OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1893

TITLE CALIFORNIA, Petitioner
v.
MARCELINO RAMOS

PLACE Washington, D. C.

DATE February 22, 1983

PAGES 1 thru 42

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA,

Petitioner

v. : No. 81-1893

MARCELINO RAMOS

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Washington, D.C.

Tuesday, February 22, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:20 p.m.

APPEARANCES:

HARLEY D. MAYFIELD, ESQ., Deputy Attorney General of California, San Diego, California; on behalf of the Petitioner.

EZRA HENDON, ESQ., Deputy State Public Defender, San Francisco, California; on behalf of the Defendant (appointed by this Court)

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CHIEF JUSTICE BURGER: Mr. Mayfield, I think you may proceed whenever you are ready. And, we are hearing California against Ramos.

ORAL ARGUMENT OF HARLEY D. MAYFIELD, ESQ.

ON BEHALF OF THE PETITIONER

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

The Respondent was sentenced to death for first-degree murder during the commission of a robbery. He robbed the on-duty employees at a fast food restaurant where he worked, after which he shot both of them in the head, and one of them lived.

He was convicted of two counts of robbery, attempted murder, and murder of the first degree, along with a special allegation that the murder was committed during the commission of a robbery. Under the California Penal Code, murder of the first degree is punishable by 25 years to life, unless certain special circumstances are alleged and found true beyond a reasonable doubt. In which case, the alternative penalties are death or life imprisonment without the possibility of parole. The penalty is determined at a separate hearing in which the trier of fact is a jury unless waived by both parties.

At that separate hearing both parties may present additional evidence, and the statute provides for certain specified aggravating and mitigating factors which the jury must

consider in addition to an additional catch-all factor permitting the jury to consider any factor in litigation.

If the aggravating circumstances outweigh mitigating circumstances, the jury is required to return a verdict of death. If mitigating circumstances outweigh aggravating circumstances, the jury is required to return a verdict of life imprisonment without possibility of parole.

The trial judge may modify a verdict of death to one of life without the possibility of parole; although if the jury returns the lesser punishment, it cannot be increased.

The statute also requires that the trier of fact be instructed that the punishment of life imprisonment without possibility of parole may in the future be modified by the governor to include a lesser sentence which permits the possibility of parole.

In this case, defense counsel objected to that instruction being given on the ground that it violated his right to due process of law, and the trial judge overruled the objection on the ground it was required by statute. On automatic appeal to the California Supreme Court, the Court expressly and exclusively reversed the death penalty on the ground that the portion of the statute which required the giving of that instruction violated the defendant's right to due process under the 5th, 8th, and 14th Amendments for two reasons.

One, that it introduced an extraneous factor into the

jury's deliberations. And, second, that it was misleading because it did not require an instruction, because the instruction did not inform the jury that the governor could also commute a sentence of death to a lesser sentence.

The issue presented on Certiorari to this Court is whether enforcement of that statutory provision requiring instruction violates the 5th, 8th, and 14th Amendments.

This Court's cases indicate that due process is violated whenever a defendant is deprived of some guaranteed right, or if a procedure is fundamentally unfair. In the capital cases which sort of blend the 5th, the 14th, and 8th Amendment principles, cases have held that a procedure which increases the likelihood of an arbitrary, a capricious, or unreliable sentencing determination may violate due process. There is a basic distinction this Court has drawn between capital cases and others on the ground that the death sentence is unique in its finality.

A subsidiary question under the question presented on Certiorari, since this is a state statutory procedure, is the question whether the statute clearly and unmistakably violates the defendant's due process rights.

In California's alternative sentences, the sentence of death, the meaning is quite clear. If that sentence is carried out, the defendant will be put to death. On the other hand, the sentence -- the alternative sentence of life without possibility of parole is not literally accurate because it does not mean

that if that sentence is imposed the defendant must inevitably be perpetually imprisoned -- imprisoned until death.

QUESTION: Mr. Mayfield, is the phrase "life imprisonment without possibility of parole" a word of art in California jurisprudence, or something to that effect?

MR. MAYFIELD: It is, Your Honor, in the sense that it does not literally mean what it says. In California law, a sentence of life imprisonment permits a consideration for parole after seven years.

The sentence of life imprisonment without possibility of parole for murder was not available in California until 1977. Previously, that sentence was only imposed on certain aggravated forms of kidnapping.

QUESTION: And, that was by referendum, wasn't it?

MR. MAYFIELD: Initiative, yes, Your Honor.

QUESTION: I mean it was referendum -- it was not debated or anything?

MR. MAYFIELD: Yes, Your Honor, there was --

QUESTION: Well, it was not debated in the legislature?

MR. MAYFIELD: No, Your Honor, not in the legislature.

QUESTION: Is there any possibility of parole for a person who is sentenced to life without possibility of parole?

MR. MAYFIELD: Yes, Your Honor, there is.

QUESTION: He can be paroled?

MR. MAYFIELD: He can be paroled because of the

statutory and constitutional provisions for the governor to commute his sentence.

QUESTION: Is the commutation by the governor considered a parole?

MR. MAYFIELD: The governor can commute the sentence --

QUESTION: Can the governor put him on parole?

MR. MAYFIELD: No, Your Honor.

QUESTION: So, that the life sentence without possibility of parole is really accurate, isn't it, because he cannot be paroled?

MR. MAYFIELD: No, Your Honor, it is not accurate.

QUESTION: Parole is quite different from the commutation of the sentence, is it not?

MR. MAYFIELD: Yes, Your Honor. The sentence may be commuted to a sentence which includes the possibility of parole.

QUESTION: It may just be commuted to a sentence of life imprisonment?

MR. MAYFIELD: Yes, Your Honor. Or it may be commuted to a sentence of 25 years to life.

QUESTION: In which event the parole would be a possibility?

MR. MAYFIELD: Yes, Your Honor.

The term "without possibility of parole" is on its face misleading because it is not literally true that the person given the sentence may never be paroled --

QUESTION: Incidentally, did I understand you to say that a death sentence, too, may be commuted by the governor to a parole?

MR. MAYFIELD: It may be commuted by the governor to a sentence, life without possibility of parole, or --

QUESTION: Life sentence?

MR. MAYFIELD: Yes, that is correct.

QUESTION: So, in the latter instance, he also could be admitted to parole?

MR. MAYFIELD: That is correct.

QUESTION: Is there any difference between the governor's considering commutation or life without parole in a death penalty if both done the same way by the governor?

MR. MAYFIELD: Not necessarily --

QUESTION: I mean are there different standards or criteria or anything?

MR. MAYFIELD: The governor can set his own criteria. Although, for individuals sentenced to life without parole, there are provisions within the Department of Corrections -- regulations for them to consider and make recommendations. There is also a vast difference in that there is relatively a small window for the governor to commute death sentence, during this period after all the appeals have expired and a period when the sentence is to be carried.

On the other hand, every individual who is in prison

under a sentence of life imprisonment without parole, always retains the possibility that he may be commuted and not spend the rest of his life in prison.

QUESTION: Mr. Mayfield, did the Supreme Court of California in its analysis of the federal constitutional question differentiate between the first and the second sentence of the so-called Briggs instruction?

MR. MAYFIELD: No, Your Honor --

QUESTION: The reason I -- Let me read you the first sentence, which you are doubtless very familiar with. You instructed under the state constitution, "A governor is empowered to grant a reprieve, pardon, or commutation of the sentence following conviction of a crime." That is simply a statement of fact, isn't it, that the governor could commute a death sentence. He could commute a life sentence without parole. He could commute any sentence?

MR. MAYFIELD: That is correct.

QUESTION: Did the Supreme Court of California feel that instruction was misleading?

MR. MAYFIELD: No. I believe not. They believe what was misleading is the fact that that is merely, I believe, a lead-in to the operative part of the instruction which says that a sentence of life imprisonment without parole may be --

QUESTION: Well, the instruction has two sentences in it. At least the California Supreme Court did not object to the

first of the two sentences?

MR. MAYFIELD: I believe the California Supreme Court objects to the entire instruction because of the view that any part of the instruction puts an extraneous factor into the jury's consideration.

QUESTION: So, you think its holding extends to holding the first sentence of the instruction unconstitutional on federal constitutional grounds?

MR. MAYFIELD: Yes, Your Honor, I believe so.

QUESTION: So, you get the same result if the instruction said, the governor may commute any sentence, including a sentence of death?

MR. MAYFIELD: I believe so, yes.

QUESTION: That is essentially what the instruction says, doesn't it?

MR. MAYFIELD: The first part of the instruction does not differentiate.

QUESTION: The governor can commute anything, including a death sentence?

MR. MAYFIELD: Yes. It does, in fact, say that. But, it does not specifically refer to the death sentence whereas the second part of the instruction does.

From the standpoint of the alternatives offered, I believe it is reasonable to consider that the determination by a sentencer will in some way be affected by the sentencer's

perception of the alternatives that he is choosing between. For example, in Beck v. Alabama where the jury could only return a verdict of guilty of a capital offense, even though there was evidence from which a lesser offense could be returned, this Court found that that would skew the determination. I believe that the determination of the jury's verdict could be skewed also if the jury believed that the difference between the alternative punishments is minimal.

For instance, it would be impermissible under the California statute for a juror who was convinced that aggravating circumstances outweighed mitigating circumstances to impose a sentence of life imprisonment without possible parole because he believed that was a more severe sentence. Probably, not too many people may think that, but I suggest there are some.

Similarly, it would be impermissible under the California statute for a juror who was convinced that mitigating circumstances outweighed aggravated circumstances to impose the punishment of death, because he thought he was doing the defendant a favor.

In this case, the defendant himself, at least, told at leas his psychiatrist that he would rather have the death penalty than life without parole.

There is a probability that a large percentage -- a substantial percentage -- of jurors will be aware of California law, and will, in any event, realize that there is a power of

commutation of sentences of life without parole -- that there is a possibility of parole. But, I think it is reasonable for California to decide that it is preferable if every juror in every case is aware of that by manner of a simple instruction which tells them this fact.

When we speak of the liability of sentencing determinations, I think that consistency is of some significance.

As to the other part of the California Supreme Court's decision that the instruction is misleading, I believe it is significant that trial counsel below did not make that argument. And, I suggest the reason possibly is set forth in the California Supreme Court's decision in People v. Morse, back in 60 Cal 2d, where they said since people probably know something about parole, you should tell the jury that there is a possibility of parole, but tell them that is not supposed to be what they base their decision on. They should not take that into consideration.

On the other hand, you should not tell a jury about the power of a trial judge, or the California Supreme Court, or the governor to commute a sentence of death --

QUESTION: Was that earlier decision you were referring to, Mr. Mayfield, based on federal constitutional grounds?

MR. MAYFIELD: No, that was based on the view of what it was a good idea to tell --

QUESTION: What the highest court of any state might do in reviewing jury instructions given in that state?

MR. MAYFIELD; Yes, but this was not based on federal constitutional grounds because the rationale for that was they said that if you tell a jury that someone else might change their death penalty decision, that may lessen their sense of responsibility for this awesome thing they are going to do in imposing the death penalty.

And, I suggest that very rarely would a trial counsel want to have that instruction given. The only conceivable reason if he thought that aggravating circumstances were so overwhelming that he wanted to convince the jury it made no difference.

QUESTION: Mr. Mayfield, may I ask you a question? The red brief has in it a table telling us how often the California governors have actually commuted death sentences, is there anything before us that tells us how often California governors have commuted life sentences without possibility of parole?

MR. MAYFIELD: At page 4, I believe, of the Opposition to the Petition for Certiorari, the counsel, I believe, set forth a list over a period of some years -- there have been 41 death sentences commuted and 24 life without parole during that period.

QUESTION: In what period was that in?

MR. MAYFIELD: I cannot tell you -- I do not recall the exact --

QUESTION: Twenty four over some several year period?

MR. MAYFIELD: Yes, a period of quite a number of

years.

QUESTION: In your view, would the defendant be entitled to have the judge tell that to the jury that this possibility had actually occurred only 24 times in the past 20 years or whatever the figure is?

MR. MAYFIELD: I do not believe so, Your Honor, because I do not think that tells very much.

QUESTION: Well, but doesn't it tell more than Briggs instruction tells?

MR. MAYFIELD: It does, but I think perhaps expansion would, in fact, invite speculation. Now, one think this instruction does is remove what is an otherwise misleading connotation that the difference between these two sentences, death and life without the possibility of parole, may appear to some to be minimal --

QUESTION: But, Mr. Mayfield, supposing your 24 examples are 24 out of 24,000 -- I don't know how many sentences this kind of put in effect -- but if in 99 and 99/100 percent of the cases, it is, in fact, life without the possibility of parole, how misleading is it?

MR. MAYFIELD: It would not be misleading, but the fact remains that the possibility of commutation for life without possibility of parole remains -- it isn't -- you didn't get commuted now so you are all through. Every one who is in prison now has that possibility.

QUESTION: Well, I suppose, you might tell them about the possibility of escape, then, too?

MR. MAYFIELD: Well --

QUESTION: I mean it is equally frequent, isn't it?

MR. MAYFIELD: I think not, Your Honor.

I suggest that if California had chosen to eliminate the sentence of life imprisonment without possibility of parole, and tell the jury to select between 25 years to life and death, that the jury would know that the defendant at some time could be released from prison. And, it would not in that case be necessary to inform the jury that the death penalty could be commuted, and I believe that California's decision that it may make for a more reliable and consistent decisions to inform the jury of the -- accurately of the meaning of this sentence does not violate any guaranteed right of the defendant or does not make the decision fundamentally unfair to him or otherwise arbitrary and capricious.

QUESTION: How many other cases are likely to be affected by a decision in this case?

MR. MAYFIELD: I do not know the exact number. I think about 30.

QUESTION: Somewhere in the record I had seen a figure of 90. Is that another category?

MR. MAYFIELD: That was the number of cases, I believe, that had been perhaps tried under the --

QUESTION: 1978 statute?

QUESTION: Yes. I cannot say where the Justice got that figure, but my survey indicates about 30 may be affected.

I would like to save the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Hendon.

ORAL ARGUMENT OF EZRA HENDON, ESQ.

ON BEHALF OF THE RESPONDENT

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

This case involves a unique provision -- there is no other statute like it in the country -- containing a provision which has been universally condemned in virtually every state jurisdiction that has been called upon to pass on it, and which --

QUESTION: I misunderstood your first statement.

MR. HENDON: Well, there is no other statute like it. The issue of whether commutation can go to a jury in the absence of a statute has been resolved in somewhere around 28 state court jurisdictions. Twenty-four of those 28 state courts have ruled that the issue of commutation in any form cannot go to a jury in the penalty phase of --

QUESTION: Well, that may be true, but on state grounds --

MR. HENDON: No, I think --

QUESTION: Is this supervisory or federal grounds?

MR. HENDON: Well, many of them are cases which precede this Court's decisions in Furman. However, there are a number of recent ones which have been cited in the briefs, and there are

more every day. In addition to those cited in the briefs, there are two that have come down -- another one out of Illinois called People v. Zabo, which was decided on January 24, 1983 and another out of Maryland called Poole v. Maryland, which was decided on January 7, 1983.

QUESTION: Are all 26 of those cases capital cases?

MR. HENDON: No, they are not. However, I personally think if a jury in a noncapital case -- a jury which has a sentencing function in a noncapital case -- cannot hear about commutation then a fortiori cannot hear about it in the capital.

QUESTION: Does it make a difference where the trial is bifurcated?

MR. HENDON: Well, only to the extent that it may be more prejudicial for a jury in a unitary proceeding to hear about it. Conceptually, I think that is just a management problem. I think theoretically and conceptually it should make no difference.

QUESTION: Mr. Hendon, you said that there were some twenty-odd state cases involving instructions like this, were they perfect counterparts to the California instruction? Did they have the first sentence as it is?

MR. HENDON: Yes, they are even more fair than the California instruction because our contention is that the California instruction in its present form is misleading because it involves partial disclosure --

QUESTION: Do you think the first part of the first

sentence is misleading?

MR. HENDON: Yes, Your Honor, I do because I do not frankly read it the same way you do. The way I read it, it says you are instructed that under the state constitution a governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime. It does not say any sentence. It does not say all sentences.

QUESTION: But certainly the use of the article, a, is a very indefinite article.

MR. HENDON: A is -- my grammar is not what it should be -- but I think it is a definite -- I think it is a particular sentence. It does not -- there is at least ambiguity in whether it is saying all sentences. A sentence and all sentences are not the same, logically or grammatically.

QUESTION: What is the federal -- what is the reasoning of the state courts who have held -- how many did you say there were -- who have held this invalid on federal constitutional grounds?

MR. HENDON: I think if you examine the reasoning behind the state court decisions, they go off on grounds which are ultimately federal constitutional grounds, though they may have preceeded Furman so that they are not couched in constitutional terms, but the logic and the reasoning is that the issue of commutation, even when the issue of commutation is put before the jury -- even when a jury is told that governor can

commute both life without parole sentence and the death sentence, which this instruction does not do -- but when the issue is put before the jury even-handedly, that injects a level of speculation into the jury's sentencing phase which renders any decision it may return unreliable and which diverts it from its primary task, which is after all what? It is to decide whether this individual, in light of this crime, should die.

QUESTION: How many of the state decisions are expressly couched in federal constitutional terms?

MR. HENDON: Of the recent ones --

QUESTION: Of all of them. You said there were 28.

MR. HENDON: I can think of three off-hand. The most recent Illinois case. I believe Poole v. Maryland is federal constitutional. I think the Louisiana case, Lindsey, is.

There are two reasons why this provision, I think -- this particular provision -- cannot pass constitutional muster. First, it affirmatively misleads a jury in the penalty phase of a capital case as to the nature of its function and the consequences of its decision. And, secondly, as I have alluded to, it injects a level of speculation and uncertainty into the penalty decision, which cannot be tolerated in the capital case and which deflects the jury from its true task.

What does this statute do? It tells a jury, in effect, you have two choices here. You can sentence to life without parole, or you can sentence to death. But you should bear in

mind that life without parole does not mean life without parole, that the governor can commute life without parole.

And, I may say in passing in response to the question that Justice Rehnquist asked that the term life without parole is no more a term of art in the state of California than is the term death.

QUESTION: What was the inception of this constitutional-- this initiative. Someone must have been bothered by something that happened.

MR. HENDON: Yes, I think that the purpose of this initiative was to overrule the case of People v. Morse, which told the jury -- What the case of People v. Morse did was to tell the jury, look, you may speculate about issues such as parole or commutation, and I, the judge, will tell you about parole and commutation so that you will know what the truth is, and so that you will not speculate. But, Morse goes on and says, it would be a violation of your oaths as jurors if you were to consider this factor in rendering your decision. Your decision is to be based upon the facts of the case and the circumstances of the crime and on nothing else.

QUESTION: You are going a little bit too far. What about a juror who knows this? What about a juror who voted for this law? Obviously he would know about it. Would he be ineligible to sit as a juror? You see, you went so far to say he should not know about it.

MR. HENDON: No, my only position is --

QUESTION: You do not have to go that far --

MR. HENDON: No I don't. I did not mean --

QUESTION: That is all I am trying to get to.

MR. HENDON: Yes. Well you are perfectly correct. I didn't -- If I left the impression that I was going that far then I take it back because I do not mean to --

QUESTION: Well, shouldn't the question then be asked at voir dire, do you know about this -- anybody who knows about it should be off the jury?

MR. HENDON: You see, the way the states -- the issue on which the state split is not whether a jury can know about commutation. That is not the issue in this case, and I think it needs to be clearly understood that that is not the issue in this case.

The issue in this case is whether a jury can consider commutation and parole.

There are many states which say, as Morse did originally, you may speculate about this. You may speculate about parole. You may speculate about commutation. Here is the truth about it. You cannot consider it. That is all we are involved in in this case. All we are involved in is the question of whether the jury can consider it.

QUESTION: You think a federal constitution may require a rule that says even though we tell you something you cannot

consider what we are telling you?

MR. HENDON: I think the federal constitution requires that there be an assurance that a jury in a capital case does not predicate its decision on unreliable, speculative information which deflects from its constitutionally mandated task, and yes, I think that --

QUESTION: Mr. Hendon --

MR. HENDON: Why wouldn't it be permissible to inform them about it so that they do not speculate about it. Some prophylactic measure has to be taken so that they do not predicate the decision on it.

QUESTION: Perhaps you have already answered this, but -- if so, I missed it -- would you be here if the instruction also covered the capital punishment?

MR. HENDON: Yes.

QUESTION: Why?

MR. HENDON: Because in that event, which is a question that the Court need not reach in this case, but in that event the issue of commutation would still be before the jury. The jury could still take into account the fact that a governor could commute a death sentence, for example.

And to the extent that it took that into account it would be taking into account the utterly unknowable. What a California governor, perhaps a governor who has not even been elected yet, may do some day in the future is obviously something

that no sitting juror can know about.

QUESTION: Well, would you be satisfied if the -- if any reference to commutation were eliminated from the instructions?

MR. HENDON: Yes, I would. That is the effect --

QUESTION: Even though jurors who know about this power are not told not to consider it?

MR. HENDON: Well, the state law is and --

QUESTION: So part of your submission is not that there must be an instruction not to consider?

MR. HENDON: No, only that if there is one, some steps must be taken to make sure that it is not being considered by the jury.

In other words, to tell the jury something they may speculate about --

QUESTION: If you -- if this instruction went on and said exactly -- if this instruction were the same except you had appendent to it, but you should not consider this? That would be all right with you? Then you would not be here?

MR. HENDON: Well I am not going to make that --

QUESTION: Well you might be here on some other case.

MR. HENDON: That is right.

QUESTION: Maybe you have know choice, you are the Respondent any way.

MR. HENDON: No, I would have a much more difficult argument. I would have the argument, you know, the skunk in the

jury box argument. You put a skunk in the jury box and then tell the jury not to smell it. Can you really -- is this the kind of information that a jury really could be asked to disregard. It is an issue that is not presented in this case. It is not one that the Court needs to reach, and I would suggest that the Court not reach it.

I think we need to talk a little bit about what a jury is being asked to consider when it is being asked to consider commutation. It is being asked to consider what is perhaps the most wide-ranging, open-ended untrammeled power that an executive can have.

This Court's opinions over and over and over again, and California opinions over and over and over again, have made clear that the power of the governor to commute is virtually unlimited. He can do so for any reason he sees fit at almost any time that he sees fit.

And, in point of fact, as the chart which Justice Stevens alluded to makes clear, California governors have exercised that power as they saw fit, in terms of their political view, their political perspective of what is an appropriate case to commute taking into consideration all of the political, essentially nonjudicial factors that go into a decision to pardon or to commute.

And, to ask a jury to somehow factor that in to the penalty phase of the capital case is to ask it to do the

impossible -- is to ask it to consider information which is the essence of speculation, the essence of uncertainty. I suggest it is not possible. It is essentially unreliable.

It also, I suggest, deflects the jury from the task that it is set forth to do. Whether a governor is going to commute a sentence has absolutely nothing to do with Marcelino Ramos as far as the jury is concerned. A) they will never know whether the governor is going to commute him; and B) if he does, he can do so, as I said, for any reason he sees fit. There have been governors in this country who have commuted all death sentences. I believe Winthrop Rockefeller before he left office in Arkansas, commuted all death sentences -- cleaned out death row. This was a political decision that he made. It had nothing to do with who was on there. It was within his power to do so.

President Andrew Johnson has commuted all sentences of all secessionists. This was a political decision, which he was free to make for what reasons he makes.

And, I suggest, respectfully to the Court that when we come to the point when juries in the most serious case, which the criminal law at least knows, are making their decisions not on the basis of what they may think is appropriate in terms of this individual and this crime, his background, what he did and why he did it. Not on that basis, but on the basis of what some future governor may do in the exercise of a power which he exercises pursuant to considerations which are wholly alien to

judicial considerations.

QUESTION: Do you really think you can generalize that way about what motivates governors to exercise the commutation power? Some governors have ad hoc advisory committees to advise them. Some do it on the basis of some newly discovered factor. Do you really think there is any basis for generalizing as you have?

MR. HENDON: Well, I think that makes my point, with all due respect. There is no basis for generalizing, and therefore, there is no basis on which a jury can generalize.

QUESTION: Johnson -- Andrew Johnson and Governor Rockefeller of Arkansas certainly did purely political --

MR. HENDON: Yes.

QUESTION: That does not mean that commutations generally are based on political considerations.

MR. HENDON: No, they may not be, but they can be. And, when they are they do not focus on the facts of the case. And, when they do focus on the facts of the case, they focus on the governor's view of the facts of the case. The jury is told nothing about the governor's view of the facts of the case --

QUESTION: You are still not correct. Governor Doyle had a commission and he at the last date would put his own lawyer to work on the case until every lead had been run down. You would not call that political, would you?

MR. HENDON: Well, what I mean by political --

Historically -- perhaps I am not using the word correctly -- historically --

QUESTION: Nonjudicial.

MR. HENDON: Nonjudicial -- Historically the power of commutation stems from the power of the sovereign to dispense grace. The sovereign could dispense grace --

QUESTION: For political reasons or any other reasons.

MR. HENDON: Any other reasons that he saw fit, yes. Finally --

QUESTION: Maybe this has happened because the governor has conscientious objections to the death penalty per se.

MR. HENDON: Absolutely.

QUESTION: Very likely it is true with the Arkansas situtation.

MR. HENDON: Absolutely. I agree. To inject my point is to inject that into the penalty phase of the capital case -- is to inject a standardless, arbitrary factor in which gets us back to state of the law --

QUESTION: No no is asking the jury to apply a standardless arbitrary -- You are just being told as a juror that there is such a standardless arbitrary factor in existence.

MR. HENDON: This statute puts the issue of commutation before the jury for its consideration.

QUESTION: But it does not ask the jury to commute or exercise political judgment to assess the penalty.

MR. HENDON: No, but it puts it before the jury as a factor for the jury's consideration.

QUESTION: But it is a fact.

MR. HENDON: Yes, but how does a jury account for that fact?

QUESTION: How do they account for lots of facts that they find? They just have to take them.

MR. HENDON: But this is a classic instance in which you are going to have two juries with different views of when a governor, perhaps as yet an unelected governor, is going to exercise the power of commutation coming back with different verdicts in cases which would otherwise be the same --

QUESTION: How about a jury considering as some death penalty statutes allow, the possibility of rehabilitation of this particular defendant? That is a relatively standardless judgment, too.

MR. HENDON: Well, but it is a factor that is tied to the defendant in the case. It proceeds from an assessment of the evidence that has been put before this jury tied to this person. What is the likelihood in the light of his life, his background, his crime, his family, all of those factors, that this is an individual who can be rehabilitated.

QUESTION: Isn't it entirely possible that if some of the members of the jury have their civics courses within ten years before the time of their jury service, they will remember

that governors have that kind of commutation power. And, then are you not dependent on having one or several jurors give some supplemental instructions to the jury about the commutaton power in the course of their deliberation?

MR. HENDON: It is possible that jurors would know about commutation. It is possible that they would not.

QUESTION: Isn't it very likely that some of them will know out of 12 members of the jury?

MR. HENDON: Yes, I would say that it might be likely that some of them would know about it. I would agree. I don't know-

QUESTION: As they might know that he could commute the death penalty.

MR. HENDON: They might.

QUESTION: This is why I still do not understand why you draw a line between the two. Had this jury been instructed that whether they impose the capital offense, or capital penalty, on the one hand, or life without parole on the other, the governors still have the power to commute in either case. Why is that prejudicial to your client?

MR. HENDON: Because if the jury thinks about -- what is going to go on in the mind of a juror when he or she thinks about the power of the governor to commute the death sentence? He is going to think -- one possible psychology which has been commonly referred to is, somebody else is going to be looking over my shoulder. If I make a mistake, it is not so bad. There

will be somebody looking at it who can possibly correct it. And a juror constitutionally should not be permitted that. A juror should resolve for him or herself --

QUESTION: It simply balances the situation, doesn't it?

MR. HENDON: No, it eliminates that defect, yes. It balances the situation, but it does not address the question of what kind of information can be before a jury for its consideration so that we wind up with consistent --

QUESTION: Of course, then you run into the Chief Justice's question. Somebody may know it from a civics course any way. And this you cannot prevent.

MR. HENDON: No, you cannot. You can only do your best. You cannot absolutely prevent it, and we are not faced in this case with the question of whether there needs to be an affirmative instruction.

QUESTION: But, given these various imponderables such as jurors knowing it from civics class or perhaps having voted for or against this particular initiative, wouldn't it be fair to say that the state ought to be entitled to the very wide latitude in making decisions as to what kind of facts go before the jury and what do not -- that it is not simply only one particular set of instructions which pass constitutional muster?

MR. HENDON: No, I agree with that, and I do not contend otherwise. If this were a case in which the instructions said to the jurors, here is the governor's power to commute life

without parole sentences. Here is the governor's power to commute death sentences. You are instructed not to consider these factors. They are not relevant for you in coming to the task which the constitution and the law imposes upon you. We would have a very different case.

QUESTION: Well, what if they said everything but the last -- everything but, you are not to consider?

MR. HENDON: Well, then I think the presumption has got to be that they are considering it.

QUESTION: Supposing it is. What is wrong with that constitutionally?

MR. HENDON: Because there is no way that a jury can factor that in to its decision in a way which satisfies the repeated injunction of this Court's cases since Furman, that the state must take extraordinary measures -- I believe was Justice O'Connor's language in Eddings -- must go to extraordinary measures in order to ensure that death sentences are not returned on the basis of arbitrariness, caprice, or mistake.

QUESTION: Well, do you think it is less likely that a jury given this instruction will return an arbitrary verdict than if a jury which is given no instruction, goes out to the jury room -- three of the people voted for this initiative, four of them voted against it, two others know something about the commutation part, they probably each have a somewhat different perception about it--and the jury argues about it in that context?

MR. HENDON: Your Honor, that is not that this case -- You are posing to me the situation -- as I understand your question -- you are posing to me the situation where the choice is between an instruction, which tells them about it and tells them to disregard it or this instruction.

QUESTION: No, I am posing no instruction, which I think is what you were posing.

MR. HENDON: No, I am saying that no instruction may pass constitutional muster.

QUESTION: It seems to me you are putting the state courts at power to instruct in these cases in a very narrow bind under the federal constitution, given the fact that courts are constantly wondering, will the jurors probably already know this, should I instruct on it, should I not? Not just in this area but lots of others. And, until now I do not think it has been thought the federal constitution had a preference one way or the other, so long as the state court was reasonably fair about the thing

MR. HENDON: No, I think the federal constitution makes very clear the nature and quality of the information that can go before a sentencer in a capital case. I think in Gardner v. Florida this Court ruled that potentially unreliable information by a judge, in that case -- potentially unreliable information -- put before a judge under a statute which this Court had otherwise previously upheld as constitutional in Proffitt v. Florida required a remand for a new sentencing hearing.

This Court has gone to great lengths to ensure that a part of the capital sentencing decision is not arbitrary, unknowable, speculative information. Many, many things happen after the jury returns a verdict of death.

There is review by the state's highest court. Should a jury be told about that? They may speculate about that? There is escape. People die in prison. People are killed in prison. Many, many things can happen.

It strikes me that the system only works -- and the Constitution requires for the system to work -- that jurors do their duty. Their duty is to do what they think is right based on the facts of the case, and to assume that other duly constituted authority will do its job. The governor will do his job. The jury does its job. The Supreme Court does its job. It works that way. It does not work if you have got juries basing decisions on what the governor is going to do.

Before leaving, I do not want us to lose sight of the fact that there is a specific -- that there are two specific issues in this case.

One involves this particular instruction. I have been arguing all this time on the assumption that the entire issue of commutation should not be before the jury whether we are talking about death commutation or life without parole commutation. We are faced with this particular statute, and I ask the Court to bear that in mind. This is a statute which involves partial

disclosure, neither more nor less. The jury is told that life without parole does not mean life without parole period. They are not told that death does not mean death, even though death clearly does not mean death.

QUESTION: Did the defendant request an instruction like that?

MR. HENDON: State law prohibited the defendant from requesting --

QUESTION: Well, wasn't it possible after the enactment of this initiative that a reasonable lawyer might think that state law would change in that regard?

MR. HENDON: I do not know what the federal constitutional significance of that reasonable possibility is. If we are talking about -- certainly there is no procedural default --

QUESTION: Well, ordinarily you cannot complain about the failure to give an instruction which you did not request. If you say this would have been a fine instruction if they just added to it this little part that I have now dreamed up. But if you did not ask the trial court for that you cannot complain about it.

MR. HENDON: Well, I think, if I take the thrust of your question correctly, what you are really talking about is a procedural default, in essence object at trial. The California Supreme Court has reached the issue on the merits in this case. There is no issue. Whatever shortcoming of state law and state

procedure there may have been in failing to tender this instruction to the jury has been forgiven by the California Supreme Court. That is no obstacle to this Court's going on and reaching it.

I ask the Court to bear in mind that the California Supreme Court has stated flat out that if this were -- if we were dealing with a provision here which were an installment -- a provision of an installment sales contract for the purchase of an automobile, and it were before a municipal court somewhere in the state of California, that that court would be required to strike it down.

This is the equivalent of telling somebody I have two automobiles to sell. I want you to know that one of them has a cracked engine block, not disclosing that the other one also has a cracked engine block. There is nothing more nor less than this. And, I suggest, that if it is not good enough for a municipal court in the state of California then it ought not be good enough in a death case before the highest court in the land.

The other thing that I guess needs to be mentioned -- although I do not think more can be done about it than mention it -- is that there is a procedural problem in this case. I think there is a serious question about the security of the court's jurisdiction in this case. There is a ruling on the merits of a state law issue in this case contained at footnote 22 of the Court's Opinion. It is the last issue briefed in our brief on the merits in which the California Supreme Court has

ruled flatly that there was an error of state law in this case under California Evidence Code, Section 352, in the admission of certain highly prejudicial error, basically statements of the defendant that he might seek revenge on the jurors. But the California Supreme Court has ruled under California evidence law -- there is no federal constitutional question there -- that this was erroneously admitted. It should not be repeated at retrial. They did not go on and reach the question of whether that error standing by itself and without regard to the federal constitutional question would require a reversal.

I suggest it is a very serious error --

QUESTION: Did that just go to the -- what did it go to?

MR. HENDON: It went to the penalty phase -- strictly to penalty, yes.

The California Supreme Court purported to predicate its decision on the federal constitution, and, therefore, it did not address the question of whether this error standing by itself should mandate reversal of the penalty phase. In a situation like that I suggested in the brief that this Court cannot feel secure that the Petitioner has met his burden of demonstrating not only that the court predicated its decision -- that the California Supreme Court predicated its decision on a federal constitutional ground, but that that ground was necessary to --

QUESTION: Suppose we agreed with you. What would

you suggest?

MR. HENDON: Well, the two options that this Court's cases have followed in that situation is either to dismiss the Writ as having been improvidently granted, or to vacate the opinion of the California Supreme Court and remand for a determination of whether the violation of California evidence law, standing by itself would -- and apart from any consideration, federal constitutional considerations -- would require reversal of the penalty.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Mayfield?

MR. MAYFIELD: Yes, Your Honor.

REBUTTAL ARGUMENT OF HARLEY D. MAYFIELD, ESQ.

ON BEHALF OF THE PETITIONER

MR. MAYFIELD: In regard to the jurisdctional question of the issue that the California Supreme Court found prejudicial evidence, it was bound up in the constitutional issue they were addressing. Prejudicial evidence they found admitted included the defendant's psychiatrist's testimony that the defendant himself knew about the possibility of parole and was considering whether he might want to take revenge if he were paroled.

In regard to amplifying instructions, the California Supreme Court did not find and the statute does not provide that a defendant, if he chose to do so, could not request additional amplifying instructions whether they related to a disclaimer

telling the jury not to consider the other instruction or an additional instruction about commutation of the death penalty.

The citation to Gardner v. Florida, that case is sort of the obverse of this case. That involved the instance where the sentencer, the judge, had some information that the defendant and his counsel did not have, and may have based his decision on that. Well, that was unfair.

In this case, the information that the jury was given is information which the defendant knows, his counsel knows, and we are asked to find that is unfair for the jury to know.

In regard to a necessity for some prophylactic measure to offset this instruction to the jury informing them that there is, in fact, a possibility of parole, I suggest that we have it in the declaraments of the statute itself, which sets forth specific factors for the jury to consider and permits them to return a death penalty only if they find aggravating factors outweigh mitigating factors.

And, I suggest that this instruction is not about commutation anyway. What it is a bout is about the indisputable fact that this sentence, which is described as life imprisonment without the possibility of parole, if which by its description has parole in it, that this sentence is, in fact, not a sentence that has no possibility of parole. That is what the subject of the instruction is.

QUESTION: What you want to say is that the sentence is not true

MR. MAYFIELD: That is correct as it --

QUESTION: Well, is a statute that is not true a valid statute?

MR. MAYFIELD: I am not saying that the sentence is -- I am saying that there is a possibility of parole, and I am saying, yes, the statute is valid and particularly if jurors are made aware of the fact of what this alternative sentence is.

The jurors are not told to speculate as to when the defendant might be paroled. They are specifically told to consider these factors and determine whether aggravating circumstances outweigh mitigating circumstances.

QUESTION: May I go back to the jurisdictional point for a moment? The testimony that was erroneously admitted, as I remember, was the psychiatrist's testimony that this defendant had said that if his sentence is commuted, he might seek revenge against the prosecutor, the judge, and the jury? Was that what he said, something like that?

MR. MAYFIELD: Yes, Your Honor.

QUESTION: Now, and your view is, even though that is a matter of state law -- an error of state law -- it would presumably be harmless error, is that your thought? Why wouldn't that be a sufficient reason for reversing the conviction?

MR. MAYFIELD: What I am saying is that the reason it was found to be erroneous -- the California Supreme Court said it was this instruction --

QUESTION: Because the instruction emphasized the

fact that the sentence might be commuted?

MR. MAYFIELD: Since this instruction permitted this evidence to be introduced, it found that the mere mention --

QUESTION: Well, but I am not quite clear on what your response is. The jurisdictional argument that your opponent makes is that well, this is clearly an error of state law. The California Supreme Court has told us that. And, it is rather obviously a fairly significant error because it suggests to the jury that they ought to sentence the man to death in order to protect themselves, and, therefore, the judgment would have been reversed on state law grounds even if they are wrong about the federal constitution.

And, if that is true, then we do not have jurisdiction. Now, what is your response to the argument?

MR. MAYFIELD: My response to that is that the error they found on state law grounds was error because of the conclusion that the instruction regarding the possibility of parole was erroneous on federal constitutional grounds.

QUESTION: Well, that may be true, but it is still ultimately a state law ground as to the erroneously admitted evidence, isn't it?

MR. MAYFIELD: No, Your Honor, it is not.

QUESTION: Oh, I see --

MR. MAYFIELD: Because it is -- the only reason -- the reason it was erroneously admitted was because of the

ruling on the federal constitutional error.

QUESTION: You are not suggesting that it would have been harmless error? Let me just be sure I get that to one side?

MR. MAYFIELD: I am suggesting that on state law -- if it is strictly state law grounds -- then under the state law the California Supreme Court would have to examine the evidence and determine that a miscarriage of justice occurred.

QUESTION: If this were remanded as your colleague suggests, or if we ruled that there is an adequate independent state ground, I take it that would be on the basis there was going to be a new trial. And, I suppose the new trial would go forward without this instruction, since the state Supreme Court has ruled that the instruction is unconstitutional.

MR. MAYFIELD: Yes --

QUESTION: And, if the new trial went forward and the state lost, the federal issue would be foreclosed, I suppose.

MR. MAYFIELD: That is correct. If there were a new trial in all cases, the California Supreme Court's ruling --

QUESTION: You say that without the federal constitutional ruling which you say is erroneous, the state would never -- the state court would never have made this evidentiary rule.

MR. MAYFIELD: I do not go that far. I say that the evidentiary ruling -- the finding of prejudice is so bound up in the federal constitutional ruling that we cannot say that there

is an independent state problem.

CHIEF JUSTICE BURGER: Thank you, Gentlemen.

The case is submitted.

We will hear arguments next in Jones against Barnes.

(Whereupon, at 2:22 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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CALIFORNIA, Petitioner v. MARCELINO RAMOS #81-1893

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