2003 Supplement to

# AMERICAN CRIMINAL PROCEDURE

CASES AND COMMENTARY

Sixth Edition

Stephen A. Saltzburg
Daniel J. Capra

American Casebook Series®

THOMSON
WEST

## 2003 Supplement to

# AMERICAN CRIMINAL PROCEDURE

## CASES AND COMMENTARY
## Sixth Edition

By

**Stephen A. Saltzburg**

*Howrey Professor of Trial Advocacy,*
*Litigation and Professional Responsibility*
*George Washington University Law School*

**Daniel J. Capra**

*Philip D. Reed Professor of Law*
*Fordham University School of Law*

**AMERICAN CASEBOOK SERIES®**

THOMSON
WEST

Mat #40152681

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-328-9352

**ISBN** 0-314-14684-9

*TEXT IS PRINTED ON 10% POST CONSUMER RECYCLED PAPER*

# West's Law School Advisory Board

# Table of Cases

**The principal cases are in bold type. Cases cited or discussed in the text are roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.**

*

2003 Supplement to

# AMERICAN CRIMINAL PROCEDURE

## CASES AND COMMENTARY

Sixth Edition

*

# Table of Contents

Page

# Part I

# RECENT DEVELOPMENTS

## Chapter One

# BASIC PRINCIPLES

## I. A CRIMINAL CASE

**Page 5. Add the following after the headnote on Kansas v. Hendricks:**

### *An "As Applied" Challenge to Confinement of a Sexual Predator: Seling v. Young*

In Seling v. Young, 531 U.S. 250 (2001), a person incarcerated as a sexual predator challenged his confinement on double jeopardy and ex post facto grounds. His challenge therefore depended on whether he was subject to civil or criminal confinement. The sexual predator statute challenged by Young was virtually identical to that upheld as civil rather than criminal in *Hendricks*. He argued, however, that *Hendricks* had upheld a facial challenge to the sexual predator statute, while his challenge went to the statute *as applied*. He contented that the state's sexual offender program in fact provided no treatment and in fact resulted in conditions worse than confinement on a criminal charge. The Court, in an opinion by Justice O'Connor, rejected the possibility of an as applied challenge to the sexual predator statute as "fundamentally flawed." Justice O'Connor reasoned as follows:

> We hold that respondent cannot obtain release through an "as-applied" challenge to the Washington Act on double jeopardy and *ex post facto* grounds. We agree with petitioner that an "as-applied" analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses. Unlike a fine, confinement is not a fixed event. As petitioner notes, it extends over time under conditions that are subject to change. The particular

> features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.

Justice Scalia wrote a concurring opinion joined by Justice Souter. He elaborated on the problems of an as applied challenge:

> The short of the matter is that, for Double Jeopardy and *Ex Post Facto* Clause purposes, the question of criminal penalty *vel non* depends upon the intent of the legislature; and harsh executive implementation cannot transform what was clearly intended as a civil remedy into a criminal penalty, any more than compassionate executive implementation can transform a criminal penalty into a civil remedy. This is not to say that there is no relief from a system that administers a facially civil statute in a fashion that would render it criminal. The remedy, however, is not to invalidate the legislature's handiwork under the Double Jeopardy Clause, but to eliminate whatever excess in administration contradicts the statute's civil character. When, as here, a state statute is at issue, the remedy for implementation that does not comport with the civil nature of the statute is resort to the traditional state proceedings that challenge unlawful executive action; if those proceedings fail, and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal. Such an approach protects federal courts from becoming enmeshed in the sort of intrusive inquiry into local conditions at state institutions that are best left to the State's own judiciary, at least in the first instance. And it avoids federal invalidation of state statutes on the basis of executive implementation that the state courts themselves, given the opportunity, would find to be ultra vires. Only this approach, it seems to me, is in accord with our sound and traditional reluctance to be the initial interpreter of state law.

Justice Thomas wrote an opinion concurring in the judgment. Justice Stevens wrote a dissent.

### *Registration of Sex Offenders–Civil Regulation or Criminal Punishment?: Smith v. Doe*

In Smith v. Doe, 123 S.Ct. 1140 (2003), the Court upheld Alaska's version of a "Megan's Law" against a challenge that it violated the Ex Post Facto Clause. Megan's Laws, adopted by legislatures throughout the country, require those convicted as sex offenders to register with their state of residence. Information about the offenders is then published over the internet. Alaska's version required sex offenders to register

even if they were convicted before the date of the legislation. The Court, in an opinion by Justice Kennedy for five Justices, held that the statutory scheme was civil rather than punitive, and therefore the Ex Post Facto Clause did not apply. The Court noted that the purpose of the law, as expressed in the statutory text, was to protect the public from sex offenders. Justice Kennedy cited *Hendricks* and declared that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective" and that "nothing on the face of the statute suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm." The Court also noted that the Alaska law simply requires registration; it "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint."

Justice Kennedy rejected the argument that the registration system was punitive because it was tantamount to probation or supervised release, which clearly are aspects of the criminal justice system. He distinguished registration from probation or supervised release as follows:

> Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion. It suffices to say the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause.

Justice Thomas wrote a short concurring opinion.

Justice Souter concurred in the judgment. He noted that the Alaska scheme did contain some aspects of punishment. For example, some of the provisions were located in the criminal code; the touchstone for regulation was the commission of a past crime rather than current dangerousness; and the statute made written notification of the registration requirement a condition of a guilty plea to any sex offense. He also noted that the publication of sex offender status on the internet might be seen to bear "some resemblance to shaming punishments that were

used earlier in our history to disable offenders from living normally in the community." Justice Souter, however, concluded as follows:

> To me, the indications of punitive character stated above and the civil indications weighed heavily by the Court are in rough equipoise. * * * What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court's judgment.

Justice Stevens dissented. He declared as follows:

> No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.

Justice Ginsburg, joined by Justice Breyer, wrote a separate dissent. She argued that the registration and reporting requirements are comparable to conditions of supervised release or parole, and that the public notification regimen called to mind the shaming punishments of the past. She concluded as follows:

> What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. * * * [T]he Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.