In the

Supreme Court of the United States

LUCIOUS JACKSON, JR.,

Petitioner,

vs.

STATE OF GEORGIA,

Resopndent.

No. 69- 5030

c. 2

Washington, D. C.
January 17, 1972

Pages 1 thru 44

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

EM IN THE SUPREME COURT OF THE UNITED STATES

LUCIOUS JACKSON, JR.,

Petitioner,

v. No. 69-5030

STATE OF GEORGIA,

Respondent.

Washington, D. C.,

Monday, January 17, 1972.

The above-entitled matter came on for argument at 1:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JACK GREENBERG, ESQ., 10 Columbus Circle, Suite 2030, New York, New York 10019, for the Petitioner.

MRS. DOROTHY T. BEASLEY, Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia 30334, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 69-5030, Jackson against Georgia.

Mr. Greenberg, you may proceed whenever you're ready.

ORAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GREENBERG: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the Supreme Court of Georgia, and it raises, in another context, the questions of the two preceding cases, and that is, whether the imposition and carrying out of the death penalty in the case of one convicted of the crime of rape constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The petitioner, Lucious Jackson, was sentenced to death for the crime of rape by the Superior Court of Chatham County, Georgia, in 1968. The conviction was upheld by the State Supreme Court against the Eighth and Fourteenth Amendment challenges.

Petitioner is a 21-year-old black escaped convict, who had been sentenced to a three-year term for automobile theft. He was out of captivity for a period of three days, and while out of captivity he allegedly committed several crimes as well as the rape for which he was convicted.

The State's evidence was that he broke into the home of a white housewife, the wife of a physician, threatened her with a pair of scissors, stole five dollars and some change, engaged in a physical struggle with her, raped her, escaped when the maid arrived, and hid in a neighbor's garage for several hours, where he was found.

The prosecutrix, in addition to having been raped, suffered some abrasions and lacerations, but no additional injury appeared.

The petitioner was indigent and represented by court-appointed counsel. Apart from pretrial motions asking for appointment of a psychiatrist, change of venue, and a continuance to allow time to prepare the case, the defense presented no evidence.

The trial, including a separate proceeding held in the morning to determine petitioner's competence to stand trial, lasted one day.

The jury knew only the State's evidence and that petitioner is a Negro. And on this record it sentenced him to death. The jury acted under Georgia law, Section 26-1302, which appears on page 1a of our brief, which is that -- it was at that time; it's been changed slightly -- that:

"The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life: Provided, however, the jury in all

cases may fix the punishment by imprisonment and labor in the penitentiary for not less than one year nor more than 20 years."

In the two cases just argued, Aikens and Furman, the petitioners urged that the death penalty in cases of homicide constitutes cruel and unusual punishment. Here, too, in this case we urge that the death penalty in the case of rape constitutes cruel and unusual punishment.

And for a moment I would like to focus on the word "unusual". Infliction of capital punishment for rape is indeed the most unusual of punishments for any crime in the United States or, indeed, in the world.

At this point I am going to speak for a moment about racial statistics. There have been some questions about racial statistics and statistics that may or may not be judicially noticeable. All the statistics that I will relate come from National Prisoner Statistics, a publication of the United States Department of Justice.

The figures are so overwhelming that, at a minimum, if they're not conclusive, they cast the burden upon the respondent to explain them. This is not strange in a racial case, in cases involving juries, schools, employment, voting; figures speak, as the Fifth Circuit said in another context, and judges listen. And sometimes the figures are not persuasive, sometimes they're conclusive. At a minimum, if they're sufficiently persuasive, they cast the burden of

explanation upon the other side.

Our opponents have said in their brief and have said in argument, with regard to other aspects of statistics in these cases, that there are many questions that the statistics leave unanswered. For example, in a rape case, has the death penalty been inflicted because the defendant is a particularly vicious person? Was the crime committed by a group of people? Was a weapon used? Was an injury inflicted? Did the victim have a particular reputation for chastity? Was there a child involved? And so forth.

We have attempted to answer these questions in another litigation in the State of Georgia, Williams v. Georgia, in which petition for writ of certiorari is now pending before this Court. The law of the State of Georgia, as declared by the Supreme Court of Georgia in the Williams case, is that the explanations are inadmissible.

Williams v. Georgia, I might say, is reported at 173 S.E. 2d, 72.

The explanations of the statistics, which we have attempted to put into evidence by testimony, an analysis of a representative sample of the rape cases in the State of Georgia over a 20-year period, is that it is inadmissible. And we would say that the figures that I'm about to discuss are probably, undoubtedly conclusive on their face; but if there are any explanations to be made they should come from the

State of Georgia not from the respondents who have made an effort to answer these figures.

The crime of rape is punished capitally in the Southern States only. There is or was an exception in the State of Nevada, which punished rape by death where bodily harm was done. That statute has been invalidated. And so it is a Southern phenomenon only.

Q How was that statute invalidated, by court or by special --

MR. GREENBERG: By court.

Q Upon what basis?

MR. GREENBERG: I believe it was invalidated on something that came to the U. S. v. Jackson grounds.

Q Yes.

MR. GREENBERG: It is visited upon black people in the South overwhelmingly. There have been 455 executions for rape since statistics have been kept. And of the 455 men put to death, 405 have been black.

At the moment there are 73 men on Death Row awaiting execution for the crime of rape. Of the 73, 62 are black, one is a Mexican, one is an Indian, and the race of three is not known to us.

That means that historically, since figures were kept, and at the present time the execution rate, for the crime of rape runs approximately at the rate of 90 percent

black defendants put to death or being held on Death Row to be put to death.

In the State of Georgia, 61 men have been put to death for the crime of rape since statistics were kept. Of those 61, 58 have been black. The Georgia statistics run somewhat higher, at about a rate of 95 percent.

Now, in the case of Williams v. State of Georgia, and in two other cases pending in the State of Georgia, there have been efforts to examine these statistics in considerably more detail. All of these matters are pending in the courts in the State of Georgia, and the Williams case is pending here as a matter of fact.

In the case, Mitchell v. Smith, pending in the court of, I think, Tattnall County, the statistics were developed at very considerable length. And it was demonstrated that in cases where a black man rapes a white woman, 38 percent of the defendants were sentenced to death. In a case where any other racial combination was involved, one-half of one percent of the defendants were sentenced to death.

Now, these are the States where, as is well-known and I need not elaborate on this, where there has been for many years, until outlawed by this Court and other courts, racial segregation in schools and various aspects of public life were required to permit it, these are also the States, and I think it's much more closely to the point, which have antimiscegena-

tion laws, until they were outlawed by the Loving case, and there's a long footnote in the Loving case which details which of the States had those laws. These also considerably overlap the States which have capital punishment for rape.

Now, in the rest of the world, and I think that's not an inadmissible consideration to take into account, capital punishment for rape is authorized only in South Africa, Malawi, and Taiwan. That is, throughout the entire world, certainly throughout the entire Western World which shares our culture, throughout the entire English-speaking world which shares our jurisprudence, throughout the entire United States, throughout the Southern part of the United States with the exception of black men, very slight exception for small handful of white men who suffered that penalty, capital punishment for rape is a penalty so rare that I think the word "unusual" is perhaps an understatement of the frequency with which it appears.

It's difficult to think of a punishment which is more unusual than capital punishment for rape.

It's unusual, when looked at from another point of view: in Ralph v. Warden, the case decided by the United States Court of Appeals for the Fourth Circuit, which invalidated capital punishment for rape in certain circumstances, Judge Butzner sets forth the fact that between 1960 and 1968 there were 190,798 reported cases of rape. Now, by 1971 and 1972,

of course, the figures are higher. Yet at that time there were only 70 men on Death Row for the crime. And the disproportion is, to say the least, staggering.

And so the punishment if cruel and unusual in any sense of those words.

Now, the State of Georgia particularly, the outcome which I have described here, may not be strange, in fact may be entirely to be expected.

Here is a legislative history of the Georgia statute, which casts considerable light on its reasons for its enactment, and the way it is operated.

Before the Civil War in the State of Georgia there were two sets of statutory penalties for the crime of rape. If a slave or a free person of color raped a white woman, he was to get the death penalty; any other rape was punishable by a term of one to twenty years.

After the Civil War, the statutory scheme which was on the books of the State of Georgia was repealed and essentially the statutory scheme that we have at this point was re-enacted to take its place. And we have all these statutes set forth verbatim in the appendix at the end of our brief.

And the discretionary death penalty for the crime of rape was enacted into Georgia law. And what has happened in the administration of the statute, this discretionary

statute, has been essentially what was required under the particular language of the Georgia legislation that existed prior to the Civil War.

Looking at capital punishment in general, that is, for the crime of rape and the crime of homicide, we find that while it is authorized for one purpose or another in most of the States, it is in fact almost never applied, except in a random, unstandardized way against the poorest, the least educated, and disproportionately against racial minorities.

The figures can be put together in various ways. It might be said, as has been said by some counsel this morning, that most of the States authorize capital punishment for one crime or another.

Another way of looking at it is if one takes the past decade, in 1962, and takes the States where there have been no executions, and going to the past decade one does not -- one is not confined to the period of time in which judicial stays have been dominating the picture; if one takes the past decade, one finds 24 States in which there has not been an execution where executions might be permitted. One finds nine States in which capital punishment has been completedly abolished; making 33 States or 66 percent of the States of the Union which neither have exercised nor permit capital punishment for any crime. And the overwhelming number of jurisdictions in the Free World, including Canada and England,

with which we share a common jurisprudence --

Q Mr. Greenberg, there are now, as I understand it, 41 States where -- which impose capital punishment for one -- under one circumstance or another, plus the Federal Government; that makes 42 jurisdictions here.

Of those 42, how many -- in how many of those 42 jurisdictions are there now men waiting, under the sentence of death, of the 700, almost 700 people --

MR. GREENBERG: I think we have --

Q -- men and women, who are under sentence of death. Do you know, of those 42?

MR. GREENBERG: I think we have a table here. How many men under sentence of death?

Q No, not how many, I know there are about 700 men and women, almost.

MR. GREENBERG: That's right, yes.

Q Of those --

MR. GREENBERG: Yes?

Q -- in how many States are they?

MR. GREENBERG: In how many States are there people under sentence of death? I think we have a statistic on that here.

I just don't have this table in front of me. There are so many statistics in all these cases.

Q Well, I know, but just --

MR. GREENBERG: Someone may hand that to me, if they could --

Q -- say -- my question was on what you're talking about right now, as to what there are.

MR. GREENBERG: Yes.

Well --

Q I can get it later.

MR. GREENBERG: Yes. Having spoken of the question of unusualness, just a word or two about the issue of cruelty.

We would submit that if the word means anything at all in plain English, and an analysis of a constitutional legislative provision, while it doesn't end with -- or may end with, but must start with the reading of the plain language.

The taking, the intentional taking of a life of a prisoner who is held in captivity and has been held there for years, it is, by any plain understanding of that, cruel.

And I think that the framers of the Bill of Rights recognized that. They may not have thought it was unusual, but Mr. Livermore, in the debates on the Bill of Rights, in our brief it's set forth on 7d, and some of the -- very little legislative history -- spoke about the cruel and unusual clause, and he said: "No cruel and unusual punishment is to be inflicted. It is sometimes necessary to hang a man, villains often deserve whippings and perhaps having their ears cut off,

but are we, in the future, to be prevented from inflicting these punishments because they're cruel?"

They were recognized to be cruel, whipping and cutting off the ears was not recognized as being unusual.

Now it is unusual, unusual for any cause and even more unusual for the crime of rape.

As to sometimes the meaning of the term is confined to mode of punishment, that is, is gassing or electrocution or hanging cruel? As to that there are materials set forth in our brief, but if the case is to be reduced to the issue of whether or not the particular mode of execution is cruel, there, at a minimum, ought to be, we submit, an evidentiary hearing which has been asked for in some of these cases, and discussed somewhat at length in the last footnote of the brief in the Aikens case.

In some cases, and indeed historically we have looked at the question of proportionality or disproportionality: Is it excessive to take a man's life for any crime or for the crime of rape?

And that raises the question, we submit, of the common view of the death penalty for rape throughout this country and throughout the world, that is of the fitness or the unfitness of the punishment. And even in this sense cruelty and unusualness, we believe, merge, and we get back to the question, particularly in the rape cases, of: Is it

disproportionate to take a life for this crime when so few countries in the world -- no other countries in the world, and so few States use this punishment for this crime, and then confine it essentially to the black people.

I was handed a note here saying that on Death Row there are now 30 men on Death Row in 34 States, there is one man in Arkansas and 105 in California.

Q A total of 34?

MR. GREENBERG: 34 States.

Q You don't know if that includes the Federal Government? I think there are two. Thank you.

Q How did the one in Arkansas come to be there? Is that since Governor Rockefeller's amnesty?

MR. GREENBERG: I would think that must be, yes.

Q His amnesty covered what? About twenty --

MR. GREENBERG: I think it was 24 men, yes.

Q -- more or less.

MR. GREENBERG: Twenty-four men.

Q I suppose commutation would have been a more accurate term.

MR. GREENBERG: Yes, I think so. Yes.

These cases, while they involve the issue of capital punishment, also involve the role of the Bill of Rights in our constitutional scheme. They are fateful cases for racial minorities, and not only for the reasons of the vast dispro-

portion in which capital punishment is inflicted upon black men and Mexican-Americans; more particularly, just confined to this case, the crime of rape. More than the life of a miserable handful of individuals is involved. No matter how these cases come out, if they are lost there will only be a few unfortunates put to death out of our national population of more than 200 million souls.

The question is, to what end? Taking a life in the name of the law has no practical effect on the regular administration of justice. It's a symbolic act. Perhaps a kind of a ritual sacrifice, that tells many things. But to racial minorities, to black people, it tells something of how much the law values their own individual lives.

It would not be strange if the oppressiveness, the unevenness, the cruelty, the unusualness with which the supreme penalty is inflicted works, in effect, on how those minorities view the legal system.

The Bill of Rights, of which the cruel and unusual punishment clause is a part, has long assured that our legal system exists for and benefits all our citizens. The purposes of the Bill of Rights, one of which is welding this nation into a people of equal respect for and allegiance to the rule of law can be served only, we submit, by outlawing the barbarities of gassing, hanging, and electrocution in the name of the law.

Therefore we submit that the judgment below should be

reversed. And I reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Mrs. Beasley.

ORAL ARGUMENT OF MRS. DOROTHY T. BEASLEY,

ON BEHALF OF THE RESPONDENT

MRS. BEASLEY: Mr. Chief Justice, and may it please the Court:

This Court has said, in Fahy vs. New York, in 1947, that it would not apply the Fourteenth Amendment to standardize the administration of justice and stagnate local variations in practice.

And in 1959, in Williams vs. Oklahoma, it was said: Neither the due process clause of the Fourteenth Amendment nor anything else in the Federal Constitution requires a State to fix or impose any particular penalty for any crime it may define, or to impose the same or "proportionate" sentences for separate and independent crimes.

That was in 1959.

If the death penalty for the crime of rape is cruel and unusual, then I would submit that it is an imposition upon the legislative enactment which has been enacted and has been the law in Georgia since before 1851. Rape has consistently taken the death penalty in Georgia, and just in 1960 the Legislature again considered the penalty for rape.

I think it's significant to note that when it did

consider the penalty in 1960 it was not whether it should or should not do away with the death penalty for rape; but, rather, should it leave it to the discretion of the jury to make it an alternative sentencing of one year to life, or should it be, rather, one to twenty years or life; and the latter was what won out.

But there was no question, even in 1960, as to whether the maximum penalty should be the death penalty or not. That is the will of the people of Georgia, and there has been nothing shown in this case which would indicate that that will should be overborne by a construction of the United States Constitution.

The main argument that's made is that the legislative history of the rape statute in Georgia shows that it must be based on racial considerations. And I would submit that what Mr. Justice Blackmun said in Stephens, when he was a Circuit Judge, quoting Brown vs. Allen, a 1953 case, is applicable here.

The quotation was: "Former errors cannot invalidate future trials."

And I think that's very legitimate here, because most of the statistics that are taken by petitioner to allegedly show that the only factor which goes to indicate the death penalty for rape in Georgia cases must be race. I think that those factors and those statistics are used from the period of time in the Thirties and the Twenties, and the Forties, the

Fifties, when perhaps there was racial discrimination, we don't know; but the cases are not looked at as to what their circumstances are, or how heinous they are in comparison to other rapes.

Or the proportion of persons, white or black, who commit rapes, and what the factual circumstances of the cases are.

And I think that they cannot make the presumption, which they indicate here, that the juries are looking at rape cases and determining that a man should suffer the death penalty in the last analysis because only of his race. And that's the presumption which the petitioner asks this Court to make. I think there's no valid basis for that whatsoever.

Moreover, they don't apply it to the circumstances in this case. Their argument is based on generalities, that, well, there are so many Negro men who have been executed for rape in Georgia, and there are so many Negro men now on Death Row in Georgia for rape, that it must be because they're black.

I think that they offer no support whatsoever to forward that contention. Moreover, I point out that among those who are now on Death Row -- or really not even on Death Row, they're kept on a different floor; we don't have a Death Row for prisoners until they have a date set -- there are two white men that are now under death penalty for the crime of rape in Georgia.

And I would question the petitioner whether the penalty should be imposed upon them, because, after all, their race couldn't possibly have been involved. So, is it not cruel and unusual punishment to them, too?

It couldn't be if the consideration is only one of race.

Moreover, if it is a racial consideration, the contention is against a lack of equal protection, perhaps, a discrimination that has arisen. But that is not shown. It's not proved. They don't meet the quality of proof that's required to make a prima facie case of discrimination.

Secondly, it would be, instead, an indictment against the jury system. It would be a presumption that the jurors are using a prejudice against race to indicate what would be an appropriate penalty. That again does not speak to the death penalty, per se; but, rather, attacks the jury system. And I think there is no basis whatsoever given in this case and in these briefs by the petitioner to show that that would be so.

I'd like to point out also that he makes no claim of discrimination in this case. There certainly would be many opportunities to show it. We have the voir dire in which any indications of prejudice could have been shown. There was a motion for a new trial, and that would have been an absolutely perfect place to show that the penalty was excessive under the

circumstances of the case. It is the usual practice to file a motion for a new trial to indicate that the penalty or the verdict was unjust or that it lacked equity, so that the Court would have an opportunity to look at the penalty and see whether, in the circumstances of the case which was before it, it was very lively before it, not on appellate record, the Court itself could measure whether the penalty was excessive in that particular case.

Q Can that be done in Georgia?

MRS. BEASLEY: Yes, sir.

Q In other words, --

MRS. BEASLEY: And it's the usual practice.

Q In other words, if the jury comes in with a finding of -- a conviction and then imposing a sentence of 19 years in the penitentiary, counsel for the defendant can say that it's way too much under the circumstances of this offense. He can say that --

MRS. BEASLEY: Yes, under what we call the --

Q -- after he files, and the court has power to change the verdict, does he?

MRS. BEASLEY: It would be under what we call the general grounds for a motion for a new trial, which would be that either the verdict was not supported by the evidence, or the verdict was contrary to the evidence, --

Q No, I'm talking about the sentence; I thought

you were.

MRS. BEASLEY: Yes. Well, the verdict, of course, would be both the finding of guilty and the sentence, and that it was unjust, or without equity.

Q And does the trial judge have power to change it, or only to grant a new trial?

MRS. BEASLEY: He would have to grant a new trial in that circumstance.

And also, of course, that would go up on an appeal, in an appeal situation, the same --

Q But the jury's -- the sentence imposed by the jury is final so far as it's a sentence; the trial judge does not have power, does he, in Georgia, to change the sentence as such?

MRS. BEASLEY: That's right. That's correct. That is province of the jury. And of course the statute was written that the penalty for rape would be death unless it was recommended by the jury that it be life or that it be between one and twenty years.

Q Oh, I thought alternatively it could be from one to twenty years in the penitentiary.

MRS. BEASLEY: Or life. It would be the particular --

Q As I understand Georgia, it's this -- and you tell me if I'm wrong -- if a jury finds some defendant guilty of rape, it can impose a sentence of imprisonment, anywhere from

one to twenty years in the penitentiary or it can impose a death sentence or it can impose a sentence of life in the penitentiary.

MRS. BEASLEY: That's right.

Q Isn't that right?

MRS. BEASLEY: That's right. But it starts off --

Q Nothing between twenty years and life, so far as imprisonment?

MRS. BEASLEY: No. That was the question that arose in the Legislature in --

Q That's what I thought; in 1960. That's what I thought.

MRS. BEASLEY: -- 1960. Right.

And, moreover, not only was the question raised in 1960, but we had a complete Criminal Code revision in 1968, so that the question of penalties and the appropriateness of penalties was again taken up by a Special Criminal Code Commission, which was reported to the Legislature. And of course penalties for each of the crimes was considered by that Commission, so that there was a reflection, certainly, of the will of the people in that instance.

I think thatyou would have to also presume, if you agree with the presumption that race is included, that the juries have some kind of conspiracy against Negro rapists, for it to be consistent with that reason only. But I think that

petitioners show no dissimilarities between those cases which would make the only factor being race, to show that it was that factor which made them impose the penalty. And again I would say that that would not go to the invalidation of the penalty, per se, but as to the invalidation of the penalty in the particular case. And there has been no evidence whatsoever in this case which was in 1958, when Witherspoon was applied. And certainly there would have been an opportunity to show any jury discrimination in this case.

Petitioner says -- and, by the way, one of the white men under the death penalty in Georgia proposed, made the position that the penalty of death was discriminatorily imposed upon him because he was a white man, and only three out of 66 white man had been executed for rape.

So that it just goes the other way, too; it just depends on how you want to look at it.

And his sentence, of course, was upheld.

Q I had understood Mr. Greenberg's argument on this branch of the case to be directed primarily to the submission that this is a highly unusual punishment; highly unusual, and that that's, after all, what the grant of certiorari was in these cases. We don't have here before us any equal protection claims --

MRS. BEASLEY: That's right.

Q -- but whether or not this is a cruel and unusual

punishment. And his argument in this branch of the case was directed, as I understood it, to submitting to the Court what an unusual punishment it was, that it was so rarely imposed, that when it was imposed it was imposed on an identifiable faction of defendants.

MRS. BEASLEY: I think his argument with regard to it being unusual is that it's unusual because most of the nations of the world and most of the States in the country don't impose it for rape. But I think that it has to be taken into consideration: what do they impose?

If they impose life imprisonment, that in itself is a very severe penalty, and is the distinction between life imprisonment and death so great that the death penalty constitutes a grossly disproportionate penalty for the crime of rape? Is rape -- you have to look at the nature of the crime, and I think that's one of the great fallacies in the arguments that have been presented by the petitioner in this case.

They looked only at the criminal, they don't look at the totality, at society too; and I think that Mr. Justice Cardozo, in Snyder vs. Massachusetts, pointed this out very clearly. He said: But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be straightened until it is narrowed to a filament; we are to keep the balance.

And I think that that's exactly the answer to the

question of whether it's excessive in these cases.

Q How many States provide for death -- I mean for life imprisonment?

MRS. BEASLEY: I don't know, Mr. Justice Marshall.

Q Well, you were saying that was just as bad as death. If no other State has it but Georgia, that wouldn't help you much,would it?

MRS. BEASLEY: That's true, --

Q I'm sure there are others, but I mean --

MRS. BEASLEY: I'm sure there are others, but I don't know how many there are.

Q All right.

MRS. BEASLEY: And those that have -- there have been other States that had the death penalty for rape that have changed it, so that they --

Q Regardless of where.

MRS. BEASLEY: -- they did not regress to anything a great deal less, I don't believe. And I don't think that petitioner has made out a case that it is grossly disproportionate to the crime, particularly when you take into consideration, and I think you must take into consideration, the severity of the crime.

Armed robbery -- nobody has made a point that armed robbery shouldn't be a capital crime. But there the thing is over with, it's done; whereas, a rape leaves a lasting impres-

sion on a woman. And it certainly is a very severe and very heinous crime. It's one that doesn't arise because someone wants property, but it's invasion of something very, very personal. And it's a completely overbearing of another person's will, and an invasion of someone's body. And I think that when you look at the nature of the crime itself, I think that you could not say that it is grossly disproporationate to provide that kind of a penalty for that kind of a crime.

Q But if you shoot a man and make a vegetable out of him, you can't kill him?

MRS. BEASLEY: Not at all, I think --

Q If he's completely incapacitated, he's out of his mind, and everything else, you can't hang him?

MRS. BEASLEY: If he's just shot -- that's correct.

Q You just can't hang him!

MRS. BEASLEY: That's correct. But that fact doesn't make any less severe the crime of rape.

Q I agree.

MRS. BEASLEY: And that, of course, is the only one we're measuring now, as to whether the penalty in this case was --

Q I think your problem and my problem is getting over into equal protection; and we don't want to get over there.

MRS. BEASLEY: If there was the lack of equal protection, then, of course, it would have to be shown. And

if there was a lack of equal protection, that goes to that argument and doesn't have anything to do with the abstract penalty itself.

Q That's not here.

Q What percentage of defendants who are convicted of rape are given the death penalty in Georgia?

MRS. BEASLEY: Mr. Justice White, I don't know what the percentage would be.

Q Let's assume it was one in a hundred.

MRS. BEASLEY: I think that --

Q Let's just assume that it was one in a hundred rapists, convicted rapists, who got the death penalty.

MRS. BEASLEY: Unh-hunh.

Q I'm not saying those are the figures, but let's assume it.

MRS. BEASLEY: If there were true, then I think we would have to look at the circumstances of the crime. The rate is --

Q Well, let's make a further assumption that in all -- the circumstances of all 100 cases were identical.

MRS. BEASLEY: That still leaves it up to the jury, under our system.

Q Well, I know it does. But would you say then that the infliction of the death penalty was unusual?

MRS. BEASLEY: I think not. It would depend on what

the other impositions were. I think if all of the other punishments that were given were a term of twenty years, then perhaps the death penalty would be unusual for that one case.

Q Well, then, --

MRS. BEASLEY: But if --

Q -- let's make that assumption: that everyone else was given twenty years. We're not talking equal protection here but I'm just talking about whether the imposition of the death penalty is unusual.

MRS. BEASLEY: It may very well be if there was only one out of a hundred, and that was consistent throughout history.

Q Well, why would you deem that unusual?

MRS. BEASLEY: Because it was so rare that it never came up except once.

Q Well, but wouldn't you say --

MRS. BEASLEY: Again I would say that that would not make it constitutionally unusual, cruel and unusual, because again it would be within the legislative boundaries that were set for that punishment.

Q So you would say no matter how rare, no matter how rare the imposition of the death penalty is, the State has the power to invoke that?

MRS. BEASLEY: Yes. So long as due process is accorded.

Q Well, I assume due process in the sense of procedural fairness.

MRS. BEASLEY: Yes, sir. Then I think it would not be constitutionally cruel and unusual punishment.

Q Do you give any separate context to "cruel" as distinguished from "unusual"?

MRS. BEASLEY: Yes. I think it has a different meaning. It indicates pain rather than how often the particular punishment is imposed. I think the context in which "cruel" is used is one indicating lingering death, for example, or torture.

Q Well, what about -- what about banishment?

MRS. BEASLEY: Since that's not used at all, it would be unusual.

Q If it were used once out of a hundred times, if the State would have the power to do it?

MRS. BEASLEY: I'm not sure whether it would or not. The Fourteenth Amendment says that the State may not deprive a person of life, liberty, or of property without due process of law, which means, to me, that it may deprive him with due process of law; of life or of liberty or of property; and banishment would not be included. It would not be an acceptable form of punishment in the context of our system of justice.

Q So your --

MRS. BEASLEY: That type, it would be a type of

punishment that is outside of our scheme.

Q So your answer to the rarity of the imposition of capital punishment for rape is, first, that even if it's very rare, the State has the power to retain it?

MRS. BEASLEY: Yes, indeed.

Q And is there -- do you have another level to the argument; secondly -- what?

MRS. BEASLEY: I'm not sure there is a second.

Q Well, that's what I wondered. There isn't, you say?

MRS. BEASLEY: If the State has the power to retain it, then it may be retained.

Q Well, I take it, you say that it isn't rare, also?

MRS. BEASLEY: That's correct.

Q In Georgia?

MRS. BEASLEY: Oh, yes, sir. Indeed, I don't think that it is rare, because we do have a number of persons. I don't at the moment have the exact figure before me, but it's in our brief, of the number.

Q Isn't that identifiable? Isn't that kind of information available in Georgia? Out of so many convictions for rape, how many are given the death penalty?

MRS. BEASLEY: No. No, we don't -- I don't have that information. But we do have in our brief the number of convictions --

Q But I thought your opponent purported to give us the number of --

MRS. BEASLEY: I think he had 50-some --

Q -- death penalties imposed in rape cases.

MRS. BEASLEY: I think that was in a Southeastern basis or on a national basis; but I haven't seen figures on Georgia itself, State by State.

Q Well, he purported to give us the figure on Georgia, I thought.

MRS. BEASLEY: I don't recall him saying so. If he did, I'd like to know what it is.

I don't expect that there is -- has been a recent figure. And of course it would only be a recent figure that would show how unusual it would be, in terms of this case.

Q But even if it were one in a hundred, only one in a hundred, you would say the State has the power to impose it?

MRS. BEASLEY: Yes, indeed.

Q I understood you to say that you did have a second string to your constitutional argument, Mrs. Beasley; perhaps I misunderstood you. But in response to the question just now from my brother White, I thought you told him that "unusual" did not, as a constitutional matter, within the phrase used in the Eighth Amendment, did not mean simply rare. When you said that yes, it would be, if it were only one in a thousand

that would be with extraordinary rarity; but that that didn't mean it was unusual within the meaning of the Eighth Amendment. And I gather that you meant that that word in the Eighth Amendment meant something other than just rare; that it meant something like some sort of an exotic or offbeat sort of method of punishment, and you --

MRS. BEASLEY: I think it does.

Q -- you mentioned banishment. I thought you did add a second string to your bow. Did I misunderstand you?

MRS. BEASLEY: No. I think, indeed, that's exactly what it means.

Q I thought so.

MRS. BEASLEY: Because we talked in both the Fifth and the Fourteenth Amendment, of taking life and taking property and taking liberty, which of course means imprisonment. But we don't talk about anything else. So it applies the limitation to those things under the terms of our system of criminal justice, and other things, like torture or banishment, would be outside of it. In most instances.

But, by the same token, the things that are within the deprivations of life or liberty or property would not be unusual unless, of course, it was never used for that particular crime.

For example, if you used the death penalty for larceny, and only one State used it, that might be unusual;

because it was not at common law -- well, it was. That's not a good example.

But I think you see what I mean. The usefulness of the three types of penalties was taken for granted and was certainly, even more than that, was put right into the Constitution.

Q By three types, you mean deprivation of life, --

MRS. BEASLEY: Life, --

Q -- deprivation of property, --

MRS. BEASLEY: -- liberty, --

Q -- and deprivation of liberty?

MRS. BEASLEY: Right. Right. And here we're talking about deprivation of life. And then it becomes only a matter of degree.

The petitioners here say that it's excessive for rape, although they do go a step further and say: not only is it excessive, but the only reason that they're imposing it in the South is because of race.

But I don't think that the statistics, certainly these statistics don't show that. They may give some indication that more Negroes are -- have imposed upon them the death penalty, but you again would have to look at the facts of the crimes involved, to see whether it was excessive. And he has made no indication, he has made no claim and no allegation that it was excessive in this case.

But only that it was excessive in the abstract.

Q Well, excessive in this case and in all cases, I thought?

MRS. BEASLEY: Well, in the abstract principle.

Q Yes.

MRS. BEASLEY: That's right. But he doesn't go so far as to say, well, if it's not excessive in all cases, then it's excessive in this one.

Q Yes.

MRS. BEASLEY: And I think for good reason, I don't think that he could show that it was.

Q What would be your answer if the statistic in Georgia showed that the only people in the history of Georgia ever given the death penalty in rape were Mexicans or Negroes? Would your argument be the same?

MRS. BEASLEY: If there were true, I would say that we would again have to look at the circumstances of the crime, that if he could show --- make out what this Court has termed a prima facie case of discrimination in sentencing, then, of course, it would be on an individual case basis; the penalty would be invalid.

And if, as a result, no jury convicted or sentenced a white man, or no jury sentenced a black man again for the crime of rape --

Q Well, my case is that no jury has ever sentenced

any white man for rape, and every Negro convicted of rape had been sentenced to death. You wouldn't have any problem with that?

MRS. BEASLEY: That probably would be a prima facie case.

Q But that's not this case, that's your point.

MRS. BEASLEY: That's not this case, and, moreover, it has nothing to do with whether the death penalty is cruel and unusual punishment.

I think in all of this, I mentioned just a moment before, that we have to look also at the crime and not only at the criminal. As was said in a recent case of State vs. ? Basacia in New Jersey in 1971, I think this is pertinent:

"The first right of the individual is to be protected from attack. That is why we have government, as the Preamble to the Federal Constitution plainly says. In the words of Chicago vs. Sturges, a 1911 United States Supreme Court case, primarily governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded may be regarded as lying at the very foundation of the social compact.

"The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus consecrated, but rather to say that those rights may not

be read to defeat the very reason of government itself."

The government in these cases has determined that rape and murder, under the circumstances of these cases, bear the death penalty as the maximum; and we maintain that they should be retained as penalties.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Beasley.

Mr. Greenberg.

REBUTTAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GREENBERG: Mr. Chief Justice, and may it please the Court:

Counsel for respondent has conceded that if, of the 61 persons put to death for the crime of rape, all 61 had been black, then she said there would be what you call the prima facie case, that there was some sort of specific racial incidence to the penalty.

Well, the facts are 58 out of 61, and I submit that's a difference that is just de minimis.

Q Well, Mr. Greenberg, didn't she add to that -- I thought I heard her say -- that that would make a prima facie case under the Fourteenth Amendment, perhaps.

MR. GREENBERG: Yes. Well, I was about to come to that; that would make a prima facie case under the Fourteenth Amendment, that is correct.

Now, we --

Q But that's not here.

MR. GREENBERG: We are here under the cruel and unusual punishments clause of the Constitution, and of the equal protection clause, in which all the questions that might arise on an equal protection case as to explanation, we would submit, do not arise when the only issue is: Is it unusual?

Not, why is it unusual; how is it unusual; what are the possible explanations, and so forth. Merely, Is it unusual?

Q Well, do you suggest, Mr. Greenberg, on this terminology, I'm a little puzzled by a good many of the arguments. Do you consider that a punishment is unusual simply because it is infrequent? Is the term in the Constitution synonymous with the frequency or infrequency?

MR. GREENBERG: Well, I wouldn't say that --

Q Or the quality of it?

MR. GREENBERG: -- that's exclusively the meaning. The terms have been used in a variety of ways. But one meaning, certainly, is frequency or rarity or unusualness, yes.

I would say yes. That if the --

Q Would you regard this --

MR. GREENBERG: -- death penalty for rape is something that is, you know, almost never used, then it is extremely unusual; and it is, we would submit, beyond a doubt cruel.

Q But historically it has been used a good deal,

hasn't it?

MR. GREENBERG: Yes, but nowadays almost not at all. Either -- I mean it's confined to a part of the country, to a part of the population of that part of the country, in a world in which it is totally nonexistent, with very rare exception. And that, to me, means unusual.

Q What -- do you have the figures on Georgia, Mr. Greenberg, --

MR. GREENBERG: Yes, I have some figures on --

Q -- as to how many people have been convicted of rape?

MR. GREENBERG: The only Georgia figures we have been able to find are in, I might say, are set forth in our brief in the Aikens case on page 9f. They are not comprehensive.

Q Well, of course, if only 61 people have ever been convicted of rape in Georgia, why, then it would be anything very unusual about it -- about --

MR. GREENBERG: That's right.

Q -- imposing the death penalty in 61 cases.

MR. GREENBERG: Right.

Q So what's -- where is the other grant to be made?

MR. GREENBERG: Well, we have -- we have figures only, we have been able to find figures only from July 1964 to December 31st, 1968. During that period of time there were

299 commitments for the crime of rape. Now, that doesn't include, for example, probation and suspended sentences and a variety of other things. But 299 commitments, of which 8 men were sentenced to death; but the lives of those 8 men, obviously -- although they obviously were not taken, if, indeed -- it may be that none of them actually were taken because of the circumstances of the State during that period of time.

That's -- and the citations to all that available data are on page 9f of the Aikens brief, in paragraph 3.

Now, as to all the possible explanations, why it turns out to be 58 out of 61, respondent says that the circumstances of the crime ought to be considered. We -- the Georgia courts will not -- will not contemplate that evidence; they will not consider that evidence. There has been an effort to introduce that kind of evidence into the courts of the State of Georgia.

Q Now, what kind, Mr. Greenberg?

MR. GREENBERG: Well, we conducted a very extensive study of capital punishment over the past twenty years in most of the Southern States, including the State of Georgia. And every possible factor that could occur to human imagination that might affect a juror in coming to a conclusion on the penalty was put into the study of every single record in all of these cases. They were all examined.

The viciousness of the crime; whether a group of --

Q I understand your answer now, --

MR. GREENBERG: -- and so forth.

Q -- I think.

MR. GREENBERG: This was subjected to statistical analysis, and an effort was made to introduce it in a number of Georgia cases, including Williams, which is now pending here. And one of the issues in the Williams case now pending here is the fact that the Georgia courts would not permit us to put this into evidence.

Q But, may I -- Mrs. Beasley, on the other hand, told us, at least as I understood it, that in any given case, not only the trial court but the reviewing court will consider a claim that the punishment imposed in that case was inequitable, is the word she used -- I don't know if that's the jurisprudence in Georgia. And if it finds that it was, it will grant a new trial for that.

MR. GREENBERG: Well, it would not -- but the evidence that we're talking about in this case, as to whether or not the penalty is unconstitutional because it violates the cruel and unusual clause --

Q I understand.

MR. GREENBERG: -- is very extensive, and I think completely persuasive evidence, which, if I might say, is pending in court in the State of Georgia, would show that 38 percent of black men convicted of raping white women are

sentenced to death; one-half of one percent of all other racial combinations are sentenced to death.

Q My question was only prompted by what, I am sure you would concede, that the crime of rape covers a very wide spectrum. It can go from an extremely heinous sort of a crime to the other extreme involving, let's say, an adult woman and her former boyfriend, or something like that --

MR. GREENBERG: Right.

Q -- which is -- and that, and as I've -- and at the heinous extreme it does generally involve a stranger. Right?

MR. GREENBERG: But on the matter of evidence that goes to the penalty, in Georgia's single-verdict procedure, that sort of evidence, as we understand the Georgia law, is not admissible. What may be considered on a motion for new trial is the evidence in the case in general --

Q The circumstances of that particular case.

MR. GREENBERG: The circumstances of that particular case. But other evidence might possibly go to sentencing, such as, let's say, the mental state of the defendant in the case. That is not admissible under Georgia law in the case.

Q Did you try to get it in this case?

MR. GREENBERG: No. No, there was no evidence put on in this case. There was an effort to get a psychiatrist --

Q And you weren't prevented from putting it on?

MR. GREENBERG: Well, I would say yes, we were, in this sense --

Q Did you tender it?

MR. GREENBERG: Mr. Justice Marshall, what occurred in this case, there was an application to the court for the appointment of a psychiatrist to examine this defendant and testify as to the question of his sanity. The appointment of a psychiatrist was denied. The court appointed a psychiatrist solely on the question of his competence to stand trial.

Q Well, the last thing I was talking about was psychiatry. I was talking about these figures.

MR. GREENBERG: We did not tender these figures in this case. The Georgia courts have told us they're inadmissible in Georgia, in other Georgia cases that are now pending.

Q But you had no ruling on it in this case?

MR. GREENBERG: There's been no ruling in this case. There's no doubt, however, that this very exhaustive and time-consuming and expensive examination of Georgia practice, if our contentions were upheld in any case it would be applicable to all similarly situated Georgia cases.

But there was nothing tendered in this case, Mr. Justice Marshall.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Thank you, Mrs. Beasley.

The case is submitted.

[Whereupon, at 1:53 o'clock, p.m., the case was submitted.]

- - -