Supreme Court of the United States

October Term, 1968

In the Matter of:

WILLIAM L. MAXWELL, Petitioner, vs. O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY, Respondent.	**Docket No.** 622

Place Washington, D. C.

Date March 4, 1969

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

William L. Maxwell,

Petitioner,

v. No. 622

O. E. Bishop, Superintendent of Arkansas State Penitentiary,

Respondent.

Washington, D. C.
Tuesday, March 4, 1969.

The above-entitled matter came on for argument at 11:50 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

ANTHONY G. AMSTERDAM, Esq.
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(Counsel for Petitioner)

DON LANGSTON, Esq.
Deputy Attorney General
State of Arkansas
(Counsel for Respondent)

APPEARANCES (Continued)

ALBERT W. HARRIS, JR., Esq.
Assistant Attorney General
State of California
(Amicus Curiae in support of Respondent)

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 622, William L. Maxwell, Petitioner, versus O. E. Bishop, Superintendent of Arkansas State Penitentiary.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Amsterdam.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.

ON BEHALF OF PETITIONER

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

This is a Federal habeas corpus proceeding on behalf of William Maxwell, a condemned man, challenging the sentence of death imposed upon him by an Arkansas jury.

Unlike the Boykin case which the Court has just heard, no question is presented here with regard to the ultimate power of the State of Arkansas to use death as a penalty for crime. Even for the crime of rape of which William Maxwell was convicted.

The questions presented relate entirely to the procedures by which the death penalty is administered in the State of Arkansas and by which out of the total number of persons convicted of the crime of rape, some are selected to live, and others are selected to die.

We have two Federal constitutional claims against the Arkansas procedure which for short reference I may term the

standards claim and the single verdict claim.

In order to put into perspective and to show their relationship, because I think they are intimately related, I would like to take a hard look at the outset if I may at the procedure by which Arkansas does determine, case by case, individual cases whether persons convicted of rape shall live or shall go to their death in the electric chair.

Now, under Arkansas law there is one statutory provision which provides that the punishment for the crime of rape is death. Another statute in effect since 1915 provides that in any case in which the punishment is death by law, the jury may return instead a verdict of imprisonment for life in the State Penitentiary.

The effect of these two statutes, therefore, is to create an authorization, the availability of returning the death penalty in a broad range of cases, but to require the death penalty in none.

Thereby, both supposing that selection is possible among the total number of persons convicted of rape and requiring that selection must in fact be made among the total number of persons convicted of rape of some smaller number who shall suffer death, the extreme penalty for that crime.

Now it is not surprising that such a selective process is set in motion by Arkansas law because the crime of rape is in Arkansas as elsewhere a crime that includes a wide

range of factual situations. It is simply, any consummated sexual assault. It can be committed against a mature woman, against a child, with a weapon endangering life, not endangering life. The victim can be permanently, physically injured or not permanently, physically injured. A tremendous range of factual situations involved and a large range of offenders. And, in fact, on this record one can say that only about a quarter, 25 out of a hundred of the persons actually convicted of rape get the death sentence.

Now, I put the focus here at the beginning to point out where I think the focus has to be in this case. On the process by which that selected judgment is made, this is not an insignificant or an unimportant process. It is literally vital, but it is also vital in a legal sense because the law of Arkansas as to whether rape is or is not a capital offense is in fact being made, case by case, as in each individual adjudication the determination is made whether the defendant lives or does.

That is a law-making process. The penalty for rape in Arkansas is not death. It is subjection to this decisional process. And the question which this case presents is whether the specific procedures used in Arkansas to make that decision comport with the Constitution.

Now, how is a decision in fact made. It is made in each case by a jury. A jury cannot be waived in a death case.

If, as Petitioner Maxwell did, the defendant can contest guilt, if he contends that he is innocent. The jury is impaneled to decide two distinct questions. Whether he is guilty of the crime of rape and if so, what punishment shall be imposed upon him.

As to the first of these two decisions, whether or not the defendant is guilty of rape, the jury is guided as it is in any criminal case by the law defining the crime of rape and the trial in a capital case in Arkansas is not unusual in this regard.

The jury can't convict a defendant simply because they don't like him or because he is unpleasant or because they don't like the color of his skin or for any other reason. They can convict him only if they find each element of the offense established beyond a reasonable doubt on the record.

The definition of the crime of rape gives the jury something to talk about when they go back to decide the case they talk with each other about whether the elements of the offense are made out and the rule of law that is being applied by the jury to decide the guilt question and only the guilt question is the same rule of law that applies to every other person in Arkansas who has previously been tried for rape or will be.

When we get to the penalty question on the other hand, we are in a different world. Because on the penalty question,

the jury is given no instructions, the jury is given no principles to guide its decision. The ordinary procedure in Arkansas is simply to give the jury two forms. The death form which reads, "We find the defendant guilty as charged," and a life one which says, "We find the defendant guilty as charged and sentence him to imprisonment for life."

No instructions are given. The jury is simply told take your choice.

We have characterized that process of decision-making in our brief not in a constitutional sense, but in a descriptive sense as arbitrary and I might rest on that because neither California nor Arkansas in response has grappled with that question at all and need they defend the process of sentencing as I understand it on the ground that it constitutes a beneficent arbitrariness.

But I think it is helpful to examine in somewhat more detail exactly what is entailed in what I call an arbitrary process.

The jury is given in making its determination of life or death a choice which it may make without any prerequisite findings of fact. That is to say, the ordinary procedures that we all know as lawyers, that ordinarily go on in courts of law, where a judge says to a jury, if you find X, then the result will be Y, simply doesn't apply.

There are no required findings of fact. The jury

need not find that the defendant used a weapon or permanently injured the victim or that he had a prior record or any such thing. Any and every offense of rape may be punished by death. No required findings of fact.

Not only are there no specific required findings of fact in the nature of aggrevating circumstances and that sort of thing, but there are no general findings of fact put to the jury. The question is not asked, "Would society be safe is this man were incarcerated in the penitentiary for life?"

MR. CHIEF JUSTICE WARREN: We will recess now.

AFTERNOON SESSION

(The oral argument in the above-entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. Amsterdam, you may continue your argument.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.

ON BEHALF OF PETITIONER

MR. AMSTERDAM: if I may, I would like to resume a brief description of the exact nature of the discretion that the Arkansas jury has in capital sentencing.

As I have said, there are no prerequisite factual findings to return a death verdict. And the jury need find nothing specific in aggrevation of the sort that, for example, the European Codes use, that the offense was committed with a weapon, or that the defendant had a prior conviction to a similar offense or any such thing.

There is no general required finding of fact such as that the defendant is unreformable or incurable or any such thing. There are no preclusive findings of fact. That is,, findings which will exclude the death penalty.

The jury is not told if you find that the defendant was suffering a mental disease or defect which rendered him unstable, or that the defendant has no prior record, or that the victim did not use a great degree of force and resistance or that the defendant did not use a weapon, you may not sentence

to death. And there are similarly no general preclusive findings on the nature of emotional disorder or any such thing.

There is no direction to the jury that it shall take consideration of any particular range or realm of fact. The jury is not told in deciding whether to sentence the defendant to life or death you shall take into account whether the defendant used a weapon or whether the victim was previously chased or the character of the defendant or any of those things.

There is not even an authorization which would direct their attention to some things, that you may take account of. The jury is not told that there are things that they may not take account of, may not take account of race, may not take account of anything that the legislature thinks irrelevant to its purposes in enacting the death penalty.

There are no principles for judgment, no standards for judgment given to the jury at all.

Not even a kind of vague standard that is the minimum we use in any kind of other judicial proceedings, such as reasonable man. It is sometimes easy to forget how much the reasonable man standard does direct the jury in a civil damage case. At least the jury knows that the defendant's obligation is to exercise reasonable care, the care that a reasonable man would exercise toward the plaintiff.

Our whole law assumes that that has significance. It

is different from the duty the defendant owes to a trespasser to exercise somewhat less care than he might owe to someone whom he has a special duty to care for.

The jury in a civil case isn't told that they may return a verdict against the defendant if they don't like him, or if there is something offensive about him or any such thing. The issue is frank. He owes a duty of care, how much care, the care that a reasonable man would exercise. There is no such thing in the capital sentencing discretion.

Q Are there any more standards given to a judge if he does the sentencing normally?

A In a capital sentencing or a regular sentence?

Q Either one.

A In capital sentencing, ordinarily there are no greater standards given. In non-capital sentencing, there may or may not be. But even if there are no standards given, explicitly by statute, the kind of discretion he exercises is very different than that which a jury exercises in sentencing to death, for a number of reasons.

One is that the judge is a professional sentencer. And although we make no attack on the jury system as such, we think that we need not get anywhere near attacking the jury as an administrator of rules. It is very clear that a professional sentencer is better at formulating rules, adjudication by adjudication than an ad hoc group of 12 people.

Q This point rests on your faith in a professional rather than a State having furnished any standards?

A There are a number of relevant points. The noncapital sentencing apart from the professional quality of the judge, professionalism, your Honor, is a number of things all wrapped into one.

One the fact that the judge sentences a number of cases involves some consistency. He is the man who does it each time. And if only the consistency of habit, there is a consistency there.

Q The State's contribution is in furnishing the professional I take it rather than furnishing a standard?

A I think that is right insofar as certain standards are build into the assumptions of the system which are not build into capital sentencing, such as rehabilitation. When a judge sentences he knows that the man whom he is going to sentence is going to come out after a period of time. And he has to make a judgment as to whether the period is so severe that the man is going to be a serious danger from a rehabilitative standpoint afterwards.

It is not true of the capital sentencing decision. It is also true that ---

Q Well, are there any - do you know of any statutes that direct a judge specifically to take rehabilitation into account?

A There are statutes that do do that in some States.

Q Not very normal, are they?

A No, it is not, indeed.

On the other hand the judge inevitably is going to do so and the development and evolution of sentencing counsels, appellate review in some ---

Q This rests in practice and the accumulation of just from experience?

A A practice that is possible because the State provides an institutional nexus for it. Both the professional sentencer and the assumptions of the system, neither of which are true in capital sentencing.

Q What would you say about a state, Mr. Amsterdam, that just imposed a mandatory death sentence?

A A mandatory death sentence it would have none of the problems that this case raises. I would have troubles depending on the nature of the statute under other constitutional provision but none that are involved in this case.

Q No, I realize that, but there would no standards of any kind involved there except the legislative judgment of this particular crime without more carried in the legislature's point of view a death sentence.

A Your Honor, that is a standard though. If everyone was convicted of a given crime is sentenced to death

you don't have what we are complaining about in this case, an individualizing process which selects without whim or reason one person to die and another person to live.

A jury sitting in one case determining, not perhaps because he takes a different view of the fact in this case than the facts in another case, but because it may take a totally different view of a legal determinant, or it may find it did have no legal determinant, to sentence one man to live and another to die.

That is the essence of the standards of this complaint that we make. It is not involved where you have mandatory capital sentencing because everyone in the class is treated identical.

Q Mr. Amsterdam, is the rule for which you are contending here confined to capital cases? There are in some states procedures by which a noncapital cases juries fix the penalty and they have a range of discretion.

Is a constitutional rule for which you are here contending, such as it would follow that standards would have to be prescribed in such cases?

A Our contention is limited to capital cases and the justification for our so limiting it lies in three things, I think.

First, this Court has made clear for considerable period of time that the degree of arbitrariness that is

permissible in a sentencing system is less where the penalty is greater. I speak of Skinner versus Oklahoma. Now Skinner held you couldn't sterilize thieves if you didn't sterilize embezzlers.

I think that nobody on the unanimous court that decided that case assumed, and indeed the opinion said the contrary, that you couldn't sentence embezzlers to 15 years and sentence thieves to 10.

At that level of discrimination or determination there is no question about distinguishing between embezzlers and thieves. When you sterilize them or when you kill them, that is something else again.

The second consideration I think is that -- and this goes to Mr. Justice White's point as well, that when you are dealing with a noncapital sentencing regime, there are a number of considerations that come into play that justify more arbitrary individualized judgments than when you are dealing with a capital sentencing regime.

Noncapital sentencing inevitably involves in some part the question of reformation. And the only tools with which we as a society at the moment come to grips with the question of reformation are the highly individualized diagnostic judgments that are made of particular individuals.

Now, I myself have very serious troubles with the infusion of therapy in the sentencing because sentencing becomes

a mixed bag of individualized, supposedly helpful, therapeutic considerations and penal judgments, but the question as to what kind of standards to apply in that process is much more like the question involved in the Gault case as to how much you can justify some arbitrariness in the imposition of penal sanctions in order to serve therapeutic ends which require extreme flexibility.

In capital sentencing there is no therapeutic need and no therapeutic justification. The death penalty is the one penalty of which one can say it cannot be justified for purposes of reformation or rehabilitation. It is a writing off of this human creature as fit for rehabilitation and no individual judgments of the sort that need to be made diagnostically enter into judgment.

So that there is no excuse for the degree of individualization without the rules of law in capital sentencing that there is in our case.

Q I want to be sure I understand you. Are you saying that your view, a Constitution presents no barrier to a State system under which, for example, a jury might be given discretion to impose a sentence of between 1 year and 100 years?

A Your Honor, I am simply saying that this case doesn't present that question. My personal view is that there is a grave constitutional deficiency.

Q That is what I wanted to find out. I know this

case doesn't present quite that, but I take it that the theory that you are advocating here might extend to that and by the same token I suppose it would extend to something like the California adult authority procedure.

That is to say, that you have the same problems as to whether that procedure might be defective for lack of standards.

A I think that a great deal depends on several things. What decision is being made; the importance of the decision, the life-death quality of the decision is in my judgment unique; who is making the decision. I think there is a difference between a judge and a jury.

I think the Giaccio case which requires certain standards for jury action may not be that a judge has to have standards. I think that the parameters, the outer boundaries of judgment are very important.

If I may, let me try to frame this issue in terms of one that is more familiar to this Court's jurisprudence historically.

The question that is raised as I see it by our standards attack, it is not a typical question of how you limit discretion and keep it within constitutional confines. If you take, for example, a legislature that wants to regulate parades in the State, it could simply pass a permit statute that says no one may conduct a procession without a permit from the

Chief of Police. Now that would raise the gravest constitutional difficulties under the decisions of this court. Now if it wanted to enact one thatdelimited the discretion, how might it go about it?

There are a whole host of ways in which it might go about it.

One, it might say whoever conducts a procession with vehicles or a procession on the street or a procession on Pennsylvania Avenue between 14th Street and the Capitol, that delimits the range of cases in which the judgment is being made.

Secondly, it might say that in determining whether a permit shall issue, the Chief of Police shall take account of traffic congestion, the movement of emergency vehicles, simply whether there is not a parade or procession that same day and that sort of thing.

Third, it might subject the judgment of the permit issue to review by another agency, by a court. Now each one of these, without getting rid of discretion totally, delimits the discretion and again it would make a considerable difference whether the permit was totally unavailable or whether the permit only had the power to put it off for a day, set it sometime within the week, but not on the particular day requested.

Q Well, unhappily, your last discussion suggests the possibility that you may have two questions: One, the immediate question, I spend it is necessary, and the next

question, when the next ball game is played, which is, are these particular standards appropriate and adequate?

A Precisely. And what I think we -- where I think we are in this case is where this court was in 1930 when it first began to enact ordinances. It simply has to say whether an Arkansas procedure which has available to it all of the different devices by which they might control the discretion, limiting the range of cases to which it applies, providing for aggrevating circumstances, prerequisite findings of fact, precluding the death penalty when certain mitigating findings are made, establishing rules or principles or even just telling the jury so that they have something to talk about when they go back there and they all have to agree.

That you must come to a decision constant with certain principles.

Q Just so there won't be any misunderstanding again so far as I am concerned, with respect to judge sentencing, are you saying that as a matter of your understanding of the Constitution of the United States, it is not necessary that the standards be prescribed to guide the judge, for the reasons that you have so well stated here in deciding whether he will impose the death sentence or something less?

A I am not saying that the Constitution does not require standards of the judge. I am only saying that this case does not raise it.

Q That is what I wanted to be clear on. Now, finally, and this is my last question of you, what we have been discussing in this colloquy would apply more or less to the same to your second point, namely the need for a unitary, your objection to a unitary trial.

Is that correct?

A That is correct.

Q You, in answer to Mr. Justice Fortas' initial question in this series about distinguishing a capital sentence from an ordinary sentence and you said there were three distinctions. You got as far as two.

The Skinner against Oklahoma distinction and the absence of any therapeutic possible of arguable therapeutic purpose in a capital sentence.

What was the third?

A Thank you, Mr. Justice Stewart. The third is more limited to Arkansas in this case. It is that the Arkansas Supreme Court does review sentencing imposed by juries in non-capital cases and it does not in capital cases.

And, as I was trying to sketch out, it makes for me a great deal of difference whether the discretion is limited by a review or whether it is not. That is one of the factors that makes the discretion given juries in death cases totally arbitrary with no restraint, no protection against abuse.

Now, I am not passing at this point beyond the

standards argument. I launched off into this in the course simply of describing the standardless trial. I would like to finish, if I may, my description of the trial process and then state briefly the two constitutional contentions that emerge from it.

The Arkansas jury not only makes the guilt and penalty determinations, but makes them at one sitting if the defendant contests guilt.

All the evidence submitted on all questions is submitted at once. The jury goes out and returns a verdict both on guilt and on punishment.

Now, the effect of this, the most immediate effect of this is fairly obvious. If the defendant takes the stand to speak, to have his voice heard by the people who have the power of life and death decision over him, he runs into all of the prejudices that the privileges of self-incrimination is intended to protect him against.

First, if he takes the stand and doesn't claim innocence, he is going to be convicted. There is just no doubt that a jury will convict a man who gets on the stand and testifies and doesn't say I didn't do it.

If he gets on the stand and he does testify that he didn't do it, he is subject to cross-examination, which is clearly potentially incriminating. In addition to that, under Arkansas procedure he is subject to impeachment of the most

vicious sort, literally every bad act however remote and whether reduced to conviction or not can come in against him with inevitable prejudice on the guilt determination.

Q You mean every act throughout his entire life?

A There is only one limitation that I know of, your Honor. There are a couple of Arkansas cases that say that a bad act which is too remote may not be proved, but the Arkansas Court has admitted, for example, a minor liquor violation 20 years old, an automobile accident, 24 years old, those sorts of things.

So I think the remoteness requirement is insignificant and the practical fact of the matter is that however prejudicial, for example, we have cited in our brief cases in which a man on trial for murder when he took the stand was impeached by showing that he had committed a prior murder.

Its relevance to credibility is questionable but its prejudice on the guilt issue is obvious. Now this is the kind of thing for which he lets himself in if he takes the stand.

On the other hand, if he doesn't take the stand he literally goes to slaughter like a dumb beast. He is deprived of his best witness on facts in mitigation. He is the only person who can tell about his motivation, particular circumstances that may have led up to the act for which he subsequently convicted which may convince the jury in its totally

unfettered discretion not to sentence him to death. He is the best witness on background facts, facts about his childhood, his upbringing that the jury may take into account.

But more than that, his testimony is the only thing that can bring home the jury that they are sentencing a human, a live human being whom they have heard speak like other human beings and it is the characteristic of speech that human beings have. They are sentencing such a person to death and what happens in a case like William Maxwell is, if the defendant decides that he is going to exercise his privilege against self-incrimination and not take the stand and not be subject to impeachment and not prove guilt out of his own mouth, he goes to life or death decision without the jury ever having heard a word uttered by him.

Q Mr. Amsterdam, you stated earlier in your argument that in Arkansas, as I suppose in other States, the statutory offense of rape can cover a very wide spectrum actually of human conduct.

As far as I can see we don't have anything of the facts of this case. We don't have the trial transcript, we don't have any description of what the actual conduct was here and I suppose that the theory of Arkansas, rightly or wrongly, is that the jury's discretion is to be exercised in the light of what they hear from the witness stand as to the particular circumstances constituting this particular statutory violation.

And that we don't have here at all. I wondered if it is available.

A I would say the facts are described in the Arkansas Supreme Court's opinion in 370 S.W. 2d and I think this court could notice the facts described in ---

Q You don't have a transcript of that trial here?

A The trial transcript, your Honor, is not in this record and there is a recitation of the facts that is fairly complete by the Arkansas Supreme Court on the appeal. As to Arkansas' taking any position that the jury does indeed rely on those facts, the answer is we simply don't know.

Q Well, I suppose ---

A It is not required to.

Q Well, the jury hears the case for the prosecution on the issue of innocence or guilt and as I say as you rightly point out that is about all it hears. And so I suppose the theory must be that it is to exercise its sentencing discretion based upon what it has heard from the witness stand with regard to the circumstances of this statutory violation.

A I suppose that might be. The proof doesn't seem to meet the theory because the evidence that we have gathered indicates that there are three factors which distinguish people who are sentenced to death and people who are sentenced to life generally in Arkansas.

Race, the Commission of contemporaneous offense, some

other offense like robbery, which Maxwell did not commit and a prior record imprisonment and we do not know whether Maxwell has any prior record of imprisonment on this record.

Q Now, do we know from the trial record?

A We would not know from the trial record.

Q He did not take the stand?

A By exercising the privilege avoided going into the question of background at all, with the result -- and this is quite typical -- that a defendant who claims the privilege has the jury decide whether or not he should live based on five minutes of his life, or ten minutes of his life.

All they know about this man is what they have heard that he did in the few minutes constituting the crime, no more than that is known.

Now, whether or not the theory of Arkansas is that they act on that, our theory is that they need not act on that under Arkansas law. Arkansas law allows the jury to act on something broader than that if it is presented, but the defendant can present it only at the cost of waiving his Federal constitutional privilege against self-incrimination.

Q Is the trial transcript -- I think I saw somewhere in the briefs that this trial transcript was available in the United States District Court, in the Federal Court of Appeals?

A Mr. Justice, the status of the trial transcript

in this case is very confused. Let me state it as briefly as best I can.

The pretrial order of the Federal District Judge in this case provided that the transcript would be available and that portions of it might be put into the record by counsel if they wished.

No portions were formally put into the record. On the other hand, the trial transcript had been around in the District Court for a long while. This being Maxwell's second habeas corpus petition, and the District Judge in fact relied on it in some part, although none of it was formally introduced, for some of his findings, such as the finding that Maxwell did not take the stand.

The transcript, because it was not in the record in the District Court, did not go up to the 8th Circuit. Shortly before the decision by the Court of Appeals for the 8th Circuit, the Clerk of that Court wrote counsel asking that a copy of the trial transcript be furnished.

And the Court of Appeals also relied on certain aspects of it such as portions of the opening argument by defense counsel, and that sort of thing. Again, formally it is not here.

I do not think that the transcript is in fact before this court. It is not physically here, but I do not think that it is in fact here. However, certainly those facts which appear

in the opinions below or in the opinion of the Arkansas Supreme Court might properly be relied on by this Court.

Q Well, I suppose it is a public record then?

A Oh, yes. And I don't think -- indeed we have gone to the point of actually in our Appendix say, quoting a portion of it, not otherwise introduced. We think it is non-controversial. It is a public record.

Q And it is now lodged, so far as you know, with the 8th Circuit Court of Appeals?

A I don't know that it is technically lodged there. It certainly was sent there. And they do have a copy.

Now, if I may briefly pass from what I had intended to be merely descriptive to the argument, the standards question seems to be resolved by the briefing in this case, in a relatively simple matter.

We contend that the power given Arkansas juries to sentence to life or death is legally arbitrary in violation of the rule of due process. It offends, we think, every aspect of the rule of law that this Court has found previously in the due process clause.

First of all, it involves sentencing on a case-by-case basis, by jurors who need not even discuss why they choose to send a man to death. If they do discuss why and they decide on a common ground, there is no assurance that that ground is common to any other defendant but this defendant.

The man who is just tried and just convicted and just sentenced to life might have facts identical with those of the defendant who now goes to death, the only difference being that because Arkansas provides no help, the juries take different views, not of the facts, but of the law.

A necessary consequence of that kind of arbitrariness in decision-making is that people are unequally treated in violation of the notion basic we submit the both due process and equal protection that requires even-handed administration of justice, people treated similarly.

That doesn't mean individualization in sentencing but it means individualization on a rational basis, not on a hit or miss fluke basis that arises from having no standards whatever from making the sentencing decision.

It also means that not only are the people who are sentenced to death treated unevenly, unequally, as against those sentenced for life, but they are treated irrationally in the sense that there is no relationship, no assured connection between the purposes for having a death penalty law and its imposition in this case.

There is nothing to assure that whatever Arkansas may want to achieve by allowing rapes to be punished by death, that on the facts of this particular case the justification attaches.

Q Is the Arkansas practice differ in any way from

the practice in the Federal Courts under statutes where the death penalty is permitted and to be fixed by the jury?

A It is not, your Honor.

Q It is not different?

A Well, it depends, now, again, the Federal statutes are somewhat different. Some of them give the judge sentencing power and others give the jury sentencing power.

Q I am talking about those like the kidnapping, the Jackson statute, for example.

A As to the Federal statutes that give the jury sentencing power, they do it in the same way that Arkansas does. And that, indeed, is true, I am quick to admit of most jurisdiction. Now there are differences in terms of the degree of reviewability of the jury's judgment. Some jurisdictions provide that the jury must make the determination on the evidence of record which Arkansas does not. There are all sorts of other minor differences.

But the major thrust of the Arkansas procedure is that used in the Federal courts in jury sentencing and elsewhere.

Q Yes.

Q Almost everywhere elsewhere, isn't it?

A Pardon me, Mr. Justice?

Q Does the procedure anywhere differ materially from the Arkansas procedure?

A In Illinois, for example, the concurrence of the

trial judge and the jury is necessary. In Arkansas the jury alone makes the decision, and as I say I have indicated I think there may be a difference if you have a judge sentencing. There may not, but there may well be.

Q I am addressing myself to those jurisdictions where the imposition of the death penalty is by the jury and the jury alone where it has a choice between imposing death or affixing life.

I am wondering, is there any jurisdiction where the regime in that regard is substantially different from what it is in Arkansas as you described it?

A No, I think not, except to the extent -- and this comes to the interrelatedness of our two arguments -- where you have a split verdict of procedure. You have a two-trial procedure. The effect may be different because the jury has a plenary penalty trial, has more to base its judgment on.

But in specific response to your Honor's question, the answer is that they are equally without standards.

The fact of what has happened simply is this: The legislatures have passed the buck all over. We had mandatory capital sentencing for an awful long time. And when that became totally impossible to maintain, instead of proceeding to determine in what cases the death penalty would be implied, the legislatures all over said we can't decide this thing, we are going to pass it on to the jury. And they simply made it

discretionary.

There are differing forms of substantive crimes, differing procedures. The notion of discretion is essentially common.

Now, a third, I think, vitally important thing to recognize, in the regime which is common practice in Arkansas, is simply that the jury can get away with the most flagrant violations of clear constitutional rights without getting caught at it.

One of the purposes of the rule of law, of the requirement that procedures be regular, systematically applied and applicable to all like cases, is simply to prevent against abuse.

Now what we have in Arkansas -- and this is what I think is so relevant of the racial evidence on this record -- is a sentencing pattern of clear racial discrimination. It couldn't be caught said the District Court because the factors that go into the jury's decision case by case are so intangible, so difficult to catch on to, that you can't prove that even a jury which, even a set of juries which convict Negroes of raping white victims and sentencing them to death, this proportionately frequently are in fact discriminating. We don't know.

There may be all sorts of intangible factors other than race that affects it.

The 8th Circuit took the view that somewhat more

hardheaded that probably juries aren't discriminating generally, but Maxwell's jury probably didn't discriminate.

Again, how do you know?

There is no way. The jury didn't have to have any reason, let alone any specific reason for affixing the death penalty and so what happens under a regime of this sort is not only the giving up of all political responsibility in the representatives of the people, the Legislature, to fix standards of general application, passing the buck in effect to individual juries, but when individual juries react in a way which violates the most clear and unequivocal commands of the Constitution, a court can't catch the matter.

Our submission essentially is that such a regime violates the rule of law basic to due process. That there is inherent in the very notion of due process of law the requirement of a rule of law which governs like cases and applies.

I think that this Court would not, for example, sustain an Arkansas sentencing procedure which provided that every man convicted of rape should roll the dice and if it came up 7 or 11 he would die and any other numbers, he would live.

Actually, what Arkansas has done is worse. It is worse because I assume that the dice would not discriminate on grounds of race and it is worse because the 2 out of 12 chances that each man would have are at least identical.

We have not even that assurance and the argument is

made by Arkansas and it is made by California that everybody is being treated even-handedly and equally under this sentencing procedure.

Q Mr. Amsterdam, have you attempted to formulate the kind of standard that you think would be constitutionally acceptable? I know it is not involved in this case, but it probably is the next step if you prevail here.

A I would be glad to address that. There are several ways I think the Legislature could go about it.

Q Would it have to be Legislative? Suppose that it took the form of instructions by the Judge? Would that satisfy you or not? When I say satisfy you, I beg your pardon, I mean of course in terms of your view of the constitutional requirement.

A As far as the Federal Constitution was concerned, it would satisfy our demands for a constitutional rule of law provided that the following conditions were met. One, that the standards were announced by the highest Court of the State or at least approved by it so that the same standards were announced by different trial judges in different cases.

Two, that the standards were made clear before the trial so that the defendant would have a fair opportunity to know what he was trying at the trial.

Provided that those two conditions were met, and that the standards themselves met the substantive requirements of

definiteness for standards, it wouldn't matter whether they were done legislatively or judicially.

And I would think the matter of State policy it would be quite improper for the Court to promulgate these, just as I was going to suggest, I am troubled about suggesting specific standards to this Court because the individual standards that one desires are responsive to the most fundamental penalogical policy questions as to why use the death penalty and when.

Q I understand that, but as far as I am concerned, it is a little difficult to think about your point in the abstract without having some fairly specific idea of what kinds of standards or what kind or kinds of standards the Federal Constitution would regard as within the limit of the constitutional toleration.

A Let me respond to that in two ways.

First, by saying that I had in mind something not terribly unlike the approach taken by the model penal code. Although that is not an exclusive approach. And although again I voice caution for two reasons, first of all, the Model Penal Code's description of the aggregating and mitigating circumstances and that sort of thing applies to murder and not rape.

So, it is of no use particularly in drafting a rape statute. And also because I have very grave trouble about certain of the specific formulations of the Model Penal Code.

For example, one of the aggrevating circumstances is

that the crime is atrocious. That troubles me. I think that they could describe it and get out what they want in terms of it being committed on a minor child or helpless person or it being committed with considerable willful infliction of pain, so that there are a number of details about the Model Penal Code I might point out that the approach today is a not insignificant model.

The second way to respond to that is to try to give you what I think of is in some ways in which a Legislature concerned with the crime of rape might put standards into a sentencing statute.

One way they might go about is in the manner I suggested in describing what Arkansas didn't have. You can have required factual findings, prerequisite factual findings, so that you can consider them if you will aggrevating circumstances.

The jury may not impose the death penalty unless it finds that the defendant used a weapon, that he injured the victim permanently in a physical way, that he committed the offense on a victim of gravely disparate age. One can enumerate half a dozen but I say simply that is one approach.

Q You see, the difficulty that that raises and I am sure it is obvious to you is that suppose the Legislature says, "Oh, no, no, no, Mr. Amsterdam, that is not what we mean. We mean any old kind of rape."

In other words, that what you are talking about is standards which in effect redefine the crime. We are not talking about purely what shall I say, things like due process standard such as that it was done in the course of the commission of another crime, well even that will get into the area.

But it is not like the reasonable man example or premeditation or these more generalized things where you start talking about inflict the death penalty if the victim was of a desperate age.

You are really saying to the Legislature, "No, you may not impose the death penalty except for this kind of rape."

A No, I don't think that is necessarily so. I have trouble in conceiving the matter that way for two reasons.

One, the Arkansas Legislature hasn't released any old kind of rape. It said the death penalty is available for any old kind of rape, but we really don't expect that it will be imposed for any old kind of rape.

It is going to be imposed either wholly arbitrarily or in some set of subclasses and it has made no attempt whatever to define those subclasses.

But, in addition to that, this is only one of the ways in which a Legislature might regularize the procedure. The Legislature said that the governing issue was the atrocity of the crime. At least that would allow the jury to consider that in focusing on that as distinguished from the character

of the defendant.

If the Legislature said, "Yes, any old kind of rape," but the issue is how bad is the defendant. Is he reformable? Will the public safety be served adequately by imprisoning him for life instead of killing him? That would be a test the jury could apply which would focus in far more than we have the issue which is before the jury.

If I may, I would like to simply state that the essence of our constitutional contention with regard to the single trial procedure is related but distinct from the attack on the standardless penalty trial related because the factual description I have given you indicates any defendant who claims his privilege against self-incrimination necessarily goes to trial for his life in front of a jury which is totally uninformed, totally deprived of the requisites of information for rationally sentencing and, therefore, the arbitrariness which the standardless discretion allows almost inevitably in fact is what occurs in the sentencing.

The jury has no basis on which to sentence.

Q Is part of your submission that the States may not limit considerations of sentencing to just a crime? Are they constitutionally required to consider the possibilities of rehabilitation or the character of the prisoner?

A This case and our submission do not raise that question. I think that other provisions of the Constitution

and those we invoke here do require that. But that is no part of our submission here. What we do say is this: That where a State authorizes its jury to take any view of the law, and any view of the facts and sentence the defendant to life or death on any basis, that if it then reqmires the defendant to forego the exercise of his privilege against self-incrimination as the cost of putting before the jury material on which rational sentencing decision can be based, that it has so burdened the exercise of the privilege and so deprived the rationality the determination which is ultimately made by the jury if the defendant exercises his privilege that the due process caluse along with the Fifth Amendment are violated.

Q Do you know whether in Arkansas in the non-capital cases there is a provision for presentence reports?

A I do not know whether there is a provision for presentence reports in noncapital cases. I would assume that there was not. I would assume so because even capital sentencing is also done by jury in Arkansas.

Q I take it in those cases the judge does sometimes participate in the sentencing?

A I would assume.

Q Mr. Amsterdam, what, under Arkansas law, are counsel permitted to argue to the jury in their closing arguments with respect to the imposition of the death sentence or not?

A Counsel are permitted to the jury, yes, and both counsel may argue to the jury with regard to the death sentence. Of course, the difference is that prosecution has all sorts of good things to argue from. He has got the crime. And defense counsel if the defendant exercises the privilege has nothing to argue about.

Q I remember a case that came here from Ohio back in the 1920's, in which -- and I remember it because my father was counsel for the petitioner in the case and I was a little boy -- in which Ohio, which has a somewhat similar system to Arkansas', but this was for first degree murder, had not allowed the counsel for the defendant to even argue to the jury that they should extend, recommend mercy, as that State says, and that decision was either affirmed or certiorari was denied. I have forgotten which.

But I wondered if in the case law of Arkansas if some of these standards have not been evolved in deciding what is permissible to be argued to the jury with respect to the imposition of penalty in a capital case.

A Mr. Justice Stewart, my statement that counsel are permitted to argue to the jury rises from my observation of reading transcripts in Arkansas death cases. There is no decision of the Arkansas Supreme Court which specifically talks about counsel arguing to the jury at all, let alone defining what arguments are proper and what arguments are not.

One can find nothing in Arkansas case law that is instructive about standards that stems from the argument. I simply state from observation that counsel are indeed permitted by the trial court to argue the penalty issue to the jury although as your Honor suggested, in other States not even that is permitted.

The discretion is is supposed to be so Archaean a matter that it emerges surfaces and works its doings only in the jury room. That is not so in Arkansas.

Q Since so far as appears they could argue anything. They could argue anything, I suppose.

A As far as I know. There is no recorded decision challenging a prosecutor's argument or sustaining a defense counsel's argument or whatever.

But the discretion is absolute.

Q Yes.

A And one would assume that if the discretion is absolute that absolutely anything may be argued.

Q Mr. Amsterdam, may I just ask one question before you sit down.

Getting back to your colloquy with Mr. Justice White I know it is your position that this question isn't here in this case. But suppose we had a Legislature say, "In a trial for the crime of rape, the Court shall instruct the jury that the death penalty may be imposed if the jury is of the view

that death is the punishment that should be imposed for the crime committed by the defendant." That is all the statute says.

Would that standard be unconstitutional?

A No, but it would be better than Arkansas'. Because at least it focuses in on the crime.

Q Because looking at the facts, as you referred to them, you referred us to the Supreme Court opinion. I would suspect that on these facts if there were that kind of instruction, that the facts of this particular crime perhaps would have brought the death penalty anyway.

A Oh, I must differ, your Honor.

Q Oh, really?

A I think that is not so. Every rape crime is a serious crime. There is no doubt about it.

Q Oh, I know, but this one, dragging her out of the house, taking her two blocks away, beating her father, beating her, cutting her up?

A Well, cutting her up, she suffered some cuts and bruises.

Now, Your Honor must remember, what we are talking about is a State in which where you have intraracial crime 14 percent of the cases get death.

Now, one asks, you know just guessing whether this is in the most serious 14 percent of the cases, I would say -- having seen a lot of these cases -- in my judgment at least

it is not. But that is a judgment in any event that I leave to your Honor. However, the important thing is, the jury doesn't have to think about that. The jury doesn't have to care whether this is atrocious, not atrocious, heinous where the victim was injured, whether the cuts were accidental, how long they lasted, whether they were cured, any of those things.

None of that is relative. The jury just goes out and decides that maybe they don't like the color of the defendant and they sentence him to death.

Q What is your position if they repeal the statute and give the judge the right to sentence again, without more, no standards, no anything in Arkansas?

A My position would be that something which simply gave a judge the power to do the same arbitrary test a jury is now doing wouldn't be constitutional.

Q That is not my question.

My question was, if they repeal the statute and re-enact the statute which says that the judge has the sole right to sentence in rape cases or any other cases, period?

A If they did that ---

Q Good or bad?

A Bad.

Q Why?

A Well, although it is worse to give a jury this kind of discretion, it seems to me what one does when one passes

it to the judge with no more than that is essentially to again permit a judge to make individual judgments case by case which need have no relationship to the judgments passed in the next case.

Now it is not quite as bad as a jury.

Q That would upset many a criminal statute now in existence or do you limit it to rape cases?

A I am not sure I understand the question.

Q Well, embezzlement. The judge now sentences without any standards, right?

A Noncapitally, yes, your Honor. That is correct.

Q Without any standards.

A That is correct.

Q And that can run from 0 to 100 years.

A One hundred years in some offenses.

Q Certainly, consecutive sentences.

A Oh, yes, your Honor. Certainly.

Q Without any standards.

A Except those which are assumed within the preconditions of the judicial role or which emerge from the fact that as Mr. Justice White has put it you have a professional sentencer subject to common aspirations, common experience.

Q Those wouldn't be enough to save the complete discretion system in your view, would it?

A In my judgment, it would not, although again I

must refer the court to a distinction that I think is crucial between capital and noncapital sentencing. I think there are justifications for a more clinical case-by-case approach in noncapital sentencing that are not available in capital sentencing and I am clear from the decisions of this court that the degree of arbitrariness allowable is greater where the imposition is greater.

The death penalty is the greatest known to man.

Q You limit it for this case you are perfectly right to limit it to death cases.

A With this case I have no ---

Q My point is I don't see why you should go further than that.

A I have very great difficulty with the whole regime of sentencing in the discretion that we have and so do a lot of other people. But I need go no further in this case than death cases.

Q There is a great deal of the rationale, Mr. Amsterdam, of the opinion in the Witherspoon case was based upon the very premise that a jury under our system, the system followed conventionally in most of the States is allowed to roam essentially at large in deciding whether or not to impose capital punishment.

And that, therefore, it became awfully important that the jury insofar as possible would be, would represent the

conscience of the community. That premise, as I say, was at the base of -- largely at the base of what was decided in the Witherspoon case. Isn't that correct?

A It was not a constitutional assumption. It was an assumption as to what Illinois law required.

Q Permitted.

A If a state permits this kind of discretion, then it cannot stack the jury in exercising the discretion. But I think the Court needed to make none and made none of the kind of assumption that is of a constitutional nature that Illinois could do that.

Q Yes.

A The question was not raised in Witherspoon whether Illinois could do it. It appeared that Illinois had done it, and the question was whether you can give the jury unfettered discretion and skew people who exercised it.

Q In a jurisdiction where you have the diminished responsibility rule, if the diminished responsibility instruction is given in all capital cases, I don't know whether it is or not, but if it is, would that take care of the requirements as you see it?

A No, although it would present a limitation, each question of diminished responsibility your narrower definition of the crime or whatever. Now is the outer parameters of the discretion ---

Q I understand that. But I was just wondering why that wouldn't satisfy a constitutional requirement by sort of -- it is backwards if you will -- by defining circumstances in which less than the death penalty may be given?

A If it were put in as a limitation on the death penalty as distinguished from the limitation on conviction, it might do that, but again you fall into the problem of the single verdict trial.

We don't know whether Maxwell has diminished responsibility or anything else because he wouldn't present evidence on that without waiving the privilege. Again, the interrelatedness of the two issues becomes apparent. The diminished responsibility alone would solve neither of our two constitutional contentions, separately or together.

MR. CHIEF JUSTICE WARREN: Mr. Amsterdam, your time has expired, but you may have five minutes to close if you wish.

MR. AMSTERDAM: I would prefer to reserve it if I might for rebuttal.

MR. CHIEF JUSTICE WARREN: Well, you haven't anything to reserve. But if you wanted to take five minutes in rebuttal you might do it. And, of course, counsel may have five minutes more also.

Mr. Harris.

ORAL ARGUMENT OF ALBERT W. HARRIS, JR., ESQ.

AMICUS CURIAE IN SUPPORT OF RESPONDENT

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

I am here on behalf of the State of California as amicus curiae on behalf of the respondent and with the permission of the Attorney General of Arkansas speaking here, particularly and exclusively with respect to the first question that is presented in this case.

California and Arkansas in this matter of sentencing procedures in capital cases share really only one common elements and that is the element of leaving it to the jury to determine whether or not life sentence should be imposed instead of the death sentence without any standard, without any restrictions, without as we put it in our instruction in your absolute and sole discretion.

That is the common element we share and that is why we are here and that is why we are concerned about this case.

Q You have a separate penalty trial?

A Yes, we do, your Honor. We have a so-called bifurcated trial where at the outset if the jury returns a verdict on guilt, and on guilt alone, and then usually a couple of weeks later they start a penalty hearing ---

Q The same jury?

Q The same jury?

A Normally it is the same jury. The trial judge has the authority to convene a new jury upon good cause shown. But normally it is the same jury.

Q And the bifurcated part of it is required in every capital case. Is that correct?

A Yes, it is. It can't be waived.

Q The judge has no discretion to say in this case we are just going to have a single jury to determine at the same time?

A No, it has to be done in two stages in every case.

Q How long has that been the law?

A It has been the law as long as I have been concerned about it. I guess it must be a good 15 years, maybe longer than that. I really don't know.

Q Up to that time ---

Q Not longer than that.

Q Up to that time, what kind of a trial did they have?

A Pardon me, your Honor.

Q Up to that time, what kind of trial was it?

A We had a unitary trial as they do in Arkansas.

Q You have unitary trials for noncapital cases?

A In California?

Q Yes.

A Yes, at the present time.

Q And jury sentencing in any of them?

A Very, very little jury sentencing. Once in a great while. There have been very little.

Q And there have been objections to yours on the ground that it violated principally the fundamental fairness and so forth? What do you think about that?

A Well, that is one of the reasons that we are here, your Honor. This issue was very thoroughly gone into before the California Supreme Courts last year, and this particular attack on the question of lack of standards was raised and resolved by the California Supreme Court in favor of the established practice.

So we submit that it is valid and inconstitutional for a jury not to be restricted in determining whether to return a life sentence instead of the death sentence.

Q Suppose that was the original basis of a jury trial, that they would act in their discretion, members of the community?

A Well, that is right

Q Expressing the community sentencing.

A That is correct. Well, basically it seems to me the same rule is followed in Arkansas as far as the lack of any standards or any restrictions on the jury is concerned is precisely the same rule that this court required in the Winston

case some 70 years ago when you held that it was improper for the trial judge to give a standard to the jury and to say to them you should return a death sentence unless you find mitigating circumstances in this case.

Now you held that that was not correct, that the trial judge should leave it to the jury in their absolute discretion and not tilt the scale on way or the other. That is precisely the case in California and the jury is told that in no uncertain terms and it is my understanding that that is the case in Arkansas.

But I want to make it clear that on this question of the unitary trial, we do not express any view because we in this guilt proceeding meet the objections that are raised in terms of information being made available to the jury; both sides are free to put in evidence in mitigation or evidence in aggrevation and they are both free to go into the background of the defendant and to go into anything that is relevant.

Of course, it has to be competent evidence. And it is very common to call psychiatrists. The defendant may call a psychiatrist who says he has examined the defendant and he is familiar with criminal characters and under his judgment this man can be rehabilitated.

There is all sorts of evidence and certainly all of the things that would go into a judge sentencing on the basis of a probationary report or a diagnostic reports in our

noncapital cases. So I think as far as that objection is raised and as far as it is tied into the lack of standards, we meet that very well in California.

Now I am not so sure it is a benefit to the defendant. Certainly the bifurcated trial was enacted as a means of giving the jury the fullest information before it passed sentence, and I think that is a good idea.

To say that it benefits the defendant is something else again because the defendant is stuck with his own record. He made his life and if it hasn't been a good one, he will suffer for it in a penalty trial. There is no question about it.

It can be very difficult for the defendant whether or not in the long run it is better to bifurcate or whether it is better and gives the defendant a better shot at it to let it all go in one trial, limit the jury to what is admissible on the murder charge or rape charge or whatever, is quite another question.

In any event, we proceed on the bifurcated trial. We also have some provisions for review which have been mentioned in briefs particularly filed by the petitioner who argues that the Arkansas jury verdict is unreviewable, for all purposes.

Q Before you get to that, may I ask you whether at the end of the penalty trial there are any instructions given by the judge, and if so, what they are?

A At the end of the penalty trial the jury is

instructed in a standard instruction that it is the duty of the jury to determine which of the penalties, death sentence or life imprisonment, which should be imposed. I won't read the whole thing but just basically.

You should consider all of the evidence received here in court presented by the people and defendants throughout the trial before this jury.

And that would normally include all of the evidence on the guilt phase as well.

You may consider also all of the evidence of the circumstances surrounding the crime, of the defendant's background of history, and of the facts in aggrevation or mitigation of the penalty which has been received here in court.

However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggrevation of the offense on the other.

It is the law of this State that every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life at the discretion of the jury. And then they are told they have to indicate in their verdict which of the two, either death as it is put here, or life, they prefer.

And then they are told this notwithstanding facts if any proved in mitigation or aggrevation in determining which punishment shall be inflicted you are entirely free to act

according to your own judgment, conscience and absolute discretion.

That verdict must express the individual opinion of each juror. Beyond prescribing the two alternative penalties the law itself provides no standard for the guidance of the jury in the selection of the penalty, but rather commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the jury.

In the determination of that matter if the jury does agree it must be unanimous as to which of the two penalties is imposed.

Q Is that in your brief, or that instruction in your brief?

A It is certainly not set forth in full, your Honor. It may be referred to.

Q Could that be left filed with us, please?

A I would be very happy to do that.

There are some other instructions that come in. For example, the California Supreme Court had a great problem over the last few years about arguments that well this man if you give him a life sentence might be paroled after 7 years and go back and commit another crime.

And we have a special instruction that covers that phase. What a life sentence means.

Q What is it?

A Pardon me?

Q What is the special instruction on that subject?

A Well, it is quite a long one, your Honor.

Q I mean the substance of it.

A What it is basically, it is that the jury is told that a life sentence means that he may be paroled at some time, but it is up to the adult authority to determine -- that is a separate agency in California -- to determine when, if ever, he is released.

And in general, you are not supposed to be concerned about that anyhow. They will do their job properly. You do your job properly. That is the gist of it, that he can be paroled but that this shouldn't enter into your considerations as jurors.

We submit that the California procedure and I think it is basically the same on this element of lack of standards, was adopted originally to benefit the defendant, the defendants in capital cases, and it is easy to say that the Legislature passed the buck, that it didn't want to decide the hard question of who should be executed and who shouldn't be.

But I don't think that was the basis for it. I think the basis for it was in the experience of all of us who know anything about capital cases that it is impossible, at least I think it is impossible, to set out in advance those

considerations exclusively. New cases come along. New situations develop.

Some of the considerations are those referred to human qualities and emotions that we can't reduce to a formula.

Q Well, it is because of that that I confess a little surprise that you are apparently willing to accept identification of your procedure on this point with that of Arkansas.

The word standards is a word of great difficulty, and I think that whether the absence of standards breaches constitutional proportion is a question that may appear quite differently in the context of Arkansas' procedure on the one hand and the context of California's on the other, because it is at least arguable, I think, that under the California procedure, whether or not you say there are standards, the jury's attention in the second, penalty trial specifically focused upon the qualitative judgments that I suppose are at least arguably relevant to the kind of penalty that ought to be imposed.

Whereas in the Arkansas procedure as I understand it at this moment, that does not happen. Therefore, the two systems in this respect are not necessarily properly equated, even before the application of constitutional concepts.

A I certainly didn't mean, your Honor, to convey the impression that the two systems are the same or that if one falls the other must inevitably fall. And we do not identify

our system with Arkansas. In fact, I have attempted to point out here some of the differentiating factors. But when you pin it right down to the question of lack of standards and isolate that, I think we are on the same footing.

Now it may be that there are other aspects of the procedure which would say that even if the court felt there was some defect in the Arkansas procedure, we certainly hope that the court would recognize the national impact of the rulings and that is one of the reasons we wanted to present our position here and then our State Supreme Court has just resolved this question squarely and upheld the absence of the standards.

Q How did your court split on that? I have forgotten.

A It was 4 to 3, your Honor.

There is one other phase of the differentiation in our system, your Honor. After the jury comes to its verdict, the trial judge has the power to on a motion for a new trial to review all of the evidence, everything in the case, and determine in his discretion, the death sentence having been returned by the jury, whether the sentence should be life instead of the death sentence.

He can't, of course, go up to death if the jury returns life. But he can in effect reduce the sentence. And that does not have to be because of some error, but because of his appraisal of the, of all of the evidence in the case.

Q Is it your understanding that that is the same in Arkansas, or is it different?

A No, my understanding, your Honor, is that it is different, but I am certainly not -- I have to rely pretty much on what is said by the parties. I am not qualified to speak on that. I don't think they have that power. They may have.

We certainly have the power. It is true that on appellate review the Supreme Court of California, and that is for all death penalty cases go in California, there is no other review, and it is automatic in all death cases.

Q I am sure that the judge in Arkansas must have a power to set aside a judgment, death or life judgment,

If under the old theory that if he thinks it is so outrageously wrong that he wants to do something about it, I imagine. I don't know. Do you know?

A I certainly wouldn't want to act as if I were an authority, your Honor. I don't know. Let me put it that way. I do know that it is done in California and it doesn't have to be done for error. It can be done simply because the judge in his judgment, again with no more standards than the jury had to start with, thinks that a life sentence should be imposed.

In addition, there is still a further review and I think it is important to make sure that there is no, this is not an arbitrary decision passed in a vacuum or something.

There is a review by the trial judge. There is a review by the State Supreme Court. Not of the question of whether it should be a death sentence or a life sentence, but on the question of any error that may have occurred during the penalty trial and the least error without reversal.

Q The Supreme Court can raise or lower the sentence?

A No. No, they can review the record, your Honor, for error in the penalty trial.

Q They can't touch the sentence?

A That is the view. We have one justice now who is of the view that they can, in a death case. But the established law in California is that they can't.

Q There are six on the other side?

A I think it was six, yes.

Now those are some of the things, but if I could come back to this basic idea, it seems to me it is based on two things. One is the, as I have said it is so difficult to formulate in advance these considerations, and the result is that a case comes along where everybody involved feels that the death sentence should not be posed, but it may not fall within some predetermined category.

Q When you get into things like pity and sympathy and kindness and compassion, how you can reduce that to any kind of a standard in the due process sense of the statute defining

conduct, I don't understand and the petitioners haven't told us.

Again, in California, for example, the jury is told in the guilt phase of a case -- this is true of any case -- you can't take into account any pity or sympathy you might feel for this defendant no matter how down and out he is, you have to decide the facts. Is he guilty of murder, whatever it might be, robbery, and you have to put pity and sympathy out of your mind.

Now if you are trying a capital case and they are given that instruction in the guilt phase, then you have to correct that impression in the penalty phase, because they can properly be guided by such things in determining penalty, in sentencing, just like a trial judge can be, take consideration or take these things into consideration and unless it is the position of the appellant petitioner here that pity and kindness and compassion should be excluded from the sentencing process and must indeed be excluded as a matter of constitutional law, then it seems to me that he can't prevail.

The model code certainly says nothing as I recall about kindness or compassion. No State to my knowledge has ever enacted standards of the kind that are suggested here. The ones in the Model Penal Code have been around for some time. They have never been adopted by anybody.

This discretionary sentencing in capital cases has been with us as I pointed earlier, it was at the instance of

this Court some 70 years ago that the Federal Courts commenced this procedure.

We have known about it. We haven't been offended by it. The results have been by and large pretty good with undoubtedly there are always arguable cases, but no court has ever held that this is a constitutional defect in sentencing.

Only two years ago this Court agreed to adhere to the decision in Williams against New York which in evaluating the sentencing procedure in New York in a capital case, permitted the trial judge to consider matters in the probationary report and in other sources, and to consider things that had not been testified to in open court so that in effect the defendant had no right to cross-examine.

The witnesses that, and the information sources of information that the trial judge considered, and in that case the trial judge in the face of a recommendation of a life sentence by the jury, after reviewing these matters, that came to him not from the witness stand but by way of report, imposed the death sentence in his good judgment, again without any standards as far as I can tell and this Court affirmed it.

Two years ago in Patterson, Specht against Patterson, you said you had given it some thought that you would adhere to that decision in Williams against New York.

It seems to me that the issues are different in this case. But that the sentencing procedure in Arkansas and the

sentencing procedure in California and in the Federal Courts and everywhere in the United States, as far as I know, that this aspect of the sentencing procedure does comport with due process of law and with equal protection of the laws.

There is no problem here in my judgment of undue vagueness in the law, although granted there are no standards specifically set forth, but the definition of the crimes that call for capital punishment everywhere is very specific.

It certainly is in Arkansas and it is in California. And those crimes are set forth wherever they might be, murder in the first degree, rape, however the Legislature wants to apply it.

And the fact that the defendant doesn't know and indeed no one knows and no one in this room knows, whether if he undertakes a murder in the first degree a jury will ultimately return a death sentence or life sentence, is one of those risks that he has to take in his life.

He doesn't know if the Governor will grant him clemency, he doesn't know if the District Attorney in whatever county he happens to be in throughout the United States will ask for a death sentence. He doesn't even know what the higher courts may rule in some things that may happen to him in the course of his procedure. Of course he doesn't know these.

But he knows this, if he commits a murder in the first degree, he is subject to the death penalty.

Now giving the jury the discretion to return a life sentence was the humanitarian step. This Court has recognized that. And in determining guilt and there has to be this prior determination of guilt before we ever get around to sentencing, the defendant has the benefit of all of the constitutional protection.

We don't see any unfairness in this situation. We don't see any uneven application of the law. The same rule is applicable to everybody that goes before the jury. Everybody who commits a murder in the first degree, or a rape in the State of Arkansas.

They all have the same opportunity. In fact, they even have a better opportunity to seek a life sentence under the discretionary procedure than they would under any of these conceivable standards.

Here the whole thing is wide open. Anything that a defense attorney can conceive of to say that might persuade a juror, mind you you need a unanimous verdict, if you can convince one juror that there should be a life sentence, why he has accomplished the purpose. And the only bounds are his own imagination, hiw own ingenuity.

I don't think any standards are going to limit that.

There is another point here, too, I think, and I forget to mention it in our discussion earlier about the California procedure, that it is clear in California that the

trial judge can on request advise the jury about factors that they might consider. And reference is made to the Model Penal Code. It would have to be made very clear to the jury that these were not controlling in any sense, but if that were done, there would certainly be -- I think the jury could be told of those factors, they can be told they can take kindness and so forth into account.

So, we submit that the mere absence of standards does not in any way make the Arkansas procedure for that reason unconstitutional. If there are other objections that we don't share with Arkansas in terms of procedure, why I am sure the Attorney General from Arkansas is prepared to deal with those.

I have just one closing remark and that is I think that in light of your decision in Witherspoon, wherein you recognized that under Illinois law the conscience of the community was focused on this man and what he had done and there was no guide given to the jury, and you insisted that that jury should be fairly composed, and there was some dispute about whether that one was, but nevertheless it would be fairly composed to reflect the conscience of the community.

That rule in Illinois in the absence of standards is essentially the same thing that you have to face in Arkansas and the same thing that we have in California.

And it seems to me that having recognized that, and making sure as you have made sure that the jury must be a fair

representation of the community because you are invoking their conscience, invoking the qualities as I referred to, the kindness, compassion, not simply an arid determination of facts, but a real judgment, not in the legal sense, but in the general sense, a judgment of what should be done with the person.

Q How was the jury qualified at the trial of this case? I don't know because I haven't seen the transcript.

A Well, your HOnor, in our brief, amicus brief, we suggested that the Court should give some consideration to that very point. The case was tried back in 1962. We did not at that time have the transcript.

We thought it was probably a good guess there might be a violation of the Witherspoon rule. In the meantime, and in fact yesterday morning, I examined the transcript. It is right here.

Q Oh, that is where it is. I thought it was back in the Eighth Circuit.

A Well, this is a copy. I don't know, it looks like the original to me, but here it is. And I took the opportunity to go over it, and sure enough, there are at least seven jurors about ---

Q Can we reach the Witherspoon in this case?

A Well, it hasn't been raised.

Q Do we have any power to reach it here?

A Well, you have handed down a ruling in the

Witherspoon which ---

Q I guess it is Federal habeas though here isn't it?

A This is Federal habeas.

Q This is Federal habeas.

A I think you could.

Q All that is being attacked in this case is the sentence of death. Am I right about that? Not the conviction?

A That is my understanding. It is the sentence of death is being attacked and not the conviction. At least at this point.

Q What does the record show? You started to tell us.

A Well, I don't want to -- I think it is between the State of Arkansas and the attorney for Mr. Maxwell, but just in going over it, for example, there were seven jurors who were excused on this ground that they were opposed to capital punishment.

Now, I think you have to look at each one of them and the first one, this is about all there was on this, as to Mr. McCleary, the first man excused. He was asked, "Do you entertain any conscientious scruples about imposing the death penalty?"

And he said, "Yes, I am afraid I do," and he was excused.

Q Colored?

A Yes.

And then another one said, "I would not sentence the death penalty." I suppose you might argue meant that I wouldn't in any case, but it wasn't spelled out.

There is another one who said, "No, sir, I don't believe in capital punishment" and went off. And as I say there were a total of seven. The last one said, "I am against capital punishment."

I suppose there could be argument on each side as to whether or not this complied with Witherspoon, but it is certainly arguable that it did not. We think you could reach that. We think that issue might very well be resolved in favor of the petitioner and that would save him from all that he seeks to get at this point and that is to save his life.

Having that issue, there is no need that you go into this other question.

But we submit that if you do, we ---

Q What you are saying is that the record shows in your judgment an indication that the Witherspoon rule was violated?

A Yes, sir.

Q And that -- I believe it was Justice Douglas wrote an opinion several years ago and he said that this Court could see no reason to send it back to go through a habeas

corpus, an unnecessary habeas corpus, when the record plainly shows here that some rule has been violated.

A Well, of course, you don't have the transcript before you now, but I am sure you could secure it.

Q That transcript is in court? Is it not?

A It is here. It is on the table, but it is not part of the Appendix.

Q It is here. It is part of the record that was before the judges whose judgment we are -- and it happens that I was not for the Witherspoon rule but I certainly was for the case that Justice Douglas wrote that we shouldn't go through a vain and useless ceremony sending the case back, all the delay that would occur when the record, the matter is plainly before our noses.

A Yes, your Honor.

Q Is there any objection by either side to having this transcript before the Court?

MR. HARRIS: We certainly have no objection. It belongs to Arkansas.

MR. AMSTERDAM: We have no objection to having the Court having the transcript before it, but I would like to speak in rebuttal as to the propriety of ruling on the witness in issue.

MR. CHIEF JUSTICE WARREN: Oh, yes.

MR. AMSTERDAM: We certainly have no objection to the

transcript.

MR. CHIEF JUSTICE WARREN: Very well, then, if you will leave it with the Clerk, please.

MR. HARRIS: Thank you, Mr. Chief Justice. My time that we have been allowed has expired.

MR. CHIEF JUSTICE WARREN: Mr. Langston.

ORAL ARGUMENT OF DON LANGSTON, ESQ.

ON BEHALF OF RESPONDENT

MR. LANGSTON: May it please the Court.

I checked this transcript out of the Supreme Court Clerk's Office in Arkansas, last Friday with the specific purpose of bringing it here for your consideration. And I will lodge it with the Clerk, but whenever you finish with it I would like for him to return it.

MR. CHIEF JUSTICE WARREN: You would what?

MR. LANGSTON: Like for him to return it to me so that I can have it filed back in the Supreme Court.

MR. CHIEF JUSTICE WARREN: Yes.

MR. LANGSTON: I was going to mention ---

Q You believe that is the proper record?

A This is the original transcript filed in the Arkansas Supreme Court and it has also been considered by this Court on certiorari from the Arkansas Supreme Court.

I see here marked on it, "Received September 22, 1966, Office of The Clerk, Supreme Court of the United States."

In Arkansas we have five crimes which our Legislature has determined are bad enough to require the death sentence. Those are murder in the first degree, rape, kidnapping, treason and burning of prisons by convicts.

Our law ever since these crimes have been ---

Q What was that fourth one? I am sorry.

A Burning of prisons by convicts.

Q How about the one before that?

A Treason.

Q Treason. Oh, I am sorry.

A In Arkansas these five crimes were originally punishable by death. That was the only sentence. It was automatic on a finding of guilt in these particular cases that the person be sentenced to death.

But in 1915 our Legislature saw fit to allow some discretion by the jury and inacted a statute which allows the jury in its discreption to return a sentence, a life sentence.

In this particular case the verdict form was at the top of the page it said, "We the jury find the defendant not guilty." The second form was, "We the jury find the defendant guilty of rape and fix his punishment at life imprisonment." The third form was, "We the jury find the defendant guilty as charged in the information."

And when the jury brought in the verdict saying, "We the jury find the defendant guilty of rape as charged in the

information," that ended their proceedings. It was then mandatory upon the judge to under the law to sentence the defendant to death.

Q Suppose as I think Mr. Justice Black raised in his colloquy this judge thought this outrageous or it shocked his conscience or something like that.

Couldn't he set it aside, send it back to the jury for reconsideration or something like that?

A Of course, one, he can when a motion for a new trial was filed by the defendant he can grant a motion for new trial and give him a complete new trial. We didn't cite it in our brief ---

Q Are there any limitations on that? Does it have to be for errors committed in the trial or can he just say ---

A I believe that the defendant can probably say in his motion for a new trial that the judgment is contrary to law in that it is excessive and that would be an error.

Q That it is what?

A That would be an error.

Q What?

A That the judgment is contrary to law in that it is excessive.

Q Oh, excessive, yes.

Q But it has to be contrary to law. What law is

it contrary to, if it is just shocks the conscience or as Mr. Justice Black's word, outrageous?

A I think that under that he could set it aside, just being arbitrary. I don't see any recourse that the State would have in appealing the case to the Supreme Court of Arkansas on his judgment of setting it aside.

Q Is that acknowledged in any statute or any decided case or is that just something that judges do when their conscience is shocked or it is outrageous?

A There is nothing on the motion for new trial, your Honor. There is no reported cases on that. I was going to give you a second statute which I think would give the judge the authority to reduce the sentence. It has never been passed on by our Supreme Court and we didn't cite it in our brief, and it is Arkansas Statute 43-2310. That statute reads: -- I have it here before me -- It reads: This is the trial court.

> "Shall have the power in all cases of conviction to reduce the extent or duration of the punishment assessed by the jury if in the opinion of the court the conviction is proper and the punishment assessed greater than under the circumstances of the case ought to be inflicted so that the punishment be not in any case reduced below the limit prescribed by law on such cases."

That statute does appear to give him the power to

reduce the sentence to life imprisonment if he so desires. It has never been passed on by our Court.

Q Do you know of any instance in which that power has been exercised?

A I would imagine that it has never been exercised. I wouldn't want to speculate on that but ordinarily our judges follow up what the jury said. They are elected in Arkansas and I imagine they wouldn't want to go around setting aside jury verdicts because it would look bad.

Q In whose eyes?

A In the eyes of the community in which he is serving and has to run for re-election every four years.

Mr. Amsterdam said something about impeachment in his -- impeachment of a defendant who takes the stand when he testifies in his own behalf and I believe he went further than Arkansas procedure allows.

On impeachment you can't ask him about all kinds of bad conduct, but if he denies it, you are bound by his answer. You cannot introduce independent independent evidence of bad conduct. You have to live with his answer.

Q Plus a charge of perjury? He lives with his answer plus a charge of perjury?

A I imagine it would, your Honor.

We think that the Arkansas standards of death cases are set by the statute whenever in a rape case, whenever the

jury finds that a defendant has carnal knowledge of a female forceably and against her will, that it can bring in the death sentence. Those standards are the elements of the crime.

Now in its mercy the jury can bring in life imprisonment. But I do want to emphasize that the penalty actually is death and not life imprisonment and that appears at the Arkansas procedure sort of reverse from some of these others.

In California theirs is the ultimate. But ours is a mandatory sentence of death, but with this statute the jury can in its discretion recommend life imprisonment, which the judge must abide by.

Now in Arkansas, the say on the crime of larceny which carries a penalty of from 1 to 21 years, all that the jury has before them is the evidence and the definition of the e lements of larceny and they can set that punishment at any point in that extent of time that they want to.

The prosecutor gets up there and argues that he ought to have 21 years. The defense gets up and argues that he ought to get the minimum sentence. And the jury then sets it somewhere inbetween that.

It appears from my reading of the Federal statutes that their procedure in death sentences is the same as it is in Arkansas, that they have a unitary jury, one jury, and that they bring in the verdict of guilt and fix the punishment at the same time.

So it appears to us that the Arkansas statutes are stricken down by this Court that the Federal rule would also fall with it.

In this case in the transcript, going back to the Witherspoon argument that the jury is the conscience of the community, and that is sort of a standard, the Court's instruction No. 2 on page 380 of this transcript, he among other things tells him that in reaching your verdict exercise your judgment, your common sense and reason in passing upon this case and give the testimony of any and all witness such weight as you think it is entitled to and let your verdict be in accordance with the truth and the law.

When the State proved that this person intruded -- when the State proved that Maxwell entered into his victim's home, beat her up, drug her across the street and attacked her in a vacant lot, then the State proved a case for death and the only way he can get anything less is for the jury to exercise mercy which it declined to do under the facts of this case.

Q Forgive me for raising this. It may not be correctly relevant, but I always have difficulty when counsel refer to the jury as reflecting the conscience of the community.

Now, particularly in these penalty matters might very well be that if you took a vote in the community the prevailing sentiment would be to lynch him or hang him or electrocute him, or Lord knows what.

But that the material that is there before the jury might indicate to a reasonable man who is a human being that some other consequence ought to be attached and one of the fundamental, perhaps it is philosophical rather than strictly legal, one of the fundamental questions that all of this raises is what is a juror supposed to do.

I had thought that a juror was supposed to bring the bear upon the material before him as comprehended by his senses, his qualities as a human being subject to the law and the standards, if any, that were given him, rather than to reflect on what might be a community attitude towards rape or murder or this particular felony.

A Well, of course, I think that the jury -- I don't know whether this answers your question or not -- but I don't think the jury can leave its conscience outside of the jury box. I think they take everything, their biases or prejudices ---

Q Now, it is their conscience they bring, not the conscience necessarily, the conscience in the sense of the reaction grossly of the people at large who don't have before them what the juror is supposed to have before him. And that is, as I was trying to suggest, perhaps not very articulately related to the question that is being argued here, namely the question as to whether in bringing to bear his own conscience, his own qualities as a human being, his own comprehension upon the material before him, if that is a juror's function rather

than just to reflect the gross reaction of the community.

The juror must as a matter of constitutional principle have the guidance of some standards in at least a philosophical sense that may be lie perhaps close to the heart of the issue in this case.

A Of course, we think that the standard is set in the statute and we don't see how you could draft a set of standards that would tell the jury what to do in each particular case. I think the Legislature, to adopt standards, would have to be in session all the time and enact almost ex post facto law to cover every situation.

That is what our argument is. The only thing that you -- we don't think whether you use a weapon or whatever you do makes any difference. We think that the evidence before the jury, that that is the standard that they are going to go by is the evidence that is presented in the case.

If there are no further questions, that is our case.

MR. CHIEF JUSTICE WARREN: Very well.

Mr. Amsterdam.

REBUTTAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.

ON BEHALF OF PETITIONER

MR. AMSTERDAM: Thank you, Mr. Chief Justice.

I would like to address three things if I may in rebuttal.

One, the substantive arguments for the States of

California and Arkansas only very briefly.

Two, the Witherspoon question in this case.

Three, the point brought up by California as to the difference between California and Arkansas procedure and the relevance of that for disposition of this matter.

My response on the substantive level can be, I think, very brief.

As I understand both California and Arkansas admit that we have got an arbitrary procedure going here and they defend it simply on the grounds that it is necessary, that you can't do anything else, whether it is beneficial to the defendant.

Both in reading the brief and in hearing the oral argument, I was struck that I had heard this argument somewhere before. And so I looked around. I find that indeed I have.

The argument that you have to allow arbitrary discretion so as to individualize on the facts of each individual case was originally written by William Paley in 1785. He was defending the English Bloody Code under which 250 crimes were capital, and he defended on the ground that you couldn't get a narrower formulation. There was just no way in which you could cut down on some of those crimes by fixing standards, taking some of them out of being capital.

He said, "The preference for the English system of having a broad net in which you can make capital punishment

available and then let the executive commute, was in the consideration that the selection of proper objects for capital punishment depends principally upon circumstances which however easy to perceive in each particular case after the crime is committed, it is impossible to enumerate or define beforehand." And so on.

And he concluded eventually that the law of England was based on the wise policy of sweeping into the net every crime which under any possible circumstance may merit the punishment of death and then letting individual circumstances ferret it out. He concluded that the wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offenses which the laws of England are accused of creating beyond those of other countries, thus the Bloody Code was justified.

Q How many capital crimes were there?

A About 250, your Honor.

Q What year was that?

A He wrote in 1785 originally. Of course the way England did go about it was they simply cut back more and more.

They first of all removed the death penalty for stealing from bleaching grounds and then for pickpocketing and then for taking threepence and what have you. Until they got it down eventually to murder.

Then in 1957 notwithstanding the Royal Commission's

recommendation which California cites in its brief, saying it was very difficult to get down any narrower as a matter of categories, the English went ahead again in 1957 in delimited capital punishment by category.

Now the only other thing I think I need answer ---

Q Was that done by Parliament or with the Court?

A It was done by Parliament.

Q By the Parliament.

A That is correct.

The only other thing I need answer to the suggestion that the arbitrary discretion is justified by necessity or beneficence is that it makes an awful difference who you are beneficent to. It might well be that a few defendants might get a better shake. A lot of them would get more even justice and it makes a difference whether it is a white or black defendant that you are talking about in terms of whether this is a good or bad system.

In any event, I want to emphasize that our argument does not take discretion, compassion or anything else out of the system. That is what Mr. Justice Fortas was talking about when he spoke about the next question or the next case.

The question is whether standards can be devised which we compassion in but narrow the range or discretion beyond where Arkansas allows.

Our contention here is that Arkansas has thrown the

net too broadly in dealing with the discretion too little. We do not contend for mandatory categories which throw out wisdom and pity and compassion. We simply contend for a rule of law that limits the application of the death penalty much more narrower than Arkansas does.

The second thing I want to address myself to is Witherspoon. I hope that in looking at the transcript of the voir dire in this case this Court will remember a number of things.

First, Witherspoon has been generally cut to ribbons by the courts below, and I don't think the court can lightly assume ---

Q By the courts below?

A Arkansas, your Honor. By every lower court that I have seen decide a Witherspoon case since Witherspoon. There are a dozen of them pending on certiorari here.

The kind of cutting of ribbons I am talking about is that the lower courts have eased up on the kind of opposition to the death penalty that permits exclusion.

Secondly, they have authorized exclusion where questions were asked which is a pretty good Witherspoon question if the answer is equivalent. And they authorize exclusion.

Three, they reprint Witherspoon records as though they were done in light of Witherspoon. Assume the juror is saying something that meets the Witherspoon test and go ahead and let

him set.

Four, a number of courts have held that if only a couple of jurors are thrown off on Witherspoon it doesn't make it bad, as only a couple.

Five, the courts have held that if the prosecutor's remaining peremptory challenges exceed the number of jurors in question, that that sentence doesn't get vacated under Witherspoon.

Now I raise all this for this reason. This case has never had a Witherspoon claim in it. The habeas petition was filed prior to Witherspoon. The District Court specifically, since this is a second Federal habeas corpus petition asked whether there were other issues in the case and Witherspoon was never put in here.

And the court said -- now I am going to be very weary about, weary not wary, about entertaining a third one -- I simply wouldn't assume that this case is going to be settled or that Maxwell is going to stay alive for vindication of some Witherspoon claim and again I am worried about the Witherspoon claim on this record, in terms, unless this court sets right all of the developments of post Witherspoon law which it made a very limited ruling indeed out of Witherspoon.

More than that, Maxwell has been on death row in Arkansas since 1962. He has twice come within a few days of his death. The last time to be saved only by a stay issued by

Mr. Justice White of this Court.

What a lot of courts are doing in light of Witherspoon is they say we vacate the death sentence and give him a new trial, new penalty trial now to determine whether he should live or die.

It would be an inhumanity second only to killing this man not to resolve the issue now finally presented, whether the State of Arkansas has any right to be trying this man for his life under the unconstitutional procedures that we are challenging

Q Suppose you have contemplated the possibility that the prescription of standards may result in more and not fewer death penalties. Have you got a reaction to that, Mr. Amsterdam?

A I think I have two reactions to it. One, I doubt it. It depends on what standards they are, and two, it assumes that our argument is an argument for mandatory categories which would take compassion out of the system.

Q That is not what I had in mind. But necessarily, there is a possibility in a way and men may reasonably differ as to how important it is, that prescribing standards for the imposition of the death penalty may result in more death penalties than would come about if the juries were just left free to do what they choose.

And I assume you have considered that and that you have concluded that it is not really relevant to the legal

argument that you make.

A I have, your Honor, and I will add this.

There are to the best of my knowledge 475 men on death row at this moment in the country; 470 of them were sentenced by juries exercising discretion kin to or in some way like Arkansas'.

The decision in this case which we ask for would vacate or lay the ground for vacating a number of death sentences we contend are unconstitutional.

The Governor of Arkansas has 14 men on death row whose executions he has held up pending disposition of this case. This Court has before it petitions for certiorari from Alabama, from New Jersey, from North Carolina, California raising this issue.

I am very sensitive to the notion that this Court should not decide constitutional questions prematurely but if imminent death of dozens of people can make an issue not premature, the issues presented here are not premature.

There is no question of no adversity. There is enough adversity in this case to float a dozen constitutional issues. There is no question here of a nonfocused nature of the issues. The issues are clearly focused and the question is presented for decision.

We suggest that for this court to put off on speculation of Witherspoon or something else, the contention between

these parties, Arkansas contending they have a right to try William L. Maxwell and kill him without standards, and are contending that for the better part of six years he has been on death row for longer than that under jeopardy of death, under an unconstitutional regime, that is the issue we put to this court, we ask this court to decide.

The Arkansas procedure is unconstitutional for violation of the rule of law and we hope that it will reach and decide the issue in this case.

Thank you.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 2:20 p.m. the above-entitled matter was concluded and the Court recessed to reconvene at 10 a.m. Wednesday, March 5, 1969.)