IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1978

NO. _____

RAYMOND A. HELGEMOE, WARDEN,
NEW HAMPSHIRE STATE PRISON, ET AL.,
Petitioners

V.

THOMAS E. MELOON,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioners, Raymond A. Helgemoe, Warden, New Hampshire State Prison, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding

on October 31, 1977.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 564 F.2d 602 (1st Cir. 1977) and a copy of that Opinion is appended hereto as Appendix A. The Opinion of the District Court, which granted Respondent's Petition for Writ of Habeas Corpus and was affirmed by the First Circuit, is not reported; a copy of that Opinion is appended hereto as Appendix B. The Opinion of the New Hampshire Supreme Court which upheld Respondent's conviction is reported as State v. Meloon, 116 N.H. 669, 366 A.2d 1176 (1976). A copy of the Opinion is appended hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 31, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

I. WHETHER NEW HAMPSHIRE REVISED STATUTES ANNOTATED 632:1, I-c, WHICH MAKES IT UNLAWFUL FOR A MALE TO HAVE SEXUAL INTERCOURSE WITH A FEMALE NOT HIS WIFE WHO IS LESS THAN FIFTEEN YEARS OLD, OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATUTORY PROVISION INVOLVED

New Hampshire RSA 632:1 states in pertinent part:

> "632:1 Rape.
> I. A male who has sexual intercourse with a female not his wife is guilty of a class A felony if . . .
> (c) the female is unconscious or less than fifteen years old . . . ."

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the First Circuit's affirmance of an Opinion by the United States District Court for the District of New Hampshire granting Respondent's petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. The Opinions of both the Circuit Court and the District Court held that New Hampshire's statutory rape law (RSA 632:1, I-c), under which Respondent was convicted, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Respondent, Thomas E. Meloon, and the prosecutrix, Susan D. Souriolle, first met in Portsmouth, New Hampshire during late August or early September of 1973. At the time of this meeting, the prosecutrix

was thirteen years of age; the Respondent was twenty-four. On three separate occasions thereafter, the Respondent and the prosecutrix engaged in consensual sexual intercourse. Respondent was then arrested, charged, indicted, and on May 21, 1974, convicted of statutory rape pursuant to New Hampshire RSA 632:1, I-c. (This statute was repealed and replaced on August 6, 1975, with RSA 632-A, a gender neutral law.)

Respondent's conviction was upheld on direct appeal to the New Hampshire Supreme Court, which considered and explicitly rejected Respondent's equal protection claims. See Appendix C. However, the United States District Court for the District of New Hampshire subsequently granted Respondent a writ of habeas corpus on the ground that New Hampshire's statutory rape

law, RSA 632:1, I-c, violated the Equal Protection Clause of the Fourteenth Amendment. See Appendix B.

The judgment of the District Court was affirmed by the United States Court of Appeals for the First Circuit on October 31, 1977. See Appendix A.

REASONS FOR GRANTING THE WRIT

I. IN HOLDING THAT NEW HAMPSHIRE'S STATUTORY RAPE LAW, RSA 632:1, I-c, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The law under which the Respondent was convicted, RSA 632:1, I-c, made it unlawful for any male to have sexual intercourse with a female not his wife who was less than fifteen years old. The District Court, in striking down this statute, became the first court in the nation to hold any statutory rape law unconstitutional on equal protection grounds. The Court of Appeals then affirmed. Petitioners respectfully submit that the decisions of the District Court and the Court of Appeals are erroneous.

These decisions present this Court with the unique opportunity not only to address the first impression issue of the constitutionality of a gender based statutory rape law vis-a-vis the Equal Protection Clause, but also to reanalyze and clarify the unsettled question of what is the correct equal protection test to apply to statutory classifications based on sex.

Few areas of the law have troubled this Court as much in recent years as has the problem of testing statutory classifications based on sex against the Equal Protection Clause of the Fourteenth Amendment. There are, of course, two traditional tests to which constitutionally challenged statutes under the Equal Protection Clause have been subjected -- rational basis and strict scrutiny. Under the rational basis

standard a state is entitled to make reasonable classifications among persons upon whom benefits are conferred or burdens imposed, and the equal protection safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. See, e.g., Dandridge v. Williams, 397 U.S. 471, 484-485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); and Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955).

The strict scrutiny test is imposed if the statutory distinction is based upon a "suspect classification" such as race, alienage, or nationality, (Loving v. Virginia, 388 U.S. 1 (1967); Graham v. Richardson, 403 U.S. 365 (1971); and Oyama v. California, 332 U.S. 633 (1948)) or if the distinction infringes a "fundamental

interest." Dunn v. Blumstein, 405 U.S. 330 (1972); and Skinner v. Oklahoma, 316 U.S. 535 (1942). To successfully withstand the strict scrutiny test, a state must demonstrate a "compelling state interest" in creating the challenged classifications. Skinner v. Oklahoma, supra.

Where the statutory classification under consideration has been based on sex, however, this Court has been unwilling to apply either of the traditional tests. Instead, the Court has resorted to an amorphous "substantial relation" test which requires more heigntened scrutiny than would be applied under the rational basis standard, but less stringent scrutiny than is applied to suspect legislation.

The middle-tier approach began to evolve in Reed v. Reed, 404 U.S. 71

(1971). The Court, in striking down a probate statute which gave males a preferred position as executors, stated:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Reed v. Reed, supra, at 76. (citation omitted)

The rationale of the Reed decision provided the underpinning for subsequent holdings which invalidated statutes employing gender as an inaccurate proxy for more germane bases of classification and which rejected administrative ease and convenience as sufficiently important objectives to justify gender-based distinctions. See, Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wisenfeld, 420 U.S.

636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); and Stanley v. Illinois, 405 U.S. 645 (1972). In other cases the Court, applying in some instances the traditional rational basis test and in others the substantial relation test of Reed, found that certain classifications challenged as sexually discriminatory were in fact based on functional or circumstantial differences between the sexes; therefore no violation of the Equal Protection Clause existed. See, General Electric Co. v. Gilbert, ____ U.S. ____, 97 S. Ct. 401 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); and Kahn v. Shevin, 416 U.S. 351 (1974).

In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices went so far as to conclude that sex should be regarded as

a suspect classification. Since Frontiero, however, the Court has not only declined to hold that sex is a suspect class, but it has significantly retreated from that position. See, Califano v. Goldfarb, ____ U.S. ____, 97 S. Ct. 1021 (1977); General Electric Co. v. Gilbert, supra; Craig v. Boren, 429 U.S. 190 (1976); and Mathews v. Lucas, 427 U.S. 495 (1976).

The most relevant precedent for the instant case is Craig v. Boren, supra, the only Supreme Court gender-based discrimination case concerning a criminal statute. In Craig, the Court examined and struck down an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. The majority applied the substantial relation test from Reed, but three Justices

expressed outward concern with this standard. Justice Powell, in a concurring opinion, indicated that the rational basis test should take on a "sharper focus" when addressing a gender-based classification, but he balked at characterizing the new test as an independent "middle-tier" approach. Craig v. Boren, 429 U.S. 190, S. Ct. 451, 464 (1976). In separate dissenting opinions, both Chief Justice Burger and Justice Rehnquist expressed their position that gender based cases, like all cases where no suspect classification or fundamental interest is involved, should be tested by the traditional rational basis standard. Craig v. Boren, supra, at 466, 467, 469. Justice Rehnquist went on to express his concern that the substantial relation test is "so diaphanous and elastic

as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . ." Craig v. Boren, supra, at 467, 468.

In the instant case the Court of Appeals was troubled by the amoebic quality of the substantial relation test. Chief Judge Coffin comments that it is "hardly a precise standard," and he worries that "we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard." Meloon v. Helgemoe, supra, at 604.

Despite the First Circuit's misgivings over the imprecision of the Reed substantial relation test, the Court found that the New

Hampshire statute could not pass muster under that test. This decision is made even more suspect by the First Circuit's suggestion that the Court would not have struck down the statute under the "minimal rationality test." Meloon v. Helgemoe, supra, at 606.

In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale basis and strict scrutiny tests. This new standard lacks definition, shape, or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so "diaphanous and elastic" as to permit subjective judicial preferences and prejudices concerning particular

legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard. In all events, it presents the opportunity for the Court to correct a situation which invites subjective judicial judgments and possible abuses.

Finally, as noted above, the instant case is one of first impression. Never has this Court weighed a gender-based statutory rape law against an equal protection argument. The implications of the First Circuit's Decision for all gender-based criminal statutes and for equal protection analysis in general are devastating. The decision should not be left to the Court of Appeals. The issue is substantial and worthy of this Court's

consideration.

II. THE HOLDING OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE AND WITH THE DECISIONS OF ALL OTHER STATE COURTS WHICH HAVE CONSIDERED THE QUESTION.

During the course of Respondent's direct appeal to the New Hampshire Supreme Court, he first raised the issue of whether RSA 632:1,I-c was violative of the Equal Protection Clause. The Court considered Respondent's argument and in a unanimous decision explicitly rejected it. State v. Meloon, supra, at 670, 671.

The New Hampshire Supreme Court does not stand alone. On the contrary, equal protection attacks against statutory rape laws have been universally rejected by every state court considering the question.

See, e.g., People v. Mackey, 46 Cal. App. 765, 120 Cal. Rptr. 157 (1975); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973); In re W.E.P., 318 A.2d 286 (D.C. App. 1974); State v. Drake, 219 N.W. 2d 492 (Iowa 1974); In re Interest of J.D.G., 498 S.W.2d 786 (Mo. 1973); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976); and Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975).

The holding of the Court of Appeals runs directly counter to that of the New Hampshire Supreme Court. It is also in conflict with the decisions of all state courts which have considered the question. It is a significant issue, and a significant conflict. It is a question of law which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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January 25, 1978