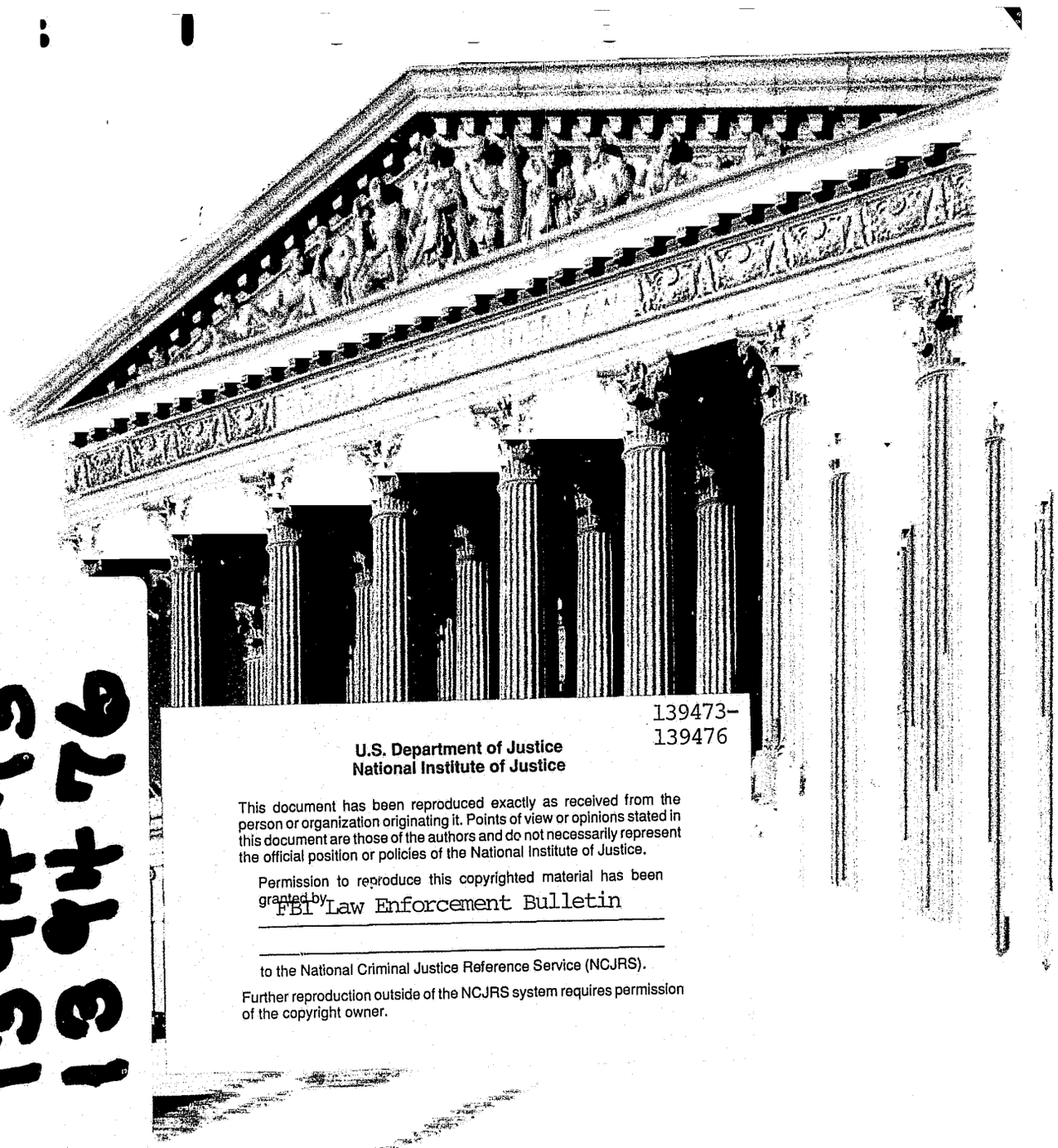

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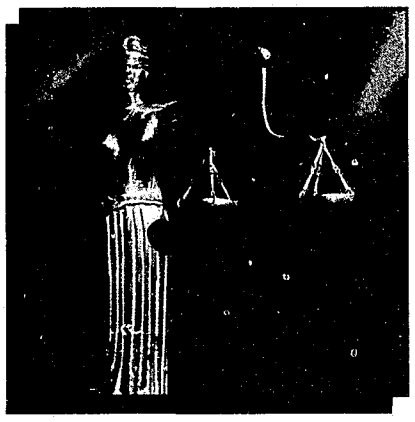

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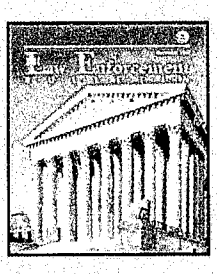

On the Cover: During the 1991-1992 term, the U.S. Supreme Court handed down several decisions of particular interest to law enforcement. See article p. 25. (Cover photo © Pete Saloutos, 1992, Tony Stone Worldwide.)

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Supreme Court Cases
1991-1992 Term

By
WILLIAM U. McCORMACK, J.D.

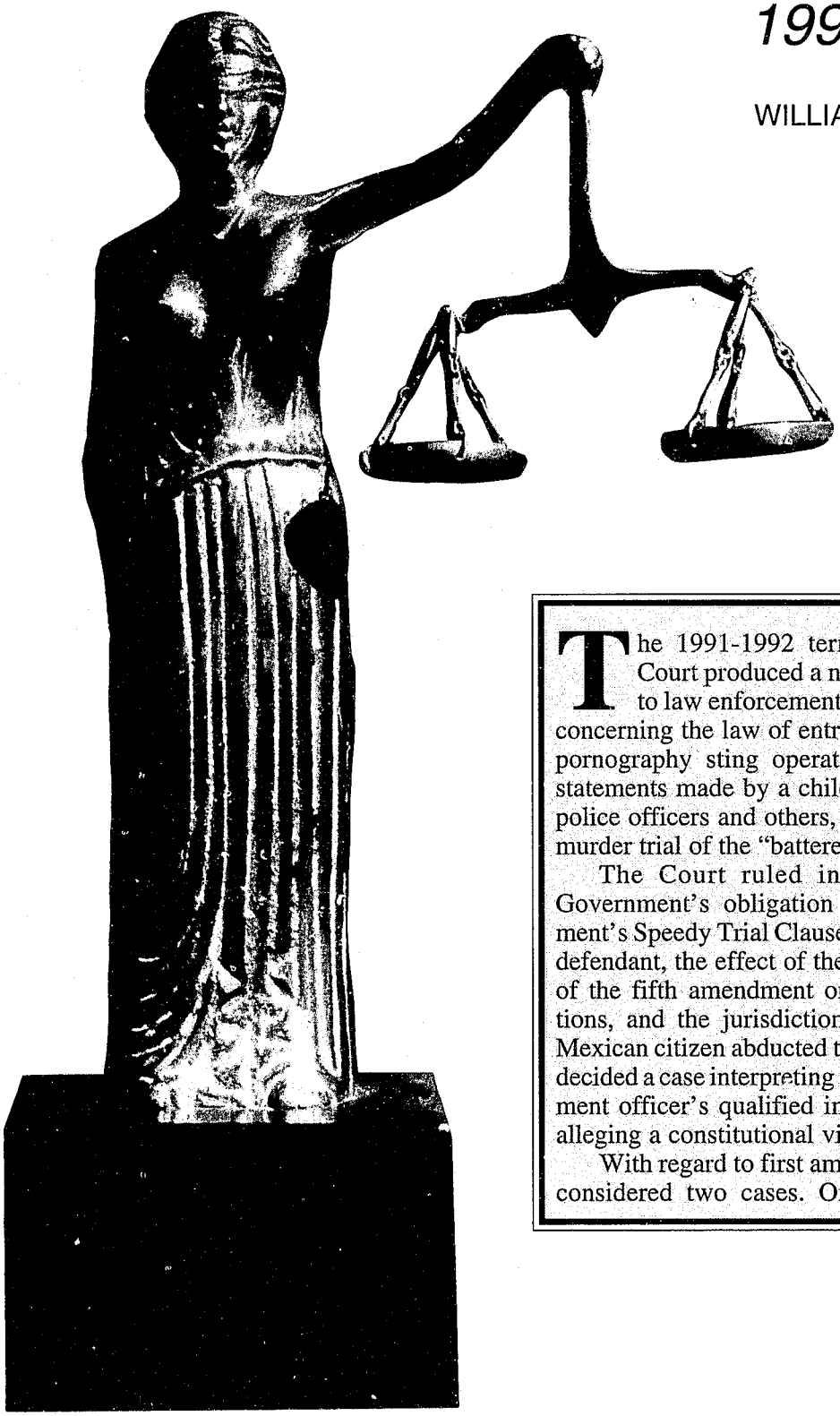


Photo by Kathy Morrison

The 1991-1992 term of the U.S. Supreme Court produced a number of cases of interest to law enforcement. The Court decided cases concerning the law of entrapment in a Federal child pornography sting operation, the admissibility of statements made by a child sexual assault victim to police officers and others, and the admissibility at a murder trial of the "battered child syndrome."

The Court ruled in cases concerning the Government's obligation under the sixth amendment's Speedy Trial Clause to bring to trial a charged defendant, the effect of the Double Jeopardy Clause of the fifth amendment on complex drug prosecutions, and the jurisdiction of U.S. courts to try a Mexican citizen abducted to the United States. It also decided a case interpreting the scope of a law enforcement officer's qualified immunity from a civil suit alleging a constitutional violation.

With regard to first amendment issues, the Court considered two cases. One case struck down an

Special Agent McCormack is a legal instructor at the FBI Academy.

ordinance designed to prevent the bias-motivated display of symbols, such as burning crosses; the other invalidated a parade permit scheme designed to recoup expenses incurred for police protection and administrative costs.

Jacobson v. *United States*, 112 S.Ct. 1535 (1992)

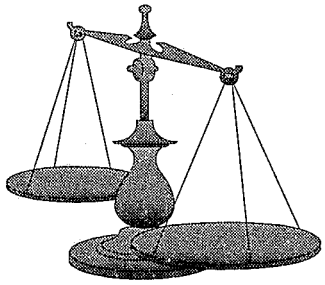
In *Jacobson*, the Court overturned the Federal child pornography conviction of a Nebraska farmer because he was entrapped by a U.S. Postal Service child pornography sting operation. The case began in February 1984, when the defendant legally ordered and received two magazines containing photographs of nude preteen and teenage boys from a California adult bookstore. Subsequently, Congress changed the law and made it illegal to receive sexually explicit depictions of children through the mail.

The U.S. Postal Service obtained the defendant's name from a mailing list seized at the adult bookstore and then began an undercover operation to explore the defendant's willingness to order illegal child pornography. Over the next 2 1/2 years, the Postal Service and Customs Service, through five fictitious organizations and a bogus pen pal, repeatedly contacted the defendant through the mail, exploring his attitudes toward child pornography, disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit material, and offering him the opportunity to order illegal child pornography.

Twenty-six months after the Postal Service's first mailings to the defendant, the Government still had no evidence that he illegally possessed or received child pornography in the mail. Rather, the defendant's only responses to some mailings revealed certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Eventually, however, the defendant ordered a magazine containing child pornography from a catalogue provided during the Postal Service's sting operation.

The defendant was tried and convicted of the illegal receipt of the pornographic magazine despite his entrapment defense. On appeal, the Supreme Court reversed, finding that the defendant was entrapped as a matter of law. The Court ruled that the prosecution failed to show, beyond a reasonable doubt, that the defendant was predisposed to receive child pornography through the mail prior to the time when the Government first contacted him.

The Court noted that in typical drug stings or Government-sponsored fencing operations, where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use to the defendant because the ready commission of the criminal act amply demonstrates the defendant's predisposition. However, in this case, the Court concluded that the defendant's 1984 lawful purchases and his expression of certain generalized personal inclinations to view teenage sexual material was not sufficient to prove, beyond a reasonable doubt, that he was predisposed to commit the crime charged, independent of the Government's coaxing.



White v. *Illinois*, 112 S.Ct. 736 (1992)

In *White*, the Court upheld the admissibility of out-of-court statements made by a child sexual assault victim to her babysitter, her mother, the police, and medical personnel who treated her. The Court decided that a witness need not be unavailable for trial before her out-of-court statements can be admitted as exceptions to hearsay evidentiary rules.

In the case, a babysitter and the mother of a 4-year-old child deter-

mined that the child had just been sexually assaulted in her home by the defendant. After the child described the assault, the mother notified the police. When the police arrived at the house, they obtained a more-detailed description of the assault from the 4-year-old victim. The police then took her to a hospital, where she described the sexual assault to the nurse and doctor who were treating her.

At trial, the State twice attempted to have the 4-year-old victim testify. However, because she apparently experienced emotional difficulty when brought into the courtroom, the victim left without testifying.

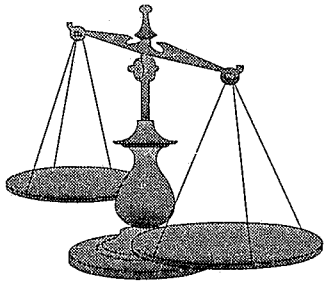
The State then called the babysitter, the mother, the police officer, the nurse, and the doctor to testify regarding the child's description of the assault. The defendant objected on hearsay grounds, but the judge found the out-of-court statements of the victim admissible under exceptions to the hearsay rule as spontaneous declarations and statements made in the course of securing medical treatment. The defendant was thereafter found guilty.

The Supreme Court sustained the conviction, rejecting the defendant's argument that the witness must be unavailable at trial before such hearsay statements are admissible. Instead, the Court held that a finding of unavailability of an out-of-court declarant is necessary only if the out-of-court statement was made at a prior judicial proceeding.

In this case, the vicitm made the statements to the mother, babysitter, and police officer shortly after the incident, and to medical personnel in the course of receiving medical treatment. Such statements are materially different than statements made at judicial hearings because they carry special guarantees of credibility and reliability.

The Court stated that an utterance or declaration offered in a moment of excitement, or spontaneously without the opportunity to reflect on the consequences of the exclamation, may justifiably carry more weight than a similar statement made in the relative calm of the courtroom. Similarly, a statement made by a person to a treating physician or nurse carries special guarantees of reliability, since the person knows that a false statement may cause misdiagnosis or mistreatment.

Last, the Court pointed out that its recent decisions in *Coy* v. *Iowa*, 487 U.S. 1012 (1988) and *Maryland* v. *Craig*, 110 S.Ct. 3157 (1990), which require a showing of necessity before a child sexual assault victim could testify at trial behind a screen or by closed-circuit television rather than face the defendant in an open courtroom, were not controlling. The Court affirmed that no necessity requirement exists as a predicate to the admissibility at trial of out-of-court declarations of a child sexual assault victim.



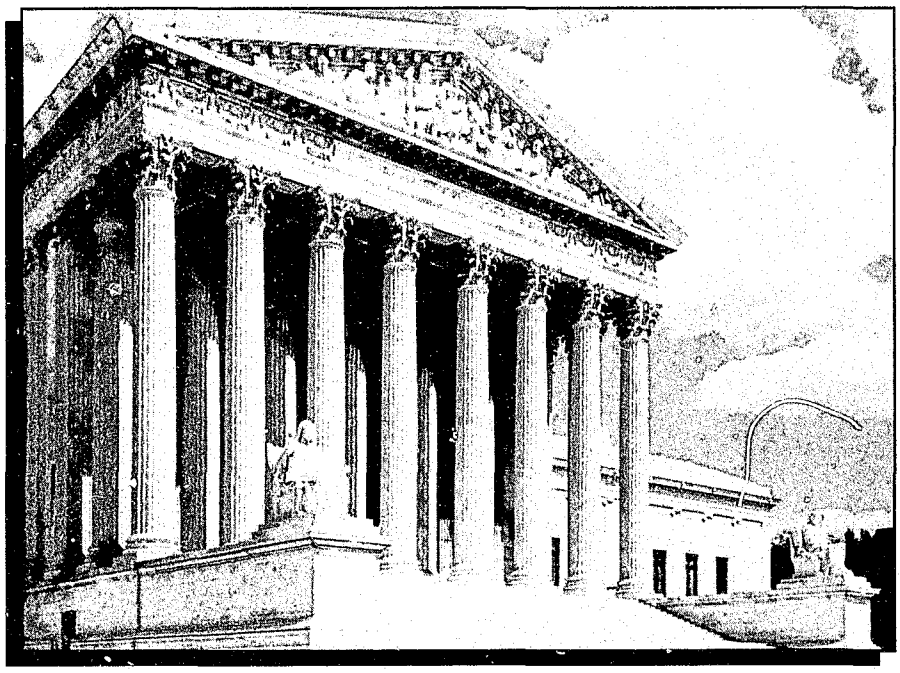
***Estelle* v. *McGuire*, 112 S.Ct. 475 (1992)**

In *Estelle*, the defendant was charged with the murder of his infant daughter, who died as a result of multiple internal injuries. The defendant claimed to police that his daughter fell off a couch. At trial, the State introduced evidence through two physicians that the victim was a battered child, including testimony concerning several prior injuries to the infant, such as partially healed rib fractures.

The defendant was convicted, and his conviction was upheld by the State appellate courts. However, the U.S. Court of Appeals for the Ninth Circuit granted habeas corpus relief to the defendant, finding that the "battered child syndrome" evidence was erroneously admitted and that there was a prejudicial instruction to the jury concerning the use of the prior injury evidence. The Supreme Court reversed the Ninth Circuit and held that habeas corpus relief was inappropriate in this case, since there was no constitutional error committed by the trial court in admitting the "battered child syndrome" evidence.

In its opinion, the Court first made clear that habeas corpus review is only appropriate where there has been a conviction that violated the Constitution, laws, or treaties of the United States. In this case, the Court held that no constitutional violation occurred.

The State was required to prove that the infant's death was caused by intentional means, and the "battered child syndrome" evidence helped the State to do that. Even though the State did not offer evidence to prove



that the defendant caused the previous injuries to his daughter, and even though the defendant did not raise accident as a defense at trial, the "battered child syndrome" evidence was relevant and not in violation of the Due Process Clause of the 14th amendment.

Doggett v. *United States*, 112 S.Ct. 2686 (1992)

In *Doggett*, the Court determined that a delay of 8 1/2 years between a defendant's indictment and trial violated his sixth amendment right to a speedy trial. In this case, the defendant was indicted in 1980 on drug charges, but left the country for Panama 4 days before police officers arrived at his home to arrest him.

The next year, law enforcement officers determined that the defendant was under arrest in Panama, but did not file an extradition request because they thought it would be futile. Upon the defendant's release from jail in Panama, he traveled to Colombia and reentered the United States in 1982, undetected by law enforcement officials.

He lived openly using his true name until 1988, when a simple credit check by law enforcement disclosed his address and led to his arrest. The defendant unsuccessfully moved to dismiss the 1980 drug indictment, arguing that the Government's failure to prosecute him earlier violated his sixth amendment right to a speedy trial.

The Supreme Court began its opinion by reviewing the four factors used to determine speedy trial claims. These factors include 1) whether delay before trial was uncommonly long, 2) whether the Government or the criminal defendant is to blame for that delay, 3) whether, in due course, the defendant asserted his right to a speedy trial, and 4) whether the defendant suffered prejudice as a result of the delay.

Concerning the first inquiry, the Court found that the 8 1/2-year delay was not only uncommonly long but also extraordinary, and thus, clearly triggered the speedy trial inquiry. The Court stated that post-accusation delay becomes presumptively prejudicial at least as it approaches 1 year.

Concerning the second speedy trial factor, the Court determined the Government to be at blame for the length of the delay. The Court found that for 6 years, Government investigators made no serious effort to find the defendant and were thus negligent in their attempts to arrest him. The third speedy trial factor also weighed in the defendant's favor because the trial court found that the defendant was not aware of his indictment before his arrest; thus, the defendant had a good reason for not invoking his right to a speedy trial until after his arrest.

With respect to the last speedy trial factor, the Court stated that prejudice to a defendant includes the anxiety and concern of a defendant generated by the delay and the possibility that a defendant's defense will be impaired by dimming memories and loss of exculpatory evidence. However, the Court held that specific proof of prejudice does not have to be demonstrated where excessive delay presumptively compromises the reliability of a trial.

The Court concluded by distinguishing the different reasons for the delay. If the delay is caused by the Government's bad faith, the length of delay allowed will be shortened. When the delay is not in bad faith but attributable only to the Government's negligence, it will be accorded less weight in determining prejudice to the defendant. However, even delay occasioned by the Government's negligence creates prejudice that compounds over

time, and at some point, as here, becomes intolerable.

***United States* v. *Felix*, 112 S.Ct. 1377 (1992)**

In *Felix*, the Court dealt with the effect of the Double Jeopardy Clause of the fifth amendment on two overlapping drug prosecutions. This case arose out of a Federal drug investigation of a methamphetamine manufacturing facility operated by the defendant in Oklahoma, which law enforcement officers raided and shut down. However, the defendant evaded arrest and moved his operation to Missouri.

Eventually, he was arrested and indicted in Missouri for the methamphetamine manufacturing activities he conducted in the State. At the defendant's trial in Missouri, he claimed he was working covertly for the Government. To counter this defense, the prosecution introduced evidence of his prior illegal acts in Oklahoma to show his criminal intent, and the defendant was convicted.

The Government then brought a second indictment in Oklahoma against the defendant, charging him with a conspiracy and manufacturing a controlled substance in Oklahoma. Part of the overt acts forming the basis of the Oklahoma conspiracy charge included activity for which the defendant had already been convicted in Missouri.

The defendant was convicted of all of the Oklahoma charges. On appeal, he claimed his Oklahoma conviction violated his protection against double jeopardy, since he had been previously tried and convicted in Missouri on evidence of the same criminal actions.

The Court upheld the conviction, ruling that the Double Jeopardy Clause only prevents duplicative prosecution for the "same offense." First, the Court determined that introduction at the Missouri trial of the defendant's acts in Oklahoma for purposes of showing criminal intent was not in any way a prosecution of the defendant for the Oklahoma charges. Second, the Court ruled that a substantive offense and a conspiracy to commit that offense are not the "same offense" for double jeopardy purposes. Thus, the Oklahoma conspiracy charge against the defendant was a completely distinct offense from the Missouri crimes for which he had already been convicted.

***United States* v. *Alvarez-Machain*, 112 S.Ct. 2188 (1992)**

In *Alvarez-Machain*, the defendant, a citizen and resident of Mexico, was indicted for participating in the kidnap and murder of Drug Enforcement Administration (DEA) Agent Enrique Camarena-Salazar and a pilot working with Camarena. In 1990, the defendant was forcibly kidnapped at the behest of the DEA from Mexico, flown to El Paso, Texas, and arrested by DEA officials. The Mexican government officially protested the abduction.

The defendant successfully moved to dismiss his indictment, claiming that the U.S. Government lacked jurisdiction to try him because he was abducted in violation of the United States-Mexico Extradition Treaty. The Supreme Court reversed and held that the defendant's forcible abduction did not prohibit his trial in the United States.

The Court noted that a defendant brought before a court in accordance with an extradition treaty may raise jurisdictional claims under the terms of the treaty. However, when a treaty is silent on forcible abductions, it does not govern a court's jurisdiction to try an abducted defendant. In this case, the Court found that the United States-Mexico Extradition Treaty said nothing about the obligation of the two countries to refrain from forcible abductions, and thus, did not govern the jurisdiction of a U.S. court to try the defendant.

(Note: This opinion should not be interpreted as authorizing law enforcement officers to conduct foreign abductions, since any such activity raises important political and foreign policy issues that must be considered at the highest level of government.)

***Hunter* v. *Bryant*, 112 S.Ct. 534 (1991)**

The Court in this case reemphasized the important protection that qualified immunity provides to law enforcement officers sued for violating the Constitution by dismissing a lawsuit against law enforcement officers alleged to have made an arrest without probable cause. The case began in 1985, when the plaintiff walked into the University of Southern California's administrative offices and delivered two photocopied handwritten letters that referred to a plot to assassinate President Reagan.

The rambling letters referred to the potential assassin as "Mr. Image," who was described as "Communist white men within the National Council of Churches." The letter stated that "Mr. Image wants to murder President Reagan on his up and coming trip to Germany."

Campus police contacted the Secret Service, and a university employee identified the plaintiff as the person who delivered the letter. Two Secret Service agents then went to the plaintiff's home to interview him, and he admitted writing the letter but refused to identify "Mr. Image."

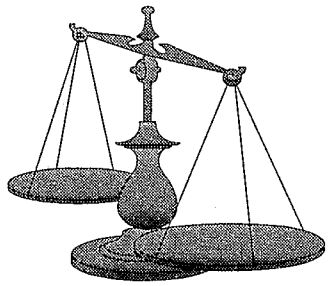
The agents then obtained consent to search the plaintiff's residence and found the original of the letter. However, the plaintiff refused to answer questions concerning his feelings toward the President or to state whether he intended to harm the President. The two agents then decided to make a warrantless arrest of the plaintiff for making threats against the President.

The plaintiff was arraigned and held without bond for 2 weeks before the criminal complaint was dismissed. He then sued the arresting agents for a constitutional violation, alleging that they had arrested him without probable cause.

The trial court denied the agents' motion for summary judgment on qualified immunity grounds, and the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's finding that whether probable cause existed for the arrest was for a jury to decide. The Supreme Court reversed and held that the civil suit should have been dismissed on qualified immunity grounds.

The Court stated that qualified immunity shields law enforcement officers from constitutional lawsuits if reasonable officers could have believed their actions to be lawful in light of clearly established law and the information the officers possess. In the context of a warrantless arrest, the Court stated that even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity.

The Court held that the Ninth Circuit's decision was wrong because it placed the question of immunity in the hands of the jury when that determination should be made by the court long before trial. The Court then stated that the agents were entitled to immunity if, as in this case, a reasonable officer could have believed that probable cause existed to arrest the plaintiff. The Court concluded that the qualified immunity standard gives ample room for mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.



***R.A.V.* v. *City of St. Paul, Minn.*, 112 S.Ct. 2538 (1992)**

In *R.A.V.*, the Court struck down a city ordinance designed to prevent the bias-motivated display of symbols or objects, such as Nazi swastikas or burning crosses. The case concerned the prosecution of a teenager who assembled a crudely made cross and burned it on the front lawn of an African-American family. The defendant was charged under a St. Paul ordinance that made it a misdemeanor to place on public or private property a symbol or object, such as a Nazi swastika or burning cross, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."

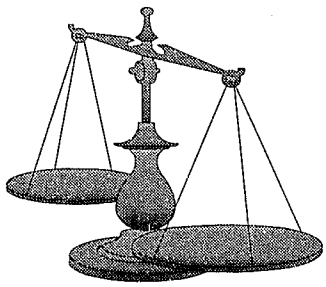
The trial court granted the defendant's motion to dismiss the charges as an impermissible restriction on the first amendment freedom of speech, but was reversed by the Minnesota Supreme Court, which held that prosecution under the ordinance was permissible since it was limited to conduct that amounts to "fighting words." The U.S. Supreme Court reversed the Minnesota Supreme Court and held that the ordinance was invalid under the first amendment, even when interpreted to prohibit only "fighting words," because it prohibits otherwise permitted speech solely on

the basis of the subjects the speech addresses.

The Court began by noting that the first amendment generally prevents the Government from proscribing or prohibiting speech or even expressive conduct, such as flag burning, because of disapproval of the ideas expressed. The Court stated that certain categories of speech, such as defamation, obscenity, or "fighting words," can be regulated because of their constitutionally proscribable content. The Court then noted that the Government may not regulate speech based on hostility or favoritism toward a particular message and to hold otherwise raises the possibility that the Government may effectively drive certain ideas or viewpoints from the marketplace of ideas.

Applying these principles to the St. Paul ordinance, the Court found that the ordinance's prohibition on "fighting words" was directed to speech that insulted or provoked violence "on the basis of race, color, creed, religion or gender." As such, it sought to regulate speech based on its content or message. The Court stated that the first amendment does not permit a government to impose special prohibitions on those speakers who express views on disfavored subjects.

The Court pointed out that there were adequate content-neutral alternatives to punish the type of conduct in this case, such as arson or property crime charges. Thus, the city had not demonstrated that the ordinance was necessary to serve a compelling interest of the city to prevent this type of activity. The Court concluded by stating that it believed burning a cross in someone's front yard is reprehensible, but the city has sufficient means to prevent this type of conduct without violating the first amendment.



***Forsyth County, Ga.* v. *Nationalist Movement*, 112 S.Ct. 2395 (1992)**

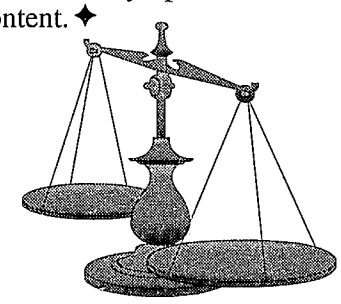
In this first amendment case, the Court struck down a county ordinance that required the issuance of permits for parades, assemblies, and other uses of public property by private organizations and permitted the imposition of a fee based upon the expense to the county caused by the parade or assembly. The ordinance provided that every permit applicant shall pay an amount to be determined by the county administrator in order to meet the expenses incident to the administration of the ordinance and to the maintenance of public order. However, the sum could not exceed $1,000 per day.

In 1989, the Nationalist Movement (a Ku Klux Klan affiliate) proposed to demonstrate for 1 1/2 to 2 hours on the county courthouse steps in opposition to the Federal holiday for the birthday of Martin Luther King, Jr. The county imposed a $100 fee based on the administrator's time in issuing the permit. The Nationalist Movement refused to pay and sued requesting a temporary restraining order and permanent injunction against the county, claiming the ordinance illegally infringed the first amendment freedom of speech.

In its opinion striking down the ordinance, the Court restated the general rule that there is a heavy presumption against a prior restraint of speech. The Court recognized that a government may regulate the uses of public forums, but if a permit scheme controls the time, place, or manner of speech, it must not be based on the content of the speech. Instead, it must be narrowly tailored to serve a significant governmental interest and must leave ample alternatives for the communication.

The Court found two problems with the county ordinance in this case. First, it vested unbridled discretion in the county administrator to determine what fee to charge, and thus, did not contain adequate standards for the county administrator to apply. Second, it impermissibly allowed consideration of the content of the speech in setting the fee.

Because the costs imposed on an applicant were designed to offset police protection and other county expenses, it was necessary for the administrator to assess the content of the message and to estimate the response of others to that content. The fee assessed for a parade permit, therefore, would impermissibly depend on the administrator's measure of the amount of hostility likely to be created by speech based on its content. ✦



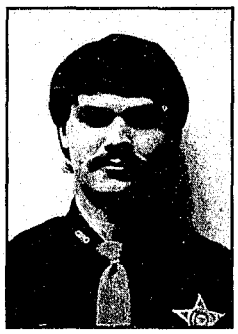
The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.

Sgt. Dean Atkinson and Officers James Bowen and Bernard Coughlin of the Oregon, Wisconsin, Police Department responded to the report of a female being assaulted. When the officers arrived, they found a man applying a chokehold on the victim and holding a knife to her throat, threatening to kill her. During the tense negotiations that followed, the suspect momentarily lowered the knife from the victim's throat, allowing the officers to pull her away from the assailant. The offender—who was later found to have an extensive violent criminal history—was taken into custody. The victim was later treated for her injuries and released.

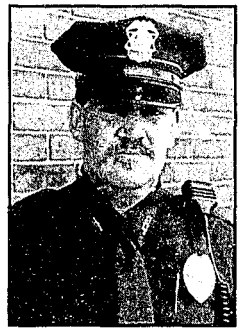
Sergeant Atkinson

Officer Bowen



Officer Coughlin

Officer Roland Holt of the Jefferson City, Tennessee, Police Department responded to the report of a man threatening suicide. Upon arriving at the scene, Officer Holt was confronted by the distraught subject, who had placed a pistol to his head. After almost an hour, during which time the man threatened the officer with a loaded handgun, Officer Holt finally persuaded him to surrender his weapon without incident.



Officer Holt

Nominations for ***The Bulletin Notes*** should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short writeup (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the *Editor, FBI Law Enforcement Bulletin*, Room 7262, 10th and Pennsylvania Ave., NW, Washington, DC 20535.