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In the

Supreme Court of the United States

LINDA R. S., et al.,

Appellants,

v.

RICHARD D. and TEXAS, et al.,

Appellees.

No. 71-6078

Washington, D.C.
December 6, 1972

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v.	:	No. 71-6078
RICHARD D. AND TEXAS, ET AL., Appellees.	:	

Washington, D. C.

Wednesday, December 6, 1972

The above-entitled matter came on for argument at 11:54 o'clock a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WINDLE TURLEY, ESQ., McKool, Jones, Shoemaker, Turley & Vassallo, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205, for the Appellants.

ROBERT W. GAUSS, ESQ., Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-6078, Linda against Texas.

Mr. Turley, you may proceed.

ORAL ARGUMENT OF WINDLE TURLEY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. TURLEY: Mr. Chief Justice, and may it please the Court:

My name is Windle Turley. I represent the appellant in this case, Linda Shell, individually and on behalf of her minor child and on behalf of the class of unwed mothers and illegitimate children in the State of Texas which she represents.

The nature of this case is similar to the one just presented to the Court except it does have a couple of variations. It, like the case just heard, involved what we contend is an unreasonable discrimination and exclusion of Texas child support laws.

Involved in this instance, however, your Honor, is the question of the Penal Code Article 602 of the Texas Penal Code and whether the appellant has standing to challenge the District Attorney's exclusion of her rights under that Penal Code.

The facts which have given rise to this particular case are basically these:

In October of 1970 the appellant, while unmarried, gave birth to a baby girl in Dallas, Texas. She requested the father of the child to marry her. She requested that he support the child. She made these requests on numerous occasions. He refused to do either.

The mother, then, faced with the situation in the State of Texas where no rights were provided for her under the common law for support for her child, under the Penal Code for the support of her child, or under the Civil Family Code, then requested that a 3-judge court be convened in the Northern District of Texas, which it was, to hear her contention that the exclusion of her rights to child support for her illegitimate child discriminated against her and that child in that they had unequal protection of the laws under the Federal Constitution.

The 3-judge court was in fact convened and did hear the case. The court made three findings, your Honor.

One was that they had no jurisdiction to consider the appellant's contention that the civil statute in Texas was unconstitutional.

Second, they did find that they were properly convened, however, to examine the Penal Code in the State of Texas and her challenges under Article 602 of that Code.

Finally, however, in a divided opinion, Judge Hughes dissenting, the court found that the appellant had no standing

to challenge the unconstitutional -- what she contended to be unconstitutional -- application of Article 602 of the Texas Penal Code. And, your Honor, it is from that divided opinion of the 3-judge court below that we have presented this direct appeal to the Court.

Thus, there are two issues, I believe, involved in this case for submission to this Court:

One, with respect to standing, whether the appellants have standing to challenge on a constitutional ground the refusal of the Dallas County District Attorney to entertain her complaint against the father of this child, which refusal was apparently based solely upon the fact that the child was illegitimate.

QUESTION: Did you --

MR. TURLEY: Yes, your Honor.

QUESTION: -- and Mr. (inaudible) --

MR. TURLEY: Yes, your Honor.

QUESTION: -- file also an appeal in the Court of Appeals?

MR. TURLEY: No, your Honor, we came to this Court on a direct appeal from the 3-judge decision.

QUESTION: Of course, we have jurisdiction of this case only if this is a case in which a 3-judge district court was required to be -- if this is a case which was required to be heard by a 3-judge district court.

MR. TURLEY: Your Honor, we did not file --

QUESTION: The common law held that it was not, didn't it?

MR. TURLEY: With respect to the civil statute, that's correct. And we did not file an appeal of the civil ruling made by the 3-judge court. We have presented this appeal -- they did find that they were properly convened to hear the challenge to the Penal Code, but that the appellant had no standing.

QUESTION: Um-hmm.

MR. TURLEY: Yes, your Honor.

QUESTION: And also, what did they find about whether or not it was the right defendant when you are challenging a penal statute?

MR. TURLEY: With respect to the -- they made no --

QUESTION: They were not charged with the enforcing of a penal statute against Mr. Richard D.

MR. TURLEY: Yes, your Honor, there was some discussion about that. And that gets us into exactly what the standing problem is.

The 3-judge court, the majority opinion, felt that the standing in this case, the challenge to the Penal Code, should only be brought by the father of a legitimate child who is prosecuted under Texas law and that he might have a right to contend that there is an unequal protection of the

laws because the law does not apply to the father of an illegitimate child.

We contend to the Court, however, your Honor, with respect to the standing issue that about 50 years ago when the Texas legislature enacted the Article 602 of the Penal Code, they specifically intended, we believe, at that time to include all children. Specifically in the language in its briefest form, they provided that any parent, any parent, who shall wilfully refuse to provide the support of his children shall be guilty of a misdemeanor.

Yes, your Honor?

QUESTION: How does that contention avail you when we have the case of Beaver v. State where the Supreme Court of Texas has put its own interpretation on what the Texas legislature meant? Aren't we bound by that so far as what the statute means?

MR. TURLEY: I don't believe we are, your Honor. And that's exactly what did happen, however, just a few years after the legislature enacted that statute, then the Texas highest court did in fact say in Beaver v. State that"children" used in that Penal Code intended to apply only to legitimate children. And thus they excluded the rights of illegitimate children to recover child support benefits from their fathers.

QUESTION: No matter what we might think the statute would mean, we are bound by the construction of that

statute by the highest court of your State.

MR. TURLEY: I agree, your Honor, that the common law interpretation of the courts of the State of Texas, the Penal Code as interpreted and the civil statute, all exclude child support benefits for the right of the children. And I think it boils down to a matter that the courts and the legislature in the State of Texas have consistently but systematically over the many years continued to exclude illegitimate children from rights of support, the same support rights that they extend to --

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

MR. TURLEY: Thank you, your Honor. I am sorry.

[Whereupon, at 12:00 o'clock noon, a luncheon recess was taken.]

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Turley.

MR. TURLEY: Mr. Chief Justice, and may it please the Court:

Before the noon recess, we had just examined the fact that the two basic issues involved in this case deal with the standing of the appellant to question the action of the District Attorney in connection with her wrongful exclusion, what we contend to be wrongful exclusion, from the child support laws and the Penal Code in Texas, and, second, the equal protection point.

We had discussed the standing issue to the extent, your Honor, that we had considered that Texas has enacted a statute which requires the father of children to support these children, and failing to do so, they are subject to a penalty under the law. And we have also seen that in Beaver v. State the Texas Supreme Court interpreted the word "children" to mean only legitimate children and thereby, by that Court decision, the judicial ruling excluded from the benefits of the Texas law the rights of illegitimate children.

I submit to the Court that when Linda Shell, the mother of the illegitimate child in this case,went to the Dallas County District Attorney and asked him to please

prosecute the father of this child for his wrongful failure to support the child, and when he refused to do so solely upon the grounds that the child involved was illegitimate, that there occurred an unconstitutional application of what might have otherwise been a constitutional law passed by the Texas legislature.

QUESTION: Mr. Turley.

MR. TURLEY: Yes, your Honor.

QUESTION: Focusing just on the merits rather than standing for the moment, what you are really asking us to do is to say that as a matter of constitutional law, a Texas criminal statute should be applied to embrace a category of potential defendants whom the Supreme Court of Texas has said it doesn't embrace. Isn't that right?

MR. TURLEY: That's correct, your Honor. That's right. And failing to do so, there is a violation of the equal protection of the Federal Constitution.

Advancing then to the standing issue, when viewed in the light of this Court's decisions in the past 10 years with respect to standing to raise a constitutional issue, and summarizing five of those decisions very briefly, I think it is apparent and manifest that there is standing in this case for this mother to challenge the action of the District Attorney.

In 1962 in Baker v. Carr this Court considered that

a sufficient stake was necessary in the outcome of the litigation so as to assure concrete adverseness. And certainly there is a sufficient stake because the child involved here is pleading with the District Attorney to have her provided with a part of economic support for her well-being. And she's totally adverse to the position assumed by the District Attorney in this case.

Second, in Hardin v. Kentucky Utilities in 1968, the Court considered that the utilities company in that instance who was questioning a statutory regulation as it applied to a competitor was a person within the class to be protected. And those, I think, your Honor, are the key words in that particular decision. And as they apply in this instance, it is abundantly clear that a minor child in the State of Texas was intended to be protected by the application of Article 602.

And then, Flast v. Cohen in 1969, this Court focused upon an additional criteria, I believe, when this Court said that we must look at the individual as he or she might relate to the litigation and not the issue itself. Granted, there is a constitutional issue involved, but how does the person as a person relate to that issue? And when we apply this child to the issue, to the controversy in this case, we find that she is personally involved in any controversy with the District Attorney's office. And she doesn't participate in

that controversy as an ancillary issue or as a mere interested citizen. She is intimately involved in any action she might take, and thus we meet the criteria of standing as established in 1969 in Flast v. Cohen.

And then later in Data Processing case and the other competitor cases against Camp which this Court considered, there was a discussion of whether the litigant was within the zone of interest to be protected. And I think it is apparent that we are within the zone of interest that the legislature intended to protect here.

And finally, this past year when this Court considered the Sierra Club v. Morton decision, at which time it was the feeling of this Court that although the Sierra Club did not show standing in that instance, there was, on page 733 of that decision, the words of this Court when you said that an economic injury is a recognized basis for standing. And it's unquestioned that the denial to this illegitimate child of the economic benefit of her father constitutes an economic injury.

Thus, standing in this case, your Honor, is consistent with prior enunciations of this Court. But for a more important reason I submit we should recognize standing here, and that's because it is right. It is right in consideration of the reasons behind those opinions of the Court. It was right in Baker v. Carr that the litigant

has standing when that litigant challenged his disproportionate representation in the legislature. And you were concerned there with his voting rights. It was right when the taxpayer even, a Federal taxpayer, in Flast v. Cohen said that part of the money he is paying in Federal income taxes may be going for an unconstitutional purpose, and the Court recognized that he had standing. And it was right when the Court said that competitors in the Data Processing case and the travel agency case and the Investment Company case, all versus Camp, had a right to challenge and question the Comptroller's action in regulating competing banks.

I think it is manifestly right in this instance, your Honor, that the child here who is the sole recipient of the economic benefits to be gained by an application of the Texas Penal Code Article 602 to her father certainly stands as an injured party sufficient to have standing before this Court in this case.

Yes, your Honor.

QUESTION: Actually, Mr. Turley, aren't you really trying to get at Section 4.02 of the Civil Code, the inadequacy of that provision?

MR. TURLEY: That relates to it, your Honor, and I think we cannot divorce all of the three -- the common law, the Civil Code, and the Penal Code. They all three exclude the illegitimate. And if Article 4.02 provided for support of

the illegitimate, then perhaps there would not be what the Court has called the insurmountable barrier, and there might be a possibility of some other alternative, and she would not be totally discriminated and excluded. But because Article 4.02 does exclude her, as well as 602, then I think we have to address ourselves to all three.

QUESTION: Yet you can't challenge Article 4.02 in this appeal, can you?

MR. TURLEY: I'm not directly challenging it, your Honor. I would submit to the Court, however, that the same reasons that make the application of Article 4.02 a violation of this child's equal protection rights are the same reasons that make Article 602 of the Penal Code a violation of those rights.

QUESTION: But the 3-judge court held that you couldn't maintain that before the 3-judge court because you weren't seeking to enjoin any State officer.

MR. TURLEY: That is absolutely correct, your Honor. And in that respect we do not challenge it.

QUESTION: Let's assume that there was only 4.02 on the books, no 602 at all. Could you sensibly bring a suit to force Texas to have a criminal statute that would make it a crime to fail to support your children?

MR. TURLEY: I thought we could, your Honor, as I try to do that --

QUESTION: That's precisely what you are trying to do here, isn't it?

MR. TURLEY: I am not specifically complaining -- I think I do not have a right --

QUESTION: You're saying Texas should make it a crime to fail to support your children, your illegitimate children. There just isn't any crime like that in Texas.

MR. TURLEY: Not exactly. I am saying that Texas does not have to enter into this area at all. I know of no reason why Texas -- well, perhaps they should as a matter of good social policy, provide for the support of all children. I know of no reason that they have to.

QUESTION: Do you want the enforcement of 602 enjoined? I didn't know that's what you wanted.

MR. TURLEY: No, your Honor, I want the District Attorney in Dallas County instructed to cease his discriminatory application of Article 602.

QUESTION: I know, but 602 means A, B, C. It covers these. But you want an order that says that Texas have a paragraph 602a which says, "And we mean illegitimate children, too."

MR. TURLEY: In effect, that's the net result, your Honor.

QUESTION: What you have asked is that they cease their discriminatory application.

MR. TURLEY: That's correct.

QUESTION: Which has to mean that they can't apply it to legitimate --

MR. TURLEY: Cannot apply it to one class without the other.

QUESTION: But they can't apply it to fathers of illegitimate children unless the legislature makes the nonsupport by a father of an illegitimate child a crime, can they?

MR. TURLEY: Yes, I think they can, your Honor. I think this Court --

QUESTION: I thought your Supreme Court had already construed, contrary to your reading of 602, that statute is applicable only to the fathers of legitimate children. Am I wrong?

MR. TURLEY: You are absolutely correct, your Honor, that is what the State Supreme Court said in Beaver v. State.

QUESTION: Isn't that interpretation of 602 conclusive upon the 3-judge court just as conclusive upon us?

MR. TURLEY: I don't believe it is, your Honor. I think that any time, be it a court or governmental agency or anybody else acting under the cover of law within a State, discriminates against an individual to the extent that they deny them the equal protection of the law, then an issue is

raised for this Court's consideration.

QUESTION: I know what you want. The prayer that you asked was they stop the discriminatory application of 602, and you state the Supreme Court has said that 602 can apply only to the fathers of legitimate children.

MR. TURLEY: I am saying that --

QUESTION: How can it be except in the context of a discriminatory application limited to the fathers of legitimate children? How can the prayer be --

QUESTION: (Inaudible) legitimate --

MR. TURLEY: Yes, your Honor. I frankly do not believe that it is compatible,that the decision in Beaver v. State is compatible with what I am asking State court to do.

QUESTION: Another alternative would be if you would ask if they declare it unconstitutional, 602 unconstitutional, they can't enforce it against anybody.

QUESTION: Are you asking that?

MR. TURLEY: We discussed that in the lower court, your Honor, and I have presented it as an alternative in this case. In the brief we did not discuss it extensively. And I present it as an alternative.

QUESTION: Which are you asking?

MR. TURLEY: I am asking that this Court, first of all, and preferably, instruct the Dallas County District Attorney to stop his discriminatory application of a State

statute.

QUESTION: Well, that's a euphemism for saying that he enforce 602 against the fathers of illegitimate children. That's really what you want.

MR. TURLEY: That's right, I'm asking that it be enforced against all children equally unless there is some rational basis for excluding illegitimates.

QUESTION: The Chief Justice' question was, or else against no one. Is that your --

MR. TURLEY: That's exactly right, your Honor, and that's what I was starting to say a moment ago.

QUESTION: This Court can't take the latter position. There's an old case back in 1950, (inaudible) against Board of Education that says if the only relief you get is that nobody gets anything, then we will not grant it. And that would be what you are asking for.

MR. TURLEY: Well, no, your Honor. I think that if the Court goes so far as to say --

QUESTION: Well, how would it help you if we declared it unconstitutional, it couldn't be enforced against anybody?

MR. TURLEY: Your Honor -- and this gets into the magnitude and the consequence of the problem involved.

QUESTION: There's no magnitude involved. What do you get out of it?

MR. TURLEY: There are 20,000 illegitimate children born in the State of Texas each year.

QUESTION: What do the 20,000 get out of it?

MR. TURLEY: If it's not enforced against anybody?

QUESTION: Right.

MR. TURLEY: Legislature that is responsive to the needs of all the children and not to one class in particular.

QUESTION: So it means that the legitimate children would suffer.

MR. TURLEY: Your Honor, I think --

QUESTION: Right?

MR. TURLEY: It may be true. That may have to happen.

QUESTION: And that helps you?

MR. TURLEY: I think it will make the legislature responsive. I think any time, your Honor, when we have a situation where a minority group, and in this case illegitimate children, are denied their constitutional --

QUESTION: Board of Education said specifically by this Court that while some other means might be proper, injunction is not the proper means to take from one group and give the other group nothing.

MR. TURLEY: I think, your Honor, that that kind of a problem has to be weighed on its merits each time it is presented. I would not like to see a blanket application of that ruling. And I think under these facts that it really not

go that far.

QUESTION: How can you ask us to order a prosecuting attorney to enforce a law in a manner in which the Supreme Court of Texas said the law does not apply?

MR. TURLEY: Well,your Honor, I think the Supreme Court of Texas is participating right in the act with the Dallas District Attorney in refusing to grant illegitimate children their rights under the Federal Constitution. The State of Texas need never enact a child support law, but once it chooses to do so, it has a duty to apply it --

QUESTION: Even if I agree with all you say in the posture of this case, what specifically can we do other than to read a new section into 602?

MR. TURLEY: Your Honor, the language of the section is clear. It says "children."

QUESTION: The State says it does not apply to your clients.

MR. TURLEY: That's what the State said in Levy v. Louisiana, that the word "children" excluded illegitimate children. And this Court said to interpret it that way constitutes invidious discrimination.

QUESTION: (Inaudible) clarify it in your brief.

MR. TURLEY: Yes, we did, your Honor. Yes, we did.

QUESTION: I would suppose your alternative may be the only --

QUESTION: Strike down 602.

QUESTION: So that it doesn't apply to anybody.

MR.TURLEY: If it is, your Honor, I would hope it would not be necessary to go that far, but it may be. And if it is, I think the circumstances --

QUESTION: But did you want us to do it?

MR. TURLEY: Yes, sir.

QUESTION: You are not abandoning that alternative?

MR. TURLEY: No, I'm not. And the reason is this, and we have to weigh when we are applying the test of discrimination, of whether it be permitted to stand, we have to weigh it not just as counsel in the preceding case indicated as to whether there is a rational basis for it, because there may be a slight rational basis. But we have to also measure it in the terms of the magnitude and the consequences of the rights infringed. And when we do that -- and this is significant -- in the State of Texas 9 percent of the children that are born every year now of live births are illegitimate. Some 20,000 in 1969. Thirteen percent of all the live births in Dallas, Texas, in 1969 were illegitimate. That's 8400 (?) a year. This is a significant proportion of the minor children in the State of Texas and it's growing at a significant rate.

QUESTION: All of your standing arguments make good sense when you are trying to broaden the application of the statute. But I would be inclined to think that in the

case that Justice Marshall mentioned to you, when you are trying to say that it should be applied against no one, you will have a great deal of difficulty in showing how your client will benefit from that.

MR. TURLEY: Your Honor, I think it's --

QUESTION: You would be saying in that situation that the State shall not extend the benefit to another class if they are not extending it to me.

MR. TURLEY: That's exactly right. We are dealing here with a significant minority class that do in fact constitute --

QUESTION: And isn't the only issue that's here standing?

MR. TURLEY: I think it is.

QUESTION: Let's assume for the moment that we couldn't accept your first point that you could order Texas authorities to enforce this statute, and we arrived at your second line, namely, the constitutionality of 602. But before you get to that, the standing issue is there. And that's the way the 3-judge court turned you down, isn't it, on standing?

MR. TURLEY: That's exactly right. Yes, sir.

QUESTION: What if we thought the 3-judge court was wrong on denying standing with respect to the constitutionality of 602? Then we would just say there was

standing and send it back, wouldn't we?

MR. TURLEY: The Court could do that. I would think the Court could also dispose of the case, and there is authority for this, dispose of the case on its merits after having heard it and had the briefs and everything.

Considering now, if we can, your Honor, with the test to be applied, not only are we concerned with magnitude in numbers, but we are concerned also with the consequence to the illegitimate children involved in this particular deprivation of economic support. Obviously, the economic support of a father affects the child in many ways, and I will not take the Court's time to enumerate them because I think they are obvious.

But we go a step further. In a recent article, an outstanding psychologist has summarized the problem facing the illegitimate child perhaps in an even greater way than the economic problem when he said that to be fatherless is bad enough in this society, but to be fatherless with the stigma of illegitimacy can be a psychological catastrophe for that child.

QUESTION: Isn't this argument to be made to a legislature and not to a court?

MR. TURLEY: It can be made to a court, your Honor.

QUESTION: Isn't that where your real relief lies? You say you have legislation pending down there.

Your Honor, this argument, the psychological effect, the social problems involved, was in fact an argument that was made in Brown v. School Board in 1954 and was one of the points that that court looked at in reaching its decision in that case. So it wouldn't be the first time that a court has taken into consideration the results or the consequences of being denied a civil liberty.

But more important, or equally important, is the effect on the community as a whole, your Honor, of these particular problems. We have to take an analysis of the problem of illegitimacy and the kind of social life out of which he comes in order to understand it. We find that the lowest economic and education levels within the community are those who have the lowest rate of abortions, the lowest rate of postpregnancy marriages, and the lowest rate of adoptions of illegitimate children. Such that in final analysis the net additional load of illegitimate children falls heaviest upon that group in the community who are least able to accommodate it. And I think this is one of the reasons that one-third of the children in the State of Texas receiving aid to dependent children are in fact illegitimate children.

The State contends that the paternity laws would be coercive and hard to apply. Yet 48 States have paternity laws of one type or another that recognize support rights in children.

QUESTION: What happened to the 50th State? All counsel this morning have spoken of Texas and 48 States. What's the 50th one?

MR. TURLEY: I believe that's Idaho, your Honor, and I can't tell you why they are the way they are.

Counsel this morning failed to take into consideration the effectiveness of modern blood grouping tests which almost totally eliminate a good deal of the controversy surrounding paternity. With respect to whether a paternity exclusion of illegitimate children promotes morality in a community, that's the old argument that was applied. I would submit to the Court that the converse is true, that it in fact does not promote morality, but promotes irresponsibility, such that we are faced now with a situation in the State of Texas where, because of the District Attorney's refusal to apply Article 602, the wrongdoer, the father, goes free and the innocent victim of the crime, the child, is punished for it by not receiving any support.

In consideration of Levy v. Louisiana, Glona v. American Guaranty, Stanley v. Illinois, and Weber v. Aetna, all considered opinions of this Court --

I'm sorry, your Honor.

QUESTION: No. I am just wondering. How can you blame the District Attorney of Dallas when your State Supreme Court has said the statute which he has to enforce

is of limited application, namely, to the fathers of legitimate children?

MR. TURLEY: So far as I know, no District Attorney in the State of Texas has taken one of these cases since 1923. If he did take a case and did prosecute it, we could have a new ruling from the Supreme Court.

QUESTION: I know, but I just wonder how can you fault him if the Supreme Court of Texas has told him, "You may apply this statute only to fathers of legitimate children. Doesn't he have to --

MR. TURLEY: Only to the extent that he is the enforcer of that law, your Honor, only to that extent.

QUESTION: Wouldn't it be futile on his part to bring them? He would be dismissed out of hand, wouldn't he, as long as the Supreme Court of Texas maintains this position and the Texas legislature stands on that statute?

MR. TURLEY: I think in the absence of a statement from this Court that this kind of discrimination is invidious discrimination, that it might be futile to bring that kind of case, and he probably could expect the same result from the Supreme Court and from the State legislature.

QUESTION: If we accept your alternative view, he isn't going to have to do anything, he doesn't pursue anyone, legitimate or illegitimate, until your legislature acts.

MR. TURLEY: There is a qualification on my

alternative which I never have made, and I want to before I sit down. That is that if this Court should strike down the Texas child support laws, I think that it should be accompanied by a mandate that the order would not be effective until the legislature has had an opportunity to act, and it will convene in January through May of this next year.

QUESTION: You say declare this statute unconstitutional, but we tell them keep it alive as though constitutional long enough for you to act?

MR. TURLEY: That's what a 3-judge court has done in San Angelo or San Antonio, I believe.

QUESTION: Has this Court ever used that mechanism?

MR. TURLEY: Not that I am aware of, your Honor, but I think it could be an effective process.

QUESTION: You could have had this case dismissed, you know.

MR. TURLEY: What, your Honor?

QUESTION: You could have had this case dismissed. You still -- would you prefer to have 602 declared unconstitutional as of now or not?

MR. TURLEY: My first preference is that --

QUESTION: Yes, but let's assume that you don't get your first preference, then what? Then say the only alternative was having 602 declared unconstitutional as of now.

MR. TURLEY: I think, your Honor, you should do it

for the reason that it is unfair and unjust to deny a significant minority group their rights in order to protect the rights of a majority group. We have finally come to a point where we have to do that.

QUESTION: Do you know of any case in this Court or in any Federal court that has ever held that a State criminal law was unconstitutional because it did not go far enough?

MR. TURLEY: Because it did not go far enough?

QUESTION: That's what your claim is in this case.

MR. TURLEY: I think the law goes far enough, your Honor. I'm saying that the interpretation placed upon it by the court --

QUESTION: Perhaps my question wasn't clear. I will repeat. Do you know of any case in this Court or any Federal court that has ever held that a State criminal law was unconstitutional because it did not go far enough?

MR. TURLEY: No. I have looked for that and have not found one, your Honor. And what we are saying is -- what I am saying is that this is the infirmity of the position. Generally, a State official is restrained by injunction from prosecuting an unconstitutional law. In this case I am saying he should be restrained from refusing to prosecute a law which would grant then the equal rights to citizens --

QUESTION: Could a bank bring a 3-judge court case against a State Attorney General because the State had a law

that made larseny a crime but didn't make embezzlement a crime?

MR. TURLEY: I think if a bank found themselves in a situation, your Honor, where the Attorney General was prosecuting the State law against all the neighboring banks but refusing to prosecute it against them because their assets were too high or too low or some other discriminatory basis, I think they could bring an action. Yes, I do.

QUESTION: Well, it wasn't my question, of course.

QUESTION: Mr. Turley, looking at page 29 of the appendix which contains your complaint to the relief requested when you filed your original action in the District Court, in paragraph 2, you ask that a declaratory judgment be issued holding the Texas child support laws unconstitutional in their exclusion of unwed parents. And then you go on in paragraph 3 and pray that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of child support laws and that the defendant be required to pay a reasonable amount of money.

I don't, at least on the face of your prayer for relief, see that that really asks that Statute 602 be stricken down in its entirety. Would you disagree with me?

MR. TURLEY: No, I wouldn't, your Honor. As I said, I have contended in the 3-judge court below and throughout

these proceedings that there is no necessity for any court to go that far, that you have ready available machinery to simply say to the State, "Cease your invidious discrimination." And I think if that's all that this Court said, that would put a stop and bring the proper remedy that we need.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Turley.

Mr. Gauss.

ORAL ARGUMENT OF ROBERT W. GAUSS, ESQ.,

ON BEHALF OF THE APPELLEES

MR. GAUSS: Mr. Chief Justice, and may it please the Court:

I think that it might be well for me at the outset to talk about this case a little bit from the standpoint of its present posture and how it got here, what has happened.

This case was originally brought by the plaintiff and both Article 602 of the Penal Code and Article 4.02 of the Family Code which was under discussion before noon today were under challenge, and the constitutionality of those two statutes was being attacked.

Of course, they relate to the same general problem, the support of legitimate as distinguished from illegitimate children.

Now, in that case which was brought in Federal court, a 3-judge court was requested, and the 3-judge court determined at that time that, first, Article 4.02, the civil

statute, did not present a question for the 3-judge court and it was remanded back to Judge Sarah Hughes for her sole decision. They then went on to decide that the penal statute was a proper -- the request for a 3-judge court was properly exercized as to the penal statute and decided, however, that there was no standing of these people to attack that statute. In other words, the subject matter of the statute did present a constitutional question, but the parties who brought the suit had no standing.

Now, Judge Hughes in her opinion, which is in the appendix -- excuse me, it's in the brief of Mr. Bailey -- denied the relief which was requested under 4.02.

As far as I know, we have been made known of no appeal from that decision of the one-judge court. So, of course, as has been pointed out, the only thing before this Court at this time is the decision of the 3-judge court that these people, these plaintiffs, did not have standing to bring the lawsuit and attack it in the manner in which it was being attacked.

In answer to a question posed by, I believe it was Mr. Chief Justice, I'm not sure, one of the Justices, it certainly is my opinion that all this Court can do as far as the posture of this case is concerned at this time, if they should decide that the 3-judge court incorrectly decided the standing question, is to send it back and let them go ahead

and pass on the case on the merits, because that's all that's before this Court.

QUESTION: Mr. Gauss, I am not sure I agree with you. My understanding was that we review judgments below, not necessarily for the reasons given by the 3-judge court to dismiss this action. And if we were to conclude that it should be dismissed for different reasons, we might not send it back.

MR. GAUSS: I concur with that, your Honor. I possibly didn't go far enough. I agree, if this Court feels that it should be dismissed, even for different reasons, there would be no cause for remand. But I am saying that if -- what I am trying to say is that if this Court determines that the decision of that court based on the question of standing alone was an erroneous decision, then that is the only thing that is before this Court as far as remand is concerned.

If I understand you correctly, your Honor, for example, if this Court decided that the 3-judge court was incorrect in their reasoning, but this Court does find another reason for dismissal, certainly it would not warrant a remand.

QUESTION: Including a ground which that court never reached? We don't ordinarily do that, do we?

MR. GAUSS: Well, of course --

QUESTION: Perhaps it's all academic because if we

found that there was standing, it wouldn't make much difference whether we remanded it or not because they could start all over again.

MR. GAUSS: I agree with you, your Honor, I think it is academic. But the point I tried to make here is that the merits of this case are not before this Court at this time.

QUESTION: By that you mean the merits of the attack on Section 602, the constitutional attack.

MR. GAUSS: This is correct, the constitutionality of Article 602.

Now, I --

QUESTION: They were certainly addressed at very great length and in detail by the dissenting judge, Judge Hughes, were they not, General?

MR. GAUSS: Yes, sir. Yes, sir, she wrote a very vigorous dissent.

QUESTION: She dissented first on standing and expressed her view there was standing and therefore she moved to the merits and discussed them fairly and in detail and expressed her view that this criminal statute was unconstitutional and further expressed the view that she would therefore issue a permanent injunction enjoining the state officials to apply Article 602 in such a way as to require parents of illegitimate children to provide support.

So to that extent, the matter was certainly not ignored in the 3-judge court.

MR. GAUSS: I agree, your Honor, it was not ignored, but it is not before this Court in the decision of the 3-judge court. The simple decision there was that there was no standing.

QUESTION: Therefore, they didn't reach the merits.

MR. GAUSS: Correct.

Of course, just parenthetically I would disagree with Judge Hughes in her dissenting opinion. Actually, I think what we need to look at is really what are they asking for. Now, this is a criminal statute which is under attack, and they are asking this Court to order a state official to prosecute a criminal case. Now, if it were confined only to this case, the Court must take notice that the prosecution of criminal matters is entirely within the discretion of the District Attorney or the prosecuting attorney. He must investigate, and for any myriad of reasons, he may determine that this is not a prosecutable case.

QUESTION: But in this case, he gave a reason.

MR. GAUSS: I am sorry, your Honor.

QUESTION: In this case he gave a reason. He said the statute didn't allow him to. Am I right?

MR. GAUSS: Well, this would be assuming, Mr. Justice Marshall --

QUESTION: What was his reply?

MR. GAUSS: I don't know, your Honor. He did decline to prosecute.

QUESTION: And didn't he give a reason? I understood from what Mr. Turley said, he gave a reason that the statute didn't allow him to.

MR. GAUSS: If so, your Honor, it does not appear of record. I was not the attorney of record at that stage of the proceedings. The record does not reflect, as I recall, that there was any reason given. It simply was a declination on his part to prosecute a criminal matter.

QUESTION: Where did Judge Hughes get this idea that he should be made to prosecute regardless of what the statute said?

MR. GAUSS: Well, I think the record will reflect in that regard, your Honor, that actually this request to the District Attorney to prosecute this man was in fact made after the case had been submitted to the 3-judge court, and it was allowed that they amend their pleadings even at this stage of the proceedings.

But at the time that the matter was considered by the 3-judge court, it is my understanding that no request had even been made, and I don't know, your Honor, as I say, I see nothing of record which would indicate what his reasons were.

But, of cou he could have, as I say, any number of reasons. Now, I think it's patent from the record in this case that the reason why in this case he refused to instigate criminal proceedings is because the Texas law exempted this particular man from criminal prosecution by virtue of Beaver which had been decided way back in 1923.

QUESTION: 1923?

MR. GAUSS: 1923, I believe, your Honor.

QUESTION: I know Judge Hughes carried it away back to 1887.

MR. GAUSS: Well, I believe Beaver was decided in 1923.

QUESTION: Yes. But on the point, she just said that the Texas courts since 1887 have held that the present statute does not apply to illegitimate children.

MR. GAUSS: Well, I think, as far as I have been able to determine in my research, the first judicial decision under Article 602 of the Penal Code as such was the Beaver case in 1923. In that particular case, a criminal prosecution was brought against the father of an illegitimate child and a conviction was had, and this was reversed by the Court of Criminal Appeals -- this is a technical matter. The highest court in Texas in criminal matters is the Court of Criminal Appeals as distinguished from the Supreme Court, but it was the highest court in criminal matters. The Court of Criminal

Appeals reversed it simply saying that this statute when the word "children" is used, it means legitimate children and it grafted the word "legitimate" on there. This is the law of Texas.

QUESTION: Has any father of a legitimate child prosecuted under this statute ever challenged its application to him because of this exclusion of fathers of illegitimate children?

MR. GAUSS: Not as far as I know, Mr. Justice Brennan.

QUESTION: You would think he would have standing, wouldn't you?

MR. GAUSS: I would think that he would. And this, of course, I think the 3-judge court felt that the proper way to bring this thing into focus is by this person who stands to bring the prosecution.

QUESTION: Have there been any prosecutions that you are aware of since that opinion of the 3-judge court under this statute against the father of legitimate children?

MR. GAUSS: I am not aware of any, your Honor.

QUESTION: I would suppose we are going to get a challenge to it the very first prosecution that is brought under it now.

MR. GAUSS: I am sure he would. I am sure he would.

Actually, from my knowledge of the situation, the

criminal statute is not very widely utilized as far as enforcing child support. And that gets to another matter. Counsel assumes, and maybe it is a correct assumption, that the enforcement of this criminal statute would -- or I will put it this way, that failure to prosecute fathers of illegitimate children deprives this child of a right of some sort.

QUESTION: You think enforcement of it gives a legitimate child a right?

MR. GAUSS: It certainly would be indirect at best, your Honor, because --

QUESTION: What's the purpose of the criminal law? It's to influence conduct, isn't it?

MR. GAUSS: Yes, sir.

QUESTION: Your idea is that if you make it a crime to fail to support your child, maybe people will support their children.

MR. GAUSS: Well, I agree. I agree that philosophically that indirectly it would have that effect.

QUESTION: Well, indirectly, then, failing to enforce it deprives somebody of a right. I mean, if the authorities fail to enforce the statute as it is written, legitimate children perhaps aren't getting what they would if it was enforced.

MR. GAUSS: This would be correct, your Honor.

QUESTION: And hence, illegitimate children aren't getting it either.

MR. GAUSS: This is correct. And I might say this, that as to the argument of counsel, and as far as the social problems and that sort of thing are concerned, that I personally would be the first in line to urge the legislature to change the law. But this is, I feel, a legislative problem. It's something -- I think that the standing question is very fundamental. In Flast this Court said the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a Federal court and not to the issues he wishes to be adjudicated.

Now, the parties to this case, on the one hand, are a mother and a child. On the other hand, the only order which could be issued to anybody in this case would be to the District Attorney of Dallas County, I suppose. And this certainly would not accomplish the purposes which I submit that counsel seeks to obtain in this case. They go on in Flast and say the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

QUESTION: Mr. Gauss, can you help me? It looks to me like I don't see any defendant here representing the State of Texas in these pleadings.

MR. GAUSS: Your Honor, as far as I know, the --

QUESTION: It says in Section IV of the complaint, "The Defendant, Richard D." Well, he is the putative father, isn't he?

MR. GAUSS: Yes, sir.

QUESTION: And implied is the Defendant, State of Texas. That's implied because certain laws and actions of the State infringe on Federal rights. So it's the State of Texas that's a party.

MR. GAUSS: Yes, sir. Yes, sir, but the question --

QUESTION: Can this many people -- that way you can make the whole State a party.

MR. GAUSS: Well, I am looking, your Honor, to the relief which is sought in this case.

QUESTION: That's right.

MR. GAUSS: And to whom, if counsel is seeking an order from this Court to the State of Texas that you cease and desist in the future from refusing to prosecute these people, I suppose that this would, of course, in Texas the ... District Attorney of each judicial district is the prosecuting attorney. I'll take it back. It would be the County Attorney because I believe 602 has been changed to a misdemeanor.

QUESTION: Well, General, under the law of Texas, can the Attorney General or any State official make a prosecutor prosecute?

MR. GAUSS: If it's ever been done, your Honor, I don't know.

QUESTION: I mean, does the law allow it?

MR. GAUSS: Not that I know of, your Honor. The District Attorney --

QUESTION: Suppose we issue an order saying that the State of Texas must prosecute these people, how would it be enforced?

MR. GAUSS: I don't know. This is my question, your Honor. I don't know how it could possibly be enforced. The prosecuting attorneys in Texas, the local prosecuting attorneys, are autonomous. The Attorney General of Texas has no criminal jurisdiction whatsoever, and the District Attorney, of course, has jurisdiction to prosecute felonies, and the county attorney misdemeanors. They are not subservient to the Attorney General, or as far as I know, any official of the State any more than they would be just to counsel here who has brought this action. I think that he has as much standing as the Attorney General would have.

QUESTION: I am looking at page 39. Would this be correct? Apparently, it says on page 39 -- this is the colloquy between Mr. Bailey -- who is he?

MR. GAUSS: Mr. Bailey was the Assistant Attorney General who --

QUESTION: Well, this is between him and the Court.

And he states, "The initial claim...was filed against solely the State of TExas."

Then in the next paragraph he says, "After the filing of our trial Brief...the Plaintiffs amended their Complaint to bring in certain other parties; namely, the District Attorney, Dallas County, the Chief Justice of the Texas Supreme Court, and the Attorney General of the State of Texas."

And then he says, "I would at the conclusion of this like to move to dismiss the Chief Justice." Is the Chief Justice still a party?

MR. GAUSS: No. The next sentence, your Honor.

QUESTION: Oh, I see. "We grant that right now." I see. But he did not move to dismiss the District Attorney or the Attorney General, I gather.

MR. GAUSS: This is correct.

QUESTION: So they are still parties.

MR. GAUSS: Yes, sir.

QUESTION: There is no Eleventh Amendment problem, then.

MR. GAUSS: Not at this point, because the court decided it on the question of standing as to the plaintiff's themselves.

QUESTION: (Inaudible) these other defendants had not as of that time been served with process, so the court didn't

have personal jurisdiction over them.

MR. GAUSS: I think this is correct, too, your Honor. I don't think the Governor was served, I don't think the Attorney General was served.

QUESTION: Are they parties then?

QUESTION: That was my question.

MR. GAUSS: It would be highly questionable.

QUESTION: It names the defendants, but until they are served they are not parties.

QUESTION: Doesn't an appearance by the Assistant Attorney General to have moved to dismiss on merits amount to an appearance on behalf of the state officials?

MR. GAUSS: Well, certainly we haven't raised it at this point, your Honor. We assume we are in the case. Certainly the State statute is under attack, and we are here representing the State of Texas.

QUESTION: You don't say that the Attorney General wasn't served. Because under the 3-judge rules, you have to serve the Attorney General. Am I correct on that?

MR. GAUSS: Yes.

QUESTION: You have to serve them. So can't we assume that he was served?

QUESTION: You have to serve him with notice even if he is not a defendant.

MR. GAUSS: I think that's probably right. I think

that's probably right.

QUESTION: Just to complicate this brew, over at page 41, Mr. Bailey says, "Well, in this connection, may it please the Court, we have not been served -- granted I have been in court representing the State of Texas."

And Judge Thornberry says, "Well, what I want to make clear is -- our Order of Dismissal is confined to the Chief Justice."

Mr. Bailey then says, "All right, sir."

QUESTION: Absent special appearance, you are in the case, aren't you?

MR. GAUSS: Yes, sir, I think we are in the case. I think we are in the case.

QUESTION: Who is in the case?

MR. GAUSS: Beg pardon?

QUESTION: Who is in the case?

MR. GAUSS: The State of Texas.

QUESTION: Well, the State of Texas can't consent to a district court hearing a case it doesn't have any jurisdiction over.

QUESTION: What about the Eleventh Amendment?

MR. GAUSS: Well, your Honors, I must confess ignorance as to what actually transpired regarding the service and notice to participants.

QUESTION: Well, this much we do know, apparently.

That is, that Mr. Bailey, after the amendment which added the Attorney General and the District Attorney, he appeared and apparently all he says is, "I have been in court representing the State of Texas." Does that mean he is also representing the others?

MR. GAUSS: I am sorry, your Honor --

QUESTION: Does that mean he is also representing the officials, does it?

MR. GAUSS: I think so. I think he certainly took that position at the time, and I would assume that proper notice and service was had upon the officials to properly get the State of Texas into the case.

QUESTION: Well, you are here representing your boss.

MR. GAUSS: Yes, sir.

But again, the cases cited by counsel, I think they make no departure from Flast as to the standing question. The cases involved certainly not criminal matters. And I have come across no case other than the one case cited by Judge Hughes which does involve a criminal statute. This was the Oregon statute, and I believe she cites it on page 65, this Pierce v. Society of Sisters. That case involved a situation where the State of Oregon passed a statute which made it a crime not to send -- for a parent not to send their children to public school. The plaintiffs in the case were private schools, and they took the position that they had

long-term contracts with parents and the enforcement of this criminal statute against these parents would certainly work a great, very direct detriment upon them financially and a property right, a contract right. And they held in that case that there was standing. But that is, I submit, a far cry from a situation where it's being asked that the State of Texas or state officials -- and in effect that's all it amounts to, that, "Texas, you start prosecuting these people." And I don't know how this Court could possibly couch an order that would be enforceable, because there are too many things that are involved.

I suppose an order could be couched in terms that you will not refrain from prosecuting illegitimate fathers based solely on the fact that the child is illegitimate. But, again, I don't think that's before the Court. I think at this time that what this Court has before it is to make a determination of whether these plaintiffs were properly before the court, if they have proper standing to attack this statute. And I submit, your Honors, that this is all that the Court is called upon to decide in this case. The other matters may be reached in the companion case which was argued this morning, but certainly I think that the merits of the constitutionality or the wisdom of the Texas legislature and the Texas courts as to their treatment of responsibilities of fathers of illegitimate children is not before the Court in

this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gauss.

Thank you, Mr. Turley.

The case is submitted.

QUESTION: Mr. Chief Justice, may I ask Mr. Turley a question?

MR. CHIEF JUSTICE BURGER: By all means.

Mr. Turley, if you will take the lectern.

REBUTTAL ARGUMENT OF WINDLE TURLEY, ESQ.

ON BEHALF OF THE APPELLANTS

QUESTION: Where is the notice of appeal in this case?

MR. TURLEY: I have one, your Honor. While I am looking for that, your Honor -- I will look for that and while I am looking for it, on page 56 in the appendix is stated why the District Attorney did not take the case and he was served with citation on March 29, 1971.

Our Notice of Appeal -- thank you, your Honor. It's on page 73 of the appendix.

QUESTION: Well, where is the -- I understood a Notice of Appeal has to have the people who you are appealing from. Name the parties.

MR. TURLEY: Well, throughout the appendix, your Honor --

QUESTION: But is there any place in here that you

notified anybody as to who were the appellees in this case?

MR. TURLEY: Who were the appellees?

QUESTION: Yes, because the only people I see is the State.

MR. TURLEY: Your Honor --

QUESTION: How about page 75, paragraph (7), "Whether the Defendant Henry Wade."

QUESTION: That's what the --

MR. TURLEY: Page 75.

QUESTION: I want to know where did you name your appellees? The reason I ask this question is because I have got the original record here and I don't see it here either.

MR. TURLEY: Your Honor, I will just answer that as best I can, and that is that on page 75 in paragraph (6) and (7) -- or paragraph (7), we set forth the fact that the Defendant Henry Wade should be enjoined and ask that relief be granted against him.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

[Whereupon, at 1:56 o'clock p.m., the case in the above-entitled matter was submitted.]