Supreme Court of the United States

Supreme Court, U. S.
NOV 19 1970

OCTOBER TERM, 1970

In the Matter of:

Docket No. 203

DENNIS COUNCLE McGAUTHA, Petitioner,	
vs.	
STATE OF CALIFORNIA, Respondent	

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

DENNIS COUNCLE McGAUTHA, Petitioner,	:	
vs.	:	No. 203
STATE OF CALIFORNIA, Respondent.	:	

Washington, D. C.,

Monday, November 9, 1970

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

HERMAN F. SELVIN, ESQ.,
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Beverly Hills, California
Counsel for Petitioner

RONALD M. GEORGE, ESQ.,
Deputy Attorney General of California

ERWIN N. GRISWOLD, ESQ.,
Solicitor General of the United States

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments in the first case, No. 203, Dennis McGautha vs. State of California.

Mr. Selvin, you may proceed whenever you are ready.

ARGUMENT OF HERMAN F. SELVIN, ESQ.,

ON BEHALF OF PETITIONER

MR. SELVIN: Mr. Chief Justice, may it please the Court, this case is on writ of certiorari to the Supreme Court of California to review a judgment of death imposed by a jury upon the Petitioner after his conviction of murder in the first degree.

The question that is raised and to which the granting of certiorari was limited is whether California's procedure of imposing the death penalty by leaving the choice of penalty to the jury in its absolute discretion, unguided and uncontrolled by any standard fixed by law is a denial of due process.

That there are no standards governing the process in this law of California is a fact that has been noted many times by the highest court of that State and the jury in this case was told that in so many words, that to them and in their absolute discretion was confided the choice of penalty for which choice the law fixed no standards.

It is my plan to discuss that question for what it

is, a question of law, not one of penology, not one of policy. The question does not necessarily implicate the constitutionality of the death penalty per se. It is aimed primarily, so far as our presentation is concerned, at the procedure, the standardless procedure by which California imposes the penalty.

That being so, I suggest that we are brought to grips with first principles arising whether the due process clause, the main purpose, the basic purpose of that clause, this Court has said time and time again, is to prevent government from imposing burdens upon a person from depriving a person of his life, liberty and property without due process of law. Save, as this Court expressed it in one case, save by the valid laws of the land.

Now, that does not mean, as this Court pointed out in one of the first cases that arose after the 14th Amendment had been adopted, that does not mean any law that a legislature may enact. It means only those laws that are consistent with the basic purpose of the amendment, that purpose being in a few words to impose upon the judicial process, and the legislative process too for that matter, the rule of law.

It is a requirement because it is inherent in that purpose that law shall not mean something for the occasion or for the moment, but some fixed and ascertainable standards by which a rule -- by which a rule is established, not merely so that individuals may be able to conduct themselves in

conformity to the law but but as well so that the courts may determine whether in fact they have conducted themselves in conformity with the law.

In other words, the rule of law established by the due process clause, I submit, imposes a rule of decision or standards for a rule of decision as well as standards for a rule of conduct.

We would have, I suggest, no trouble, no trouble with that concept if what were before this Court was a statute of a sort that said, for instance, that murder was simply any killing that in the absolute discretion of the jury was determined to be deserving of some kind of punishment. We would have no trouble because the rule is thoroughly established that a statute must so define proscribed conduct as to enable not only a person to conduct himself lawfully but enable the court to determine whether he has conducted himself lawfully.

If that is so, if that is so with respect to the determination of guilt, why should it not be in respect of the imposition of penalty? The process by which a person is deprived of his life is not a fragmented process even though the actual trial may, as it is in California, be divided in two stages. It is one process, from accusation through to final imposition of sentence, and there is nothing, nothing in the 14th Amendment that provides that it shall be applicable only to a part rather than the whole of that process.

And as this Court has said in that connection, the sentencing procedure is not immune to squibnee under the due process clause. But when if in respect to determination of guilt the rule of law imports that necessity for standards doesn't matter respectively, the sentence after all is a final culmination of the process by which the defendant is to be deprived of his life or liberty as the case may be.

Q Mr. Selvin, how long has California had a statute providing for the bifurcated trial?

A Since 1957, I believe, Your Honor. It has been quite a while.

Q And under California procedure has it always been the jury which fixes the punishment?

A Since that bifurcated procedure, yes, Your Honor. Even before the bifurcated procedure the jury had fixed the --

Q Even before?

A For a good many years.

Q If California, as many other states, had a procedure whereby punishment was fixed by the judge, would you be making the same argument here today?

A Not necessarily. My submission then would be alternatively, the first answer I would make is that if standards are required of the sentencing power that required of the judge as well as of the jury, but the case of the

judge is a classifiedly different situation, and the legislature might well distinguish between the two. There is the matter of the judge's special training and experience and expertise, there is his greater knowledge of the purposes and objectives of the criminal law, a knowledge that goes beyond that which an ordinary person could be supposed or deemed to have, and there is the coordination of his own action, his own exercise of discretion to what he determines from his experience and from his knowledge of the law are the objectives and the aims of punishment.

That being so, the likelihood that he would arrive at a result intended or dictated by the law, as distinguished from personal preference or personal reaction of the situation, is so much greater that a legislature could very well classify between the two and insulate that classification in my submission from any contention under either equal protection or due process.

Q One last question, while I have you interrupted. As I understand Mr. McGautha's co-defendant received a life sentence from the jury, and I take it it is your position that this difference in the imposition of penalty is indicative of caprice on the part of the jury?

A Well, it is illustrative, it is not necessarily so. Of course, I recognize, as California argues, that there were factors in the evidence upon which a jury might

rationally have made a difference between the two men. The vice is we don't know that that's what they did; the particular vice is they weren't told that the law makes whatever it is they may have decided in that connection a distinguishable or, not a distinguishable but a significant difference between the two men.

California has said that the jury undoubtedly determined that McGautha was the trigger man. Well, I would say that's a pretty good guess, but it is by no means an ineluctable inference or even necessarily an inference that probably should be drawn. The evidence on that score was in sharp conflict, and under a statute imposing standards of a sort, for instance, that we find in the model penal code, notwithstanding that the jury exhypothisae was satisfied that McGautha pulled the trigger, there might have been because of the sharp conflict enough doubt in their minds so that under an appropriate instruction they could have treated that doubt as a mitigating circumstance. Now, I'm not saying the Constitution requires that that be treated as a mitigating circumstance; what I am saying is that that is an indication of the kind of standards that could be framed, that could be imposed, and that might lead to the very result understandably and inferably, at which here California only guesses.

Q Is there anything in the record which indicates that anyone other than McGautha or Wilkinson pulled the trigger?

A Yes, there is testimony -- Mr. Wilkinson testified in effect it was McGautha; McGautha testified in effect that it was Wilkinson. There was some evidence from the proprietor of the store, the lady involved, describing the activities of the two men, describing the activity of one of themen who from her description of the size and coloration and the rest must havebeen McGautha, which was inconsistent with McGautha being able to fire the shot. As I say, the evidence on that score was in sharp conflict, and -- as a matter of fact, it was in conflict within theprosecution's own case, the jury didn't have to wait until the penalty phase of the trial for that conflict to develop, because neither of the defendants took the stand in the guilt phase, but from the ballistic testimony on the one hand, the testimony of the proprietor of the store on the other, there was a conflict in the prosecution's case about which one of the two fired the shot.

Q Mr. Selvin, while you are on that subject, let me go back to your observations about the experts posture of the judge in imposing sentence, where you indicated, if I heard you correctly, that the legislature could vest this power in the judge without standards. Is that your position?

A Well, the legislature -- yes, classify the judge differently and treat the judge situation as different from that of the jury because of the --

Q How does that square with the idea that is

widely held, widely expressed, that the jury and the whole process is to expres's the community conscience, to distinguish between the judge as an expert and the jurors as non-expert laymen in that respect?

A I distinguish between the judge and the jury in respect of their expertise in the law so far as the conscience of the community is concerned.

Q But when the judge fixes the sentence, is he making a legal decision, in your view? Is that a question of law?

A That when he considers the aims and objects of punishment, when he considers the material, the information that in normal practice every judge gets by way of presentencing reports, probation reports and the like, I think that there is a considered and designed effort to impose the particular penalty in thecircumstances of this particular case, in the judge's opinion as an expert of the law, is what the law had in mind as a general policy.

Q If you are right in the proposition that it is a question of law, then how can the jury be deciding it at all, with or without guidance?

A Well, simply, as a question of law, simply because the statute does nothing, nothing necessarily, imposes upon a state a sharply defined division between the functions of judge and jury in a case. Common law for many years, wasn't

it, until Fox's act and others, the jury decided the law in libel cases, among other things. That was submitted to them. It is not unknown to the law that questions of law may be submitted to the jury, but when they are, when they are I suggest that generally admitted under a charge that attempts at least to put before the jury the considerations that the law considers to be the determinants of decision, and that is what the California procedure does not do.

Now, if I may say just a word, if Your Honor please, about the conscience of the community. There can be no question about the fact that the jury does reflect the conscience of the community. There can be no question about the fact that a link between the community and the jury is an important part of our judicial system, but that link must be maintained and cautions must be exercised within the limits of the Constitution and the jury must have those limits explained to it, and those limits must be fixed to the extent that they need to be madespecific by the law.

I need only cite by way of example two comparatively recent decisions of this Court in Wrightman against Mulke

expressing the conscience of the California community overwhelmingly and directly in adopting a certain constitutional amendment in California was held unconstitutional by this Court, notwithstanding that it was the direct expression of the conscience of the community.

In Lucas, an initiative reapportioning the Colorado legislature was held to be unconstitutional, notwithstanding that it represented the voice of the community. What I am saying is, and what this case is illustrating is that conscience is in itself not an unbridled thing so far as the law is concerned. It is confined by the constitution just as much as the legislature, the judiciary, or the executive is confined.

Q Does California or do other states have jury sentencing in non-capital cases?

A There is none that I can think of in California. California indeterminate sentence law. There is jury sentencing in non-capital cases in other jurisdictions, I understand.

Q In a case like that where -- and supposing there is a range of punishment from five to fifteen years for a particular crime, would you say under your argument that a jury had to be given standards as to how to measure?

A I suppose as a purely logical or abstract question the answer is yes, that it should be; but there again do we not have a classifiably different situation? In the first place, the range is a difference in degree, not in kind, asit isin the capital sentencing case. The sentence is a much more irrevocable fact once it is established. The jury deals then with the type, with the type of situation and the pressures and the tensions and the simple meannesses that lead

to them with which they are much more likely to be familiar in the ordinary run of life than they are to be familiar with what it is that motivates someone who kills another human being.

Well, that is a very rough idea, if Your Honor please, of factors again that make non-capital jury sentencing a classifiably different situation. I take it that the Constitution certainly doesn't require complete conformity, or uniformity. It certainly doesn't require logical perfection. There must be some to work, I think was Mr. Justice Holmes' famous phrase, and some latitude, some latitude must be found in these things.

Let me say just a word, if I may, before I reserve what is left of my time to reply to mention briefly what seems to be the argument in opposition to the position we have taken in this case.

So far as California is concerned, about what it comes down to is that the penalty phase of a murder trial in California is a pretty fair thing. All relevant evidence is admitted, procedural niceties are observed, and review of errors of law are provided for. Well, that begs the question. The question is, are standards necessary, and if they are, are they given to the jury. Is the rule of law imposed in that phase of the case or isn't it. It isn't enough to say that the trial in its non-sentencing procedural aspects is a fair trial. Theargument proves too much. You can say exactly the

same thing about the guilt phase of the trial, and yet even California would not argue that the question of guilt , not guilt but definition of the alleged crime could be left to the jury without any guidelines or standards or without any fixing by the legislature.

The argument in the brief of the Solicitor General seems to be that jury sentencing is an old practice, and being an old practice, we should retain. At least the fact that it is unconstitutional has never been strongly enough urged apparently to have it decided, to have it decided that it was. Well, this Court at theclose of last term, it seemed to me, answered that kind of an argument. The argument, incidently, also begs the question because it doesn't come to grips with the proposition of whether due process of law means law in the sense of standards. But the answer was made by this court in Williams against Illinois. Neither the antiquity of the practice nor steadfast judicial or legislative adherence to it insulates it from attack under the Constitution, and it is that attack under the Constitution that we made here, primarily for the reason to put into one short sentence, that it ignores the basic purpose of the Fourteenth Amendment, which is to establish the rule of law throughout the entire case, not just a part of it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Selvin.

Q I have one more question. If California

provided that upon confiction for first degree murder that the death penalty were mandatory, would that in your view be unconstitutional?

A Let me say first that it's not necessary to my argument that it be unconstitutional. I am inclined to think that on balance it would not be. Now, the question might arise under the cruel and unusual punishment clause; it might arise under the due process clause. Under the cruel and unusual punishment clause, the argument that has satisfied my mind and my own reflection on it is that there were 160-some odd crimes for which the death penalty was standard procedure at the time that amendment to the Constitution was adopted. So far as due process is concerned, I suppose it gets down ultimately to the question whether there is such a compelling interest on thepart of the government to make retribution a factor in criminal law as to justify taking one's life, because I submit that only a compelling interest can justify the taking of one's life even for the commission of a heinous crime. But if retribution is not such a compelling interest, then rehabilitation, protection of society and all the rest of the purposes of the punishment that can be encompassed and can be furthered by life imprisonment would then leave the answer to the question let me say at least in doubt.

But primarily, from the standpoint of far more or less limited attack on the California procedure, there is nothing

that needs to be decided in that connection that in any way indicates the death penalty per se.

Q Well, if the death penalty were mandatory and were not unconstitutional, then you are here because California ismore lenient that it might have to be.

A Well, it is capriciously more lenient. It does not -- you see, California hasn't expressed any preference for one penalty rather than the other. Our supreme court has said so time and time again, and in fact, a jury is told that in just about those words. The trouble with the California situation is that the penalty for murder has not been fixed by the law. Now, that's quite a different thing, I submit, from saying the penalty is death but someone, be it the jury, the judge, the governor or some administrative commission, has the power to dispense clemency. In that case an argument could be made -- I don't have to make it, but an argument could be made that the requirement of standards does not apply because there is no constitutional right to mercy. But there is a constitutional right to know what it is that you can and can't do and what happensto you if you do it.

Q What your argument comes down to, Mr. Selvin, in a sense is that the legislature of California could vest this uncontrolled, unguided power in a judge or the legislature could reserve it to itself, unguided and without articulated reasons, by a mandatory death penalty, without offending the

Constitution in either case.

A So far as the legislature is concerned, when it defines the crime with constitutional accuracy and says the penalty for that crime is one thing or the other, it has implicitly set the standard. It has the legislative power within the confines of the Constitution to set the standard.

So far as the judge is concerned -- I have answered thatquestion somewhat ramblingly -- I think it is a classifiably different situation the legislature might do it, and that justification for doing itwould be found in the small likelihood that the judge's knowledge and sense of obligation, and more particularly, his knowledge of the objectives of the criminal law would in effect see that the sentence, would see to it that the sentence was opposed in accordance with the law's purposes and intentions in the matter.

That is, in substance, what the California courts have said with respect to its indeterminate sentence law, except that they find problem with the language of the statute, some rather more specific standards than that, but it does come down to the same thing, that having set the generalized standards, the objective of the statute, it is then permissible for the legislature to impose on one having the necessary qualifications and expertise the job of seeing whether those standards are met in a particular case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Selvin. Mr. George?

ARGUMENT OF RONALD M. GEORGE, ESQ.,
DEPUTY ATTORNEY GENERAL OF CALIFORNIA

MR. GEORGE: Mr. Chief Justice, and may it please the Court, this case on direct review from the California Supreme Court involves a single issue, whether petitioner was deprived of due process of law under the Fourteenth Amendment by the procedure under which the jury was entrusted with the decision whetherhe should be punished alternatively with death or life imprisonment, and the resolution of this issue will affect the sentences of each of the over 550 prisoners in the Nation under sentence of death.

The procedure which is involved in petitioner's case under California law provided that after the jury found the petitioner guilty of first degree murder, additional evidence and argument on the issue of punishment was received and the jury returned a penalty verdict after being instructed as follows:

First of all, that the proper factors to consider in guiding its discretion in fixing the punishment were so-and-so -- I'll get into those in more detail -- but they were instructed as to certain factors. I'll mention in summary form these factors included all the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of penalty. The jury was further instructed to base its decision on the evidence received in court. The jury was instructed

as to the necessity of not being arbitrary or governed by mere conjecture, prejudice or public opinion. However, and if anything this tips the scales in the defendant's direction, the jury was instructed that it could be influenced by pity, mere sentiment or sympathy for the defendant.

Thus the question at bar is not whether it is constitutional to submit the jury a penalty in a capital case, to a jury without any standards. The question properly before this Court in this case is whether the standards which are provided by California are constitutionally adequate. I might mention in response to Mr. Justice Harlan's question that there are indeed two offenses that I am aware of under California law which provide for the jury to fix the punishment. Those happen to be penal code Section 193, Vehicular Manslaughter, and Section 264, Statutory Rape.

Now, I'd like to give a very brief outline of the factual situation --

Q Neither of those the death penalty?

A That is correct.

Q What is the range of punishment allowable for the jury to fix in those two offenses?

A In statutory rape I believe it is one to fifty years.

Q One to fifty?

A One to fifteen.

Q Fifteen.

A Five-zero; yes. And in vehicular manslughter it is lesser range. There is a choice in some offenses I would just guess about three or four that the jury is entrusted with, whether to send the defendant to state prison or instead the county jail, and then in those situations specified terms are provided by statute.

Now, outlining briefly the factual context of this case, because I think it is very important to approach this case as a living reality and not as -- in a factual vacuum, not a metaphysical exercise here, but we are dealing with the rights of one individual and specific facts here. The offense itself, well, the victim was the owner of a little market which he and his wife operated. The death of the victim occurred during a holdup committed by petitioner and his co-defendant, Mr. Wilkinson. Petitioner was 41 years of age; Wilkinson was 25.

This was an unnecessary, cold-blooded execution of Mr. Smitana, the owner. He offered no threat; he was unarmed; he didn't attempt to obtain a weapon. He was five foot, three inches tall, 135 pounds, 52 years of age. He could have been robbed without aweapon. There was certainly no reason to kill this man.

Petitioner -- there is evidence showing that he told

a Mrs. Dupree later on that he was the one who had killed Mr. Smitana. He also told the man who drove him up to Bakersfield that hehad killed Mr. Smitana. It was McGautha's gun, I believe, that was established as the one that fired the fatal shot, although McGautha later indicated that he had loaned the gun to Wilkinson, that they had somehow exchanged weapons right before going in, and of course the jury was entitled to weigh that evidence for what it was worth.

And what's very significant was that the jury apparently stressed in its fixation of penalty who was the triggerman. What is significant is, on the issue of guilt this was insignificant; under California's felony murder rule both men had committed first degree murder and either or both could obtain the death penalty from the jury. However, after the jury brought in that verdict of guilt, it was then that they on two occasions asked to have read back to them evidence of witnesses on that precise question, as to the admissions made by petitioner that he had shot the man, and other evidence bearing on that question.

The district attorney's argument, which was very calm and collected, ended with the sentence, "Members of the jury, I urge you to weigh this evidence as to who fired the fatal shot and to give the man who fired the fatal shot the death penalty."

Now, furthermore, what do we have? We have two men

with remarkably different backgrounds. Petitioner is a four-time loser. He committed theft, robbery by assault, robbery and a prior murder. By contrast, Wilkinson had no prior convictions. All we know is he had some arrest which did not result in a conviction for a bad check count.

And finally, petitioner at the trial refused to accept responsibility even as to the prior convictions which he admitted outside the presence of the jury, so we have a vivid contrast here. Now, basically respondent affirmatively believes that the death penalty and the procedures by which it is imposed in California are constitutional, but perhaps the best approach to the question in the case at bar is to consider the various objections which petitioner and his amicus curiae have raised tothe procedure. And these objections are basically three:

They are that the absence of fixed standards prevents the defendant from knowing how to defend himself at the penalty proceedings;

Secondly, that the jury is permitted to impose the death penalty for arbitrary reasons -- dislike of the defendant's expression on his face, the color of his eyes, the color of his skin, anything;

Thirdly, that there is no meaningful review of this decision. It's an arbitrary decision and that's it. Well, an evaluation of these claims requires a brief outline of the

special procedures provided under California exclusively for the conduct and review of penalty determination in capital cases. First of all, even-handed discretion is conferred upon the jury by Penal Code Section 190.1 and the standard instruction, and counsel are allowed broad leeway in their voir dire examination ofthe jurors, and this case is a very good illustration of that. There was specific mention by the jurors that they would not takeinto account the race of the defendants, no bias, no personal preconceptions, nothing; that they would base their evidence on the matters before them.

Secondly, there are special rules as far as the admissibility of evidence is concerned, and this is in accordance with modern penological views to allow the jury to judge the offender and not merely the crime. So other offenses are admissible to show the defendant's background, but the prosecution must establish these other offenses beyond a reasonable doubt.

Secondly, prosecution evidence is excluded where it's merely inflammatory and has slight probative weight. There have even been cases excluding evidence that the victim died in unusual pain, where the California Supreme Court said well, there is nothing to indicate that the defendant intended this unusual pain to occur.

Thirdly, there is a very wide scope of evidence allowed in mitigation. The defendant can bring in, and usually does bring in, anything and everything;he can bring in that he

was kind to his dog when he was a little boy at five, that he was nice to his mother, that he had tough breaks all along the way; everything he wants.

Q Does the record show how long the jury was out on the sentencing?

A The jury was out a bit longer than they were on the guilt phase, and I believe it was the better part of a day, but I'm not clear to theexact amount of time. But something in the neighborhood of that.

Fourthly, and this, in this respect the California Supreme Court has gone way beyond what this court held in the Williams case, no hearsay or incompetent evidence is permitted on theissue of penalty. The prosecution can't come in and say Joe Blow heard that the defendant did this, and all that. No, everything must be established by the same strict rules which govern the admission of evidence on the issue of guilt.

Now, the argument, that too is strictly curtailed. The prosecution is precluded from mentioning such things as the fact that the defendant might be out on parole in seven years if he gets a life sentence. He is not allowed to argue all sorts of things about the fact that the death penalty is considered by some to be a deterrent. He is not allowed to argue that the trial court might reduce the punishment in its complete discretion, nor that the state supreme court or the governor might do that.

This is thought to dilute the jury's sense of responsibility, so none of that can be done. There is a special rule of prejudicial error. Any substantial error whatsoever requires reversal, even where the California Supreme Court would affirm, had that same error occurred at the guilt trial of a defendant. And finally we have very meaningful review by the trial judge who has complete discretion which he often exercises to reduce the death sentence to life imprisonment, and he need not find any reason, he need not find any error of law, he need not do anything, he can re-weigh the evidence de novo and for his own reasons, which need never be disclosed, reduce that death sentence to life, and that is done.

Q Is that done sui sponte or only on application?

A It can be done either way, but I think it is a fairly routine motion which is made. In California there is always a two- or three-week gap between the return of the verdict and the imposition of sentence, at which time routinely a motion for a new trial and/or reduction of punishment is made.

And as I cited in my brief, there are no figures kept on this, but I was able to find two cases in one week in Los Angeles County this year wherein this was done. The death sentence was reduced to life.

And finally the California Supreme Court, that review is certainly meaningful, 69 percent of some 58 cases

decided in the last three years, capital cases had been reversed by that court on the automatic appeal that that court has of all death penalty cases. And the Governor, too, has commuted approximately 40 percent, the ratio has run like that, of the death sentence.

Q The Supreme Court has power to reverse the imposition of the death sentence for a new penalty trial alone, while leaving the finding of conviction, the verdict of conviction undisturbed. We know that from what you have told us and from many cases that we have seen here. Does it also have power, as you told us the trial judge has, to simply reduce the sentence?

A It is a different type of power. It cannot decide by its own self imposed restriction that a different punishment would be more appropriate, but what it can do is reduce the degree of the offense -- and I cited, I believe, five recent cases in which the California Supreme Court has done this. They said, well, we are not going to re-weigh the evidence here as to whether or not this man should have received the death penalty; however, we find that for this reason or other there wasn't really enough evidence of premeditation, we reduce it to second degree and, of course, that automatically immunizes the defendant from the death sentence, and under California law, by the way, a defendant can never under any circumstances, contrary really to what the court said in

the Pierce case, receive a death sentence the second time around. Once he has that death sentence reduced to a lower degree, he can never get first degree murder again.

Q Well, if the Supreme Court should reduce it to a lower degree of homicide, then is that the end of it or is there a new trial on penalty or a new trial on anything?

A No, that is the end of it.

Q It is just we find that the evidence on the guilt phase was not sufficient to show any, whatever it is, deliberation or premeditation, and therefore the most he can be guilty of is second degree murder?

A Yes.

Q And we affirm it and then that automatically carries the sentence of what, one year to life or whatever it is --

A That's it.

Q -- in the discretion of the adult authority, and that is the end of it? There are no new proceedings in the trial court?

A That is correct. That's right. And aside of re-weighing evidence of premeditation in the case of People vs. Anderson, which we have cited, there the Supreme Court said this was a murder of first degree by virtue of the felony committed and we find that there is insufficient evidence to indicate that the defendant was engaged in deviate sexual

conduct and therefore the first degree murder conviction can't stand so we reduce it to second, so that is done, too.

Finally, I would like to indicate in this respect that --

Q The defendant doesn't get another shot under those circumstances for a new trial when the most he could be convicted of would be second degree murder?

A You mean when it is reduced?

Q Yes, when the Supreme Court said the evidence in this case, viewing it most strongly in favor of the prosecution, simply does not show a case of first degree of murder. We therefore reduce it, to the conviction of second degree murder and affirm the conviction, is that what they do?

A That is true. As modified, it is affirmed, but an important qualification is that there must affirmatively appear in the record sufficient evidence to uphold it on that second degree theory. When there is any doubt as to that, the thing is reversed completely and sent back for a new trial. So that is only done when, let's say, the mental element clearly indicates malice of forethought, that there is some doubt as to whether it rises to the level of premeditation.

Q When you say for a new trial, do you mean on penalty only?

A Well, that would depend exactly on what was involved in the case. It can be done either way.

Q This is reversal, you mean?

A Yes. The two questions are dealt with somewhat separately and sometimes only the penalty is reversed and sometimes both the guilt phase and the penalty phase.

Q It goes back for a new trial on penalty only, a new jurey is empaneled, then?

A That's correct, and that usually means that the prosecution has to present much of its, if not all of its evidence on the question of guilt, because the jury has, of course, to be informed of that as the main basis really for its determination whether the defendant is fit to live.

Now, the death penalty is a very selective thing in California. As the statistics that we have cited indicate, it is a small proportion of murders which become murders in the first degree. In turn, it is a small proportion of first degree murders which receive the death penalty. And the statistics I think clearly wipe out any semblance of basis for the argument that there is a racial overtone to the death penalty as far as California is concerned. In fact, those statistics affirmatively show that, if anything, it is the caucasions who have received more death sentences than racial minorities in proportion to their convictions of first degree murder.

Now, what I would like to do is go back to these three basic objections now which have been raised and note how

they bear up. It is pretty clear that the defendant doesn't have any trouble knowing how to defend himself, at the penalty phase he is free to take anything he wishes in his background and the most heinous criminals always are able to come up with some story, some excuse, some explanation for the jury, so this isn't any problem.

As far as the jury being permitted to impose the death penalty for arbitrary reasons, it is essential to note that the jury is free to do this under any system, a system of fixed standards, they can still do it. They can be told don't consider his race, don't consider the expression on his face, and they can still come back and do that and there is no system divisible by man that can preclude that possibility.

In fact, the Royal Commission in Great Britain found that jurists were exercising their discretion in mandatory capital offenses where they felt that they didn't like the death penalty for this particular individual, they would find the man not guilty or find him guilty of a lesser offense admittedly for that purpose, to preclude imposition of the death penalty. So there is no system that can get away from the possibility, humanly acceptable, of some discretion.

Now the standards which have been proposed by petitioner in amicus curiae, fixed standards, these I think are rather unrealistic attempts to try and categorize every

conceivable factual situation, and this is impossible. But what is significant is, I was frankly even startled when I reviewed each of the 128 capital cases decided by the California Supreme Court in the last five years, I could not find one that did not include at least one of the aggravating circumstances specified by the model penal code, such as more than one victim, a victim being a police officer, committed during the course of a rape or robbery, during an attempt to escape custody, or particular heinousness. Everyone of these elements -- or rather one of them was always present.

And what is almost amusing is that the fixed standards, not only are they not workable or effective as far as their aim, they don't escape the so-called vice of vagueness or arbitrariness because since it is impossible to make an exclusive list of all mitigating circumstances -- and this is what really can redound to the disadvantage of the defendant -- or of aggravating factors, they leave a loophole, they say "or anything else that would particularly indicate cruel, unusual cruelness or depravity," so it is still open-ended. And I think that fixed standards would result in more death verdicts because jurists would feel inclined to say, well, here we find two or three of these things here, the man has a prior record, he shot more than one victim, I guess this is in the proper case for the exercise of our mercy function.

And how is an appellate court going to review

something under these fixed standards? How are they going to decide there is enough evidence of aggravation or there isn't enough of mitigation, or there is some of each and we are going to re-weigh this? This is I think an impossible task to try to impose upon an appellate court.

And, of course, despite petitioner's denials, it is very obvious that his arguments implicate judge sentencing, not only in capital cases but judge sentencing in other criminal cases. It implicates the granting and denial of probation, it implicates the fixing of indeterminate terms by an administrative agency, and it implicates parole proceedings, and possibly even clemency, although that may be an extra legal function.

Now, this is basically what the fixed standard proposal means, that the jury needs a list defining all the aggravating and mitigating factors and a formula for weighing them, something like A plus B plus C minus X and Y. This, I would like to inquire, how does this aid the jury's function in determining, as this Court said in Witherspoon, whether a defendant is fit to live. This is not a matter for expertise, this is a matter of expressing the conscience of the community.

The proposals that petitioner has advanced would turn the fact-finding process -- it would rather turn the fixing of punishment into a fact-finding process, and this is totally foreign to the concept of punishment fixing, even with

special verdicts this couldn't properly be evaluated. And I think this is important, that to be effective fixed standards would have to impel a death verdict in some factual context. They would have to say, if you find these aggravating circumstances, then return a verdict of death. However, they leave a loophole. They say despite aggravating circumstances, even if there are no mitigating circumstances, you can still return a verdict of life. Now this is probably just and proper, but it shows that what these proposals for fixed standards really amount to in the last instance is a contention that there is a constitutionally impelled preference for life, and this by the backdoor, and this is a different thing from saying that there is a permissible legislative preference for life.

Where does the Constitution express a preference for life? It doesn't, and yet this would be the end result. On the contrary, the Constitution, in the Fifth Amendment, speaks of capital offenses and recognize them. And if you don't have this loophole, which the proponents of fixed standards have made, then you have unavoidable and desirable jury discretion and --

Q Is there in the brief of the other side a short compact statement of what standards they say are constitutionally required?

A No, there is not a specific one, but I would like to read to you what petitioner advances as his suggestion

for standards and inquire whether this would meet constitutional requirements, objections of vagueness, and I quote from petitioner's brief, and that is stated on page 27 of his brief, footnote 19:

"Consideration of the choice of penalty could be centered around these objectives" -- that is, of penalty -- "with a view of choosing that one which, having regard to the circumstances of the case and the character and temperament of the defendant, would most nearly further rather than frustrate them."

Now, I inquire if this is any kind of standard? I don't know what a jury would do in trying to follow this or of an appellate court trying to review this.

Q Is that the nearest to a set of standards that has been proposed?

A That is the nearest except cross-reference to the model penal code set of factors, which I have discussed.

Now, in the very short time remaining, I would like to note this, as Mr. Justice Blackmun stated: California could abolish the degrees of murder and fix the penalty of death where there was a certain standard of aggravation consisting of premeditation or felony murder in the absence of mitigating circumstances which they could define, as the statute does, the defendant being under 18 years of age, or else there could be a first degree mandatory death sentence,

as Delaware has, with the judge's power to reduce it to life, a discretionary power when the jury recommends that.

But the logical end result of petitioner's argument is this, either no death penalty or a mandatory death penalty, and we submit that either one is undesirable.

And in conclusion I would like to state this: First of all, petitioner is in no position to raise these contentions which are not really applicable to his situation or himself, these vague claims of arbitrariness, racial bias, and all the rest. The record affirmatively discloses a constitutional basis for this, and as this Court said in Harris, we shouldn't permit the possibility that abuses occur to give sinister coloration to procedures that are basically reasonable.

Now, finally, we submit that jury discretion is an unavoidable feature of capital punishment, as the Royal Commission indicated, even where there is a mandatory death sentence. Aside from being unavoidable, it is desirable from the standpoint of fairness as it enables the jury to best carry out its functions of expressing the conscience of the community, as Witherspoon sets out. And not only is it desirable, it is to the defendant's advantage, as we have indicated, it would result in more death verdicts to have fixed standards.

And if some of petitioner's argument is ready to admit that theoretical and unrealistic campaign for fixed

standards, artificial and arbitarily fixed standards, is only a device to abolish the death penalty, at least with respect to the 550 men now under sentence of death. And they admitted in Maxwell vs. Bishop that they are ready to urge the very unconstitutionality of those fixed standards whose absence they now decry as constitutional error. So before accepting the theoretical arguments of petitioner that fixed standards are the only procedure that a state may enact for jury determination in a penalty in capital cases, it must be remembered that over 550 dangerous persons, who committed the worst or the most vicious crimes, would be perhaps permanently immunized from receiving the death sentence, despite the considered judgment of thousands of jurors and hundreds of judges that the interest of society demanded the extreme penalty.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. George.

Mr. Solicitor General?

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

SOLICITOR GENERAL OF THE UNITED STATES

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court, at the invitation of the Court and with the assistance of Mr. Lacovara, we have tried to be of as much help to the Court as possible in this difficult matter.

Before I begin my argument, I would like to make two amendations in the brief we have filed. The first is in the tabulation page 130 showing the chronological development

of the introduction of jury discretion into all of the -- into the statutes of all of the states. Near the bottom of page 130 there is a reference to the New York statute which is there dated 1937. Actually the New York statute of 1937 applied only to felony murders. It was not until 1963 that New York extended jury discretion to all murders.

And then on page 138, where we list the federal statute authorizing jury discretion, the first of the federal statutes there cited, 18 USC 837(b) --

Q I beg pardon? What page?

A Page 138.

Q Yes.

A The first of the federal statutes, 18 USC 837(b) has now been repealed, since our brief was filed, I may say. This was not an -- this was lack of foresight on our part. It was repealed by the Organized Crime Control Act of 1970, signed by the President on October 15, and by the same Act section 844 of Title 18 was added, and that statute gives the jury or the judge power to fix the death penalty, thus meeting the problem disclosed by the Jackson case.

Because of the importance of these cases, this case and the following one, it is especially important to bear in mind what is not involved here. These cases do not directly involve the general question of the validity of the death penalty, though they are, of course, an indirect attack on

that. Nor do they involve any question of the application of the death penalty in cases of rape, which was involved in Maxwell vs. Bishop. In both cases, the convictions before the court were for the crime of murder.

Finally, there is no suggestion in the record and no contention on behalf of the petitioner that there has been discrimination here on the basis of race, either in the selection of the jury, in the evidence presented, or in the rulings or charge of the trial court.

In this case, the McGautha case, the only question is whether the Constitution requires the legislatures of the states and Congress to spell out what are called standards, though they are never disclosed, which must be put before the jury as a part of the process by which they determine whether the penalty for the particular murder shall be death or life imprisonment.

That question, too, is involved in the Crampton case, and my argument here will be applicable to that case too. The Crampton case also involves the additional question as to whether the Constitution requires a split or bifurcated trial separating the question of guilt from the question of penalty, and that is not involved here, as California does provide a split trial, and I will discuss that in the time allocated to me for argument in the Crampton case.

Both of these question --

Q Mr. Solicitor General, has California had a bifurcated trial from the beginning of jury sentencing?

A No, Mr. Justice, California has had the bifurcated trial since 1957 and jury discretion came into California in 1874, which was 83 years before.

Q I see.

A California was one of the relatively early states to adopt jury discretion.

Q Yes.

A Both of the questions in these two cases, it seems to me, fall within the realm of federal-state relationships. How far as these matters which fall within those areas which ought to be for determination by the several states or are they matters where the states have yielded up their power by joining the federal compact?

And in another sense the cases may be thought of as presenting a problem of separation of powers. How far are these matters for determination by the legislative branch of the government, both state or federal? Or how far are they matters for determination by the judiciary?

In either aspect, the questions are, of course, appropriate for decision by this Court as the ultimate arbiter on federal constitutional questions for the Nation.

With respect to standards, there are certain things that are clear. In the first place, there is nothing specific

in the Constitution relating to this matter. We have only the general provision of the Fifth Amendment, adopted in 1790, that Congress shall not deprive any person of life, liberty or property without due process of law, a provision made applicable to the states by the 14th Amendment in 1868.

Perhaps it may be said that the concept of due process of law does not provide standards for the guidance of the courts on this question and is none the worse for that. However, it is clearly a very general concept and it would be at least surprising if it was found to have a meaning today which no one had ever conceived it had during the first 175 years or so of its existence.

Of course, I am familiar with Holmes' statement that it is revolting to have no better reason for a rule of law than so it was in the time of Henry II, but it is also equally true, I think, that it is at least surprising to find things in the Constitution today which no one dreamed were there as recently as five years ago, and with which we lived for 175 years without even raising the question.

Theoretically I suppose a requirement that there must be legislative standards for jury sentencing in murder cases would be equally applicable to jury sentencing in non-capital cases, and a fourth of our states have extensive jury sentencing in non-capital cases. It doesn't particularly appeal to me, but it also, it seems to me, to be the sort of

thing which the states ought to be free to determine in their own way. And it would imply, indeed, it seems to me, to sentencing by a judge in capital and non-capital cases and, as suggested by counsel for California, to parole boards, and I can't find any theoretical reason why it wouldn't be equally applicable to the action of the governor or the President in extending executive clemency.

It is clear, though, that jury sentencing in non-capital cases predated the Constitution. There was no jury sentencing in capital cases at that time because they all carried the death penalty.

As a matter of fact, the problem we have here has a great deal of background behind it. Very early in our history there were efforts to mitigate the harshness of the unvarying death penalty for serious crime. It was in 1794 that Pennsylvania adopted the device of dividing murder into two degrees, one with the death penalty and the other covering murders where the extreme penalty was thought unwarranted. Over the years this solution was adopted in nearly every state, but it was soon found that the degree system, though helpful, was too rigid and mechanical and that indeed is a part of the problem with so-called standards.

It could not take care of all the variations or nuances or all the factors that might be relatively involved. There were pressures on the jury system and juries sometimes

felt forced to reach verdicts of acquittal, though guilt had been proved because they felt the penalty was too severe. An effort to meet this problem took the form of introduction of jury discretion as to the penalty. The first statue of this sort was in Tennessee in 1838, 132 years ago. That statute provided no standard and no one of the statutes subsequently enacted has undertaken to provide standards. Such statutes have now been passed in one form or another in every one of the forty-six states which have the death penalty and in relevant acts of Congress.

Moreover, these statutes have been repeatedly before the courts and the courts, including this Court, have repeatedly sustained them, often with allusions to the fact that determination of the penalty lay within the complete discretion of the jury.

The contention for standards in this field is, I think, essentially diversionary. It is really a part of an attack on the death penalty itself. That is surely understandable and is a wholly appropriate matter for the consideration of the legislative authority.

But beyond that, I think that the contention is essentially allusive. In one guise it would simply call for the proliferation of the definitions of the degrees of murder. Long experience has already shown that this is too rigid, too mechanical, that it leads indeed to results that are harsher

than the community is prepared to accept.

If by standards it is meant that these are factors which the jury is to take into consideration in reaching its judgment, all of the evidence and experience is that this is just what juries do now. There is no reason to think that properly selected juries today do not approach this task conscientiously and thoroughly. Though their standards may not be wholly articulated, they are in fact the standards of the community.

That is what the jury is for and careful inquiries have shown that this is what juries in fact do.

Further specification and detail would probably not have much effect, since juries, as representatives of the community, do in fact take into account the aggravating and mitigating circumstances that are included in the best known formulations. The chief one of these is the list of aggravating and mitigating factors in the American Law Institute's draft of a model penal code, none of which have been adopted in any state, though many other provisions of that proposal have been adopted.

This is a little like the problem of defining insanity instructions to the jury. Now, this is a great question on which much psychiatric, academic and judicial time and energy have been spent, but it has never seemed to me that the exact definition made much difference. No matter what the

formulation is, the jury knows that its task is to determine whether this particular defendant, under the circumstances appearing in this case, should be held to be responsible for what he has done in the light of the general standards of the community.

Moreover, the specification of these aggravating and mitigating circumstances would, in all likelihood, lead to harsher verdicts rather than more lenient ones insofar as the specification of standards has any effect at all. Murder and first degree murder is all we are talking about, is inevitably a grizzly business, and any murder, there will be circumstances within the aggravation list; as counsel for California has pointed out, that was true in every one of 128 murder cases in that state in the past five years.

If in every murder trial these aggravating circumstances are put before the jury as one of the matters which, as a matter of law, they are to take into consideration the conscientious jury, recognizing the presence of this aggravation in this case, will find it more difficult to reach a lenient verdict.

We will have, I suspect, in many cases requests on behalf of defendants to omit all charge as to standards and to leave the matter to the judgment and discretion of the jury. Opposition to capital punishment is surely understandable, but as long as it is the law of the land the mitigating

provisions developed in the law over many years, first the establishment of the degrees of murder, and second discretion in the jury, the people surrogate to fix the penalty of life imprisonment rather than at death, should not be found to violate the due process clause.

This is a resolution of an extraordinarily difficult problem which has been wrought over many years with surprising unanimity, legislative and judicial. Our present solution has been divised with great care and thought by the very processes which may in all fairness be called the due processes of law.

Adoption of the petitioner's contentions here is unwarranted, both practically and theoretically, and would in fact be illusory. The ultimate solution of this problem is a matter for the judgment of the representatives of the people in their legislatures.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Selvin?

ARGUMENT OF HERMAN F. SELVIN, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. SELVIN: Mr. Chief Justice, may it please the Court, due to the difficulties of practicing law some three-thousand miles from the seat of the Court and, more importantly, from the location of the brief printer, the reply brief on

behalf of the petitioner was not available until this morning. In fact, I only received my copy this morning. I call the Court's attention to that fact because some, not all, of what I am about to say in reply is covered, I think more dramatically, in any event, in that brief. It isn't long.

Q Which brief, the reply brief?

A The reply brief, yes.

Q Filed here on November 6?

A I think that -- November 6? This is my copy. Yes, November 6, yes.

Q Yes.

A But I just got my copy this morning. I didn't -- perhaps I was confused by the fact that the exigencies of time didn't permit the printer to send proof to me, so you may find a couple of typos, and I am sure you will find some awkwardness of language that might have been ironed out had I had the proof.

In any event, there are two or three preliminary matters referred by the State of California that I think I should mention. Whether this case will affect the fate of some 550 other prisoners is a fact that none of us, I suppose, can escape considering. In the cases of those 550, very likely most of them, whether this case will affect them or not will depend pretty largely on the decision that is ultimately made as to whether this case, assuming a result favorable to

the present petitioner, would have retroactive effect.

I mention that for only one reason. This is McGautha's first time around. He is still on direct review of his original sentence. There is no question of element of retroactivity that needs to be decided so far as he is concerned, and I submit with all the earnestness that I can that notwithstanding the traditional processes by which a determination between two individuals or between the state and an individual may have an effect upon the law generally and have an effect upon the cases of others, cannot implicate McGautha's constitutional rights, whatever they may be.

Now, it is no approval necessarily, either by counsel or by the court, of the crime of which McGautha was found guilty to determine that he is entitled to be found guilty and entitled to be sent to his doom, if at all, only by the process of law required by the Constitution of the United States, and that is what is here.

Well, reference has been made by the Attorney General of California to the number of reversals that have emanated from the Supreme Court of California in death penalty cases. It is true, there have been a pretty large percentage of reversals. None of them were for reasons involving anything that is at issue in this case.

We have, as Your Honors are certainly aware from reading California's brief and reading our brief in this case,

we have in California something called the Morse rule which prohibits argument or evidence about what the adult authority may do in the way of paroling a life termer. Most -- not most of those reversals, but a large part of them went off on that particular local rule of practice. A great many of them went off on Witherspoon grounds after this Court came down with Witherspoon. And may I say they went off on Witherspoon grounds somewhat grudgingly, so far as the Supreme Court of California is concerned, but nevertheless they went off.

Nothing in that series of reversals has anything whatever to do with the proposition that the absence of standards nevertheless assures a defendant that the question of his penalty will be decided by the law rather than by the personal reactions of the jurors, unguided and uncontrolled.

Q Mr. Selvin, may I ask you a question. I assume you have given this case much thought. You show it by your brief and your talk. Do you have any suggestion as to standards any more than that in your -- page 27, note 19?

A I have nothing to add to that in the way of a suggestion for a minimal standard beyond the references to the work of the --

Q It is a question of language, isn't it?

A To a considerable extent, perhaps it is. It is not exactly language except as language channeled spot and consideration, and confine stop and consideration to the

channels into which the law wants it to flow, and that I suggest is the important thing about standards for a jury. Instead of leaving them completely at large, it tells them, these are the things you ought to be thinking about in deciding whether to put this man to death or to give him a life term, just to say I told in the case of guilt, what you ought to be thinking about, was there premeditation, was there malice of forethought, was there appropriate identification, and so on right down the line.

Q Now, when you get to standards, you would say was there what?

A I'm sorry, I didn't hear the last part.

Q You were just telling about the charge in the case of murder, premeditation and so on. You said you would tell them was there this. What would you suggest that the judge could say to the jury was there this?

A Well, I would suggest something that perhaps was an elaboration or a specification of the general suggestion that I made in the footnote on page 27. I myself, so far as my own thinking on the subject is concerned, was somewhat taken by the approach of the American Law Institute, which is much more specific and yet flexible enough from the approach that I have taken. And, incidentally, the commission to study the revision of the federal criminal code has taken substantially the same kind of an approach, although not

exactly the same. They differ. The fact that those two commissions studying the problem from conscientious and scientific point of view arrived at a general proposition that was alike but different shows that this is not a delicate question of federal-state relationships, as the Solicitor has intimated. The states will be left free within a very broad range to frame whatever standards they think fit the conscience and standards of their own particular community.

All that the Constitution would require is minimal standards. Now, it is true, the 14th Amendment says nothing. The 14th Amendment says nothing about standards. May I suggest that it says nothing about a statute defining a crime being so certain that a person will know what it is that he can or can't do? It doesn't say anything but there is no question but that that is what it means. Does it say anything --

Q Although we are pretty late in the argument and perhaps I am obtuse here, perhaps I have missed something, but I still -- it is not at all clear to me what your concept is when you talk about standards. Just now, in answer to my brother, Justice Black, you said -- repeated two or three times that the jury should be told this is what you ought to be thinking about in deciding whether or not to impose the death penalty. Well, that is one kind of standard.

Another quite different kind, and it is different

in kind, not in degree, is that the jury must be told you may not sentence this man to death unless you find this and that and the other, or unless you find the absence of this or that and the other. Now those are two quite different concepts of standards and I don't frankly know which one you are talking about.

A Well, the latter is the American Law Institute approach and the approach of the commission studying the revision of the federal criminal code. It is the approach that I personally prefer, because it is specific, it gives the jury something they can get their teeth into, it gives them something concretely that can be discussed --

Q And you don't mean that the jury should merely be told these are the kinds of things that you ought to be thinking about?

A Oh, no, not that alone.

Q Which is it that the -- would the Constitution in your submission be satisfied by either kind of standard?

A I think as minimal standards, yes. If they give them a general standard -- while it is a much less serious thing, I think you would find an analogy as to form in the decisions relating to delegation of legislative power to administrative agencies, the standard that must accompany such a delegation can be a very general and a very broad one. It doesn't have to be specific, enough to indicate to the

body who is given the power what it is that the delegating body thinks they ought to be doing and how they ought to go about doing it.

Now, I realize those are general propositions. If a state wants the specific, it finds a model in the model penal code. It can work with that. If it wants something that is broad and general and with much flexibility and much room for what has been called the conscience of the community as it is possible, still keeping the operation of that conscience confined within that broad boundary, it can take the kind of an approach that I have suggested.

Q And you think either would satisfy the 14th Amendment?

A In my opinion, they would. I think so.

Q So you are not confining yourself to either one concept or the other?

A No, not at all, and I am happy at the opportunity to make that clear. We are not -- I am not seeking a result that will impose upon the fifty states of this Union a uniform necessarily adoptable procedure with respect to standards. They have got as much scope there, it seems to me, as they have in defining what you constitution murder, of murder in the first degree, of murder in the various degrees.

And while I am at it, may I interject -- it has nothing really to do with what I have just been saying except

that the use of the word "murder" suggested it to me -- it is true that Mr. McGautha is a four-time loser in the language of Mr. George. All of those four convictions were in the State of Texas, beginning I think when he had attained the ripe age of 17. One of those was for the crime in Texas is called murder without malice.

Now, murder without malice is the somewhat pejorative name for whatelsewhere is called manslaughter. Now, I am not saying that that makes a light or trivial offense, of course it doesn't. But it is still not quite the serious thing that is implied by the word "murder" without any explanation or qualification.

Now, my reason --

Q How old is he?

A At the time of --

Q Yes.

A I don't --

Q I mean at the time he committed this crime. What --

A This crime, I think he was in his early forties, Your Honor.

Q What?

A Early forties, 41 I believe the evidence is. Forty-one. He had been in California, I think, just a few years before that time, having spent about half of the time

from when he became 17 years of age until he moved to California, having spent about half of that time in Texas Penitentiary. He was convicted four times. He did serve in the armed forces in between, apparently without trouble.

Now, having spent perhaps too much time on what my personal ideas are about what the jury should be told in respect to standards, I would like to read very briefly what McGautha's jury was told and what every California jury in this kind of a case is told, particularly because it disposes, I submit, of California's argument that the penalty phase of the trial is so fair and so scrupulously guarded that anything that the defendant wants to put before the jury can go in and the jury will know what it is they can do with that evidence.

And this is what the jury is told -- I am not going to read the whole -- all of the instruction, but the parts that go really to the question of standards. It is the law of this state -- page 222 of the Appendix, Your Honor -- 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 it says if you choose one or the other, you must say so, and then it goes on -- notwithstanding facts, if any, proved in mitigation or aggravation, 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. They don't even have to agree on the reason why they are going to give death or life, as the case may be.

Q Do you think it should be required?

A No, but it is an indication of the extent to which the procedure is completel uncontrolled and not confined by law, by standards, by criteria as to what the law says are the determinants that go into making a decision, a judicial decision. No, I don't say that they ought to agree on all the reasons.

Q The jury might disagree on the reasons for finding a verdict of not guilty or a lesser charge, isn't that true?

A They could, yes, except that if they disagreed on whether there was or wasn't premeditation, for instance, having regarded the definition of murder in California, that might not be --there might not be a valid verdict. There they all have to agree that there was premeditation, and they all have to agree that there was malice and they all have to agree that it was the defendant who did it.

Then the charge goes on -- and this is the important thing -- because, despite all of this evidence, despite everything that goes in, this is what they are told aboutthe extent to which they can deal with the situation on their own. Now,

beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in 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. Now, that is what they are told, despite everything that may have been put before them, it is a matter entirely of their judgment, conscience, and absolute discretion.

Q But they are affirmatively told, are they not, that they make this decision on all the evidence that they have heard?

A They are told to consider all of the evidence, yes, Your Honor.

Q And the defendant, would you say that the defendant has any real limit on what he can put before the jury?

A Well, there are some, they are not as broad -- I mean they are not as narrow as perhaps might be the case. I think the general rule in California is that anything may be put before the jury if it would be put before the judge if he were taking evidence for the purpose of determining what the sentence should be. That is very broad, but there are limits, and one of the most important limits, for instance, is the limit imposed by the Morse rule. I should think that

a very relevant circumstance in determining whether one should have life or death is to consider the possibilities that a life team might not be a life team, that the man even though not rehabilitated might be out on the streets sometime within a comparatively short period of years, and yet that is one of the important things that they can't be told, that can't be evidence about it, and it can't be argued.

Q You don't suggest that that would be helpful to a defendant in this situation, do you?

A Well --

Q To be told that he might -- to have the jury told that he might be out on the street very soon?

A Well, no, but, on the other hand, if they could be told what the parole system is like and how difficult it is to get out on the street, under an adult authority performing his function, that might be helpful, if the jury were worried, as California suggests was the case here, if the jury were worried about turning a murderer loose on the streets, they might very well want to know how effective or ineffective, as the case may be, the parole system was.

Now, it could be helpful to the defendant, it could be harmful to him. It would be an essential point from the standpoint of the Constitution, the essential point is that the jury would have been given something relevant and something that under a proper set of standards would be told was

a factor to take into account and how to take it into account.

Q Is that included in the ALI proposed standards?

A No.

Q I didn't think so.

A No.

Q So it is not a necessary part of a proposed set of standards, is it?

A Nothing that I suggested is a necessary part of any set of standards beyond the fact that we should set some kind of a basis, some kind of a proposition or rule that would govern the deliberations.

Q Well, Mr. Selvin, am I correct, Mr. George said the state cannot show that, that this man can get out on parole in --

A No, not any more, not since Morse. They could at one time. That is how the problem arose.

Q In this case they couldn't do it?

A No. The jury inquired about the possibility of parole and the judge then gave them the so-called Morse instruction, which was prepared by the Supreme Court in the Morse opinion, to be given in that situation. What that instruction comes down to is that, yes, he can be paroled but it is really none of your concern in fixing sentence, and it says so in --

Q And you say you want the right of the petitioner to put that in?

A Well, what I want -- what I want is the right to have standards, leaving it to the legislature to determine what those standards should be.

Q I am only worried about this one standard you suggest, which I don't understand how it would benefit the petitioner.

A It may not benefit the petitioner. I mention it to show that the rules of evidence aren't completely down so far as the penalty hearing is concerned. There are limits that the prosecution cannot exceed, there are limits that the defendant cannot exceed.

Q May I ask you something? Did the defendant ask any instructions?

A No. No, Your Honor, and it would have been an illegal act for him to have done so because in the Helt case, which I have cited in the brief and in the case that has been decided since, instructions that would have told the jury they could take this into account, and they should give significance to these various states, have been held properly refused. It could have been completely out of line to have asked.

Q You mean you can't ask any instructions of any kind?

A Oh, they can ask, but when they start going beyond the kind of an instruction that I have read and start specifying specific things bearing upon aggravation or mitigation, as the case may be -- on mitigation, of course, if it comes from the defense, our Supreme Court has consistently ruled that it is proper, that it was not error to refuse those instructions because, as they said in the Howk case, the instruction that I read to you was given and that is enough, and that is all that they are entitled to.

Q Well, except that it really beings on the bottom of page 221 and covers all of 222 and most of page 223, and does reflect, does it not, particularly on the top of page 222, the cases decided by your Supreme Court, which on the state submission at least do constitute standards. In this part of the trial the law does not forbid you from being influence by pity for the defendants, and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case. However, the law does forbid you from being governed by mere conjecture, prejudice, public opinion, or public feeling, and so on, and each one of those expressions in the court's instructions reflects, does it not, a decided case by your Supreme Court? And to that extent it reflects standards, if you want to be that -- at least that is what the state submits that they are.

A In a sense, they are judicially created limitations on the extent to which the jury can go, yes. There is no question about that. The jury isn't turned completely loose. They are given that charge, don't be arbitrary, don't be influenced by public opinion. I am a little at a loss how to reconcile that don't be influenced by public opinion or public feeling and the conscience of the community that they are supposed to represent, and to which they are supposed to give force in their verdict.

I see my time is up, Your Honors. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Selvin. You acted at the appointment of the Court and at our request, and we thank you for your assistance, not only to the petitioner but your assistance to the Court.

Thank you, Mr. Solicitor General and Mr. Attorney General. The case is submitted.

(Whereupon, at 11:40 o'clock a.m., argument in the above-entitled matter was concluded.)

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