

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1206

TITLE CHARLIE WAYNE ROSE, Appellant V. BARBARA ANN McNEIL
ROSE AND TENNESSEE

PLACE Washington, D. C.

DATE March 4, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 CHARLIE WAYNE ROSE, :

4 Appellant :

5 v. :

No. 85-1206

6 BARBARA ANN McNEIL ROSE AND :

7 TENNESSEE :

8 -----x
9 Washington, D.C.

10 Wednesday, March 4, 1987

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:57 a.m.

14 APPEARANCES:

15 JERRY S. JONES, ESQ., Johnson City, Tennessee; on behalf
16 of the Appellant.

17 ROGER CLEGG, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; as amicus
19 curiae, supporting Appellant.

20 HOWELL H. SHERROD, JR., ESQ., Johnson City, Tennessee;
21 on behalf of Appellee Rose.

22 W. J. MICHAEL CODY, ESQ., Attorney General of Tennessee,
23 Nashville, Tennessee; on behalf of Appellee
24 Tennessee.
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P R O C E E D I N G S

(10:57 a.m.)

CHIEF JUSTICE REHNQUIST: Mr. Jones, you may proceed whenever you are ready.

ORAL ARGUMENT OF JERRY S. JONES, ESQ.

ON BEHALF OF THE APPELLANT

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

This veterans' rights case is here on appeal from the Court of Appeals of the State of Tennessee, the Supreme Court of that great state having denied application for permission to appeal, which is in the nature of a writ of certiorari.

The issue in this case is whether the scheme which the states have devised to circumvent federal law frustrates a federal purpose and violates the expressed intent of Congress when it enacted the Veterans' Benefits Act.

There are three federal statutes which are primarily at issue in this case. They are all found in the Veterans' Benefits Act, Title 38 to the United States Code. They are 211(a), 3101, and 3107.

The United States government has joined in this case as amici and the government is in a better position to argue the federal law than I, so with the

1 Court's permission I will touch on those statutes but
2 defer the in-depth discussion to the United States
3 government.

4 QUESTION: Mr. Jones, let me straighten myself
5 out on some factual matters. The marriage of these two
6 people took place after his Vietnam injuries, I take
7 it? He was fully disabled when they were married?

8 MR. JONES: That's correct, Justice White.

9 QUESTION: So the children came along also
10 after the disability?

11 MR. JONES: Yes, Your Honor.

12 QUESTION: Did the Tennessee courts order --
13 do any more than to require that he pay \$800 a month?

14 MR. JONES: Two hundred dollars per month?

15 QUESTION: Eight hundred dollars, whatever the
16 figure was.

17 MR. JONES: It was \$800 per month, Your Honor.

18 QUESTION: Did it do any more than that? It
19 did not direct any allocation of the disability benefits
20 directly?

21 MR. JONES: No, Your Honor. That is where we
22 contend that there was an attempted -- or where the
23 State did circumvent the expressed intent of Congress.

24 QUESTION: But the order itself merely placed
25 on him an obligation to pay \$800 a month. If he had

1 acquired it from inherited wealth, he could pay it out
2 of that, couldn't he?

3 MR. JONES: There would be no question. We
4 would not be here if that were the case.

5 QUESTION: And the order did not tell him --
6 or did it, that is what I am asking -- to use \$800 of
7 your disability payment to satisfy the support
8 obligation?

9 MR. JONES: The court did not state that. But
10 the facts show that \$500 per month must come from
11 veterans disability benefits or from property which was
12 accumulated by the use of veterans disability benefits.

13 QUESTION: Well, suppose he had inherited some
14 money in the meantime?

15 MR. JONES: If it had been a substantial
16 amount so that he could have made his child support
17 payments, we would not be here.

18 QUESTION: Do you contend -- let me just be
19 sure I understand. The property accumulated from the
20 pension payments could have been used or could not have
21 been used to satisfy an obligation?

22 MR. JONES: I am sorry. I didn't understand
23 the question.

24 QUESTION: Well, supposing instead of \$800 a
25 month, he had a Cadillac or something he bought with

1 veterans payments and the order had said, don't pay \$800
2 a month, sell the Cadillac and give the proceeds of sale
3 to your dependents.

4 Would that violate the statute?

5 MR. JONES: Yes, it would violate the intent.
6 I don't think it would violate the statute per se. But
7 the statute states that the veterans benefits are exempt
8 from levy, attachment or seizure both before and after
9 receipt by the beneficiary.

10 Now, the cases which deal with that problem
11 outside the domestic relations area indicates that the
12 funds which are used to purchase assets, or the assets
13 that are purchased from these funds are likewise exempt
14 because Congress stated that the funds were exempt both
15 before and after receipt by the beneficiary.

16 QUESTION: Mr. Jones, the record shows, I take
17 it, that Mr. Rose had \$7,000 accumulated?

18 MR. JONES: The record does not show that,
19 Justice O'Connor. The State will argue that there was
20 some \$12,000 from the sale of the parties' marital
21 residence.

22 QUESTION: I see.

23 MR. JONES: But the proof would show that that
24 money came from the Veterans Administration from a grant
25 that was given to Mr. Rose to help defray the cost of a

1 house that was designed to meet his special needs.

2 QUESTION: But that the money was not itself
3 part of the disability payments?

4 MR. JONES: It comes under the -- no, no,
5 that's correct, Your Honor. It comes -- the money that
6 he received for the house comes from a special grant
7 from the Veterans Administration for people who need to
8 have homes that --

9 QUESTION: And is that money subject to the
10 same legal restrictions that the disability payments,
11 monthly disability payments are under?

12 MR. JONES: Justice O'Connor, it is my
13 understanding that any money which comes from the
14 Veterans Administration is subject to the
15 anti-attachment provisions in 3101.

16 QUESTION: And whatever money was available to
17 him over and above the monthly payments, you assert,
18 came through the Veterans Administration and is subject
19 to whatever the legal requirements are?

20 MR. JONES: That is correct, Your Honor, and I
21 might clear one point on that. When I talk in terms of
22 money coming from the Veterans Administration, that is
23 money which comes to a disabled veteran.

24 Any money that comes for other reasons is not
25 at issue here, and I couldn't answer that with regards

1 to money that might come through the Veterans
2 Administration for a veteran who is not disabled. The
3 situation here is that we have a highly decorated
4 Vietnam veteran who received some 15 citations including
5 the Vietnam Cross of Gallantry, the Bronze Star for
6 valor, and the Purple Heart among the others.

7 Mr. Rose lost both of his legs, his right
8 hand, and a portion of his right arm in addition to his
9 right eye in combat in the former Republic of Vietnam.
10 As a result of those injuries Mr. Rose received a
11 medical discharge from the United States Army and was --
12 at that time began receiving these veterans disability
13 benefits which are at issue here today.

14 While he was recuperating in a Veterans
15 Administration hospital he met Mr. Rose who was assigned
16 to his care. A courtship followed and marriage was the
17 end result of that courtship in 1973.

18 After the two children, and about ten years
19 later, Mrs. Rose filed for divorce, was granted a
20 divorce from the veteran, and was awarded custody of the
21 two minor children. Mr. Rose was despondent at that
22 time to the point that he was probably in a state of
23 shock.

24 He didn't even contest this at that time. He
25 contested none of this at that time. The decision

1 became final, was not appealed from. Mr. Rose consulted
2 with me and wanted to know if he had rights.

3 After advising him that in my opinion he may
4 have rights under the Veterans' Benefits Act, I advised
5 him that if he did not pay the child support as ordered
6 he would probably go to jail. Mr. Rose decided to
7 enforce his federal rights and stopped making child
8 support payments except that he paid the sum of \$90,
9 which is the minimum amount that is designated by the
10 Veterans Administration for the benefit of the children
11 who are not living with the veteran.

12 That brought it to a head real quickly. He
13 was in fact incarcerated for a short period of time and
14 we brought this case up through the state courts and are
15 now here asking the Court, this Court, the Supreme Court
16 of the United States, to determine whether what we have
17 here is in fact a levy, an attachment or a seizure of
18 these veterans disability benefits.

19 The logic of the State is this --

20 QUESTION: That has to be your position, isn't
21 it, that it equates with an attachment, or if you will,
22 a garnishment?

23 MR. JONES: Yes, Your Honor. A right without
24 the ability to assert that right is no right at all. In
25 this case the states are saying, "If you enforce your

1 federal rights to have this property, unassignable, then
2 you lose your freedom. The decision, Mr. Rose, is
3 yours."

4 QUESTION: Mr. Jones, if this were a similar
5 provision in a spendthrift trust in the private sector
6 rather than in a statute, I suppose there is
7 considerable authority that the State's position is
8 correct, that support payments can be ordered and can be
9 enforced by contempt proceedings and are not subject to
10 the spendthrift trust provisions.

11 Is that right?

12 MR. JONES: I cannot answer that, Your Honor.
13 I would be glad to brief it, if it would shed light for
14 this Court.

15 We think, though, that the Act of Congress
16 which has vested jurisdiction of these funds for child
17 support matters in the Veterans Administration, is
18 conclusive and controlling, particularly in light of the
19 fact that there's the anti-attachment provisions in the
20 law which is very similar to what this Court decided in
21 Hisquierdo in 1979 and McCarty versus McCarty in 1981,
22 which Congress re-examined those and passed new laws but
23 as in those cases, this is a question for the Congress
24 to determine and not for the states in an effort to
25 override or circumvent the laws which Congress had

1 enacted.

2 QUESTION: Mr. Jones, your basic argument is
3 that Congress wanted this money to be for the exclusive
4 use of the veteran and not to be allocable to his
5 dependents?

6 MR. JONES: No, Justice Scalia. That is not
7 what the law is at all. The law says that -- I think
8 the purpose or the intent is that the Administrator of
9 the Veterans Administration is in a better position to
10 weigh the needs of the disabled veteran and the needs of
11 the family, and because there is a national interest
12 involved here, raising a military and providing for the
13 military, that if the family has to suffer because the
14 veteran's needs are greater than the family's needs,
15 then it's because it's a vital national interest.

16 QUESTION: How has the Administrator used his
17 authority under Section 3107? Does he do it on a
18 case-by-case basis or is it just this \$90 minimum that
19 you are talking about?

20 MR. JONES: No, Your Honor. The Veterans
21 Administration has promulgated regulations wherein a
22 custodial parent may petition, has a right to petition,
23 the Veterans Administration and then the benefits will
24 be apportioned according to the equities of the case.

25 There are some 27,000 veterans' former spouses

1 receiving money through that procedure at the present
2 time.

3 QUESTION: Mr. Jones, do you really think that
4 some remote, distant federal institution like the
5 Veterans Administration is in a better position as a
6 practical matter to consider the details and equities of
7 all these thousands of cases and to consider the real
8 needs of the children and the disabled veteran, than
9 state courts where these matters are traditionally
10 handled?

11 MR. JONES: Your Honor, I would be reluctant
12 to respond to that. I think Congress has spoken with
13 force and clarity in this matter and I think that they
14 have made the decision. I think that they have weighed
15 it, and if they are wrong I am sure they'll re-evaluate
16 their position.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

18 We will hear now from you, Mr. Clegg.

19 Mr. Clegg, somewhere in your argument you will
20 tell me how this order affects the payment of this
21 disability monthly check, if it is monthly, in any way.
22 It still goes direct to the veteran, as I understand
23 it. You carry on and relate it to me.

24 ORAL ARGUMENT OF ROGER CLEGG, ESQ.

25 AS AMICUS CURIAE SUPPORTING APPELLANT

1 MR. CLEGG: I will address that, and feel free
2 to remind me if I overlook that.

3 Thank you, Mr. Chief Justice, and may it
4 please the Court:

5 The issue in this case is whether a state
6 court can require a divorced veteran to pay over part of
7 his disability benefits for child support, or whether
8 that kind of apportionment can be made only by the
9 Veterans Administration.

10 This case is not about whether appellees
11 should get child support from Mr. Rose's benefits or
12 even about how much child support she should get. It is
13 about who decides these questions, the state court or
14 the Veterans Administration.

15 QUESTION: Let me ask you, Mr. Clegg, and I
16 think it has been gone into before but I want to make
17 certain I understand. What actually happened here is
18 that the state court entered an order requiring that Mr.
19 Rose pay \$800 a month for child support?

20 MR. CLEGG: That is correct.

21 QUESTION: Was there any effort to garnish?

22 MR. CLEGG: No, there was not.

23 QUESTION: Or attach?

24 MR. CLEGG: Let me give the --

25 QUESTION: Can you answer whether or not there

1 was any effort?

2 MR. CLEGG: No, there was not. However, it is
3 clear from the proceedings that the court knew that the
4 payments would have to come from these veterans
5 disability benefits, and the court said -- knew that,
6 and saying that said to Mr. Rose, "Pay this child
7 support that you have fallen behind in or you will go to
8 jail."

9 QUESTION: But why does that equate with an
10 attachment or a garnishment?

11 MR. CLEGG: Why isn't it a seizure? I think
12 that our argument is that reading 38 U.S.C. 3101(a), it
13 is an attachment levy or seizure. 3101(a) reads,
14 "Payments of benefits due or to become due under any law
15 administered by the Veterans Administration shall be
16 exempt from taxation, shall be exempt from the claim of
17 creditors, and shall not be liable to attachment, levy
18 or seizure by or under any legal or equitable process
19 whatever" --

20 QUESTION: But where was this --

21 MR. CLEGG: -- "before or after" --

22 QUESTION: Where was the attachment or
23 garnishment or seizure anywhere along the line?

24 MR. CLEGG: Your Honor, the --

25 QUESTION: The Veterans Administration still

1 paid it monthly direct to the veteran?

2 MR. CLEGG: That's right, and he would get it
3 and if he was willing to stay in jail he could continue
4 to receive it. That's correct.

5 I don't think that that is a fair reading of
6 3101. I don't think that --

7 QUESTION: If he owed some merchant and the
8 merchant sued and the court ordered the veteran to pay
9 the creditor out of his check, that statute would bar it
10 because the funds are exempt from the claims of
11 creditors, is that it?

12 MR. CLEGG: That's right, and that's the
13 second string to our bow, is that we think that Mrs.
14 Rose here is a creditor. If that is correct, then the
15 language of attachment, levy and seizure need not be met.

16 Again, though, I don't think it is proper to
17 read the evidently very broad language of Section 3101
18 in such a narrow fashion, and the Court in the
19 Hisquierdo case was reading an almost identically worded
20 section 231-M and did not feel so constrained. Family
21 law --

22 QUESTION: May I just follow up on Justice
23 White's question. Does it mean that in the -- say a
24 creditor case, say the creditor got a judgment for
25 \$1,000. Would you say the Tennessee court couldn't even

1 enter the judgment?

2 Maybe it wouldn't be collectable, but could
3 they defend the suit if, say, he bought some new clothes
4 or a car or something and ran up a bill of a couple
5 thousand dollars at a store and the store then sued him
6 for the \$2,000 and he defended on the ground, "The only
7 money I have I received from the Veterans
8 Administration, ergo, don't enter a judgment against me."

9 Could he do that?

10 QUESTION: Well, they could get the judgment,
11 I guess, but --

12 MR. CLEGG: The judgment, fine, but when the
13 court turns to him and says, "Pay this or go to jail" --

14 QUESTION: All right. So that, is it, just by
15 analogy then, is the order requiring the payment of \$800
16 a month different from the judgment? Maybe the -- or
17 say, "Go to jail or pay it," maybe.

18 Is the order of the Tennessee court itself
19 requiring the payment contrary to the federal statute?

20 MR. CLEGG: I think that it is in this context
21 where, you know, the sheriff was there and the Court
22 turned to the sheriff and said, you know, "Take him into
23 custody," and where he was in fact in custody and
24 incarcerated in this case.

25 QUESTION: That's the only position you can

1 take, isn't it?

2 MR. CLEGG: I'm sorry?

3 QUESTION: That the only position you can take.

4 MR. CLEGG: Well, I think that even -- I'm not
5 sure about that, Justice Blackmun. I think that because
6 in this case he was in fact put in jail, even if the
7 court order was not violative of Section 3101, that the
8 judgment of the Tennessee Court of Appeals affirming
9 that order was.

10 QUESTION: Well, are the contempt proceedings
11 where the Court tells him to go to jail -- it is
12 ordinarily separate from the order requiring him to pay,
13 isn't it?

14 MR. CLEGG: That's correct, but --

15 QUESTION: Was it separate here? I mean, was
16 an order first entered requiring him to pay \$800 a month
17 and then when he was unable to comply he was held in
18 contempt?

19 MR. CLEGG: I believe that the sequence was
20 that that order was entered. There was a hearing where
21 Mr. Rose said, "I don't believe that I have to pay this
22 until the Veterans Administration has apportioned the
23 amount."

24 The Court said, "I don't believe that that's
25 what the law is. Pay it or you will go to jail."

1 They conferred, counsel and Mr. Rose conferred
2 and came back to the Court and said, "Well, we're going
3 to stand on our rights," and the Judge said, "Fine,
4 you're going to jail." And he went to jail.

5 QUESTION: Well, whether you're willing to do
6 so or not, surely you could confine your attack to the
7 order committing him for contempt, saying that the state
8 court order, "Pay \$800," isn't indicating where that
9 money should come from. It's only when the state judge
10 knows that he is going to have to pay these Veterans
11 Administration benefits and still insists on sending him
12 to jail if he doesn't, that's your legal or equitable
13 process, not the entry of the order.

14 MR. CLEGG: That's our best argument, Your
15 Honor.

16 QUESTION: Mr. Clegg, isn't there really a
17 line of common law precedents and cases that distinguish
18 familial obligations from commercial obligations, and in
19 similar contexts, in spendthrift trust provisions
20 written just like this statute, haven't courts enforced
21 those familial obligations?

22 MR. CLEGG: Well, there has been a divergence
23 of opinion on that, Justice O'Connor, and as Appellant
24 State point out, this law was -- 3101 was enacted in
25 these terms in 1935. In 1932 there was an Idaho Supreme

1 Court decision which upholds the government's position
2 in this case.

3 In 1933 there was the Tennessee State Court
4 decision which upholds the government's position in this
5 case. In 1936, the year afterwards, there was a New
6 York State Court opinion upholding the government's
7 position in this case.

8 So, I think that you are quite right that
9 there is a line of authority that treats alimony and
10 child support differently, but I don't think that that
11 authority is so clear that it can override the very
12 explicit and broad language in this statute, which this
13 Court said in the Porter versus Aetna case, is to be
14 construed broadly.

15 QUESTION: What about the other assets that
16 Mr. Rose might have had? Do you take the position that
17 whatever aid he received to acquire housing is governed
18 by precisely the same statutory language?

19 MR. CLEGG: I believe that it would be,
20 Justice O'Connor, because 3101, as I said, "payments of
21 benefits due or to become due under any law administered
22 by the Veterans Administration." I should add that the
23 \$7,000 that you brought up, Mr. Rose filed an affidavit
24 saying, you know, before the Tennessee court saying that
25 that money was no longer available at the time.

1 So, it was clear to the Court that Mr. Rose
2 was going to have to make this payment out of veterans
3 disability benefits or go to jail. It's quite clear.

4 QUESTION: Mr. Clegg, I take it your argument
5 is that even in the absence of this no attachment, no
6 garnishment statute, that this order was invalid because
7 it invaded the -- it was contrary to the intent of
8 Congress with respect to who should make these kinds of
9 rules?

10 MR. CLEGG: That's right.

11 QUESTION: Wholly an independent argument?

12 MR. CLEGG: That's right. I mean, we think
13 that 3101 is sufficient for this case. But it is not
14 our only argument.

15 There is the fact that in 42 U.S.C. 659 and
16 662 where Congress provided explicitly that certain
17 federal payments could be subjected to legal process for
18 child support, it exempted any payments for Veterans
19 Administration payments. This is similar to the
20 reasoning that the Court used in the McCarty case.

21 And as you say, Congress said in 38 U.S.C.
22 3107 that the Veterans Administration would have this
23 power. I should add that -- in response to one of the
24 earlier questions -- that this procedure is one not only
25 that has been used 27,000 times but which is laid out in

1 the regulations.

2 The Veterans Administration, and it's a
3 regional office that does this, so it's not completely --

4 QUESTION: So, where would someone in
5 Tennessee have to go?

6 MR. CLEGG: I assume it's somewhere in
7 Tennessee.

8 QUESTION: Does the VA ever pay more than \$90
9 a month?

10 MR. CLEGG: Yes, they do, and in fact the
11 regulations say that in a typical apportionment case
12 somewhere between 20 and 50 percent of the benefits is
13 generally an equitable amount. In this case that would
14 come out to \$700 a month, almost as much --

15 QUESTION: But that's not -- why do we have
16 the \$90 figure here?

17 MR. CLEGG: That's the statutory amount that
18 is automatically given a veteran when he has an
19 additional child dependent. But the VA is not limited
20 to that and has not limited themselves to that.

21 The VA is going to consider the same factors
22 that the state court considered. It is going to
23 consider the need of the veteran, the need of his
24 children, their other income, and the level of benefits
25 that he gets.

1 In short, I think that Congress has spoken
2 explicitly to this question and --

3 QUESTION: Mr. Clegg, suppose that he had \$400
4 a month income from some independent source, some
5 retirement.

6 MR. CLEGG: No problem with that.

7 QUESTION: What do you mean, no problem?

8 Wouldn't you be taking the same position here because
9 \$400 is only one-half of \$800?

10 MR. CLEGG: I'm sorry.

11 QUESTION: That \$400 would have to come out of
12 his disability payment? Wouldn't you be making the same
13 argument here?

14 MR. CLEGG: Yes. That \$400 --

15 QUESTION: Suppose it were \$795, and five
16 dollars that he had to use out of the disability
17 payment--

18 MR. CLEGG: Yes.

19 QUESTION: You still would be here for the
20 \$500?

21 MR. CLEGG: For the five dollars, yes. The
22 Court can consider these benefits in setting child
23 support payments. It can take all his other money
24 away. But what it can't do is touch one penny of those
25 veterans benefits.

1 QUESTION: So, each month, then, one would
2 have to look at his independent income to see whether
3 there is a violation of the statute, each month? He
4 might in some month have \$805 from independent income?

5 MR. CLEGG: That's right. That's right.

6 QUESTION: That's not a very good system, is
7 it?

8 MR. CLEGG: That problem is avoided if you go
9 to Veterans Administration in the first instance and if
10 you go to the state court in the first instance then the
11 problem is going to arise only if the veteran asserts
12 that he is being forced to pay out of his disability
13 benefits and then the burden of proof is going to be on
14 him to show that.

15 QUESTION: Wouldn't the federal government
16 have a right to tell somebody what they can do with that
17 money?

18 MR. CLEGG: Yes, Justice Marshall, and in this
19 instance Congress set out a statutory scheme that
20 provides that the Veterans Administration --

21 QUESTION: Well, is it welfare?

22 MR. CLEGG: No, it's veterans disability
23 benefits.

24 QUESTION: What is it, a disability payment?

25 MR. CLEGG: Yes.

1 QUESTION: That wasn't earned?

2 MR. CLEGG: I think it was earned.

3 I'd like to reserve the remainder of my time
4 for rebuttal.

5 CHIEF JUSTICE REHNQUIST: Very well, Mr. Clegg.

6 We will hear next from you, Mr. Sherrod.

7 ORAL ARGUMENT OF HOWELL H. SHERROD., JR., ESQ.

8 ON BEHALF OF APPELLEE ROSE

9 MR. SHERROD: Mr. Chief Justice, and if it may
10 please the Court:

11 This case is not a veterans case to start
12 with. It is a case that arose out of a divorce in
13 Tennessee where there was a hearing, where Mr. Rose was
14 represented by an attorney who declined to put on proof
15 in a divorce case, that the court, the Tennessee Court
16 was the only forum that Ms. Rose had to approach because
17 the State of Tennessee as the exclusive jurisdiction of
18 dissolution of marriage. Custody and support flow from
19 that.

20 At the time that the court originally heard
21 the divorce, Mr. Rose made \$43,000 tax-free. The court
22 is obligated under Tennessee law to make a decision as
23 to the relative abilities to pay by the parents of the
24 children and then look at the needs of the children, and
25 then make an award.

1 They did this. They made an award of \$800 a
2 month. Of the \$800 a month there was a source of income
3 for Mr. Rose outside his veterans benefits in the amount
4 of \$474 today. It was \$465 at the time the award was
5 made. The difference would have to be made up.

6 In the original divorce they split the equity
7 in the house. Mr. Rose got \$12,000. I would
8 respectfully suggest that the federal statutes do not
9 protect the property -- the payments, once items have
10 been purchased, and that that money was available to
11 make up the difference between his income that was not
12 veterans benefits and the \$800 awarded by the court.

13 The time for the contempt was approximately
14 five or six months later. At that point in time there
15 was no way -- I said there is no way -- there is no
16 indication that the \$12,000 had been spent. In fact,
17 Mr. Rose files an affidavit that says, "I have spent
18 some of the money and the rest of it I have set aside
19 for this litigation as opposed to paying my kids' child
20 support."

21 QUESTION: Mr. Sherrod.

22 MR. SHERROD: Yes, ma'am.

23 QUESTION: Apparently Mrs. Rose never made
24 application to the VA for an apportionment or child
25 care--

1 MR. SHERROD: That is correct, and there is a
2 reason. There are two parallel systems. It's like
3 comparing apples and oranges or rocks. It has a
4 Tennessee statute which looks at custody and awards
5 support for children based upon the ability of the
6 parents to pay and the needs of the child.

7 That adjudication is made based upon any
8 evidence which is brought before the court, which Mr.
9 Rose could have done. The veterans' apportionment is
10 there specifically for those cases where a veteran might
11 become incompetent or the state remedy might otherwise
12 be inadequate and you couldn't, for example, get service
13 of process over a veteran.

14 Then, a person could go to --

15 QUESTION: But you don't take the position, do
16 you, that Mrs. Rose was somehow precluded by state law
17 or otherwise from applying at the VA for an
18 apportionment?

19 MR. SHERROD: No, it would just have been a
20 futile act. There would be no reason for her to go
21 there because the State of Tennessee had the
22 jurisdiction to do what she wanted to do, that is,
23 procure --

24 QUESTION: But it would hardly be futile if
25 she could get money.

1 MR. SHERROD: Well, it's two parallel
2 systems. She had a choice.

3 QUESTION: She just chose not to do it?

4 MR. SHERROD: Yes, ma'am.

5 QUESTION: Nothing under Tennessee law would
6 have prevented her from going to the VA in addition to
7 getting her divorce and getting custody of the children,
8 would it?

9 MR. SHERROD: Nothing would have prevented her
10 from asking for an apportionment. The VA does not take
11 the same factors into account, though, that the state
12 court would.

13 QUESTION: She might have been unsuccessful or
14 less successful, but she didn't even try here?

15 MR. SHERROD: She did not try, and she would
16 have had to go to Nashville, Tennessee and they do not
17 have any published means by which one could effect this
18 procurement. For example, under the Veterans' rules and
19 regulations, she would have made her application.

20 If an objection was made, it could have been
21 up to a year before a decision would have been made and
22 during that period of time she would have received no
23 allocation. The Veterans Administration takes into
24 consideration such things as the meritoriousness of the
25 custodial spouse, which has nothing to do with the

1 rights of the children.

2 For example, they could have found that this
3 was an unfit person to get an allocation, "Therefore,
4 we're not going to give it regardless of the needs of
5 the children."

6 QUESTION: I take it, though, Mr. Sherrod,
7 it's your position that if she had gone, maybe after a
8 delay and gotten, say three or four hundred dollars a
9 month from the direct payment out of the Veterans
10 Administration, you could then have gone back to the
11 Tennessee court and said, "This isn't enough, we need an
12 additional allotment"?

13 MR. SHERROD: Yes, Your Honor.

14 QUESTION: So you could have had both, I
15 suppose, at least theoretically, under your view of the
16 case?

17 MR. SHERROD: Yes, Your Honor, but all you get
18 -- you're not getting the same thing. What you get from
19 the State of Tennessee is an order of support. What
20 you get from the Veterans Administration is an allotment
21 check that comes directly from the government to be
22 applied to the order of support.

23 QUESTION: Right.

24 MR. SHERROD: Theoretically, I guess, the
25 Veterans Administration could say, we're going to give

1 an allotment check of \$1,000. Well, when it comes Mr.
2 Rose only owes \$800, so \$200 would be immediately
3 refundable.

4 I find it hard to fathom that the Veterans
5 Administration would give an allotment check --

6 QUESTION: But if you would rather get your
7 money in that form and then pay the overage back than
8 have to fight for it every month --

9 MR. SHERROD: Yes, sir. A question was asked,
10 too, about what are veterans' benefits, and they are
11 actually an earnings replacement based upon average
12 impairment in earning capacity. And so, given that, the
13 other cases like this, Hisquierdo and McCarty, talk
14 about money going to a beneficiary.

15 In this particular case the beneficiary is not
16 the veteran. The beneficiary is the veteran and his
17 family, and his family includes his children, divorced
18 or not divorced, and under those circumstances
19 Hisquierdo and McCarty would be readily distinguishable
20 because these are the same dollars that the man was
21 using to pay for his children for the ten years he was
22 married.

23 That money was sent to him as a replacement
24 for his income. He made the choice to get married and
25 have children. He has the income to support them.

1 Now taking the worst case, what if his wife
2 had died and now he's got his children without a custody
3 order, he just has custody. And he takes the position,
4 well, I don't have to buy their clothes any more. I
5 don't have to buy their food.

6 Is he immune from any kind of civil or
7 criminal prosecution because it's veterans benefits and
8 nobody can get them? I think that would be a very
9 untenable position for the government to take, and it's
10 an extreme example.

11 The purpose of the state jurisdiction is not
12 the same as the purpose of the federal regulations.
13 Like what I just said, the federal regulations are
14 basically in addition to any state jurisdiction that's
15 available.

16 There is no major damage which we can see
17 which we believe to be the test. We do not believe the
18 test is exclusivity of the VA apportionment procedure
19 because if that's true, they would not have provided for
20 apportionees to receive parts of the money.

21 I mean, if it says they may consider upon
22 proper application whether or not to make an
23 apportionment --

24 QUESTION: But how about getting away from the
25 apportionment statute and getting back to the

1 attachment, garnishment statute, don't you -- because
2 it's a pretty strong argument that an order committing
3 Mr. Rose for contempt for failure to pay the child
4 support payments would come under the definition of
5 attachment, levy or seizure by any legal or equitable
6 process whatever?

7 MR. SHERROD: No, Mr. Chief Justice, because
8 the order doesn't interfere with the flow of money from
9 the VA to the veteran. It's not -- and were the
10 government to make the statement that this protection of
11 anti-attachment follows what is purchased by the funds,
12 I believe tht to be incorrect.

13 QUESTION: But how about the language at the
14 very end of 38 U.S.C. 3101 where it says, "either before
15 or after receipt by the beneficiary"?

16 MR. SHERROD: Are you talking about where
17 there is a contempt action that, you are going to jail
18 if you don't pay this money?

19 QUESTION: Well, the language I just read said
20 that you can't have equitable process or attachment or
21 garnishment, anything like that, either before or after
22 receipt by the beneficiary. So, it seems to me it's
23 designed to do more than just not interfere with the
24 flow of money from the VA to the veteran.

25 MR. SHERROD: Well, there is no specific

1 intent. The veteran still has the ability to, in this
2 particular case especially, not to pay -- not to use VA
3 benefits.

4 At the time the order of contempt was made, he
5 was in a position that he could have paid outside the
6 veterans' benefits and still made his payments. So, in
7 this particular case, factually it wouldn't apply.
8 Theoretically I do not believe -- I think it is
9 distinguishable.

10 It is not a -- I think the words are "specific
11 attachment" which would include a garnishment or process
12 such as that. And I think what it is, if a court
13 doesn't have the jurisdiction to enforce its orders --

14 QUESTION: Well, if the Tennessee Court of
15 Appeals had said he could have made these payments
16 without invading veterans' benefits we might have a
17 different case. But that isn't what they said.

18 MR. SHERROD: The only cases that benefits
19 don't seem to address your point, if it is that there is
20 a federal interest that they are trying to protect and
21 there is no federal interest in this case that is trying
22 to be protected, because even if the veterans' benefits
23 were supposed to be used entirely for the \$800 and the
24 court ordered contempt, the benefits in this case are
25 not those benefits that are specifically protected by a

1 federal statute.

2 So, I would say that it would not be
3 applicable, not that it couldn't be called an equivalent
4 process. I just think it would not be applicable.

5 The case that comes to mind is Robison where
6 there was a review of educational benefits and the
7 Veterans Administration -- in that particular case it's
8 "state jurisdiction is not judicial review." And I'm
9 trying to liken that the contempt is not the equivalent
10 -- it's not trying to place judicial review or Veterans
11 Administration use or the allocation of specific
12 veterans funds to a use which they were not supposed to
13 be applied. I think none of those apply in this case.

14 QUESTION: I was thinking the contempt
15 citation was analogous, or at least might be governed by
16 the language, "attachment, levy or seizure by any legal
17 or equitable process whatever."

18 If you are told, you know, either you pay this
19 money out of the \$300 or you go to jail, that certainly
20 comes pretty close to any kind of legal or equitable
21 process.

22 MR. SHERROD: It seems to me like we would be
23 prostituting the Section 3101 which is not there to
24 protect the veteran -- it's there to protect the veteran
25 and his family from creditors but it's not there to

1 protect the veteran from his family and that's what
2 they're using it for in this case.

3 I guess that's what I am trying to say. I
4 would also say that our argument would be the same if
5 the veteran were injured after or -- it doesn't make any
6 difference whether his disability occurred before or
7 after he married and had children.

8 We feel that it's a choice that he makes. In
9 a particular case, had he married and had children, you
10 know -- I think every person is chargeable with the fact
11 that if you have children you're going to have a duty to
12 support them and I don't think you can have children and
13 then ignore the duty of -- regardless of when the
14 disability comes along.

15 So, when you make that -

16 QUESTION: And supposedly, if this statute
17 prevents what was attempted to be done here on the basis
18 of the "attachment, levy, garnishment" language it would
19 also prevent this veteran from being incarcerated for
20 child support, for failure to support his children when
21 his wife is still alive.

22 MR. SHERROD: Yes, sir, I would think that
23 would be true.

24 QUESTION: The State could not proceed against
25 him at all for failure to support his children and his

1 obligation would be dependent entirely upon whatever the
2 VA thought was appropriate?

3 MR. SHERROD: Yes, sir, I believe that would
4 be the result. I will also state we found no
5 legislative or congressional intent that pre-empts state
6 law in this area.

7 The only legislative intent that we found was
8 to see that a veteran is protected, and a veteran is
9 protected under many of the statutes but under this
10 particular statute the veteran and his family is to be
11 protected. I'd reiterate that.

12 If there are no further questions, I would
13 defer to Mr. Cody.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Sherrod.

16 General Cody, we will hear from you at this
17 time.

18 ORAL ARGUMENT OF W. J. MICHAEL CODY, ESQ.

19 ON BEHALF OF APPELLEE TENNESSEE

20 MR. CODY: Mr. Chief Justice, and may it
21 please the Court:

22 It is the position of the State of Tennessee
23 that Congress has not pre-empted in this case the
24 traditional function of the states in determining child
25 support. The Tennessee statute is constitutional on its

1 face and is applied here in that there is no expressed
2 conflict with federal law and no major damage to clear
3 and substantial federal interest in this case.

4 QUESTION: What do you feel is the purpose of
5 the provision that allows the Administrator to
6 apportion? What is it there for?

7 MR. CODY: Justice, it is our view that 3107,
8 which is the apportionment statute, is an administrative
9 aid in child support enforcement. It is an alternative
10 and a parallel proceeding which is compatible with state
11 court enforcement.

12 It is a method that allows the government to
13 make direct payments to the children, something that of
14 course the state court cannot do. It is available in
15 addition to or when state court remedies are unavailable
16 or inapplicable.

17 When this statute was originally passed in
18 1924 it primarily was concerned with incompetence, and
19 it still applies in that situation. There might be a
20 case where there was a separation but not a divorce,
21 where the husband is in another state or where they
22 might not even know where the husband is.

23 It is a way that the government can assist in
24 a direct payment. We think the statute is clear that it
25 is not exclusive. The language -- the word "may" is

1 used twice in the statute.

2 The state court in its order is not making an
3 apportionment. It's not doing anything akin to 3107.
4 It's not executing on a federal interest. And there's
5 no division of that interest.

6 The state believes that this Court, as well as
7 Congress, has recognized that domestic relations
8 including the protection of children and the support of
9 children belongs to the laws of the state, and the state
10 courts provide forums and have historical expertise and
11 the ability to give a comprehensive review to support,
12 custody and visitation, all of those things that are
13 involved.

14 So, there has developed an area, I believe, in
15 the law which requires a presumption against pre-emption
16 in the field of domestic relations. Congress must
17 positively require by direct enactment, before this
18 pre-emption will be presumed.

19 The consequences of the conflict, if they
20 could be found in one of these three statutes which we
21 submit are not there, those conflicts would have to
22 sufficiently injure a federal program so as to require a
23 non-recognition.

24 We believe that here there is no major damage
25 to any clear and substantial federal interest. The

1 purpose here, as indicated earlier, is that if a veteran
2 is disabled that he and his dependents will have a
3 source of income to replace these lost earnings.

4 I think, as Justice O'Connor indicated, there
5 is a body of law from this Court beginning with the
6 Westmore decision in 1904, that says that children are
7 not creditors and child support is not a debt; that this
8 exemption in 3101 is for the veteran and his family and
9 not for the veteran against his family.

10 Prior judicial considerations in this area, we
11 think overwhelmingly show that the courts -- the D.C.
12 Circuit, two decisions there, and nine states have held
13 that child support is not within exemptions, and
14 Congress has re-enacted this statute many times without
15 significant change.

16 We believe that there was a desire on the part
17 of Congress to protect veterans from creditors and not
18 to protect veterans from state courts; that if Congress
19 had intended the 3107, the apportionment aspect, to be a
20 sole recourse rather than an ancillary and an assisting
21 resource, then it could have said so clearly.

22 We submit that under the facts of this case,
23 that there has been no damage to any substantial federal
24 interest. It is suggested by the Solicitor that the
25 interest here is that if a veteran believes that his

1 disability benefits might be awarded to his children by
2 a state court that somehow he might conceal his injury.

3 That does not seem to be a strong purpose
4 because military pay is already subject to garnishment
5 itself, and we believe it untenable that Congress would
6 have intended that this result would happen.

7 QUESTION: General Cody, your argument raised
8 a question in my mind about these 27,000 cases over at
9 the Veterans Administration. You suggest that many of
10 them may be voluntary arrangements where there is not
11 necessarily a divorce situation but where there is a
12 reason why they would not want to pay the money directly
13 to the veteran but might to a dependent.

14 I just notice the statute authorizes payment
15 to, on behalf of the veteran, spouse, children or
16 dependent parents. But this case doesn't involve a
17 spouse. It's an ex-spouse.

18 Do you agree that they actually make these
19 payments to former spouses as well as spouses?

20 MR. CODY: If the Court please, Mr. Justice, I
21 think that one of the difficulties that we have in this
22 record is the way this case came up, there is very
23 little information as to how the VA procedure does work
24 because the apportionment situation did not occur.

25 When the Solicitor mentioned in that regard

1 that it could be 20 percent as a minimum given, under
2 the regulations that apparently only applies to a
3 hardship situation and not a regular apportionment.

4 It is difficult for me to answer your question
5 but I think that we would have to say that if the
6 apportionment statute means anything at all, that it
7 would have to be available to a separated or a former
8 spouse. But we believe it is an ancillary procedure
9 that, in line with the 1975, 1977 and '84 child
10 enforcement support legislation, that Congress
11 recognized that we've got an emergency in this country
12 in supporting children, in getting assets available to
13 them, and this is just a way that the federal government
14 assists in what is primarily a state, traditional state
15 function.

16 If there are no further questions.

17 CHIEF JUSTICE REHNQUIST: Thank you, General
18 Cody.

19 Mr. Clegg, you have one minute remaining.

20 ORAL ARGUMENT OF ROGER CLEGG, ESQ.

21 AS AMICUS CURIAE SUPPORTING APPELLANT - REBUTTAL

22 QUESTION: Mr. Clegg, I hate to impose on your
23 one minute, but really what do you do about the
24 situation where a veteran who is receiving benefits, his
25 wife hasn't left him, his children are still living with

1 him, and the state wants to move against him for failure
2 to support his children?

3 What can they do? Can the state do anything?

4 MR. CLEGG: Well, they can go after everything
5 except for the disability.

6 QUESTION: Well, they couldn't put him in jail
7 or couldn't punish him at all because so long as that's
8 all that he's getting, you are saying they can't punish
9 him for failure to support his children, right?

10 MR. CLEGG: They have to go to the Veterans
11 Administration in that situation.

12 QUESTION: That's pretty extreme, isn't it?

13 MR. CLEGG: I don't think that that's
14 extreme. That is the statutory scheme that Congress
15 has. The Veterans Administration has been charged with
16 the care of veterans and overseeing the payment of their
17 benefits.

18 QUESTION: May I ask one other question? Is
19 it your view that, supposing there is enough money, say
20 the man had enough money to pay \$700 or \$800 a month of
21 support money, but the court fixed that amount largely
22 on the basis of the availability of the -- that would
23 not violate the statute?

24 MR. CLEGG: That's fine.

25 QUESTION: That's fine. And you do say that

1 the word "spouse" includes former spouses in Section
2 3107?

3 MR. CLEGG: Yes. The regulation -- if I can
4 complete this answer --

5 QUESTION: But the regulations --

6 MR. CLEGG: Money can go directly to the
7 children in this situation. That is what would happen.
8 It would go to the children through the former spouse.

9 QUESTION: But it would be support money
10 rather than alimony? It would not authorize the payment
11 of the equivalent alimony, then?

12 MR. CLEGG: The regulations say that payment
13 can be made to estranged spouses. I don't know if that
14 includes ex-spouses.

15 QUESTION: Well, see, an estranged spouse
16 would be a spouse but a divorced spouse is not a spouse.

17 MR. CLEGG: I'm not sure whether --

18 QUESTION: See, the thing, your 27,000 person
19 figure is a very persuasive figure, but maybe they are
20 all cases in which the veteran was perfectly happy to
21 have all or any part of the compensation paid to the
22 family because he was unable to write checks or
23 something like that.

24 MR. CLEGG: Well, mainly the 27,000 figure is
25 to show that apportionments are not something that are

1 never made by the VA. There are --

2 QUESTION: But we don't know how many of those
3 are broken families?

4 MR. CLEGG: No, we don't. I mean, it could be
5 all or it could be none.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clegg.

7 MR. CLEGG: Thank you.

8 CHIEF JUSTICE REHNQUIST: The case is
9 submitted.

10 (Whereupon, at 11:50 o'clock a.m., the case in
11 the above-entitled matter was submitted.)
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CERTIFICATION

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#85-1206 - CHARLIE WAYNE ROSE, Appellant V. BARBARA ANN McNEIL ROSE AND
TENNESSEE

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