In the

Supreme Court of the United States

EHRLICH ANTHONY COKER,

PETITIONER,

V.

STATE OF GEORGIA,

RESPONDENT.

No. 75-5444

Washington, D. C.
March 28, 1977

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EHRLICH ANTHONY COKER, Petitioner,	:	
v.	:	No. 75-5444
STATE OF GEORGIA, Respondent.	:	

Washington, D. C.

Monday, March 28, 1977

The above-entitled matter came on for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DAVID E. KENDALL, ESQ., Suite 2030, 10 Columbus Circle, New York, New York 10019; on behalf of the petitioner.

B. DEAN GRINDLE, JR., Assistant Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334; on behalf of the respondent.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Coker against Georgia, No. 75-5444.

051 Counsel, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID E. KENDALL, ESQ.,

ON BEHALF OF THE PETITIONER

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

I'm David Kendall, and I represent petitioner, Ehrlich Anthony Coker, who has been condemned by the State of Georgia to be electrocuted for the crime of rape.

This case presents for review a question explicitly reserved in last term's Gregg v. Georgia decision, whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life; for example, when capital punishment has been imposed for rape that does not result in the death of any human being.

Now on September the 2nd, 1974, petitioner Coker was incarcerated for murder, rape, kidnapping and aggravated assault at the Ware Correctional Institution in Southern Georgia. During an Alchoholic's Anonymous meeting he was attending that night, a group of prisoners seized two guards, and in the ensuing disturbance, petitioner escaped through the roof of the building the meeting was being held in.

About 11:00 p.m. that evening, petitioner appeared at the home of Allen and Elnita Carver in nearby Waycross, Georgia. Brandishing a board, he had Allen Carver tied up in the bathroom, and moved the Carver's three weeks old sleeping baby in a bassinet into the bathroom with Carver.

He secured a kitchen knife with a four inch blade and took $20.30 from Allen Carver's billfold which was lying on a dresser.

He had Mrs. Carver change into her street clothes in order to show him how to start the family car. After she had undressed, he raped her, and then clothed himself in Allen Carver's clothes.

During the rape, the knife lay on a nearby dresser within petitioner's reach. He told Allen Carver that he was taking Mrs. Carver, that he would release her unharmed, but if stopped by the police, he would kill her.

After they left, Allen Carver was able to free himself and called the police. Within the hour, police arrested petitioner, who had parked with Mrs. Carver on a dirt road to evade a police roadblock.

Mrs. Carver was released, nervous, shaken, but physically unharmed apart from the rape itself.

Counsel was appointed to represent petitioner, and he was subsequently indicted for rape, armed robbery,

kidnapping, motor vehicle theft, and escape.

A special plea of insanity was filed, which under Georgia law sets up present competence to be tried, and on November 19th, 1974, the jury returned a verdict finding petitioner competent.

Now, the case was tried on all five counts of the indictment under the procedures that this Court has reviewed in Gregg versus Georgia.

At the conclusion of the first stage of the trial, the jury returned a verdict of guilty on all five counts.

At the second stage -- a proceeding was then held to determine sentence on the two putative capital counts of the indictment, the rape and the armed robbery.

Now, at this point the State introduced evidence of petitioner's prior capital felony conviction. This record consisted of three two-count indictments, involving crimes against two victims.

With one Phillip Echols, petitioner had been convicted in the Clayton County Superior Court for the December 5th, 1971 murder of one Sue Ann Wick--the rape and murder of Sue Ann Wick -- and had received consecutive sentences of life imprisonment and twenty years imprisonment.

With one Glenn Harlan Stacy he had been convicted after trial in the Richmond County Superior Court for the July 29th, 1972, rape and kidnapping of one Susan Lorrine

Jones. And for these crimes he received consecutive sentences of life imprisonment and twenty years imprisonment.

Finally, petitioner had pleaded guilty in the Taliaferro County Superior Court to another July 29th, 1972, rape of Susan Lorrine Jones, for which he received a sentence of life imprisonment.

Now, the State introduced the indictment and the sentences for these crimes, and presented witnesses who identified the petitioner as the person named in these indictments and sentences. But details of these prior convictions, of the factual circumstances of prior convictions, were not adduced.

Petitioner presented no evidence.

The trial court instructed the jury that as to the rape conviction, it could find two aggravating circumstances which, under the Georgia statute, justify the imposition of the death penalty.

The court instructed that the jury could find that the rape was committed by a person with prior capital felony conviction, and it instructed that it could find -- that the jury could find the rape committed by a person during the commission of another capital felony, to wit, the armed robbery of $20.30 from Allen Carver.

Now the trial court didn't define particular mitigating circumstances because none are defined in the

statute, but it did instruct that in mitigation the jury could recognize anything which in fairness or mercy could justify extenuation of the degree of punishment.

QUESTION: Do you suggest there aren't some extenuating circumstances here?

MR. KENDALL: Well --

QUESTION: On this record?

MR. KENDALL: -- Mr. Chief Justice, we believe that the evidence of petitioner's sanity, insanity of his alcoholism do indeed constitute mitigating circumstances. Those had been presented to the jury at the first of the trial. This is essentially a trifurcated trial. There was atrial on the issue of sanity which proceeded the trial of guilt/innocence.

The jury found both aggravating circumstances to exist beyond a reasonable doubt, and sentenced petitioner to be electrocuted for the rape.

It imposed a sentence of life imprisonment for the armed robbery conviction.

An appeal was subsequently taken to the Georgia Supreme Court, and that Court, with one justice dissenting, affirmed petitioner's sentences and convictions. A certiorari petition was subsequently filed in this Court, and on October 4th of last year, the Court granted certiorari limited to the single question, whether the death penalty may be

constitutionally exacted for a rape where the life of the victim is not taken.

While the Court's decision is of literally vital significance to Ehrlich Coker, it won't have much of an impact on the criminal justice system, whichever way the Court decides this case. Because the death penalty for non-homicide crimes has been almost totally repudiated by this society in fact.

Of the 345 people who are now on death row in this country, six are on death row for non-homicide crimes, the crimes that don't involve the death of the victim. Georgia is the only state, the only American state, and virtually the only jurisdiction in the civilized world, that now authorizes the death penalty for the rape of an adult woman.

QUESTION: Georgia also authorizes the death penalty, you've already told us, for armed robbery, does it not?

MR. KENDALL: Yes, Mr. Justice Stewart.

QUESTION: And for kidnapping.

MR. KENDALL: For kidnapping when the victim is harmed or ransom secured; it authorizes the death penalty for six capital offenses -- I mean there are six capital offenses after Gregg. It also authorizes the death penalty for treason, for murder, and for aircraft hijacking.

QUESTION: So the non-homicide -- so in non-homicide cases, the death penalty can be imposed for five different offenses under Georgia law?

MR. KENDALL: Four, because the Georgia Supreme Court, in the Gregg case, held that the death penalty could not be constitutionally imposed for armed robbery.

QUESTION: Despite the statute?

MR. KENDALL: Despite the statute. It was a statutory holding; it wasn't a constitutional holding.

Indeed, after Furman v. Georgia sixteen -- there were -- the statesenacted sixteen non-homicide death penalties. Georgia enacted five of those.

QUESTION: You say the armed robbery -- the Georgia Supreme Court's ruling that death couldn't be imposed for armed robbery was a statutory ruling?

MR. KENDALL: Yes, Mr. Justice Rehnquist. There is a cruel and unusual punishments clause in the Georgia Constitution. But that clause was not relied on in the Gregg case. There is a provision for review of a sentence that is disproportionate or excessive. And the Georgia Supreme Court held that a death penalty for armed robbery was such an illegal sentence.

QUESTION: Was it a holding that would apply to all future convictions for armed robbery?

MR. KENDALL: Yes, it was. The Court has vacated,

since that time, two other death sentences for armed robbery. In each case an armed robbery death sentence has been imposed, it's been imposed with a murder death sentence. So the one death sentence was vacated of each defendant.

Even in Georgia, only a small, arbitrarily selected fraction of eligible defendants are condemned for rape.

Finally, the death penalty for rape comes to this Court with a notorious and unsavory reputation for racial discrimination. Now petitioner Coker is white, and the Court did not grant an equal protection claim in this case. But part of our equal -- part of our Eighth Amendment submission, on behalf of petitioner Coker, is that the origin of the death penalty for rape, and such continuing acceptance as it demonstrates, is really founded in invidious racial discrimination.

Ninety percent of the people executed for this crime -- the 455 people executed for this crime since 1930 -- have been black. In Georgia itself in this period, 59 -- 58 blacks have been executed, and three whites have been executed.

Now, our submission on behalf of petitioner Coker is essentially twofold: first, that the death penalty for rape constitutes an excessive and disproportionate punishment for a crime where the life of the victim has not been taken, when judged by relevant contemporary standards.

And second, quite apart from this first claim, that the present patternof imposition of the death penalty for rape in Georgia, shows the same arbitrariness in frequency and capriciousness of application that this Court held violated the Eighth Amendment in Furman v. Georgia.

Now, thatpunishment should somehow be proportionate tothe offense was first recognized by this Court in Weems v. United States. It was again recognized in last term's -- last July's capital punishment decision.

In those cases the Court held that the death penalty for homicides intentionally committed by a defendant did not violate the Eighth Amendment, was not a disproportionate sanction. But the Court reserved the constitutionality of a death penalty where the life of a victim wasn't taken.

Now, certainly rape is a serious offense like aggravated assault, mayhem, child torture, aggravated sodomy or attempted murder. The question here, however, is whether rape will be punished by the ultimate penalty the criminal justice system can dispense.

In Woodson, a plurality recognized that the death penalty is different in kind from a sentence of imprisonment however long. It said that death is qualitatively different from imprisonment.

Last Tuesday, the plurality in Gardner v. Florida

stated that the death penalty is different from imprisonment in both severity and finality; that it differs dramatically from any other legitimate state action.

And the question posed here is not whether rape will be stringently punished. Indeed, Georgia authorizes the sentence of life imprisonment for rape.

The question is really whether it can be punished by the unique and irreversible punishment of death.

Now in the Gregg plurality opinion, the Court stated that to apply the proportionality test, the Court would not look to subjective standards, but would instead look to what it called objective indicia of contemporary attitudes toward the given sanctions.

It recognized three of these objective indicia: legislative enactments; jury verdicts; and what the Court called "history and traditional usage".

We submit by the unanimous concurrence of these indicators, the death penalty is cruel and unusual punishment today.

Now, as far as legislative enactments go, as I've mentioned, Georgia code annotated 26-2001 is literally unique in the United STates. No other American jurisdiction now authorizes the death penalty for the rape of an adult woman.

In 1926 there were 20 United States jurisdictions

that authorized a discretionary death penalty for the rape of an adult woman.

Even before this Court's decision in Furman v. Georgia, there was a trend toward abolition. Delaware abolished the penalty in '58; West Virginia abolished it in '65; the District of Columbia abolished it in 1970.

On the eve of Furman, therefore, 17 states had a discretionary death penalty for the rape of an adult woman: the 11 states ofthe confederacy; four border states--Kentucky, Maryland, Missouri, Oklahoma, plus Nevada where there was severe bodily injury; in the United STates.

Now Furman wiped these statutes off the books, because all were discretionary.

QUESTION: But you don't suggest that -- that this Court's Furman decision represents a community consensus that would be the same as if those 17 states had themselves repealed the statute, do you?

MR. KENDALL: Well, I submit that the Court's Furman decision does reflect the disuetude into which the death penalty had falled in many kinds of cases, both murder and rape. We really, as an indicator of contemporary standards, rely on the legislative reaction to Furman and to Gregg, for that matter.

Because when the legislators had to take another look at the crime of rape, only six states enacted any kind

of death penalty for rape offense after Furman.

Now three of these states, Tennessee, Florida, and Mississippi, enacted the death penalty for the rape of a child under 12, or in the case of Florida, under 11. North Carolina and Louisiana enacted a very narrow death penalty, mandatory death penalty, for the rape of an adult woman, where there was serious bodily injury, or where a weapon was used.

Only Georgia enacted a death penalty that would punish any rape of an adult woman with death.

So we think there was -- the reaction to Furman does manifest that legislative repudiation. And indeed, there is a further reaction. Because since Gregg, this Court's decision in Roberts and Woodson had the effect of invalidating mandatory death penalty statutes. So that invalidated Tennessee's death penalty statute, Louisiana's, North Carolina's, and Mississippi's.

QUESTION: Well, now, how long in time do you give them to react under your standard of Furman?

MR. KENDALL : Well, I think probably with those states it's too short to be sure. But we do know that, for example, Louisiana has enacted within a month of this Court's Roberts decision, enacted a death penalty for homicide, for certain kinds of homicide. It defeated a death penalty for aggravated rape. So I think that

Louisiana we can check off. Tennessee -- the only other legislative activity that I'm aware of is in the State of Tennessee, where a death penalty for homicide has cleared the judiciary committee of both houses, and the death penalty for rape bills have been defeated within those committees.

So I'm not suggesting that there is enough time since Gregg to fully assess it. But we do know that there have been four death penalty for homicide statutes passed since Gregg. None of those states have enacted a death penalty for rape. And there are three other states, which we note in our reply brief, where both houses of the legislature have enacted a death penalty bill for homicide. And those are awaiting the governor's signature, in Maryland, New Jersey and Virginia. And the houses of the legislature have not enacted a death penalty for rape.

QUESTION: You have mentioned the irreversibility of the death penalty as one of the bases for its infirmity constitutionally. I wonder if you'd expand a little on that. How does that enter in this case in any different way from any other capital case?

MR. KENDALL: Mr. Chief Justice, I didn't mean to suggest that that was the only reason for its unconstituionality in this case. What I did mean to suggest was that it was a reason whereby an exceptionally high standard of review

and justification.

And I think that that fact -- the death penatly is different in one respect because it is irreversible; and I think that that means that this higher standard of review has to be applied to the justifications advanced by the states, and also to the consideration whether a particular death penalty for a non-homicide case is consonant with contemporary values.

QUESTION: You have two concepts there really, haven't you? The generality applying to the penalty in all cases; and the application to the particular case.

Now, irreversibility is usually advanced as an argument because of the possibility of error in the judgment.

MR. KENDALL: Well --

QUESTION: And do you argue that in this particular case?

MR. KENDALL: Yes, we do. We think that in one sense, the execution of petitioner Coker, or Everheart or Cooks or anybody else on death row for rape, would be error, not in the sense I think error is usually meant, but in the sense that it is an erroneous execution, because society has broadly repudiated it.

QUESTION: Well, I didn't mean error in that sense. I meant -- I was directing my observation about error to

the argument usually advanced here that the death penalty is obviously irreversible, and you might execute the wrong person, that is, a person not guilty.

MR, KENDALL: Well, there are certainly other collateral claims presented in this case, which the Court did not grant certiorari on the basis of, that would be pursued in collateral proceedings, which might demonstrate that because of insanity or some other reason, this death penalty was erroneous.

So in that sense, we do have that claim of factual error in this case.

The second --

QUESTION: Mr. Kendall, before you proceed:

If we have a prison inmate who has been convicted of aggravated rape and sentenced to life, a mandatory life sentence under a statute that forbids parole, and the inmate escapes and commits another aggravated rape, what punishment do you think would be appropriate?

MR. KENDALL: That of course is not the case presented here, but --

QUESTION: I understand.

MR. KENDALL: -- it seems to me that in the circumstances of that case, imprisonment would be an appropriate punishment when judged by what society does to all other people who are -- essentially all other people

who are convicted of that crime.

QUESTION: Would that be any punishment for that individual?

MR. KENDALL: It would certainly -- certainly he would have the stigma of another rape conviction. Society would be protected since it would have kept him incarcerated --

QUESTION: The same way it was protected on the first go-round?

I say, it would be protected to the same extent that it had been protected after his first conviction for rape?

MR. KENDALL: Yes, Mr. Justice Powell --

QUESTION: Yet, he escaped.

MR. KENDALL: That is correct. Of course, petitioner Coker was incarcerated --

QUESTION: I'm not talking about Coker. I was asking your view as to whether or not there could ever be a situation where in the absence of any other punishment, capital punishment would be appropriate for repetitive crimes of rape.

MR. KENDALL: Well, we think that the objective indicators that the Court pointed to in Gregg would indicate that society -- where a life has not been taken, the death penalty is inappropriate to protect a value other than life.

QUESTION: What deterrence would exist in the circumstances I described?

MR. KENDALL: I think that the deterrent -- deterrence connotes protection for society, it seems to me, in that case. I think that that certainly if there is a life without parole statute, the -- adding the sentence would not in and of itself impose more punishment.

But insofar as deterrence is a question that relates to the general public, I think the usual safeguards that can be applied to prevent escape would adequately protect the public.

Because it's interesting, in both the Coker and the Coley case, which are two -- the Coley case is very similar to this case in many ways -- even prisoners who escaped from a correctional facility, committed rape, neither of those prisoners was incarcerated in a maximum security facility.

The State of Georgia can take more steps than it has taken in these cases to protect society. Also, the State of Georgia can enact, as it has not yet enacted, some longer term of mandatory imprisonment for repeated crimes, whatever those crimes are.

In Georgia, under Georgia Code Annotated 77-525, a prisoner comes up forparole in seven years, regardless of what his sentence is. Now, Georgia could

extend that time if it wished to do so.

The second --

QUESTION: Of course anybody who is serving a life sentence without hope of pardon or parole, who escapes, can with practical impunity commit any offense unless -- including whether it be petty larceny or jaywalking or shoplifting -- unless you decide that the only way to give him additional punishment is to give -- is to put him to death for jaywalking or shoplifting or petty larceny; isn't that correct?

MR. KENDALL: Well, this case was really not tried on a recidivism theory. The jury was instructed that Coker's repeated crimes could justify imposition of the death penalty. He had capital felonies other than rape. The Georgia Supreme Court did not review it on a recidivist theory. In fact, its proportionality review consisted entirely in the statement that the death penalty here is not excessive or disproportionate.

As we point out, in comparison with the Coley case, although Coley was an armed robbery recidivist, the two factual circumstances are almost identical. In fact, if anything, the Coley case is a little more aggravated on the facts.

But many states have opposed -- or many groups have opposed life without parole statutes, because it

deprives the corrections authority of all control over inmates who hope at some point to be paroled.

QUESTION: Haven't any studies been made of what happened in states thatlong since abolished capital punishment, like Maine, for example? What do they do?

MR. KENDALL: Well, the only study I know of is a study by Professor Bailey that appears in a 1976 book, Capital Punishment in the United States. He did a regression analysis, which indicated that, a, rape rates in abolitionist states were lower than in retentionist states; and also that the death penalty executions in retentionist states bore no relation to the rape rates.

That would suggest that there is no deterrent effect of the death penalty. But Bailey also, I think in fairness, observed that the death penalty was simply too sporadically imposed to really warrant a good regression analysis. It's very seldom imposed. It also constituted no threat, he said, to the white rapist. So he didn't really say that his study was at all conclusive. But the data is so bad that it's difficult to get a conclusory study.

So I've mentioned that petitioner with Messrs. Hooks, Everheart, Shoe, Hughes and Boyer are the members of an exclusive, but hapless, fraternity. They are the only people now on death row. There are a couple of ways

to measure their uniqueness. First of all the Uniform Crime Reports indicate that about 1,200 forcible rapes occur every year in Georgia. That would be about 4,800 rape offenses committed under the new statute.

The other thing we point out in our brief and reply brief is that the Georgia Supreme Court has reviewed 59 cases in which life or less have been imposed as a punishment for crime. Not all rape convictions certainly were appealed to the Georgia Supreme Court, but we do know that at least 59 non-capital rapes have been reviewed.

I think I've said enough to indicate what our Furman submission is. It is simply that without reaching the question of whether the death penalty if disproportionate for the crime of rape, the pattern of imposition here is precisely that observed in Furman. The death penalty is an extraordinarily rare punishment for the crime of rape.

I'd like, if I may, to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kendall.

Mr. Grindle.

ORAL ARGUMENT OF B. DEAN GRINDLE, JR., ESQ.

ON BEHALF OFTHE RESPONDENT.

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

We have essentially three points that we wish to

make this morning.

First is that the constitution does not define what is and what is not a capital crime.

Secondly, we submit that condemning death for rape under any and all circumstances would have far reaching consequences over and beyond this particular case, and over and beyond the question vis a vis rape, that is capital punishment vis a vis rape.

Our third point that we would wish to stress is, recidivism and violent crime.

The Court has noted that the wisdom of capital punishment is generally a matter for the legislative forum. We submit that this reflects the wisdom of the framers of the constitution, and that the legislative judgment is bound primarily in this area by the Eighth Amendment.

Now the Court in the Gregg series of opinions has held that death for murder is not unconstitutional, regardless of the offense, regardless of the offender, and regardless of the procedure involved. It is difficult for us to fathom how a constitutional distinction can be drawn between rape and murder.

QUESTION: You do concede, I suppose, General Gridle, do you not, that disproportionality is one of the criterion, one of the criteria, one of the ingredients in a constitutional determination of whether a punishment is

cruel and unusual; in other words, you would concede, I suppose, that the imposition of the penalty of death for running through a red light would be cruel and unusual punishment, would you not?

MR. GRINDLE: I would concede that. I would --

QUESTION: So that is conceding that disproportionality is a -- can be a dispositive ingredient in a determination of what is cruel and unusual punishment, is it not?

MR. GRINDLE: On the basis of the plurality in Gregg and the concurrences, I think that I would be forced to concede.

QUESTION: Well, you would, wouldn't you? Wouldn't you -- you would concede, wouldn't you, thatthe death penalty for stealing ten cents is cruel and unusual punishment?

MR. GRINDLE: Yes, I would. And for purposes of this case --

QUESTION: Regardless of anything this Court has held, wouldn't you, as a constitutional lawyer, concede that?

MR. GRINDLE: Yes. And for purposes of this case, we have, in effect, conceded that disproportionality is a measure of the constitutional review in this type of case.

The point that I wish to draw, in terms of murder

and rape, is that the statutes are not designed to execute all murderers. For the same reason, the statute is certainly not designed to execute all rapists.

The point is, that some rapes can be viewed -- not only can be, but are viewed by society as just as serious and calling for severe sanctions, just as many murders are.

In fact, some rapes, depending on the circumstances of the offense, the character of the offender, would call for more public condemnation than many murders, based on the fact that many, many murders occur among friends, among family members, and rape, of course, seldom involves that situation. That's not to say that it does not occur, but it's generally a situation where the victim is a stranger to the offender.

QUESTION: Mr. Attorney General, does Georgia draw a distinction in its law between rape and aggravated rape? do you have two separate statutes that --

MR. GRINDLE: The crime of rape is not defined in terms of rape and aggravated rape. We simply have one definition.

QUESTION: The statute that's in the briefs is the only rape statute in Georgia?

MR. GRINDLE: Yes, defined as --

QUESTION: There's no statutory definition of aggravated rape?

MR. GRINDLE: There is not. We have simple rape and statutory rape.

However, by virtue of the fact that the General Assembly authorizes death as a permissible penalty for rape, written into the capital punishment statute, is, in effect, an aggravating element; and that we have to read both together.

And to that extent, although we don't have degrees of rape, just in terms of findings of crime, as a matterof practice, before a death penalty would be authorized in any particular rape case, it would be in the nature of some type of aggravated crime.

QUESTION: Does this not leave the jury at large to impose the death penalty in any rape depending upon their their own reaction to the evidence? Unguided by any instructions on the standards of the kind Justice Powell was probing at?

MR. GRINDLE: To the extent that the jury should always refuse to return a death verdict, that may well be true. Butit would also be true in a murder case.

The jury is always free to ignore the instructions. In the general case, the aggravating circumstances would be charged to the jury, and they would pass on those.

QUESTION: The jury has to find at least one or more statutory aggravating circumstances in order to

impose -- impose the death penalty in Georgia, isn't that correct?

MR. GRINDLE: That is correct.

QUESTION: For a rape case or a murder case, or any other --

MR. GRINDLE: Any capital case.

QUESTION: But in this case, for example, an aggravating circumstance would be a previous conviction for a putative capital felony. So that would be an aggravating circumstance, even if the rape found were that of a jilted boyfirend and his former girlfriend, people who were not strangers, but who knew each other?

MR. GRINDLE: That is correct, Mr. Justice Stewart.

However, I should point out, and it's important, that this point be noted: and that is, the mere fact that a particular aggravating circumstance is present does not mean that death sentence will be affirmed. In other words, the presence of theaggravating circumstance is a mere prerequisite to even considering the imposition of the supreme penalty, and not --

QUESTION: General Grindle, is there any statute or anything else that says what standards shall be used to decide whether it's aggravated or not?

MR. GRINDLE: The circumstances, the aggravating

circumstan es themselves, we submit provide the standards.

Now, one or more --

QUESTION: You say, defy the statute?

MR. GRINDLE: That aggravating circumstances in effect define the standards. They are the standards, in other words.

QUESTION: But what are they in Georgia? Where can you point me to them? Where I can read them?

MR. GRINDLE: The aggravating circumstances, Mr. Justice Marshall, appear in our code at Section 27-2534.1.

QUESTION: Where is that?

QUESTION: Where are you reading from?

MR. GRINDLE: I'm reading from our Code Annotated.

QUESTION: Well, can you give us a page in your brief.

QUESTION: Page eight, of the petitioner's brief.

MR. GRINDLE: Yes, that is at page 8 of the petitioner's brief.

And particularly on page 9, the ten aggravating circumstances are listed.

QUESTION: Well, those are for murder.

QUESTION: No, they're for any death --

QUESTION: Where is that, you mean, where it says 27-2537.

QUESTION: Numbers one, two and seven apply to rape.

QUESTION: Correct.

MR. GRINDLE: In this particular case, the aggravating circumstances were number one, the prior record of conviction for a capital felony; and number two, the petitioner was also engaged --

QUESTION: Seven is more specific.

MR. GRINDLE: Pardon?

QUESTION: Seven is more specific.

QUESTION: That wasn't found here.

QUESTION: For you, isn't it?

MR. GRINDLE: That one perhaps has been the occasion for more litigation and argument than the others. That is not present in this case.

QUESTION: I see.

MR. GRINDLE: That circumstance was not charged, and of course it was not found. Numbers one and two were charged; they were found.

QUESTION: And the others weren't even charged? If you remember?

MR. GRINDLE: I believe there was a charge on armed robbery, but the jury did not find that.

QUESTION: That's what I thought.

MR. GRINDLE: The petitioner has submitted that this case would not have -- or that is, a decision in his favor would not have much impact beyond his case.

We disagree.

We disagree for this reason. The recourse available to society, if society determines that certain non-homicidal crimes must be punished and deterred, and that terms of imprisonment are not sufficient, the alternative is to amend the constitution, assuming that the Court has ruled in the petitioner's favor. And that would be because we submit that the case would be construed as having consequences beyond just the crime of rape. Specifically, the exception noted in the Gregg opinion was crimes where the offender has not taken the life of the victim. Although opinions here would obviously be concerned with rape, it would be construed, we submit, much more broadly; and that constitutional amendment would be the only conceivable recourse; and that as a practical matter would be very difficult.

And revision, in light of future experience, would be very difficult.

Now we don't know --

QUESTION: Let me ask: your argument is that a decision in favor of the petitioner in this case, holding that it is constitutionally impermissible to sentence somebody to death for the commission of the offense of rape not involving a homicide would have broad implications because it would be understood as holding that the imposition

of the death penalty for any non-homicidal offense would be constitutional and permissible.

Is that your argument?

MR. GRINDLE: That is my argument.

QUESTION: And what other non-homicidal offense would you suggest would be -- or should be held to be constitutionally permissible as far as the infliction of the death penalty is concerned?

MR. GRINDLE: I have two categories in mind. And that is, in effect, concerning yourself, that is, society concerning itself with the violent recidivist, regardless of the nature of his crime.

QUESTION: Even though it's just repeated cases of assault and battery, for example?

MR. GRINDLE: Not necessarily for that --

QUESTION: Well, that's violence.

MR. GRINDLE: I think -- well, it's hard to be drawing a line as to say where who would draw the line. I think that would be a legislative judgment. But I would look for the recidivist who has committed prior capital crimes such as we have in our statute. If he's killed, if he's maimed and continues to do so, then society needs to protect itself from that individual.

QUESTION: Well, if he's committed murder, this Court in the Gregg case has given you the answer on that.

MR. GRINDLE: I'm not responding really to the particular crime where he does/the victim. Certainly, if he has killed before, and he attempts to kill again, if he commits another armed robbery or has killed or has seriously maimed a victim, if he has this type of record, and he commits another armed robbery, it should be permissible to deter that specific individual from further such acts.

Now, in terms of general crime --

QUESTION: Well, it would certainly deter him. Generally, deterrent is considered as having a somewhat different meaning; that is, to deter others, because of the example you make of him.

MR. GRINDLE: I want to move to what I call specific deterrence as opposed to general deterrence, or incapacitation. I was referring to incapacitation in terms of that individual.

QUESTION: Right.

MR. GRINDLE: Also, before I move on to that point, other crimes that may come to the forefront in the years to come, or perhaps at this day and time, just in the formative stages; in the past ten years we have seen aircraft hijacking become somewhat of an everyday occurrence inthe newspapers.

Fortunately, it has been curbed in recent years. But if you have -- and also, in a similar vein, hostage

taking has become very popular. In future years, terrorism of that sort may continue to increase. And when we have hostages taken, if we have injuries to those hostages, the disruption of the governmental process, that is the type of thing that we cannot be sure of. And of course if those hostages or the acts engaged in result in death, that would be permissible to execute them there.

QUESTION: Whatis your attitude --

MR. GRINDLE: If they are prosecuted for murder.

QUESTION: Mr. Grindle, what is your attitude about espionage and treason? These are older ones and --

MR. GRINDLE: Yes, that, Mr. Justice Blackmun, goes to the integrity of the -- of your democracy. I think that is a justification, perhaps: we put our freedom and our form of government on a pedestal. And although that is historically been a capital crime, I have not given much thought to the point, because of its fortunate rarity.

QUESTION: Has anybody ever been sentenced to deat in Georgia for espionage or treason?

MR. GRINDLE: Not to my knowledge.

QUESTION: Well, is espionage a crime in Florida? In Georgia?

MR. GRINDLE: Mr. Chief Justice, to my knowledge treason is a crime. I'm not sure if we have a separate crime of espionage. And in my lifetime, I can't recall

anyone being tried for treason.

QUESTION: Mr. Grindle, what do you read the plurality opinion in Gregg as applying to the Rosenberg case, assuming that the facts were all properly found in that case and that they were guilty of what they were charged with?

QUESTION: In that connection, I asked the other question not because Gerogia might or might not have a statute relating to espionage or treason, but because a decision in this case will certainly bear upon federal crimes, or federal treatment of those crimes. And Justice Rehnquist's question is similarly directed.

MR. GRINDLE: In response to that, your Honors, the -- as I understand the question, what impact the plurality in Gregg would haveon the case such as the Rosenberg spy trial? Do I understand it correctly, your Honor?

The -- as I read the plurality in Gregg, there must be a two-step process: first, is the crime served by -- or is the punishment -- does the punishment serve any legitimate government interest. Not necessarily that this be the best punishment. And number two, is it disproportionate.

And if the impact is to say that capital punishment is unconstitutional if a life is not taken reverts to a contemporary form of the eye for an eye principle.

And we submit that society should not be relegated to such a simplistic formula, that in many instances the need to deter such crimes would go to the very foundations of your government would be sufficient justification to permit the taking of a life when none has in fact been taken. That is, none have been taken directly.

QUESTION: Of course, that legislative policy, the legislative policy reflected in this Georgia statute, means that a person can commit murder with impunity, if one wants to put it that way, if -- after committing a rape. An assailant could think, well, I might as well kill the victim because the punishment would be no greater; isn't that correct?

MR. GRINDLE: I would disagree with that, your Honor. I think the logic behind that question would perhaps be sound if we had a mandatory system, where the offender would be executed just for committing the rape, would absolutely be executed --

QUESTION: Well, it's not mandatory for either, is it?

MR. GRINDLE: Well, in the mandatory systems that Woodson, in effect, threw out, that point would have more validity. In the discretionary system, I do not feel it has much validity. Number one, our statute gives the rapist the incentive not to harm. If he does murder,

the likelihood of the chances that he will receive a death verdict are increased tremendously. And if the fear of capital punishment deters in the sense of saving victims lives, we submit that it would also have a fall down effect, in other words, that if life taking is deterred, then the tendency to harm the victim would also be deterred somewhat, such as the armed robber who goes into the convenience store for the stickup. He would be deterred from taking a gun perhaps into the store, fearing that he would commit murder in the course of the armed robbery.

If he chooses not to take his gun into the store, perhaps he won't commit the armed robbery at all.

Therefore, in our system, the incentive is not to harm your rape victim. If you do, that still doesn't mean that you will be executed.

Our third point is recidivism and violent crime, and I've touched on that briefly before. And the question is simply what is society to do with the incorrigible recidivist who not only demonstrated that he will rape again but has also demonstrated that he will likely kill or seriously injure those whom he rapes.

Now, the petitioner has stated that he was not tried under a recidivist theory. Well, we disagree with that completely. First, the aggravating circumstance under which he was found guilty, that we noted before, is the prior

conviction of a capital felony. And we submit that that is the basis for such a aggravating circumstance, or that the theory underlying that specific aggravating circumstance, if specific deterrence, that is, to deter -- to preclude that particular individual from committing further violent crimes; to incapacitate thatparticular criminal. And that has been recognized in many of the so-called mandatory statutes. In fact, in Texas, that is -- it is required that it be determined that the offender will likely engage in further serious violent crime.

That was the basis of this aggravating circumstance. It was relied upon heavily by the state. And we submit that was the primary basis on which he was tried, as a recidivist.

When we look at the specific crimes involved here, we see three prior rapes, two pertaining to the same victim. One victim was severely injured. The other victim was killed.

Now, the particular victim in this case was not harmed over and beyond the rape itself. But we submit that to deter those who have demonstrated their recidivism, such as this petitioner, the question of the constitutionality of punishing death for rape should not hinge on the fact that he did not harm his most recen t victim. IN fact the quickness with which he was apprehended perhaps saved this victim from a fate similar to her predecessors,

QUESTION: If the death penalty is not imposed on this man, did I understand you to say he will be eligible for a statutory release arbitrarily at some point?

MR. GRINDLE: Our parole board will review a life sentence, or will review one serving a life sentence after seven years. And Mr. Coker would be sentenced to life if his death sentence is vacated.

I would like to conclude with the observation that Mr. Justice White made in Roberts, and that is, that death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kendall?

MR. KENDALL: Yes, Mr. Chief Justice, just a few points.

REBUTTAL ARGUMENT OF DAVID E. KENDALL, ESQ.,
ON BEHALF OF THE PETITIONER

MR. KENDALL: The need to protect society really has more than one facet. And I commend to the Court's attention the amicus curiae brief, filed by a number of women's rights organizations. They make the point that for their constituents, the death penalty for rape is counterproductive. It discourages prosecutions; may lead to jury nullification; and

gives the criminal, in a state where homicide is punishable by death, an incentive to kill the victom. So as far as they're concerned, I don't think anyone can tax them with insensitivity to rape victims. The death penalty for rape is counterproductive.

Now, the second thing I'd like to say is about the use of the death penalty for other crimes. As I pointed out earlier, in the four years since Furman, nobody has been condemned to die for some non-homicide, and only six people have been condemned to die for rape.

I think this underlines the wisdom of the Court's traditional Ashwander principle in not confronting this case until it has to. A decision in the rape case will not necessarily decide those cases. And those cases may simply be moot, because the death sentences under these other crimes may never come to the Court.

As far as the racial history of the death penalty in Georgia goes, I think it's interesting that in the respondent's brief there is not one syllable of exculpation of the history of the death penalty for rape in Georgia. We've set forth the legislative history. It appears to be designed after the Civil War to punish black defendants who commit the crime of rape against white victims. That's what observers have concluded, and that's what the statistics seem to show. So this penalty does not come to this Court with a

a kind of even-handed history of application.

I've mentioned that the case was not tried on a recidivist theory. What I meant by that was thatthe jury was not instructed in any way as to Coker's future dangerousness.

Now, we've attacked the statute on its face. But we also feel that even if there are some rapes which may be capitally punished, this statute does not draw a defensible line.

It may be that there is some kind of dangerousness test, or harm to the victim test. This case was not tried on that. It also was not tried on a theory of what petitioner was likely to do in the future.

QUESTION: Aren't the -- wasn't the jurycharged on sections one and two of that statute?

MR. KENDALL: Yes, Mr. Justice Marshall, they were; but they were charged on the capital felonies of armed robbery, murder and rape. They were charged on petitioner's past record. But insofar as he constituted a threat in the future, there was nothing like the Texas capital punishment statute, instruction to the jury to consider future harm.

Finally, the point about the lex talionis: this has always been a principle, a harsh retributive principle. But historically it's been used to limit punishment. And we submit that part of the reason for the

repudiation of the death penalty may be simply a popular perception that where life is not taken, life shouldn't be forfeited.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:07 o'clock, a.m., the case in the above-entitled matter was submitted.]