

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TINA B. BENNIS, Petitioner v. MICHIGAN

CASE NO: No. 94-8729

PLACE: Washington, D.C.

DATE: November 29, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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TINA B. BENNIS, :
Petitioner :
v. : No. 94-8729
MICHIGAN :
- - - - -X

Washington, D.C.
Wednesday, November 29, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

STEFAN B. HERPEL, ESQ., Ann Arbor, Michigan; on behalf of the Petitioner.

LARRY L. ROBERTS, ESQ., Assistant Prosecuting Attorney, Wayne County, Detroit, Michigan; on behalf of the Respondent.

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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1 PROCEEDINGS

2 (11:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-8729 -- the spectators are admonished
5 not to talk until you get out of the courtroom. The Court
6 remains in session.

7 We'll hear argument next in Number 94-8729, Tina
8 Bennis v. Michigan.

9 Mr. Herpel, you may proceed.

10 ORAL ARGUMENT OF STEFAN B. HERPEL

11 ON BEHALF OF THE PETITIONER

12 MR. HERPEL: Mr. Chief Justice, and may it
13 please the Court:

14 On an October evening in 1988, petitioner's
15 husband, John Bennis, was arrested for having illicit sex
16 with a prostitute in one of the Bennis family automobiles,
17 and Detroit police seized the automobile. Both Tina
18 Bennis' interest in the vehicle and her husband's interest
19 were declared forfeit under a Michigan nuisance abatement
20 statute.

21 The Michigan supreme court rejected petitioner's
22 claim that the Due Process and Takings Clauses protected
23 her, an innocent owner, from forfeiture.

24 QUESTION: Mr. Herpel, will you tell us what the
25 record shows was the nature of the ownership in the

1 automobile in question?

2 MR. HERPEL: The record shows that the vehicle
3 was co-owned. That is, it was cotitled --

4 QUESTION: What kind of ownership under State
5 law, joint with right of survivorship, cotenants, what was
6 it?

7 MR. HERPEL: Your Honor, I --

8 QUESTION: Do we know?

9 MR. HERPEL: It's a heavily regulated area and I
10 attempted to ascertain which common law joint property
11 interest this most closely resembled. I found nothing
12 definitive on that, but I believe --

13 QUESTION: You can't tell us?

14 MR. HERPEL: I believe it's close to a tenant in
15 common.

16 QUESTION: How was the automobile titled?

17 MR. HERPEL: The automobile was titled in their
18 name, but there's no --

19 QUESTION: In both names --

20 MR. HERPEL: Yes.

21 QUESTION: -- or one name?

22 MR. HERPEL: In both names.

23 QUESTION: In Michigan law, can one co-owner
24 dispose of good title to the automobile?

25 MR. HERPEL: I believe that that is true, Your

1 Honor, that -- not for the entire automobile. One co-
2 owner --

3 QUESTION: The entire automobile.

4 MR. HERPEL: No. I believe that both --

5 QUESTION: Could one owner dispose of it?

6 MR. HERPEL: I do not believe so, Justice
7 O'Connor.

8 QUESTION: But you can't give us any citations
9 or anything like that, or any place in the record where we
10 could ascertain the nature of the ownership.

11 MR. HERPEL: I'm sorry, I cannot, Your Honor,
12 but --

13 QUESTION: Well, it makes it very difficult,
14 doesn't it, to decide this case when we don't know the
15 nature of the ownership or what rights a single co-owner
16 would have.

17 MR. HERPEL: Well, I think it -- I'm quite
18 certain that the sole co-owner does not have the right to
19 sell the entire vehicle. That much I'm certain of, that
20 both signatures would be required to dispose of the --

21 QUESTION: You can't give us a case or a statute
22 or anything of that sort?

23 MR. HERPEL: I cannot.

24 QUESTION: No.

25 QUESTION: Are we supposed to assume -- I

1 wondered the same thing. I thought maybe we're -- that we
2 should take an assumption that the supreme court of
3 Michigan -- did the supreme court make an assumption,
4 namely the assumption that the ownership interest of your
5 client was such that she had an interest that otherwise
6 couldn't be touched, it was her property, she had an
7 undivided interest or some interest that was totally hers?

8 MR. HERPEL: That much I'm quite sure of, Your
9 Honor.

10 QUESTION: So what kind of an assumption should
11 we make? What kind of assumption did they make?

12 MR. HERPEL: Well, I think that they clearly
13 made an assumption that she had a separately protectable
14 interest in this car, for which --

15 QUESTION: So you're saying even if she had, it
16 was just like totally separate property under Michigan
17 law, she has under Michigan law something that's a 50-
18 percent separate interest, whatever that might mean --

19 MR. HERPEL: Yes, I would say --

20 QUESTION: Well, I'm looking for the same thing.
21 What kind of assumption do we make?

22 MR. HERPEL: Again, I would analogize it to a
23 tenancy in common.

24 QUESTION: Like a tenancy in common.

25 MR. HERPEL: She had the interest that one joint

1 owner in a tenancy in common would have, or one tenant.

2 QUESTION: Does one usually hold cars by tenancy
3 in common? Isn't -- but in any event, he is at least
4 half-owner, and you can't impound half a car, and you
5 can't sell at an auction half a car, so in effect your
6 position seems to be that she, because she is half-owner,
7 can immunize him against having his property taken, is
8 that essentially your position?

9 MR. HERPEL: No, Justice Ginsburg, we're not
10 contending that the State has no power to forfeit the
11 vehicle. What we are saying is they cannot do so without
12 compensating Tina Bennis, the innocent owner, for her
13 interest.

14 QUESTION: Well then, why can't -- but you're
15 not saying it would be enough to give her whatever
16 pittance was left from this sale after administrative
17 expenses.

18 MR. HERPEL: Well, I would -- we would contend,
19 Your Honor, that so-called administrative expenses,
20 attorney's fees, prosecutorial attorney fees and court
21 costs, Detroit police costs, are not properly assessable
22 against her interest, that that -- as a matter of
23 constitutional law that it is improper to assess those
24 costs against her --

25 QUESTION: Is it all right for the State to say

1 this vehicle is a public nuisance because of its use?

2 MR. HERPEL: Well, the court -- the court
3 certainly exceeded traditional notions of what constitutes
4 a public nuisance.

5 QUESTION: But didn't it -- suppose it had been
6 his car entirely, couldn't they have -- would there have
7 been anything unconstitutional about the forfeiture?

8 MR. HERPEL: I don't think the Court has to find
9 that in this case, Your Honor.

10 QUESTION: We've held in any number of cases
11 that there's not, that something that's used in the course
12 of committing a felony can be forfeited.

13 MR. HERPEL: I agree, Your Honor, and I only
14 hesitated because the Michigan supreme court applied an
15 extremely novel interpretation of nuisance law, but I
16 don't want to be sidetracked on that issue, because the
17 focus here is on the forfeitability of her interest in the
18 car.

19 QUESTION: Just before we get too far away from
20 the answer to Justice Ginsburg's question, if the State
21 can forfeit the husband's interest and in your position it
22 has to remit to the wife her interest -- I take it that's
23 your position.

24 MR. HERPEL: Yes, it is, Justice Kennedy.

25 QUESTION: Does the State have to compensate the

1 wife for the loss of use of the property, her portion of
2 the property while the forfeiture proceedings are being
3 conducted?

4 MR. HERPEL: Your Honor, I guess that gest into
5 the issue of whether pre-hearing seizure is appropriate,
6 which is not presented in this case. Assuming that pre-
7 hearing seizure, which is what was accomplished here, is
8 appropriate, I don't know that she would have a claim for
9 the loss of use of the vehicle in that interim period, if
10 that is your question.

11 QUESTION: But doesn't that indicate the
12 necessity of having a forfeiture provision such as this?

13 MR. HERPEL: I'm afraid I don't understand your
14 question, Justice Kennedy.

15 QUESTION: Well, if the most efficient way, if
16 the only efficient way for the State to enforce its laws,
17 let's say, is to forfeit the offending vehicle, then the
18 forfeiture system is adequate, and all you're asking for
19 is that the wife's financial interest in the automobile
20 represented by her half of the equity be returned to her,
21 is that your position?

22 MR. HERPEL: That's the position that we're
23 taking in this case, Your Honor.

24 QUESTION: And in this case it's a 1977
25 automobile?

1 MR. HERPEL: That is correct, Justice --

2 QUESTION: What kind of automobile?

3 MR. HERPEL: It was a Pontiac sedan.

4 QUESTION: And so her interest would be about
5 what, would you say?

6 MR. HERPEL: Well, presumptively it would be
7 50 percent of the resale value of the car. I believe the
8 car was purchased approximately -- the record will show
9 that it was purchased approximately 1 month before the
10 forfeiture, and she did testify that she provided most of
11 the purchase money for the car, that there may be an
12 opportunity to rebut the presumption of 50 percent --

13 QUESTION: And how much was paid for it? Does
14 the record tell us that?

15 MR. HERPEL: \$600.

16 QUESTION: So we're talking about a claim of
17 \$300 for her.

18 MR. HERPEL: Yes, at least \$300.

19 QUESTION: Mr. Herpel, you referred to your
20 client as an innocent owner, and how do you define
21 innocent owner for these purposes?

22 MR. HERPEL: Well, Your Honor, there are -- we
23 propose a standard for defining innocence that we term the
24 negligent entrustment standard, which focuses on whether
25 the owner knew or should have known of the impending

1 illegal use. The Solicitor General has proposed an
2 alternative standard. We contend that she would prevail
3 under either standard, either the all reasonable steps
4 standard proposed by the Solicitor General, or the
5 negligent entrustment standard, which focuses on whether
6 the owner knew or had reason to know of the illegal use.

7 QUESTION: Well, let's assume the standard is
8 negligence, what could she have done -- what if she knew
9 in this case that her husband was likely to resort to
10 prostitutes using the car, would she have had a right to
11 stop him from using it?

12 MR. HERPEL: Well, I think the standard that we
13 advocate --

14 QUESTION: Well, would she have had a right to
15 stop him from using it?

16 MR. HERPEL: Not post entrustment, Your Honor.

17 QUESTION: Well, she didn't have to entrust it.
18 It's half his car.

19 MR. HERPEL: But if the time of entrustment is
20 deemed to be the time --

21 QUESTION: Why is there an entrustment? He's
22 half an owner.

23 MR. HERPEL: I agree that after the creation of
24 the joint property interest there formally can be no
25 entrustment.

1 QUESTION: Okay. Let's assume we're at that
2 point, and she finds out that he's doing these things on
3 the way home, she would have had no right to stop him from
4 using the car, would she?

5 MR. HERPEL: That's correct.

6 QUESTION: What should she have done in order to
7 satisfy a negligence standard? Should she have called the
8 police and said, look out for this car, my husband may be
9 doing bad things in it?

10 (Laughter.)

11 QUESTION: Well, I mean --

12 MR. HERPEL: Are we assuming --

13 QUESTION: -- I -- if we're going to have a
14 negligence standard, does -- how would it be applied here?

15 MR. HERPEL: Well, Your Honor, if I may, I'd
16 just like to digress briefly that the focus --

17 QUESTION: Briefly.

18 MR. HERPEL: -- is on the time of entrustment,
19 which in a joint ownership situation I think would be
20 deemed the time the joint property interest is created.
21 Now --

22 QUESTION: If she should have known at that time
23 that he was a scoundrel, that would suffice?

24 (Laughter.)

25 MR. HERPEL: Yes. I think if she knew of the

1 impending illegal use at that time.

2 Now, post entrustment --

3 QUESTION: Specifically the impending illegal
4 use. It can't be enough that this not a really reliable
5 person that I wouldn't trust the car with, Lord knows what
6 he'll do with it?

7 MR. HERPEL: Justice Scalia, I think it should
8 be specific to the illegal use --

9 QUESTION: Wow.

10 MR. HERPEL: -- that gives rise to the
11 forfeiture under the statute.

12 QUESTION: All right, but in any case, in this
13 case is there any evidence in the record that she knew at
14 the time the purchase -- the car was purchased that he
15 might use it in this fashion?

16 MR. HERPEL: No, to the contrary.

17 QUESTION: So your position is going to be, if
18 you win this case, that that's the end of the case, that
19 there's no evidence of negligence at that time, and
20 therefore what she may have learned, even if she had known
21 post purchase, would be irrelevant, and that that's the
22 end of the case. She's entitled to her 50 percent share.

23 MR. HERPEL: Certainly that's true in this
24 case --

25 QUESTION: Yes.

1 MR. HERPEL: -- because the record shows that
2 there is no knowledge at any time up until the time of
3 illegal use, but I -- you know, the Court could pose
4 cases, hypotheticals --

5 QUESTION: Right.

6 MR. HERPEL: -- that if somebody acquired
7 knowledge after entrustment --

8 QUESTION: May I ask you a different question?
9 Let's assume that at the time of the purchase she knew,
10 but she was not putting up any of the money and he simply
11 said, I'm buying this car, and I want the title issued and
12 so on, the registration issued to my wife and to me, and
13 he says to her, you have a half interest in the car, can
14 that half interest be taken from her on the assumption
15 that she knew at that time what he was likely to do with
16 the car?

17 MR. HERPEL: I would think it can be taken.

18 QUESTION: What should she have done? She had
19 no role in the purchase of the car, and she had no role in
20 the transfer of a 50-percent interest to her. What should
21 she have done?

22 MR. HERPEL: Well, if she had --

23 QUESTION: Easy come, easy go is your answer to
24 that one, I think, isn't it?

25 (Laughter.)

1 MR. HERPEL: It could well be, Justice Scalia.

2 I think that --

3 QUESTION: You answered the question. You said,
4 this vehicle was purchased for \$600, so that the -- what
5 we're talking about, you have conceded she doesn't get the
6 car, the State can take the car, so as a matter of
7 constitutional right, your argument is, she's entitled to
8 half of the value.

9 Well, if she bought it -- the total price was
10 \$600, and they had it even for a day, then the value is
11 less than \$600, isn't it?

12 MR. HERPEL: Well, I guess it depends on how
13 good a bargain they struck initially, Your Honor, but
14 certainly that \$600 is evidence of its value. I don't
15 know that it's conclusive evidence, that perhaps --

16 QUESTION: So when you said at least \$600, or at
17 least \$300, that means you're assuming they made a good --
18 a very good bargain.

19 MR. HERPEL: Well, I guess what I was referring
20 to there, Your Honor, is I think in a tenancy in common
21 situation, which I analogize this to, there's a
22 presumption --

23 QUESTION: Why don't you say joint tenancy? Why
24 do you pick the phrase, tenancy in common?

25 MR. HERPEL: Because I don't believe there are

1 rights of survivorship that attach under the Michigan
2 automobile registration statute.

3 QUESTION: Suppose that a State had a statute
4 which said that any registered owner of an automobile is
5 absolutely liable for damages that the automobile does in
6 a collision, and the husband gets in a collision, is the
7 wife subject to liability consistently with the
8 Constitution?

9 MR. HERPEL: Well, I think the Court has taken
10 for granted the constitutionality of the co-called civil
11 liability statutes for automobile owners.

12 QUESTION: Why should this case be different?

13 MR. HERPEL: It's different in two critical
14 respects, Justice Kennedy. First, such statutes arise in
15 the tort system, and are designed not to punish but simply
16 to shift losses so as to facilitate recoveries, tort
17 recoveries by plaintiffs to compensate for injury.

18 Second, and perhaps most important, generally
19 speaking, the State would not be the plaintiff in such an
20 action, and the full machinery of the State with its
21 potential for oppression is not arrayed against the
22 individual.

23 QUESTION: Well, the State's the one that passed
24 the statute. There's clearly State action in my
25 hypothetical.

1 Isn't the liability that the wife is subject to
2 in my hypothetical much greater, potentially, than the
3 liability here? The liability here is limited to the
4 amount of her interest in the automobile.

5 MR. HERPEL: The liability is greater, Your
6 Honor, and there is State action, the kind recognized in
7 Shelley v. Kraemer and New York Times v. Sullivan, but I
8 think that that is really a -- this type of State action
9 is quite a bit different.

10 I mean, a civil law -- providing a forum in the
11 way of a civil lawsuit, providing a forum for private
12 parties to --

13 QUESTION: We're asking about the validity of
14 the statute. There's no -- don't -- I wouldn't be
15 deterred by the State action. You just have to assume
16 that there is a constitutional defense against strict
17 liability if there is an overreaching on the part of the
18 State by enacting the statute.

19 You seem to assume that the statute that I gave
20 you was quite proper, and I want to know what the
21 difference is between the two cases.

22 MR. HERPEL: Well, again, I'd emphasize, Your
23 Honor, that that statute does not impose punishment, and
24 more importantly --

25 QUESTION: Ah, so it's punishment.

1 MR. HERPEL: And the State is not benefiting in
2 a pecuniary sense. The full power and machinery of the
3 State is not being arrayed against an individual. Now, in
4 the vicarious liability --

5 QUESTION: It's not being arrayed against the
6 individual at least in the early forms of the common law,
7 it's being arrayed against the thing, the car.

8 MR. HERPEL: That is correct, Your Honor, and I
9 think the Court -- the Court took an opportunity in Austin
10 two terms ago to begin to decrease reliance on the so-
11 called guilty property fiction that is associated with
12 that, and I think the Court should continue to deemphasize
13 reliance on that antiquated notion.

14 QUESTION: In the admiralty area as well as in
15 the automobile area?

16 MR. HERPEL: No, Justice Kennedy, not
17 necessarily. I think classic in rem forfeiture, as
18 indicated in the brief, arose in the admiralty and customs
19 area, and it arose because of a difficulty in obtaining in
20 personam jurisdiction over, say, owners of vessels. In
21 order for the Government to satisfy claims against vessel
22 owners --

23 QUESTION: It could hold it until the claim was
24 satisfied, couldn't it, and then redeliver the ship to the
25 person who -- right?

1 MR. HERPEL: Well --

2 QUESTION: But it didn't do that. You couldn't
3 redeem the ship. It seized the ship. It was gone.

4 MR. HERPEL: If the owner was a -- was not a
5 United States national, I don't know that that would be a
6 practicable --

7 QUESTION: Wasn't there a very ancient idea that
8 the thing was indeed the wrong-doer? I think you
9 acknowledge that in your brief.

10 MR. HERPEL: I'm sorry --

11 QUESTION: The thing here is declared -- the car
12 is declared a public nuisance.

13 MR. HERPEL: I'm sorry, I didn't hear your
14 question.

15 QUESTION: Isn't there -- you are saying the
16 thing was only security for the claim because you couldn't
17 get personal jurisdiction over the individual, but there
18 was an ancient notion that the thing itself is the
19 wrongdoer. As Michigan calls it here the thing, the car,
20 is a public nuisance.

21 MR. HERPEL: Well, that's the guilty property
22 fiction.

23 QUESTION: The deodand.

24 MR. HERPEL: Yes, the idea that an inanimate
25 object can -- you can ascribe guilt to an inanimate

1 object, but I think that --

2 QUESTION: And you say that notion is no longer
3 valid at all?

4 MR. HERPEL: Well, I think it's a -- it is a --
5 it's a rather obsolete notion. It's one that is -- it's a
6 convenient rationale for use of the civil forfeiture
7 power, and I suggested that --

8 QUESTION: It used to be due process but is no
9 longer, is that it?

10 MR. HERPEL: Your Honor, I think that --

11 QUESTION: Well, didn't we say in Austin that
12 never took hold in the United States? That was an English
13 fiction.

14 MR. HERPEL: The deodand?

15 QUESTION: Yes.

16 MR. HERPEL: Yes. Yes, we did say that about
17 the deodand. In fact, we -- I guess we -- what the Court
18 said in Austin was that the deodand, which actually was
19 rejected by the English parliament, I believe, by an act
20 in 1846, did not take hold here, and what instead, this --
21 the practice here has really derived from the English
22 navigation statutes, and once again the law review
23 literature, the historical literature suggests that those
24 English navigation acts were based on the difficulty in
25 obtaining in personam jurisdiction over owners, the -- and

1 cargo and in some cases ships were seized to satisfy
2 claims arising out of customs violations.

3 QUESTION: Does your --

4 QUESTION: That would be a good argument in
5 every case except one involving a car. Don't you have the
6 same problem with a car?

7 MR. HERPEL: I don't think so, Justice Scalia.

8 QUESTION: Well, let's assume you have a
9 negligent owner who negligently entrusted it, as you're
10 willing to acknowledge would render him properly
11 punishable, why can't the State say, I'm not going to go
12 running down where the owner is, I'm going to grab the
13 car. He can come back and make his argument that he
14 wasn't negligent, but meanwhile, you know, I think he's
15 negligent. I'm taking his car.

16 MR. HERPEL: Well, the -- Your Honor --

17 QUESTION: It's just like a ship.

18 MR. HERPEL: -- the State has a -- the
19 automobile's registration and titling of automobiles is
20 heavily regulated. We actually use paper title in -- I
21 believe in every State for car ownership.

22 QUESTION: This could have been an out-of-State
23 car, and why should Michigan have to go running to some
24 other -- so we're just going to say, if there's a crime
25 committed in a car, we think cars are like ships in that

1 regard. We're just going to grab the car. We'll sort it
2 all out later.

3 MR. HERPEL: Your Honor, I don't accept the
4 analogy because I -- it seems to me that the -- there are
5 other remedies available to the State. In fact, in this
6 case the State pursued a separate criminal action against
7 John Bennis.

8 QUESTION: How does this relate to the many
9 cases where the vehicle that's carrying the contraband is
10 taken? Now, the Federal Government is heavily into that
11 business, too. Does your argument mean that every time a
12 car is found loaded with drugs that if there is a co-
13 owner, then the co-owner has to be compensated for the
14 confiscation of the vehicle that carries the contraband --
15 boat, car?

16 MR. HERPEL: If the assumption of your
17 hypothetical is that the co-owner neither knew nor should
18 have known of the illegal use --

19 QUESTION: We're not dealing with this unusual
20 Michigan statute making cars public nuisances. Your
21 argument would cover the waterfront of all the
22 confiscation of vehicles carrying contraband, is that not
23 right?

24 MR. HERPEL: Well, or used for some illegal
25 purpose.

1 I want to emphasize, however, that it -- my
2 standard does not address the forfeitability of proceeds
3 realized from illegal activity.

4 QUESTION: How is your theory consistent with
5 what this Court held in Calero-Toledo, the leasing of a
6 yacht and the people who leased it had marijuana on board,
7 and the lessor didn't know that. In fact, it even
8 included provisions in the lease agreement that that
9 wouldn't be done, and yet the forfeiture was upheld.

10 Now, how would your theory play out there?

11 MR. HERPEL: Justice O'Connor, the Court in
12 Calero-Toledo did reach the facial challenge. It rejected
13 the facial challenge to the Puerto Rican statute, but the
14 Court never decided whether the yacht owner did or did not
15 satisfy the negligence prong of the dicta, and you're
16 asking me -- I don't know that there was enough of a
17 factual development in that case to really answer your
18 question. The --

19 QUESTION: Well, certainly the Court upheld the
20 seizure against a -- the forfeiture against a takings
21 claim by the owner.

22 MR. HERPEL: They did, but there is a bit of an
23 ambiguity in the Court's resolution of the as-applied
24 challenge, assuming that there was an as-applied challenge
25 --

1 QUESTION: Well, in any event, under your theory
2 it would not be possible to uphold a forfeiture in a
3 Calero-Toledo situation.

4 MR. HERPEL: Well, if the facts were that at the
5 time of entrustment the yacht leasing company --

6 QUESTION: Didn't know --

7 MR. HERPEL: -- neither knew nor should have
8 known --

9 QUESTION: -- the people leasing it were going
10 to have marijuana on board.

11 MR. HERPEL: Yes. I think it was Justice
12 Douglas' dissent in that case pointed out that it was two
13 marijuana cigarettes.

14 QUESTION: Yes, and it was a dissent.

15 MR. HERPEL: That's correct.

16 (Laughter.)

17 QUESTION: There was also a statement which I
18 had here that they made a point of the fact that no
19 allegation has been made or proof offered that the owner
20 did all that it reasonably could to have -- avoid having
21 its property put to an unlawful use, and then there was a
22 suggestion in dicta that had that been done, that they
23 might have reached a contrary result. Am I reading it
24 correctly?

25 MR. HERPEL: Yes, Your Honor. I think that

1 there's the sense in which there was a procedural default
2 in that case, because they --

3 QUESTION: Why was -- why is there a suggestion
4 that a contrary result would be reached, because earlier
5 in that case, hadn't it been said we've never found that
6 there was any kind of fault requirement, that there was
7 any kind of innocent owner, innocent objection. Didn't --
8 wasn't there first that general statement?

9 MR. HERPEL: Well, the Court did a rather
10 lengthy historical analysis of deodands, but I think, Your
11 Honor, what's critical here is that the Court in Austin
12 did its own historical analysis and concluded that
13 forfeiture has traditionally served, at least in part, as
14 punishment for personal culpability, and I think that that
15 history --

16 QUESTION: Well, do you --

17 QUESTION: Does it follow from your argument
18 that there cannot be any criminal punishment without at
19 least negligence? You could have no -- it's absolute
20 liability, absolute criminal liability --

21 MR. HERPEL: In any context?

22 QUESTION: -- saying, if your corporation does
23 such a thing, you will be fined so much money, period, up
24 to you to make sure it doesn't, we don't care how careful
25 you've been, absolute liability. Is -- doesn't that

1 follow from your argument?

2 MR. HERPEL: Limited to the forfeiture context,
3 or outside?

4 QUESTION: What's the difference whether it's a
5 forfeiture or a fine?

6 MR. HERPEL: Well --

7 QUESTION: I mean, it seems to me the essence of
8 your argument is, you shouldn't punish somebody who hasn't
9 been -- who hasn't been blameworthy. If you cannot punish
10 them by a forfeiture, why can you punish them by a fine?

11 MR. HERPEL: Well, it's really a species of
12 vicarious punitive liability that we're talking about
13 here, and not just strict liability, Justice Scalia, and
14 vicarious liability, punitive liability, vicarious
15 criminal liability, it is -- has very narrow -- occupies a
16 very narrow niche in our legal tradition.

17 Now, in the corporate area --

18 QUESTION: It's for highly regulated industries,
19 and aren't automobiles one of the most highly regulated
20 forms of instrumentalities in our whole system?

21 MR. HERPEL: Well, in the corporate area, I
22 think in a case called New York Central the Court did
23 recognize that a corporation, which after all can only
24 speak through its agents, it can only speak and think
25 through its agents, can be liable, and some have regarded

1 that as a form of vicarious criminal liability, but
2 vicarious criminal liability outside the corporate context
3 is exceedingly rare in our jurisprudence. It --

4 QUESTION: Well, do we look at this as criminal
5 liability here? Is that how we should analyze it?

6 MR. HERPEL: I think we have to view it as
7 punitive, the sanction as punitive. The Austin decision
8 makes that absolutely clear.

9 The sanction of forfeiture is punitive, and
10 earlier decisions of this Court in One 1958 Plymouth
11 Sedan, which held that the Fourth Amendment exclusionary
12 rule applied to civil forfeiture proceedings, and United
13 States Coin & Currency, which held that the Fifth
14 Amendment privilege against self-incrimination applies to
15 forfeiture, have treated forfeiture as criminal, or quasi-
16 criminal, so I think --

17 QUESTION: Is it at least possible that in the
18 context of joint ownership of an automobile by a husband
19 and wife, that we should presume knowledge by each as to
20 the use by the other --

21 MR. HERPEL: I don't think we should --

22 QUESTION: -- and then put any burden on the
23 innocent spouse to prove otherwise?

24 MR. HERPEL: Your Honor, the -- if this is a
25 presumptive taking under the Takings Clause, as we contend

1 it is, then as a matter of straightforward constitutional
2 analysis the burden of proving any exception to the
3 requirement to pay compensation would have to lie with the
4 State.

5 QUESTION: Well --

6 QUESTION: As I understand it, you wouldn't --
7 you don't agree that mere knowledge would be enough anyway
8 --

9 MR. HERPEL: I'm sorry --

10 QUESTION: -- do you? You don't agree that mere
11 knowledge by one spouse that the other was going to use or
12 was using the vehicle in a way here that would constitute
13 a nuisance would be sufficient fault.

14 MR. HERPEL: Oh, I think at the time of
15 entrustment --

16 QUESTION: You're saying it has to be knowledge
17 at the time they bought the car.

18 MR. HERPEL: Or if it's a case of solely owned
19 property simply being loaned, that would be the --

20 QUESTION: Oh, but that's case in which there's
21 a right of control. The problem comes because there's no
22 right of control here.

23 MR. HERPEL: Well, that's right, Your Honor.

24 QUESTION: I presume there is none --

25 MR. HERPEL: Certainly --

1 QUESTION: -- under Michigan law.

2 MR. HERPEL: Certainly, and that's why at the
3 time of entrustment I -- I mean, at the time of the
4 creation of the joint property interest one can say
5 there's -- there may an element of control over whether
6 you had --

7 QUESTION: Would it satisfy -- would it satisfy
8 your position if the State law were -- when there's this
9 joint ownership situation the Court is going to make the
10 wrong-doing owner pay the other one? It's not going to
11 come out of the State's pocket, not out of the people's
12 pocket, but if she wants to bring a claim against him,
13 he's going to have to pay. How about that? That would
14 take care of her need, compensating her.

15 MR. HERPEL: You're postulating that she would
16 have a remedy in a court of law against --

17 QUESTION: The State says, she ought to be
18 compensated. The car was a nuisance. He ought to
19 compensate her.

20 MR. HERPEL: Well, Your Honor, it seems to me
21 that it's hardly reasonable, after Tina Bennis, an
22 innocent owner, has been punished by having her property
23 interest confiscated --

24 QUESTION: Then the wrong-doer --

25 MR. HERPEL: -- to then tell her that --

1 QUESTION: The state says --

2 MR. HERPEL: -- her remedy is to go into a court
3 of law and sue her husband. At that point, you're in the
4 realm of divorce, but when you're talking about a wife
5 bringing an action --

6 QUESTION: If not before, yes.

7 (Laughter.)

8 MR. HERPEL: -- against a -- excuse me?

9 QUESTION: So it would be all right --

10 QUESTION: I said, if not before.

11 (Laughter.)

12 QUESTION: I would have thought she'd rather sue
13 her husband than sue Michigan. I don't --

14 (Laughter.)

15 QUESTION: Thank you, Mr. Herpel.

16 MR. HERPEL: Thank you.

17 QUESTION: Mr. Roberts, we'll hear from you.

18 ORAL ARGUMENT OF LARRY L. ROBERTS

19 ON BEHALF OF THE RESPONDENT

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

22 I would, if you would allow me, like to go
23 through some of the questions that have been asked,
24 because I think those questions, at least in my opinion,
25 encompass the position that the State of Michigan has

1 brought in this case.

2 QUESTION: Could you address the nature of the
3 ownership of this vehicle, if you can enlighten us?

4 MR. ROBERTS: The record, Justice O'Connor, does
5 not indicate, as Mr. Herpel indicated to the Court,
6 exactly what this is, but in my understanding of the law
7 of Michigan, as we can see, I think, from the record
8 presented, when there's a vehicle co-owned by a husband
9 and wife, in order to dispose of that, for example, at
10 sale, private sale, both individuals have to sign the
11 title to do that.

12 QUESTION: Could the creditors of one of the
13 spouses reach the entire vehicle?

14 MR. ROBERTS: Yes, I believe they could under
15 Michigan law, in this situation, yes.

16 QUESTION: A creditor could take the whole
17 vehicle.

18 MR. ROBERTS: That's correct, because of the
19 liability of ownership of the vehicle in the State of
20 Michigan under our laws and the way they've been
21 interpreted puts upon each owner liability for the use or
22 negligence or misuse of that vehicle.

23 QUESTION: Do you have a citation for us for
24 that?

25 MR. ROBERTS: I have a citation to the statute

1 that was referred to by, I believe it was Justice Scalia.
2 MCL 257.401, and that's mentioned in our brief. That is
3 the liability statute for Michigan motor vehicles, whereby
4 if an individual is entrusted with your vehicle and
5 commits an injury upon another, you as an owner or a co-
6 owner, innocent or otherwise, may be held liable for any
7 of the injuries or damages --

8 QUESTION: What about --

9 QUESTION: Does it indicate that --

10 QUESTION: What about an ordinary creditor? I
11 just have a judgment against the husband for something
12 completely unrelated to the automobile. Can I levy on the
13 wife's interest in the automobile under Michigan law?

14 MR. ROBERTS: They can levy on the automobile,
15 Justice Kennedy, but I'm not certain how the proceedings
16 would apply as to her interest, but what we're concerned
17 with here --

18 QUESTION: I think it would be very strange if
19 you could levy on the wife's interest, and I thought that
20 was the thrust of Justice O'Connor's question.

21 MR. ROBERTS: I'm -- that -- I'm not certain as
22 to what the answer is to that, but we're getting, I think,
23 beyond the facts that we have presented here, where we're
24 concerned with the police power of the State of Michigan
25 in a nuisance context in regards to Mrs. Bennis' --

1 QUESTION: Am I correct in assuming,
2 Mr. Roberts, that your position on the constitutional
3 issue would be exactly the same if she was the sole owner
4 of the vehicle?

5 MR. ROBERTS: Yes, it would.

6 QUESTION: So we really don't need to worry
7 about this half-ownership business, do we, in your view of
8 the case?

9 MR. ROBERTS: I -- I would not say that we would
10 not have to worry about it. I think we're concerned with
11 it because we're here today. I think we should be
12 concerned, because we have to reaffirm, I believe, the
13 police powers of the State in this type of nuisance --

14 QUESTION: Yes, but you say they're the same
15 even if she owned the car.

16 MR. ROBERTS: That's correct.

17 QUESTION: So your position doesn't rest on the
18 right to control the car.

19 MR. ROBERTS: Control --

20 QUESTION: I mean, if she were the sole owner,
21 presumably she has a right to control its use.

22 MR. ROBERTS: That's correct.

23 QUESTION: If she is simply a common owner as
24 against the other common owner, I assume she does not have
25 any right to control.

1 MR. ROBERTS: That's correct.

2 QUESTION: So control is irrelevant on your
3 theory.

4 MR. ROBERTS: Control in -- that's true, as
5 Justice Stevens and Justice --

6 QUESTION: So does your theory -- if there's no
7 right to control as an element of your theory, is your
8 theory basically the kind of antique theory that this is
9 the guilty object?

10 MR. ROBERTS: That may -- that is part of the
11 theory. The object --

12 QUESTION: What else?

13 MR. ROBERTS: Well, the object is the method
14 whereby the nuisance conduct was committed. The statute,
15 the police power statute, the nuisance or abatement law
16 aims at the use of an item, be it a building, a boat, an
17 aircraft, a place -- even place is named --

18 QUESTION: Well, that's what makes it a
19 nuisance.

20 MR. ROBERTS: And as an individual committing
21 certain types of conduct, which is the nuisance, in
22 that --

23 QUESTION: Right, but you're saying once the
24 object has been used to create the nuisance, your right to
25 require -- your right to go after it on a forfeiture

1 proceeding rests, in essence, on the theory that it is a
2 guilty object in the old common law sense, the deodand
3 sense.

4 MR. ROBERTS: A guilty object in the sense that
5 the conduct that the law is aimed at abating was committed
6 with the use of that, be it in or -- the vehicle perhaps
7 takes, taking an individual --

8 QUESTION: If it's a stolen vehicle -- suppose
9 it's a stolen vehicle?

10 MR. ROBERTS: Then that would be outside the
11 scope of this, and that was mentioned in the Michigan
12 supreme court opinion in this matter.

13 QUESTION: How about a car rental -- a car
14 rental?

15 MR. ROBERTS: Again, then we would get to the
16 point of control.

17 QUESTION: The rental car, and --

18 MR. ROBERTS: Car rental.

19 QUESTION: Under your theory the State would
20 take the car if the person renting the car committed the
21 unlawful act in the car.

22 MR. ROBERTS: The State would take the car, but
23 would not be able to forfeit the car --

24 QUESTION: Why not?

25 MR. ROBERTS: The distinction is made at the

1 stage whereby it's determined that the car is a rental car
2 that the rental company had no control over, nor could
3 they have been party to --

4 QUESTION: But you just told me that control is
5 irrelevant to your theory.

6 QUESTION: You said that didn't matter.

7 MR. ROBERTS: But in this situation, I'm talking
8 about an application of the law to a situation that is
9 outside the scope of a husband or a wife being a co-
10 owner --

11 QUESTION: No, but I want to know what the
12 theory -- and this is -- Justice O'Connor was -- what is
13 the theory of the State's right to forfeit, and a moment
14 ago, if I understood you correctly, you said it has
15 nothing to do with the question whether the so-called
16 innocent claimant has a right to control or not, and now
17 you are saying, I think, that it does depend on the right
18 to control, because the answer is different in the case of
19 the stolen car, and the answer is different in the case of
20 the rental car. Is control relevant, or isn't it?

21 MR. ROBERTS: Control is relevant only to the
22 extent that the statute we have to think is aimed at the
23 strict liability of those who own a motor vehicle, so
24 ownership and control are relevant in that sense, and --

25 QUESTION: Well, can --

1 QUESTION: A leasing company owns the vehicles
2 that it leases.

3 MR. ROBERTS: That's correct, but they have no
4 control over its use. Once it goes away, there's no way
5 that they can find out or --

6 QUESTION: I think Justice Souter's point is
7 that the wife has no control over the use, either. She
8 can't prevent her husband from using it if it's commonly
9 owned.

10 MR. ROBERTS: That's correct.

11 QUESTION: Then why shouldn't the wife be in
12 exactly the same position as the car renter, or the person
13 from whom the car was stolen?

14 MR. ROBERTS: Because she could -- although
15 perhaps far-fetched -- indicate to the other person using
16 the car -- perhaps she loaned the car to an individual.
17 She could say --

18 QUESTION: She didn't lend it to her husband.
19 He owns half of it.

20 MR. ROBERTS: I understand.

21 QUESTION: He has the right to drive it.

22 MR. ROBERTS: I understand.

23 QUESTION: She has -- as I understand it, she
24 has no right of control. Why, therefore, isn't she in the
25 same position as the renter or the victim of the theft?

1 MR. ROBERTS: Because she doesn't have the
2 control over the car that they do in the sense --

3 QUESTION: That doesn't make any sense,
4 Mr. Roberts.

5 Has your State supreme court held that, that
6 Hertz is off the hook?

7 MR. ROBERTS: They've indicated that in the
8 opinion.

9 QUESTION: They have?

10 MR. ROBERTS: Yes.

11 QUESTION: Where?

12 MR. ROBERTS: I don't have the exact page in
13 there. I'm indicating that I think the interpretation of
14 the opinion would be that that's exactly the situation.

15 QUESTION: Can you point to the language --

16 QUESTION: But again, I want to be sure your
17 position is the same. If she owned the car 100 percent --

18 MR. ROBERTS: Correct.

19 QUESTION: You could still forfeit it?

20 MR. ROBERTS: It could be liable --

21 QUESTION: You would say there's a distinction
22 between her as a 100-percent owner and Hertz as a 100-
23 percent owner.

24 MR. ROBERTS: Right.

25 QUESTION: Could you give us the citation of the

1 Hertz case later? I mean, just submit it to the Court.
2 I'd like to know what that is.

3 MR. ROBERTS: Certainly, Justice.

4 QUESTION: Well, is that a passage in the
5 opinion in this case, or another case?

6 MR. ROBERTS: No. I was indicating that I feel
7 from reading the supreme court opinion you can deduce that
8 that's what they --

9 QUESTION: In this case.

10 QUESTION: In this case?

11 MR. ROBERTS: Yes.

12 QUESTION: Yes, that's what I thought you were
13 saying.

14 MR. ROBERTS: But I'm not -- I -- they did not
15 specifically --

16 QUESTION: Right.

17 MR. ROBERTS: -- go through all the possible
18 situations, because they were saying this is a police
19 power matter.

20 QUESTION: But these questions we're raising go
21 to questions of the application of Michigan law rather
22 than the ultimate constitutional issue, and I'm curious to
23 know whether you think there's a difference as a matter of
24 constitutional law between an owner such as a wife giving
25 the car to her husband and a theft of the car. In either

1 event, the person doesn't have control of what happened in
2 the car.

3 As a matter of constitutional law, could a
4 stolen car be forfeited if the police catch someone with
5 marijuana in the car, or engaged in an act of
6 prostitution?

7 MR. ROBERTS: It would be liable to come into
8 the forfeiture proceedings. I don't believe it would be
9 forfeited, no, because of the --

10 QUESTION: I'm not asking about what Michigan
11 would do. I'm asking about your constitutional theory.
12 We have a constitutional question to decide.

13 Do you think, as a matter of constitutional law,
14 Michigan would have the right to forfeit stolen vehicles
15 when they are found to be used in an illicit manner?

16 MR. ROBERTS: I think that that's possible. I
17 don't have that -- I did not address that in the situation
18 we have here.

19 QUESTION: But what do you think the answer is?

20 MR. ROBERTS: I don't know. I don't know the
21 answer to that.

22 QUESTION: Thank you.

23 QUESTION: Why should a person who's totally
24 innocent, who has done whatever they could do to stop the
25 crime, who has no knowledge of it, et cetera, be punished

1 by having to give up their property?

2 MR. ROBERTS: There's a case -- Chicago,
3 Burlington, & Quincy was mentioned in our brief, and in
4 that case, as the Court is aware, there is an absolute
5 duty on the railroad carrier to comply with the Safety
6 Appliances Act, and in that case, as I recall reading, the
7 railroad carrier put forth that he had done -- he wasn't
8 aware that the cars were out of repair, he'd done
9 everything reasonable to comply, and yet he was held
10 responsible for the violation --

11 QUESTION: Yes, I agree that there are cases.
12 That was why I put the question the way I did. There are
13 pirates, there are smugglers, there are bootleggers, and
14 interestingly enough, there are corporate shareholders,
15 that each of these may be special situations.

16 So I know there are cases, so that's why maybe
17 the corporates are special, given that they are people,
18 persons, et cetera, but why -- is there any reason why a
19 person who is totally innocent should be punished for a
20 criminal offense by having to give up the property that he
21 or she owns?

22 MR. ROBERTS: Your --

23 QUESTION: I know there are those cases. The
24 cases are a question of -- is that the only reason, that
25 when there were 18th Century pirates, people were really

1 worried about pirates, for good cause, and they had to
2 impose upon the owners of the ships enormous affirmative
3 obligations to try to stop pirates. We don't have as many
4 pirates now, at least.

5 (Laughter.)

6 QUESTION: So I mean, is there any reason, other
7 than these historical facts --

8 MR. ROBERTS: Well --

9 QUESTION: -- which have changed to a degree, or
10 are there some good reasons?

11 MR. ROBERTS: If I could, I'd address some of
12 the assumptions in the hypothet, that there is a
13 punishment, and there was punishment for a criminal
14 offense.

15 Mrs. Bennis -- first of all, we maintain if
16 there was punishment, it was incidental to the regulatory
17 aim of this police power, and the criminal offense was
18 committed by her husband, not Mrs. Bennis. She is subject
19 to the civil liability of this civil law when it's applied
20 properly with due process simply because she's an owner of
21 the vehicle and gave permission or did not give permission
22 to use the vehicle.

23 That's why in this situation an individual can
24 be held liable for the acts of another in the use of the
25 vehicle as long as all the constitutional protections have

1 been given them, and here we had a court of equity which
2 by the record shows that she was afforded all those
3 protections.

4 QUESTION: Is one co-owner --

5 QUESTION: Is it a civil penalty that's being
6 imposed?

7 MR. ROBERTS: We maintain it is, Justice
8 O'Connor, yes.

9 QUESTION: A civil penalty.

10 MR. ROBERTS: Civil --

11 QUESTION: It's not a public nuisance abatement.

12 MR. ROBERTS: It is a public nuisance abatement,
13 but the penalty is --

14 QUESTION: Is the car a public nuisance?

15 MR. ROBERTS: The car is the vehicle that was
16 used to perpetuate the condition.

17 QUESTION: Is the car the public nuisance?

18 MR. ROBERTS: Under the language of the statute
19 and the way it's been interpreted, yes, because buildings
20 have been found --

21 QUESTION: But that's a very strange
22 interpretation of the meaning of public nuisance.
23 Normally you think of it as an ongoing something that
24 constitutes the nuisance.

25 MR. ROBERTS: In this situation, as the record

1 reveals and the transcript shows, there were several
2 witnesses that testified that the ongoing situation of
3 nuisance, the prostitution activities in this neighborhood
4 were such that when this individual utilized this vehicle
5 to commit further acts of prostitution or lewdness or
6 assignation, he and the vehicle were committing the
7 nuisance conduct.

8 The vehicle was the container, if you want to --
9 if I could use that word, I did not use it in the brief,
10 and the conduct was committed by Mr. Bennis and the
11 prostitute, and we have a record of the ongoing conduct,
12 so that we do have that.

13 There's not an indication that this vehicle was
14 used more than one --

15 QUESTION: To impose a civil penalty on someone,
16 must there be some fault on the part of the person against
17 whom the penalty is imposed, or can a civil penalty be
18 imposed against a totally innocent person?

19 MR. ROBERTS: We are maintaining in this
20 situation, with Michigan's nuisance abatement law, a civil
21 penalty, if you wish to call it a penalty, and it is in
22 that sense --

23 QUESTION: But you said it was. I'm just using
24 your words.

25 MR. ROBERTS: It is. It is in that sense,

1 because the condition, the use of the vehicle to
2 perpetuate the condition --

3 QUESTION: And it is possible to impose a civil
4 penalty on someone without any fault of the person --

5 MR. ROBERTS: Because of the applicable --

6 QUESTION: --is your position?

7 MR. ROBERTS: Yes.

8 QUESTION: Okay.

9 MR. ROBERTS: The strict liability of the law
10 interpretation.

11 QUESTION: Is this -- that's a good -- I mean,
12 I'm really uncertain. Is this civil or criminal? I --

13 MR. ROBERTS: Civil.

14 QUESTION: Well, they use the word guilty. The
15 statute uses the word guilty. They say if you do this, if
16 you use a car that you've leased, even, the car is a
17 nuisance and you are guilty of a nuisance.

18 MR. ROBERTS: That's correct.

19 QUESTION: And so, and this comes up in a
20 criminal proceeding. How do we answer this question? I
21 mean, I think it may differ whether it's a criminal
22 punishment or whether it's a civil -- but they -- it's in
23 a criminal proceeding.

24 If the -- would the person who ran such a car
25 have a criminal record --

1 MR. ROBERTS: This proceeding, of course --

2 QUESTION: -- who was guilty of a nuisance?

3 MR. ROBERTS: This proceeding -- no. This
4 proceeding was a civil proceeding, so that the final order
5 and judgment controls. The court speaks of its order.
6 The order here --

7 QUESTION: Did the judge in this case say
8 that -- at least in the first instance, the judge in the
9 court of first instance, that he thought that he had some
10 kind of equitable power?

11 He said, well, there might be situations bad
12 enough that I could do something, but this one isn't so
13 bad because they have a second car. That doesn't sound
14 very criminalist.

15 MR. ROBERTS: I'm sorry, what was your last
16 word, Justice Ginsburg?

17 QUESTION: The judge in this case, didn't the
18 judge say --

19 MR. ROBERTS: He did.

20 QUESTION: -- if things were really terrible, I
21 would make some adjustment here, but they're not so
22 terrible for Tina Bennis because they've got a second car.

23 MR. ROBERTS: Correct, a 1978 Oldsmobile.

24 QUESTION: So the judge at least thought that he
25 had some equitable adjustment authority, which doesn't

1 seem to fit into the criminal mode.

2 MR. ROBERTS: There was more to what he also
3 said when he made that statement, and that was that in
4 this particular case, because part of the statute allows
5 for deduction of costs and expenses, after doing so for
6 Tina Bennis' \$300 interest in the vehicle, there would be
7 practically nothing left, and then he looked to these
8 other equitable considerations and said, in this situation
9 I am treating it thusly.

10 Other situations, as the record shows, he
11 indicated --

12 QUESTION: I think I have -- just suppose we
13 have a nuisance on land and an absentee owner who doesn't
14 know anything about it, and that nuisance has to be
15 abated, does the -- under Michigan law, does the innocent
16 owner who didn't know of the existence, and the other one
17 did, have a right against the co-owner for compensation?

18 MR. ROBERTS: If it were a building at issue in
19 the case?

20 QUESTION: Yes.

21 MR. ROBERTS: Yes, it would.

22 QUESTION: Does the innocence of that co-owner
23 stop the State from abating the nuisance?

24 MR. ROBERTS: We could seek to abate the
25 nuisance, yes. It does not stop us.

1 QUESTION: May I ask another question? This
2 just doesn't involve vehicles, it could involve houses,
3 couldn't it, too?

4 MR. ROBERTS: The law encompasses buildings,
5 motor vehicles, aircraft --

6 QUESTION: If a family found out that one of
7 their children had smoked marijuana at home, could they
8 forfeit the house?

9 MR. ROBERTS: If the family found out?

10 QUESTION: If the parents -- I mean, say the
11 State found out that a teenager in a house had smoked
12 marijuana in the house, could they --

13 MR. ROBERTS: Could we? No. No, and the
14 Michigan criminal laws would first be applied, I think, to
15 that situation, and they're such that the nuisance
16 abatement laws and the forfeiture law --

17 QUESTION: That would not be a nuisance, and the
18 home would not be forfeitable?

19 MR. ROBERTS: There was a controlled substances
20 amendment put into this nuisance abatement law in 1988,
21 but no, I think that would come into the prosecutorial
22 discretion area.

23 QUESTION: Well, I --

24 QUESTION: Oh, prosecutorial discretion. Oh.

25 QUESTION: -- if I understand it, even in this

1 case the Court said that this car, if the same act had
2 been performed in some other section where it was not a
3 common problem, it would not have been a nuisance.

4 MR. ROBERTS: He indicated --

5 QUESTION: It isn't just that the performance of
6 some unlawful act renders a thing a nuisance.

7 MR. ROBERTS: No.

8 QUESTION: They really do mean a nuisance, don't
9 they?

10 QUESTION: But isn't the constitutional issue
11 the same? Couldn't they do it just on one case at a time?

12 MR. ROBERTS: We maintain in the Michigan
13 supreme court they could, but they ruled that we needed,
14 as Justice O'Connor pointed out, a continuing condition.

15 QUESTION: And in terms of the Federal
16 Constitution, if Michigan can do this, why couldn't it
17 forfeit a house in which there was -- they found out that
18 marijuana had been smoked on one occasion?

19 MR. ROBERTS: The mobile home and the body shop
20 in Austin, they sought to do that, did they not, and there
21 was just --

22 QUESTION: But why does it have to be just a
23 mobile home? Why not a mansion?

24 MR. ROBERTS: It could be.

25 QUESTION: It could be.

1 MR. ROBERTS: Under this law, that would not
2 happen.

3 QUESTION: Why not?

4 QUESTION: Only because there's a specific
5 exception saying -- built into the Michigan statute saying
6 this is not forfeitable for one puff.

7 MR. ROBERTS: We read it not as that way, but
8 the Michigan supreme court --

9 QUESTION: In any case, there's a bar in
10 Michigan law.

11 MR. ROBERTS: Right.

12 QUESTION: But there's no constitutional bar.

13 MR. ROBERTS: Not that I'm aware of at this
14 point, no.

15 QUESTION: And constitutionally it would be the
16 same case if instead of \$300 it was a \$40,000 car,
17 wouldn't it?

18 MR. ROBERTS: That's correct. The value is not
19 it, it's the use that we're aiming at, and as with Pearson
20 Yacht, that was two marijuana cigarettes.

21 QUESTION: Well, I don't have to agree with that
22 to agree with the rest of your position, I hope, because
23 I -- you know, there was a whole -- in the old law of
24 deodands there was a whole intricate theory of when,
25 indeed, the instrumentality was being used to commit the

1 crime or not, and I don't have to think that the whole
2 house is being used to commit the crime of one puff of a
3 marijuana cigarette --

4 MR. ROBERTS: No.

5 QUESTION: -- do I?

6 MR. ROBERTS: But under the Michigan law, we
7 would not be able to proceed that way. Under Federal law,
8 I think you might be able to.

9 QUESTION: And the reason again -- I don't want
10 to come -- look, I got a little distracted, because what's
11 going on is that whatever you call it, the person is
12 giving up a lot of property who's totally innocent, and
13 the reason they're giving it up is because it was an
14 instrumentality of a crime, right? I mean, that's
15 basically the reason.

16 MR. ROBERTS: Instrumentality --

17 QUESTION: And they are. Yes, all right.

18 MR. ROBERTS: Whether --

19 QUESTION: It was -- they're giving it up
20 because a person used it to commit what was a crime under
21 this statute, as I read it.

22 Is there some -- what's the reason why the
23 innocent person is required to give up the property? What
24 policy does it serve? What purpose does it serve?

25 What's the theory of why you are requiring them

1 to give up this piece of property that is theirs when they
2 themselves are innocent and have done everything possible
3 to prevent its use as an instrumentality?

4 MR. ROBERTS: Well, that's not a record we have
5 exactly here, but I understand --

6 QUESTION: I know that, but I'm trying to figure
7 out the -- I'm trying to get my own thinking straight on
8 other cases as well as this one that relate --

9 MR. ROBERTS: The powers of the State allow them
10 to go after all matters which encompass public safety,
11 health, and morals.

12 Nuisance conditions clearly fall within that,
13 and if there is, in the State, and has been sustained by
14 cases, laws that allow strict liability for ownership of
15 vehicles and the vehicles utilized in nuisance conduct, we
16 can proceed the way we did as long as the constitutional
17 protections --

18 QUESTION: It causes these people to be very
19 careful whom they give their car to, or loan their car to,
20 or whom they go into co-ownership with, I assume. Doesn't
21 it have that functional purpose?

22 MR. ROBERTS: I think it should, yes.

23 QUESTION: Thank you.

24 MR. ROBERTS: Thank you.

25 QUESTION: Thank you, Mr. Roberts.

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Mr. Seamon, we'll hear from you.

ORAL ARGUMENT OF RICHARD H. SEAMON
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENT

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

I'd like to begin by discussing some of the issues that I believe complicate what's already a difficult constitutional question.

The first issue has to do with precisely what rights co-owners have to control the property's use by other co-owners. That is not clear, and in our view, the issue of control is highly relevant under the all reasonable steps standard that we propose.

QUESTION: So if the -- going back to the argument that counsel on the other side made, if the co-owner did not know at the time of acquiring ownership that the property was likely to be used by the other co-owner for a criminal purpose, and subsequently learns it, there would be no right of control at that point.

There would be no fault, and it would not be forfeitable. The co-owner's interest, the innocent co-owner's interest would not be forfeitable, on your theory.

MR. SEAMON: That's correct, at that point in time, although we don't agree with the petitioner's

1 suggestion of a negligent entrustment standard, because we
2 think that it's unrealistic to focus simply on the point
3 in time at which the property is transferred from one
4 owner to another or the time at which the co-owner's
5 property interest arises.

6 QUESTION: Mr. Seamon, where -- I mean, as an
7 original matter, if I were writing a statute I might well
8 buy your, you know, all reasonable steps standard. It
9 seems like a good idea.

10 But we're not writing a statute. Where do you
11 get it from? I mean, where do you find it in our
12 historical tradition, or is it just that, you know, we
13 should say, well, it seems like a good idea, it must be
14 constitutional law.

15 (Laughter.)

16 MR. SEAMON: The precise formulation --

17 QUESTION: Do you find it somewhere in our
18 cases?

19 MR. SEAMON: The precise formulation comes from
20 the suggestion in Calero-Toledo. The --

21 QUESTION: From a dictum in -- and that is
22 enough to adopt it?

23 MR. SEAMON: No, it's not enough, and we don't
24 believe that that's all that supports the all reasonable
25 steps standard.

1 Both -- the history supports the broad
2 principle, in fact, that limits the Government's ability
3 to punish essentially blameless people by taking away
4 their property.

5 QUESTION: What history does that, when we've
6 certainly done it with respect to vessels.

7 MR. SEAMON: That's right, and even as long ago,
8 however, as a case like Peisch v. Ware, Chief Justice
9 Marshall wrote for the Court in 1808 that a property
10 should not be forfeited when the owner of the property
11 lacks the means to prevent the forfeiture.

12 Now, that suggestion of powerlessness to control
13 the events leading to the forfeiture is different from the
14 later formulation in Calero-Toledo, and --

15 QUESTION: Was he speaking of constitutional
16 law --

17 MR. SEAMON: He was not speaking of --

18 QUESTION: -- or of equitable power to declare
19 the forfeiture?

20 MR. SEAMON: He was speaking in terms of
21 longstanding principles. It's not --

22 QUESTION: And in Goldsmith we upheld the
23 forfeiture of a conditional vendor's interest in an
24 automobile because the buyer who's driving it around used
25 it for drugs.

1 MR. SEAMON: That's right, and we see two lines
2 of cases, really, one of which includes Goldsmith, Grant,
3 Van Oster, and Calero-Toledo itself, which recognizes that
4 a property owner cannot avoid the forfeiture of property
5 that's been used illegally merely by showing that she
6 lacked knowledge or even reason to know of the illegal
7 use.

8 By the same token, there is another different
9 line of cases, of which Calero-Toledo is also a part, that
10 recognizes limitations on the Government's ability to
11 punish people. Now, that actually brings --

12 QUESTION: They do that in dictum, whereas the
13 other cases do it in holding, don't they?

14 MR. SEAMON: That's correct. This Court --

15 QUESTION: It seems a rather significant
16 distinction.

17 MR. SEAMON: It is a significant distinction.
18 The one exception I would note to that, but it's not a
19 forfeiture case, is the one we cite in our brief,
20 Southwestern Telephone & Telegraph Company v. Danaher,
21 which involved the Court -- in which the Court set aside a
22 \$6,300 civil penalty against a phone company on the
23 grounds that the phone company had acted reasonably and
24 there was no wrongdoing that justified --

25 QUESTION: Mr. Seamons, one thing I don't

1 understand is how you put together your test with your end
2 result, because it seems to me that in many, many, perhaps
3 most marital situations, a person in Tina Bennis'
4 situation could do everything within her power to do, but
5 the law gives the co-owner the right to use the car
6 whenever and however he wants, so I don't see how the all
7 reasonable steps would work out to the disfavor of someone
8 in Tina Bennis' situation.

9 MR. SEAMON: It may be that --

10 QUESTION: She has no power over him. She could
11 say everything she wants and it's not going to do any
12 good.

13 MR. SEAMON: Our view of the result, I suppose,
14 is in part based on presumptions about how the State law
15 operates in terms of the degree of control that a joint
16 owner can exercise over another owner.

17 Certainly, it would not be reasonable to expect
18 a co-owner to do anything that she didn't have a right to
19 do under the State law.

20 On the other hand, every citizen can take
21 certain measures to prevent illegal activity that comes --
22 that they learn about, including calling the police, and
23 so it's simply not clear --

24 QUESTION: How is a Tina Bennis supposed to make
25 sure that her spouse doesn't use a car this way?

1 MR. SEAMON: It's very difficult to know in the
2 absence of knowing more about how much knowledge or reason
3 to suspect that use she had, which is unclear to us on
4 this record. In our view, all that she showed in the
5 trial court was that she lacked actual knowledge of the
6 illegal use, but she did not show that she lacked a reason
7 to suspect that --

8 QUESTION: Would it have been a different case,
9 in your view, if she had gotten on the witness stand and
10 said, this all came as a very shocking surprise to me, I
11 had no idea this was going on?

12 MR. SEAMON: Yes.

13 QUESTION: That would be the difference.

14 MR. SEAMON: Yes, but I would emphasize in
15 answering the question that it has a lot to do with the
16 nature of the offense involved here, which is I think
17 another complication.

18 I mean, it is reasonable to expect that a
19 husband who frequents prostitutes will hide that fact from
20 his wife and be able to do that successfully, but that may
21 not necessarily be true if a different offense is
22 involved, such as ongoing drug trafficking, and --

23 QUESTION: In this case, your office has taken
24 the position we should affirm the judgment of the Michigan
25 court --

1 MR. SEAMON: That's right.

2 QUESTION: -- despite this very troubling
3 question about the wife's knowledge of her husband's
4 activities and her ability to do anything about it.

5 MR. SEAMON: That's right. We believe that the
6 record, in fact, is unclear on the question of whether she
7 could have taken any reasonable steps to prevent --

8 QUESTION: Let's see where we would go with it.
9 Take the easy case in which she says, yes, I knew he was
10 doing this. There wasn't anything I could do about it.
11 He owns as much of the car as I do. What was she supposed
12 to do? In that -- I take it in your view, her interest
13 would be subject to forfeiture on those facts, based on
14 that testimony, is that correct?

15 MR. SEAMON: Our view of the proper disposition
16 of this case is based --

17 QUESTION: Well, no, I'm talking about my case,
18 the one in which she takes the stand and says, I knew he
19 was doing it, but I didn't have any right to stop him from
20 using the car, and let's further assume that as a co-
21 owner in Michigan, she didn't.

22 MR. SEAMON: No, I'm sorry, that's not our
23 position. It is our position that even if an owner has
24 knowledge of ongoing unlawful activity with regard to her
25 own property, it still remains -- can make out the defense

1 by showing that she took all reasonable steps to prevent
2 it.

3 QUESTION: Well, is right to control the
4 touchstone for determining what is reasonable?

5 MR. SEAMON: It certainly is one of the
6 foundations. Anything that one doesn't have a right to
7 do --

8 QUESTION: Okay. You're not taking the
9 position, say, in the case that I put -- the wife says I
10 knew, and so on -- you're not taking the position that she
11 was supposed to call the police and say, you better watch
12 out for such-and-such a car, because my husband is
13 engaging in illegal acts in it. You're not taking that
14 position, are you, or are you?

15 MR. SEAMON: No, not exactly. Our position
16 is -- it is not our position that if you know, you lose.

17 On the other hand --

18 QUESTION: Well, you're not taking the position
19 that she affirmatively had to call the police. Now,
20 you're saying that control is very significant. What else
21 is? What's in the middle between these two extremes?

22 MR. SEAMON: Well, I'd say there are two
23 elements. Besides control, the other element is the
24 extent to which the person knows or has reason to know
25 that her property is being used illegally. I mean, it is

1 true that in --

2 QUESTION: But that gets us back to the control
3 issue. She -- on my hypothesis, she knows beyond a
4 peradventure of a doubt, but she can't control the car,
5 and you -- I think you're saying she is not required to
6 call the police. What else should we look at to determine
7 whether she has taken every reasonable step to preserve
8 her innocence for constitutional purposes?

9 MR. SEAMON: On that point, I -- we would expect
10 property owners to notify the police if they know that the
11 property is being --

12 QUESTION: So it's the position of the Solicitor
13 General's Office that wives should call the police --

14 QUESTION: Yes.

15 QUESTION: -- when their husbands are using
16 prostitutes?

17 MR. SEAMON: Not in every case, but it is
18 certainly one --

19 (Laughter.)

20 MR. SEAMON: It is certainly one --

21 QUESTION: Don't let the laughter of clerks who
22 have never even argued a case in a municipal court deter
23 you from your answer.

24 MR. SEAMON: Thank you.

25 One, what's reasonable depends on the

1 circumstances of every case, and it's easier to understand
2 my answer, I think, in the fact situation that comes up
3 all too frequently, I'm sorry to say, in Federal cases
4 where the husband is dealing drugs, using the car or the
5 house to deal the drugs, and the wife has knowledge of
6 that, and in those cases the Federal Government does
7 indeed take the position that the wife is obligated, in
8 order to protect her property interests, in order to be
9 able to assert an innocent owner defense, to notify the
10 police.

11 Now, there are steps short of that that a wife
12 may very well decide to take.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Seamon.

14 The case is submitted.

15 (Whereupon, at 12:07 p.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

TINA B. BENNIS, Petitioner v. MICHIGAN

CASE NO. : 94-8729

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)