

Paey Appeal Selected Transcripts: Defense Attorney John Flannery Addresses the Court

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THE COURT: Mr. Flannery, you may proceed!

MR. FLANNERY: Thank you!

My name is John Flannery, and it is my honor and privilege to represent my client and friend, Richard Paey.

I wish to dedicate this argument to my father-in-law, Dr. David Smith, 82, who died of Leukemia last Thanksgiving, and who was able to tolerate the pain and to be with family in his final moments because of the pain medication that he received.

Richard is a chronic pain patient, about half the age of my father-in-law, and he has been in pain ever since an auto accident in about '87 because of the unsuccessful surgery that followed, and the multiple sclerosis that he endures.

Without medication, Richard suffers from an unremitting pain so severe that his legs feel as if they are on fire in a furnace.

Richard is serving a sentence of 25 years for possessing 3 grams of Oxycodone that he used to block and blunt the effects of this intolerable pain.

Incidentally, Richard is now receiving more pain medication in prison than the amount that he is being punished for.

What I get out of this is that that the Florida prison doctor gets it, but that the Florida prosecutor does not.

Richard is therefore not an addict, nor user, nor a pusher, although the prosecutor called him that at trial. Richard, however, never trafficked in any illegal drugs, nor did he ever distribute any controlled substance to anyone else. This is indisputable.

The government spent months trying to find evidence that he had "trafficked". But they found none. Because there is none. Nevertheless, Richard stands convicted of "trafficking in illegal drugs".

I'm a former narcotics prosecutor from New York, and we never prosecuted a "trafficking" case where there wasn't "trafficking".



Attorney John Flannery with Siobhan Reynolds (Linda Paey in background)

Richard is one of the 55 million chronic pain patients in the nation, who are not about to die, who are indeed going to live for twenty or forty or more years, and their lives will most certainly become a living hell, if they may not have the medication that eases their chronic pain.

Incidentally, chronic pain patients who receive this medication can and do function normally because they have built up a tolerance to any of the disorienting aspects of the pain medication that an occasional user of Percocet, like you or I, might encounter. Chronic pain patients on medication can drive a car, do work, participate in family functions.

If they don't have the medication, and they can't solve their medical problem by surgery or any other alternative remedy, they may consider suicide. Richard, and the millions of others like him in America, are ill.

They are not criminal. Against this backdrop, we consider the constitutionality of Florida Code Section 893.135, as it applies to Richard, and whether it constitutes cruel and unusual punishment.

We ask the questions:

First, is it cruel to sentence Richard, a patient, for 25 years in prison for merely possessing and taking his pain medication?

Second, is it unusual to sentence Richard, based not on the quantity of the controlled substance, the number of grams of Oxycodone that he had, but on the aggregate amount of any innocent mixture that combines with that controlled substance?

We insist the answer is yes to both questions!

The prosecution is comfortable with the notion that "trafficking" can mean only possession.

Justice England in *State v. Benitez*, however, said that this statutory provision "was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution from the importer-organizer down to the pusher on the street."

And this statute makes it "trafficking" if anyone possesses "4 grams or more of any mixture containing" Oxycodone -- no matter how insignificant the fraction that is the controlled substance in the "mixture".

The mischief of such legal imprecision is enormous when you consider that depending on whether you "possess" 4 grams, 14 grams, or 28 grams, you are exposed to a mandatory minimum of 3 years, 15 years, or 25 years.

Richard was convicted of 7 counts and each involved one hundred 5 mg Percocets, and that amounts to 3.5 grams of Oxycodone "total". That is gram less than the first tier by which the Accused may be found to be a "trafficker."

99.85% of every tablet that Richard had was Tylenol.

It is that "mixture" that, in the aggregate, ran up the amount to more than 28 grams, and that exposed him to a 25 year mandatory minimum.

It is no exaggeration to say that Richard was sentenced to 25 years for the crime of possessing Tylenol, as the amount of the mixture that was Oxycodone, for all 7 counts combined, was less than the minimum required to make out the "trafficking" count. Now let's consider the absurdity of this statute.

If we take a single Oxycodone tablet of 5 mg and mix it into a 12 oz. coca cola, what have we done?

Well, since a coke weighs about 341 grams, well over the 28 grams, we have a mixture that violates the statute and is "trafficking in illegal drugs."

Try an example closer to home.

My father-in-law in his last days in a nursing home had his medication ground up by a nurse, and mixed into his food.

He might have his pain medicine in a 3 ounce dish of ice cream or tapioca, that is, an amount 3 times the amount that qualifies as the worst level of "trafficking".

Does that merit a 25 year mandatory sentence?

There are nursing homes not far from this Courthouse, and across this State, indeed across this Nation where food is being prepared for the residents mixing Oxycodone and other controlled substances into "mixtures" in excess of 28 grams.

There are dining rooms in nursing homes jam-packed with citizens possessing and consuming these "mixtures."

By the law of this case, as the State would have it, if the physician, or pharmacist got the scrip wrong when issuing Oxycodone, didn't act in "good faith," even though the patient had nothing to do with getting the prescription wrong, the patient could be held responsible for "trafficking in illegal drugs".

May we truly punish anyone by such an elastic and arbitrary yardstick?

If we focus on the three tiers level of punishment under this statute, we can see how arbitrary it is when applied -- as it was in Richard's case.

We start with the premise as it is true - that the total controlled substance Richard had for all 7 counts totaled 3 grams of oxycodone.

Then we consider what happens if this controlled substance is "mixed" with any other substance.

If we mix: a Constant Amt with a mixture then, we derive the minimum sentence:

First, we mix: 3 grams w/ 1 gram of Tylenol, for a 3 year sentence;

Then, we mix: 3 grams w/ 11 grams of Tylenol to get 15 years; and

Lastly, mix: 3 grams w/ 24 grams of Tylenol for twenty-five years.

If we had Richard and two other defendants with different size mixtures, as per this illustration, even though each had precisely the same amount of the controlled

substance, that is, 3 grams, we would have three very different mandatory minimum sentences apply.

Ironically, if a fourth defendant did not mix the controlled substance it with anything at all, then the person would not even be guilty of "trafficking."

Justice England, in *State v. Benitez*, was asked to consider whether this statute was cruel and unusual insofar as it had mandatory minimum sentences but not insofar as those mandatory minimums applied in light of this questionable provision involving the "mixtures" by which we arrive at these mandatory minimums.

In Florida, the State Constitution, in Article I, Section 17 prohibits "cruel and unusual punishment", and it states that the application of this right "shall be construed in conformity with the decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

While the recent Supreme Court case law is mostly concerned with when and whether capital punishment is "cruel and unusual", there is analogous guidance from the Supreme Court's earlier case law, when a person was prosecuted for his "status" as an addict.

This Court may recall a case from the 60's, *Robinson v. California*, 370 US 660, 666, 82 S. Ct. 1417, 1420, 8th Ed 2d 758 (1962) that found it cruel and unusual punishment to make it a crime to be an addict.

The Court said: "A State may not punish a person for being 'mentally ill, or a leper or . . . afflicted with a venereal disease', or for being addicted to narcotics." *Id.*

The Court said "To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being."

In *Robinson*, the crime of addiction was a misdemeanor, and so the punishment was not as severe as in Richard's case.

The Court said, "That the punishment is not severe, 'in the abstract,' is irrelevant" -- and this I wish to underscore - the Court then concluded: "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667, 82 S. Ct. at 142.

One day in prison for a "common cold" would be cruel and unusual punishment.

All the more reason that 25 years in prison for possessing and using pain medication for an illness should be cruel and unusual punishment.

By the application of this statute, we segregate Richard from society because he is ill.

In *Trop v. Dulles*, 356 U.S. 86, at 101 (1958), the Supreme Court concluded that expatriation was a punishment more primitive than torture, because society denied that the individual existed or participated as a member of the human community.

Is the operation of this statute in Richard's case a crass vehicle to segregate the ill? At least, so it seems.

When we consider whether the punishment in the case comports with human dignity, we must consider the second clause of this right to be safe from cruel and unusual punishment and that is whether it is "unusual".

The State may not arbitrarily inflict a severe punishment.

This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.

The words "cruel and unusual" condemn the arbitrary infliction of severe punishment.

Richard insists that the punishment is arbitrary when it depends on the size of the innocent mixture that combines, with even an infinitesimal amount of the controlled substance, Oxycodone.

This statute by its operation is most cruel and quite unusual, and should be struck down as applied to the ill, as it was applied wrongly to Richard Paey.

[Related Questions by the Three-Judge Panel]

THE COURT:

But how, Mr. Flannery, may we challenge what the Legislature has done?

Don't you and your client have to ask the Legislature to change the law?

MR. FLANNERY:

No, your Honor, we don't. We ask you!

The act of the legislature is circumscribed by the founding document from which they enjoy the authority to legislate.

In other words, the legislature may not pass a bill that exceeds the grant of power from which they derive their authority from the State Constitution.

And that constitution prohibits cruel and unusual punishment.

Nor may the State pass any law that conflicts with the US Constitution, and its prohibition against cruel and unusual punishment.

In this case, the State Constitution provides, when considering whether something is cruel and unusual punishment, that the State must look to what the U.S. Supreme Court has to say.

The appropriate place to invoke the Constitution that trumps this unconstitutional application of this state statute is the court.

THE COURT:

Isn't the Governor's clemency power the appropriate remedy - if there is a remedy?

MR. FLANNERY:

No, it is not.

Clemency is a discretionary grant of absolution from the State's Chief Executive.

No one has a right to clemency.

But each of us does have a right, as individuals, to be held safe from our government imposing on any one of us any punishment that is cruel and unusual.

This right that we enjoy suggests the possibility of a wrong, an encroachment by the majority or by the government.

And a right permits us to resist that presumed wrong.

We have a right therefore to be safe from cruel and unusual punishment.

We invoke that right in a court of law, before the trial Court and failing that, before this Court.

This court has the power and authority to right that wrong.

Thus is any individual empowered, by this or any other right we enjoy, to protect himself or herself against the excesses of the government or the majority that would seek to compromise that right, by interposing that right as an objection to the imposition in a court of law.

[END]