No. 19-5752

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jimmie Kyle Anderson — PETITIONER
(Your Name)

vs.

The State of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Seventh Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jimmie Kyle Anderson
(Your Name)

3899 Hwy 98
(Address)

New Boston, Texas 75570
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does the public safety interest in incapacitating and deterring certain types of sex offenders with extremely long sentences run afoul of the 8th Amendment protection against Cruel and Unusual Punishment (Disproportionate Sentences)

2. Is the Apprendi Rule violated when a court ordered comulation of jury - assessed sentences exceeds the most extreme punishment the jury could have given ?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix __A__ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was March 22,2019 A copy of that decision appears at Appendix ___A___.

[x] A timely petition for rehearing was thereafter denied on the following date: May 22,2019 _____, and a copy of the order denying rehearing appears at Appendix ___B___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8TH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted

APPRENDI RULE

"The historic link between verdict and judgment and the consistent limitation of judge's discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of the fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

TEXAS PENAL CODE 3.03(a) and 3.03(b)

"When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by subsection (b), the sentences shall run concurrently.

(b)"If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentence may run concurrently or consecutively if each sentence is for a conviction of: 22.021 or 21.11

STATEMENT OF THE CASE

Mr. Anderson pled an open plea to four criminal counts. This occured on November 7,2017. The case was styled as cause # 4360 in the 46th Judicial District Court, Hardeman County, Texas. The trial judge Dan Mike Bird refused a sixty year plea offer from the District Attorney. Mr. Anderson does not have a criminal background. He and his wife fostered children. The defendant was fully cooperative throughout the investigation. Texas Ranger Brown confirmed Mr. Anderson's complete cooperation.(RR Vol 3 P35 L9-17); (RR Vol 3 P63 L 1-4); (RR Vol 3 P63 L 5-10). The jury assessed four terms of punishment. Ninety - nine years for the charge of assault and fifteen years for each of three counts of indecency. Judge Bird used Texas Code of Criminal and Penal Code to stack the terms of punishment. The defendant appealed his conviction in the 7th Court of Appeals. The appellate court cleared up the record to reflect the intentions of Judge Bird. The result was ninety-nine years without parole run consecutively with each of three fifteen year sentences. The final tabulation is one hundred-forty four years. Mr. Anderson requested discretionary review from the Texas Court of Criminal Appeals and was refused on May 22,2019.

REASONS FOR GRANTING THE PETITION

Texas courts have traditionally held that as long as the punishment is within the range prescribed by the legislature in a valid statute, the punishment is not excessive, cruel or unusual.However in other cases the courts have held that a sentence can be disproportionate and run afoul of the 8th Amendment guarantees even though it is within the prescribed punishment range. See: Jackson V. State 989 SW. 2d 842,845 In the Jackson case there was a question about whether the Texas Constitution provided more protection than the U.S. Constitution. This is because the federal wording is "Cruel and Unusual" and the Texas wording is "Cruel or Unusual" The Texarkana Appellate Court held in the Jackson case that:

> "We recognize that a prohibition against grossly disproportionate sentences does survive under the 8th Amendment of the United States Constitution and that it does so apart from any consideration of whether or not the punishment assessed is within the range established by the legislature in a valid statute."

The state's position simply stated is that a punishment can be excessive even though it is lawful. Mr. Anderson's one hundred and forty-four (144) Year sentence is ripe for the three step analysis now used by the 5th Circuit.Mc Gruder based on Harmelin v. Michigan 111 S.CT 2680 uses a reformulated Solem analysis. See: Solem v. Helm 103 S.CT 3001. The threshold step weighs the gravity of the offense with the harshness of the penalty. The particular facts in the instant case which are supported by the record show that there was no threatening,or cruel assaultive acts involved in any of the offenses. The children characterized the inappropriate acts as a game that Mr. Anderson played with them. See: Page 7 Memorandun Opinion Appendix A

Admittedly,we should see that these kinds of offenses are a blight in our society. The evidence in the instant case shows that, relative to many cases which can be used to compare and contrast, Mr. Anderson's actions definitely fall in the lower end of the range of harm done to the children. The state's posistion is that a violation should be matched to the mitigating facts in each individual scenario. The penal code for Aggravated Sexual Assault raises the minimum punishment from five (5) years to twenty-five (25) years. The primary sentence results in ninety-nine (99) years to be served with no chance of parole. This in itself is the same as life without parole, a punishment only second to death and traditionally given for capital murder. The cumlative addition of the other three sentences is vindictive. The threshold step is surely passed without question.

The second step is a comparison of punishments imposed on others in the same jurisdiction. The district is a rural area and so three separate counties are grouped together. These are Hardeman,Foard and Willberger. The counties in that area reported a case in Crowell, Texas, Foard County.The proceedings were prosecuted by the same District Attorney and Judge as were involved in the instant case. In April of 2017 Ronald Ray Chappell received two (2) life sentences which the judge then ran consecutively.Another case in May of 2018 is reported from Chillicothe, Texas, Hardeman County. The defendant Brian Rambo was convicted of two (2) counts of Aggravated Sexual Asssault of a Child and one (1) count of Indecency. He received ninety-nine (99) for each assault and twenty (20) years for the Indecency charge. The judge chose to stack these together. The result was two hundred and eighteen (218) years. The time assessed for the assaults is without chance of parole. A flat term of one

hundred and ninety-eight (198) would have to be served before any of the other would even begin to come into play. The sentences assessed by the jurys in the area where Mr. Anderson was prosecuted are glaringly more severe than those assessed in other jurisdictions in Texas.

In the third and final step the analysis should turn to compare and contrast of sentences assessed for like crimes in other jurisdictions.These comparison cases were all interestingly similar in that the defendants complained on appeal that their sentences were disproportionate to the offense. The following seven(7) cases are from different juridictions in the State of Texas.They are all fairly recent cases involving similar charges to those in the instant case.

1. Ray v. State 119 SW.3d 454 The defendant in this case was charged with three(3) counts of Aggravated Sexual Assault. There was evidence that the offender gave drugs to his victim for oral and vaginal sex. He was assessed sixty (60)year sentences run concurrently.

2. Thuong v. State 221 SW3d. 79 The defendant in this case was charged with three (3) counts of Aggravated Sexual Assault. Thuong sodomized and penetrated the victims vagina and mouth by force. He received eight (8) years for each count and the sentences were stacked to equal twenty-four (24) years. (Houston 2005)

3. Dale v. State 170 SW3d. 797 This is a 2005 Fort Worth case.The offender in this case was charged with five (5) counts of Aggrava- Sexual Assault and three (3) counts of Indecency. Dale was given fifty (50) years for each assault these were run concurrently.

He was given twenty (20) years for each of the remaining charges of Indecency. These three (3) were run concurrently. The court stacked the fifty (50) and the twenty (20). This offender continually asssaulted two children for over seven years. He complained on appeal that his seventy (70) year sentence was disproportionate to the offenses committed.

4. Matthews v. State 918 SW2d. 666 Matthews was originally given deferred adjudication which was violated. He received thirty (30) years for one count of Aggravated Sexual Assault. He appealed claiming grossly disproportionate sentence.

5.Nunez v. State 110 SW3d. 681, 682 Here again the defendant was initially given deferred adjudication for pleading guilty to Aggravated Sexual Assault. The defendant was ordered to attend a sex offender group therapy. He was revoked for not attending his group therapy. This defendant only received a twenty (20) year sentence.

6. Hicks v. State 15 SW3d. 626 Hicks put the State through a trial for Aggravated Sexual Assault of a Child. The defendant had two prior felonies. He received the bare minimum of twenty-five (25) years.

7. Alameda v. State 181 SW3d. 772 (Fort Worth 2005) Alameda was assessed two (2) thirty (30) year sentences which he complained on appeal that the comulation of the two,equalling sixty(60) years was disproportionate and that it violated the rule established by the Supreme Court in Apprendi v. New Jersey 120 SCT. 2348, 2359. The appellate court held that Alameda was not exposed to a penalty that exceeded the maximum he would receive if punished according to the facts reflected in the jury verdict alone. See: Alameda v.

State 181 SW3d. 772,781

> "Here the jury assessed appellant's punishment at two thirty-year sentences, the trial judge entered an order comulating the sentences, sixty years does not exceed the statutory maximum for the offense. Aggravated Sexual Assault of a Child under fourteen is a first degree felony punishable by not more than ninety-nine years to life in the State penitentiary. Tex Penal Code Ann.§ 12.32 (Vernon 2003) ; § 22.021 (Vernon Supp. 2005).Thus the sentence appellant received,sixty years does not run afoul of Apprendi".

When this formula used by the Texas Appellate Court is applied to the instant case it reveals that the maximum sentence of ninety-nine years to life was exceeded by forty-five years. This runs afoul of the Apprendi Rule.

Mr. Anderson has no prior criminal background. Two of the defendants in the comparisons received a type of probated sentence and were put in group therapy. In light of the particular elements involved in the instsant case,it is clear that the applicant was given a sentence that violates the Apprendi Rule. When the judge in the case refused a sixty year plea bargain it can be seen that he thought it too low. The extreme length of sentences passed out in applicant's area signals a personal inclination to use the comulation of these types of sentences to punish <u>any</u> offender to the maximum extent.This punishment is the same as life without parole.

Mr Anderson's one hundred and forty-four (144) year sentence is very unlikely to advance the goals of the criminal justice system in any substantial way. Neither Anderson or the State will have an incentive to pursue the needed treatment to correct his abnormal sexual behaviors or any kind of rehabilitation.