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Darrick T. Adaway v. State of Florida

WE WILL CALL THE NEXT CASE OF AD AWAY VERSUS STATE OF FLORIDA. GOOD MORNING FORM ARE THE PARTIES READY? GOOD MORNING. ARE THE PARTIES READY? MR. HEIMLICH.

IN 1995, THE LEGISLATURE CHANGED THE MANDATORY PENALTY FOR CAPITAL SEXUAL BATTERY, FROM LIFE WITHOUT PAROLE FOR 25 YEARS, TO LIFE WITHOUT PAROLE, PERIOD.

AND IN BARNES VERSUS STATE, WE UPHOLD AGAINST THE CONSTITUTIONAL CHALLENGE, LIFE WITHOUT PAROLE FOR 25 YEARS, FOR BASICALLY THE SAME OFFENSE HERE, RIGHT?

THAT'S RIGHT.

SO THE ISSUE WE HAVE TO DECIDE IS WHETHER THE FACT THAT IT IS NOW LIFE WITHOUT PAROLE, TAKES IT FROM BEING CONSTITUTIONAL TO BEING UNCONSTITUTIONAL.

YES.

AND HAVE WE EVER HELD, IN ANY OTHER KIND OF CASE THAT, ANY SENTENCE FOR A TERM OF YEARS, WHETHER IT IS LIFE OR ANYTHING ELSE, VIOLATED THE EIGHTH AMENDMENT?

I AM NOT AWARE OF ANY SUCH DECISION FROM THIS COURT.

SO THIS WOULD BE THE FIRST TIME.

YES.

AND LAST YEAR, IN IN EWING VERSUS CALIFORNIA, THE U.S. SUPREME COURT SAID IT WAS CONSTITUTIONAL, TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT, FOR A THIRD TIME OFFENSE OF ROBBERY, RIGHT, OF STEALING, AND IN THAT CASE, THE THIRD OFFENSE WAS STEALING GOLF CLUBS.

BUT LET ME SAY, RIGHT AT THE OUTSET THAT, I DISTINGUISHED THIS CASE FROM ALL THE CASES INVOLVING RECIDIVISM AND SAYING THAT RESIDENT CIRCUMSTANCES CAN RESULT IN A VERY SEVERE PENALTY. THIS CASE

I AGREE ON THAT POINT. THIS QUESTION IS EWING VERSUS CALIFORNIA DID CONCERN RECIDIVISM. HOWEVER, THE RECIDIVISM WAS IN STEALING SOME \$100, A FEW HUNDRED DOLLARS' WORTH OF PROPERTY THREE TIMES. MY QUESTION IS, ISN'T THE OFFENSE HERE, AT LEAST AS EGREGIOUS, IF NOT, AND I WOULD SAY SEVERAL TIMES MORE EGREGIOUS, THAN STEALING SEVERAL HUNDRED DOLLARS' OF PROPERTY THREE TIMES.

IF YOU ARE ASKING ME THREE TIMES, I DON'T KNOW THREE TIMES. I AM NOT ADDRESSING THREE TIMES. IT IS MY POSITION ON THIS APPEAL, THAT THE STATE CAN DO WHATEVER IT WANTS AND WHATEVER THE CASES AUTHORIZE IT TO DO, WITH RESPECT TO RECIDIVISTS, BUT THIS STATUTE IMPOSES A MANDATORY LIFE WITHOUT PAROLE ON SOMEBODY WHO COMMITS THIS OFFENSE AND HAS NEVER COMMITTED AN OTHER OFFENSE AT ALL. THAT HAPPENS NOT TO BE MY CLIENT, BECAUSE MY CLIENT HAS PRIOR CONVICTIONS, BUT THE FACT OF THE MATTER IS THAT THE SENTENCE IN THIS CASE WAS NOT IMPOSED BECAUSE HE HAD PRIOR CONVICTIONS. IT WAS IMPOSED BECAUSE THE LEGISLATURE MADE THE SENTENCE MANDATORY

FOR THIS OFFENSE , WITHOUT REGARD TO ANY PRIOR CONVI CTIONS.

BUT ISN'T THERE , ALSO , A COMMON THE ME HERE , IN THAT , IN THE U.S. SUPREME COURT SAID, WELL, WE ARE A STATE LEEINGT WELL , WH ERE A STATE LEGISLATURE DETERMINES THAT SOME ONE WHO COMMITS A CRIME OR FELO NY THREE TIMES, SIMPLY IS IN CAPABLE OF B EING REHABILITATED , AND IS A DANGER TO THE COMMUNITY , AND THEREFORE WE ARE GOINGTO USE THREE TIMES AS THE STANDARD TO I AM PRISON SOMEONE, EVEN IF IT I S A NONVIOLENT OFFENSE WHERE HE COMMITS IT THREE TIMES, DON'T THE SAME PRINCIPLES APPLY, WHERE A STATE LEGISLATURE SAYS WE THINK THAT SOME OFFENSES ARE SO SERIOUS AND SUCH A DANGER TO THE COMMUNITY , THAT WE AREGOING TO IMPOSE LIFE IMPRISONMENT ON THE F IRST OFFENSE. IN OTHER WORD S THREE OF THE NONVIOLENT EQUALS ONE OF THIS VERY SE RIOUS SEXUAL OFFENSE AGAINST A CH ILD ?

I DON'T AGREE THAT THEREIS A COMMON THREAD. I THINK THAT THE DECI SIONS UPHOLDING R E ZIT RECI DIVIST SENTENCE RECIDIVIST THE SENTENCES ARE BASED O N THE CONCEPT THAT THERE IS NO DISPROPORTION TO THE PARTICULAR OFFENSE , STEALING GOLF CL UBS, WHEN THE SENTENCE IS IMPOSED NOT WITH RESPECT TO STEALING GOLF CLUBS BUT WITH RESPECT TO ALL OF THE OFFENSES THAT AN INDIVIDUAL HAS COMMITTEDDURING THE COURSE OF HIS LIFE. THAT IS THE PROPORTIONAL ITY ANALYSIS. THE PROPORTIONAL ITY ANALYSIS IN THIS CASE IS VERY, VERY DIFFERENT.THE QUESTION IS WHETHER ALIFE SENT ENCE WITHOUT PAROLE FOR A CAPITAL SEXUAL BA TTERY COMMITTED BY ORAL GENITAL CONTACT , NOT BY PENETRATION , NOT BY UNION , IS DISPROPORTIONATE, AND MY ARGUMENT THAT IT IS DISPROPORTIONATE, HASNOTHING TO DO WITH THE CASES THAT INVOLVE RECI DI VISM. I WOULD NOT AGREE THAT THEREIS A COMMON THRE AD.

WE HAVE THERE ARE SAID THAT THE SENTENCE OF WE HAVE ALREADY SAID THAT THESENTENCE OF LIFE FOR SUCH AN OFFENSE WITH THE POSSIBILITY OF PAROLE AFTER 25 YEARS IS CONSTITUTIONAL, AND THERE IS NO RIGHT T O PAROLE AFTER 25 YEARS.THE RE IS NO GUARANTEE OF PAROLE AT ANY PO INT AFTER 25 YEARS, SO WH Y WOULD THAT ONE DIFFERENCE WITH THEPOSSIBILITY AND WITHOUT THE POSSIBILITY, RE NDER IT UNCONSTITUTIONAL?

WELL , LET ME ANSWER THAT QUESTION IN THREE PARTS. FIRST OF ALL, THE CASES IN THE UNITED STATES SUPREME COURT , SO LOM AND HARLEM , SAYTHAT IT I S IRRELEVANT WHETHER THERE IS A PAROLE SYSTEM OR NOT A PAROLE SYSTEM AND, WHETHER AS A PRACK58 MATTER, THE DEFENDANT A PRACTICAL M ATTER , DEFENDANT CAN GET GET PAROLE OR HE CANNOT GET PAROLE. THE QUESTION IS WHETHE R OR NOT THE SENTENCE OF LIFE WITHOUT PAROLE IS IMPOSED , THAT HAS NOTHING T O D O WITH WHE THER OR NOT HE CAN ACT UALLY GET PAROLE.

BA NKS HAS ALR EADY SAID WHERE IT IS LIFE WITHOUT THEPOSSIBILITY OF PAROLE , THE REIS NO EIGHTH AMENDMENTVIOLATION , SO WE NEED TO COMPARE THIS SITUATION WITH BANKS.

THAT IS WHAT I AM T RYING TO DO. I AM TRYING TO ARGUE , WITHOUT CONTESTING BAN KS , THAT THE SENTENCE IN THIS CASE IS WOR SE THAN THESENTENCE IN BANKS , MUCH WORSE THAN THE SENTENCE IN BANKS.

HOW IS THAT , IF YOU HAVE JUST SAID THAT IT DOESN'T MATTER QLORNT YOU HAVE ELIGIBILITY FOR PAR - - MATTER WHETHER OR NOT YOUHAVE ELIGIBILITY FOR PAROLE OR DON'T HAVE ELIGIBILITY FOR PAROLE, IF THE ACTION IN BANKS WAS A LIFE SENTEN CE?

WELL , I DON'T WANT TO REPEAT WHAT I HAVE ALREADY SAID THAT , THE CASES SAY IT IS IRREL EVANT.

WELL , IF IT I S IRRELEVANT , AND WE APPROVED A LIFE SENTENCE IN BANKS, THEN , WHY ISN'T THAT JUST CONTROLLING HERE ?

BECAUSE

YOU SAID THE OPPORTUNITY FOR PAROLE IS IRRELEVANT. IT IS JUST WHETHER OR NOT A LIFE SENTENCE HAS BEEN IMPOSED.

NO , YOUR HONOR. YOU MISUNDERSTOOD WHAT I SAID.

TELL ME WHAT YOU SAID.

I SAID THAT THE QUESTION IS WHETHER THE SENTENCE OF LIFE WITHOUT PAROLE IS DISPROPORTIONATE TO THE OFFENSE, AND THE QUESTION OF WHETHER THE SENTENCE AS WRITTEN , AS RENDERED , IS DISPROPORTIONATE WITH THE OFFENSE , DOESN'T HAVE ANYTHING TO DO WITH WHETHER THERE IS A PAROLE SYSTEM OR WHETHER THE DEFENDANT CAN ACTUALLY GET PAROLE. THE QUESTION IS WHETHER THE SENTENCE IN THIS CASE, WHICH IS LIFE WITHOUT PAROLE , IS ENOUGH WORSE THAN THE SENTENCE IN BANKS , TO MAKE THIS SENTENCE

BUT THE ELIGIBILITY FOR PAROLE , AND MAYBE YOU DON'T AGREE , IS OR IS NOT A RELEVANT CONSIDERATION IN YOUR APPEAL TO THIS COURT .

IT IS A RELEVANT CONSIDERATION, IN THE SENSE THAT, IN MY VIEW , THERE MAY BE PAROLE AT SOME TIME IN THE FUTURE , BUT THERE IS NO PAROLE IN THE FUTURE, I THINK MY CLIENT WILL PROBABLY BE INELIGIBLE FOR IT, BECAUSE HIS SENTENCE WAS CRAFTED TO BE WITHOUT PAROLE. AND I THINK THAT IS A VERY RELEVANT CONSIDERATION. I THINK IT IS, ALSO, A RELEVANT CONSIDERATION , THAT A SENTENCE OF LIFE WITHOUT PAROLE , IS , DEPRIVES THE DEFENDANT OF ANY HOPE .

ALL RIGHT . YOUR ARGUMENT SEEMS TO BE FOCUSING, REALLY, ON THE SEVERITY OF THE SENTENCE , VERSUS THE ACTUAL OFFENSE THAT IS COMMITTED , CORRECT?

YES.

OKAY. SO IN THIS CASE WE HAVE AN OFFENSE WHERE THERE WAS , WHAT , ORAL GENITAL CONTACT.

YES .

CORRECT?

OKAY . YES.

SO IN BANKS WE HAD ORAL GENITAL CONTACT.

YES.

IS YOUR ARGUMENT, BASICALLY, THAT , UNLESS THERE IS FULL PENETRATION , THAT THERE , THEN THIS SENTENCE WOULD BE PROPORTIONAL , NOT PROPORTIONAL?

IT IS PART OF MY ARGUMENT THAT THE OFFENSE THAT IS COMMITTED BY PENETRATION IS MUCH MORE SERIOUS THAN THE OFFENSE IN THIS CASE, AND YET THE LEGISLATURE HAS IMPOSED THE SAME SENTENCE ON BOTH, AND MADE THAT SENTENCE MANDATORY. THE TRIAL JUDGE CAN'T VARY IT.

SO WHERE WOULD WE DRAW THE LINE HERE? ASSUMING WE HAVE PARTIAL PENETRATION, YOU KNOW , I AM TRYING TO FIGURE OUT WHAT MAKES THIS ONE

I GUESS THE POINT THAT DISTINGUISHES IS THE CASES LIKE GIBSON , THAT INVOLVE UNION , AND

IT DEPENDS ON HOW YOU LOOK AT UNION. THE WAY - -

GO ON. HOW DO YOU LOOK AT UNION?

I LOOK AT UNION , AS BEING THE SAME THING AS PENETRATION , WITHOUT PROOF OF PENETRATION. I THINK UNION WAS SET UP, SO THAT IN A CASE WHERE A CHILD IS ASSAULTED IN THAT WAY AND THERE IS NO EVIDENCE OF PENETRATION, YOU CAN PROSECUTE THE DEFENDANT AS IF THERE WAS PENETRATION , WITHOUT ACTUALLY PROVING PENETRATION. OBVIOUSLY

SO IN A SITUATION WHERE YOU WOULD HAVE ORAL CONTACT THAT IS UNION , THIS SENTENCE WOULD BE OKAY?

I AM SORRY . THE UNION THAT I AM TALKING ABOUT IS GENITAL /GENITAL UNION NOT ORAL/GENITAL UNION, AND WHAT I AM SAYING IS THAT UNION IS LIKE PENETRATION. UNION IS RAPE WITHOUT EVIDENCE OF PENETRATION, BUT ORAL GENITAL CONTACT IS NOT. IT IS VERY, VERY DIFFERENT.

SO ORAL, THE FACT THAT IT WAS ORAL , YOU CANNOT GO BEYOND CONTACT TO THE UNION, IF IT IS ORAL.

WHAT TYPE OF CRUEL AND UNUSUAL PUNISHMENT ANALYSIS ARE WE SUPPOSED TO FOLLOW ? ARE WE SUPPOSED TO FOLLOW THE UNITED STATES SUPREME COURT PRECEDENT , OR DO WE JUST GO BACK TO WHAT WE DID , HAVE DONE BEFORE THE CONSTITUTION CHANGED? IS THIS WHERE IT IS CRUEL OR UNUSUAL? WHAT POSTURE IS THIS CASE IN , FIRST OF ALL. ARE WE INTERPRETING THE CONSTITUTIONAL PROVISION AS AMENDED , TO BE EXACTLY LIKE THE UNITED STATES CONSTITUTION, OR ARE WE LOOKING AT ONE THAT GIVES, BEFORE THE CHANGE THAT, GREATER PROTECTION TO INDIVIDUALS?

THIS IS , UNDER THE OLD PROVISION , CRUEL OR UNUSUAL, OF THE STATE CONSTITUTION.

SO WHAT WOULD YOU SAY , WHAT ARE, THEN , THE GUIDING CONSIDERATIONS? WE HAVE BEEN FOCUSING ON DISPROPORTIONALITY BETWEEN THE OFFENSE AND THE PENALTY'S HARSHNESS. I THINK YOU DON'T , I THINK YOU HAVE A HARD TIME ON THAT ONE. THE QUESTION I HAVE IS, THEN , DOES THE PROPORTIONALITY ARGUMENT, AS TO OTHER OFFENSES COME INTO PLAY , IN TERMS OF HOW AGGRAVATED MANSLAUGHTER IS PUNISHED BY 30 YEARS. A DEFENDANT WHO WILLFULLY TORTURES , MALICIOUSLY PUNISHES OR DOES AGGRAVATED CHILD ABUSE IS NOT PUNISHED BY LIFE IMPRISONMENT . DO WE LOOK AT OTHER TYPES OF OFFENSES , AS WELL AS HOW IT IS PUNISHED IN OTHER JURISDICTIONS? WHERE DOES THAT COME INTO PLAY , BECAUSE YOU HAVE ONLY BEEN FOCUSING ON THE FIRST ONE.

THE CASES SAY , AND I MEAN BOTH THE UNITED STATES SUPREME COURT CASES AND THE FLORIDA CASES , THAT THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE REQUIRES AN ANALYSIS OF PROPORTIONALITY OR DISPROPORTIONALITY, AND THERE ARE THREE WAYS TO LOOK AT DISPROPORTIONALITY. ONE IS TO ASSESS THE PENALTY IN RELATION TO THE CRIME .

THAT IS WHAT WE HAVE BEEN TALKING ABOUT .

YOU CANNOT IMPOSE A LIFE SENTENCE FOR OVER TIME PARKING. THIS IS NOT LIKE THAT , BUT THE PRINCIPLE IS THE SAME. THE OTHER THING THAT YOU CAN LOOK AT

IN THAT SITUATION, YOU WOULDN'T, IF YOU HAD LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR VAGRANCY, YOU KNOW , ONE ACT OF VAGRANCY , WHATEVER THE STATUTE IS NOW THAT IS CONSTITUTIONAL, YOU COULD MAKE A DECISION , JUST BASED ON LOOKING AT THAT CRIME AND THAT PUNISHMENT , THAT IT WAS CRUEL AND UNUSUAL. YOU WOULDN'T HAVE TO GO ANY FURTHER. ALL RIGHT. HERE, THOUGH, IT IS ON ITS FACE, AS INDICATED BY

WHETHER THIS RECIDIVIST THE STATUTE OR NOT , THAT YOU HAVE GOT A VERY SIGNIFICANT CRIME, WHETHER IT IS CONTACT OR NOT , THERE IS NO GETTING AROUND IT .

I DON'T DISAGREE.

SO, THEN , DO WE MOVE ON TO THE TWO OTHER PRONGS, TO EXAMINE WHETHER IT IS PROPORTIONATE TO OTHER TYPES OF SENTENCES, AND WITHIN OTHER JURISDICTIONS, IS THAT PART OF THE ANALYSIS?

OUR ARGUMENT IS THAT THE PENALTY FOR THIS CRIME IN FLORIDA, IS DISPROPORTIONATE TO THE OTHER PENALTIES THAT ARE IMPOSED IN FLORIDA. WE DO NOT COMPARE THIS STATUTE WITH STATUTES IN OTHER STATES. THE STATUTES IN OTHER STATES ARE AS BAD AS OURS . AND WE JUST DON'T MAKE THAT ARGUMENT. IN SOLOM , WHERE THESE TESTS WERE FORMULATED

DON'T YOU HAVE TO CONSIDER THAT? ONCE YOU SAY WE ARE GOING TO CONSIDER OTHER STATUTES IN FLORIDA , YOU HAVE TO, ALSO, GO TO THE THIRD PRONG. IT IS NOT EITHER/OR. YOU EITHER STOP AT THE FIRST OR YOU GO TO THE NEXT TWO. YOU DON'T GO AD SERIATUM , AND YOU HAVE TO CONSIDER WHAT OTHER STATES DO IN DETERMINING WHETHER THIS VIOLATES THE EIGHTH AMENDMENT.

I DON'T AGREE . AND I DON'T AGREE FOR A NUMBER OF REASONS , THE FIRST REASON IS THAT IN SOLOM, WHERE THESE TESTS WERE FORMULATED, JUST ICE POWELL SAYS THE COURT SHOULD , ALSO , CONSIDER NUMBER THREE , THE COMPARISON BETWEEN THIS STATE AND THE OTHER STATE. I THINK A COMPARISON OF THIS STATE AND THE OTHER STATE IN THIS CASE , IS USELESS , BECAUSE I THINK THE STATUTES OF OTHER STATES ARE ALSO INVALID.

HAVEN'T WE ADOPTED JUSTICE KENNEDY'S FORMULATION IN HARMELIN , WHICH DOES HAVE THE THREE OR FOUR-PART ANALYSIS ? SINCE HARMELIN , HAVEN'T WE ADOPTED THAT?

I DON'T THINK THAT THE THREE-PART ANALYSIS WHICH ORIGINATED IN SOLOM , REQUIRES THE ANALYSIS OF ALL THREE PRONGS, AND IN ANY EVENT , MY ANALYSIS , MY ARGUMENT IS THAT THE SECOND PRONG IS SO STRONG , THAT THE DISPOSITION , THE DISPROPORTION BETWEEN WHAT FLORIDA DOES IN THIS CASE AND WHAT FLORIDA DOES IN OTHER CASES, IS SO STRONG, THAT EVEN IF OTHER STATES DO THE SAME THING , THE FLORIDA STATUTE IS IN VALID , AND MAYBE SOME LAWYER WILL CHALLENGE THAT.

THAT IS THE HEART OF YOUR ARGUMENT HERE.

THAT IS THE HEART , ABSOLUTELY.

GIVE US YOUR BEST. YOU HAD SOME EXAMPLES QUOTED FROM THE BENCH ALREADY. GIVE US YOUR BEST EXAMPLE.

THE FIRST EXAMPLE THAT I ARGUE IS AN EXAMPLE FROM WITHIN THE STATUTE, THAT THE STATUTE IMPOSES THE SAME PENALTY FOR ORAL/GENITAL CONTACT AS IT IMPOSES FOR CHILD RAPE, FOR RAPE OF A CHILD , AND I THINK THAT IS A DISPROPORTION, IN AND OF ITSELF. THE SECOND POINT THAT I WOULD MAKE IS THAT , PRIOR TO THE ADOPTION OF THE 1974 SEXUAL BATTERY STATUTE , THE OFFENSE IN THIS CASE WAS NOT RAPE, AND IT WAS A LEWD AND LASCIVIOUS OFFENSE. IT WAS A LEVEL 7 OFFENSE UNDER THE GUIDELINES. IT WAS A SECOND-DEGREE FELONY , PUNISHABLE BY NO MORE THAN 15 YEARS.

ARE THERE ANY OTHER CRIMES IN THE STATE OF FLORIDA THAT YOU CAN GET LIFE IMPRISONMENT , WITHOUT POSSIBILITY OF PAROLE?

YES. MURDER.

ANYTHING ELSE?

AND THE SUPREME COURT SAID IN COCKER, THAT YOU CAN'T PUNISH RAPE THE SAME WAY THAT YOU PUNISH MURDER, AND THE STATE OF FLORIDA PUNISHES CHILD RAPE THE SAME WAY AS IT PUNISHES MURDER, BECAUSE THE PENALTY FOR THAT IS LIFE WITHOUT PAROLE, AND THAT CHANGE WAS MADE IN THE MURDER STATUTE AT THE SAMETIME THAT THE CHANGE WAS MADE FOR SEXUAL BATTERY AND LIFTED BOTH PENALTIES TO LIFE WITHOUT PAROLE.

WAS THERE ANY OTHER CHANGE TO SECOND-DEGREE FELONY PUNISHABLE, THAT IT WENT FROM BEING A SECOND-DEGREE FELONY TO A CAPITAL FELONY?

WHEN THE 1974 SEXUAL BATTERY STATUTE WAS ENACTED, THE STATUTE SCOOPED UP OFFENSES THAT HAD NOT BEEN RAPE BEFORE AND PUT THEM IN THE SAME CATEGORY AS RAPE, AND IMPOSED A LIFE SENTENCE WITHOUT PAROLE FOR 25 YEARS. NOW INCREASED TO LIFE, AND SAID THAT THESE OFFENSES ARE ALL THE SAME. I SUBMIT THAT THEY ARE NOT ALL THE SAME, AND THAT

YOU DON'T THINK WE WOULD HAVE TO REcede FROM OUR CASE, THE HALE CASE OR HALL, WHATEVER, IN DOING THIS?

NO. I DON'T THINK SO AT ALL. AND THE ARGUMENT THAT I AM MAKING WOULD NOT REQUIRE THE COURT TO REcede FROM BANKS. ALTHOUGH I DON'T AGREE WITH BANKS, AND IF YOUR HONOR WOULD DECLARE THE STATUTE UNCONSTITUTIONAL, THAT WOULD BE ANOTHER DAY. BUT THE COURT DOES NOT HAVE TO REcede FROM BANKS AT THIS POINT. MY POINT IS SIMPLY THAT THE SENTENCE OF LIFE WITHOUT PAROLE, SO DEPRIVES THE DEFENDANT OF ANY HOPE, THAT IT IS CRUEL AND UNUSUAL AND IMPROPER FOR THIS OFFENSE. THERE WAS A CASE IN THIS STATE, VERY RECENTLY, BLACKWELDER, WHICH I CITED AS SUPPLEMENTAL AUTHORITY, WHERE THE DEFENDANT WAS SENTENCED TO LIFE WITHOUT PAROLE FOR CAPITAL SEXUAL BATTERY, AND THEN COMMITTED A MURDER IN PRISON, SO THAT HE COULD BE EXECUTED.

ISN'T THAT A LEGISLATIVE DETERMINATION, THOUGH, WHETHER IT IS ADVISABLE OR NOT, WHETHER IT IS GOING TO HAVE CERTAIN REPERCUSSIONS OR NOT? THAT IS NOT A CONSTITUTIONAL ISSUE, IS IT?

I DON'T THINK SO. IT IS THE DECISION FOR THE LEGISLATURE IN THE FIRST INSTANCE, BUT THE CONSTITUTION, THE POWER OF JUDICIAL REVIEW, REQUIRES THE COURT TO LAY THE STATUTE AGAINST THE CONSTITUTION, AND THE WAY YOU LAY THAT STATUTE AGAINST THE CONSTITUTION IN THIS CASE, IS BY ASKING WHETHER THE PENALTY IS DISPROPORTIONATE.

BUT IT DOESN'T ASK US TO SAY WHETHER THIS IS GOING TO CREATE AN INCENTIVE TO COMMIT MORE CRIMES DISINCENTIVE TO COMMIT THIS CRIME. THOSE AREN'T THE QUESTIONS WE ASK.

WELL, I AM NOT SURE THAT'S RIGHT. WHAT I MEAN SAYING IS THAT THE CAPITAL, THE PENALTY FOR CAPITAL SEXUAL BATTERY OF LIFE WITHOUT PAROLE, IS SO CLOSE TO THE DEATH PENALTY, AND SO DEPRIVES THE DEFENDANT OF HOPE, THAT IT HAS CONSEQUENCES IN TERMS OF WHAT THE PERSON SO SENTENCED WILL DO.

CHIEF JUSTICE: I WANT TO REMIND YOU, YOU ARE IN YOUR REBUTTAL.

I AM SORRY. IT ALSO HAS CONSEQUENCES IN TERMS OF THE DETERRENT EFFECT OF THE MURDER STATUTE, BECAUSE THE PENALTY IN THIS STATUTE IS SO CLOSE TO THE PENALTY IN THE MURDER STATUTE, THAT IF THE DEFENDANT COMMITS THIS OFFENSE, HE HAS AN INCENTIVE TO KILL THE VICTIM, IN ORDER TO SILENCE THE WITNESS, AND THAT JUST SHOWS THAT THE SENTENCE

IS DISPROPORTIONATE.

CHIEF JUSTICE: THANK YOU VERY MUCH. MS. TAYLOR.

THANK YOU. GOOD MORNING. MAY IT PLEASE THE COURT. PAULETTE TAYLOR ON BEHALF OF THE STATE. THIS ARGUMENT THAT THE SENTENCE IS DISPROPORTIONATE BECAUSE IT WILL GIVE THE DEFENDANTS INCENTIVE TO KILL THE VICTIMS, IS WITH ALL DUE RESPECT TO COUNSEL, IS ABSOLUTELY LUDICROUS. THIS STATUTE PROTECTS CHILDREN AGAINST PREDATORS. IT IS AIMED AT CHILDREN WHO ARE LESS THAN TWELVE YEARS OR UNDER, AND ADULTS WHO ARE 18 AND OVER. IT SPECIFICALLY IS LIMITED TO THOSE CLASSES OF DEFENDANTS AND VICTIMS. THE REASON WHY IT IS THE VICTIMS OF TWELVE YEARS AND UNDER, IS BECAUSE THESE CHILDREN ARE IN CAPABLE OF PROTECTING THEMSELVES. THEY DO NOT

LET ME ASK YOU THIS QUESTION, THOUGH, AND, AGAIN, WHEN YOU ARE LOOKING AT PROPORTIONALITY, THE SAME EXACT SENTENCE IS GIVEN, IF A PERSON OVER OF THE AGE OF 18 BRUTALLY RAPES A CHILD, SAME EXACT SENTENCE.

CORRECT.

AND THAT DOESN'T RAISE, JUST WITHIN THAT, ANY CONCERNS OF PROPORTIONALITY? I MEAN, NORMALLY, A GAIN, YOU HAVE GRADATIONS OF MURDER, AND I HAVE GOT AND YOU HAVE GOT SECOND-DEGREE MURDER AS LESS THAN FIRST-DEGREE AND MANSLAUGHTER. THE VERY FACT THAT THERE IS NO, THAT THEY ARE ALL TREATED EXACTLY THE SAME FOR VERY, VERY, YOU KNOW, AGAIN, NOT QUESTIONING THE SERIOUSNESS OF THIS OFFENSE, BUT IN COMPARISON TO SOME OF THE, YOU KNOW, A BRUTAL CHILD RAPE, IT JUST, WHAT IS YOUR ANSWER TO THAT, JUST WITHIN THE FACT THAT THEY ARE ALL LUMPED TOGETHER AND GIVEN LIFE WITHOUT PAROLE, WHICH THE JURY IS NOT TOLD ABOUT, YOU KNOW, IN THE COURSE OF THE TRIAL. THEY HAVE NO IDEA WHAT THE SENTENCE IS GOING TO BE.

CORRECT. THE FACT THAT THERE ARE VARIOUS WAYS OF COMMITTING THE CRIME, IS NOT THE ISSUE. THE ISSUE IS WHETHER OR NOT THIS PARTICULAR CRIME AND THE CRIME THAT IS HERE, IT IS NOT JUST AS THE DEFENDANT SEEMS TO SAY, ORAL/GENITAL CONTACT. IT IS AN INVASION INTO THE CHILD'S GENITALIA. IT IS INTENDED TO PROHIBIT ADULTS FROM GAINING SEXUAL GRATIFICATION FROM CHILDREN.

WHAT ABOUT THE ASPECT OF, REALLY, SINCE THE LAW MAKES NO DISTINCTION HERE, THAT IT WOULD APPEAR TO ACTUALLY TELL THE OFFENDER, THE SEXUAL OFFENDER, THAT YOU CAN DO ANYTHING TO A CHILD, AND THERE IS NO INCENTIVE FOR YOU TO STOP SHORT OF, IN YOUR ABUSE, BECAUSE THE SAME, ONCE YOU HAVE ANY SEXUAL CONTACT, THAT THE SAME PUNISHMENT IS GOING TO BE IMPOSED, SO THERE IS NO INCENTIVE HERE, FOR SEXUAL OFFENDER TO STOP SHORT.

THAT IS SAYING DON'T EVEN THINK ABOUT IT. IT IS SAYING, AS AN ADULT, DON'T EVEN, DON'T EVEN THINK ABOUT GETTING ANY KIND OF SEXUAL GRATIFICATION FROM A CHILD.

THE OTHER ASPECT OF THIS, IS THAT, WHAT ABOUT THE INSTANCE WHEN A CHILD IS NOT SEXUALLY BUT TERRIBLY PHYSICALLY ABUSED, MAIMED AND DISABLED FOR LIFE, WHAT IS THE PUNISHMENT FOR THAT, THAT IS A BATTERY THAT LEAVES A CHILD MAIMED AND DISABLED FOR LIFE? IT IS LESS THAN, IS IT NOT, LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

IT IS NOT LESS THAN. IT IS STILL POSSIBLE THAT THAT DEFENDANT WILL RECEIVE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE.

TELL ME ABOUT THAT. WHAT, THE BATTERY STATUTE THAT COVERS THAT.

IT IS NOT MANDATORY, AS IT IS IN THIS CASE , BUT IT IS POSSIBLE FOR A DEFENDANT WHO COMMITS AGGRAVATED BATTERY , TO BE SENTENCED TO UP TO LIFE IN PRISON. IN THAT CASE , THEY CAN GET LIFE IN PRISON, AND IT IS THE POSSIBILITY OF LIFE WITHOUT PAROLE PAROLE, THAT RENDERS

IT IS NOT A MAXIMUM OF 20 TO 30 YEARS IN PRISON , FOR , UNDER A VIOLATION OF A DEFENDANT WHO WILLFULLY TORTUROUS , MALICIOUSLY PUNISHES , WILLFULLY CAUSES , PERMANENTLY DISFIGURE YOURS A CHILD , IS PUNISHED FOR CHILD ABUSE?

I THINK THEY CAN GET UP TO LIFE IN PRISON, BUT THE FOCUS HERE IS NOT BETWEEN OTHER TYPES OF CRIMES.

THAT IS ALL RELEVANT.

THAT IS NOT IN THE ANALYSIS AT ALL. YOU DON'T LOOK TO SEE, WELL , WHAT OTHER CRIMES CAN GET PUNISHMENT MORE SEVERE THAN THIS? QUESTION HERE IS , WHETHER OR NOT THERE IS ANY REASONABLE , THERE IS A REASONABLE BASIS FOR THIS PUNISHMENT.

SO ANY CHILD ABUSE COULD BE PUNISHED WITH THIS PUNISHMENT , THAT IS THAT IF A PARENT LOSES IT AND STRIKES THEIR CHILD VIOLENTLY , THAT THE SAME, IT IS BECAUSE IT IS A CHILD , SO ANY ABUSE OF A CHILD COULD BE PUNISHED WITH THE SAME PUNISHMENT?

NO. NO.

WHAT ABUSE OF A CHILD WOULD BE ELIMINATED?

WE HAVE TO , WE HAVE TO LOOK AT WHAT THE LEGISLATURE IS , WHAT THE FOCUS OF THIS STATUTE IS . THE FOCUS

I AM ASKING WHAT , YOU SAID THAT, NO , THAT SOME ABUSE OF A CHILD COULD NOT BE PUNISHED THIS SEVERELY, SO I AM ASKING YOU WHERE YOU WOULD DRAW THE LINE , WHAT ABUSE OF A CHILD , PHYSICAL ABUSE OF A CHILD, THEN , COULD NOT BE PUNISHED BY LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE?

THERE ARE VARIOUS OTHER STATUTES THAT PROTECTS CHILDREN AGAINST THE VARIOUS TYPES OF ABUSES THAT CAN BE COMMITTED AGAINST THEM.

I AM TALKING ABOUT THE CONSTITUTIONAL STANDARD THAT YOUR OPPONENT IS , HAS RAISED THE ISSUE OF HERE. WHAT OTHER CHILD ABUSE OFFENSES , PHYSICAL ABUSE OF A CHILD , WOULD CROSS THE CONSTITUTIONAL LINE, IN TERMS OF IMPOSING THIS PUNISHMENT?

IN THE PROPORTIONALITY ANALYSIS , THIS COURT NEED NOT LOOK TO SEE WHAT OTHER ABUSE WOULD WARRANT THIS KIND OF PUNISHMENT. THE ONLY THING THAT IS NECESSARY IN THIS ANALYSIS , IS TO DETERMINE WHETHER OR NOT THAT THERE IS ANY REASONABLE BASIS FOR THE LEGISLATURE TO

I THOUGHT THE CASE LAW TOLD US THAT THAT IS EXACTLY WHAT WE SHOULD DO, THAT IS THAT WE SHOULD LOOK AT HOW WE PUNISH OTHER OFFENSES , AND THEREFORE MAKE SOME JUDGMENT HERE , ABOUT WHETHER OR NOT THIS CROSSES THE LINE.

NO. THE

YOU ARE SAYING THAT YOUR OPPONENT'S ARGUMENT HERE, IS OFF BASE TO BEGIN WITH.

IT IS.

THAT IS NOT PART OF THE ANALYSIS.

IT IS NOT PART OF THE ANALYSIS. THE FIRST THING THAT THE COURT MUST DO , IS TO DETERMINE WHETHER OR NOT THE SEVERITY OF THE PUNISHMENT , OF THE CRIME. WHETHER IT IS GROSSLY DISPROPORTIONATE TO THE CRIME, SO THE FIRST THING THAT WE HAVE TO DO IS FIGURE OUT THE SEVERITY , THIS CRIME, FIGURE OUT WHAT THIS CRIME IS , HOW ODDIOUS IS THIS CRIME TO SOCIETY. IS THIS A CRIME THAT OUR SOCIETY WILL TOLERATE THIS KIND OF PUNISHMENT FOR. IN HARM EVENT LIN IN HARMELIN, THIS WAS A FIRST-TIME OFFENDER . THE DEFENDANT THERE WAS CONVICTED OF 160 GRAMS OF COCAINE, A FIRST TIME OFFENDER, AND THE COURT THERE SAID THE GRAVITY OF THAT OFFENSE WAS SO GREAT THAT, HIS PUNISHMENT OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, WAS NOT GROSSLY DISPROPORTIONATE. THE COURT DIDN'T LOOK TO SEE WHAT OUR FORMS OF POSSESSION OF COCAINE WOULD WARRANT THAT SEVERE SENTENCE. IT SAID WE ARE LOOKING JUST AT THE GRAVITY OF THIS OFFENSE , AND THIS OFFENSE IS SO GRAVE , THAT IT WARNS THIS LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.

THAT IS THE SOLE ANALYSIS.

THAT IS THE SOLE ANALYSIS.

BUT IF YOU DON'T, BUT IF YOU SAY , IF YOU GET TO THAT POINT AND YOU SAY , WELL , THIS MAY NOT BE , DO YOU MOVE ON, THEN, TO OTHER , TO THE OTHER PRONGS OF COMPARING IT TO OTHER CRIMES , COMPARING IT TO CRIMES THAT ARE COMMITTED IN OTHER STATES? WHAT KIND OF PUNISHMENT YOU GET FOR THAT CRIME? OTHER STATES?

THE ANALYSIS IS , ONCE YOU MAKE A DETERMINATION THAT THIS OFFENSE IS SO GRAVE THAT IT WARRANTS THIS PENALTY , THE ANALYSIS IS OVER. YOU DON'T GO ANYWHERE ELSE. IF YOU MAKE THE ASSESSMENT THAT THIS PUNISHMENT IS ONE OF THE RARE CASES THE COURT POINTS OUT ALL THE TIME, IT HAS TO BE THE RARE CASE THAT THIS PUNISHMENT IS GROSSLY DISPROPORTIONATE TO THE CRIME , THEN YOU VALIDATE IT OR INVALIDATE IT BY LOOKING TO SEE THAT SECOND STEP , LOOKING TO SEE WHAT KIND OF PUNISHMENT IS PROVIDED FOR OTHER CRIMES IN THIS JURISDICTION AND WHAT KIND OF PUNISHMENT IS PROVIDED FOR THE SAME CRIME IN OTHER JURISDICTIONS.

AND SPEAKING TO THE FIRST STEP, DID WE HOLD IN HALL VERSUS STATE , A COUPLE OF YEARS AGO , THAT THE EIGHTH AMENDMENT AND ARTICLE I 17 OF OUR CONSTITUTION , HAVE HISTORICALLY PROVIDED PROTECTION ONLY AS TO THE MODE OF THE PUNISHMENT AND NOT AS TO THE LENGTH OF THE SENTENCE?

THAT'S CORRECT , YOUR HONOR , AND THE COURTS HAVE , THERE ARE SEVERAL JUSTICES ON THE UNITED STATES SUPREME COURT AT THE MOMENT THAT BELIEVE THAT, THAT THERE IS NO , AS TO THE LENGTH OF THE SENTENCE, BUT IN COOTTON, IN GIBSON , THE SECOND DISTRICT COURT APPLIED THE SOLOM ANALYSIS AND FOUND THAT IT WAS NOT GROSSLY DISPROPORTIONATE, THE SAME SENTENCE FOR THE SAME CONDUCT , WHICH IS ORAL , THAT WAS GENITAL /GENITAL CONTACT. AND IN THIS CASE

EXCUSE ME. JUDGE ALTERNATE ENBURNED SAID JUDGE ALTENBERND SAID SPECIFICALLY THAT HE WOULD EXPRESS SOME CONCERN IF IT WAS ORAL/GENITAL. THAT CASE WAS GENITAL /GENITAL CONTACT.

IT WAS JUST SAYING IT WAS LIMITED TO THIS GENITAL /GENITAL CONTACT, BUT OUR POSITION IS THAT THERE IS NO DIFFERENCE BETWEEN, AS FAR AS THE INVASION INTO THE CHILD'S GENITALIA, THERE IS NO DIFFERENCE BETWEEN GENITAL CONTACT AND ORAL /GENITAL CONTACT ,. IT IS THE SAME, AN ADULT OBTAINING SEXUAL GRATIFICATION FROM A CHILD .

DO WE KNOW HOW WOULD THE DEFENDANT WAS IN BANKS ?

BANKS , I BELIEVES , WAS 23 YEARS OLD . NO. I AM SORRY. I DON'T. I THINK GIBSON , THE DEFENDANT IN GIBSON WAS 23 YEARS OLD. I AM NOT SURE IN BANKS.

WE DON'T KNOW HOW OLD THE DEFENDANT WAS IN BANKS.

NO. I DON'T KNOW. BUT THE VICTIM IN GIBSON , THE , OUT OF THE SECOND WAS EIGHT YEARS OLD AND THIS VICTIM IN THIS CASE WASELEVEN.

DO WE KNOW WHETHER THE ARGUMENT WAS LAID IN BANKS, THAT THE WAS MADE IN BANKS, THAT THE MINIMUM SENTENCE WITHOUT PAROLE , OF 25 YEARS , WOULD DEF ACTO EXCEED HIS LIFE EXPECTANCY?

NO. BUT I DON'T THINK THE DEFENDANT'S LIFE EXPECTANCY IS ANY KIND OF A FACTOR INTO WHETHER OR NOT THE SENTENCE IS PROPORTIONATE . A DEFENDANT CAN COMMIT A CRIME IN THIS CASE , 18 , 19 YEARS OLD, OVER 18 , 19 YEARS OLD. IT MAKES NO DIFFERENCE WHETHER HE IS 19 OR HE IS 99.

IT MAY MAKE A DIFFERENCE, THOUGH, IN ANOTHER SITUATION, WHERE THE DEFENDANT IS ARGUING THAT THE MINIMUM 25-YEAR SENTENCE , IS TANTAMOUNT TO A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE , IF IT IS SOME OTHER CRIME , FOR INSTANCE, THAT HE IS ARGUING ABOUT.

I DON'T THINK THE AGE OF THE DEFENDANT IS EVER A FACTOR INTO WHETHER OR NOT A CRIME IS DISPROPORTIONATE TO THE PUNISHMENT. THE LEGISLATURE FIXES A PUNISHMENT. IT IS NOT BASED ON THE AGE OF THE DEFENDANTS .

WELL , IT MAY IN SOME SITUATIONS. THIS STATUTE ACTUALLY STARTS WITH A DEFENDANT HAS TO BE 18 YEARS OF AGE OR OLDER. CORRECT?

CORRECT.

SO IF A DEFENDANT WAS 16 YEARS OLD AND WE HAD THE SAME STATUTE, REQUIRING THE SAME PUNISHMENT , YOU DON'T THINK THAT WE COULD CONSIDER THE FACT THAT THIS WAS A MINOR, WHO ACTUALLY COMMITTED THE CRIME ON ANOTHER MINOR?

I THINK THE LEGISLATURE, IN SETTING THE MINIMUM AGE OF THE DEFENDANT , HAS FACTORED INTO THE PUNISHMENT . THAT IS, IN THIS CASE , IT MAKES IT , THE DEFENDANT HAS TO BE 18 OR OVER, SO THIS COURT DOES NOT NEED TO CONSIDER WHETHER THIS WAS A DEFENDANT WHO WAS 16 , BECAUSE IT ONLY APPLIES TO THE DEFENDANTS WHO ARE 18 , SO THE STATUTE MAKES NO REFERENCE. IT IS 18 OR OVER , SO WHETHER THE DEFENDANT IS 18 IN SIX MONTHS OR 99 YEARS , IT IS OF NO RELEVANCE. I THINK THAT THE COURT HAS, THE UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT LEGISLATURES ARE ENTRUSTED WITH DETERMINING THE GOALS OF SENTENCES . ONCE THERE IS A RATIONAL BASIS OR REASONABLE BASIS TO BELIEVE THAT THAT PARTICULAR SENTENCE ADVANCES A PARTICULAR GOAL OF THE CRIMINAL JUSTICE SYSTEM, THEN BASICALLY THE ANALYSIS IS OVER WITH . HERE , WE HAVE OUR LEGISLATURE THAT HAS SAID, IN NO UNCERTAIN TERMS, THAT IT IS A GRAVE , AN EXTREMELY GRAVE OFFENSE. WE KNOW THAT BY THE PUNISHMENT THAT IT HAS PROVIDED, FOR AN ADULT TO GAIN ANY KIND OF SEXUAL GRATIFICATION FROM A CHILD , AND FOR THAT IT HAS SET THE PENALTY OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE. THAT PENALTY ADVANCES THE CRIMINAL JUSTICE SYSTEM , BY, NUMBER ONE, IT IS A DETERRENT , NUMBER TWO , IT PROTECTS THESE VULNERABLE VICTIMS WHO ARE NOT ABLE TO SOME EXTENT , NEITHER IS SOCIETY ABLE TO PROTECT THESE CHILDREN FROM THESE PREDATORS.

CAN YOU TELL ME , IN THE L AST 25 YEARS , WHETHER THERE ARE ANY CASES , AT THE U.S. SUPREME COURT LEVEL OR ANYWHERE IN THE COUNTRY, THAT HAS FOUND A PUNISH MENT FOR A CRIME TO BE CRUEL AND UNUSUAL?

WELL , SOLOM, THE COURT DID FI ND THAT IT WAS, NOT CRUEL AND UN USUAL , BUT I GUESS IT WAS DISPROPORTIONATE.

WHAT WAS THE CRIME THERE?

THAT, THE CRIME WAS , AND THAT WAS , AGAIN , U N DER RECIDIVIST STATUTE. THE DEFENDANT THERE, THE TRIGGER ING OFFENSE WAS, I THINK HE WAS ISSUING A NO-ACCOUNT CH ECK FOR \$100, AND FOR THAT HE GOT THE PENALTY OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE. THE COURT THERE , AND , AGAIN , THIS WAS A DIVIDED COURT , AND THE COURT HAS , SINCE THEN, IT IS IN QUESTION WHETHER OR NOT THAT 'TIL IT IS VALID THAT ST ILL IS VALID, BUT WE STILL APPLY THE TEST FROM SOLO M.

THAT WAS A VICTIMLESS CRIME.

THERE IS AN ISSUE ABOUT WHETHER OR NOT IT WAS A VICTIMLESS CRIME .

THEY SAID IT WAS A NONVIOLENT .

R IGH T , AND THAT WAS

THE SEVENTH NONVIOLENT OFFENSE.

R IGH T. AND THAT WAS BASED UNDER THE RECIDIVIST STATUTE. BUT HERE .

I N E W I N G , IT SEEMED ALMOST T O BE NOT IDENTICAL FACTS , BECAUSE THE AM OUNT OF MONEY AT ISSUE WAS GREATER, BUT IT WAS ONLY TH E THIRDTIME. IT WAS, ALSO , A NONVIOLENT OFFENSE.

C O R R E C T .

A N D T H E C O U R T S A I D T H A T D I D N O T V I L E D I D N O T V I O L A T E T H E C O N S T I T U T I O N .

I N E W I N G F O R T H A T O F F E N S E , W H I C H , A S T H E D I S S E N T I N E W I N G P O I N T E D O U T , T H E T R I G G E R I N G O F F E N S E W A S I N F A C T T H E T H E F T O F T H R E E G O L F C L U B S . I T , A C C O R D I N G T O T H E S E N T E N C E , I T D O E S N ' T M A T T E R H O W T H E M A J O R I T Y W A N T S T O F R A M E I T , T H E F A C T I S T H E T R I G G E R I N G O F F E N S E W A S T H E F T O F T H R E E G O L F C L U B S , A N D F O R T H A T H E G O T 25 Y E A R S I N P R I S O N U P T O L I F E , A N D T H E D I S S E N T P O I N T E D O U T T H A T T H A T S E N T E N C E I S F O R A F I R S T O F F E N S E , R E S E R V E D F O R T H E M O S T S E R I O U S O F O F F E N S E S . T H A T I S W H A T F I R S T - D E G R E E M U R D E R C O N V I C T I O N W O U L D G E T I N C A L I F O R N I A F O R T H A T O F F E N S E , F O R T H E F I R S T T I M E O F F E N S E . S O I F W E A R E L O O K I N G A T C O M P A R A T I V E L Y , I N T H A T J U R I S D I C T I O N , F O R T H E T H E F T O F A G O L F C L U B , H E G O T T H E S A M E S E N T E N C E A S A M U R D E R E R W O U L D H A V E G O T T E N , A N D T H E C O U R T T H E R E S A I D T H E R E W A S N O T , T H A T S E N T E N C E W A S N O T D I S P R O P O R T I O N A N A T .

- - W A S N O T D I S P R O P O R T I O N A T E .

S O W E H A V E T O C O N S I D E R I T N O T I N T E R M S O F T H E G O L F C L U B S . W E H A V E T O C O N S I D E R I T I N T E R M S O F T H E T W O P R I O R O F F E N S E S , A S W E L L , A N D T H E C O U R T C O N S I D E R E D I T M O R E A S A R E C I D I V I S T S T A T U T E , A N D T H E S T A T U T E P R O H I B I T I N G T H E T H E F T O F T H R E E G O L F C L U B S .

C O R R E C T . B U T T H E T H I C K O F I T , T H O U G H B U T T H E T H I N G O F I T , T H O U G H , I S W H E N W E A R E L O O K I N G A T I T , T H E R E A R E S T I L L R E L A T I V E L Y M I N O R C R I M E S , A N D T H E G O A L O F T H A T I S

TO INCAPACITATE THESE DEFENDANTS, TO TAKE THEM OUT OF SOCIETY. IN THIS CASE , WE HAVE A V ERY HEINOUS CRIME. AND THE PUNISHMENT FOR THAT AND THE ONLY WAY THAT WE CAN PROTECT THESE CHILDREN, IS TO TAKE , WHEN WE IDENTIFY WHO THESE PREDATORS ARE, IS TO TAKE THEM OUT OF SOCIETY.

COULD YOU , COULD THE LEGISLATURE IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR LEWD AND LASCIVIOUS CONDUCT?

I THINK IT COULD , IF I T SO CH OSE .

AND FOR CHILD ABUS E?

FOR CHILD ABUSE. IF THE DEFENDANT, IF THE LEGISLATURE , IN ITS WISDOM, THOUGHT THAT THIS WAS NECESSARY TO PROTECT THESE CHILDREN, BUT IN THESE KINDS OF SEXUAL CASES , AND THE FACTS OF THIS CASE BE AR IT O UT, WE HAVE THIS CHILD WHO WAS ASLE EP IN HER BED. HER MOTHER WAS IN THE NEXT R OOM. SHE HAD HER SIBLINGS IN THE ROOM WITH HER . HER AUNT WAS IN THE , OUT IN THE LI VING R OOM. AND THIS DEFENDANT FOUND THE OPPORTUNITY , IN THE DE AD OF NIGHT, TO GO IN AND COMMIT THIS SEXUAL ACT UP ON HER. WE , AS A SOCI ETY, CANNOT PROTECT CHILDREN AGAINST THESE KI NDS OF PREDATORS, SO ONCE WE IDENTIFY THEM , THEREIS, IT IS A RA TIONAL , IT IS A REASONABLE BASIS TO SAY , W ELL , THE ONLY WAY THAT WE CAN PROTECT THEM IS , ONCE WE IDENTIFY THEM, IS TO LOCK THEM A WAY FOREVER.

CAN YOU , JUST AS A PRACTICAL MATTER BECA USE WE SEE THESE JIMMY R YCE CASES, HOW, THEN , DO ALL THESE OTHER DEFENDANTS THAT SEEM TO HAVE HAD , DONE SIMILAR CRIMES, E ND UP WITH SENTENCES WHICH ARE LESS THAN LIFE WITHOUT THE POSSIBILITY OF PAROLE? ARE THEY P LEA BARGAINS? IS THAT WHAT HAPPENS?

I THINK A LO T OF THEM WERE SENTENCED BE FORE , BEF ORE THIS , THE LIFE MEANT L IFE, BUT WHAT IS HAPPENING WITH THEM NO W, IS , UNDER THE SEXUAL PREDATOR ACT , THEY ARE BASICA LLY, THE ON ES THAT ARE GETTING OUT OF PRISON ARE BASICALLY GOING BA CK IN , UNDER THE C IVIL COMMITMENT A CT, SO THEY ARE NOT BEING LET LOOSE IN SOCIETY.

NO , THEY ARE NOT, THEY ARE GETTING THE PUNISHMENT A FTER THE FACT , UNLESS YOU L OOK AT CI VIL COMMITMENT AS NOT PUNISHMENT.

CORRECT. CORRECT. SO IN A NUTSHELL , THE STATE'S POSITION ON THIS IS THAT THIS I S A VERY SERIOUS CRIME. THE LEGISLATURE HAS SET THE PENALTY. THE PENALTY IS NOT GROS SLY DISPRO PO URS DISPROPORTIONATE TO THE CRIME AND THEREFORE IT IS NOT UNCONSTITUTIONAL , AND WE WOULD AS K THE COURT TO AFFIRM THE DECISION BELOW. THANK YOU .

CHIEF JUSTIC E: REBUTTAL.

I HAVE ONE MIN UTE . I DON'T KNOW HOW TO USE IT.

LET ME JUST SAY THAT THE STATE IS MISTAKEN IN ITS SUGGESTION OF THAT A SENTENCE LONGER THAN 30 YEARS CAN BE IMPOSED FOR AGGRAVATED BATTERY ON A CHILD OR AGGRAVATED CHILD ABUSE. 30 YEAR S IS THE MAXIMUM , UNLESS THERE IS THE BASIS FOR A HABITUAL OFFENDER SENTENCE, WHICH THEN CAN BE MORE , BUT THAT IS THE SENTENCE FOR THE OFFENSE, SO SOME SOMEBO DY C UT OFF THIS CHILD'S HAS NOT FOR STEALING CHILD'S HAND FOR STEAL , THEY WOULD GET 3 0 YEARS , AND IN ORAL CONTACT IN THIS CASE, IT IS LIFE WITHOUT PAROLE.

ISN'T THAT JUST A GOOD ARGUMENT TO C HANGE THE STATUTE TO HAVE LIFE WITHOUT PAROLE FOR CU TTING OFF THE CHILD'S HAND ? THAT DOESN'T HELP US VERY M UCH, DOES IT , WITH REFERENCE TO THIS ISSUE?

THE QUESTION IN THIS CASE IS WHETHER THE SENTENCE THAT HAS BEEN IMPOSED IN THIS CASE, IS DISPROPORTIONAL TO THE OTHER SENTENCES THAT THE LEGISLATURE HAS AUTHORIZED . AND YOUR ARGUMENT RUNS IT IN REVERSE, BUT I DON'T THINK YOUR ARGUMENT DEALS WITH THE QUESTION OF WHETHER THIS SENTENCE IS DISPROPORTIONAL.

BUT ISN'T THE TRUTH OF THE MATTER IS THAT OUR SOCIETY HAS ALWAYS REGARDED THE SEXUAL OFFENDERS OR SEXUAL OFFENSES NEXT IN STATUS, PERHAPS, TO FIRST-DEGREE MURDER , AND WITH THE EXCEPTION OF THE U.S. SUPREME COURT INVALIDATING THE DEATH PENALTY WITH REFERENCE TO THE SEXUAL ASSAULT OF AN ADULT WOMAN, IT MORE OR LESS HAS LEFT THE STATES FREE TO SELECT THE PUNISHMENTS FOR THESE SEXUAL OFFENSES , ESPECIALLY INVOLVING CHILDREN.

WELL, I CERTAINLY DON'T DISAGREE THAT THESE ARE SERIOUS OFFENSES , BUT I THINK THAT THEY CAN BE PREVENTED AND DETERRED WHILE , ALSO , DISTINGUISHING ONE FROM THE OTHER AND IMPOSING SENTENCES THAT ARE PROPORTIONAL. COKER IS, IN MY OPINION , THE BEST CASE ON PROPORTIONALITY. COKER SAYS THAT YOU CAN'T IMPOSE THE DEATH PENALTY FOR RAPE, BECAUSE IT IS DISPROPORTIONAL , AND THE CIRCUMSTANCE HERE IS THAT THE SENTENCE THAT IS IMPOSED HERE, IS NOT THE NEXT THING TO MURDER.

THAT IS THE RAPE

IT IS THE SAME THING.

THAT IS THE RAPE OF AN ADULT WOMAN. IS THAT CORRECT?

THAT'S CORRECT. BUT BEAUFORD HELD, THIS COURT HELD THAT THE SAME RULE APPLIES TO THE RAPE AFTER CHILD.

CHIEF JUSTICE: YOUR ONE MINUTE HAS EXPIRED . THANK YOU BOTH, FOR YOUR PARTICIPATION IN THIS ORAL ARGUMENT. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RISE.