

THE 39TH ANNUAL
MORRIS B. MYEROWITZ MOOT COURT COMPETITION

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Transcript of Record

In The
Supreme Court of the United States

March Term 2008

Docket No. 0101-7

RUTHERFORD HARRISON,
Petitioner,

v.

STATE OF ALIVITHA,
Respondent.

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IN THE ALIVITHA COURT OF APPEALS

Criminal Docket No. 08-0908

RUTHERFORD HARRISON,

*

Appellant,

*

*

STATE OF ALIVITHA

*

Appellee.

*

* * * * *

OPINION AND ORDER

Before: Srinivasan, C.J., Ramirez, J., and Adams, J.

Srinivasan, C.J., delivered the opinion of the Court, in which Ramirez, J., joined. Adams, J., delivered a separate dissenting opinion.

SRINIVASAN, C.J.

We face the unenviable task of deciding a great moral conundrum of our era – whether a person should be sentenced to death for his crime. Rutherford Harrison (“Harrison” or “Appellant”) brought this appeal after the district court sentenced Harrison to death for the rape of a minor. The district court then denied Harrison’s motion for a new trial, finding that imposing a capital sentence for an aggravated rape of a minor in which the victim survives is constitutionally permissible. Harrison timely appealed his sentence to the Alivitha Court of Special Appeals, the state’s intermediate appellate court. This Court, after recognizing the significant impact that the case would have on the state of capital punishment in Alivitha, bypassed the Court of Special Appeals in order to decide the case for ourselves.

We now affirm the district court and hold that imposing the death penalty for a rape of a minor under the age of twelve does not constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution. We further hold that the Alivitha capital statute genuinely narrows the class of eligible offenders and is thus constitutional.

A. Background and Procedural History

The following facts are undisputed. On January 20, 2001, Linda Kennedy returned home after work to find her eight-year-old daughter, W.J.C., unconscious and profusely bleeding on her bed. Kennedy immediately placed a call to 911 and an ambulance and police car were dispatched to the residence. Upon their arrival, the paramedics discovered that W.J.C.'s bleeding was the result of extensive trauma to the vaginal area. Specifically, W.J.C. suffered from a third degree perineal tear. The paramedics transported W.J.C. to the Alivitha General Hospital, where a rape kit was done and Dr. Chester Arthur performed emergency surgery to repair the damage. W.J.C. remained in the hospital for two weeks after the incident.

Kennedy spoke with police officer Zachary Polk and relayed the following details. That morning, she went to work at 8:30 am and left W.J.C. in the care of Rutherford Harrison, her husband and W.J.C.'s stepfather. When she returned home at 5:30 p.m., she noticed that the front door was ajar and the house was silent. Panicked, Kennedy called out her daughter's name several times and eventually discovered W.J.C. in her bedroom, bleeding and unconscious. Kennedy immediately called 911 and accompanied her daughter to the emergency room. She could not vouch for her husband's absence but suggested that he could be at his parents' home. Harrison's father, Dr. Benjamin Harrison, was a city council member and lived in a very affluent part of Alivitha. Kennedy also provided Officer Polk with a description of Harrison and his car.

Officer Polk conveyed all of this information to the Wesami County police department, who identified Harrison as a potential suspect. Later that evening, police spotted Harrison driving to a neighboring state on Interstate I-905. Harrison initially failed to stop for the officers and led them on a thirty minute chase. The police eventually managed to get Harrison to stop his vehicle, and he was brought to police headquarters for questioning. Harrison waived his right to an attorney and after several hours of questioning, confessed that he had sexual intercourse with W.J.C. Harrison was charged with aggravated rape of a minor under twelve years of age pursuant to Alivitha Criminal Code, Section 509.2.¹

¹ Alivitha Criminal Code, Section 509.2 (2000): Aggravated rape

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

- (1) When the victim resists the act to the utmost, but whose resistance is overcome by force.
- (2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
- (3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.
- (4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.
- (5) When two or more offenders participated in the act.

John Van Buren, an experienced attorney specializing in death penalty cases, represented Harrison at trial. During the guilt or innocence portion of the bifurcated trial, the judge admitted Harrison's confession and the rape kit into evidence, which through DNA evidence conclusively identified Harrison as the perpetrator.

The prosecution first called W.J.C. to the stand. W.J.C. testified that Harrison had forced her to have sexual intercourse with him. In addition, she testified that her life has completely changed since the day of the attack. She has recurring nightmares of the rape and finds it difficult to sleep. Moreover, her attempts to return to school have been to no avail. She experienced panic attacks every time she saw a male teacher, making it difficult for her to concentrate in her classes. As a result, W.J.C. is now home schooled.

Dr. John Chin, an expert in pediatric medicine, testified for the prosecution as well. He explained that in his ten years of practice, W.J.C.'s injuries were the most serious that he had ever seen resulting from a sexual assault.

At the start of jury deliberations, the trial judge instructed the jury "not to discuss in any way the possibility of penalties whatsoever." After deliberating for two hours, the jury convicted Harrison of aggravated rape of a minor under twelve years of age.

During the sentencing phase, the trial instructed the jury that it had to impose either a sentence of life with no possibility of parole or a capital verdict. The prosecution, seeking the death penalty, reminded the jury that it had already found two aggravating circumstances pursuant to Section 509.3(A)(1) and (A)(9),² which made Harrison eligible for the capital verdict.

(6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

B. For purposes of Paragraph (5), "participate" shall mean:

- (1) Commit the act of rape.
- (2) Physically assist in the commission of such act.

C. For purposes of this Section, the following words have the following meanings:

- (1) "Physical infirmity" means a person who is a quadriplegic or paraplegic.
- (2) "Mental infirmity" means a person with an intelligence quotient of seventy or lower.

D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under the age of twelve years, as provided by Paragraph (A)(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

² Alivitha Criminal Code, Section 509.3 (2000): Aggravated circumstances

Van Buren presented evidence of several mitigating factors. First, he submitted the testimony of a state psychiatrist, Dr. Elizabeth Monroe, who examined Harrison both upon his arrest and just prior to the sentencing phase. Dr. Monroe testified that Harrison had a troubled childhood himself, having been raped by an uncle when he was just seven years old. In addition, she testified that Harrison had undergone a transformation since his arrest. Not only did he show genuine remorse for what he did, but he also exhibited a deeper connection with his spirituality and wanted to minister and help other inmates who experienced sexual abuse as children. Finally, Van Buren presented evidence that Harrison had no prior criminal history. At the end of the three-day hearing, the jury imposed the capital verdict pursuant to Alivitha Criminal Code, Section 509.4,³ designating in writing that it found two aggravating circumstances pursuant to Section 509.3. In addition, the jury unanimously found that there were no mitigating circumstances.

A. The following shall be considered aggravating circumstances:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, or terrorism.

(2) The victim was a fireman or peace officer engaged in his lawful duties.

(3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

(7) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(8) The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(9) The victim was under the age of twelve years or sixty-five years of age or older.

(10) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

B. For the purposes of Paragraph A(2) herein, the term "peace officer" is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

³ Alivitha Criminal Code, Section 509.4 (2000): Death penalty

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least two statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

Harrison timely appealed his sentence to the Alivitha Court of Special Appeals. Before the case could be heard, this Court bypassed the lower appellate court so that it could decide the case once and for all.

B. Standard of Review

We review the lower court's decision *de novo*. In criminal cases, the primary benefit of *de novo* appellate review is to prevent a miscarriage of justice. *Ornelas v. United States*, 517 U.S. 690, 704 (1996).

C. Discussion

I. Whether capital punishment for the rape of a minor under the age of twelve is cruel and unusual punishment under the Eighth Amendment

The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The provision is applicable to the states through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (per curiam). The Eighth Amendment guarantees that all individuals have the right not to be subjected to excessive sanctions. *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Although the legislature may not impose excessive punishment, it is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). In *Coker v. Georgia*, the Supreme Court explained that a punishment is excessive and thus unconstitutional if it either 1) made no measurable contribution to acceptable goals of punishment and hence was nothing more than the needless imposition of pain and suffering, or 2) was grossly out of proportion to the severity of the crime. 433 U.S. 584, 592 (1977). We find that neither of these circumstances apply to the instant case.

First, to determine whether capital punishment serves any measurable contribution, we must look to “the evolving standards of decency that mark the progress of a mature society.” *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). Five states, in addition to the state of Alivitha, currently allow capital punishment for the rape of a minor. 10 Okl. St. Ann § 7115(1)(2006 Supp.); Mont. Code Ann. § 45-5-303; S.C. Code Ann. § 16-3-655(C)(I)(2006 Supp.); Ga. Code Ann. § 16-6-1(a)(1); LSA-R.S. 14:42; see *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (explaining that the most reliable benchmark to determine society's evolving values is by looking at legislation). Notably, all five state statutes have remained in effect a full forty years after the Supreme Court's decision in *Coker v. Georgia*, suggesting that at least a handful of states have interpreted *Coker* as prohibiting capital punishment only for the rape of an adult woman.

More revealing than the number of states that impose the death penalty for child rape, however, is the direction of the change. For example, between 1993 and 1997, the number of jurisdictions that allowed the death penalty for non-homicide crimes doubled from 6 to 14 states. Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder That Societal Progression Continues Through Action, Not Idleness*, 58 S.C.L.REV. 509, 521 n.110 (2007). In addition to the states, the federal government imposes capital punishment for non-homicide offenses as well. Federal statutes allow the death penalty for crimes of treason and for engaging in an extraordinarily large continuing criminal drug enterprise. See 18 U.S.C. § 2381; 18 U.S.C. § 3591(b)(1); and 21 U.S.C. § 848(e) (which combine to provide capital punishment for large drug crimes). Thus, there is no merit to the notion that the death penalty is permissible only when there is a taking of a human life.

Turning to the second prong of the *Coker* framework, we must assess whether the punishment is grossly out of proportion to the severity of the crime. We find that it is not. Child rape is arguably the most heinous of all non-homicide crimes. "Short of homicide, rape is the ultimate violation of self." *Coker*, 433 U.S. at 597. In some circumstances, the "deliberate viciousness of the rapist may be greater than that of the murderer." *Id.* at 603 (Powell, J., concurring in judgment and dissenting in part) (quoting *Snider v. Peyton*, 356 F.2d 626, 627 (4th Cir. 1966)).

While a rape victim is not robbed of her life in the traditional sense, many victims are so grievously injured that their lives are beyond repair. *Id.* at 604; see Rape, Abuse, and Incest National Network, <http://www.rainn.org/statistics/effects-of-rape.html> (last visited January 25, 2008) (stating that victims of sexual assault are six times more likely than the average person to suffer from post traumatic stress disorder, twenty-six times more likely to abuse drugs, and four times more likely to contemplate suicide). "Victims may recover from the physical damage of a knife or bullet wounds . . . but recovery such as a gross assault on the human personality is not healed by medicine or surgery." *Coker*, 433 U.S. at 612 (Burger, C.J., dissenting).

The Court acknowledges that there are mitigating circumstances in this case – namely, that Harrison was the victim of rape himself, has no prior criminal history, and conveniently, has shown remorse while in prison. The Court finds that these factors, however, do not mitigate the excessive brutality of Harrison's attack on an eight-year-old child. Unlike juveniles or the mentally retarded, child rapists share no common characteristics that mitigate the moral culpability of their crimes. *C.f. Roper*, 543 U.S. at 569 (finding that juveniles are more susceptible to negative influences and outside pressures than adults, and are thus less morally culpable); see *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (finding that the mentally retarded are less morally culpable because of their cognitive and behavioral impairments). In addition, the jury in this case unanimously found that there were no mitigating circumstances. Harrison raped W.J.C. with full understanding of his actions, and fled the scene of the crime to avoid capture. He abused his power as a parent and showed utter contempt for the bodily integrity of his stepdaughter.

Given the viciousness of the attack and the victim's young age, we find that capital punishment for the rape of a minor under the age of twelve is not cruel and unusual punishment under the Eighth Amendment.

II. Whether the statute narrows the class of eligible offenders

Having found that Alivitha's capital rape statute does not violate the Eighth Amendment, we now turn to whether the sentencing scheme appropriately narrows the class of eligible offenders. Appellant contends that Alivitha's capital sentencing scheme does not narrow the class of child rapists eligible for the death penalty because the scheme does not provide guidance on which child rapists deserve the death penalty and which do not. We find this argument unpersuasive.

To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence of the defendant compared to others found guilty of the same crime." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The Alivitha statute does both. One of the aggravating circumstances listed in Section 509.3 is when the victim is under the age of twelve years. Hence, a person will not be eligible for the death penalty simply for the rape of *any minor*, but only for the rape of a minor under the age of twelve. This is a significant limitation.

Furthermore, Section 509.4 states that the jury may consider mitigating circumstances and has the discretion to recommend whether capital punishment should be imposed. Thus, even if a person is found guilty for the rape of a minor under the age of twelve, only those individuals whom the jury finds are deserving of the death penalty will ultimately receive it. In *Lowenfield v. Phelps*, the Court found that such considerations narrowed the class of persons eligible for the death penalty. See 484 U.S. 231, 246 (1988) ("The Louisiana scheme . . . at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more."). The instant case falls squarely within the Supreme Court's decision in *Lowenfield*.

For the foregoing reasons, the decision of the district court is AFFIRMED.

/s/

The Honorable Kamala Srinivasan
Alivitha Court of Appeals Judge
Alivitha Court of Appeals

ADAMS, J., DISSENTING

The majority has erred by allowing the tragic facts of this case to cloud its legal judgment. First, the Court takes the unprecedented step of allowing capital punishment for a crime where the victim ultimately survives. Such a disproportionate penalty constitutes cruel and unusual punishment under the Eighth Amendment and is thus constitutionally prohibited. Second, Alivitha's capital rape statute violates the Eighth Amendment insofar as it fails to genuinely narrow the class of such offenders eligible for the death penalty.

I. Capital punishment cannot be imposed for the rape of a minor

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Since the passage of the Eighth Amendment, numerous challenges have been made to the application of the death penalty. The United States Supreme Court has held that while the death penalty is not per se unconstitutional under the Eighth Amendment, "[i]t is an extreme sanction, suitable to the most extreme of crimes." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Thus, for instance, the Court has found that states may impose the death penalty for the crime of murder, *id.*, but not for rape. *Coker v. Georgia*, 433 U.S. 584 (1977).

Coker controls this case. Contrary to the view of the majority, *Coker's* holding is not limited solely to a crime of rape of an adult woman. According to the Court, capital punishment is excessive for the crime of rape where the victim is not murdered. *Id.* at 598. Unlike other punishments, the death penalty "is unique in its severity and irrevocability." *Id.* (quoting *Gregg*, 428 U.S. at 187 (1976)) (internal quotations omitted).

The Supreme Court has also found the imposition of capital punishment unconstitutional for violent crimes other than rape where death did not result. For instance, the Court found the punishment unconstitutional for aggravated kidnapping, *Eberheart v. Georgia*, 433 U.S. 917 (1977), and aggravated robbery, *Enmund v. Florida*, 458 U.S. 782 (1982).

Even if I were to interpret *Coker* more restrictively, the age of the victim alone is not enough to distinguish this case. Unquestionably the rape of a child under twelve is a heinous crime, one which the state has every incentive to prevent and punish. However, the Supreme Court has never used age to determine that the death penalty could be constitutionally applied to a crime where imposing the death penalty would otherwise be unconstitutional. Instead, the Court has allowed evidence about the victim, including the victim's age, to be admitted during the sentencing phase as part of a broader inquiry into whether or not to impose the death penalty. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

Beyond *Coker*, there has been a clear trend by the Supreme Court and in the states to narrow the scope of the death penalty. Since the Supreme Court decided

Coker in 1977, it has found capital punishment unconstitutional for the mentally retarded, *Atkins v. Virginia*, 536 U.S. 304 (2002), and for offenders who were minors under eighteen years of age when they committed a capital crime, *Roper v. Simmons*, 543 U.S. 551 (2005). Moreover, although five other states provide for the death penalty for child rape, not since 1964 has a state executed an individual for a non-homicide offense. *Executions in the U.S. 1608-2002: The Epsy File Executions by Date* 381 (2007).

While rape, especially that of a child, is an atrocious crime, “for the rape victim, life . . . is not over and normally is not beyond repair.” *Coker*, 433 U.S. at 598. Hence, the crime is distinguishable from murder, where “[l]ife is over for the victim.” *Id.*

II. The statute fails to narrow the class of persons eligible for the death penalty

In *Gregg v. Georgia*, the Supreme Court held that capital sentencing schemes violate the Eighth Amendment where they do not adequately guide the sentencer’s discretion and thus permit the arbitrary and capricious imposition of the death penalty. 428 U.S. 153, 200, 206-07 (1976) (plurality opinion). As a result, in order to prevent states from imposing the death penalty in an arbitrary and capricious manner, the Court has held that a state’s capital punishment law must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of the same crime. See e.g. *Arave v. Creech*, 507 U.S. 463, 474 (1993); *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990); *Maynard v. Cartwright*, 486 U.S. 420, 428-29 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 (1983). In other words, Alivitha’s capital rape statute must guide juries in differentiating between child rapes that are deserving of capital punishment and those that are not in order to ensure that the most grave of punishments are not handed down in an arbitrary or capricious manner. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J. concurring).

Even if I were to agree that imposing the death penalty for the crime of rape of a minor child does not violate the Eighth Amendment, which I do not, the statute nonetheless fails to pass constitutional muster. In duplicating elements of the crime as aggravating circumstances and then requiring only a finding of these circumstances to impose the death penalty, the statute relieves the jury of its requisite responsibility for the sentencing decision. This is illustrated by the fact that during the sentencing phase, the prosecution reminded the jury that it had already found two aggravating circumstances, making Harrison eligible for the capital verdict.

Alivitha’s capital rape statute is distinguishable from the capital murder statute found constitutional in *Lowenfield v. Phelps*. 484 U.S. 231 (1988). In that case, the Supreme Court held that the fact that an aggravating circumstance duplicates one of the elements of the crime does not make the sentence constitutionally infirm. *Id.* at 246. However, duplication was permissible in *Lowenfield* because the statute at issue had already narrowed the class of offenders eligible for the death penalty by restricting the

penalty to first-degree murder. Persons convicted of the other four types of homicide listed in the statute were not eligible for the death penalty. *Id.* at 244-46.

Alivitha's rape statute makes all child rapes potentially capital rapes. This is much broader than Louisiana's capital murder statute in *Lowenfield*. Alivitha's capital rape statute violates the Eighth Amendment insofar as it fails to genuinely narrow the class of offenders eligible for the death penalty and, as such, Appellant's death sentence is invalid.

I respectfully dissent.

Docket No. 0101-7

**In The
Supreme Court of the United States**

RUTHERFORD HARRISON,
Petitioner,

v.

STATE OF ALIVITHA,
Respondent.

ORDER GRANTING CERTIORARI

The Petition for a writ of *certiorari* to the Alivitha Court of Appeals is hereby GRANTED.

IT IS SO ORDERED that the above-captioned appeal be set down for argument on the following issues:

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits a State from imposing the death penalty for the rape of a child under twelve years of age.
2. Whether Alivitha's capital rape statute violates the Eighth Amendment insofar as it fails to genuinely narrow the class of offenders who are eligible for the death penalty.

/s/

Laura Johnson
Court Clerk