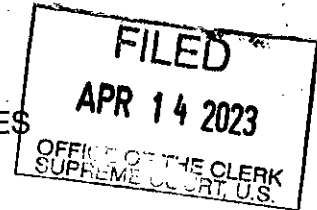


No. 22-7823

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Weston Kubbe — PETITIONER
(Your Name)

vs.

State of Utah — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Utah Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Weston Kubbe #237851
(Your Name)

P.O. Box 550
(Address)

Gunnison UT 84634
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Why do defendants in Utah have to request equal protection when sentencing criminal defendants?

LIST OF PARTIES

☐ 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:

Sean Reyes
Utah Attorney General
160 East 300 South
6th Floor
PO Box 140854
Salt Lake City, UT 84114

RELATED CASES

☐ State v. Kubbe, 20210585-CA, Utah Court of Appeals

☐ State v. Kubbe, 20221038-SC, Supreme Court of Utah

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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☐ is unpublished.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☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B 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☒ is unpublished.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 Utah Court of Appeals court appears at Appendix A 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☒ is unpublished.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).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 1/30/23.
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The 8th Amendment of the United States Constitution
"excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
- The 14th Amendment of the United States Constitution
Section 1 in part, "nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Appellate counsel filed a direct appeal with the Second District Court citing two claims, (1) PSI errors and (2) ineffective assistance of counsel.

The state ultimately agreed to the PSI errors, but argued the ineffective assistance of counsel.

The ineffective assistance of counsel was because trial counsel failed to ask for the Interests-of-Justice Framework including the proportionality analysis.

The state responded, claiming that Kubbe has not proven that trial counsel was ineffective.

The Utah Court of Appeals agreed with the state, citing that even if trial counsel was ineffective, he has not shown the result of the proceeding would have been different.

The appeals court cited that sentencing courts should consider the proportionality of a sentence, but only if the parties raise the issue.

It went on to say, at sentencing, counsel argued that if the court followed the state's recommendation, Kubbe would serve "roughly twice what the average murderer serves in the state's prison system"—an argument of the sort that might point in Kubbe's favor in an interest-of-justice analysis.

However the court of appeals affirmed the conviction.

Appellate counsel appealed to the Utah Supreme Court, comparing Kubbe's sentence to that of a murderer.

The Supreme Court of Utah denied the petition for Writ of Certiorari.

FACTS

1. The state charges Kubbe in October 2016.

One night in October 2016, two minors - GA and CR - left their houses, met Kubbe, and went back to Kubbe's house. CR, who had just told his mother that he was gay, said that Kubbe touched his genitals over his clothing. GA was reportedly high on marijuana during his stay at Kubbe's house.

Kubbe admitted to touching CR's genitals over his clothing. Kubbe adamantly denied having any type of sex with CR because he was too young.

Because of these events, the state charged Kubbe in two cases, one for GA and one for CR.

In case no. 161902084, the state charged Kubbe with two counts of child kidnapping, two counts of aggravated sexual abuse of a child, sodomy upon a child, and

enticing a minor. Kubbe entered a plea to Kidnapping and two counts of aggravated sexual abuse of a child.

Pertinent here, Kubbe admitted, as part of the plea, that he detained a minor and took 'indecent liberties' with a child.

In case no. 161902251, the State charged Kubbe with two counts of Kidnapping, two counts of child endangerment, and four counts of possession of a firearm by a restricted person. Kubbe pleaded guilty to one count of each crime.

During the investigation of CR's and GAS cases, the police learned about Kubbe's interaction two months prior with BM. BM reported that Kubbe sexually abused him. The State therefore charged Kubbe in case no. 161902627, with sodomy

' UCA 76-5-416. Indecent Liberties - Definition

upon a child, child kidnapping, and endangerment of a child. Kubbe Pleaded no contest to aggravated sexual abuse of a child and attempted child kidnapping.

The State asserted that Kubbe touched BM not amounting to rape or object rape.

2. The Court Sentences Kubbe

Kubbe requested that all his sentences be run concurrently. He requested that the court sentence him to 10 years to life instead of the presumptive 15 years to life.

Trial counsel argued that the presentence investigation report did not list any mitigating circumstances for the court to consider.

Counsel asked the court to sentence Kubbe concurrently on all charges

Rather than consecutively Counsel argued that if the sentence was consecutive, collectively he would serve over 54 years in prison, "Which is roughly twice what the average murderer in the State's Prison System." Counsel argued if the sentence was concurrent, Kubbe would serve 36 years in prison.

Pertinent here, trial counsel argued that with the decades Kubbe was going to serve in prison, "there has to be a point in time when justice has to be tempered with the notion that what he did in a very short space of time does not rise to the level of 54. It does not rise to the level I would suggest even 36 years."

Before imposing a sentence, the court noted that Kubbe had no criminal record and came from a good family.

The court reasoned that it could not "come up with a series of facts or information that in my mind equal interests of justice. The interests of justice in this case simply do not warrant a sentence of less than 15 years to life."

When the court considered concurrent or consecutive terms, it reasoned that the offenses were egregious.

The court noted that Kubbe received several letters of support, yet the court believed Kubbe was deceptive.

The court was startled by the counsels numbers and that the numbers were "staggering" claiming Kubbe would serve a prison term for "virtually the rest of your life."

The court pronounced the sentence. Three 15 years to life for each of the aggravated sexual abuse convictions.

One 3 years to life for the attempted child kidnapping conviction. Two 1 to 15 years imprisonment for the kidnapping convictions. And two 0 to 5 years imprisonment for the child endangerment and weapons possession convictions.

ARGUMENT

1. The District Court should have conducted a proportionality analysis under the interests-of-justice framework without request from counsel.

Utah Legislature has determined that not all aggravated sexual abuse of a child cases are not the same and evidences the legislature's intent to punish more serious aggravated sexual abuse of a child cases with harsher sentences.

Therefore, Utah Legislature created a tri-level distinction for 76-5-404.1.²

² Utah Criminal Code § 76-5-404.1 (2016).

The Statute distinguishes three types of aggravated sexual abuse of a child types: (1) aggravated sexual abuse of a child, (2) aggravated sexual abuse of a child resulting in serious bodily injury, and (3) aggravated sexual abuse of a child when the defendant was previously convicted of a grievous sexual offense.

That establishes different sentences. For example, a defendant convicted of, (1) aggravated sexual abuse of a child, may be sentenced to a sentence of 15 years to life.

In contrast, a defendant who has been previously convicted of (3) aggravated sexual abuse of a child causing serious bodily injury will face a sentence of life without parole.

The Legislature provided the possibility of a downward departure from the presumptive sentence of 15 years to life

to try and begin the road to rehabilitation even mattered to the court.

In fact, the court did not even acknowledge the mitigators.

The interests of justice analysis was one sided: aggravators.

For taking indecent liberties with two minors; CJR and BM, the court "would characterize" that this case was "more egregious" to the "different types of predators that we encounter in our community" and that Kubbe "had the opportunity as an adult to counsel" and that instead, Kubbe "took advantage of them".

The court believed that Kubbe was, "a wolf in sheep's clothing".

Though serious, taking indecent liberties by touching the genitals of two

Victims, each only one time, does not meet the Legislative presumptive sentence of 15 years to life.

The court failed to properly conduct an interests-of-justice analysis.

B. Consideration of Proportionality

Utah Code Section 76-1-106³, directs that Utah's criminal code "shall be construed according to the fair import of its terms to promote justice and to effect the objects of law and general purposes of Section 76-1-104."⁴

Four general goals of 76-1-104 are:⁵

(3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit

³ UCA 76-1-106. Strict construction rule not applicable

⁴ UCA 76-1-104. Purposes and principles of construction

⁵ Goals (1) and (2) are omitted.

recognition of differences in
rehabilitation possibilities
among individual offenders.

(4) Prevent arbitrary or oppressive
treatment of persons accused or
convicted of offenses.

Subsection 3 relates most closely to Sentencing.

It is the Legislative goal that sentencing
be proportionate to the seriousness of
the crime and Potential for rehabilitation.

A Proportionality analysis requires the Court
to consider the seriousness when compared
to the Severity of Sentence and the
Sentences imposed for different offenses.

However, the Utah Court of Appeals has reasoned
that district courts are only required to
engage in the proportionality analysis
"when the parties raise the issue."⁶

⁶ State v. Coombs. 438 P.3d 967.

This is objectively unreasonable.

Since the Utah Legislature has determined that not all aggravated sexual abuse of a child cases are not the same, and that one of the four goals is to "prescribe penalties which are proportionate to the seriousness of offenses," then the proportionality analysis should be standard practice.

Proportionality is defined as, "balance among people, and between crime and punishment." ⁷

Proportional punishment is defined as, "the punishment for a crime should be proportionate to the harm committed by the criminal. Thus, crimes of similar harm should have similar punishment." ⁸

The proportionality principle is incorporated into the interests-of-justice requirement which demands consideration of penalties of other crimes.

⁷ Proportionality. Bouvier Law Dictionary (2023 Edition).

⁸ Proportional Punishment. Bouvier Law Dictionary (2023 Edition).

The proportionality analysis is so deeply rooted within the jurisprudence, it should be automatic that a sentencing court perform the analysis.

Yet, in Utah, counsel must make the request and so many defendants are sentenced to life term sentences as if courts hand them out like Halloween Candy when in retrospect, the defendant did not truly deserve the sentence if a true interest-of-justice analysis was performed by the trial court.

If a true interests-of-justice analysis with proportionality was completed in Kibbe's cases, he would have not received the arbitrary sentence that he was sentenced to.

In the cases involving CR and BM, Kibbe admitted to taking indecent liberties with the minors. The State admitted that Kibbe did not rape or object rape the minors.

In the case involving GA, Kubbe admitted that he offered THC to the minor. The State admitted that nothing sexual happened between GA and Kubbe.

Taking the three cases into consideration, Kubbe was sentenced to:

(3) 15 years to life

(1) 3 years to life

(2) 1 to 15 years

(1) 0 - 5 years

Some concurrent and some consecutive.

i: Proportionality Analysis on Kubbe's Case

The 8th Amendment of the United States Constitution states; "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The 14th Amendment of the United States Constitution states in part, "nor deny to any person within its jurisdiction the equal protection of the laws."

Utah must believe that it is not part of the United States jurisdiction.

Even though the Utah Supreme Court has noted that the interests-of-justice framework "requires the court to consider the proportionality of the defendant's sentence in relation to the severity of his offense."⁹

That framework requires a request from counsel.

Kubbe presents three separate cases that the trial court could have compared the case;

Mr. Jacob Streeper confessed to family members and the police to drugging, sexually assaulting, sodomizing, and raping his three young daughters over several years.

⁹ LeBeau v. State, 2014 UT 39.

The State charged Streeper with three counts of aggravated sexual abuse of a child, among other counts. Streeper was sentenced to multiple 15 years to life counts.¹⁰

Mr. Keith Brown Plead guilty to one count of child Sodomy, and two counts of sexual abuse of a child, for sexually abusing his daughters. The district court sentenced Brown to ten years to life for the child Sodomy, and one to Fifteen years on each of the child Sexual abuse counts. The sentences were to run concurrent to one another.¹¹

Mr. Sean Thompson-Jacobson was convicted of two counts of aggravated sexual abuse of a child when the children, niece and nephew, touched Thompson-Jacobson's genitals one time. The trial court sentenced Thompson-Jacobson to two consecutive

¹⁰ State v. Streeper, 2022 UT APP 147.

¹¹ State v. Brown, 489 P.3d 152.

terms of five years to life imprisonment.¹²

Three cases of similar counts but different sentences.

Yet Kubbe was convicted of taking indecent liberties with two minors, CR and BM, and providing TLC to a third minor, GA. Kubbe was sentenced to multiple 15 years to life imprisonment for taking indecent liberties.

Not only did the trial court fail to perform an adequate interests-of-justice analysis, but had the court performed a proportionality analysis as required, the court would have come to the conclusion that 15 years to life is arbitrary to the facts. Taking only, indecent liberties, one time, with each minor warranted a downward departure from the presumed 15 years to life imprisonment.

¹² State v. Thompson-Jacobson, 2022 VT App 29.

Sadly that conclusion did not happen. With the extensive media presence in the court room, including a court authorized media camera, the various victim advocates, and the railroading of the cases, the district court clearly abused its discretion when it failed to properly consider the interests-of-justice, perform a proportionality analysis without prompting by either party, and sentence Kubbe to an arbitrary multiple 15 years to life imprisonment sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 04/14/2023