10-1980

Little v. Streater

Lewis F. Powell, Jr.

Note

In paternity suits brought by a mother, Conn. law requires "blood grouping tests" - but does not pay for them.

~~Peter, the~~ appellant, alleged father is indigent, & ~~he~~ claims entitlement to have State pay.

PRELIMINARY MEMORANDUM

Summer List 14, Sheet 1

No. 79-6779

LITTLE

v.

STREATER

In view of serious consequences, I'm inclined to think this is a Bodie case.

Appeal from Conn. Superior Court (Parskey, Shea, & Bieluch; per curiam)

State/Civil

Timely

The indigent could be ~~incarcerated~~ incommunicado (rape), also support & contempt problems

SUMMARY: Must the State pay for an indigent defendant's blood-grouping test in a paternity suit?

FACTS & DECISION BELOW: The appe mother brought a paternity suit against appt in state trial court. Appt moved the court to order blood grouping tests on appe and the child pursuant to Conn. Gen. Stat. §46b-168 (1979), which authorizes the court to order such tests on motion of any party and provides that the costs thereof will be paid by the movant. Appt asserted that he was indigent and requested that the State pay for the tests.

I would vote. In these cases the state essentially forces the

The court denied the motion insofar as it requested state-furnished tests. No tests were made, and the court held that appt was the child's father. The Appellate Session affirmed on the authority of Ferro v. Morgan, 35 Conn. Sup. 689, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979), and Knox v. Siddell, _____ Conn. Sup. _____, _____ A.2d _____ (1979).

In Ferro, the Appellate Session had rejected due process and equal protection challenges to § 46b-168. With respect to the due process clause, the Court reasoned that Bodde v. Connecticut, 401 U.S. 371 (1971), did not require state-furnished tests. Bodde held that the due process clause barred a State from charging indigents a fee to obtain a divorce, but the Court carefully limited its holding to the facts presented. The Appellate Session pointed out that paternity suits in Connecticut are civil, not criminal. They result only in money obligations, not imprisonment; and although a father can be jailed for wilful refusal to make support payments, he could not be imprisoned because of good-faith inability to make the payments due to indigency. The Court also questioned whether blood-grouping tests were as "crucial" evidence as the father maintained. Nor did the Appellate Session find a denial of equal protection. Applying rational basis scrutiny, it held that the State could reasonably place the expense of the test on the party who desired the evidence. The Appellate Session reaffirmed the Ferro holding in Knox, supra.

In the present case, the appt, after losing in the Appellate Session on the basis of Ferro and Knox, sought certification in the Supreme Court of Connecticut. That court denied certification and this appeal followed.

CONTENTIONS: Appt contends that there is a major split among state courts over whether the State must pay for the costs of blood-grouping tests when the putative father is indigent. The large majority of states courts reaching the question have held that state-provided tests are required. Franklin v. District Court, 194 Colo. 189, 571 P.2d 1072 (1977); Commonwealth v. Possehl, 355 Mass. 575, 246 N.E. 2d 667 (1969); Graves v. Daugherty, No. 14517 (W.VA. 1980); Commissioner of Social Services v. Laredo, 100 Misc. 2d 220, 417 N.Y.S. 2d 665 (Family Ct. 1979). The majority of other states provide free blood-grouping tests to indigents by statute. The only two States statutorily requiring the party requesting blood-grouping tests to pay the costs in advance are Connecticut and North Carolina.

The present case is governed by Bodde, supra. Given the distinctive nature of paternity proceedings and the remarkable effectiveness with which modern blood tests conclusively exonerate falsely accused defendants, the denial of a blood test to a putative father solely because of his indigency is the denial of a fundamental constitutional right. Because blood grouping tests are so effective, they are an essential component of the "opportunity to be heard" in civil proceedings.

Appt seeks to distinguish two other decisions in this Court: United States v. Kras, 409 U.S. 434 (1973) (indigent petitioner in bankruptcy must pay filing fee), and Ortwein v. Schwab, 410 U.S. 656 (1973) (no waiver of filing fees for indigent wishing to appeal denial of welfare benefits). Appt suggests six reasons why Kras and Schwab are inapplicable. First, because his presence in court is involuntary, appt stands in the same position as a defendant in a criminal case. Second, in paternity suits, unlike ordinary civil cases, the putative father is subject to a range of criminal or quasi-criminal sanctions for non-support. Third, although this is nominally a private suit, the State is directly involved in that (a) the mother was on welfare and was required to disclose the name of the putative father in order to continue receiving support, (b) the State referred the matter to the mother's attorney for prosecution, (c) the State paid the attorney's fee, and (d) the State is the actual recipient of the support money awarded by the trial court. Fourth, in Connecticut the putative father cannot rebut the mother's prima facie case of paternity simply with his own testimony, but must introduce independent evidence. Fifth, paternity suits by their nature involve the family rights of the father, rights which the Court is increasingly recognizing as significant. Finally, Connecticut's blood test law will create a dual system of justice with substantial, adverse, and recurring impact on indigent defendants.

Appe has filed a motion to dismiss or affirm. A paternity action in Connecticut is civil in nature. Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824, cert denied, 429 U.S. 852 (1976). The decision in Bodde governs civil proceedings and does not require

state-provided blood grouping tests to indigent defendants. To grant a free test would be to subsidize the putative father's defense. Nor does § 46b-168 violate equal protection, since it is supported by rational basis.

DISCUSSION: This is a proper appeal. The Franklin and Possehl cases are squarely in conflict with the decision below. Graves v. Daugherty and Commissioner of Social Services v. Laredo also conflict in result, although it is not entirely clear that those cases are based on federal law.

On the merits, it seems that the cases requiring state-paid blood grouping tests have read Bodde very expansively indeed, and have perhaps paid insufficient attention to Kras and Schwab. It is nevertheless true that paternity suits involve different considerations than ordinary civil litigation. The question is not so clearly foreclosed by previous cases that affirmance is in order. I recommend that the Court note probable jurisdiction.

There is a response.

7/21/80 Miller Op. in Petn.

forces
mother to bring suit and pays for the case. Unlike an indigent plaintiff, the putative father has no choice but to attempt a defense and apparently can only do so through independent evidence--generally a blood test. Although the cost of such a test is probably minimal, if the defendant (father) is indeed prevented from showing his noninvolvement, some quite severe consequences (yrs) can result. Because these cases are state initiated and will benefit only the state, it seems fair to require the state to shoulder this minor burden.

PS

September 29, 1980

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-6779

WALTER LITTLE

vs.

GLORIA STREATER

Also motion to dismiss or affirm.

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.						✓							
Brennan, J.						✓							
Stewart, J.				✓									
White, J.						✓							
Marshall, J.					Join 3								
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.						✓							
Stevens, J.				✓		✓							

Reviewed 1/4 - Retrussuil

Conn. case in which Pett., indigent accused of being father in paternity suit, argues State should pay for blood tests.

PS 1/3/80 [81] Paul says D/P probably requires affirmative answer:

1. State initiates the suit

2. State law provides that denial by putative father is insufficient alone to overcome mother's accusation. Thus, D must produce other ev.

3. Blood tests are best ev., reliable in 90% of cases.

4. Consequences of losing suit, which become res judicata, are grave

(a) Liability of support ~~until~~ while a minor

(b) Inheritance

(c) Subject to civil contempt.

BENCH MEMORANDUM

To: Mr. Justice Powell January 3, 1980

From: Paul Smith Could lead, however, to "slippery slope". Boddie, now, is only civil suit in which State required to pay indigent costs.

No. 79-6779: Little v. Streater

What about recording counsel?

Question Presented

Whether Connecticut is constitutionally required to pay for blood tests requested by the putative father, in proceedings to establish paternity that the state requires mothers on welfare to initiate.

Background

In 1975, appellee, who is unmarried, gave birth to a daughter. In order to continue receiving public assistance from the state of Connecticut, she was required by law to disclose the identity of the father, who she said was appellant. The state then retained a lawyer to bring a paternity action against appellant, with appellee as the the named plaintiff. When the action was filed in 1977, appellant was incarcerated in a state prison. Because he was totally indigent, appellant filed a motion for blood tests in forma pauperis--i.e., funded by the state. This motion was denied.

The case went to trial in 1978. At that point, appellant was still in prison and had been unable to pay for blood tests, which cost about $250 at that time.[1] After a trial at which appellant and appellee testified, the court entered an order finding appellant to be the father. At a later hearing, the court found appellant liable for $6,974.48, representing the maintenance and support costs of the child until that date. Appellant is also obligated to provide support for the child whenever he is able to do so, until she comes of age. All of this money is owed directly to the state because appellee and the daughter are on welfare. Appellant

Owed to State

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[1]The cost in Connecticut has now risen to well over $400. It is not clear whether this sum represents the cost for tests for all three parties, or only for each of them.

These blood tests have the capacity to exonerate over 90% of all falsely accused fathers.

is presently paying $2 per month.

Appellant appealed the denial of his motion for blood tests paid for by the state. In so doing, he did not challenge a state statute, Conn. Gen. Stat. § 46b-168, directly, because that statute had not yet been construed as requiring the movant in a paternity suit to bear such costs. Prior to the decision on appeal, the Appellate Session of the Superior Court decided Ferro v. Morgan, 35 Conn. Supp. 679, 406 A.2d 873, cert. denied, 177 Conn. 753, 399 A.2d 526 (1979). Ferro construed the statute as mandating payment by the movant,[2] and upheld the constitutionality of the statute, as so construed. In this case, the Appellate Session relied on Ferro and rejected appellant's appeal in a short per curiam opinion. The state supreme court denied review.

In Connecticut, a paternity suit is a civil proceeding. The law provides that the consistent accusations of a mother cannot be rebutted solely by denials from the defendant male. Kelsaw v. Green, 6 Conn. Cir. Ct. 516, 276 A.2d 909 (App. Div. Cir. Ct. 1971). It also provides that a court may enforce its paternity finding with civil contempt sanctions if the father refuses to make the required support

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[2]The statute provides that the court may order any party in a paternity suit to undergo blood tests. It then states that the "costs of making such tests shall be chargeable against the party making the motion." (emphasis added).

Under Conn. law party requesting blood tests must pay for them

payments. Conn. Gen. Stat. § 46b-171. There is, in addition, a possibility of criminal sanctions for such nonsupport, under id., § 53-304(a). In either case, the fact of paternity itself is res judicata after the initial court finding in a civil paternity action like the one at issue here.

Discussion

There are two possible theories for explaining why appellant has a constitutional right to have blood tests paid for--due process and equal protection. These may be treated separately, although in this area they tend to merge. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1963) (right to free transcript on criminal appeal); cf. Ross v. Moffitt, 417 U.S. 600, 608 (1974) ("The precise rationale for the Griffin and Douglas lines of cases has never been explicitly stated ... .").

I. Due Process

The parties give greater emphasis to the due process theory, and it is, in my view, the stronger argument for appellant. The argument is the following: The state has initiated a civil lawsuit to declare appellant the father of appellee's child. In doing so, the state is seeking to obtain support payments for itself, since appellee and her daughter are on welfare. The effect of the verdict against appellant is that he is obligated to make such payments when he is able to do so, and may suffer imprisonment if he fails to pay. In

addition, this verdict constitutes a final determination that appellant and the child are father and daughter--a determination with other consequences for both appellant and the child. When the state initiates a lawsuit with these possible consequences--both financial and personal--due process considerations become important. Here, there exists a test that can conclusively exonerate the vast majority of innocent men. The state cannot simply allow putative fathers to pay for such tests if they are able, especially where its rules of evidence make the only other evidence the defendant is likely to have--his own testimony--legally insufficient to overcome the accusations of the mother. In this setting, indigent men receive no due process at all, since they are unable to offer evidence that can have any legal effect.

The state responds that this is a civil case and due process does not require more than a trial at which the putative father is allowed to introduce any competent evidence. Only once has the Court required the states to make affirmative efforts to improve the lot of indigents in civil cases, Boddie v. Connecticut, 401 U.S. 371 (1971), and there the filing fees at issue were preventing all access to the courts for divorce proceedings. This case does not become criminal merely because a father may be jailed for failing to make support payments. This incarceration is akin to a finding of contempt of court, and serves merely to enforce the court's orders.

A stronger argument than in Griffin & Douglas

It is important to recognize, first of all, that the due process argument raised by appellant here is easier to make than the due process arguments considered in Griffin, supra, and Douglas v. California, 372 U.S. 353 (1963) (right to counsel on first criminal appeal). In cases involving criminal appeals, the problem is that this Court has held that there is no constitutional right to any appeal at all. Ross v. Moffitt, supra, 417 U.S. at 611. Therefore it is hard to argue that due process requires free transcripts for indigent appellants, or that an appeal without appointed counsel is procedurally unfair. In addition, in an appellate situation, it is the appellant who is invoking the protection of the court, not the state that is forcing him to defend himself. See id., at 610-11. For all of these reasons, these appellate cases are based in part on equal protection considerations.

Here, however, there are no such difficulties with the due process approach. The state has essentially forced appellee to bring this suit for its benefit,[3] and appellant is an unwilling participant. As a result, there is clearly a right to some form of due process prior to the declaration of paternity. The only difficult question is the kind of process that is due. Specifically, is this one of the situations in

Clearly some right. Q is what process is due

[3]Indeed, the State Attorney General is named as a party here, and appellee's brief was filed by him.

which the state must aid affirmatively one party's presentation of his case? Cf. Boddie, supra, at 376-77 (filing fees for divorces) ("Resort to the judicial process by these plaintiffs is no more volutary in a realistic sense than that of the defendant called upon to defend his interests in court. ... In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judical forum.").

Answering this question requires a weighing of numerous factors--including the importance of the decision being made, the importance of the particular kind of evidence involved, the availability of alternative forms of evidence, and the countervailing state interests. In this case, all of these factors argue in favor of requiring states to pay for blood tests.

First, it is clear that this particular determination had great importance for a person in appellant's position. The finding of paternity creates a substantial financial obligation that is both immediate and continuing. Moreover, unlike other civil proceedings leading only to financial liability, this sort of suit has significant non-financial consequences, both for the defendant and for his putative child. The court has decided that a parent/child relationship exists between these two persons. This

determination is similar to the divorce determination considered so significant in Boddie, supra, at 374 ("Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.") (emphasis added); United States v. Kras, 409 U.S. 434 (1973) (Boddie distinguished on the ground that it involved fundamental interests, unlike a bankruptcy case). For this reason, this case is easily distinguishable from the average civil case.

Next, it is clear that the particular piece of evidence that appellant wants the State to pay for is hardly insignificant. This blood test can exonerate over 90% of falsely accused men, and it is fair to say that it is a standard part of paternity suits in the United States today. The importance of this test becomes clear when one considers the alternatives available to appellant.[4] There are unlikely to be witnesses to the act of conception, and Connecticut has taken steps to make his own testimony legally irrelevant when

Ev. may be controlling

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[4]Appellant points to studies indicating that paternity findings are quite likely to be erroneous. This fact increases the importance of the blood test device.

it stands alone in contradiction to the plaintiff's accusations. It is this factor that, for me, distinguishes this case from numerous others in which indigents might demand funding for the preparation of a civil or criminal case. Here, if appellant is consistently accused by the plaintiff, his trial has no real meaning at all unless he can offer a blood test in evidence. For due process purposes, the trial becomes equivalent to an administrative declaration of paternity based solely on the woman's accusation.

Finally, as the ACLU points out, the state's interest in refusing this payment is not very compelling. The state spends considerable amounts of money to bring these actions against indigents who, because of that status, are unlikely to be able to make substantial support payments. Once paternity is declared, the efforts to collect these payments is quite likely to result in higher costs than benefits. In this context, one suspects that the state is bringing this action as a matter of principle, rather than for financial reasons. If it chooses to do so, it seems fair to expect it to provide the single piece of evidence that can make the defense viable.

II. Equal Protection

I would decide this case on due process grounds and avoid the difficult question whether this case is a proper place in which to extend the cases involving benefits for indigents in the criminal justice system. See Douglas, supra;

Griffin, supra. The equal protection theory has at least two analytical problems. First, a wealth classification is not inherently suspect.[5] Second, there is not really any classification here at all. The State is merely treating everyone, rich and poor, equally. Cf. Douglas, supra, at 361 (Harlan, J., dissenting) (To approach the present problem in terms of the Equal Protection Clause is, I submit, but to substitute resounding phrases for analysis. ... The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich ...."). These problems are sufficiently formidable to counsel against an equal protection approach here.

Conclusion and Summary

In my view, appellant's due process argument has merit and should prevail. The only real argument against him is that, although fairness seems to be on his side, a victory

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[5]Professor Gunther suggests that a higher level of scrutiny applies when the wealth classification affects fundamental interests. G. Gunther, Constitutional Law 810 (9th ed.). Such an approach could be adopted here.

for him would lead the Court down a slippery slope. Obviously, there are many expensive evidentiary aids that the rich use in civil and even criminal cases. Arguably, there is a danger that indigents will begin to demand payment for such devices when they are haled into court by the State. There are, however, several factors that make this situation unique and these can be emphasized. First, there is a fundamental interest involved. Second, this evidentiary device is peculiarly important and peculiarly determinative. Most importantly, the State gives little or no legal effect to the only other evidence likely to available to such a defendant--his own testimony. These considerations render this case unique, and are sufficient to overcome the state's argument that due process does not require more than an open proceeding at which the defendant can present whatever evidence he can afford.

79-6779 Little v Streater
6/12/81

The D/P argument for payment of cost of test by State:

1. State initiates the suit

2. State law: denial by putative father is not enough to rebut mother

3. Blood tests best evidence (90% reliable)

4. Consequences) revision
   a. Support to age 18
   b. Inheritance
   c. Civil contempt

Q- Can we limit (slippery slope)?
: Boddie only civil case +
there access to court was at issue.

Paul Smith

[81]

79-6779 LITTLE v. STREATER

Argued 1/13/80

Blue (appointed to represent appellant)

The "governing principle" stated by Blue is that "group blood tests" are conclusive ev. – & no other ev. is equally conclusive.

McGovern (Asst AG) (a stupid lawyer!)

Tax is a "civil case" – but the jury is in "guilty" or "not guilty". In all other ~~contracts~~ respects, case & trial & consequences are civil.

No provision in statute for assessment of "costs"

State ~~does not pay for attorney~~ does not pay for lawyer – except when public defender.

5. Handwriting ev ?

Supreme Court of the United States

6. Ballistic test ?

Memorandum

....., 19.....

What about paying for:

1. Lie detector test ?

~~2. Alcohol~~

2. Blood test in drunk trial case

3. Any other scientific test

4. Indigent putative father's travel expense to attend trial.

79-6779 Little v. Streater
1/15/81

The critical Q for us is whether we could limit a holding for the putative father - i.e. a reversal.

1. As in Boddie, there is a fundamental interest here: the creation (rather than termination) of a permanent biological relationship - with enormous reverse consequences.

2. As in a rape case, the only witnesses, usually, are the participants. Conn. law requires a jury. for the woman if her testimony is contradicted ~~by~~ only by the man. The blood test may be essential to his defense

Reverse 9-0

79-6779 Little v. Streater — Conf. 1/16/81

The Chief Justice Reverse

Conn. places an unusual burden on the ≠ alleged father.

Statute is 200 years old (C.J. read the statute.)

The burden of proof is shifted to the father - which is unique.

On this basis (burden of proof), we can write narrowly

Mr. Justice Brennan Reverse

Δ Can't prove his case by his own testimony. This is unique burden.

This was a D/P violation

Boddie is close

Mr. Justice Stewart Reverse

Rely on the burden.

Also State brought this action.

Reinst ops. to these unique circumstances.

D/P violation.

Mr. Justice White Reverse

Mr. Justice Marshall Reverse

Would write more broadly

Mr. Justice Blackmun Reverse

State is not neutral - it has an interest (economic)

Boddie helps.

Accuracy is important - child has interest.

Mr. Justice Powell Reverse

D/P grounds.
Agree with what
CJ, PS & HAB have said

Mr. Justice Rehnquist Reverse

Mr. Justice Stevens Reverse

Agree with TM that would
form a broad opn. — encouraging
use of evi. as reliable as this

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 19, 1981

Re: 79-6779 - Little v. Streater

Dear Chief:

Please join me.

Respectfully,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 19, 1981

Re: No. 79-6779, Little v. Streater

Dear Chief,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

I would join. This opinion ~~case~~ puts sufficient emphasis on the factors making the case unique.

PS

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 19 1981

Recirculated: _____

1st DRAFT

Reviewed

Join

SUPREME COURT OF THE UNITED STATES

No. 79-6779

Walter Little, Appellant, v. Gloria Streater.	On Appeal from the Appellate Session of the Superior Court of Connecticut.

[May —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether a Connecticut statute, which provides that in paternity actions the cost of blood grouping tests is to be borne by the party requesting them, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when applied to deny such tests to indigent defendants.

I

On May 21, 1975, appellee Gloria Streater gave birth out of wedlock to a female child, Kenyatta Chantel Streater. As a requirement stemming from her child's receipt of public assistance, appellee identified appellant Walter Little as the child's father to the Connecticut Department of Social Services. See Conn. Gen. Stat. § 46b–169 (1981). The Department then provided an attorney for appellee to bring a paternity suit against appellant in the Court of Common Pleas at New Haven to establish his liability for the child's support.[1]

At the time the paternity action was commenced, appellant was incarcerated in the Connecticut Correctional Institution at Enfield. Through his counsel, who was provided by a

[1] While the case was pending, the Court of Common Pleas was merged with the Superior Court of Connecticut. See Conn. Gen. Stat. § 51–164s (1981).

legal aid organization, appellant moved the trial court to order blood grouping tests on appellee and her child pursuant to Conn. Gen. Stat. § 52–184 (1977), which later became Conn. Gen. Stat. § 46b–168 (1981) and includes the provision that "[t]he costs of making such tests shall be chargeable against the party making the motion." [2] Appellant asserted that he was indigent [3] and asked that the State be ordered to pay for the tests. The trial court granted the motion insofar as it sought blood grouping tests but denied the request that they be furnished at the State's expense. App. 8.

For "financial reasons," no blood grouping tests were performed even though they had been authorized. *Id.*, at 12. The paternity action was tried to the court on September 28, 1978. Both appellee and appellant, who was still a state prisoner, testified at trial. *Id.*, at 14–19.[4] After hearing the testimony, the court found that appellant was the child's

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[2] In its entirety, Conn. Gen. Stat. § 46b–168 (1981) states:
"In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child, and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion."

[3] Appellant's financial affidavit, which was filed with the motion, showed that he had weekly income and expenses of $5 and no assets. App. 7. The trial court later specifically found that, at the time of the motion, appellant "was indigent and could not afford to pay the costs for blood grouping tests." *Id.*, at 23.

[4] Although appellant admitted intimacy with appellee, he expressed doubt that he was the child's father because of appellee's alleged relationship with another man and because she had not allowed him to see the child. App. 17–18.

father. *Id.*, at 20. Following a subsequent hearing on damages, the court entered judgment against appellant in the amount of $6,974.28, which included the "lying-in" expenses of appellee and the child, "accrued maintenance" through October 31, 1978, and the "costs of suit plus reasonable attorney's fees." *Id.*, at 20–21. In addition, appellant was ordered to pay child support at the rate of $2 per month—$1 toward the arrearage amount of $6,974.28 and $1 toward a current monthly award of $163.58—directly to Connecticut's Department of Finance and Control. *Ibid.*[5]

The Appellate Session of the Connecticut Superior Court affirmed the trial court's judgment in an unreported *per curiam* opinion. Relying on its prior decision in *Ferro* v. *Morgan*, 35 Conn. Supp. 689, 406 A. 2d 873, cert. denied, 177 Conn. 753, 399 A. 2d 526 (1979), the Appellate Session held that Conn. Gen. Stat. § 46b–168 (1981) does not violate the due process and equal protection rights of an indigent defendant in a paternity proceeding. The Appellate Session thus found no error in the trial court's denial of appellant's motion that the cost of blood grouping tests be paid by the State. App. 25.

Thereafter, appellant's petition for certification was denied by the Connecticut Supreme Court, 180 Conn. 756, 414 A. 2d 199 (1980); and we noted probable jurisdiction. — U. S. — (1980).

II

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." Appellant argues that his right

[5] The minimal sum of $2 was ordered presumably because appellant was indigent and incarcerated. However, his payments to the State are subject to future increase pursuant to Conn. Gen. Stat. § 46b–171 (1981), which provides that "[a]ny order for the payment of [child] support . . . may at any time thereafter be set aside or altered by any court issuing such order."

to due process was abridged by the refusal, under Conn. Gen. Stat. § 46b–168 (1981), to grant his request based on indigency for State-subsidized blood grouping tests.

Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162 (1951) (concurring opinion). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). In *Boddie* v. *Connecticut*, 401 U. S. 371, 381 (1971), the Court held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Accord, *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965); *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950). And in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we explained:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

These standards govern appellant's due process claim, which is premised on the unique quality of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity actions under Connecticut law.

A

The discovery of human blood groups by Dr. Karl Landsteiner in Vienna at the beginning of this century, and subsequent understanding of their hereditary aspects, made possible the eventual use of blood tests to scientifically evaluate allegations of paternity. P. Speiser & F. Smekal, Karl Landsteiner 89–93 (1975). Like their European counterparts, American courts gradually recognized the evidentiary value of blood grouping tests in paternity cases, and the modern status of such tests has been described by one commentator as follows:

> "As far as the accuracy, reliability, dependability—even infallibility—of the test are concerned, there is no longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority. There is, in fact, no living authority of repute, medical or legal, who may be cited adversely. . . . [T]here is now . . . practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity." 1 S. Schatkin, Disputed Paternity Proceedings § 9.13 (1975).

The application of blood tests to the issue of paternity results from certain properties of the human blood groups and types: (a) the blood group and type of any individual can be determined at birth or shortly thereafter; (b) the blood group and type of every individual remains constant throughout life; and (c) the blood groups and types are inherited in accordance with Mendel's laws. *Id.*, § 5.03. If the blood groups and types of the mother and child are known, the possible and impossible blood groups and types of the true father can be determined under the rules of inheritance. For example, a group AB child cannot have a group O parent, but can have a group A, B, or AB parent.

Similarly, a child cannot be type M unless one or both parents are type M, and the factor rh' cannot appear in the blood of a child unless present in the blood of one or both parents. *Id.*, §§ 5.03 and 6.02. Since millions of men belong to the possible groups and types, a blood grouping test cannot conclusively establish paternity. However, it can demonstrate nonpaternity, such as where the alleged father belongs to group O and the child is group AB. It is a negative rather than an affirmative test with the potential to scientifically exclude the paternity of a falsely accused putative father.

The ability of blood grouping tests to exonerate innocent putative fathers was confirmed by a 1976 report developed jointly by the American Bar Association and the American Medical Association. Miale, Jennings, Rettberg, Sell & Krause, Joint AMA–ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L. Q. 247 (Fall 1976). The joint report recommended the use of seven blood test "systems"—ABO, Rh, MNS, Kell, Duffy, Kidd, and HLA—when investigating questions of paternity. *Id.*, at 257–258. These systems were found to be "reasonable" in cost and to provide a 91% cumulative probability of negating paternity for erroneously accused Negro men and 93% for white men. *Id.*, at 254, 257.

The effectiveness of the seven systems attests the probative value of blood test evidence in paternity cases. The importance of that scientific evidence is heightened because "[t]here are seldom accurate or reliable eye witnesses since the sexual activities usually take place in intimate and private surroundings, and the self-serving testimony of a party is of questionable reliability." Larson, Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond, 13 J. Family L. 713 (1974). As Justice Bren-

NAN wrote while a member of the Appellate Division of the New Jersey Superior Court:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.
>
> "The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day. Their reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but 'they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts' . . . ." *Cortese* v. *Cortese,* 10 N. J. Super. 152, 156, 76 A. 2d 717, 719 (1950).

B

Appellant emphasizes that, unlike a common dispute between private parties, the State's involvement in this paternity proceeding was considerable and manifest, giving rise to a constitutional duty. Because appellee's child was a recipient of public assistance, Connecticut law compelled her, upon penalty of fine and imprisonment for contempt, "to disclose the name of the putative father and to institute an action to establish the paternity of said child." Conn. Gen. Stat. § 46b–169 (1981). See *Maher* v. *Doe,* 432 U. S. 526 (1977); *Roe* v. *Norton,* 422 U. S. 391 (1975).[6] The State's

[6] In response to an interrogatory, appellee, through her attorney, stated that her "continuing eligibility for [public] assistance required her to disclose [the] father's identity." App. 10.

Connecticut's disclosure requirement is fostered by 42 U. S. C. § 654 (4), which directs that, as to any child born out of wedlock for whom benefits under the Aid to Families with Dependent Children program are claimed, the states must undertake "to establish . . . paternity . . . unless it is against the best interests of the child to do so" and "to secure support for such child from his parent." See also 45 CFR § 232.12 (1980).

Attorney General automatically became a party to the action, and any settlement agreement required his approval or that of the Commissioner of Human Resources or Commissioner of Income Maintenance. See Conn. Gen. Stat. §§ 46b–160 and 46b–170 (1981). The State referred this mandatory paternity suit to appellee's lawyer "for prosecution" and paid his fee as well as all costs of the litigation. App. 10, 20; Tr. of Oral Arg. 30, 34, 40.[7] In addition, the State will be the recipient of the monthly support payments to be made by appellant pursuant to the trial court's judgment. App. 31. "State action" has undeniably pervaded this case. Accordingly, appellant need not, and does not, contend that Connecticut has a constitutional obligation to fund blood tests for an indigent's defense in ordinary civil litigation between private parties.

The nature of paternity proceedings in Connecticut also bears heavily on appellant's due process claim. Although the State characterizes such proceedings as "civil," see *Robertson* v. *Apuzzo*, 170 Conn. 367, 365 A. 2d 824, cert. denied, 429 U. S. 852 (1976), they have "quasi-criminal" overtones. Conn. Gen. Stat. § 46b–171 (1981) provides that if a putative father "is found *guilty*, the court shall order him to stand charged with the support and maintenance of such child" (emphasis added); and his subsequent failure to comply with the court's support order is punishable by imprisonment under Conn. Gen. Stat. §§ 46b–171, 46b–215, and 53–304 (1981). Cf. *Walker* v. *Stokes*, 45 Ohio App. 2d 275, 278, 344 N. E. 2d 159, 161 (1975); *People* v. *Doherty*, 261 App. Div. 86, 88, 24 N. Y. S. 2d 821, 823 (1941).

Moreover, the defendant in a Connecticut paternity action faces an unusual evidentiary obstacle. Connecticut's original "bastardy" statute was enacted in 1672, see The Book

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[7] At oral argument, the Assistant Attorney General of Connecticut acknowledged that the cost of any witnesses for the plaintiff in a proceeding such as this also would be paid by the State. Tr. of Oral Arg. 45.

of the General Laws for the People Within the Jurisdiction of Connecticut 6 (1673), and from 1702 until 1902 it stated in pertinent part: "And if such woman shall continue constant in her accusation, being put to the discovery, in the time of her travail, and also examined on the trial of the cause, it shall be prima facie evidence that such accused person is the father of such child." *Mosher and Bennett,* 108 Conn. 671, 672, 144 A. 297 (1929). In *Booth* v. *Hart,* 43 Conn. 480 (1876), the Connecticut Supreme Court construed this statutory language as follows:

> "[For 146 years], parties to suits with but one exception could not testify in their own behalf. But in cases of illegitimate children, . . . an exception was made of suits brought by [a mother] for the maintenance of [her] child, and she was allowed to testify who was its father under certain safeguards provided by the statute. And the statute went on to provide that if she should continue constant in her accusation, being examined on oath and put to the discovery in the time of her travail, the person whom she declared to be the father of her child should be adjudged to be so, unless from the evidence introduced by him the triers should be of the opinion that he was innocent of the charge. The existence of these few facts were all that was necessary to maintain the suit in the first instance, and the burden of proof then changed to the defendant, and he was required to prove himself innocent of the accusation by other evidence than his own." *Id.,* at 485.

In 1848, the Connecticut Legislature enacted a statute providing that "no person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise." *Id.,* at 481. Since the defendant in a paternity action was no longer precluded from testifying in his own behalf, the 1848 statute removed the need for the safeguard of putting the complainant "to the discovery, in

the time of her travail." *Id.*, at 486. In its modern form, Conn. Gen. Stat. § 46b–160 (1981) simply states that "if such mother or expectant mother continues constant in her accusation, it shall be evidence that the respondent is the father of such child." Nevertheless, in *Mosher* v. *Bennett*, *supra*, 108 Conn., at 674, 144 A., at 298, the Connecticut Supreme Court held:

> "The mother still has the right to rely upon the prima facie case made out by constancy in her accusation. She is no longer required under oath to make such discovery at the time of her travail. *The prima facie case so made out places upon the reputed father the burden of showing his innocence of the charge, and under our practice he must do this by other evidence than his own.*" (Emphasis added.)

Accord, *Kelsaw* v. *Green*, 6 Conn. Cir. Ct. 516, 519–520, 276 A. 2d 909, 911–912 (1971).[8]

Under Connecticut law, therefore, the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denied him that reliable scientific proof by requiring that he bear its cost.

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[8] At oral argument, the State's Assistant Attorney General represented that "[c]urrently th[is] is the law of Connecticut," Tr. of Oral Arg. 46; and, when presented with a hypothetical situation, his response illustrated the practical operation of the evidentiary rule:

"QUESTION: [D]oes that mean . . . that [if] she takes the stand [and says], 'he's the father, he's the father, he's the father, he's the father.' She never deviates. . . . He takes the stand and says, 'I am not, I am not, I am not, I am not.' And the factfinder believes him and doesn't believe her, you're saying—

. . . . .

"[COUNSEL'S ANSWER]: If that was the testimony, she would win." Tr. of Oral Arg. 44.

See Conn. Gen. Stat. § 46b-168 (1981). In substance, the State has created an adverse presumption regarding the defendant's testimony by elevating the weight to be accorded the mother's imputation of him. If the plaintiff has been "constant" in her accusation of paternity, the defendant carries the burden of proof and faces severe penalties if he does not meet that burden and fails to comply with the judgment entered against him. Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.

C

Our holding in *Mathews* v. *Eldridge, supra,* at 335, set forth three elements to be evaluated in determining what process is constitutionally due: the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and the governmental interests affected. Analysis of those considerations weighs in appellant's favor.

The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. See *Stanley* v. *Illinois,* 405 U. S. 645, 651–652 (1972). Just as the termination of such bonds demands procedural fairness, see *Lassiter* v. *Department of Social Services,* — U. S. — (1981), so too does their imposition. Through the judicial process, the State properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's main-

tenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.[9]

Given the usual absence of witnesses, the self-interest coloring the testimony of the litigants, and the State's onerous evidentiary rule and refusal to pay for blood grouping tests, the risk is not inconsiderable that an indigent defendant in a Connecticut paternity proceeding will be erroneously adjudged the father of the child in question. See generally H. Krause, Illegitimacy: Law and Social Policy 106–108 (1971). Further, because of its recognized capacity to definitively exclude a high percentage of falsely accused putative fathers, the availability of scientific blood test evidence clearly would be a valuable procedural safeguard in such cases. See *id.*, at 123–137; Part II–A, *supra*. Connecticut has acknowledged as much in § 46b–168 of its statutes by providing for the ordering of blood tests and the admissibility of negative findings. See n. 2, *supra*. Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute. Thus, access to blood grouping tests for indigent defendants such as appellant would help to insure the correctness of paternity decisions in Connecticut.

The State admittedly has a legitimate interest in the wel-

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[9] In its report on the 1974 Social Services Amendments to the Social Security Act, 42 U. S. C. §§ 654, 655, et al., the Senate Finance Committee stated:

"In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the Committee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child. . . . The Commitee is convinced that . . . paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing." S. Rep. No. 93–1356, 93d Cong., 2d Sess. 52 (1974).

See n. 6, *supra*.

fare of a child born out of wedlock who is receiving public assistance, as well as in securing support for the child from those legally responsible. In addition, it shares the interest of the child and the defendant in an accurate and just determination of paternity. See Regulations of Connecticut State Agencies § 17–82e–4 (1979). Nevertheless, the State also has financial concerns; it wishes to have the paternity actions in which it is involved proceed as economically as possible and, hence, seeks to avoid the expense of blood grouping tests.[10] Pursuant to 42 U. S. C. § 655, however, the states are entitled to reimbursement of 75% of the funds they expend on operation of their approved child support plans, and regulations promulgated under authority of 42 U. S. C. § 1302 make clear that such federal financial participation is available for the development of evidence to establish paternity, "including the use of . . . blood tests." 45 CFR § 304.20 (b)(2)(i)(B) (1980). Moreover, following the example of other states, the expense of blood grouping tests for an indigent defendant in a Connecticut paternity suit could be advanced by the State and then taxed as costs to the parties. See Ark. Rev. Stat. § 34.705.1 (1962); Kan. Stat. Ann. § 23–132 (1974); La. Rev. Stat. § 9:397.1 (West Supp. 1981); N. H. Rev. Stat. Ann. § 522:3 (1974); Ore. Rev. Stat. § 109.256 (1979); Tex. Family Code Ann. § 13.03 (b) (Vernon Supp. 1980).[11] We must conclude that the State's mone-

[10] Laboratories surveyed in a 1977 study sponsored by the Department of Health, Education, and Welfare (now the Department Health and Human Services) charged an average of approximately $245 for a battery of test systems that led to a minimum exclusion rate of 80%. H. E. W. Office of Child Support Enforcement, Blood Testing to Establish Paternity 35–37 (1977). According to appellant, blood grouping tests were available at the Hartford Hospital for $250 at the time this paternity action was pending trial, but the cost has since been increased to $460. Brief for Appellant 4, and n. 5.

[11] Other jurisdictions also make blood grouping tests available to indigents by statute. See, *e. g.*, Ala. Code § 26–12–5 (1977); D. C. Code § 16–2343 (Supp. V 1978); Haw. Rev. Stat. § 584–16 (1976); Md. Ann.

tary interest "is hardly significant enough to overcome private interests as important as those here." *Lassiter* v. *Department of Social Services, supra,* at —.

Assessment of the *Mathews* v. *Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, is effectively denied "a meaningful opportunity to be heard." *Boddie* v. *Connecticut, supra,* at 381.[12] Therefore, "the requirement of 'fundamental fair-

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Code § 16–66G (Supp. 1980); Mich. Comp. Laws Ann. § 722.716 (c) (1968); Minn. Stat. Ann. § 257.69 (2) (Supp. 1981); N. D. Cent. Code § 14–17–15 (Supp. 1977); Pa. Cons. Stat. Ann. § 42–6132 (Purdon Supp. 1980); Utah Code Ann. § 78–25–23 (1977); Wis. Stat. Ann. § 767.48 (5) (West Supp. 1980). In addition, the highest courts of Colorado, Massachusetts, and West Virginia have held that putative fathers may not constitutionally be denied access to blood grouping tests on the basis of indigency. See *Franklin* v. *District Court,* 194 Colo. 189, 571 P. 2d 1072 (1977); *Commonwealth* v. *Possehl,* 355 Mass. 575, 246 N. E. 2d 667 (1969); *State ex rel. Graves* v. *Daugherty,* 266 S. E. 2d 142 (W. Va. 1980).

Apart from Connecticut, it also appears that North Carolina requires all defendants requesting blood tests in paternity proceedings, irrespective of means, "to initially be responsible for any of the expenses thereof" or do without them. N. C. Gen. Stat. § 8–50.1 (b) (2) (Supp. 1979).

[12] In *Boddie,* we held that due process prohibits a state from denying an indigent access to its divorce courts because of inability to pay filing fees and costs. However, in *United States* v. *Kras,* 409 U. S. 434 (1973), and *Ortwein* v. *Schwab,* 410 U. S. 656 (1973), the Court concluded that due process does not require waiver of filing fees for an indigent seeking a discharge in bankruptcy or appellate review of an agency determination resulting in reduced welfare benefits. Our decisions in *Kras* and *Ortwein* emphasized the availability of other relief and the less "fundamental" character of the private interests at stake than those implicated in *Boddie.* Because appellant has no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant, this case is comparable to *Boddie* rather than to *Kras* and *Ortwein.*

ness'" expressed by the Due Process Clause was not satisfied here. *Lassiter* v. *Department of Social Services, supra,* at ——.

III

"[A] statute . . . may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie* v. *Connecticut, supra,* at 379. Thus, "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id.,* at 380. We hold that, in these specific circumstances, the application of Conn. Gen. Stat. § 46b–168 (1981) to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment.[13] Accordingly, the judgment of the Appellate Session of the Connecticut Superior Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

[13] Because of our disposition of appellant's due process claim, we need not consider whether the statute, as applied, also violated the Equal Protection Clause.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 20, 1981

Re: No. 79-6779 - Little v. Streater

Dear Chief:

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 20, 1981

RE: No. 79-6779 Little v. Streater

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

May 20, 1981

79-6779 Little v. Streater

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 21, 1981

RE: No. 79-6779 - Little v. Streater

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 27, 1981

Re: No. 79-6779 - Little v. Streater

Dear Chief:

Please join me.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 27, 1981

Re: No. 79-6779 Little v. Streater

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
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				79-6779 Little v. Streater				