Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

HARRINGTON JOSEPH JOHNSON,

Petitioner

vs.

THE UNITED STATES OF AMERICIA

Respondent

Docket No. 5247

Place Washington D. C.

Date March 4 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

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BARRINGTON JOSEPH JOHNSON,

Petitioner

vs

No. 5247

THE UNITED STATES OF AMERICA

Respondent

The above-entitled matter came on for argument at 10:50 o'clock a.m. on Wednesday, March 4, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Petitioner

SAMUEL HUNTINGTON, ESQ.
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On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will now hear arguments in Number 5247, Johnson against the United States.

MR. JUSTICE BLACK: (Presiding) Mr. Lippman.

ORAL ARGUMENT BY WILLIAM J. LIPPMAN, ESQ.

ON BEHALF OF PETITIONER

MR. LIPPMAN: Mr. Justice Black, and may it please the Court:

This case presents the question and the effect of a constitutionally invalid death sentence construction upon Petitioner's conviction for rape under the District of Columbia rape statute where the evidence of guilt was not compelling.

Briefly the facts: Petitionerwas convicted largely on the testimony of the complaining witness, who testified that she was on her way to work on January 22, 1967 at St. Elizabeth's Hospital; that her car broke down in front of a gas station. She went to the gas station to seek help. Petitioner drove into the same gas station purely by happenstance. He volunteered to push the Petitioner's car to the parking lot in St. Elizabeth's Hospital. She accepted his offer. Upon

Upon arrival at the parking lot she testified that he forced her into his car and drove off. Shortly thereafter they stopped at a gas station where he purchased a dollar's worth of gas. There was an attendant present. She made no

outcry, no effort whatsoever to seek the assistance of the attendant.

They then drove off to a secluded spot; they parked for a while. He asked whether she was married. She said "yes." He asked whether she loved her husband. She said "no." He then asked her to remove her underclothes. She proceeded to do so without any protest, following which an act of intercourse took place.

After the act of intercourse, at her request he drove her back to the door to the St. Elizabeth's parking lot. She gave him her car keys; he gave her his correct phone number. He promised to return that afternoon to help start her car. He did return that afternoon and was promptly arrested and charged with rape.

Throughout the entire episode the complaining witness offered no protest or resistance by word or action because, she said, "she was in fear for her life." She testified that she suffered from a thyroid condition, but no medical testimony was adduced to corroborate this point.

The complaining witness was unmarked; there was no evidence of force, other than her own testimony that she was in fear for her life.

Petitioner took the stand in his own defense, admitted that he pushed the complaining witness's car to the lot, but denied the act of intercourse. Petitioner was

indicted and tried under the provisions of 28 D. C. Code 2801, which is reproduced on page 3 of our brief, which gave the jury discretion to sentence a defendant to death for the crime of rape.

At the outset of the trial the prosecution announced that the case was a capital case, but that the government was not seeking the death penalty. Nevertheless, the case was tried before a death qualified jury with one juror being accused becuase she stated that her opposition to capital punishment would prevent her from returning a verdict of guilty if, as a consequence, Petitioner might be sentenced to death.

The Court charged the jury that even though the Government was not seeking the death penalty it was free to sentence Petitioner to death if they found him guilty, and that if they were unable to agree that the death penalty should be imposed they should really return a verdict of "guilty" and the Court would impose an appropriate penalty.

The portion of the charge with respect to the death penalty was set forth at pages 297 and 298 of the appendix.

Petitioner was found guilty and sentenced to a term of imprisonment of from six to 18 years. His direct appeal to the Court of Appeals --

Q Does the record show how long the jury was out?

A Yes, Your Honor, Mr. Justice Harlan; the jury was out two and a half hours, I believe, or more

particularly: two hours and 20 minutes.

Q Did they come in for instructions, supplemental instructions during that period?

A I don't believe so, Mr. Justice Harlan.

His direct appeal to the Court of Appeals was pending when the Court, this Court's decision in United States v. Jackson, 390 U.S. 570 was handed down. The Court of Appeals panel returned the appeal and affirmed the particular conviction with Senior Judge Fahey's dissenting opinion.

Petitioner's conviction was again affirmed by the Court of Appeals on rehearing en banc in a divided opinion. Four of the judges on the Court of Appeals dissented on the grounds that the evidence was insufficient to sustain Petitioner's conviction and three dissented on the additional grounds that Petitioner was prejudiced by the trial of this case as a capital case.

If the Court please, Petitioner here contends that his conviction violates this Court's holding in the Jackson case and that he was tried for a capital offense when he should not have been.

More particularly it is our contention that the death sentence instruction gave the jury an impermissible choice of verdicts which might have resulted in a compromise verdict in this case.

Petitioner's principal contention here is

eloquently stated in the dissent of Judge Fahey below. After quoting his approval from the opinion of Mr. Justice Marshall when then Circuit Judge Marshall -- excuse me, Your Honor, in the Hetenyi versus Wilkins case, Judge Fahey states, and I am quoting from the appendix at page 346:

"We cannot surmise there was no likelihood ofthe jury considering the availability to them of the death sentence. We have no basis for such a surmise. And it is the erroneous availability of the death sentence, not the likelihood of its rendition, that gives rise to the prejudice. It may have exerted an undiscernable influence on jurors in deciding whether to find guilt but without the death sentence, or not guilty. One or more jurors with his or her attitude about the crime of rape, reenforced by the statutory provision for a death sentence, might have been so influenced, as stated by the Second Circuit in Wilkins Supra 348 Fed 2d at 867: "It is sufficient if there is a reasonable possibility of prejudice.

"For the Court to erroneously to give the jury a range of verdicts more severe than the law allows in the case on trial is for the Court erroneously to influence the jury adversely to the accused. As a result the verdict rendered may be more severe than otherwise it would have been, even if not the most severe permitted by the erroneous construction."

Q Why do you say it was held to refer to the

death penalty?

A We say it was there, Mr. Justice Black, because the charge gave the jury a choice of three verdicts; it gave them the choice of the verdict of "not guilty," of "guilty as charged," or guilty with the death --

Q Why do you say it was an error to submit the death penalty?

A We say it was error because, under this Court's decision in Jackson the trial of this case as a capital case, including the death sentence charge, violated the Petitioner's constitutional rights and he was prejudiced thereby, Mr. Justice Black --

Q What constitutional right?

A Well, the constitutional right to which he was to be protected under the rationale of this Court's decision in Jackson. Jackson holds that he was, by electing to stand trial by jury, he was exposed to greater punishment than there would have been if he had waived his right to a jury trial or pleaded guilty.

And this was a constitutional defect which held the penalty scheme in the kidnapping act and the same scheme that was incorporated in the D. C. rape statute. Only the jury, under the D. C. rape statute could sentence a defendant to death. So to that extent we have an analogous situation to Jackson.

Q Am I correct that in this case the jury found him guilty, period?

A Yes, Mr. Justice Marshall; they returned a verdict of guilty, but without the death penalty --

Q Where do you get the compromise there?

A Because the charge, Mr. Justice Marshall, gave them an additional option; it gave them the right to return a verdict of "guilty" with the death penalty. As we read the statute there are clearly three possibilities here, and the "guilty as charged" verdict could be construed as a verdict of guilty on the lesser included offense. If the jury had returned a verdict of "guilty" with the death penalty that could have been similar to aggravated rape, ordinary rape perhaps guilty as charged.

Those were the three options. As the charge clearly indicated, they had three possible alternatives here. Now, it is possible in that situation for one jury to feel: "well, let's sentence this defendant to death;" another juror to feel: "Well, let's acquit him."

Q But they were only out two hours and 20 minutes; that was awful fast bargaining. There have been studies made of juries that bargaining comes after many hours; do you know what the studies show?

A Mr. Justice Marshall --

Q I can see where a jury would say: "Well,

we can find manslaughter, involuntary manslaughter, third degree murder, second degree murder, first degree murder or first degree murder with the death penalty, but where the jury has the decision of deciding whether or not he is guilty of rape I don't see so much bargaining in there.

Q I suppose part of your argument, is as I understand it that in a case that divided the Court of Appeals as closely as this one did, on whether the evidence was even sufficient, the question of harmless error takes on a significance different from that which it would take on where the evidence was overwhelming.

A That is entirely correct, Mr. Justice Harlan. I am glad that you made the point, sir, because we're not arguing this contention in the abstract; we're arguing it with reference to this close case of guilt.

Q Let me ask you this question: what sentence did this man get finally?

A Six to 18 years.

Q Is he in jail now?

A He is now serving his sentence at Lorton Reformatory; yes, sir.

Q How much of it has he served?

A He has served three years and he is eligible for parole in the fall of 1973.

We believe that the rationale of the Fahey

dissent has indeed been adopted in this Court's opinion in Price v. Georgia, decided last term. Here the Petitioner was subjected to trial for a capital offense and exposed to the hazards of capital punishment, much the same as was the Petitioner in Price v. Georgia, and that the death sentence instruction here gave the prosecution the advantage of offering the jury a choice, a situation which is apt to induce a jury to strike a compromise, rather than to continue to the debate his innocence.

So, if I may just respond to Mr. Justice Marshall's observation a minute ago. It's true the jury was out two hours and a half; it's not a very long time. It's quite possible to stipulate that they did not seriously consider the death sentence, but it's impossible to rule out that possibility; and this is where law can say by hindsight what actually happened in that jury room as part of the jury deliberations, so long as it was an option tendered in the charge to the jury, it's got to be credited as a realistic possibility.

Q But we're talking about realism, too. It is true that the Government said at the beginning of the trial that they were not asking for the death penalty.

A That is correct, Mr. Justice Harlan.

Q So I would suppose that's a factor that, in weighing the whole situation here, should be taken into account.

A Again, the test is not as you would read it or as I would read it, but as the impact it had upon the jury. Let me just read the critical portions of the charge, Mr. Justice Harlan.

Starting at the bottom of page 287 of the Joint Appendix:

"If, however, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of rape, then the statute provides that you may unanimously do so, recommend totthe Court that the death penalty attach."

The Government is not seeking the death penalty -- I repeat: The Government is not seeking the death penalty. "But you may, if you wish to do so, add the words 'with the death penalty' to your guilty verdict," if you find him guilty.

Now, this following paragraph I regard as quite critical.

Q Do you think that was error?

A Yes, sir.

Q Do you think he was bound by the statement of the Government that they weren't seeking the death penalty?

A No, no; I think he had to charge the jury according to the statute. That's what the statute provided at the time.

Then he goes on to say: "If you do not wish to have the death penalty imposed or if you are unable to agree

that the death penalty should be imposed, the you should merely return a verdict of "guilty."

Now, how does that language strike the jury? Isn't he really saying -- isn't it a possible interpretation that he's telling the jury: "Well, if you don't feel this crime is heinous enough or that the defendant should be killed, should be put to death, then just find him guilty."

Now, the jury retired tothe jury room with those instructions. There is no part of the trial which is of graver importance than the determination -- than the guilt-determining process of the Court's charge.

I refer the Court respectively to the language of Mr. Justice Frankfurter in Andres v. United States, in his concurring opinion: 333 U.S. 740 at 765: "Charging the jury is not a matter of abracadabra; no part of the conduct of the criminal trial is there a heavier task than on the presiding judge. The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors."

So here we have a situation where the jury is given an impermissible option -- impermissible in the --

Q Why do you say it was impermissible if you say the judge had a right to give that charge and was not bound by the decision of the Government --

A It was voided andmade an illegal charge by this Court's decision in Jackson, Mr. Justice Black, by virtue

of the statutory scheme.

Q You mean Jackson versus Denno?

A No; United States versus Jackson, the United States versus Jackson.

Q Does the record show how old this man was?

A Beg your pardon, Mr. Justice Harlan?

Q Does the record show how old this defendant was?at the time

A I believe he was in his late twenties at the time.

Q Does the record show the composition of the jury? Was it an all male jury or partly male, partly female, or what?

A It was partly male and female, Mr. Justice Harlan. It was not an all-male jury.

Q How old was the victim?

A The victim was, I believe, in her late 30s or around 40; and the record also shows that they were the same physical size.

Q Was this an interracial --

A No; they were both members of the Black race, Mr. Justice Stewart.

Q What you apprehend -- or could have happened was that some jurors would say, "Well, he's guilty, but if you're going to give him the death penalty I'm going to

vote to acquit because I simply can't give him the death penalty, and therefore the jurors agreed more or less to find him guilty without giving him the death penalty. Is that the sort of thing you are concerned may have happened?

A My concern is that the availability of the death sentence option might have led to a compromise resulting in the "guilty as charged" plea by giving a possible holdout who wanted to acquit to agree that he would go over to the majority and find the defendant guilty as charged, provided no death penalty were imposed.

In other words, as a quid pro quo for rejecting the death sentence, a holdout who wanted to acquit might have been won over.

That's the way we view the compromise possibilities here. Again we're talking about possibilities, not probabilities because I don't think it's the province of the Court or Counsel or anybody as part of a rationalization after the fact to say what exactly was in the minds of the jury. This Court has been circumspect and refuses to do it -- engage in such an action.

Q I gather, under the District system as it then was; it's been changed since, but as it then was that if everyone agreed he was guilty he had to get life under a guilty verdict unless everyone also agrees to give death; is that right?

A I believe the statute provides for

imprisonment up to 30 years.

Q Well, I know there is, but my point is: he couldn't get death even though everyone agreed he was guity; he could not get death unless everyone also agreed he should get death; is that right?

A That is correct.

Q That's the way it works.

A Yes. It had to be unanimous either way.

Q But there had to be an affirmative recommendation of the death penalty, did it not?

A It had to be a verdict of guilty with the death penalty?

Q Affirmatively; the jury had to affirmatively add that.

A That is right.

Q If you had a situation where they were unanimous that he was guilty, if there was a single holdout then the only result would have been a verdict of guilt without the death penalty; is that right?

A Yes. I believe that's a fair construction of the statute.

Q Well, by the same token, does that have any bearing on whether or not there was this kind of pressure to compromise that you argue?

A I believe -- again, Mr. Justice, it's

impossible to say where the pressure comes from. There might just as readily have been a holdout who wanted to acquit who was won over to the middle ground because of the availability of the death sentence --

Q Suppose it wasn't availabe and he just upped and said "no?" All he had to do was say "no death penalty" and they would give him 30 years.

A I'm sorry, I don't understand the question, Mr. Justice White. All who had to do?

Q Well, why would one juror trade a vote for guilty to avoid the death penalty when all he had to do was to just say "no death penalty." Just one person say "no death penalty" and they automatically give him 30 years; not a hung jury, not a new trial, but 30 years, that's all he would get; one person saying -- well, he doesn't need to take anything away to avoid the death penalty. All the needs to do is say "no death penalty."

A There still might have been a way of avoiding a hung jury. The compromise might have been reached as a method of avoiding a hung jury.

Q Well, but that wouldn't have anything to do with the death penalty.

A Well, you are asserting, Mr. Justice White, that the difference in the reasoning of the jury -- I cannot really go on that assumption. I think that under the statute

and under the charge that they were confronted with a [illegible] package; again there were three possibilities.

Q They were clearly told, and accepted, I think, that there was this alternative of -- that if you disagree on the penalty that's the end of the matter.

A But it was a unitary vote and a unitary procedure that was called for; it wasn't a two-step procedure.

Q No; but in their deliberations in the jury room isn't it so that all 12 of them could have agreed that he was guilty and 11 of them might have thought that he ought to have the death penalty but the 12th says: "No; I won't give him death," and the only verdict they could return would have been a proper verdict of guilty to which would automatically attach the 30 year sentence.

A Not automatically --

Q Well, whatever it is.

A -- up to 30 years. Yes, Your Honor, certainly it is a possibility.

I should like to close my direct argument and reserve the rest of my time for rebuttal, with this quote from the opinion of this Court in Jackson v. Denno, 378 U.S. 386 Senate, an opinion written by Mr. Justice White, where the following language appears:

"For we cannot determine how the jury resolves these issues and will not assume that they were reliably and

properly resolved against the accused."

That's this case. Thank you.

MR. JUSTICE BLACK: Mr. Huntington.

ORAL ARGUMENT BY SAMUEL HUNTINGTON, ESQ.

ON BEHALF OF THE UNITED STATES

MR. HUNTINGTON: Mr. Justice Black and may it please the Court:

The Government's basic position in this case is that no prejudice resulted to petitioner from the trial of his as a capital case.

Q Are you going to argue the fact that the United States does not --

A We do make that argument atsome length in our brief and I had planned to refer to it briefly. I think it is set forth quite adequately in our brief.

The main thrust of Petitioner's argument here is that the instructions to the jury on the death penalty issue may have interfered with the jury's deliberations on the issue of guilt; and heavy reliance is placed on this Court's decision last term in Price v. Georgia and the 1966 Second Circuit's opinion in the Hetenyi v. Wilkins.

Both cases, of course, involve the double jeopardy problem of retrying a person for murder after he had been found guilty only of the lesser-included offense and that conviction had been upset on appeal.

The analogy Petitioner seeks to draw between the Price and Wilkins situation and this case are unfounded for several different reasons. The first reason is that in each of the former cases the murder chargewas one of the principal issues, that's the principal issue in the case. Each prosecutor had sought to establish first degree murder and the jury's deliberations and the defendant's guilt in those caseswould necessarily center in and focus on that first degree murder charge.

By contrast, the death penalty issue in this case played a very insignificant role. Some statistics are worthy of note.

Since 1930 only three persons have been executed for rape in the District of Columbia, the last one occurring in 1949. Because I could discover no jury has imposed the death penalty in a rape case since the 1950s and at least in the last several years the Government has not sought to impose the death penalty.

Turning to this case the prosecutor specifically stated during voir dire that he was not seeking the death penalty. After the voir dire neither the prosecutor nor the Petitioner's trial counsel again referred to the death penalty issue. In his summation the prosecutor merely requested a verdict of "guilty as charged."

And then, of course, during the charge to the jury

the judge twice repeated that the Government was not seeking the the death penalty; nor did the evidence presented by the government make it likely that the jury would seriously consider imposing the death penalty. This is not a case of aggravated rape.

Petitioner's argument on the sufficiency of the evidence really cuts two ways here: he argues that the evidence did not really establish nonconsent, but we maintain that the closer of the evidence is on the consent issue the lesslikely it is that the Government would, that the jury would seriously consider imposing the death penalty.

Q Could I ask you a question? Are you arguing this case on the premise that Jackson governs this case, even though retroactively? Are you arguing it on that premise --

A Well, this part of my argument is based on that premise.

Q Based on that premise; I understand that.

Now, the second question I want to ask you: on that premise you are arguing that this was harmless error, at best?

Now, I read the Court of Appeals' opinions and I couldn't find any advertent discussions on the harmless error issue, except insofar as embraced and encompassed in the statement that the other contentions were without merit; am I right?

A That's right; it did not specifically --

Q It did not.

A But this whole argument I'm making now, I think, supports the finding that Petitioner was not prejudiced but beyond a reasonable doubt.

Well, now, turning to this compromise contention, we believe that that is also -- the analogy with Price and Wilkins does not exist. In Price and Wilkins there was the case of first degree murder, second murder or voluntary manslaughter, and not guilty.

Before the jury could unanimously return a verdict of guilty of the second -- of the lesser-included offense, which they did in both Price and Wilkins -- the juror's holding out for not guilty had to give up their insistence on that verdict and the jurors' holding out for the first degree murder had to give up their insistence on that verdict. So, obviously there was a possibility of compromise.

As Mr. Justice White pointed out, the effect does not exist here. The jurors did not have to agree on the death penalty issue so that in order to return a verdict of guilty it was not necessary that the jurors who might have thought that they should impose the death penalty, give up anything. Obviously, if they were in favor of imposing the death penalty they would believe in Petitioner's guilt.

So, the same dynamics that existed and the same

potential for compromise just don't exist here.

Q I understand the Petitioner's point to be that that second part of the charge could be interpreted as telling the jury that you must be unanimous in order to give the death penalty and that if you are not unanimous on the death penalty automatically you find him guilty.

A WEll, he does make that point here; he made it in his opening brief and in his reply brief and he quotes the first full paragraph at the top of page 298 of the Appendix, which does say that if you do not wish to have the death penalty imposed or if you are unable to agree, then you should merely return a verdict of guilty.

However --

Q I think we both agree that that was rather inappropriate language; don't we?

A WEll, I think -- in isolation you can put that interpretation on it. I think if you read the last two paragraphs on the bottom of page 297 in conjunction with that it's perfectly clear that the trial judge instructed the jury, fi t of all, to determine the guilt question.

He so said that: "If you find him not guilty that's the end of the case." If you find him guilty then you can go on and consider the death penalty which the Government has not sought to impose and if you are unable to agree there then you return a "guilty" verdict. I don't really think that

this charge is ambiguous in that point at all.

Petitioner also alleges in its brief -- he didn't refer to it in argument -- Mr. Lippman didn't refer to it -- that the fact that the jury was death-qualified may have prejudiced Petitioner on the issue of guilt.

Well, to begin with, the jury in this case was not truly death qualified in that the prosecutor did not seek to obtain a jury which would determine the death penalty. The prosecutor merely sought to have a jury which would be unbiased on the issue of guilt. And this whole question to the jury was whether their views on capital punishment would interfere with their ability to return a verdict of guilty if the evidence so compelled. One witness was excused.

There are several decisions of this Court that have established that the exclusion of persons for views on capital punishment cannot be held to -- that the evidence simply is insufficient to hold that that would bias, make the jury prosecution-prone.

The Witherspoon case so held and Bumper and North Carolina the same result was reached, and as a matter of fact in Pope v. United States, involving -- decided under Jackson, involving a Jackson-type decision, the jury was death-qualified and Pope received the death penalty but in remanding this case, this case simply remanded for resentencing. Therefore, impliably holding that Pope was not prejudiced on the question of guilt,

although that point was argued.

I would like briefly to refer to the remaining points made in Petitioner's brief. He argues the sufficiency of the evidence; that issue actually involves both questions of fact and law. The legal question involves the proper interpretation of the phrase "forcibly and against her will" as contained in the D. C. Rape Statute. Both the majority and the dissenting opinion below recognized that under the prevailing and proper interpretation of that statute, overcoming the resistance of a woman by placing her in the fear of death with serious bodily harm, was the equivalent of using force to overcome physical resistance.

So the disagreement centered on what was necessary to establish fear.

Q Does the record show at what stage after this alleged affair she complained that she was raped?

A Yes; the record shows Mrs. Fushee -- well, Mrs. Mayes, the complainant, testified that when Petitioner returned her to her place of work she went in and reported to her supervisor and told her the crime.

Mrs. Fushee testified -- her supervisor -- testified as a defense witness that when the complainant arrived she first asked if she could have the day off. She first said, "I what to talk to you; can I have the day off? I don't feel fit for working." She testified that the complainant was very

upset and very nervous and that she asked the complainant to come into the back room. There were a lot of people in the hall when they first met, and that in the back room the complainant broke down and told of the crime.

Q I would assume there were guards there when she came to work.

A There is no evidence that there were any guards at the parking lot --

Q I looked for it; there is nothing in there about it anywhere. I tried to find it in the record, but there is nothing either way.

A Nothing either way. There is evidence that Petitioner waited until one car had parked and someone had gone inside before pushing the car into thelot.

Q Who alerted the police to arrest this man?

A Well, as soon as it was reported to the supervisor they reported that to the security guards at the hospital and they then called in the police.

Q She did not make any complaint to the police herself?

A Well, she stayed with the supervisor and --

Q Well, I understand that. The arrest was triggered by her conversation with the supervisor, who got in touch with the guards and they with the police; is that it?

A That's right, Your Honor.

Now, the evidence on fear, I think, is certainly sufficient to support this verdict. Mrs. Mayes repeatedly testified that she was scared to death and that she thought Petitioner was going to kill her. She also testified that he stated that if she didn't scream he wouldn't hurt her.

There is also some objective testimony in that she testified that he recognized she was nervous and he told her that he knew she was scared because she was so nervous.

Under all of these circumstances -- I won't belabor the point -- the resolution of this issue, we believe, the Court of Appeals was correct.

First of all, involving an interpretation of the D. C. Statute as it does, on the issue of law, this Court has traditionally deferred to the opinion of the Court of Appeals on local D. C. matters and we think that they should do so here.

On the issue of facts the jury finding was concurred in by the Court of Appeals and we don't believe this Court should consider the matter further.

Q How did the Court divide on the evidence point?

A Five to 4.

Q Five to 4; four thought the evidence was too thin?

A Four of them thought the evidence was too

thin, but they didn't base it on credibility; they based it more on the interpretation of what is necessary to show fear.

Q That it was what?

A What was legally necessary to establish fear as a substitute for force under the D. C. Statute.

Q They assumed the truth of everything that the complaining witness said, as I read the dissenting opinion and they said that that was insufficient to establish the offense of rape in the District of Columbia.

A Yes.

The final argument Petitioner raises here relates to the prosecutor's characterization during summation of Petitioner's defense as inconsistent. He argues that his defenses were alternate; in denying intercourse on the one hand and arguing that the Government could not establish non consent.

However, the Petitioner did offer evidence on the consent issue. He offered the evidence of Mrs. Fushee, the hospital supervisor and she testified that Mrs. Mayes had first for leave. That could only be relevant on the issue of consent.

Mrs. Fushee, however, further testified in direct contradiction to defense's theory that intercourse had not taken place. She placed the arrival of Mrs. Mayes at the hospital at 7:30 whereas Petitioner had testified that he had

left her off at 6:45 and another witness had testified that Petitioner was home by 7:00 o'clock. So, really Petitioner was arguing inconsistent defenses.

Even if the prosecutor's isolated remarks here were somewhat in excess this case is no way comparable to the Burger case, the 1935 decision of this Court, reversing for prosecutorial misconduct, where the conduct there pervaded the entire trial and included many different items.

And I just will close in noting that the Court of Appeals for the District of Columbia examines very closely charges of prosecutorial misconduct as in the case of United States against Stevenson in 424 F. 2d, 923. They cite a whole bunch of cases there in which they have examined it, but neither the majority nor the dissent in this case felt called upon to comment on this issue.

In conclusion we submit that the judgment below should be affirmed.

REBUTTAL ARGUMENT BY WILLIAM J. LIPPMAN, ESQ.

ON BEHALF OF PETITIONER

MR. LIPPMAN: Just a few brief points, Mr. Justice Black.

First, with reference to Mr. Justice Stewart's comments with regard to the evidence. This Petitioner was convicted on the basis of the testimony of the complaining witness, which might have been corroborated with respect to the

act of intercourse, but was not corroborated, in our judgment, with respect to the consent issue.

Now, the Court of Appeals in the Coltrain case, Coltrain v. United States, 418 Fed. 2d 1131, which was decided after this case initially, talks about the element of corroboration and all evidence of the defense. We maintain that that element of corroboration was missing here.

Now, if the Court please: this record in its entirety cannot be read without getting the feeling that there has been some kind of miscarriage of justice here. This was true at the point of trial and the Court of Appeals, the form of the Court of Appeals' opinion: 5 to 4; it is particularly true now what we have the issue of United States v. Jackson violation and the Price case.

Now, we feel that this case does come under the reasoning of the Price case, but we're not asking this Court to make a broad pronouncement of constitutional significance here. This Court can exercise its supervisory powers under the Federal Courts and reverse this conviction if it feels that there has been substantial error or substantial injustice below.

As regards the holding by Mr. Huntington so far as the statistics are concerned. Of course the jury didn't know how many rape defendants have been sentenced to death. It's impossible to impute this knowledge into the minds of the

jurors. This would be making a basic mistake by assuming that the only issue here is the issue of the death sentence construction and how it affected the jury's deliberations.

We have a broad issue in that the defendant was tried for a capital offense when he shouldn't have been, and he was exposed to all the incidents of a capital trial. This Court has recognized the distinction between being tried for a capital offense and other offenses.

Indeed, it was recognized in the opinion of Price V. Georgia. And I think in Price v. Georgia the Court said that to be charged with a capital offense -- of course that went up on double jeopardy, but they did say that's an ordeal not to be viewed lightly. The language of this Court in Price v. Georgia.

Thank you for your attention.

MR. JUSTICE BLACK: Mr. Lippman, I believe you were appointed by the Court?

MR. LIPPMAN: Yes, Your Honor.

MR. JUSTICE BLACK: The Court wants to thank you for your services.

MR. LIPPMAN: Thank you very much.

MR. JUSTICE BLACK: I am comforted by the fact that the lawyers will perform these services for indigent defendants.

MR. LIPPMAN: Thank you very much, Mr. Justice

Black.

(Whereupon, the argument in the above-entitled matter was concluded at 11:40 o'clock a.m.)