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Section 5: Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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A narrowly divided Supreme Court yesterday gave police sweeping authority to arrest and jail individuals who break even minor criminal laws such as failing to fasten a car's seat belt.

The 5-4 ruling upheld the arrest and hour-long jailing of a Texas mother who had been pulled over by a police officer in 1997 for not wearing a seat belt and for not attaching the belts of her two children. She ultimately paid a $50 fine.

The court, answering a legal question that it had never faced in 210 years of US constitutional history, declared that officers may take into custody for at least a brief period anyone they believe has broken a law, whether serious or not.

"The country is not confronting anything like an epidemic of unnecessary minor-offense arrests," so it is doubtful that the situation "needs constitutional attention," Justice David H. Souter wrote for the majority.

Police, according to the decision, do not need an arrest warrant when they encounter someone engaging in what they believe is law-breaking. All that is constitutionally required is "probable cause," that is, the officer must have a basis for concluding that a crime has been committed.
Under a 1991 Supreme Court decision, police may hold a person for up to 48 hours before taking the person to a judge or magistrate to determine whether the detention is justified.

Souter stressed that courts are not to second-guess whether the crime was serious enough to justify detaining the individual. The court, he added, refused to create a new constitutional right insulating an individual from being taken into custody and held when the crime involved could result only in a fine, not jail time.

With the Constitution no barrier to such arrests and detention, the court majority said individuals confronted by police could depend on "the common sense" of the officers not to routinely make arrests for petty crimes, or on the political accountability of local government officials who oversee the police.

The ruling is not likely to lead to many arrests in Massachusetts for traffic violations that could result only in fines, according to Captain Robert J. Bird, a spokesman for the State Police.

"In Massachusetts, there are a limited number of motor vehicle violations where the officer has the power to arrest," he said. A driver cannot be stopped by police simply for not wearing a seat belt, though an officer can pull over a car in which a child 12 or under is not wearing a belt. But no seat belt infractions are offenses for which a person may be arrested.

There are five traffic violations, such as driving without a license or driving a stolen car, in which a conviction could lead to either a fine or imprisonment under Massachusetts law, Bird said. There has been no question of police authority to arrest in those circumstances.

Only one traffic violation in Massachusetts - failure to produce a driver's license when asked - results only in a fine and still could lead to an arrest, he said. Yesterday's ruling settles the question of police authority in that type of situation.

The decision was a surprise because its author, Souter, usually votes with the court's liberal bloc in siding with individual rights in police encounters. Moreover, the dissent was written by Justice Sandra Day O'Connor, who normally votes with the court's conservative bloc to uphold police authority.

Joining Souter in the majority were Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas. O'Connor's dissent was supported by Justices Stephen G. Breyer, Ruth Bader Ginsburg, and John Paul Stevens.

The dissenters condemned the ruling for giving police unbounded discretion that carries grave potential for abuse. "As the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual," O'Connor said.

Stephen R. Shapiro, legal director of the American Civil Liberties Union, called the ruling "extremely disturbing," adding that "the most disturbing to us is that this opens the door to arrest of any motorist around the country for any trivial offense."

Though the Texas woman was white, Shapiro said the ruling stirs fears that this authority would be exercised in a racially discriminatory way, with police using
minor traffic violations as a pretext for targeting "drivers of color."

The ruling won the praise of the National Association of Police Organizations. Stephen R. McSpadden, general counsel of the group of 4,000 police organizations, said that if the ruling had gone the other way, "each time a police officer made an arrest for a traffic offense, he could be subject to a lawsuit for violating a constitutional right."

The motoring public, he said, is protected, because "if the police arrest everybody, there is going to be political protest."

Yesterday's ruling involved Gail Atwater, who lives in the Austin suburb of Lago Vista. On March 26, 1997, she was driving a pickup truck with her two children, going home from soccer practice, when an officer she had encountered before pulled her over.

She later said the officer was loud and abusive, and frightened the children. The children were not arrested only because neighbors intervened to take them. The officer handcuffed Atwater and took her to a police station for booking. She was kept in a jail cell for an hour until a magistrate ordered her release.

She pleaded no contest to failure to fasten the seat belts in the pickup, and paid a $50 fine. She later sued, contending that her arrest and detention violated her Fourth Amendment rights against an "unreasonable" seizure. The court rejected her claim.

The case is Atwater v. Lago Vista, 99-1408.

In a second 5-4 ruling yesterday, the court barred private individuals from filing lawsuits contending that federally funded programs are operated in a way that discriminates, in practice, on the basis of race or ethnic background.

The court rejected a lawsuit by a group of Spanish-speaking motorists in Alabama, who contended that a state motor vehicle policy of giving driver's license tests only in English has the effect of discriminating on the basis of ethnic background. (Massachusetts offers the driver's license test in 25 languages.)

In an opinion written by Scalia, the court said private individuals have a right to sue only when a federally funded program involves intentional race or ethnic discrimination.

The case is Alexander v. Sandoval, 99-1908.

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The Supreme Court, fearing a high-tech future in which police with special scanners could detect what is happening inside a private home, ruled 5 to 4 yesterday that officers must get a search warrant to use such devices.

"The question we confront," Justice Antonin Scalia wrote for the majority, "is what limits there are upon the power of technology to shrink the realm of guaranteed privacy" under the Constitution.

Specifically, the court ruled it unconstitutional for police without a warrant to use a heat-sensing device aimed at the outside of a house to seek evidence of crime - in this case growing marijuana - inside the dwelling.

But the ruling went well beyond that specific circumstance, laying down a broad "bright-line rule" that would apply to all sophisticated devices that may yet be developed that increase police surveillance capability by allowing them to "see" inside homes and detect what they could not view with their own eyes.

As long as the devices that police use for surveillance are "not in general public use," the court said, the use of new technology will be treated as a search limited by the Constitution's warrant
requirement, as specified in the Fourth Amendment's privacy guarantee.

The court refused to draw the protective line of privacy so that it would shield homes only from physical intrusion by police, saying "that would leave the homeowner at the mercy of advancing technology, including imaging technology that could discern all human activity in the home."

Beyond the heat-sensing device at issue in the case before the court, Scalia noted that directional microphones, monitoring satellites miles in the sky, and radar scanners that can look through walls now exist or are being developed to aid police.

The court's ruling came in the case of Danny Lee Kyllo of Florence, Ore., who was challenging his conviction for illegally growing marijuana after an officer gauged the heat coming from his house by using a thermal imager that works like a video camera but shows only heat rays.

There was extra heat coming from Kyllo's house, which the officer concluded was a sign that Kyllo was using high-intensity lamps inside to aid in growing marijuana. With that and other information, officers got a search warrant and found more than 100 plants growing inside.

Kyllo argued that the use of the heat sensor was a search, and that police needed a warrant to use that device. The court agreed, and sent the case back to lower courts to decide what to do about Kyllo's conviction and his 63-month prison sentence.

The decision produced unusual lineups within the court. Scalia, one of the court's most conservative members, drew the support not only of fellow conservative Justice Clarence Thomas, but also of three of the court's more liberal members, Ruth Bader Ginsburg, David H. Souter and Stephen G. Breyer.

Justice John Paul Stevens, another liberal, wrote the dissenting opinion, joined by three members of the court's conservative bloc: Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy and Sandra Day O'Connor.

The dissenting justices protested that the heat sensor did not pick up anything going on inside Kyllo's home, and certainly nothing that was "intimate." But Scalia retorted, "In the home, all details are intimate details, because the entire area is held safe from prying government eyes."

If police were allowed to use a heat sensor without having a court's permission, Scalia said, the device might monitor something as intimate as determining the hour each day that "the lady of the house" took her bath.

The case is Kyllo v. US, 99-8508.

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Drug Test of Pregnant Women Without Consent Is Banned

The New York Times
Thursday, March 22, 2001

Linda Greenhouse

The Supreme Court ruled yesterday that hospital workers cannot test maternity patients for illegal drug use without their consent if the purpose is to alert the police to a crime.

The 6-3 decision did not finally resolve a 10-year-old lawsuit brought against the city of Charleston, S.C., by women who were arrested, under a cooperative program between a public hospital and the police department, after a positive urine test for cocaine. The question of whether any of the 10 plaintiffs actually consented to the tests remains to be decided in the lower courts.

But the majority opinion by Justice John Paul Stevens was a strong statement that the facts of the women's pregnancy and of possible danger to their fetuses through illegal drug use did not change the basic constitutional analysis: in the absence of either a warrant or consent, the drug tests amounted to unconstitutional searches.

Justice Anthony M. Kennedy wrote a separate concurring opinion. Justice Antonin Scalia wrote a dissenting opinion that was joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas.

The court overturned a 1999 decision by the federal appeals court in Richmond that regardless of whether the women provided informed consent, the warrantless drug testing program was justified by the "special needs" of stopping drug use by pregnant women and getting the women into treatment.

Stevens said that the "special needs" exception to the Fourth Amendment, which the court has recognized in limited circumstances to justify drug testing for health and safety purposes, did not apply to a program that was so directly connected to law enforcement.
"The central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment," Stevens said. "While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs," he continued, "the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal."

And that was the constitutional problem, Stevens said: because law enforcement "always serves some broader social purpose or objective," a statement of a worthy ultimate goal could not suffice to insulate a particular law enforcement program from constitutional scrutiny.

The "stark and unique fact" of this case, he said, was that the cooperative program between the hospital and the police "was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions."

Although the legal issue before the court yesterday in Ferguson v. Charleston, No. 99-936, was a narrow one, the case touched on deeper questions about medical privacy in general and the rights of pregnant women in particular.

The hospital of the Medical University of South Carolina and the Charleston police devised the drug-testing program in the face of growing concern about the fate of "crack babies" born to cocaine-using mothers.

At the time, the late 1980s and early 1990s, jurisdictions around the country were considering various novel legal theories for prosecuting pregnant women for behavior that endangered their fetuses, to the concern of many medical professionals who warned that the most direct effect would be to frighten women who were using drugs away from prenatal care.

Organizations including the American Medical Association and the American Public Health Association filed briefs with the court on behalf of the plaintiffs that made that argument. Stevens took explicit note of the briefs, saying that in light of them, "it is especially difficult to argue that the program here was designed simply to save lives."

Before Charleston first modified and then dropped its program after several years, 30 women were arrested, with nearly all the charges dropped after the women agreed to enter treatment. Some who tested positive for cocaine during labor were taken to jail in handcuffs or leg shackles shortly after giving birth. The hospital did not test all its maternity patients, only those who met certain criteria, many of which correlated with poverty.

In his dissenting opinion, Scalia said the fact that the public employees and officials who participated in the program might now face damages for violating the women's constitutional rights "proves once again that no good deed goes unpunished." He said the program served a legitimate medical purpose, and the fact that it served a law enforcement purpose as well should not take it outside the scope of the court's "special needs" doctrine.

The court has applied that doctrine a handful of times, to justify the drug testing of student athletes, Customs agents and railroad workers involved in train accidents, all in the absence of the
warrants that would ordinarily be required.

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In a significant ruling on the use of police power, the Supreme Court struck down random roadblocks intended for drug searches, saying they are an unreasonable invasion of privacy under the Constitution.

Law enforcement in and of itself is not a good enough reason to stop innocent motorists, the majority concluded Tuesday in the first major ruling of the new term.

"Because the checkpoint program's primary purpose is indistinguishable from the general interest in crime control, the checkpoints contravened the Fourth Amendment," which protects against unreasonable searches and seizures, Justice Sandra Day O'Connor wrote.

The court's three most conservative justices dissented, saying the roadblocks Indianapolis set up in high-crime neighborhoods served valuable public safety and crime-fighting goals. Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented.

"Efforts to enforce the law on public highways used by millions of motorists are obviously necessary to our society," Rehnquist wrote. "The court's opinion today casts a shadow over what has been assumed ... to be a perfectly lawful activity."

Thomas joined the entire nine-page dissent. Scalia agreed with Rehnquist only in part.

Justice Anthony Kennedy, like O'Connor a sometime "swing vote" between the court's ideological poles, sided with her in the majority.

The American Civil Liberties Union had sued on behalf of two detained motorists, and the 7th U.S. Circuit Court of Appeals in Chicago eventually found the practice was probably unconstitutional.
"Today's decision sends a clear message that even a conservative court is not willing to countenance the serious erosion of our basic constitutional rights," said Steven Shapiro, ACLU's legal director.

O'Connor stressed that the high court ruling does not affect other police roadblocks such as border checks and drunken-driving checkpoints, which have already been found constitutional.

But the reasoning behind those kinds of roadblocks - chiefly that the benefit to the public outweighs the inconvenience - cannot be applied broadly, O'Connor wrote.

"If this case were to rest on such a high level of generality, there would be little check on the authorities' ability to construct roadblocks for almost any conceivable law enforcement purpose," the opinion said.

During oral arguments in October, several justices seemed troubled by the notion that by unwittingly driving into the checkpoint, a motorist is open to a criminal investigation that presumably would not have happened otherwise.

Others questioned whether the use of drug-sniffing dogs was heavy-handed. The dogs were led around the car's exterior at every stop.

The case is one of several the court has taken recently that examine the limits of police powers to hunt for drugs.

- The court heard arguments in the case of a man detained by police outside his home for about two hours while officers got a search warrant for drugs. In that case, justices seemed to indicate by their questions that they saw little wrong with the police approach.

- The justices will also consider a case involving a man arrested for growing marijuana after police outside the home monitored heat generated by grow lamps in his garage.

- In 1999, the court ruled that immigration officials violated bus passengers' privacy rights by squeezing the luggage in overhead racks in a search for drugs.

In the Indianapolis case, lawyers for the city said catching drug criminals was the primary aim of the roadblocks set up in the summer of 1998. The city conceded the roadblocks detained far more innocent motorists than criminals, but contended the checks were a quick and efficient way to hunt for illegal drugs and that the severity of the drug problem in some areas justified the searches.

While agreeing that society would no doubt be safer without illegal drugs, O'Connor said "the gravity of the threat alone" cannot determine whether the program was constitutional.

Similarly, the majority rejected the idea that the checkpoints could also help catch drunks and drivers without valid licenses or registrations.

Under that justification, O'Connor wrote, "authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."
The city conducted six roadblocks over four months in 1998 before the practice was challenged in federal court.

Police stopped 1,161 cars and trucks at random and made 104 arrests, 55 of them on drug charges.

Several other cities have used similar checkpoints, but others held off to see how the Supreme Court would rule on Indianapolis.

The case is Indianapolis v. Edmond, 99-1030.

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For as many as 100,000 people who go through buyers' clubs to acquire the cannabis that eases the effects of devastating illnesses including AIDS, cancer, and multiple sclerosis, Monday's unanimous U.S. Supreme Court ruling against medical marijuana was a harsh blow. Voting 8-0, the court ruled against the Oakland Cannabis Buyers' Cooperative, a California club that distributed marijuana for medical purposes. Justice Clarence Thomas, who wrote the decision, declared that "marijuana has no medical benefits worthy of an excon" from its status as an illegal drug under the federal Controlled Substances Act. As a result, federal drug enforcement agents and U.S. attorneys now have the power to shut down other buyers' clubs. There are some three dozen of them nationwide, according to Keith Stroup, executive director of the National Organization to Reform Marijuana Laws (NORML). Still, it's not clear exactly how the decision will affect patients whose medication has long been stuck in legal limbo. Though the Supreme Court decision is irreversible, some advocates are predicting that, practically speaking, medical marijuana users will continue to smoke on the hazy outskirts of the law.

For one thing, most medical marijuana users will be unaffected since they don't get their pot at buyers' clubs. "They grow it themselves or go to the corner and buy it like everyone else does," says Dan Abrahamson, director of legal affairs for Lindesmith Center, a nonprofit organization that promotes liberal drug policies.

And even while marijuana has been illegal under federal law; nine states have exempted patients from prosecution for having or smoking pot if a doctor recommends they use it. The decision...
didn't directly address these state protections, including eight voter initiatives and a Hawaiian law that protects medical marijuana users. Most medical marijuana arrests are made by state authorities, and experts doubt the court decision will lead to a federal crackdown.

"We know that this is one of the lowest priorities for the feds in the war on drugs," says Abrahamson. "History shows that that's not how they're going to focus their limited resources."

In California, where state law allows patients to grow and use marijuana if a doctor recommends it, none of the six clubs involved in the initial litigation that ultimately made it into Monday's decision is still selling marijuana, and only one of more than 30 clubs once operating statewide is still operating as it was, according to Dave Fratello, spokesman for the advocacy group Americans for Medical Rights. Fratello emphasizes that patients are still finding the drug, however. "The federal case never stopped medical marijuana distribution, it simply drove it underground," he says. "Now it takes a couple of phone calls to find marijuana that could have been obtained from the storefronts." Fratello also complains that patients buying on the street face "ripoffs, fakes, and price-gouging."

The roughly seven buyers' clubs in New York City operate in a similar gray area. One club, the Patients' Cooperative, has registered almost 1000 members and regularly provides marijuana to some 200 people with AIDS, glaucoma, or MS, according to the group's coordinator, Kenneth Toglia. Though the state makes no special protection for medical marijuana users, the club asks its members to provide proof of diagnosis from their doctors in exchange for identification cards, which, according to Toglia, have helped them escape arrest.

In the two years the club has been in existence, between 40 and 50 people have had run-ins with police, according to Toglia, and about half have been released with their pot after showing their identification cards and explaining that they were using it for medical purposes. A few, including a blind man who suffers from glaucoma, were sent to jail.

The medical benefits of pot are worth such a price, supporters say. It can combat not only the pain of disease but also the many side effects of medications, according to John Sheridan, a member and past president of New York Cannabis Care. Sheridan, who has AIDS-related wasting syndrome, says he smokes marijuana to restore his appetite, which has been diminished by the regimen of antiviral drugs he takes. Pot has helped Sheridan, who is 5 foot 8, bring his weight up to 143 from a mere 111 when he was at his sickest in 1994.

Though some people take Marinol—one of the chemicals found in pot—in a legal, prescription form, others say the pill is inferior to the plant alternative, in part because its effect is harder to moderate. "It would usually come on so strong that I would be too hungry to eat," Sheridan says of Marinol. "When I was suddenly so hungry, I'd throw up everything I ate."

With pot, Sheridan has developed a routine of taking his antiviral pills, smoking part of a joint, and then having a small meal within 20 minutes. For the AIDS patient, no law or Supreme Court decision will change how he chooses to treat this discomfort. A night in jail seems a small worry "when I've already been threatened by the grim reaper," says
The Oakland case has more significance to lawmakers, who have been struggling to separate medical marijuana from other drugs for years. "The decision is a frightening one beyond marijuana," says Manhattan-based assemblyman Dick Gottfried, the sponsor of state legislation that would allow doctors to prescribe marijuana (it has languished for the past four years). "I think when Congress is playing doctor, they are stepping into the constitutional right of privacy."

Gottfried also notes that the Food and Drug Administration approved one of the active chemicals in pot as safe and effective when it's marketed by a drug company as Marinol. "For the Supreme Court to say that they cannot review a congressional determination that the same ingredient when inhaled is criminal is utterly irrational," says Gottfried.

Perhaps most frustrating to medical marijuana advocates was the court's refusal to reconsider marijuana's designation as a "schedule one" drug, for which there are no exceptions. "The court seems to say that if Congress makes a medical decision, that's the end of the discussion," says Gottfried. Pending federal legislation sponsored by Massachusetts congressman Barney Frank would reclassify pot as a "schedule two" drug, making it legal to prescribe, as some opiates and barbiturates already are.

In the meantime, medical marijuana advocates are doing what little they can. Even if they won't be providing pot, "[Buyers' clubs will continue to provide ID cards," says NORML's Stroup. And most patients will continue to get their pot illegally, whether from small cooperatives or dealers on the corner.

It's an arrangement that many medical marijuana users find sorely inadequate. "Eventually, the U.S. is going to have to make some kind of exception for medical marijuana," says the Patients' Cooperative's Toglia. "Until then, it'll be like the French resistance-a lot of people risking their lives to keep others alive."

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Stay of execution entered by trial court, barring execution of defendant with IQ of 67 during pendency of legislative proposal to ban execution of mentally retarded persons, is inconsistent with North Carolina law, and therefore emergency petition for writs of prohibition and certiorari filed by state are hereby allowed and stay of execution entered by trial court dissolved.

Question Presented: Does significant objective evidence demonstrate that national standards have evolved such that executing mentally retarded man would violate Eighth Amendment prohibition against cruel and unusual punishment?

Ernest P. McCARVER, Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

In the General Court of Justice
Superior Court Division

Decided February 27, 2001

STANBACK Jr., Presiding Judge;

THIS CAUSE, coming on to be heard and being heard on defendant's application for writ of habeas corpus pursuant to chapter 17 of the North Carolina General Statutes, before the Honorable A. Leon Stanback, Jr., Superior Court Judge, presiding at the February 26, 2001, Session of Chatham County superior Court; and after carefully reviewing the evidence and hearing the arguments from counsel, the court makes the following:

FINDINGS OF FACT

1. A bill pending before the North Carolina General Assembly would ban the execution of the mentally retarded. There is reasonable likelihood and probable cause to believe that this bill will become law and will apply to the defendant. This would rob the court of jurisdiction to execute defendant.

2. Defendant has been tested as having an IQ of 67, which falls within the range of mental retardation, and within the parameters of the proposed bill.

3. No court has determined whether defendant is or is not mentally retarded.

4. Defendant would be irreparably harmed if executed prior to a final determination of the pending legislation.

5. The State will suffer little or no harm if a stay of execution is granted.
BASED ON THE FOREGOING FINDINGS OF FACTS, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. This Court has jurisdiction over the parties and this action.

2. Legislation pending before the North Carolina General Assembly would ban the execution of the mentally retarded. There is a reasonable likelihood and probable cause to believe that this bill will become law and apply to the defendant. This would rob the court of jurisdiction to execute defendant.

3. Defendant would be irreparably harmed if executed prior to a final determination of the pending legislation.

4. The State will suffer little or no harm if a stay of execution is granted.

IT IS THEREFORE ORDERED that defendant's application for writ of habeas corpus is GRANTED as follows: A stay of execution is entered preventing the State of north carolina from executing defendant until the earliest of the following:

a. The adjournment of the 2001 Session of the North Carolina General Assembly without action being taken on legislation to prevent the execution of the mentally retarded;

b. The General Assembly rejects legislation banning the execution of the mentally retarded or said bill is approved by the General Assembly but vetoed by the Governor, and not overridden by the General Assembly;

c. Legislation banning the execution of the mentally retarded is passed into law, and it is determined by a court of competent jurisdiction that said bill does not apply to defendant.

IT IS FURTHER ORDERED that defendant's application for writ of habeas corpus with regard to the age mitigator issue and the Apprendi/Jones issue as set out in defendant's application is DENIED.
STATE OF NORTH CAROLINA

v.

ERNEST PAUL McCARVER

Supreme Court of North Carolina

Decided February 27, 2001

ORDER

Upon consideration of the Emergency Petition for Writs of Prohibition and Certiorari filed by the State of North Carolina and the Cross-Petition for Writ of Certiorari filed by Petitioner, Ernest Paul McCarver, the following order is entered;

It appears to the Court, based upon the Petitions filed by the State and Petitioner, that the stay of execution entered by the trial court in this matter on 27 February 2001 is inconsistent with North Carolina law.

NOW, THEREFORE, IT IS ORDERED (i) that the Emergency Petition for Writs of Prohibition and Certiorari filed by the State of North Carolina on 27 February 2001 are hereby allowed and the Cross-Petition for Writ of Certiorari filed by Petitioner on 27 February 2001 is hereby denied; and (ii) that the stay of execution entered by the trial court on 27 February 2001 is hereby dissolved.

By order of this Court in Conference, this the 27th day of February, 2001.
The Supreme Court rejoined the heated national debate over the death penalty Monday, announcing it will decide whether the Constitution's ban on "cruel and unusual punishment" bars execution of mentally retarded people.

The justices said they will hear an appeal by North Carolina death-row inmate Ernest McCarver, whose lawyers say he is retarded. The justices halted his execution early this month just hours before he was to have been put to death.

The justices decided in 1989 the Constitution allows execution of mentally retarded killers. McCarver's lawyers say Americans' views on the issue - what legal arguments refer to as "standards of decency" - have changed since then.

"There has been a substantial change in American society," his lawyers wrote in his appeal. "The penalty of death is plainly cruel when imposed on those whose culpability is lessenened by their inability to reason."

The Constitution's Eighth Amendment bans "cruel and unusual punishments." the question, McCarver's lawyers contend, is whether a punishment offends contemporary standards.

Prosecutors said considerable evidence showed that McCarver was not mentally retarded, but they added that even if he was, his execution would not violate the Constitution.

North Carolina Gov. Mike Easley denied clemency, saying McCarver planned the 1987 stabbing and choking death of a co-worker, motivated by revenge.

This month, the justices blocked the execution of another man said by his lawyers to be borderline retarded. Antonio Richardson had been scheduled to be put to death March 7 in Missouri.

The court also plans to hear arguments Tuesday in another case involving a death-row inmate whose lawyers say he is mentally retarded.

The case involving Johnny Paul Penry of Texas does not ask whether the Constitution prohibits executing the mentally retarded. Instead, Penry's lawyers say jurors who sentenced him to death for murder did not have the chance to properly consider his mental capacity.

It was not immediately clear how the justices' decision to hear McCarver's case this fall will affect the Texas appeal. But Penry's lawyer, Robert S. Smith, said that if the Supreme Court decides the mentally retarded cannot be executed, "I would hope and believe that that decision will be applied to Penry."

The Supreme Court used Penry's case in 1989 to rule that the Constitution allows the execution of mentally retarded killers.

There have been 702 inmates executed nationwide since a Supreme Court-ordered
moratorium ended in 1977. Of those, about 35 had showed evidence of mental retardation in tests, said Richard Dieter of the Death Penalty Information center, a group critical of how capital punishment is administered.

The 1972 ruling that halted executions nationwide said existing laws made capital punishment too arbitrary. Executions resumed in 1977, and during recent years the nation’s highest court and Congress have moved to limit and speed up death row inmates’ appeals.

Recent debate over the death penalty has centered on arguments that some death-row inmates are innocent. Last year, Republican Gov. George Ryan of Illinois imposed a moratorium on capital punishment in his state after 13 inmates were exonerated.

McCarver, 40, was convicted of the January 1987 stabbing and choking death of Woodrow Hartley, a 71-year-old worker at the Concord, N. C., cafeteria where McCarver had worked.

The inmates lawyers say he has the mind of a 10-year old and reads at third-grade level. The Supreme Court halted his execution on March 1 after he had been served his last meal.

In denying clemency, Easley said McCarver was competent enough to gain employment and earn driving privileges, and no court had found him incompetent.

Thirteen capital-punishment states prohibit execution of the mentally retarded: Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, South Dakota, Tennessee, Washington and New York, except for murder by a prisoner. Another 12 states do not have capital punishment. Those states, combined with the federal government and District of Columbia, mean that most U.S. jurisdictions bar such executions, McCarver’s lawyers said.

McCarver’s most recent IQ test, arranged by the defense team, put his score at 67, but his IQ was measured at between 70 and 80 before his 1988 trial.

Kent Scheidegger of the Criminal Justice Legal Foundation said he believed most people would oppose executing the mentally retarded, but he believed it was preferable to act through legislation rather than a court ruling.

Diann Rust-Tiemey, director of the American Civil Liberties Union capital punishment project, said, “The time is ripe for the court to take a look at this. We’re hopeful that the court will see that the public’s views on this have changed, and that under evolving standards of decency it is untenable to execute the mentally retarded.”

The case is McCarver v. North Carolina, 00-8727.

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A Dismal Record on Executing the Retarded

*The New York Times*

Thursday, June 14, 2001

*Harold Hongju Koh*

How does the Bush administration view executing people with mental retardation? When asked this week, President Bush said: “We should never execute anybody who is mentally retarded. And our court system protects people who don’t understand the nature of the crime they’ve committed nor the punishment they are about to receive.”

His answer surprised many, since as governor of Texas he declined to halt the execution of a mentally retarded man and opposed a flat legislative ban on this sort of execution. When asked to clarify his meaning, a spokeswoman said: “This is not a change of policy. He’s talking about the standards they had in Texas.”

But this clarification makes no sense. The standards applied in Texas are designed to protect the mentally ill, not the mentally retarded. In Texas and many other states, people with I.Q.’s of less than 70 and low adaptive skills can and have been sentenced to death. A mentally retarded defendant can be found “not insane” and hence be deemed competent to stand trial and be convicted because he arguably understood the difference between right and wrong, as a child might understand that difference. Such a defendant can be executed without ever grasping the most basic legal principles that decided his fate. The United States Supreme Court will soon decide in the case of Ernest McCarver, a North Carolina death row inmate with the mind of a 10-year-old, whether to require a categorical ban against executing people with mental retardation.

The McCarver case arises at a time when public views are rapidly shifting. In 1989, the last time the court considered the issue, only two states banned execution of people with mental retardation. Today, 15 states and the federal government ban such executions and 12 others and the District of Columbia have abolished the death penalty. On Tuesday, Gov. Jeb Bush of Florida signed a bill prohibiting execution of mentally retarded prisoners. Legislatures in three other states have approved such bills.

Internationally, only Kyrgyzstan is also known regularly to execute people with mental retardation. Nine prominent former American diplomats recently told the Supreme Court in the McCarver case that such executions create diplomatic friction, tarnish America’s image as a human rights leader and harm broader American foreign policy interests.

At this pivotal moment, President Bush cannot simply dodge the question by obfuscation. He justifies capital punishment as a deterrent to crime. But what deterrent effect does it have on individuals with childlike minds?

President Bush must honestly acknowledge that under current law those with mental retardation are regularly executed. If he sincerely believes that “we should never execute anybody who is mentally retarded,” he should make it administration policy by instructing his solicitor general, Theodore Olson, to file a friend-of-the-court brief with
the Supreme Court to oppose Mr. McCarver's execution. He should follow the lead of his brother Jeb Bush on this issue and encourage the governors of Texas, Connecticut and Missouri to sign the bills now on their desks banning execution of mentally retarded people.

Only a small portion of the condemned in this country are mentally retarded. The president would show real compassion and principle by protecting this population from a practice considered barbaric in the rest of the civilized world.

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High Court to Review Executing Retarded; Decision May Reflect Changes in State Laws on Mentally Disabled

The Washington Post
Tuesday, March 27, 2001

Charles Lane

The Supreme Court announced yesterday that it will decide whether the Constitution permits the execution of mentally retarded criminals, raising the possibility of one of the most significant reversals in the law on capital punishment since the reinstatement of the death penalty 25 years ago.

The court had apparently settled the issue of executing mentally retarded offenders in 1989, when it decided by a 5 to 4 vote that the practice did not necessarily violate the Constitution's ban on "cruel and unusual" punishment.

But yesterday the justices said they would reconsider that ruling in the case of Ernest McCarver, a convicted murderer on North Carolina's death-row whose attorneys say he has an IQ of 67.

Because of the unique legal issues involved, McCarver's case provides the first signal that the court's view of capital punishment may be evolving to take account of a greater public concern with how capital punishment is administered.

"There's no guarantee that they will change" the 1989 ruling, said George Kendall of the NAACP Legal Defense Fund in New York. "But it at least shows that there has been enough change in the circumstances to warrant a reexamination." It takes the votes of four justices to agree to hear a case, but five to decide one.

The court's 1989 decision was largely based on the fact that only two states at the time banned executions of mentally retarded criminals. This, the court said, was not enough evidence of a "national consensus" that the practice violated the country's "standards of decency."

Today, however, 12 of the 37 states that allow the death penalty have banned executions of mentally retarded people. When combined with the 13 states that do not permit capital punishment, half the states now forbid executions of the mentally retarded. Federal law also forbids executing the mentally retarded in federal cases. (The District of Columbia has no death penalty.)

In their appeal to the court, McCarver's lawyers said these developments show that the country's values have changed enough to warrant abolishing capital punishment for the mentally retarded.

"I was hopeful because the court in 1989 was sharply divided, and the landscape has changed since then," said Seth Cohen, one of McCarver's attorneys.
The court's decision to consider McCarver's appeal was announced as the justices prepared to hear arguments today in a case involving Johnny Paul Penry, the mentally retarded Texas death row inmate whose previous appeal gave rise to the 1989 ruling.

Despite rejecting the ban on executing mentally retarded offenders, the court ordered a new trial for Penry because it said Texas law did not permit his jury to adequately consider whether his retardation was a reason to sentence him to life in prison instead of death.

Retried, convicted and sentenced to death in 1990, Penry now says that flawed jury instructions in the second proceeding again prevented jurors from giving him a fair chance at a life sentence.

While Penry's latest appeal is a rallying point for foes of the death penalty, it presents the justices with legal issues that affect only Penry and perhaps a few other death row inmates in Texas.

In light of the court's decision to hear McCarver's appeal, however, the Penry case takes on new significance as a source of clues to the possible evolution of the court on the broader issue of executing mentally retarded offenders.

Last year, when they were considering how to frame their Supreme Court case, Penry's lawyers debated whether to ask the court to consider renewed constitutional challenge to the execution of the mentally retarded. After consulting with experts in death penalty litigation, the lawyers concluded that the justices were not likely to consider such an argument, which the attorneys has pressed unsuccessfully in lower courts.

As the lawyers were aware, on Aug. 7, the Supreme Court had declined to halt the execution of a murderer in Texas, Oliver David Cruz, who also said he was mentally retarded and had raised procedural issues similar to Penry's. Three of the court's liberal members, Justices John Paul Stevens, Ruth Bader Ginsberg and Stephen G. Breyer, publicly dissented from that decision.

"It's possible we were wrong," said Robert Smith, Penry's attorney. "But it was a tactical judgment."

Thirty-five mentally retarded people - defined as those with an IQ of 70 or lower - have been executed since the Supreme Court permitted the resumption of the death penalty in 1976, according to the Death Penalty Information Center, a Washington nonprofit group that opposes capital punishment.

Human Rights Watch, another anti-death penalty organization, estimates that there are 200 to 300 mentally retarded inmates among the death row population of more than 3,700 convicted murderers.

Proponents of a ban on executing the mentally retarded argue that the practice serves neither to punish nor deter crime. The mentally retarded lack the ability to rationally weigh the consequences of their actions, opponents say, and executing these "least culpable" offenders amounts to "cruel and unusual" punishment prohibited by the Eighth Amendment to the Constitution, and by international law.

"The United States may be the only constitutional democracy whose law expressly permits the execution of persons whose cognitive development has been limited by mental retardation and that carries out such executions," a March 20 report by Human Rights Watch said.
Many prosecutors and victims’ rights groups oppose a ban, arguing that even people of very low intelligence can often tell right from wrong, and that the concept of mental retardation itself is elastic. Better to let juries and courts determine defendants’ culpability on an individual basis, they argue.

“There are not a lot of criminals who are mentally retarded,” said Kent Schiedegger, legal director of the Criminal Justice Legal Foundation, which has filed a friend-of-the court brief on behalf of the state of Texas in Penry’s case. “On the other hand, there is a very large number who might claim it.”

Indeed, Ernest McCarver’s case illustrates how difficult it can be to come up with a universally accepted definition. McCarver was 26 years old on Jan. 2, 1987, when he stabbed 71-year-old Woodrow F. Hartley to death at a cafeteria in Concord, N.C.

Arguing against McCarver’s Supreme Court appeal, attorneys for North Carolina noted that a defense-appointed psychiatrist testified at McCarver’s 1992 sentencing trial that he had scored 74 on an IQ test before the trial, not quite low enough to qualify him as mentally retarded.

Last February, however, as McCarver’s attorneys were working on appeals to spare him from execution, they brought in a psychologist to administer a new intelligence test in prison. McCarver scored 67.

If history is any guide, Justice Sandra Day O’Connor will be the pivotal figure in the court’s decision on McCarver’s case. The 1989 Supreme Court case, now known as Penry I, was closely fought in a court divided between formidable death penalty foes, such as the late Justices William Brennan and Thurgood Marshall, and equally determined supporters of capital punishment, such as Chief Justice William H. Rehnquist and Justice Antonin Scalia. Rehnquist and Scalia are still on the court today.

According to a Jan. 13, 1989 memorandum to Rehnquist from O’Connor included in Marshall’s papers at the Library of Congress, O’Connor held the deciding vote in the case and took it upon herself to fashion an opinion for the court.

In the opinion, O’Connor wrestled with the question of how to define mental retardation and how to attribute culpability to mentally retarded defendants.

O’Connor dealt with these concerns in a portion of her opinion which held that state law must give juries a chance to make a “reasoned moral response” to evidence of mental retardation. This section - - the basis for giving Penry a new trial - - was joined by Brennan, Marshall, the late Justice Harry Blackmun and Stevens, who is still on the court.

However, O’Connor concluded that, “on the present record,” it was not clear that all mentally retarded people lacked the reasoning ability ever to warrant capital punishment, because they could make use of an insanity defense.

The portion of her opinion that held there was insufficient evidence of a “national consensus” to warrant abolishing executions of the mentally retarded was joined by Rehnquist, Scalia, and Justice Anthony M. Kennedy and Byron White, who has since retired.

O’Connor’s opinion said a national consensus against capital punishment for mentally retarded criminals “may ultimately find expression in legislation, which is an objective
indicator of contemporary values upon which we rely."

Scheduled executions for McCarver and Antonio Richardson, a convicted murderer from Missouri who says he is retarded, were stayed by the court in the first week of March. The court will hear McCarver v. North Carolina, case no. 00-8727, next fall, and a decision is expected by July 2002.

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Civil commitment under Kansas Sexually Violent Predator Act, Kan. Stat. Ann. §59-29a01 et seq., violates 14th Amendment's due process clause in absence of finding that offender suffers from volitional impairment rendering him dangerous beyond his control.

**Question Presented:** Does 14th Amendment's due process clause require state to prove that sexually violent predator "cannot control" his criminal sexual behavior before state can civilly commit him for residential care and treatment?

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**In re CRANE**

Supreme Court of Kansas

Decided July 14, 2000

ALLEGRUCCI, Justice:

Michael T. Crane appeals from the district court's order committing him to custody under the Sexually Violent Predator Act, K.S.A. 59-29a01 et seq. (Act). In State v Crane, 260 Kan. 208, 918 P.2d 1256 (1996), this court affirmed Michael Crane's conviction of lewd and lascivious behavior for exposing himself to a tanning salon attendant on January 6, 1993. His convictions of attempted aggravated criminal sodomy, attempted rape, and kidnapping were reversed. They arose out of an incident in a video store that took place approximately 30 minutes after the tanning salon incident.

The aggravated sexual battery conviction that supplied the prior conduct element of Crane's sexual predator determination arose out of the video store incident. In that instance, Crane waited until he was the only customer in a video store and then grabbed the clerk from behind. With his genitals exposed, he lifted and pushed her and squeezed her neck with his hands. Crane three times ordered her to perform oral sex and said he was going to rape her. The attack ended when Crane suddenly stopped and ran out of the store.

Although the kidnapping charge could not be renewed, other charges arising from this incident were refiled. Pursuant to a plea agreement, Crane pled guilty to one count of aggravated sexual battery, a class D felony.

The present action was initiated when the State filed a petition in the district court seeking to have Crane evaluated and adjudicated a sexually violent predator. At the commitment trial, the State presented evidence of Crane's inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals.

Psychologist Douglas Hippe evaluated Crane in 1994 and reviewed the mental health records subsequently compiled for
Crane. He concluded that Crane suffers from antisocial personality disorder. Of the seven criteria listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV) for antisocial personality disorder, Crane consistently exhibits six, in Hippe's view. Crane also suffers from exhibitionism, which is a separate disorder. According to Hippe, exhibitionism alone would not be a sufficient basis for finding that a person was a sexual predator. Crane, in his opinion, is a sexual predator due to his combination of antisocial personality disorder and exhibitionism. He cited the increasing frequency of incidents involving Crane, increasing intensity of the incidents, Crane's increasing disregard for the rights of others, and his increasing daring and aggressiveness.

Psychologist Robert Huerter tested and interviewed Crane in 1993 with regard to Crane's claiming to have been in a blackout state during the video store incident. He concluded that Crane had not experienced blackout.

Psychiatrist Leonardo Mabugat testified that Crane suffers from antisocial personality disorder, "a pervasive pattern of disregard for and violation of the rights of others," which usually starts in or around adolescence.

The victim of the video store incident testified that the prosecuting attorney had talked with her about the State's entering into a plea agreement with Crane. The victim had been upset because she did not think that Crane would be serving enough time.

At the commitment trial, the victim expressed her disappointment in the course Crane's prosecution had taken. The prosecutor drew out her dissatisfaction by asking, "So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years?" And he followed up on her affirmative response with "And understandably you're very upset about how the system treated you in this case, right?" "Yes, very," she answered. The victim had been told by the State that the kidnapping charge could not be refiled against Crane on account of a technicality.

In this regard, the prosecutor had suggested to her that obtaining a guilty plea "was the best way to go in order to be able to go down the line" and use the option of the Act. The victim agreed to the plea bargain because she believed "it was the only way to make sure that it didn't end there." The victim testified, "I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the Sexual Predator Act. As I was--as I understood, this was the only option, but if we can get a--some kind of a conviction, then we can use this option later down the road to make sure he stays off the street."

Crane raises several issues on appeal; however, the controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The majority opinion, written by Justice Thomas, controls the result in this case. Crane contends that the trial court erred in ruling that the Supreme Court's holding in 

Hendricks does not require a showing of a volitional impairment that prevents him from controlling his dangerous behavior when the respondent's mental disorder is a personality disorder. * * *
On August 3, 1998, the district court held as a matter of law "that even though the State's expert witnesses might agree that Respondent's mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior, that K.S.A. 59-29a01 et seq. does not specify such a required element to be proven."

Accordingly, the jury was instructed that in order to establish that Crane is a sexually violent predator, the State had to prove (1) that Crane had been convicted of aggravated sexual battery and (2) that he "suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility." "Likely" was defined as "more probable to occur than not to occur." "Mental abnormality" was defined for the jury in accordance with K.S.A.1999 Supp. 59-29a02(b) as a "condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." "Personality disorder" was defined for the jury as a "condition recognized by the ... [DSM IV], and includes antisocial personality disorder." * * *

Kansas' statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression. The Act provides for commitment of persons determined to be sexually violent predators. A "sexually violent predator" is defined in the statute as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." K.S.A.1999 Supp. 59-29a02(a). "Mental abnormality" is defined as a "condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A.1999 Supp. 59-29a02(b). The phrase "likely to engage in repeat acts of sexual violence" "means the person's propensity to engage in repeat acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." K.S.A.1999 Supp. 59-29a02(c).

The legislature specified that a person subject to commitment, in addition to having some history of a sexual offense or offenses, must be likely to engage in future, dangerous sexual behavior on account of a mental condition. With regard to the mental condition, the legislature provided that it could affect either emotional capacity or volitional capacity. Volitional capacity is the capacity to exercise choice or will; a condition affecting the capacity to exercise choice or will in this context would be one that adversely affected the capacity, thereby rendering the person unable to control his or her behavior. The legislature identified emotional capacity as an alternative faculty that could be affected by the condition. Logic would seem to dictate that the alternative to a capacity involving the exercise of will is one in which the exercise of will is not at issue. Thus, a condition affecting that faculty would not necessarily remove the person's ability to control his or her behavior. It seems, therefore, that the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to
include a source of bad behavior other than inability to control behavior.

The legislature also provided an alternative to a mental abnormality and that is a personality disorder. However, there is no definition of personality disorder in the Act. Thus, there is no express requirement of a finding of inability to control behavior in a personality disorder. Nor is there anything implied by the absence of a definition of personality disorder that would inject the requirement.

There also is no pattern definition of personality disorder. The Notes on Use of PIK Crim.3d 57.41 state that a pattern definition is not possible because there are too many conditions recognized by the American Psychiatric Association as constituting personality disorders. "Notwithstanding, the Committee does recommend that the trial judge fashion an appropriate definitional instruction based upon the specific diagnosis stated in the American Psychiatric Association manual." In the present case, the trial judge instructed the jury that "personality disorder" is a "condition recognized by the ... [DSM IV], and includes antisocial personality disorder."

At trial, Dr. Mabugat testified for the State that Crane suffered from the mental abnormality of exhibitionism and from the personality disorder called antisocial personality disorder. With respect to antisocial personality disorder, Dr. Mabugat testified that Crane displayed a pervasive pattern of disregard for and violation of the rights of others that included the following behavior: failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; impulsivity or failure to plan ahead; irritability and aggressiveness, as indicated by repeated physical fights or assaults. Dr. Mabugat believed that Crane's behavior was a combination of willful and uncontrollable behavior. Thus, if a volitional impairment were required for commitment under the Act, there was evidence of some inability on Crane's part to control his behavior.

* * *Stated more generally, Crane's understanding is that the Supreme Court read a volitional impairment requirement into the Act as a condition of its constitutionality.***

***

In summary, the Supreme Court opinion in *Hobbs* does not seem to include consideration of willful behavior. The Act's definition of mental abnormality seems to include behavior that the respondent could control, and the Act is silent with regard to personality disorder. Crane's position is that the Supreme Court read a requirement of inability to control behavior into the Act in order to uphold its constitutionality. Thus, he argues that the Act cannot be applied to him in the absence of a finding that he was unable to control his behavior. We find merit in the defendant's argument.

A fair reading of the majority opinion in *Hobbs* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hobbs*. Justice Thomas, speaking for the majority, stated that to be constitutional, a civil commitment must limit involuntary confinement to those "who suffer from a volitional impairment
rendering them dangerous beyond their control."

521 U.S. at 358, 117 S.Ct. 2072. He noted that the Kansas Act set forth criteria to make such a finding by linking future dangerousness to a "mental abnormality" or "personality disorder" that "makes it difficult, if not impossible," to control such behavior. 521 U.S. at 358, 117 S.Ct. 2072. **

However, in the present case, Crane suffers from a "personality disorder," which by definition does not include a volitional impairment. As noted, there was some evidence to that effect. Within the standard of proof beyond a reasonable doubt, however, such evidence does not seem adequate. K.S.A.1999 Supp. 59-29a07(a). Its sufficiency is a question for the jury, which was not instructed to make a finding as to Crane's inability to control his behavior. Since we hold that such a finding is required, the failure to so instruct the jury was error and requires that we reverse and remand for a new trial.

Crane also argues that the State's application of the Act violates the constitutional prohibitions of ex post facto laws and double jeopardy. The element of inability to control behavior also figures in the Supreme Court's consideration of Hendricks' ex post facto and double jeopardy claims. There, it is a part of the reasoning that supports the conclusion that the Kansas Act establishes civil rather than criminal proceedings. 521 U.S. at 360-69, 117 S.Ct. 2072. Because the Ex Post Facto and Double Jeopardy Clauses pertain exclusively to penal statutes, the Supreme Court concluded that the Kansas Act "runs afoul" of neither. 521 U.S. at 371, 117 S.Ct. 2072. **

** **Crane's convictions of kidnapping, attempted aggravated sodomy, and attempted rape arising from an incident involving a video store clerk were reversed by this court. 260 Kan. 208, 918 P.2d 1256. The State refiled charges of attempted aggravated sodomy and attempted rape. Then the State and Crane entered into an agreement that concluded the criminal matter with his entering a plea of guilty to the single offense of aggravated sexual battery. He pled guilty in August 1997, and his conditional release date was January 6, 1998. The victim's testimony at Crane's sexual predator trial revealed that the State told her of its intention to follow Crane's plea with a sexual predator petition in order to prolong his confinement. **

Crane presents forceful arguments that the application of the Act in his circumstances has punitive features. Crane, unlike Hendricks, did not admit that his sexual behavior was on account of an irresistible urge. Nor was there a finding that Crane is unable to control his behavior. As we previously noted, this case does not arise out of an improvident plea bargain. Here, the State's primary motive for filing the petition was not to obtain treatment for the defendant. However, so long as the State has an evidentiary basis for filing the petition, its motive should not render the resulting judgment and commitment of the defendant to be punitive.

**

We will address the remaining issues raised by Crane, as they may again be raised in the district court on remand. Crane argues that the evidence of prior sexual conduct should not have been admitted into evidence when he had agreed to stipulate to the convictions.
The State was required to prove two elements—(1) that Crane had been charged with or convicted of a sexually violent offense and (2) that he suffers from a mental abnormality or personality disorder that makes him likely to engage in repeat acts of sexual violence. K.S.A.1999 Supp. 59-29a02(a). Accordingly, the jury was instructed as follows:

"The State alleges the respondent is a sexually violent predator. The respondent denies the allegation."

"To establish this charge, each of the following claims must be proved:"

1. That the respondent has been convicted of Aggravated Sexual Battery, a sexually violent offense; and
2. That the respondent suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility."

Crane offered to stipulate with regard to his status as a convicted sexual offender. The State declined to stipulate. The State argues that evidence of offenses other than the conviction specified in the first element is relevant to the second element because mental health experts base predictions of future sexual behavior on past sexual behavior.

The district court permitted the State to decline to stipulate and to call a number of witnesses who testified about past instances of Crane's sexual behavior. The statement of facts in the State's brief on appeal recounts the testimony of 11 "behavior" witnesses. Most of them testified about incidents that were not subject to proof. That is, most of them testified about incidents other than the aggravated sexual battery that was the basis for the conviction the jury was required to find.

Crane next argues that the State's failure to personally serve him deprived the

In this case, Crane argues that K.S.A. 60-447 should be effective where 60-455 was not, and he relies on State v Lee, 266 Kan. 804, 977 P.2d 263 (1999), to give effect to his offer to stipulate to conviction of aggravated sexual battery. K.S.A. 60-447 excludes evidence of specific instances of conduct, other than evidence of conviction of a crime, as proof of a character trait. Gardner v Perdomo, 197 Kan. 188, 416 P.2d 67 (1966). Because most, if not all, of the complained-of evidence was evidence of conviction of crimes, it would not have been excluded by K.S.A. 60-447. Crane's reliance on Lee also lacks merit. In that case, the court held that a criminal defendant's request to stipulate that he or she is a convicted felon must be honored and that the stipulation will satisfy the State's burden of proving the convicted felon element of the crime of criminal possession of a firearm. 266 Kan. 804, Syl. ¶ 4, 977 P.2d 263. The application of Lee, a criminal proceeding, to the present proceeding is questionable due to the criminal/civil dichotomy. However, we need not answer that question. In Lee, the court cautioned: "Our views should not be read as limiting the State in presenting a full in-depth story of a prior crime when the prior crime has relevance independent of merely proving prior felony status for K.S.A. 21-4204(a)(4) [possession of a firearm by a convicted felon]." 266 Kan. at 816, 977 P.2d 263. This court held in Hay that the evidence of prior conduct was material to the question of likelihood that the respondent would engage in repeat conduct as well as to the element of conviction of prior conduct. Thus, the court's holding in Lee does not apply in this sexual predator proceeding.

Crane next argues that the State's failure to personally serve him deprived the

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* * *
district court of jurisdiction. Crane contends that the Act is a subpart of the Care and Treatment Act for Mentally Ill Persons (CTAMIP), K.S.A.1999 Supp. 59-2945 et seq. He would have the court regard the provision for notice to proposed patients within the CTAMIP as an umbrella provision extending to the Act. His construct does not withstand examination of the statutes. Both Acts are in the Probate Code, Chapter 59. They do not occupy the same article, however. The CTAMIP constitutes Article 29 of Chapter; the Act constitutes Article 29a. The Articles have different names, different definitions, and different functions. Without an express reference in the Act to the notice provision of CTAMIP, there is no basis for believing that it applies equally under both.

Finally, Crane argues that the timing of the State's petition against him did not comply with statutory requirements. The State filed a sexual predator petition against Crane on December 11, 1997. He was released on parole on January 6, 1998. Crane contends that as a consequence of the State's failing to serve him personally with notice, the action was not commenced against him before his conditional release. As discussed in the preceding paragraph, with no personal service requirement in the Act, there is no basis for Crane's contention in that regard.

With respect to the timing of the petition, there is nothing in the record to suggest that it was improper under the version of K.S.A. 59-29a04 that was effective at the time of Crane's release. K.S.A.1997 Supp. 59-29a04 provided for a petition to be filed by the attorney general within 75 days of receiving written notice that Crane's release was scheduled. K.S.A.1997 Supp. 59-29a03(a)(1) required the Department of Corrections to give notice 90 days prior to Crane's anticipated release.

It may be noted that in 1999 the legislature added the following proviso to 59-29a04: "The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59-29a01 et seq., and amendments thereto." K.S.A.1999 Supp. 59-29a04(b).

The judgment of the district court is reversed, and the case is remanded for a new trial.
The Supreme Court said Monday it will decide what proof states need to justify locking criminals up as sexual predators after their prison terms are over.

The justices said they will hear arguments this fall on whether states must prove that sexual predators are unable to control their dangerous behavior. Kansas officials argue against that standard, saying it is enough to show that someone is dangerous and has a serious mental-health problem.

The lawyer for Michael T. Crane, convicted twice of sex-related offenses, said Monday that if the justices rule for the state, "all they have to prove is that he's done it before and he's likely to do it again." Lawyer John C. Donham added, "That's certainly not sufficient to commit somebody to a mental hospital." Four years ago, the justices ruled 5-4 in an earlier Kansas case that it does not violate criminals' constitutional rights to confine them as sexual predators after they complete their prison term.

The justices said the Kansas law, intended to protect society, required a finding of a "personality disorder that makes it difficult, if not impossible, for the person to control his dangerous behavior." No finding of mental illness is required, the court said.

The Kansas Supreme Court ruled last July that a lower state court made it too easy to use civil commitment proceedings to confine people as sexually violent predators.

Crane had been convicted of exposing himself to a tanning-salon attendant in 1993 and also pleaded guilty to aggravated sexual battery in an attack on a video-store clerk.

The state sought to have Crane locked up as a sexually violent predator after he completed his prison sentence.

A state judge decided the state did not need to prove that Crane could not control his dangerous behavior. Instead, the judge told jurors to decide whether he suffered from a personality disorder that made him likely to engage in future acts of sexual violence.

The jury ruled against Crane, and the court ordered him confined in a state facility. Crane is being held in the Larned State Security Hospital.

The Kansas Supreme Court ordered a new trial. Under the Supreme Court's 1997 ruling, people can be confined as sexual predators only upon proof that they cannot control their dangerous behavior, the state court said.

In the appeal granted Supreme Court review Monday, the state's lawyers said the ruling would improperly limit the number of sexual offenders who can be committed for treatment.
"Proof of dangerousness ... linked to a serious mental problem" is enough to meet the standards set by the Supreme Court in 1997, the state's appeal said.

Crane's attorney said in court papers, "Before the state can involuntarily commit a person to a mental hospital, there must be a finding that the person has lost the ability to control his dangerous behavior."

The case is Kansas v. Crane, 00-957.

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Ruling Below (9th Cir., 232 F.3d 1241):
In determining whether Border Patrol agent's stop of minivan driven by defendant near Mexican border was supported by reasonable suspicion, as Fourth Amendment requires, district court should not have considered following facts: that defendant's vehicle slowed as it approached agent's vehicle, that defendant failed to wave at or otherwise acknowledge agent, that children in vehicle waved but did not turn towards agent while doing so, that one minivan stopped on same road during past month was found to contain marijuana, that agent did not recognize defendant's vehicle as belonging to local resident, that vehicle was registered to address in city block notorious for smuggling, and that children's knees were raised as if their feet were resting on some sort of cargo; remaining facts on which district court relied in upholding stop—that road was sometimes used by smugglers, that defendant was driving on that road near time at which Border Patrol shift change would occur, and that minivans are sometimes used by smugglers—are legitimate and probative but are insufficient to establish reasonable suspicion; illegal stop tainted defendant's consent to search that revealed duffel bag of marijuana under children's feet.

Questions Presented: (1) Did court of appeals erroneously depart from totality-of-circumstances test that governs reasonable-suspicion determinations under Fourth Amendment by holding that seven facts observed by law enforcement officer were entitled to no weight and could not be considered as matter of law? (2) Under totality-of-circumstances test, did Border Patrol agent in this case have reasonable suspicion that justified stop of vehicle near Mexican border?
Canyon Road near Douglas, Arizona. Leslie Canyon Road is a largely unpaved, flat, and well-maintained road in the Coronado National Forest that parallels Highway 191. Although Border Patrol Agent Stoddard asserted that the road is rarely traveled by anyone other than ranchers and forest service personnel and is “very desolate,” at its southern end, it is paved for about ten miles, and there are residences on both sides. Moreover, there is a national forest in the area, as well as the Chiricahua National Monument, both of which attract a number of visitors. There are also campgrounds and picnic areas around Rucker Canyon.

The Douglas Arizona border station is located about 30 miles from the boarder on the highway at the intersection of I-191 and Rucker Canyon Road. The station is not operational every day of the year, although on January 19 it was. On that occasion, Border Patrol Agent Stoddard was working at the Douglas station. About 2:15 p.m. that afternoon, a sensor alerted him to the fact that a car was traveling north on Leslie Canyon Road. Stoddard testified that this made him suspicious for three reasons: first, the timing—the car passed by around 2 p.m. and officers change shifts at 3 p.m. According to Officer Stoddard, smugglers often try to synchronize their movements with shift changes. Second, cars traveling north sometimes use the surrounding, unpaved roads to bypass the station. Third, another officer had stopped a minivan heading north on that road a month earlier and had found marijuana.

His curiosity piqued, Stoddard drove east on Rucker Canyon Road to intersect with Leslie Canyon Road. As he drove, he received another report of sensor activity, indicating that the vehicle was heading west on Rucker from Leslie Canyon. After Stoddard passed Kuykendall Road, he noticed a Toyota minivan approaching in a cloud of dust. Stoddard proceeded to pull over to the side of the road to observe the minivan as it approached. Although he did not have a radar gun, the agent guessed that the van was traveling at 50 to 55 miles per hour when he first spotted it. According to Stoddard, the minivan slowed as it neared his car. In the minivan was Ralph Arvizu, accompanied by his sister, Julie Reyes, and her three children—Julissa, Renato, and Guillermo.

As the Toyota passed, Stoddard observed the two adults in the front, and three children in the back. According to Stoddard, the driver appeared rigid and nervous. Stoddard based this conclusion on the fact that Arvizu had stiff posture, kept both hands on the steering wheel, and did not acknowledge him. According to Stoddard, this was unusual because drivers in the area habitually “give us a friendly wave.” Stoddard also noticed that the knees of the two children sitting in the very back seat were higher than normal, as if their feet were resting on some object placed below the seat.

As the minivan passed, Stoddard decided to follow it. As he did, the children began to wave. According to Stoddard, this seemed odd because the children did not turn around to wave to him; rather, they sat in their seats and continued to face forward. The “waving” continued off and on for about four to five minutes. Based on this, Stoddard believed that the children had been instructed to wave at him by the adults in the front seat.

As the two cars approached the intersection with Kuykendall Road, Stoddard noticed that the Toyota’s right turn signal was flashing. It was turned off briefly, but was turned on again shortly
before the intersection. The Toyota then turned on to Kuykendall, an action which Stoddard also found suspicious because Kuykendall was the last road a car would take to avoid the border station on Highway 191. **

At this point, Stoddard ran a vehicle registration check and discovered that the van's license plates were valid, and that the car was registered in Leticia Arvizu at 403 4th Street in Douglas, Arizona. At the suppression hearing, Stoddard testified that the neighborhood in which 403 4th Street was located was "one of the most notorious areas" for drug and alien smuggling. **

On cross-examination, Stoddard conceded that he had no information about smuggling activities either at 403 4th Street in particular or on that part of Leticia Arvizu, in whose name the minivan was registered.

At this point, Stoddard decided to stop the van. As he approached the driver's side, he noticed that there was something underneath the children's feet. As Stoddard approached the Toyota, Arvizu leaned out the window and said "Good morning, officer. How are you doing?" According to Stoddard, Arvizu appeared nervous, and did not remember the name of the park to which he was driving. When Stoddard asked Arvizu about his citizenship, Arvizu replied that he was in fact an American citizen, as were all of the minivan's occupants. When Stoddard asked if Arvizu had anything or anyone hidden in the van, Arvizu said no. Nevertheless, Stoddard asked if he could look around the van, a request which Arvizu said he interpreted as a request to look around the outside of the vehicle, not to look inside. (At the suppression hearing, both Arvizu and his sister testified that Stoddard had his hand on his gun when he approached the vehicle and asked to look around. Stoddard denied this.) Stoddard did not tell Arvizu that he had a right to refuse, nor did he read Arvizu his *Miranda* rights. When Arvizu agreed to let Stoddard look around, the agent walked around to the passenger's side and opened the sliding door. Stoddard testified that as he did so, he saw a black duffel bag and smelled marijuana. Stoddard proceeded to open the bag and discovered marijuana inside.

Arvizu was charged with possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). At a suppression hearing, Arvizu argued first, that Stoddard did not have reasonable suspicion to stop the minivan, and second, that he did not give voluntary consent to the search of his van. The district court rejected both arguments and denied the motion to suppress. Arvizu then entered a conditional guilty plea, under which he reserved the right to appeal the denial of his motion to suppress. This appeal followed.

2. Legal Background

In order to satisfy the Fourth Amendment's strictures, an investigatory stop may be made only if the officer in question has "a reasonable suspicion supported by articulable facts that criminal activity may be afoot." **

In determining whether reasonable suspicion exists, we must take into account the totality of the circumstances. ** At the same time, however, factors that have so little probative value that no reasonable officer would rely on them in deciding to make an investigative stop must be disregarded. **

Although the level of suspicion required for a brief investigatory stop is less demanding than that required to establish
probable cause, the Fourth Amendment requires an objective justification for such a stop. **Thus, the Supreme Court has held that reasonable suspicion does not exist where an officer can articulate only "an inchoate and unparticularized suspicion or 'hunch' of criminal activity." Illinois v Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L.Ed.2d 570 (2000). Rather, reasonable suspicion exists only when an officer is aware of a specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion. **In turn, particularized suspicion means a reasonable suspicion that the particular person being stopped has committed, or is about to commit, a crime. United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690.

At times, conduct that may be entirely innocuous when viewed in isolation may nevertheless properly be considered in determining whether or not reasonable suspicion exists. **Put another way, "conduct that is not necessarily indicative of criminal activity may, in certain circumstances, be relevant to the reasonable suspicion calculus." United States v. Montoya-Carrillo, 208 F.3d 1122, 1130 (9th Cir. 2000)(en banc); Wardlow, 528 U.S. at 125, 120 S. Ct. at 677. At the same time, innocuous conduct does not justify an investigatory stop unless other information or surrounding circumstances of which the police are aware, considered together with the otherwise innocent conduct, provides sufficient reason to suspect that criminal activity either has occurred or is about to take place. **

In all circumstances, law enforcement officials are entitled to assess the facts in light of their experience. Brignoni-Ponce, 422 U.S. at 885, 95 S. Ct. 2574. Nevertheless, "[w]hile an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop." Nacano v INS, 797 F.2d 700, 705 (9th Cir 1986), **Thus, while an officer's experience may furnish the background against which the relevant facts are to be assessed as long as the inferences he draws are objectively reasonable, Cortez, 449 U.S. at 418, 101 S. Ct. 690, experience is not an independent factor in the reasonable suspicion analysis. Montoya-Carrillo, 208 F.3d at 1131-32.

3. Analysis

In finding that the stop by Agent Stoddard was justified by reasonable suspicion, the district court relied on the following list of factors: 1) smugglers used the road in question to avoid the border patrol station; 2) Arvizu drove by within an hour of a Border Patrol shift change; 3) a minivan stopped on the same road a month earlier contained drugs; 4) minivans are among the types of vehicles commonly used by smugglers; 5) the minivan slowed as it approached the Border Patrol vehicle; 6) Arvizu appeared rigid and stiff, and did not acknowledge the officer; 7) the officer did not recognize the minivan as a local car; 8) the children's knees were raised, as if their feet were resting on something on the floor of the van; 9) the children waved for several minutes but not towards the officer; and 10) the van was registered to an address in a neighborhood notorious for smuggling. Based on these factors, the district court concluded that reasonable suspicion did exist. We disagree.

"What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke multi-factor tests, balancing of interests or fact-specific
weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it.” Montero-Camacho, 208 F.3d at 1142 (Kozinski, J. concurring). Thus we attempt here to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here.

In reaching our conclusion, we find that some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case, and that others, singly and collectively, are insufficient to give rise to reasonable suspicion. We begin by considering the factors the district court improperly relied on, before turning to those which it properly took into account.

One of the factors on which the district court relied-namely, the fact that the minivan slowed as it approached the Border Patrol vehicle—is squarely prohibited by our precedent. United States v. Montero-Camacho, 208 F.3d at 1136; United States v. Garcia-Camacho, 53 F.3d 244, 247 (9th Cir. 1995). We note that Agent Stoddard never claimed that Arvizu broke any traffic laws. Nor, for that matter, did he assert that Arvizu drove erratically or evasively. Rather, Arvizu simply slowed down. As we have previously noted, slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity. Id at 247; United States v. Hernandez-Alvarado, 891 F.2d 1414, 1419 (9th Cir. 1989).

A second factor relied on by the district court, Arvizu’s failure to acknowledge Agent Stoddard, is of “questionable value . . . generally” * * * and carries weight, if at all, only under special circumstances. See Hernandez-Alvarado, 891 F.2d at 1419 n. 6 * * * As we have held previously, a failure to acknowledge a law enforcement officer by look or gesture, while possibly indicating a lack of neighborliness, ordinarily does not provide a basis for suspecting criminal activity. Garcia-Camacho, 53 F.3d at 247; Gonzalez-Rivera, 22 F.3d at 1446. * * * Because no “special circumstances” rendered “innocent avoidance . . . improbable,” Arvizu’s failure to acknowledge Stoddard’s presence by waving, or by indicating some other form of recognition, Hernandez-Alvarado, 891 F.2d at 1419 n. 6, provides no support for Stoddard’s reasonable suspicion determination.

For similar reasons, we find that the children’s conduct carries no weight in the reasonable suspicion calculus. If every odd act engaged in by one’s children while sitting in the back seat of the family vehicle could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes. More to the point, if a driver’s failure to wave at an officer provides no support for a determination to stop a vehicle, it would be incongruous to say that the vehicle could be stopped because children who were passengers in the car did wave. See, e.g., Garcia-Camacho, 53 F.3d at 247.

As we have previously held, “factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law.” Montero-Camacho, 208 F.3d at 1132 (citation omitted). An examination of four additional factors-namely, the third, seventh, eighth, and tenth—demonstrate that they have little or no weight under the circumstances. The fact that one minivan stopped in the past month on the
same road contained marijuana is insufficient to taint all minivans with suspicion. (In contrast, as we discuss below, evidence that in the Border Patrol’s experience, minivans are sometimes used by smugglers may be of some probative value, because the inference arises from more than a single, isolated incident.)

The fact that the officer did not recognize the minivan as belonging to a local resident also fails to contribute to the reasonable suspicion calculus. Evidence introduced at the suppression hearing made it clear that the area in question is one that is used for many purposes by different kinds of people—local residents use the roads as a shortcut, while both residents and tourists alike camp, hike, bike, picnic, and visit the local forest and national monument. Accordingly, it is hardly surprising that a Border Patrol agent would not recognize every passing car.

Similarly, the fact that a van is registered to an address in a block notorious for smuggling is also of no significance and may not be given any weight. See United States v. Jimenez-Medina, 173 F.3d 752, 755 (9th Cir. 1999) (holding that “coming from the wrong neighborhood” does not give rise to reasonable suspicion). In arriving at this conclusion, we first consider the cases which involve an individual’s presence in a high crime area. The rule that controls such cases is that presence in a high crime area is not enough un and of itself to give rise to reasonable suspicion, Brown v. Texas, 443 U.S. 47, 59, 99 S. Ct. 2637, 61 L.Ed.2d 357 (1979), but “officers are not required to ignore the relevant characteristics of a location” when an individual’s conduct, if considered in the context of that location, gives rise to reasonable suspicion that a crime has been or is being committed. Windlow, 528 U.S. at 124, 120 S. Ct. at 676 * * * In contrast, where a person lives is an entirely different matter, and one’s place of residence is simply not relevant to a determination of reasonable suspicion. Otherwise, persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming the victims of crimes but also of being victimized by the state’s efforts to prevent those crimes—because their constitutional protections against unreasonable intrusions would be significantly reduced.

Moreover, in Mortero-Camargo, we cautioned that “courts should examine with care the specific data underlying” the assertion that an area is one in which “particular crimes occur with unusual regularity.” * * * Mortero-Camargo, 208 F.3d at 1138. In this case, the data simply does not withstand that scrutiny. The only evidence in the record to support the “high crime” characterization is Stoddard’s assertion that the 400 block was “one of the most notorious areas” for drug and alien smuggling. Agent Stoddard did not explain the factual basis for this assertion, nor did he identify the source of his information. For this reason as well, we conclude that the district court’s reliance on this factor was misplaced. See Mortero-Camargo, 208 F.3d at 1143 * * *

Finally, we note that the fact that the children’s knees were raised, while consistent with the placement of their feet on packages of illicit substances, is equally (if not more) consistent with the resting of their feet on a cooler, picnic basket, camping gear, or suitcase. In determining whether reasonable suspicion exists, we have considered whether a car appears heavily loaded. * * * We have done so where the vehicle was riding low or responded sluggishly to bumps. Garcia-
Czmaho, 53 F.3d at 245 * * * In general, however, we have not given that factor much weight, absent other circumstances that warrant attributing particular significance to it. * * * In this case, moreover, we are faced with an entirely different situation, in which Officer Stoddard first inferred from the fact that the children’s knees were raised that their feet were resting on some sort of object. From this, he next inferred that whatever the children were using as a footrest might well be contraband. That a family traveling in a minivan might put objects on the floor of the van and that children might use those objects as a footrest does not seem at all odd to us. In short, we find this factor also to be all too common to be of any relevance.

Having considered those factors that are not relevant in this case, we must now turn to those that are—namely, that the road was sometimes used by smugglers, that Arvizu was driving on the road near the time that the Border Patrol shift changed, and that he was driving a minivan, a type of car sometimes used by smugglers. Although these factors are indeed both legitimate and probative to some degree, * * * they are not enough to constitute reasonable suspicion either singly or collectively. * * *

As the testimony at the suppression hearing made clear, the road in question is used for a number of entirely innocuous purposes—including as a way of getting to camping grounds and recreational areas, and as a shortcut when traveling from one community to another. Thus, the fact that Arvizu’s car was using the road is of only moderate significance. Similarly, minivans, although sometimes used by smugglers, are among the best-selling family car models in the United States. Thus, although, under applicable case law, the make of the car may be of some relevance in determining whether reasonable suspicion exists, it does not carry particular weight here. United States v Brignoni-Ponce, 422 U.S. 873, 885, 96 S. Ct. 2574, 45 L.Ed.2d 607 (1975); United States v Garcia-Baron, 116 F.3d 1305, 1307 (9th Cir. 1997); Bugarin-Casas, 484 F.2d at 855. We also find that the time at which Arvizu drove by the sensors on Leslie Canyon Road, although relevant, Frano-Munoz, 952 F.2d at 1057, is of little probative value, especially in the absence of other factors that tend more persuasively to demonstrate evasive behavior. Jinez-Medina, 173 F.3d at 754-55. In this case, Arvizu’s car passed by the sensors at around 2:15 p.m., approximately 45 minutes before the scheduled shift change. While it makes sense to us that smugglers might wish to take advantage of shift changes, a car’s traveling on a road in the general area of the Border Patrol station three quarters of an hour before the actual shift change does not seem to us to add much to the mix.

Given the above analysis, we hold that the stop by Agent Stoddard was not supported by reasonable suspicion. The next question, then, is whether the illegality of the stop taints the evidence as a result of the search that ensued. We hold that it does.

Under the Fourth Amendment, an illegal stop taints all evidence obtained pursuant to the stop, unless the taint is purged by subsequent events. United States v Morales, 972 F.2d 1007, 1010 (9th Cir. 1992); United States v Delgadillo Velasquez, 856 F.2d 1292, 1299 (9th Cir. 1988). Accordingly, in Florida v Rojas, 460 U.S. 491, 508, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983), the Supreme Court suppressed the evidence discovered as a result of a search following an illegal stop, even though the police obtained the defendant’s consent to
the search, because the illegal stop tainted the subsequent consent. **

In determining whether the taint of an illegal stop has been purged, "[t]he question we must ask is whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." United States v Millan, 36 F.3d 886, 890 (9th Cir. 1994) (internal quotations omitted). The government bears the burden of showing admissibility. United States v Taheri, 648 F.2d 598, 601 (9th Cir. 1981); United States v Perez-Esparza, 609 F.2d 1284, 1290 (9th Cir. 1979).

Federal courts have invariably found that consents to search at the time of or shortly following an illegal stop of a vehicle are unlawful because the search is tainted by the primary illegality and the taint has not been purged. ** That makes sense to us. Ordinarily, when a car is illegally stopped, the search that follows will be a product of that stop, as will any consent to that search. Here, the interrogation, consent and search flowed directly from the stop. United States v Hernandez, 55 F.3d 443, 447 (9th Cir. 1995); Millan, 36 F.3d at 890. No events occurred after the stop that served to purge the subsequent consent and search of the taint. Rather, the officer merely questioned Arvizu, became suspicious because of his answers, and asked for consent. This is a classic case of obtaining evidence through the exploitation of an illegal stop, as is the case in which an officer's suspicions are aroused by what he observes following the stop, and on that basis obtains such consent. Accordingly, we hold that the taint of the illegal stop was not purged by intervening events.

Because we conclude that the stop by Agent Stoddard was not supported by reasonable suspicion and that there were no intervening events that purged the taint of the illegal stop, we reverse the district court's denial of Arvizu's motion to suppress.

REVERSED and REMANDED.
Defendant's agreement that, as condition of probation, he will submit to searches of himself, his property, and his residence by any probation officer or law enforcement officer at any time, with or without search warrant, arrest warrant, or reasonable cause, cannot, under Fourth Amendment, justify warrantless search of home conducted not for probation purposes but as part of criminal investigation.

Question Presented: Does defendant's agreement o term of probation that authorized any law enforcement officer to search his person or premises with or without warrant, and with or without individualized suspicion of wrongdoing, constitute valid consent to search by law enforcement officer investigating crimes?

UNITED STATES of America, Plaintiff-Appellant

v.

Mark James KNIGHTS, Steven Simoneau, Defendants-Appellees

United States Court of Appeals
for the Ninth Circuit

Argued and Submitted July 11, 2000

FERMANDEZ, Circuit Judge:

The United States appeals from an order which suppressed evidence seized from the home of Mark James Knights in a warrantless search conducted by members of the Sheriff's Department of Napa County, California. It claims that the evidence was properly seized during a probation search. The district court disagreed; so do we. We affirm.

BACKGROUND

From 1996 on, Pacific Gas and Electric Company's facilities in Napa County had been subjected to vandalism over 30 times. Those incidents included short circuits caused by throwing chains onto transformers, damaging of gas power switches, and damaging of power pole guy wires. Suspicion had focused on Knights, and on his friend, Steven Simoneau. Many things contributed to that. In the first place, those vandalisms started after Knights' electrical services had been discontinued in March of 1996 because he not only did not pay his bill, but also had found a way to steal services by bypassing PG & E's meter. Detective Todd Hancock of the Sheriff's Department also thought it noteworthy that incidents of vandalism of PG & E property seemed to coincide with Knights' court appearance dates regarding the theft of PG & E services.

More than that, on May 24, 1998, Knights and Simoneau were stopped by a sheriff's deputy near a PG & E gas line. They could not explain their presence in the area to the deputy, who observed that Simoneau's pick-up truck contained
pipes, pieces of chain, tools, and gasoline. The deputy asked to search the vehicle, but was refused permission. A few days later, a pipe bomb was detonated against the exterior of a building where a burglary had taken place. That building was not far from Knights' residence.

For our purposes, the final incident occurred on the morning of June 1, 1998. Some miscreant, or miscreants, had managed to knock out telephone service to the Napa County Airport by breaking into a Pacific Bell telecommunications vault and setting fire to it. Brass padlocks which secured the vault and an adjacent PG & E power transformer had been removed, and a gasoline accelerant had been used to ignite the fire. Within a short time after that incident occurred, a sheriff's deputy drove by Knights' residence and observed Simoneau's truck parked in front. The deputy got out of his patrol car and felt the hood of Simoneau's truck. It was still warm at the time, which suggested that Knights and Simoneau might have been involved in the vandalism. The investigation focused even more purposefully upon them as a result.

Thus, on June 3, 1998, Hancock set up surveillance of Knights' apartment. At approximately 1:45 a.m., Knights and Simoneau arrived at the apartment in Simoneau's pick-up truck. The two proceeded to enter the apartment where they remained with the lights on until about 3:10 a.m. At that point, Simoneau emerged from the apartment carrying three cylindrical items cradled in his arms. On the basis of his training, Hancock believed those to be pipe bombs. Simoneau walked to the truck, placed an object shaped like a jar in the back of it, and then walked across the street to the bank of the Napa River, where he disappeared from view. Hancock then heard three splashes as Simoneau, seemingly, deposited those objects in the river. Simoneau returned to the truck without the cylinders, picked up a glass jar from the truck bed and wiped it with a cloth. He then climbed into that truck and departed.

Hancock trailed Simoneau until he stopped in a driveway. When Hancock entered the driveway Simoneau was not around, but Hancock discovered a number of suspicious objects in and about the truck. In the bed of the truck were a Molotov cocktail and explosive materials. Also, a gasoline can and two brass padlocks, which seemed to fit the description given by PG & E investigators of the locks removed from the Pacific Bell and PG & E transformer vault two days earlier, were observed. The truck was seized, impounded, and later searched pursuant to a warrant.

With all of that information in hand, Hancock decided that he would conduct a warrantless "probation" search of Knights' home. As Hancock saw it, he did not need to obtain a warrant because at an earlier time Knights had been placed on summary probation after he was convicted of a state misdemeanor drug offense. A person on summary probation in California is not under the direct supervision of a probation officer. However, in this case, a term of that probation required Knights to "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Relying upon that and the authorization of his supervisor, Hancock proceeded.
He began to organize the search at about 5:00 a.m. that morning, and conducted it at 8:00 a.m. after breaking through a door and entering the apartment where Knights was still abed. The search was productive. It turned up detonation cord, ammunition, unidentified liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, photographs and blueprints stolen from the burglarized building, and a brass padlock stamped PG & E. Needless to say, Knights was arrested.

Ultimately, Knights found himself in federal court because he was indicted for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition. See 18 U.S.C. §§ 371, 922(g); 26 U.S.C § 5861(d). He moved to suppress the evidence seized in the June 3, 1998, search, and the government asserted that it was conducted pursuant to a probation consent. The district court agreed with Knights that the claimed probation search was really a subterfuge for an investigative search and ordered suppression. This appeal followed.

STANDARD OF REVIEW

A district court's determination of whether there was consent to search is generally treated as a factual determination, but we have said that in "determining whether as a general rule certain types of actions give rise to an inference of consent, de novo review is appropriate." United States v Shaibu, 920 F.2d 1423, 1425 (9th Cir.1990). The district court's conclusion that the probation search of Knights' apartment was a subterfuge for a criminal investigation is a factual determination which we review for clear error. See United States v Watts, 67 F.3d 790, 793-94 (9th Cir.1995), rev'd on other grounds, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).

DISCUSSION

The difficulties at the interface between a person's right to the security of his home and the needs of law enforcement are sempiternal. Nonetheless, the balance is weighted in favor of the home dweller for reasons with a weighty ancient lineage. **

* * *The Fourth Amendment carried forward and burnished the principles upon which they relied when it commanded that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." * * *

Of course, there can be no doubt that a person can consent to a search of his home, although we carefully scrutinize claims that he has done so. See Shaibu, 920 F.2d at 1425-26. There also can be little doubt that Knights did consent to searches when he agreed to the terms of his probation. * * *But we have made it clear that his consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term. That was illustrated in 1985, when we were faced with a California probationer who had not had supervision services commenced and at whose home a supposed probation search was conducted. See Mertwan, 760 F.2d at 965. We had this to say after we reviewed the record:
The facts show that none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision. There is no showing that the state ever made any efforts toward rehabilitating Merchant. He did not receive supervision or counseling. In fact, he was never even assigned a probation officer.

The search was conducted because the assistant district attorney had received reports of gunfire on Merchant's property. These facts strongly suggest that the search was a subterfuge for conducting a criminal investigation. We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement. Because the search here clearly was not a genuine attempt to enforce probation but apparently had a motive of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred. Consequently, the exclusionary rule applies with full force. *Id* at 969 (citations omitted).

** * * * **

Here, the district court's determination that the purpose of the Sheriff's Department was the investigation of Knights and the termination of his nefarious career, rather than a probation search, was not clearly erroneous. Indeed, it was an almost ineluctable conclusion. Detective Hancock, and his cohorts, were not a bit interested in Knights' rehabilitation. They were interested in investigating and ending the string of crimes of which Knights was thought to be the perpetrator. That string began long before his summary probation started. In fact, his probation started just three days before the last incident. True, a probation officer may also wish to end wrongdoing by a probationer, but there was no "also" about Detective Hancock's purpose. He was performing his duty as a law enforcement officer and had drawn some very good inferences from the facts, but he was using the probation term as a subterfuge to enable him to search Knights' home without a warrant. In so doing, he crossed the frontier that separates citizen privacy from official enthusiasm. The subterfuge will not work. That would seem to bring this opinion to a logical close, but we must pause to consider a number of arguments against this result.

The government first asserts that the Supreme Court severely undercut our probation search jurisprudence when it issued Whren v United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In fact, says the government, our jurisprudence is so weakened that this panel should give it the slight tap that will send it crashing to the ground. We will not do that for at least two reasons beyond pure principle. In the first place, we have reiterated our rule since Whren was decided. *See* Oney, 116 F.3d at 372. Secondly, the government's argument turns on the notion that the subjective purposes of the officers should not be considered if, objectively, a probation officer could have conducted a probation search. That argument is based upon the holding of Whren that the reasonableness of traffic stops with probable cause does not depend upon the subjective intentions of the officers. *See* Whren, 517 U.S. at 813, 116 S.Ct. at 1774. That form of argument is far off target when applied in the context at hand. Here the issue is not whether a search or seizure with probable cause should be invalidated because of an officer's subjective intentions. It is,
rather, whether, without another basis for a warrantless home search, there was consent to the search in the first place. That is a different question entirely. It depends on whether the consent covers what the officer did. See United States v. Wimine, 202 F.3d 1, 12-13 (1st Cir.), petition for cert. filed, 69 U.S.L.W. 3087 (U.S. June 22, 2000) (No. 00-60). We recognize that the California Supreme Court disagrees with our Wimine analysis. See People v. Woods, 21 Cal.4th 668, 677-81, 981 P.2d 1019, 1025-27, 88 Cal.Rptr.2d 88, 94-97 (1999). But, then, that court does not control our reading of federal constitutional law, and for the reasons already stated, we find its analysis unpersuasive. However, mention of that case does lead to another of the government's arguments.

The government asserts that in order to avoid confusing state law enforcement officers we should accept the fruits of their search, even if we think that the search was unconstitutional under the United States Constitution. We think not. While state court rulings, especially on questions of state law, may be of interest, they do not determine the legality of a search for Fourth Amendment purposes. See Oloqy, 116 F.3d at 372. Application of the exclusionary rule regarding searches does not ordinarily turn on state law, even if the state courts would take a more stringent view. See United States v. Conner, 220 F.3d 1103 (9th Cir.2000); United States v. Mota, 982 F.2d 1384, 1387 (9th Cir.1993); see also id. at 1389 (Fernandez, J., concurring). More to the purpose, accepting the government's argument would amount to the recrudescence of the silver platter doctrine. But that platter was melted down by the Supreme Court in Elkins v United States, 364 U.S. 206, 208, 80 S.Ct. 1437, 1439, 4 L.Ed.2d 1669 (1960), where the Court rejected the idea that the fruits of a search by state officers which would be unconstitutional if conducted by federal officers could be introduced in a federal criminal trial. We will not refabricate that platter.

The government passingly makes the argument that the officers relied in good faith on California law, and, therefore, suppression should not follow. We have previously rejected just that kind of argument in this context. See Merchant, 760 F.2d at 968-69. At any rate, the officers were not trapped into relying on some state law or ordinance which was later found to be unconstitutional. See Illinois v. Krull, 480 U.S. 340, 349-50, 107 S.Ct. 1160, 1167, 94 L.Ed.2d 364 (1987); cf. Grassman v City of Portland, 33 F.3d 1200, 1209-10 (9th Cir.1994). For at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional. Perhaps the California courts will admit the fruits of the search of Knights' residence; we will not.

Finally, argues the government, the purposes of a probation search were served because Knights was supposed to "obey all laws," was deterred by the search from being a threat to the community, and was further deterred from engaging in further criminal activity. No doubt a true probation search can serve those ends. Then, too, so does an investigative search. In fine, with its adnous argument the government hopes to indirectly eliminate our cases which rely on the difference between probation and investigation searches. It cannot. * * *

**CONCLUSION**
As we enter the 21st Century, citizens find the very notion of privacy under almost relentless assault. Random suspiciousness taking and testing of body fluids proliferates on ever more flimsy grounds; motor vehicle departments sell information about those who are forced to give it in order to obtain driver's licenses; banks use private account information for other purposes and provide it to other related entities; when a consumer visits a website, a spy is placed in his computer; it has become easier to invade homes without knocking and giving notice; and on and on. In this climate, it is easy to develop callouses on our sense of privacy. Perhaps it even seems quaint to worry much about the sanctity of a home where we can speak, listen, read, write and think in privacy. Perhaps it seems even more quaint to worry about "[a] probationer's home [which], like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.' " Griffin v Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987). But worry we must, and do.

We now reiterate our insistence that even when a probationer has consented to searches of his home as a condition of his probation, those searches must be conducted for probation purposes and not as a mere subterfuge for the pursuit of criminal investigations. In making this decision we need not rely on some resident numen or wait for Fulgora to light our way. We can, instead, rely upon the wisdom of the ages and upon the sagacity of the numerous Ninth Circuit judges who have written before us. If we do not heed all of that history and learning, who will?

AFFIRMED.
The Supreme Court agreed Monday to decide if police may prosecute new crimes with evidence seized from homes of criminals who consented to blanket searches as a condition of probation.

The Justice Department and California's attorney general both asked the justices to reconsider lower court rulings that threw out bombmaking supplies other evidence seized during the search of a home of a man on probation for an unrelated drug crime.

At issue is the rationale for searches of probationers' homes, and whether a probationer waives constitutional protections by giving advance consent to a search.

The case concerns a northern California man suspected of a series of vandalism attacks on Pacific Gas & Electric transformers and other property.

Mark James Knights had a long history with the utility, which had accused him of stealing electric service and running out on his bill.

As a condition of probation for a drug conviction in 1998, Knights agreed to let police or probation officers search him, his home, car or other property at will.

Sometimes called a "Fourth waiver," the form Knights signed greatly limits his Fourth Amendment protection against unreasonable search or seizure.

Knights contended police used his probationer status as a pretext to follow a hunch that he and a friend were behind an explosion and fire that damaged a PG&E transformer. The explosion knocked out telephone service to the Napa County Airport.

The early morning search of Knights' apartment was intended only to investigate the fire, and not to check up on Knights' rehabilitation for the drug conviction, he argued.

Police watched the pair for two days after the fire, and then went into Knights' apartment without a warrant. There, they found detonation cord, ammunition, liquid chemicals, books on chemistry and electric circuitry, bolt cutters and a brass padlock stamped "PG&E." Police also said they found drug paraphernalia.

Knights was arrested and charged with arson conspiracy and other crimes.

A federal judge ruled that evidence seized at the apartment could not be used at trial, and the San Francisco-based 9th U.S. Circuit Court of Appeals agreed.

Knights did consent to searches when he agreed to terms of his probation, the appeals court found.

"But we have made it clear that this consent must be seen as limited to probation searches, and must stop short of investigation searches," the court
found.

The 9th Circuit, which has issued similar rulings before, is at odds with the California Supreme Court over the legitimacy of this kind of probation search.

Two other states, Arkansas and Georgia, have rules similar to California's, according to a survey by the Rutherford Institute. The generally conservative legal group filed a friend-of-the-court brief on Knights' behalf.

Other states require police or probation officers to meet specific conditions before they can search probationers' homes.

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The case is United States v. Knights, 00-1260.

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Also This Term:

00-973 United States v. Vonn

Ruling Below (9th Cir., 224 F.3d 1152):

Government's contention that guilty-pleading defendant learned of his right to counsel during court proceedings prior to preceeding at which his plea was accepted, and that district court's failure, in violation of Fed.R.Crim.P. 11(c), to advise defendant at latter hearing of his right to have counsel at trial thus did not affect defendant's substantial rights, may not be considered, given rule of cases such as United States v. Odeto, 154 F.3d 937 (9th Cir. 1998), that court will not go beyond plea proceeding in considering whether defendant was aware of his rights; neither prosecutor's elliptical reminder to district court at plea proceedings of its obligation to inform defendant of right to counsel nor fact that defendant was represented by counsel at plea proceeding provides assurance that defendant understood his right to counsel at trial, and, therefore, district court's error was not harmless.

Questions Presented: (1) Is district court's failure to advise counseled defendant at his guilty plea hearing that he has right to assistance of counsel at trial, as required by Fed.R.Crim.P. 11(c)(3), subject to plain error review, rather than harmless error review, on appeal in case in which defendant fails to preserve claim of error in district court? (2) In determining whether defendant's substantial rights were affected by district court's deviation from requirements of Rule 11(c)(3), may court of appeals review only transcript of guilty plea colloquy, or may it also consider other parts of official record?

00-1214 Alabama v. Shelton


Suspended sentence of imprisonment on misdemeanor offense, which would be nullity if judge were unable to ever order sentence of imprisonment to be executed, triggers Sixth Amendment right to counsel as interpreted in Scott v. Illinois, 440 U.S. 367 (1979), which held that right to counsel applies to defendant who is sentenced to “term of imprisonment” for petty or misdemeanor offense.

Question Presented: In light of “actual imprisonment” standard established in Argersinger v. Hamlin, 407 U.S. 25 (1972), and refined in Scott v. Illinois, does imposition of suspended or conditional sentence in misdemeanor case invoke defendant's Sixth Amendment's right to counsel?

00-1187 McKune v. Lile

Ruling Below (10th Cir., 224 F.3d 1175, 67 Crim. L. Rep. 780):

Prison sex abuse treatment program that requires participants to disclose past sexual misconduct or suffer significantly reduced personal privileges and affords no confidentiality creates real and appreciable risk of self-incrimination, in violation of prisoners' Fifth Amendment privilege against compelled self-incrimination.
**Question Presented:** Does revocation of correctional institution privileges violate Fifth Amendment’s privilege against self-incrimination when prisoner has no liberty interest in lost privileges and such revocation is based upon prisoner’s failure to accept responsibility for his crimes as part of sex offender treatment program?

**00-6933 Lee v. Kemna**

**Ruling Below (8th Cir., 213 F.3d 1037):**

Habeas petitioner’s claim that he was denied due process by state trial court’s denial of his motion for continuance, which he had sought in order to produce alibi witnesses, was procedurally defaulted in light of state court’s decision that petitioner’s motion for continuance did not comply with state rules of procedure, which is adequate state law ground independent of federal due process question; petitioner’s claim that his default should be excused because counsel’s failure to follow state rules constituted ineffective assistance of counsel was never presented to state court as independent ground and thus cannot now be used to establish cause of procedural default; nor can procedural default be excused by petitioner’s claim of actual innocence, because factual basis for affidavits he relies on as requisite new evidence existed at time of trial and could have been presented earlier; even assuming that alibi testimony was new evidence, petitioner did not show likelihood that reasonable jurors would not have convicted him if they had heard alibi testimony of three family members when testimony of four prosecution witnesses refuted alibi.

**Questions Presented:**

1. Did Eighth circuit err by affirming district court’s denial of petition for habeas corpus because petitioner’s rights under Fifth and 14th Amendments were violated when trial court refused to grant him 19-hour continuance to contact his three subpoenaed alibi witnesses who unexpectedly did not return after lunch break? (2) Should hearing have been held on habeas corpus to at least consider testimony of alibi witnesses to effect that they were told by court personnel to leave? (3) In circumstances in petitioner’s case, was his claim of federal violation regarding denied request for short continuance procedurally barred from federal court? (4) Has petitioner made substantial showing of actual innocence according to standard of *Schlup v. Delo*, 513 U.S. 298 (1995), for his alibi witnesses to be explored further to prevent fundamental miscarriage of justice?

**00-9285 Mickens v. Taylor**

**Ruling Below (4th Cir. (en banc), 240 F.3d 348, 68 Crim. L. Rep. 531):**

Habeas corpus petitioner who alleges that his trial counsel labored under conflict of interest that rendered his representation in adequate to satisfy Sixth Amendment right to effective assistance of counsel must, under *Cuyler v. Syl腔*, 466 U.S. 355 (1980), establish both actual conflict of interest on part of trial counsel and adverse effect thereof, even if trial court failed to inquire into potential conflict about which it reasonably should have known.

**Question Presented:** Did court of appeals err in holding that defendant must show actual conflict of interest and adverse effect in order to establish Sixth Amendment violation when trial court fails to inquire into potential conflict of interest about which it reasonably should have known?
Evidence introduced at sentencing phase of capital murder trial that defendant had talked about escaping while in prison and had attempted to do so, that he had made weapon while in prison, and that he had bragged about his crime did not implicate defendant's future dangerousness for purposes of rule of *Simmons v South Carolina*, 512 U.S. 154 (1994), that when capital defendant would be ineligible for parole if sentenced to life in prison and prosecution argues his future dangerousness as basis for imposing death penalty, defendant is entitled to have jury informed of his parole eligibility thorough argument or jury instruction; nor did prosecution argue defendant's future dangerousness by arguing that defendant was worse than serial killer and by stating that "murderers will be murderers."

**Question Presented:** Did South Carolina courts' refusal to inform capital defendant's sentencing jury that he would never be eligible for parole if jury sentenced him to life imprisonment rather than to death violate *Simmons v South Carolina*?