Jayne Bray, after whom the Bray v. Alexandria *case was titled, was one of those arrested during the 1989 D.C. Project.*

will never know what the Justices were thinking when they voted to hear the *Jayne Bray* case — but we will always know that God displayed His Sovereignty in that vote to grant a Writ of Certiorari. After that God demonstrated His Abundant Grace by empowering the team of attorneys headed by Jay Sekulow to prepare the *Bray* case for briefing and argument."

The *Bray* case was argued twice before the Supreme Court. During the first argument, the Court had only eight justices (Thurgood Marshall had retired; Clarence Thomas had not yet begun his service). During both arguments, on October 16, 1991, and on October 6, 1992, Jay Sekulow argued as counsel for the petitioners and John Roberts, deputy solicitor general of the United States, presented argument as a Friend of the Court supporting the pro-life position. During the first argument, the abortionists' case was presented by a senior partner at a heavyweight Washington law firm; during the second argument, a staff attorney with NOW presented the oral argument.

Late in the Court's term, in June, 1992, the parties were expecting the Court to render its decision. Instead, they received word that the *Bray* case was being returned to the argument calendar for reargument in the fall of 1992. A great deal of speculation was generated by the Court's order. Normally, reargument means that the Court is equally divided on a case. (This usually occurs when a justice is missing from the Court, either because of death, retirement or because a justice has declined to participate in a case.)

ACLJ had heard rumors that the decision in *Bray* was being written for the Court by Justice Antonin Scalia — now they wondered whether he wrote an opinion so strongly favoring their arguments that he scared middle of the road justices such as Anthony Kennedy and Sandra O'Connor. Scalia is known for persistent and probing questions at oral argument and occasionally caustic writings in his decisions.

The gloom only increased when, in late June, 1992, the Court issued its ruling in the Pennsylvania abortion case, *Planned Parenthood v. Casey*. There, in black and white, were Justices O'Connor, Kennedy and Souter, singing the praises of *Roe v. Wade*. Seeing that all three had aligned themselves with "the dark side," ACLJ began to wonder whether the Court was planning to trounce pro-lifers with its decision in *Bray*.

"We remembered that the Lord had brought this case to the Supreme Court and that He continued to be the master of the situation," said Jay Sekulow.

After the second argument, the parties prepared themselves for a quick decision. Because cases frequently are reargued for the benefit of a new justice, other minds on the Court are usually made up. Most thought that they would not have to wait until the end of the term, in June, 1993, for this decision if the reargument was only done to allow Justice Thomas to participate in resolving the case.

Another abortion case, *Roe v. Wade*, took a similar route in its day. Then, Associate Justice Blackmun felt that reargument might allow the configuration of the court's vote to become more firm in its support of the right to kill babies. After reargument, as everyone knows, the decision in *Roe v. Wade* was announced on January 22, 1973.

The *Bray* Decision

The *Bray* decision was announced on January 13, 1993. Just days before the abortionists gained ascendancy at the White House. Just a week before pro-lifers returned to Washington for their annual rally and march to the Supreme Court. Just before pro-life activists returned in force to Washington, D.C., to save women and children from abortion.

The Court's decision was, it turned out, written byJustice Antonin Scalia. Joining him in his opinion and the Court's judgment were Chief Justice William Rehnquist and Associate Justices Byron White, Anthony Kennedy, and Clarence Thomas. Associate Justice Souter refused to join Scalia's written opinion, although he agreed with the judgment or result. Associate Justice Stevens dissented and was joined in his dissenting opinion by Associate Justice Blackmun. Associate Justice O'Connor, likewise, dissented and was joined in her dissenting opinion by Blackmun.

The majority opinion by Justice Scalia gave the rescuers everything they asked the Court to give. Right out of the box, Scalia took up the second question from our petition: whether opposition to abortion was the legal equivalent of discrimination. In his opinion, Scalia rejected that conclusion: "We reject the apparent conclusion of the District Court...that opposition to abortion constitutes discrimination against women." Rather, he noted, "opposition to voluntary abortion cannot possibly be considered...an irrational surrogate for opposition to...women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward...women as a class." Next, Scalia held that the lower court had erred in ruling that women seeking abortions made up a class of persons who enjoyed special protection under the KKK Act. Scalia explained that the KKK Act protects persons because they are members of discrete classes. Originally, the KKK Act protected the class of "newly freed Blacks and their Republican supporters." In recent times, courts have upheld claims relying on nonracial classifications. The trial court in the *Bray* case, however, had held that women seeking abortion constituted a class protected by the KKK Act, and that opposition to abortion worked an injury on members of that class.

After rejecting the notions regarding opposition to abortion as discrimination and women seeking abortion as an appropriate class, Scalia turned to the question of the two substantive rights that were allegedly injured by rescues: the right to travel interstate and the right to an abortion.

Regarding the right to travel, Scalia wrote that two separate consideration showed that there was no injury to the right to travel interstate.

First, he noted, the right to travel recognized by the Supreme Court, was only capable of deliberate violation. In other words, it had to be at least one purpose of rescuers to injure the right to travel interstate before the right was impinged. In this case, Scalia said, "Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel."

Second, Scalia wrote, when a woman from out of state travels to an abortion facility in Virginia and is unable to enter the facility because the sidewalk immediately outside it is crowded with abortion opponents, no constitutional right to travel is implicated. The right to travel, which is inferred from the text of the Constitution, guarantees that states cannot treat nonresidents differently from residents, without an adequate showing of governmental interest. Additionally, that right guarantees unfettered passage from state to state. Rescue activities, however, do not treat nonresidents differently from residents and do not interfere with passage from state to state.

Nor could the abortionists prevail in their claim based on the other substantive right, the right to obtain an abortion. Scalia explained that the right to abortion could not be violated by private conspiracies. The right to an abortion, he noted, does not guarantee freedom from private interference with abortions. Only state actors can violate the right to abortion by interfering with a woman seeking an abortion. Thus, Operation Rescue was incapable of violating the right to an abortion.

Finally, Scalia addressed the issues of attorney's fee awards and jurisdiction. Regarding attorney's fees, he said, "Because respondents were not entitled to relief under 1985(3), they were also not entitled to attorney's fees and costs under 42 U.S.C. 1998. We therefore vacate that award." Regarding jurisdiction, or the authority of the trial court to entertain such lawsuits, he declared: "[W]hile [the KKK Act claims] fail, they were not , prior to our deciding of this case, 'wholly insubstantial and frivolous.'" So writing, Scalia stripped the abortionists of their principal motivation for these federal suits (attorney's fees awards) and of the entry into federal court (jurisdiction).

Although Justice Kennedy joined in the majority opinion and judgment, he also wrote a concurring opinion. "[I]t is important to note," he wrote, "that another federal statute offers the possibility of powerful federal assistance for persons who are injured or threatened by organized lawless conduct..." When pervasive lawlessness prevails in a state, the state may request assistance from federal law enforcement officers through the Attorney General of the United States.

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Petition for a Writ of Certiorari

The United States Supreme Court has a broad discretion over its docket. Very few cases are forced upon the justices. Currently, almost all cases actually decided by the Court result from the Court granting a Petition for a Writ of Certiorari.

When the Court grants a Petition for a Writ of Certiorari, it issues a document, called a Writ of Certiorari, to the lower court—state or federal—whose decision is to be reviewed. In essence, the Writ of Certiorari directs the lower court to certify the record in the selected case and deliver it to the Supreme Court.

To obtain review on certiorari, a petitioner files a document called a petition, which sets out (1) the issues presented by the case, and, (2) the reasons why the court should hear the case. At the front of every petition is a Statement of Questions Presented. The Court limits its review of a case to the issue presented in the "Statement of Questions Presented," which appears on the first page of the petition.

Bray family welcomes decision

CATHY RAMEY

Michael and Jayne Bray discuss the Supreme Court decision with Elli, Jonas, and Epiphany.

Jayne and Michael Bray, who headline the latest Supreme Court decision regarding abortion, live in a quiet Maryland town not far from the nation's capitol.

In January of 1990, when abortion industry powerhouses filed for an injunction against Operation Rescue and several other persons, Jayne was six months pregnant and enjoying the company of her husband after four years of separation. Michael, a Lutheran pastor, had been incarcerated on a charge that he conspired to bomb a clinic.

Although Jayne had been active with Operation Rescue during some of their largest national rescue events, neither of the Brays were considering blocking the doors to D.C. area mills. They were tagged onto the case by abortion zealots who had staked out their home, copied down license plate numbers, and then testified that the Bray family had housed known rescuers.

Jayne Bray had also reserved a hall for an Operation Rescue public meeting to be held during the D.C. Project, and from the pulpit Michael had given out a phone number for church members who were asking about the events planned to commemorate the Roe vs. Wade anniversary. The indications that they were involved as co-conspirators against one of the nation's largest industries were slight, but substantial enough for a liberal court.

Today the Bray family; Elli (11), Jonas (9), Epiphany (8), Beseda (3), Perseverance (1 1/2), and twins Isaac and Anastasia (due in April), still live in the same home they occupied when the D.C. abortion juggernaut came down. And as a result of the Supreme Court decision they are likely to be able to stay. The case that threatened to sweep their home out from under them in favor of those who kill babies has finally been resolved in their favor.■