Tuesday to review a ruling that questions the way the government catches and charges suspected drug dealers and terrorists.

The case, stemming from narcotics arrests of two immigrants near an Idaho mall, is the first with implications for terrorism to catch the court's interest since Sept. 11.

The Bush administration played up the issue in urging the court to intervene. The government lost in a lower court and will get to argue for a reversal in the court term that begins next fall.

The case revolves around prosecutors' use of conspiracy charges for crimes that have already been discovered and prevented by law officers.

The 9th U.S. Circuit Court of Appeals, in a string of cases dating back five years, has said that law officers cannot stop a crime, lure people into getting involved with the help of informants, then charge them with being part of the conspiracy.

That's what the appeals court said happened to Francisco Jimenez Recio and Adrian Lopez-Meza when they were arrested during a sting operation involving a flatbed truck loaded with about \$12 million worth of cocaine and marijuana.

Officers had seized the truck and arrested a driver and companion near Las Vegas in 1997. With the companion's help, lawmen

set up the sting operation at a mall in Nampa. Recio and Lopez-Meza were arrested after showing up there to get the truck.

The 9th Circuit said Recio and Lopez-Meza would likely not have been involved in the conspiracy had they not been lured into it. The court added the government did not prove any other involvement in a conspiracy.

Solicitor General Theodore Olson told the high court in a filing that the appeals court finding "exonerates culpable defendants and needlessly complicates the prosecution of conspiracy cases."

"The vital need for undercover government efforts both to apprehend conspirators and to prevent their planned offenses from actually occurring extends far beyond drug cases. Similar legitimate law enforcement tactics are crucial in violent crime, terrorism and other contexts," Olson wrote.

The two men had received prison sentences of more than 10 years. Recio also was convicted of possession of drugs with intent to distribute, a conviction the 9th Circuit left undisturbed.

Thomas A. Sullivan, the attorney for the two, told the court that prosecutors did not have enough evidence for a conspiracy charge. He said they could

pursue a similar charge against Lopez-Meza.

The men were wearing pagers and had calling cards when they were arrested, the chief evidence against them.

Olson said it should not matter if the government intervenes during a crime. He said under the standard of the appeals court, officers who fear compromising prosecutions would have to be careful in stopping crimes.

The case is United States v. Recio, 01-1184

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