10-1971

Jackson v. Georgia

Lewis F. Powell Jr.

Death Case

BENCH MEMO

No. 69-5030 OT 1971
Jackson v. Georgia
Cert to Georgia SC

I. QUESTIONS PRESENTED

(1) Does the imposition and carrying out of the death penalty for the crime of rape constitute cruel and unusual punishment because it offends evolving community standards of decency?

(2) Does the imposition and carrying out of the death penalty for the crime of rape constitute cruel and unusual punishment because the punishment is excessive, i.e., because the punishment does not fit, or is disproportionate to the crime?

II. FACTS

Petr, Lucious Jackson, Jr., was tried by a jury in the Superior

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Relevant cases: See cases listed Aikens memo
O'Neil v. Vermont, 144 U.S. 323 (1892)
Ralph v. Warden, 438 F.2d 786 (4th Cir.1970)

Court of Chatham County and found guilty of the forcible rape of Mrs. Mary Rose. Mrs. Rose is a white woman, wife of a physician, and mother of a small child. Petr is a 21-year-old Negro male. The rape occurred at the victim's home. The victim was forced to submit under threats of injury by Petr using a sharp pair of scissors. It appears from the evidence that Petr initially intended to rob the victim and when he discovered that she had no money around the house decided to go ahead and rape her. Mrs. Rose suffered no serious physical injuries and required no hospitalization. The jury imposed the death penalty and the Georgia Supreme Court affirmed, rejecting Petr's claim that the death penalty offended the 8th Amendment.

III. CONTENTIONS OF THE PARTIES

(I will treat separately the arguments raised with respect to the two arguments utilized by Petr.)

(1) Question # 1

Petr's primary contention is, as it was in Aikens and Furman, that the death penalty's utilization offends evolving standards of community decency. The theme of the argument is premised on Aikens and the notion there developed that the death penalty is tolerable only because it is used against only the poor, the uneducated, the misfits, and the minorities. The argument is more compelling in this case because there is simply more objective evidence of public rejection of the death penalty where the crime involved is rape rather than murder. Petr first points out that the nations of the World almost uniformly have rejected the death penalty for rape. Out of some 60 countries reviewed in a 1965 United Nations study only 3 countries other than the U.S. still allow the death penalty in such cases (the only other major

country was South Africa). Another study canvassed 128 countries and found only 19 retained the death penalty as of 1963. It is worthy of note that the one federal lower court case which has held the death penalty cruel and unusual as punishment for rape, Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970) (Haynesworth, Sobeloff, Butzner), relies extensively on this heavy preponderance of international rejection.

Petr notes that the death penalty is prescribed for rape in only 16 states and by the federal government. Furthermore, there have been only 20 executions for rape since 1960 and none since 1964. These figures are cited as indicators that the majority of the people find the punishment abhorrent to standards of decency. Also, among those 16 states, all, except Nevada which has had the penalty but no executions since 1930, are either Southern or border states (see brief of Petr pp. 14-15). These states are all states in which state-enforced racial separation was a way of life, at least in the school area, prior to 1954. Retention and utilization are said to be limited essentially to Negroes. Since 1930, out of 453 executions for rape, 405 have been Negroes. Eighty-nine percent of all rape-based executions have been of Negroes. And, in the apparently vast majority of those cases, the Negro has been charged with rape of a white woman. In Furman the State of Georgia points out that all 8 Negroes on death row in that State today on rape convictions are there for acts perpetrated on white women.

In an effort to explain both the geographical distribution of rape-death penalty statutes, and the racial impact of the punishment, Petr traces the history of the Georgia rape statute. Prior to the Civil War the maximum penalty for rape by a white man was 20 years and was death for a Negro (whether the Negro was a

slave or a "freed man of colour."). After the Civil War, Georgia abolished slavery and, in 1866, supplanted the former rape statutes with a statute calling for the death penalty for rape, or in the discretion of the judge, a lesser penalty. Petr's reliance on the geographical and racial character of the death penalty is not presented with any design to demonstrate that the death penalty for rape violates the equal protection clause. Rather, it is introduced to show that the death penalty is acceptable to the people only because it is not evenly enforced. Indeed, Petr contends, the penalty stays on the books only because of its discriminatory use against Negroes. Stated in other terms, the penalty only fails to shock the community's conscience [redacted] because it will never be applied against whites, and because, in some instances, it satisfies latent racial biases.

The State of Georgia accuses Petr of trying to change the focus of the case. While Petr phrases the argument in terms of 8th Amendment standards, the State believes that, essentially, Petr is making an equal protection argument. Petr is accused of trying to sneak in a discrimination argument through "the back door." The State notes that, apparently, Petr made an equal protection argument in the State SC and that the argument was rejected because Petr offered no evidence to prove his case. The State points out that in the usual equal protection clause case, the burden is on the party claiming discrimination to introduce evidence at least sufficient to establish a prima facie case. Here, no evidence was introduced below. Petr has not shown the racial motivations of Georgia juries; nor has he shown the racial biases of the Georgia legislature in passing and keeping the penalty.

Other considerations are offered to rebut the racial implications of the death penalty's application in rape cases. First,

the statistics indicate that more Negroes are arrested for rape than are whites and more Negroes are convicted (and given sentences other than death) than are whites. The implication of these statistics is that more Negroes commit the crime than do whites, although there are, of course, no reliable statistics available to prove or disprove that hypothesis. Resp also suggests that, in looking at the rape-death penalty figures, the old statistics--1930 to within the last decade--should be discounted. It is the public rejection of the penalty today that is important, not whether the penalty was acceptable or unacceptable, or racially motiviated, 30 years ago. Looking at only the figures for the last few years, it is more difficult to generalize about the racial impact of the penalty.

Resp also rejects the reliance on international abolition of the death penalty. An analogy is drawn to the obscenity cases which discuss the standard that obscenity is material which offends "contemporary standards in the community." Under that test this Court has held that the focus should be on the community as a nation--a national standard. Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). In gauging the temper of evolving community standards, therefore, the focus is said to be on what the people of this country find to be cruel and unusual. And, the fact that the death penalty in rape cases is a strictly Southern phenomenon is attributed to that region's independent recognition of the seriousness of the offense. Georgia says that, in the exercise of its police power to protect the safety of its citizens, it has chosen the form of punishment which offers the greatest hope of deterrence.

Resp,of course, also relies on its arguments in Furman against the evolving decency rationale.

(2) Question # 2

Petr separately contends that the death penalty under the circumstances of this type of case violates the cruel and unusual punishment clause because the penalty does not fit the crime. The first statement of this philosophy may be found in Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 337, 339-40 (1892). In this case the defendant was convicted of selling an intoxicating liquor. He was given a fine of $6,140, which would be converted to a 54-year prison sentence if he was unable to pay the fine by a stipulated date. Justice Field stated his belief that in addition to prohibiting punishments which afflict torture, such as the "rack, thumbscrew, the iron bolt, and stretching limbs and the like," the inhibition of the 8th Amendment was "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." This view of the Amendment was adopted by the majority opinion in Weems v. United States, 217 U.S. 345, 365, 377 (1910). This is the case in which, for falsifying a public document, the accused was sentenced to 15 years of hard labor. The Court found that punishment to "cruel in its excess of imprisonment."

Petr claims that death for rape is abhorrent to rational standards of decency and that the penalty is excessive for the crime. Again, Petr returns to the racial theme contending that the excessiveness of the penalty is a response to racial hatreds and not to any sense of community concurrence that the crime deserves the punishment.

Resp answers by claiming that rape is among the most heinous crimes known today; it is never unpremeditated or accidental; it is bound to have long-range psychological effect on the victim;

the possibility of physical injury to the victim is almost always present; the act is one perpetrated on those who are incapable of meeting force with force; it has a psychological impact on the husband and children of the victim. As long as the State has the responsibility of protecting its citizens from such harms, it should be free to choose the most strict penalty. This latter point is particularly true, argues Georgia, because of the recent upswing in the incidence of rape. Resp cites figures supplied by the FBI indicating that forcible rape has increased by 121 % since 1960.

IV. DISCUSSION

Petr's "standards of decency" argument has more force in this context than it does in the Aikens or Furman cases. If we are to look at this question from Petr's hypothetical starting point--whether the masses of the people would consider the death penalty impermissible if it were evenly and uniformly applied in all cases in which it might--the figures indicating the geographical and racial incidence of death penalties for rape are quite troublesome. It would appear that Georgia, and probably most of the other Sourthern States, did not allow death penalties for rape committed by a white man at any point in their history before the end of the Civil War. And today it is, de facto, still not used against white men but only against black rapists who attack white women. It should be noted that the question of discrimination is really insulated from disposition under the equal protection clause. The jury system shields any pattern of dsicrimination so long as the jury is properly charged and there is evidence to support its view.

While I find Petr's argument more compelling in rape cases, I

believe it would be intellectually difficult to drawn a constitutional line between this case and Aikens & Furman. I cannot believe that the Court is capable of holding that it is able to discern an evolution away from the death penalty in rape cases but has not yet seen the same evolution in other cases. The evidence, although compelling, is simply not that strong.

Finally, on the punishment-fit-the-crime point, I do not think that this Court can hold that death may not be imposed for rape without concluding that its imposition violates community standards of decency, i.e. without acceptance of the first point, the second does not seem to follow.

LAH

Jackson v. Ga. · 69-5030 1/17/72
(Rape)

Greenberg

Indigent Petr. – ct. appted counsel.

"Unusual" – as related to Rape.
D/S imposed only in So. states. Utah did impose D/S, but its statute was held invalid.

Race – cited statistics showing discrimination.

In the rest of world, D/S for rape only in 3 other countries.

Race, he argues, what makes D/S is "unusual."

Cites Brennan's opinion in 4th Amdt case

He argues against death penalty in any & all types of cases.

Jackson (p 2)

Mrs Beasley (for Ga)

In 1960 Ga. Legislature re-considered D/S for rape + retained it. Also a complete Code Rev. in 1968.

Assuming racial discrimination in the past, that is irrelevant to 8th Amend. argument.

We must look at this particular case. There is a Court which must decide each case on law + fact. We are not a Legislature considering policy.

No claim of discrimination is made in this case.

In Ga. trial judge may grant new trial if he finds the jury sentence to be unjust.

Ga. law allows on rape penalties (i) D/S, (ii) life, or (iii) 1 to 20 yrs.

Stewart J: We have no equal protection issue in these cases. Issue is that punishment is "unusual" under 8th. (But this, it seems to me, is based on infrequency & rarity & not on racial mix).

She argues rape is indeed a heinous crime - with permanent effects on victim.

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(See reverse side)

Mrs. Beasley (cont.)

No matter how infrequently the D/S applied to rape case, she says the penalty is not "unusual" in any 8th Amend. sense. But she also contends, D/S is imposed often enough to keep it from being "rare" or "unusual".

She further argues that rarity of use is not an imp. as whether the D/S is some exotic or unique type of punishment (e.g. banishment). Ties her argument back to "due process" language as to "life, liberty or property."

Must look at duty of gov't to protect its citizens from crime.

Greenberg

As to actual expenses in Ga., see p. 9 ff (of appendix) of Aikens Brief.

Statistical data were not tendered in his case.

Conf 1/21/72

Court ..... *Voted on*....., 19...

Argued ..1/17/72....., 19... *Assigned* ....., 19... No. 69-5030

Submitted ....., 19... *Announced* ....., 19...

JACKSON

vs.

GEORGIA

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Conf. 1/21/72

Court .....
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No. 69-5030

JACKSON

vs.

GEORGIA

Denny

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Conf. 2/18/72

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

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

No. 69-5030

JACKSON

vs.

GEORGIA

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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