
IN THE
Supreme Court of the United States of America

October Term, 2000

STEVEN BAYLOR,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

***ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE***

~ BRIEF OF PETITIONER ~

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by the Justice and attorneys involved, hereinafter referred to as the “petitioner” versus the “State.” Letters of Consent of both parties have been filed with the Clerk of this Court.

Statement of Case

Steven Baylor is fifteen years of age and has been convicted in the state of Tennessee for the rape of an eleven year-old girl under Tennessee Code Annotated § 39-13-503. Baylor has a previous criminal record as a repeat sex offender, and as part of a plea bargain arrangement, he agreed to be surgically castrated in return for probation and no prison time.

With the firm belief that this plea bargain is inherently coercive and that its realization would violate both Mr. Baylor's Eight Amendment and privacy rights, the American Civil Liberties Union has filed suit on his behalf. Both the District and Appeals Courts have denied Mr. Baylor's appeal and upheld his plea bargain agreement. Baylor now seeks a just verdict from the United States Supreme Court.

Constitutional and Statutory Laws Involved

Tennessee Code Annotated § 39-13-503 (2000): Rape

United States Constitution

Article III, § 2

First Amendment

Third Amendment

Fourth Amendment

Fifth Amendment

Eighth Amendment

Ninth Amendment

Fourteenth Amendment

Summary of Argument

Mr. Baylor, the petitioner in this case, does not contest his conviction of rape under Tennessee Code Annotated § 39-13-503. It is the punishment instituted by the state of Tennessee that we find inhumane and unconstitutional. The United States Constitution guarantees that its citizens will be protected from “cruel and unusual punishments” in the Eighth Amendment, and the Supreme Court has recognized that Americans also have a constitutional right of privacy, in which the government may not intrude without compelling state interest and showing that its actions are of the least means available. It is our contention that surgical castration, imposed upon a repeat sex offender as a condition of his probation, violates these fundamental constitutional guarantees. We also assert that the terms of the plea bargain in this case were inherently coercive in their nature, and that the Court must hold Mr. Baylor’s choice of castration, probation, and no prison time in place of incarceration invalid as a result.

Castration, in several forms, is becoming more and more popular as a punishment and term of probation for sex offenders in states throughout this nation. A reaction to public fears stemming from high profile cases of child molestation and murder, sterilization statutes for sex offenders are currently in place in eight states—most in severe violation of prisoners’ Eighth Amendment and privacy rights. The Court must halt this injustice now.

There are those who would argue for the state of Tennessee that surgical castration is a medical treatment being used to help rehabilitate the offender and make him less of a danger to others. It is our strong assertion that this procedure is in fact a type of punishment, meeting all of the qualifications of the *Rennie* test established in *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), and as such, violates Mr. Baylor’s Eighth Amendment rights. Surgical castration results in permanent mutilation, adverse health effects, and there is no concrete evidence that it can

indeed guarantee, or even increase the likelihood, that a sex offender will not strike again.

Although *Trop v. Dulles*, 356 U.S. 86 (1910) allows for “evolving standards of decency” in determining what punishment is cruel and unusual, it is our contention that mutilation has never, and will never, be accepted by our society as a dignified means of punishment. Lower courts have held compulsory sterilization unconstitutional, and the Supreme Court of South Carolina has ruled unanimously that surgical castration as a term of probation violated the Eighth Amendment in *State v. Brown*, 326 S.E. 2d. 410 (S.C. 1985). A verdict for Mr. Baylor in this case is then a logical extension of the reasoning of these courts.

Not only is surgical castration cruel in its very nature, however, it is even more barbaric in this case because we are dealing with a fifteen year-old child offender. In direct violation of what the Court defined to be acceptable punishment in *Solem v. Helm*, 462 U.S. 277 (1983), the state of Tennessee has deemed it suitable to impose an irreversible surgical procedure on a child that will deny him all hopes of having children in the future and will subject him to numerous adverse effects, when there is no proven therapeutic value! We find such a notion to be repulsive- and unconstitutional in its disproportionate nature.

Further, the Court has accepted an implied right to privacy in the “penumbras,” or shadows of the First, Third, Fourth, Fifth, and Ninth Amendments and incorporated that right to the states in *Griswold v. Connecticut*, 381 U.S. 479 (1965). We assert that although the courts have never guaranteed the right to have a sex drive, the Court has included the right to procreate in an individual’s protected “zone of privacy” in *Eisenstadt v. Baird*, 405 U.S. 438, (1972). Mr. Baylor, however, will be denied this fundamental right if the terms of his plea bargain agreement are carried out. While we concede that privacy rights may be taken away in certain instances by the state, the Court has held that such an encroachment must satisfy the terms of strict scrutiny.

We argue that there is no compelling state interest when there is no scientific proof of any guaranteed benefit to society, and that the less intrusive punishment of imprisonment may in fact do more to ensure government interests in protecting society and reducing criminal actions.

Finally, in addition to our assertion that surgical castration in this case violates Mr. Baylor's Eighth Amendment and privacy rights, we also contend that the procedure is not a valid condition of a probation whose purpose should be rehabilitation, and not punishment, and that in keeping with the precedent of a number of lower court decisions, the plea bargain agreement must be held invalid because of its inherently coercive nature. This coercive nature of the arrangement is even more glaring when Mr. Baylor's age is taken into account. In this case, the state wishes to argue that a fifteen year-old boy can make an objective and informed decision between incarceration that will most likely rob him of most of his young adult life-- and immediate freedom if he submits to a surgical procedure. We argue that the option of a long prison sentence is in fact a "threat," as defined in a New Jersey court ruling in *Wolf v. Marlton Corporation*, 154 A. 2d. 625 (N.J. 1959), that renders such a decision on the part of Mr. Baylor involuntary, and unacceptable to this Court. We ask that the Court remand Mr. Baylor's plea agreement for sentencing terms in keeping with the precepts of our Constitution.

Argument

I. Standing

This case arises from the state of Tennessee. Having lost on appeal at both the district and appeals court levels, Mr. Baylor seeks a final ruling by the United States Supreme Court. Pursuant to Article III, § 2 of the United States Constitution, which defines the jurisdiction of the Supreme Court to include all “cases and controversies” arising under the Constitution itself, jurisdiction for this case is further established. *Baylor v. Tennessee* involves controversies concerning the cruel and unusual punishment clause of the Eighth Amendment, incorporated to the states through the due process clause of the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962), and the privacy rights acknowledged by the Court in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments and incorporated to the states in *Griswold v. Connecticut*, 381 U.S. 479 (1965). These issues, as they relate to punitive surgical castration, have yet to be resolved clearly and concisely by the courts. *Baylor v. Tennessee* also deals with concerns regarding the procedures and practices of the judicial system in terms of coercion in sentencing and probation that must be clarified by the highest court before further injustice occurs.

The petitioner, Mr. Baylor, is indeed an adverse party in this case and he has demonstrated a vested interest, as demanded in *Frothingham v. Mellon*, 262 U.S. 447 (1923), in claiming direct injury through the denial of his Eighth Amendment and privacy rights. Few injuries, if any, can be more direct or personal than an invasive and irreversible surgical procedure like castration. However, as the procedure has not yet taken place, the Supreme Court can remedy this situation by overturning the plea bargain agreement and remanding Mr. Baylor’s case for a sentence consistent with the terms of the Constitution. Castration as a punishment for

sex offenders and an option for probation is becoming widely popular throughout the United States as legislators clamor to answer public outcry to recent high profile cases of child molestation and murder. However, in their rush to please constituents and subdue the “monsters” that plague society, politicians have disregarded the Constitution and the values upon which this nation was founded. Through this case, the Supreme Court can finally negate *all* punitive surgical castration as cruel and unusual punishment and a violation of prisoners’ rights to privacy.

II. Implications for the United States

A. Brief History of Sterilization

Castration as a form of punishment is not a new phenomenon. Compulsory sterilization has existed for thousands of years in many nations and cultures throughout the world, including ancient Greece. However, more recent compulsory sterilization was used primarily as a means of selective breeding and emerged as a direct result of the eugenics movement that began in the latter half of the nineteenth century. Seeking to eliminate social problems through genetic control, eugenicists called for programs of sterilization to eliminate reproduction for the “unfit.” Compulsory sterilization of the mentally retarded, alcoholics, and criminals gained widespread popularity throughout the United States in the 1890s, and in 1907, Indiana became the first state to enact sterilization legislation.¹ Washington, California, Nevada, and Iowa followed with statutes allowing for sterilization as a means of punishment for sex offenders and criminals.²

Before 1927, lower courts treated compulsory sterilization with the revulsion it deserves and invalidated such laws as violations of the equal protection or due process clauses of the Fourteenth Amendment because of their singling out of a specific group.³ However, in an

infamous decision, the Court legitimized involuntary sterilization of the mentally retarded in *Buck v. Bell*, 274 U.S. 200 (1927). We maintain that this practice of sterilization of the mentally retarded, like that of the Nazis in World War II, is abhorrent and no doubt unconstitutional, but it is also our assertion that *Buck* cannot be extended to include the castration of sex offenders. *Buck* dealt specifically with the eugenic sterilization of a woman patient and did not address punishment, the cruel mutilation of castration, or the privacy rights of the individual.

B. A Current Problem

Today, punitive sterilization by castration is unfortunately enjoying a resurgence of popularity as an alternative sentencing device for sex offenders here in the United States, and abroad. As the Court is no doubt aware, the media has given extremely high publicity to recent cases of child molestation and murder. Polly Klaas and Megan Kanka, the namesake of “Megan’s Law,” are familiar to many Americans, and their stories induced widespread fear, rage, and panic when it was made known that their attackers were repeat offenders.⁴ The stories of these two young girls, and those of all victims of sexual violence, are indeed gruesome and frightening. Perhaps, on an emotional level one can justify any punishment for sex offenders and any means by which legislation could protect children or other potential victims. However, the Constitution was designed to prevent such emotional and irrational conclusions, and we must remember that even criminals have basic human rights and guarantees as citizens of this nation.

Despite the fact that statistics show a decline in rape and other violent sex crimes, high profile cases have nevertheless propagated the popular belief that sexual violence is on the rise, and have led legislators to respond to public outrage with a series of laws that deny the rights of a few in a misguided attempt to protect the majority. In 1996, California became the first state to mandate chemical castration for repeat sex offenders.⁵ Since that time, seven additional states:

Florida, Georgia, Iowa, Louisiana, Montana, Oregon, and Wisconsin have all added castration laws, and Alabama is currently debating the issue under Governor Don Siegelman.⁶

Given this appalling trend toward injustice and a return to the “medieval” days of torture and physical mutilation, rejected by the Founding Fathers, we feel it imperative that the Court consider Mr. Baylor’s case and resolve this national issue. The defenders of such punitive practices point to low rates of recidivism as a result of castration and a safe society once sex offenders are stripped of their “urges.”⁷ However, it is our contention that not only is castration cruel and unusual punishment that denies a man his fundamental human rights, it is by no means a “treatment” for sex offenders. Given the mixed results of recidivism studies and cases where castrated offenders have committed additional sex crimes, such a belief that castration is part of a larger plan of rehabilitation can only lull society into a false sense of security.

C. Now *Baylor v. Tennessee*

Mr. Baylor’s case is a clear one. Surgical castration as a term of probation is cruel punishment that violates fundamental human rights, including the right to privacy. It is also our contention that the offer of castration in return for probation and no prison time is inherently coercive, and that no choice made by Mr. Baylor can be shown to satisfy the terms required for informed consent reviewed by the court in *Canterbury v. Spence*, 409 U.S. 1064 (1972).

As counsel for Mr. Baylor, we seek justice first for his situation. However, this case also exemplifies a larger national issue of injustice that the Court has the power to resolve if it sees fit. Our judicial system was never meant to institute barbaric policies that deny fundamental rights to a few with the *hope* that these actions might protect the majority.

III. Cruel and Unusual Punishment

A. Description of Castration

Before we address the issue of how surgical castration classifies as cruel and unusual punishment, we feel that it is necessary for the Court to understand what is involved in such a procedure. Surgical castration entails the complete removal of the testicles, where testosterone is produced.⁸ This reduction in testosterone does not prevent an individual from being able to achieve an erection or have intercourse, but it does reduce the sex drive and result in irreversible sterilization. Lower levels of testosterone also result in a number of side effects that can include “perspiration, loss of facial and body hair, weight gain, and softening of the skin.” Studies analyzing the effectiveness of surgical castration have shown that such a treatment will probably have a limited effect in the treatment of rapists and sex offenders driven to commit their crimes not by their sex drives or certain “urges,” but rather through anger and rage.⁹ Given the fact that castrated individuals can still participate in intercourse, this is a very dangerous prospect for sex offenders who are released with little to no jail time because it is believed that their castration has rendered them “cured” or “harmless to society,” simply by reducing their sexual desire.

B. Treatment?

There are those who would argue for the respondent that castration as a term of probation in this case is not being used as a method of punishment, but that it is instead a means of treatment, or a way to facilitate rehabilitation by removing a sex offender’s “urges” that does not classify under the Eighth Amendment. Again, before addressing the specifics of this amendment, we will address the issue of treatment first for the Court. A previous federal court ruling established a method of examining whether or not a medical procedure classified as punishment or treatment in *Rennie v. Klein*, 462 F. Supp. 1131, 1143 (D.N.J. 1978). In examining whether the forced administration of a drug to an inmate in a state hospital was

treatment outside the limitations of the Eighth Amendment, the court examined first, whether the drug had therapeutic value, whether it was an accepted medical practice, whether it was part of an ongoing treatment program, and finally, whether the negative effects were unnecessarily harsh compared with the benefits. We can address surgical castration in a similar way to show that it in fact does not constitute medical treatment or rehabilitation for the sex offender.

First, it is our contention that the castration of Mr. Baylor would have no therapeutic value. As stated previously, the results of scientific investigations into the effectiveness of castration on rehabilitating sex offenders are inconclusive and mixed. One must first assume that there is some “biomedical cause” for sex crimes and that a surgical procedure can remedy that cause. Some studies claim a high rate of reduction in recidivism after castration, but no investigations are accepted as absolutely conclusive and many caution that reducing testosterone does not eliminate the rage and hostility that drives many sex offenders to commit their crimes. Distinguishing between those who commit their acts as a result of strong desire and those who are driven by anger and violence can be next to impossible, and one mistake will set an offender free in society to commit his crimes once more. Some opponents of castration point out that even if an offender is deprived completely of any sex drive, “rapes have been committed with broomsticks, coke bottles—any blunt object.”¹⁰ Violence is a potential for which castration is no cure. There are simply no concrete therapeutic benefits for Mr. Baylor in choosing castration-- which leads to the second question of whether this is accepted medical treatment.

Surgical castration, alone, is indeed an accepted medical treatment for conditions such as prostate cancer,¹¹ however there has been no widespread acceptance of castration of sex offenders in the medical community. In fact, there have been cases where court-ordered castration could not be carried out because physicians could not be found who would perform the

procedure.¹² Third, there is no evidence that this castration is offered in conjunction with any long-term therapy program. And finally, given the fact that there are no proven benefits for Mr. Baylor, the negative side effects of such a procedure, the disfigurement, humiliation, weight gain, and loss of hair would simply add to the unnecessary harshness of such a practice. Surgical castration fails to meet any of the criteria used by the court for classification as treatment. Castration is a punishment inflicted by the court system as a term of probation in this case and has no value as a tool of rehabilitation.

C. Mutilation is Cruel

The Eighth Amendment of the United States Constitution reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” It is our contention that the Court must find the surgical castration of Mr. Baylor to be a violation of his constitutional protection from cruel and unusual punishment. This protection is demanded of the states, as well as the federal government, due to the incorporation of the ban on cruel and unusual punishment through the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962).

i. Unique and Irreversible Punishment

Castration falls well within the Court’s definition of punishment, as outlined in *Farmer v. Brennan*, 511 U.S. 825 (1994): “Punishment, from the time of the founding through the present day, has always meant a fine, *penalty*, or confinement inflicted upon a person by the authority of the law and the *judgement and sentence of a court*, for some crime or offense committed by him....” The Court has also made a distinction between the application of the Eighth Amendment to non-capital offenses and the death penalty in *Rummel v. Estelle*, 445 U.S. 263 (1980), citing *Furman v. Georgia*, 408 U.S. 238 (1972) in stating: “The penalty of death differs

from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.” In *Rummel*, the Court concluded that the Eighth Amendment was applicable only to penalties that met this “unique nature.” However, this uniqueness in irreversibility is also applicable to surgical castration in Mr. Baylor’s case. Once he has undergone this procedure, there is no return to a completely normal life. He will suffer mutilation, the negative side effects of lowered hormone levels, and the fact that he has been denied a basic human right to procreate and have children.

ii. Barbaric Punishment

Although castration is becoming more and more common as a means of punishment, the Court has shown in cases like *Wilkerson v. Utah*, 99 U.S. 130 (1879) and *In re Kemmler*, 136 U.S. 436 (1890), that the Eighth Amendment does not prohibit specifically unusual punishments, but rather those that are excessively cruel. Thus, we will focus the remainder of our argument primarily on the cruelty and brutality of surgical castration.

The Eighth Amendment was instituted to prevent punishments like torture and mutilation that were seen as “barbaric.” However, the Court has recognized in *Trop v. Dulles*, 356 U.S. 86, 101 (1910) that what society deems “barbaric” can change over time. According to Chief Justice Warren, “[t]he amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society.” It is our contention, however, that our society has not, and does not, condone mutilation or the inhuman treatment of its citizens. To accept such methods of punishment would in fact be a *regression* to medieval practices that have never been accepted in our American culture. *Trop* also stated that: “[t]he basic concept underlying the Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment

stands to assure that this power be exercised within the limits of civilized standards.” Again, it is our contention that physical mutilation will never be “dignified” or “civilized” in this society.

Sterilization as punishment is barbaric and cruel, and has been held as such by the lower courts. In *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914), an Iowa Federal District Court overturned a statute mandating vasectomies for criminals convicted twice for a felony as a violation of the cruel and unusual punishment clause because of the humiliation that would result in the offender. Similarly, a Nevada District Court halted the vasectomy of a rapist in *Mickle v. Henrichs*, 262 F. 687 (D.C. Nevada 1918) because “while vasectomy in itself is not cruel... when resorted to as punishment, it is ignominious and degrading, and in that sense it is cruel.” If vasectomies, a procedure that does not result in disfigurement and the side effects of lowered testosterone levels, can be held as cruel and unusual, then surely we can extend that classification to the harsh nature of surgical castration!

Indeed, the Supreme Court of South Carolina has ruled unanimously in *State v. Brown*, 326 S.E. 2d. 410 (South Carolina 1985) that surgical castration is unconstitutional. Given a choice between 30 years in prison or a suspended sentence and five years probation with an agreement to surgical castration, all three rapists convicted in the case chose castration in order to avoid prison time.¹³ The court ruled that surgical castration was physical “mutilation,” and as a result, it was cruel and degrading and in violation of the Eighth Amendment’s protection. We agree wholeheartedly with this decision.

iii. Disproportionate Punishment

Further, the Court established in *Weems v. United States*, 217 U.S. 349 (1910) that a punishment disproportionate to the offense for which it is imposed violates the Eighth Amendment. Here, we contend that where a prison sentence is the standard penalty for sex

offenders, surgical castration violates the disproportionality test as well. “Proportionality” is a difficult issue to define. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court defined punishment as excessive if it was disproportionate to the crime committed and a less severe punishment existed that could achieve the same purpose.

On an emotional level, perhaps an irreversible procedure with negative side effects and no proven benefit approaches “proportionality” with a gruesome offense like rape or child molestation. The victim in this case was an eleven year-old girl. However, we would also call the Court’s attention to the fact that Mr. Baylor is only a fifteen year-old boy. Prior to this point, we have not used Mr. Baylor’s age in arguing the cruel and barbaric nature of castration because it is our firm assertion that such a procedure is inherently brutal and contrary to the values of our society no matter one’s age or status. We also maintain that surgical castration is a disproportionate punishment for offenders of all ages, but in this case, it is glaringly so. Here, the victim was a child, but so was the offender. Physical, irreversible mutilation of a child that will deny him all hope of future procreation and subject him to adverse health effects, with NO proven rehabilitative result is repulsive. Our nation was not founded on the principle of “an eye for an eye.” We do not steal from thieves, rape rapists, or kill all those who kill. Punishment is meant to provide for the safety of the population as a whole. Here, the surgical castration of a child carries no guarantee that Mr. Baylor will not commit another offense. The less invasive and intrusive alternative of a prison sentence carries a much stronger guarantee that a sex offender cannot cause harm. Clearly, physical disfigurement of a child is disproportionate to the offense that he has committed and violates the very purpose and nature of constitutional punishment.

IV. Fundamental Rights

A. Zone of Privacy

Although there is no express mention of privacy as a guaranteed right in the United States Constitution, the Court has acknowledged an implied right to privacy since *Boyd v. United States*, 116 U.S. 616, 630 (1886). In *Boyd*, the Fourth and Fifth Amendments were deemed applicable to “all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life... the invasion of his indefeasible right of personal security, personal liberty, and private property.” This right to privacy was later extended to the states through the Fourteenth Amendment due process clause in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* developed this “zone of privacy” and gave it classification as a *fundamental* right, in which the government cannot interfere without compelling state interest. It is not our contention that the right to privacy is absolute in all cases. However, as established in *Roe v. Wade*, 410 U.S. 113, 155 (1973), if privacy is denied an individual, then state action is subject to strict scrutiny, and the state must prove both that it has a compelling interest in the matter, and that it has operated in the least intrusive means possible. We assert that in this case, the state’s action of attempting to surgically castrate Mr. Baylor as a form of punishment violates his fundamental privacy rights and does not meet strict scrutiny.

B. Right of Procreation

Although the Court has not ruled that an individual has a “right” to have a sex drive, it recognized “the right of the individual to... engage in any of the common occupations of life, to marry, establish a home and bring up children...” in *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court later declared procreation to be a *fundamental* right in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) when it held that sterilization of repeat criminals violated the equal protection clause

of the Fourteenth Amendment. The Court then went even further to extend the fundamental “zone of privacy” to include procreation in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) when it stated that privacy must embrace the right of the “individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Roe v. Wade*, 410 U.S. 113 (1973) reinforced this defense of procreation as a part of an individual’s right to privacy, as did *Paul v. Davis*, 424 U.S. 693 (1976).

Thus, the surgical castration of Mr. Baylor, which would indeed deny him all ability to have children of his own in the future by rendering him irreversibly sterile, is a violation of his *fundamental* right of procreation as established by the Court. This right to procreate is guaranteed by the Court’s defense of an individual’s inherent right to privacy, and as such, any state action to take away such a right is subject to strict scrutiny. First, is there a compelling state interest in having Mr. Baylor surgically castrated and denying the right to have children in the future? The government does indeed have a strong interest in reducing crime, specifically sex crimes in this case, and in providing for the safety of the general public. However, as we have asserted previously, there is no conclusive evidence that castration will make a sex offender less of a danger to society or that it can guarantee that he will not strike again. Given the questionable efficacy of such a procedure, the state cannot contend that castration will reduce crime or place the public at less of a risk of harm-- and the state cannot contend that it has a compelling interest in denying Mr. Baylor his future ability to procreate for the benefit of an “experiment” by the state. Secondly, are there less intrusive means of accomplishing the government’s goals of reducing crime and providing for public safety? Once again, the less invasive sentence of time in prison is not only an option, but it is also more likely to guarantee

the state that a sex offender will not have the opportunity to cause harm by removing them from society! Surgical castration, then, clearly fails both prongs of strict scrutiny and violates Mr. Baylor's fundamental rights of procreation and privacy.

V. Terms of Probation

A. Valid Condition?

In addition to our claims that the surgical castration of Mr. Baylor is a violation of his Eighth Amendment and privacy rights under the Constitution, it is also our contention that castration is not a valid condition of probation that may be used by the court system. Terms of probation are normally concerned with rehabilitating an offender, and not with punishment. In accordance with these underlying values, the American Bar Association's Standards for Criminal Justice allows a judge to impose medical and psychiatric treatment on criminals as a term of their probation.¹⁴ However, as we have asserted previously, surgical castration is not a form of treatment, but rather a punishment with no proven rehabilitative worth, and it in no way guarantees that an offender will not repeat his behavior in the future. In fact, in this case, castration was offered in return for no prison time, even though Mr. Baylor is a repeat sex offender. Such a plea bargain arrangement could in fact place society at even more of a danger in lulling the public to believe itself secure, while sex offenders are set free with shorter, or no prison sentences. Surgical castration simply has no value as a probationary measure or option.

B. Inherent Coercion

In a number of lower court decisions, it has been made very clear that probation does not have to be accepted by an individual.¹⁵ The state of Tennessee will no doubt argue that castration in this case was by no means compulsory, and that Mr. Baylor chose his terms of probation and did not have to accept surgical castration. However, it is our firm assertion that

Mr. Baylor's choice was not completely voluntary, that it was in fact inherently coerced, and as such, it must be held invalid by the Court.

If an offender agrees to submit to a medical procedure as a term of probation, courts have held that he or she must give "informed consent" as outlined in *Canterbury v. Spence*, 464 F. 2d. 772 (D.C. Cir. 1972) and reviewed by the Supreme Court later the same year. Informed consent requires that the offender be advised of all side effects and risks that can result from a medical procedure before making his or her choice. In this case, then, Mr. Baylor must be informed of the irreversibility of surgical castration and the adverse effects that occur due to the lowered levels of testosterone prior to making a plea bargain agreement. However, the underlying principle for such a requirement is "individual autonomy," or what *Canterbury* termed the right of "every human being of adult years and sound mind... to determine what shall be done with his own body." *Id.* at 778. Here, we would remind the Court once again of the age of the petitioner in this case. While *Canterbury* allows for *adults* to make such informed decisions, Mr. Baylor is only a child, and is in no way mature enough or fit to make such life-altering decisions as to whether he is prepared to take on an irreversible procedure that will result in disfigurement and the denial of any future possibility of children.

In addition, there is also considerable lower court precedent to show that when confronted with the choice between a medical procedure and little to no prison time on one hand, and a long term of incarceration on the other, there is an element of coercion in such options that renders an offender's consent involuntary. In *Wolf v. Marlton Corporation*, 154 A. 2d. 625 (New Jersey 1959), the court found that consent is involuntary when any "threats" are made that prevent an individual from acting freely. In this case, a long prison term for a fifteen year-old boy can easily be seen as a "threat." When given the choice between spending all of his young

adult years behind bars or accepting surgical castration and living a free life, few individuals of such an immature age and lack of a vision of a protracted future would think twice about the irreversibility and negative effects of such a procedure. Mr. Baylor, a child, was not allowed to act freely. Rather, he was coerced by the state into making the decision they wished to see made. Another court ruling arising from the state of Michigan sheds additional light on this situation. In *Kaimowitz v. Department of Mental Health*, Civil No. 73-19434-AW, summarized at 42 U.S.L.W. 2063 (July 31, 1973), the court ruled that a mental patient could not give voluntary consent to experimental surgery due to the inherent coercion involved in the fact that the patient's release was dependent on that surgery. This case deals with a similar situation. Mr. Baylor faced a long prison term, and his release was dependent on his agreement to an invasive surgical procedure with questionable benefits. The added factor of Mr. Baylor's immature age makes the plea bargain agreement here all the more coercive, and completely invalid and unjust.

Conclusion

If justice is to prevail in this case, the Court must find for the petitioner and overturn Mr. Baylor's plea bargain agreement. We have shown that surgical castration is cruel and unusual punishment, that it violates an individual's constitutional rights to privacy, and by extension, procreation, and that this plea arrangement was coerced from Mr. Baylor. We have shown how castration as a means of punishment is spreading in popularity throughout the United States. One by one, additional states add punitive castration laws to their rolls as legislators clamor to provide their constituents with the reassurance that the victims they hear of in the news will not be their children, their grandchildren, or the little girl next door. This injustice must stop.

Fear and emotion cannot form the basis of our sentencing of criminals. Our nation was not founded on the principles of "an eye for an eye" or retribution. Rather, the purpose of punishment is to rehabilitate the offender if possible, or provide for the safety of society by preventing future criminal acts. We have described for the Court what is involved in the process of surgical castration. We have shown the Court that surgical castration has no proven rehabilitative value and that it must be classified as a punishment, rather than a treatment under the *Rennie* test. We have also shown that the surgical procedure is a barbaric form of mutilation when not performed out of medical necessity, and that the process in fact, causes more harm to the offender than any guaranteed benefit and violates his fundamental Eighth Amendment right to be protected from cruel and unusual punishment.

In addition, we have also shown that the age of Mr. Baylor renders such mutilation all the more repulsive in its nature. Today, many cringe in revulsion at the horrors of medieval torture or the eugenics practiced by Hitler in Germany during World War II. How, then, can this society

or the Court validate the disfigurement of a child, the removal of his testicles, replete with all the adverse side effects of a life as a man with low levels of testosterone, and the denial of any future ability to have children when there are no proven benefits for the offender or the general public?

Yet, the faults of punitive surgical castration do not end with Eighth Amendment guarantees. Rather, we have shown that castration violates the fundamental right of procreation that the Court has incorporated into its guarantee of a “zone of privacy” for individuals in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), an established that government may not interfere in this “zone” without showing compelling state interest and that its action satisfies the least means test. We then went further to demonstrate for the Court that surgical castration fails these precepts of strict scrutiny because it can show no established benefit for the health and safety of society, and the less intrusive punishment of imprisonment exists.

Lastly, we have shown the Court why surgical castration should not be used as a term of probation and how the very nature of such an option in return for little to no prison time is, in fact, inherently coercive, and that no choice of castration in these instances can be accepted as an informed, free, and voluntary decision. Once again, the young age of the petitioner makes this agreement all the more abhorrent in its coercion. Mr. Baylor is not an adult that can make such life-altering decisions, especially when that decision has the “reward” of freedom if chosen, or the “punishment” of a long prison term if rejected. Lower court precedent has shown us what logic and reason must lead the Court to conclude: such agreements are unjust.

Mr. Baylor was coerced into the terms of his plea bargain arrangement. The very nature of these terms, combined with the petitioner’s young age must render his decision involuntary and unacceptable to this Court. We ask that the Court classify the surgical castration of sex

offenders for what it truly is: cruel and unusual punishment under the Eighth Amendment of the Constitution and a violation of an individual's right to privacy and procreation. Thus, we request that the Court remand Mr. Baylor's sentence for terms suitable under the Constitution: namely, incarceration and rehabilitation.

Respectfully Submitted,

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