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# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1563

TITLE CALIFORNIA, Petitioner V. ALBERT GREENWOOD BROWN, JR.

PLACE Washington, D. C.

DATE December 2, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA, :

Petitioner, :

v. : No. 85-1563

ALBERT GREENWOOD BROWN, JR. :

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Washington, D.C.

Tuesday, December 2, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

JAY M. BLOOM, ESQ., Supervising Deputy Attorney General of California, San Diego, California; on behalf of the petitioner.

MONICA KNOX, ESQ., San Francisco, California; on behalf of the respondent.



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C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 85-1563, California versus Brown.

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

ORAL ARGUMENT OF JAY M. BLOOM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BLOOM: Thank you, Mr. Chief Justice, and may it please the Court:

This is a death penalty case arising out of Riverside County, California, and it involves the giving of an instruction at the penalty phase of that trial.

Before getting into the instruction, I would like to lay out a little of the procedure, how the trial occurs in California. The California death penalty process is a two-step process. At the first step the jury determines the guilt or innocence of the defendant and determines the truthfulness of the special circumstances allegation.

The special circumstances allegation is used to narrow the category of first degree murderers who may receive the death penalty. Once the jury determines the truthfulness of the special circumstances allegation, the case proceeds to the penalty phase where the jury

may return a verdict of death or life without possibility of parole.

Now, in this case the evidence of the guilt phase showed that the defendant had raped and murdered a young, 15-year old girl and then called the parents to tell -- called the mother to indicate she would never see her daughter alive again.

The jury returned a verdict finding defendant guilty of murder in the first degree and rape, and as a special finding found the murder was premeditated. It also found as a special circumstance that the murder had occurred during commission of a rape.

At the penalty phase the defendant presented evidence of remorse of a prior rape and evidence of sexual dysfunction and evidence from his family. The prosecution presented evidence of a prior rape.

The jury fixed the punishment at death, after hearing three instructions. The first instruction is the one that is at issue before this Court, and basically it says, you must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the people and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law to the case, and that you will reach a

just verdict regardless of what the consequences of such verdict may be.

The jury was also instructed that they were to take into account and be guided by various aggravating and mitigating factors contained in instruction known as "Caljic 8.84.1." That laid out the various aggravating and mitigating factors and also indicated the jury could consider any other circumstance which extenuated the gravity of the offense, even though not a legal excuse for the crime.

The jury was finally instructed with Caljic 8.84.2 which indicated the jury could consider, take into account, and be guided by the applicable factors of aggravation and mitigation upon which it had been instructed. The jury was then told, if the aggravating factors outweighed the mitigating factors, it shall impose the death penalty. However, if the mitigating factors outweighed the aggravating factors, it was to impose a punishment of life without possibility of parole.

QUESTION: Mr. Bloom, where in the instructions was the jury told that it should consider mitigating evidence about the background and the character of the defendant?

MR. BLOOM: Well, it is our position, Your

Honor, that Caljic 8.481 which deals with the various aggravating, mitigating factors, it discusses the jury is to consider the circumstances of the offense, prior violent conduct, any mental defects of the individual, and under the "K" section, any other circumstance which extenuates the gravity of the offense, even though not a legal excuse.

QUESTION: Did it say -- was the instruction, "any other circumstance which extenuates the gravity of the crime"?

MR. BLOOM: No. The exact language, Your Honor, was "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

QUESTION: And do you think that that makes it clear to the jury that they could consider evidence going to the background and character of the defendant?

MR. BLOOM: Yes, Your Honor, because in the first place this instruction tracks exactly penal code 190.3 which this Court discussed in California versus Ramos, and in that decision this Court indicated in footnote 19 of the opinion that the instruction allowed the jury to consider all evidence to show a penalty less than death was appropriate and met the standards of Lockett versus Ohio. This Court also noted, citing to

190.3, that the California scheme like the Texas sentencing scheme insures the jury will hear all relevant mitigating evidence.

Now, in addition, in Pulley versus Harris which dealt with the 1977 California law, this Court had occasion to also discuss 190.3, which was substantially the same language, and the Court indicated that the statute and the California system was constitutional.

So, since the instruction given here tracks exactly 190.3, which in essence has been upheld by this Court in Ramos and Pulley versus Harris, to permit a defendant to present all relevant mitigating evidence, it is our position that the instruction does allow the jury to consider all the relevant evidence.

Basically, what the position of the state in this case is, is the instruction telling the jury not to be swayed by mere sentiment, sympathy, conjecture; tells the jury, the best it can, to divorce itself from emotion. What these factors are, are not mitigating factors but are motions of the jurors, as Justice Mosk indicated below in his dissent in the Lamphear decision. And, when followed by Caljic 8.481, the jury then is to consider all the relevant mitigating evidence.

This Court indicated in Gardner versus Florida that a motion has no place in decision to impose the

death penalty. In addition, the Chief Justice, dissenting recently in Caldwell versus Mississippi, indicated, "There is nothing wrong with urging a capital sentencing jury to disregard a motion and render a decision based on the law and the facts."

He then said, "I do not understand the Court to believe that motions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions."

It is our position that what these instructions do is, the instruction telling the jury not to be swayed by sentiment, conjecture, sympathy, et cetera, tells the jury, put aside these emotions. They have no place in determining life or death. But what you are to do is to view the facts and the law as given to you in Caljic 8.84.1 and Caljic 8.84.2.

In addition, the emotions dealt with here, sympathy, sentiment and conjecture, aren't necessarily beneficial to the defendant as respondent alleges here. Sentiment, sympathy and conjecture could just as likely be engendered for the victim, or just as likely be engendered against the defendant in a death penalty case.

QUESTION: If the word "sympathy" were out of

the instruction, would you be here; the single word, "sympathy"?

MR. BLOOM: Well, I think we would be here because the court below indicated that the instruction as a whole is invalid. It didn't deal just with sympathy. It also dealt with the issue of just verdict and consequences of the verdict.

So, all these factors taken together, the Court indicated, were inappropriate for the jury to consider.

QUESTION: Mr. Bloom, may I follow up on a question that Justice O'Connor asked you about the adequacy of the instructions to take into consideration the mitigating evidence, and I have in mind particularly the argument of the prosecutor at the Joint Appendix at page 90 and 91 where he refers to the fact that they brought in a parade of relatives who talked about the background of the defendant as a child and then argued that that testimony was a blatant attempt by the defense to inject personal feelings in the case to make the defendant appear human, to make you feel for the defendant and so forth, but that the judge would in effect tell you that you must not be swayed by sympathy.

Doesn't that suggest that the judge was in effect directing the jury not to consider that kind of

mitigating evidence?

MR. BLOOM: Well, no, Your Honor. What he was telling the jury was to consider the facts and the law. At the opening of his argument, for example, he says, "You are not to consider sympathy, sentiment or any of these factors."

But then he goes on and says, "You are to consider the mitigating factors," and he goes through them and lists them. That's the opening of the prosecutor's argument.

Now, in addition he also notes at one point in his argument that the jurors are not to be swayed by sympathy for the victims. They are to consider the facts and the law of the case.

QUESTION: Well, I understand that, but is there an instruction in there that -- I don't think -- you responded to Justice O'Connor, I believe, by referring to the instruction that says, you should not -- you may consider matters that reduce the character of the offense or of the crime, the quality of the crime.

But is there anything that suggests to the jury that they may consider the sympathetic aspects of the defendant's personal history?

MR. BLOOM: Well, I think my point was that the instruction as a whole allows the jury to --

QUESTION: It allows them to do it, but does it tell them to do it?

MR. BLOOM: Well, yes. It tells them that they are to take into account and be guided by the following factors, and then it lists the various factors and some of the factors, for example, are the age of the defendant, whether at the time of the offense he had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, whether he acted under duress or under substantial domination of another person, whether the offense was committed under a circumstance which the defendant reasonably believed --

QUESTION: But none of those mentioned his background, his personal background?

MR. BLOOM: Well, the last one does, any other circumstance which extenuates the gravity of the crime.

QUESTION: The gravity of the crime.

MR. BLOOM: Even though it is not a legal excuse. Now, the California Supreme Court in the Easley case did indicate that it felt that instruction dealt only with the offense and not the offender. However, this Court as I indicated in the Ramos decision, indicated in footnote 19 that 190.3 of the penal code, which this instruction is a verbatim statement of that,

does comport with Lockett and Eddings and allows the jury to consider all relevant mitigating evidence.

So, my point is in essence that this Court has already upheld the validity of this instruction by upholding 190.3 because they are the exact same language.

QUESTION: But in doing that, did we have before us an argument or -- like the prosecutor made here, or the other statements that were made to the jury? Maybe that catchall instruction is a little bit ambiguous, but what happens when it's coupled with the argument that was made to the jury?

MR. BLOOM: I think there are two answers to that. First of all, I think as I understand the issue before the Court, it is the facial validity of the instruction.

Now, there may be cases where a prosecutor may go beyond bounds. We're not saying this is the case, but the issue is whether the four corners of the instruction comport with the Eighth Amendment.

QUESTION: Why is that, now? That the prosecutor's instructions -- the prosecutor's argument, you say, are not before us and cannot be considered?

MR. BLOOM: Well, I'm saying that I don't understand that to be the issue before the Court. I understand the issue to be the facial validity of the

instruction itself. That was what cert was granted on.

Now, of course a prosecutor may make arguments in some cases that go beyond the limits of this instruction. In addition, in this case the prosecutor's arguments were consistent with that instruction.

QUESTION: Well, do you think so? I mean, in addition to the other things that have been read, he said, there is mitigation. Absence of criminal activity, no mitigation, right? Absence of prior felony conviction, no mitigation; whether or not the victim was a participant, no mitigation. All that's true.

But then he says, no mitigation, no mitigation, no mitigation. Age of the defendant, no mitigation. Whether or not the defendant was accomplished, no mitigation. Other circumstances, no mitigation.

Now, is it really possible to say that there was no mitigation in everything that had been brought forward, other circumstances, no mitigation?

MR. BLOOM: But in California the jury is instructed that the arguments of the prosecutor are not the law. The jury -- the prosecutor presents his case. He's saying, the defense evidence does not constitute substantial mitigation to determine a punishment less than death.

The defense then gets up and says, we've put on all this evidence of mitigation. It's an argument between both sides as to whether the evidence is substantial mitigation or not. It does not mean that the jury is precluded from considering it.

It's just the argument of the prosecutor. He's not saying, you cannot consider this evidence. He's saying, divorce yourself -- first of all, he is saying, divorce yourself from the emotions and look at the facts and the law. And then he says, when you look at the facts and the law, there is no mitigation here.

QUESTION: Well, I think a jury could reasonably understand that polemic language that way if the instruction were clear enough. But when the instruction says, "any other circumstance which extenuates the gravity of the crime," the gravity of the crime, you know, you could read that to mean, it has to be a circumstance connected with the crime, not with the defendant's prior life.

MR. BLOOM: Well, I think you have to view that in the context, though, of the other provisions of the instruction where they talk about the individual. If "A" through "J" for example had been limited to just dealing with the offense itself, it's possible the jury would believe that.

But all the other provisions deal with the offender as well as the offense, as I indicated, age, mental defect, duress, things like that; so there is no reason to suddenly conclude that when you get to the "K" provision, that that's only limited to the offense.

And again, I think that --

QUESTION: Did the defendant's counsel object to the prosecutor's argument on this point?

MR. BLOOM: I don't think he did, Your Honor. I'm not quite sure, in all candor. But again, I think that the issue as I understand it is what the validity of this instruction is, and not if the prosecutor may have misstated --

QUESTION: But, Mr. Bloom, on that point the state court's opinion first states the instruction and then it goes on to say, "The prosecutor made similar arguments both during the voir dire of the jurors and the close of the penalty case. Defendant contends that these admonishments" -- that is, covering both the instruction and the prosecutor's argument, and then it goes on and says, "defendant is correct."

So, it seems to me the ruling of the court that we are reviewing is one that relied on both the argument and the instruction.

MR. BLOOM: Well, but the question that was

certified -- we filed a petition for cert, and as I understand the question that was certified was question one of our petition which was, whether an instruction at the penalty phase on these issues violates the Eighth Amendment where the defendant has been permitted unlimited opportunity to present mitigating evidence, and the instruction merely advised the tryer of fact not to consider matters not relevant to the offense or the offender.

QUESTION: Well, if we adhere to that and we agree that the instructions alone would not be bad but combined with the argument would be bad, what would we do? Would we reverse and remand to the state?

This is a capital case. It seems to me we want it to come out right, don't we?

MR. BLOOM: Well, I think what happens, though, is the Supreme Court of California viewed the prosecutor's arguments in the context of what we would construe its misunderstanding of the validity of the instructions.

The Court historically, as all the briefs have indicated, has found that giving of a sympathy instruction violates the federal Constitution and previous deferment indicated that it violated the state Constitution, and it viewed the prosecutor's arguments

in that context.

Now, if this Court were to adopt our position and conclude that the giving of this instruction is not improper in that it just tells the jury to put aside its emotions and view the facts and law of the case, if the Supreme Court of California would look at the prosecutor's arguments in that light it might reach a fully different conclusion.

QUESTION: So, you would say, then, we would remand for separate consideration of the instruction -- of the argument if we have a problem with that?

MR. BLOOM: I would think that that would be an appropriate way to do it because again, I think the Supreme Court of California has what I believe is a misunderstanding of what the concepts in this instruction mean versus concepts of mitigation.

These are emotions, which as I have indicated the law of this Court is, really has no place in the equation of determining life or death.

QUESTION: Of course, part of the problem is, it's not just the instruction in this case. I'm not sure of the appropriateness of it, but in one of the briefs there was a listing of instructions in other cases which present the same problem.

MR. BLOOM: That's true, in Louisiana --

QUESTION: I don't mean instructions. I mean, arguments by the prosecutor.

MR. BLOOM: Well, again thoe arguments, we don't know -- those arguments are not this case, obviously, and there may be error in those other cases. But again, those cases are not before this Court, nor do I understand it is the validity of the prosecutor's arguments.

And even if --

QUESTION: Except it's a little hard to hear the state come before us and tell us, listen, all this excludes is emotion. It doesn't mean that you can't take into account all these other factors, but then to read the argument that the State has made to the jury in a number of cases which seems to say the opposite.

MR. BLOOM: Well, but again --

QUESTION: I'm sure it's not your fault, but it has to be the State's fault.

MR. BLOOM: Well, again those cases are not this case, and our position would be that if you are going to reach the merits of the arguments to the prosecutor, that they are consistent with what we are saying here because at one point in his argument he tells the jury, don't consider sympathy for the victims any more than you would consider sympathy or any of

these emotions for the defendant.

And at the beginning of his argument he talks about the fact that, don't be swayed by these emotions. You must consider the law. And then he goes through the "A" through "K" provisions of 8.84.1 and lays them out one by one for the jury.

And of course, he makes his argument that they are not to -- there's no mitigation as to these factors but as to others.

Our point, essentially, here, is that in California versus Ramos this Court indicated that within reason each state has a right to determine what factors should weigh in the life or death equation. And again, in Skipper versus South Carolina, Justice Powell in his concurring opinion noted the same thing, that within certain reasonable standards a state has a right to determine what these factors should be.

It is our position that when a jury is allowed to consider all relevant mitigating evidence, as it is in this case, there is nothing inappropriate about telling jurors to try and circumscribe their discretion as much as possible and put aside these normal, human emotions and give both sides a fair hearing and determine the case on the law and the facts.

Again, the final line of the instruction is,

"You will reach a just verdict." So, it tells them to view the facts and the law and render a fair verdict on that rather than on emotions.

QUESTION: Mr. Bloom, do you say the State has a right to do this? Well, the State Supreme Court did this.

MR. BLOOM: Well, but again --

QUESTION: And you're objecting to that.

MR. BLOOM: We're objecting but --

QUESTION: When you are talking about the State, what are you talking about?

MR. BLOOM: Well, we're talking about the people of the State of California. Similarly, in Ramos the California Supreme Court indicated that giving the Governor's commutation instruction was inappropriate, but we petitioned for certiorari and the issue was whether the people of the state have a right to have this considered as a factor in the death penalty equation.

And it is our position that --

QUESTION: The Court said that you cannot tell a jury that you can't have any sympathy for the defendant.

MR. BLOOM: Well, it didn't say sympathy for the defendant. It said, sympathy for anybody.

QUESTION: Well, that's what the State Court said.

MR. BLOOM: Well --

QUESTION: And you said the State didn't say that?

MR. BLOOM: Well, first of all as I indicated, what we are saying is, as we said in California versus Ramos, the State or the people have a right to have certain factors considered in the death penalty equation. It's -- each state has a right to determine what the qualities the jury should consider are.

Now, California, this instruction has existed for many years and it has been decided that the jury should be told to put aside their emotions for anybody. We all understand that people when they are making a life or death determination are going to be emotional. You can't help but be emotional.

What we're saying here is that it's not unreasonable to ask these jurors, to the best of their ability, to put aside these emotions and look at the facts and the law and consider any factor that's relevant mitigating evidence. For example, if the defendant wanted to put on evidence that as a child he was dropped on his head and his parents beat him up, that's fine. The jury may consider that as mitigating

evidence and it may evoke some emotions.

But, what we're saying is that they should not decide the case on emotions alone but view the evidence and determine in the equation whether under "K" or under any other provision, the aggravating factors are outweighed by the mitigating.

QUESTION: Alone.

MR. BLOOM: Well, it says, "You must not swayed by mere sentiment" --

QUESTION: I said the word "alone." I don't see the word "alone."

MR. BLOOM: I'm sorry, I don't understand.

QUESTION: You said it said "alone." I'm saying the statute doesn't say "alone."

MR. BLOOM: I'm sorry. I don't think I said that, but I may have misspoke myself.

But in conclusion, then, I think that what we're saying here is that it is reasonable in accord with the Ramos decision to allow the State to tell a jury to put aside its emotions and decide a case fairly on the facts and the law, as this instruction does do, and under 8.84.1, "The jury may consider all relevant mitigating evidence relating to the offense and the offender."

For these reasons, the giving of the

instruction here was constitutional, and the decision of the California Supreme Court should be reversed.

At this time I would like to reserve five minutes for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bloom. We'll hear now from you, Ms. Knox.

ORAL ARGUMENT OF MONICA KNOX, ESQ.

ON BEHALF OF THE RESPONDENT

MS. KNOX: Thank you, Mr. Chief Justice, and may it please the Court:

In 1976 in Gregg versus Georgia this Court noted that the admission of relevant mitigating evidence under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the determination of punishment, especially if the sentencing is performed by a jury.

Respondent here was allowed to put on all of his mitigating evidence. The problem was that he was denied the proper use of that evidence by the prosecutor's argument and the Court's instructions.

I think it is worthwhile to spend a minute or two on some of the facts. I have no quarrel with what Mr. Bloom has said about the facts. I would just like to add a few comments.

Respondent put on a substantial amount of

mitigating evidence at the penalty phase of his trial. He put on several family members who testified that he was a quiet, loving youngster and young man, that he had been devastated at a very early age by the divorce of his parents and the separation from his father, and that he cared very much for his family members, keeping up relationships with them even while he was in prison.

In addition, respondent presented the testimony of a psychiatrist who indicated that respondent had severe psychosexual problems, that they were based primarily on a grossly distorted sexual upbringing by his mother.

QUESTION: Was there any objection to that evidence by anybody?

MS. KNOX: No. All of this evidence came in without objection.

QUESTION: And the judge certainly didn't say, what's the purpose of all this?

MS. KNOX: No, he didn't.

The psychiatrist further indicated that respondent was not a sociopath, that he was regularly employed. He valued education. He kept close relationships with family and friends, that his behavior was sexually and not violently motivated, and that he presented no danger in an all-male prison population.

Respondent testified on his own behalf. He echoed the pleas of his family members and asked the jury to show him mercy.

At the end of all this evidence the judge instructed the jury in the instructions that Mr. Bloom has indicated to this Court. The prosecutor exploited these instructions in his argument by emphasizing the duty of the jury to follow the law as the Court would give it to them.

He argued that all the factors that the Court would list for them to consider were aggravating factors, that no mitigating evidence had been presented on any of them. He repeatedly warned the jurors against personal emotions of sympathy, compassion or mercy.

QUESTION: Ms. Knox, if in this case the judge had not given the instruction, the catchall instruction about relevant mitigating evidence as to the crime but had made it clear in that instruction that the jury could consider evidence going to the background and character of the defendant, but nevertheless had given the sympathy instruction that the State petitioned on, would you be making this same argument?

Does that sympathy instruction alone necessitate a reversal, in your view, or is it the problem of the companion instructions?

MS. KNOX: Respondent's position is that the anti-sympathy instruction alone is unconstitutional in all circumstances. But I really believe that the issue before this Court can be and is much narrower than that.

That is, this is really a straightforward Lockett case. Respondent put on a lot of mitigating evidence and yet nothing in the instructions that were given to the jury adequately told them that they could consider that mitigation.

In fact, the instructions really told them that they couldn't consider that mitigation. That was the argument of the prosecutor, and if the prosecutor understood and interpreted that instruction that way, it certainly is likely that at least one if not more of the jurors understood the instruction in that way.

QUESTION: Oh, I don't know that that's so. You know, the adversary system does tend to produce extravagant statements on both sides, doesn't it?

MS. KNOX: It certainly does.

QUESTION: So, that isn't necessarily true, it seems to me. What have we accepted cert on? Do you agree with the statement of the State that the only point that we've taken this case for is the sympathy instruction?

MS. KNOX: No. I believe that this Court has

taken this case to review the decision of the California Supreme Court. That decision was that the anti-sympathy instruction, together with the other restrictive penalty instructions, did not allow the jury to properly consider respondent's mitigating evidence.

And I believe that that is the decision that is on review in this Court, and that that's the issue that this Court is considering.

QUESTION: What was the order granting certiorari?

MS. KNOX: What the order said was restricted to the first question presented in the petition for cert.

QUESTION: Which was?

MS. KNOX: Which was, whether the giving of an anti-sympathy instruction was unconstitutional.

QUESTION: Now, you're making your case weaker than it is. It was whether the giving of that instruction was all right where the defendant has been permitted unlimited opportunity to present mitigating evidence, and the instruction merely advised the tryer of fact not to consider matters not relevant to the offense or the offender.

It was introducing some matters beyond the mere instruction, the opportunity to introduce evidence, at least. It doesn't mention, however, the argument of

the prosecutor, does it?

MS. KNOX: No, it doesn't, and I don't believe that respondent's argument hinges on the argument of the prosecutor. I think the argument of the prosecutor is relevant because it indicates the type of interpretation that people schooled in the law give to these instructions.

QUESTION: Was any objection made to the prosecutor's argument at trial?

MS. KNOX: No, there was not an objection made to the prosecutor's argument. But this really is an instructional case, as I said. I don't believe the argument hinges on the prosecutor's argument.

QUESTION: Ms. Knox, let me go back just a minute to your own view of the proper construction of the question presented which we granted certiorari on. It talks about the sympathy instruction.

It says, "Where the defendant has been permitted an unlimited opportunity to present mitigating evidence." Now, you don't have any complaint, do you, here that the trial court excluded mitigating evidence that should have come in?

MS. KNOX: No. I think that brings up the issue of California versus Ramos, which the State seems to be relying on very heavily. In a footnote in that

opinion, this Court did say that the California penal code, Section 190.3, was consistent with Lockett principles.

What penal code Section 190.3 says before it gets to the list of factors that the jury is to be instructed on is that the defendant should be able to present evidence on any matter relevant to mitigation including evidence of his character, background, history, mental condition and physical condition.

That is quite consistent with Lockett. The problem is the very problem that existed in Eddings. Eddings was allowed to introduce all his evidence without limitation.

The problem was that the sentencer didn't consider the evidence. That is the very problem that exists in this case. Respondent clearly was allowed, without objection, to present all of his mitigating evidence.

The problem comes with instructions to the jury. The jury was not told that they were to consider that mitigating evidence. And so we're left --

QUESTION: Ms. Knox, how do you get that? If I read it together with the argument, I'm -- you know, I'm on your side. But apart from the argument, why would you read the instruction that way?

The last part of it is -- the residual clause is, "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Now, the argument you make in your brief is that the jury would think that that has to be something that relates narrowly to the actual commission of the crime itself.

But, as was pointed out by the state in its argument, a jury wouldn't reasonably understand it that way since before Subsection K a lot of the other subsections specifically mention factors that have nothing to do narrowly with the commission of the crime, such as whether there was any prior felony conviction, whether -- how old was he, and so forth.

It seems to me, in that context it would be unreasonable to read "K" alone and again, leaving aside the prosecutor's argument, it would be unreasonable to read that to say there has to be something about the narrow circumstances of the crime as opposed to the defendant's prior history.

MS. KNOX: I think there are two answer to that. One has to do with -- this instruction was not given by itself. It was given with an antisympathy instruction which I'll get to in a minute.

But more important than that, it seems to me

that when you say there are other factors that don't go to the narrowness of the crime, there are two factors in this whole list that don't go to that crime. One is the age of the defendant and the other is his prior criminal activity.

All the rest of those factors listed have to do with what the defendant was like at the time of the crime. Was he acting under physical impairment? Was he acting under the duress of another?

But, it all has to do with what he was like at the time of the crime. When you get to factor "K," the very wording of the instruction restricts it to a consideration of what happened at the time of the crime.

It says, "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." It talks just like all the other factors do about what defendant was like at the time of the crime.

And I think that's the problem. If you look at the opinion of the California Supreme Court in People versus Easley, they said that was the problem. And now, since 1983 and since the opinion in Easley, what courts are instructing juries about penalty is -- there's another sentence that is added to factor "K" which says, "Or any other evidence the defendant offers as a basis

for a sentence less than death."

That tells the jury, it's that language that tells the jury that evidence that isn't connected directly to the crime --

QUESTION: Where is that new language?

MS. KNOX: It's now in the standard Caljic instruction. It was developed by the California Supreme Court in People versus Easley.

QUESTION: Of course, even when that's given you would still come in and object if the anti-sympathy instruction were given, I presume?

MS. KNOX: Yes. And the reason for that is, because of what the jury is supposed to be doing at the penalty phase, that it's clear from decisions of this Court that what the jury does in the penalty phase is not a rigid and mechanical parsing of statutory factors; that it's a highly discretionary decision, it calls for a highly subjective opinion by the jurors; that it calls not just for their legal and factual judgment about the evidence they heard but it calls for their moral assessment and their moral judgment of that evidence too.

I think that to classify sympathy --

QUESTION: To the use of the word "emotion" too, that they shouldn't put aside their emotions?

MS. KNOX: Well, I think the --

QUESTION: I mean, is that the next case after we disapprove sympathy -- excluding sympathy, would we be asked to disapprove the exclusion of emotion?

MS. KNOX: No, I don't think that's the next case, because I think that -- well, I think if the judge were to instruct the jury to disregard emotion and not say anything further, yes, that would be wrong.

There are clearly some types of emotion such as prejudice, for example, which are not supposed to play a part in the jury's determination, whether at guilt or at a penalty trial. But it's also clear that there are many emotions which validly play a part in the jury's determination at penalty, for example, retribution.

Retribution is the primary justification for a death sentence. Retribution is clearly an emotion, and yet it plays a proper part in the jury's determination at penalty.

In Gregg versus Georgia, this Court said that the instinct for retribution is part of the nature of man. The same thing is true with sympathy. Sympathy is a natural reaction on the part of jurors to the type of mitigating evidence that respondent presented in this case.

QUESTION: But, counsel, the language in the

instruction here was qualified by the word "mere," "mere sympathy." I have read that with perhaps not full regard for the ejusdem generis rule which you suggest all jurors know, as meaning that you don't want to just go off on sympathy alone or emotion alone.

Now, if that were a correct reading of that instruction, do you still think it's objectionable?

MS. KNOX: Well, first of all, I don't believe it is a correct reading of the instruction because --

QUESTION: If it were, do you think it would be objectionable?

MS. KNOX: Yes, I think it's objectionable because it's very unclear what that means. I mean, the state makes -- in its pleading has made much of the idea that this is mere sympathy, that what that means is that it's untethered sympathy.

Well, it's not entirely clear to me what untethered sympathy means. If it means sympathy that's not based on evidence but sympathy that just comes out of the sky, then it seems to me we have dealt with the exclusion of that by the Witherspoon Whip process.

We have gotten rid of those people who are just going to bring in some type of emotion because they're against the death penalty, for example; that once you've gotten past that stage and you're at the

penalty stage and they've heard all this evidence, it seems to me that if they have a feeling of sympathy and they have a sympathetic response to the evidence and they want to exercise mercy for the defendant, that is clearly constitutionally valid and to tell them "mere sympathy," what the "mere" does is imply that there's something wrong with sympathy.

It doesn't tell them there are different types of sympathy, some of which apparent and some of which are not.

QUESTION: You know, if we were a commission or a committee of the California Bar sitting down to compose jury instructions, maybe we wouldn't come up with this one. But to win your case, it seems to me you've got to show that this instruction is not just a little bit off the mark but that it's actually unconstitutional, that it doesn't come within the latitude that Pulley and Ramos said there are for states within the capital system.

MS. KNOX: And I think we can do that. It seems to me that the jury -- when you tell the jury that they can't consider sympathy, that because we believe that juries pay attention to jury instructions and they follow them, the jury is going to try to make some sense of what that means in the context of the decision that

they're supposed to be making.

QUESTION: But you think we would approve an instruction that says to the jury, you may consider your feelings of retribution in deciding what penalty to impose; you may consider your thirst for retribution? I gather that from your earlier comments.

MS. KNOX: I don't think you need an instruction for that because I think that just naturally happens.

QUESTION: Oh, I know, but let's assume California says, let's do it, and they have an instruction like that. Do you think we'd approve that?

MS. KNOX: Well, I think that the comments this Court has made in cases such as Gregg versus Georgia indicate that you would, yes.

QUESTION: Well, the state in setting up a criminal system can have retribution as one of the purposes of its penal system. But we said that the jury can be instructed that -- what about sympathy for the victim? Would we approve an instruction that said, you may consider your feelings of sympathy including sympathy for the 15-year old girl who was raped and murdered?

MS. KNOX: Yes.

QUESTION: You would? Well, you're

consistent, I'll say that.

MS. KNOX: I think that without telling the jury that, though, that that in fact does happen, that that -- in part, that's my point, that these are all very natural reactions.

QUESTION: It's an imperfect world, and it may well be that the jury doesn't always follow instructions. But what the State is trying to do is saying, you know, as much as you can, put aside emotion. Put aside sympathy.

You're right, they may not do it 100 percent.

MS. KNOX: Let's say the jury makes their best attempt to do that. Then what good has respondent's mitigating evidence done him?

I mean, he might as well have not introduced it. If the jury cannot use their sympathetic response to tht evidence and decide whether to exercise mercy for respondent, or for a capital defendant, then the defendant might as well not put on the mitigating evidence.

It's the only use their mitigating evidence has, and if you tell the jury that they can't use it that way, essentially what you're doing is telling the jury not to pay any attention to the mitigation at all.

QUESTION: But the use under the California

instructions is that you put the aggravating factors on one side and the mitigating factors on the other side, and prescinding from emotion or sympathy, the California courts say, you decide which outweighs the other, making believe you are an emotionless judge.

That's what they're telling -- it may be hard to do, but is there anything wrong with asking them to try to do that?

MS. KNOX: Yes, because to say that you put the aggravating evidence on one side and the mitigating evidence on the other side makes it sound like what you're doing is something that is very mechanical, that all you do is, you know, see how many are over here and see how many are over there, and whatever side has the most number wins.

Well, as Chief Justice Rehnquist said in Barclay versus Florida, that is not what a capital sentencing proceeding is about. It is not a mechanical parsing out of statutory aggravating and mitigating factors.

QUESTION: -- some evidence that may suggest to the jury that there is a reason for forgiving the defendant for what he did, is that forbidden by this instruction?

MS. KNOX: Yes, I think it is forbidden by

this instruction. I think that the sense that a jury would make of this instruction is that any feelings of leniency they have for the defendant are totally unacceptable feelings, and that they cannot act on them; that if they want to exercise mercy towards the defendant because of the mitigating evidence they've heard about his background, that they cannot do it.

QUESTION: Let's take age. Why does the state permit that as a mitigating factor, and how would it mitigate if the jury -- I take it you think this instruction forbade the jury to take into consideration age?

MS. KNOX: No, I don't think it did, but one of the factors specifically given to the jury as something they could consider, the age of the defendant.

QUESTION: Well, I know, I know, but -- well, I take it that -- wouldn't the age just provoke sympathy? Or, what would it do?

Would it help -- would it say, we ought to forgive him for this, or that, it's easy to understand how he might have committed this crime? What is it?

MS. KNOX: Well, I think the factor of age can work in several different ways. It can work as aggravating, for example, and in many, many cases in California it's argued that way.

I believe that it can work as mitigating in a case, if you have a very young defendant, for example, I believe it could be mitigating to the jury.

QUESTION: Well, and any mental disturbances or anything like that?

MS. KNOX: Well, I think that you have to look at the instruction carefully, though. What it says is, any mental disturbance at the time of the crime. It does not indicate that a prior or subsequent mental disturbance is at all relevant to the jury determination.

But, see, if you believe -- let's say that there was a mental disturbance at the time of the crime, and that's one of the things that the jury is specifically told on their list of factors to consider.

If you believe that they will consider that as mitigation, I think that you're quite right, Justice White, that the way they consider it as mitigation is if they have a sympathetic response to that evidence.

The problem is when you give --

QUESTION: Here's the evidence, that this fellow's been a good man all his life. His relatives and his friends say, we think he's great and this is just a temporary lapse, and trying to convince the jury that this man will be all right in the long run, we just shouldn't execute him, shouldn't kill him.

Now, is that sympathy?

MS. KNOX: I believe that there is a sympathetic component in that analysis.

QUESTION: Well, do you think this instruction forbade the jury from taking that into consideration, saying, well, he just doesn't deserve the death penalty, he's probably never going to do this again, this was one of those crimes of passion that will never happen again?

MS. KNOX: Yes, I believe that's exactly what the instruction does. First of all, the standard instruction listing the factors doesn't tell them they can even consider that type of evidence. But assuming that they were given a more expansive standard instruction telling them that they could consider that type of evidence, then I think what happens when you then add on top of that an anti-sympathy instruction is that, what you have done is you have give them conflicting jury instructions.

On the one hand, you've told them to consider it and to consider it there is a sympathetic component in the consideration, and on the other hand you have told them they can't weigh that sympathetic component. And so, I think at the very least what you have done is hopelessly confuse the jury.

QUESTION: You don't think the word "mere" --

isn't the word "mere" in the instruction?

MS. KNOX: There is a word "mere" in the instruction.

QUESTION: You don't think that helps any either?

MS. KNOX: No. In fact, if anything I think that probably confuses the issue much more. I mean, what the instruction says is not to be influenced by mere sentiment, conjecture, sympathy, et cetera.

Now, if the "mere" modified "sympathy" as is being suggested, it modifies every term in the instruction. And therefore it would modify, for example, "prejudice."

Well, then what it means is, you are telling the jury is not to be influenced by mere prejudice, suggesting that prejudice is okay as long as it rises above the level of "mere." Well, it seems to me that type of analysis --

QUESTION: There are an awful lot of jury instructions that have never been challenged by any responsible defense lawyer which, if you treated them as if you're parsing provisions of the Internal Revenue Code, you could adduce some doubt about which adjective modified which.

That isn't the way we ordinarily go about

parsing jury instructions, is it?

MS. KNOX: Perhaps it's not, Your Honor, but I think that we have -- we're dealing with a decision between a defendant's life and death, and we should be very careful what we tell jurors. Maybe we have to be more careful about what we tell jurors.

QUESTION: But we also, if there are 170 cases in California that depend on whether or not this instruction is unconstitutional, we should also be very careful not just to get into a very arcane word game.

MS. KNOX: And I'm not advocating that we should. I would like to correct an assumption which I think Your Honor has, and that is that there are 170 cases that rely on this.

This instruction has been against California law for many, many years. This is only the third case that the California Supreme Court has considered where this instruction was given at the penalty phase.

It is not routinely given, and there are nowhere near 170 cases, or even 17 cases in California where this instruction was given.

QUESTION: But didn't one of the dissenting judges make some comment to that effect?

QUESTION: Justice Lucas, was he wrong when he said there were 170 cases?

MS. KNOX: Justice Lucas was not referring to the anti-sympathy instruction, Your Honor. There is a second part of the Brown decision which is not before this Court, and that has to do with the separate penalty instruction which was give, which told the jury that if they found aggravating outweighed mitigating that they shall impose the death penalty.

It is that instruction that is routinely given to penalty juries, and that is what Justice Lucas was talking about when he said that there were a lot of cases which that instruction was given in.

QUESTION: Is this instruction, though, one that is quite common nationwide? I recall, certainly in the State of Arizona, it was part of the standard instructions in that state for years, and I had rather assumed that it was given all over the country.

MS. KNOX: No. There are, I think, about seven states which fairly routinely give anti-sympathy instructions at penalty.

QUESTION: Death penalty statutes that have produced a lot of people on death rows? What states are they?

MS. KNOX: I don't know. I know Illinois, for example, is one of them.

QUESTION: Well, how about Florida?

MS. KNOX: No. Interestingly, Florida is one of the states which does not allow an anti-sympathy instruction.

QUESTION: Texas?

MS. KNOX: I'm not sure about Texas, Your Honor.

QUESTION: Georgia?

MS. KNOX: No. I think Georgia doesn't allow it, because I did speak to the head of the ACLU there.

QUESTION: Alabama?

MS. KNOX: I don't know about Alabama.

QUESTION: Louisiana?

MS. KNOX: I'm sorry, I don't know.

QUESTION: The trouble is, you don't know which way the sympathy is going to break, for the victim or the offender, and that's part of the problem. The whole thrust of our jurisprudence in this field has been to try to eliminate the irrationality of capital punishment, to try to prevent one person getting condemned to death in a flukey way where somebody else didn't, and sympathy is simply not tied to reason.

What you sympathize with, I may not sympathize with.

MS. KNOX: Maybe so, but the whole penalty decision cannot be a totally rational, objective

decision. It is a very subjective, discretionary decision by its nature.

We cannot make it totally rational. It's true that --

QUESTION: We have been trying.

MS. KNOX: Well, but to try with an anti-sympathy instruction is essentially to tilt the scale towards death for a defendant. Yes, it is possible that if you allow the jury to consider sympathy, that some jurors will have sympathy for the victim.

I think that happens whether you allow the jury to consider sympathy or not. But in the end, it's all the capital defendants have going for them at the penalty trial.

They get to the penalty stage of the capital proceeding because they have been convicted of a very serious crime that is essentially an unmitigated crime, that as Justice Groden in the Brown opinion noted, that the issue is not really between good and bad, is this defendant a good man or is he a bad man, do we give him death or life based on that.

The fact of the matter is that we are dealing with very serious offenders who generally have very serious criminal backgrounds, that the only thing that

they have going for them in terms of getting the jury to opt for a decision of life is a sympathetic response to their evidence in the hope that they will exercise mercy.

Respondent literally staked his life on the hope that the jury would do that in this case, that they would listen to his evidence, that they would consider it, that they would have a sympathetic response to it, and that they would exercise mercy for him.

And yet, the instructions given in the case which were clearly aggravated by the prosecutor's argument -- but the instructions given told the jury that they could not do that.

Respondent might as well have sat mute at the penalty phase for all the good putting on all his evidence did.

QUESTION: I forgot what you answered before. You would allow the exclusion of emotion, you would allow -- say, don't be swayed by emotion? Can you give that instruction?

MS. KNOX: As long as it's clear to the jury that factors such as sympathy, compassion and mercy can be considered. And the reason I say that I would allow for the exclusion of emotion is because there are some emotions such as prejudice, for example, which clearly should not play a part in the jury's determination.

QUESTION: Well, if you just said emotion, it would probably eliminate compassion, wouldn't it?

MS. KNOX: I don't think that we can constitutionally eliminate compassion. It's the very basis for a decision such as Eddings, that if you eliminate compassion, if you eliminate the types of things that we're talking about, defendants at a penalty trial have absolutely no chance at all of getting a life verdict out of their jury.

QUESTION: We are just trying to figure out how many standard instructions -- and how many states eliminate emotion. I mean, you know, I would certainly put that in an instruction all the time.

And, you think that would be bad because it's too broad?

MS. KNOX: Yes. I think that one of the things that is rather telling about this instruction is that the instruction was developed for the guilt phase of the trial. In fact, the use note in the standard Caljic, the book of jury instructions in California, specifically tells judges not to give it at a penalty trial.

It was developed for a guilt trial because the issue there is much more of an objective issue. It is a stage --

CHIEF JUSTICE REHNQUIST: Your time has expired, Ms. Knox. Thank you.

Mr. Bloom, do you have anything more? You have seven minutes remaining.

MR. BLOOM: Yes, Your Honor. Thank you.

ORAL ARGUMENT OF JAY M. BLOOM, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BLOOM: May it please the Court:

With regard to the issue of sympathy, I think it must be considered that at the penalty phase when this instruction is being given, the defendant has already presumably been convicted of murder in the first degree, and a special circumstance of some sort has been found.

So, under these circumstances to believe necessarily that sympathy would be helpful to a defendant, I think is wrong. I think that if anything, as indicated in the briefs, sympathy is likely to be engendered the other way against the defendant in favor of the victim. So, for this reason it seems eminently reasonable and fair to everybody involved to tell the jury, put aside these gut reactions the best you can; decide the case on the facts and the law.

Now, with regard to the prosecutor's argument, I wanted to invite the Court's attention if I could to

page 6524 of the reporter's transcript, and this is the opening of his argument. He says, "Remember, during the voir dire I told you that the Court would not leave you adrift to your own feelings to decide which of the two punishments should be imposed. The Court would provide you with guidelines, instructions to make these decisions, and indeed this will happen. The Court will instruct you in determining the penalty to be imposed. You shall consider all the evidence which has been received during any part of the trial. You shall consider, take into account and be guided by the following factors."

He then goes through the various "A" through "K" factors. So, even though he starts out saying, I want you to put aside your emotions as I told you, he then says, go ahead and view the evidence, which is precisely what he's supposed to be doing.

In addition, I think the instruction must be viewed as a whole. I think that respondent's brief narrowed the Court too much onto the issue of sympathy. The other words are crucial here: "You must not be swayed by mere sentiment, conjecture, sympathy, but you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict.

In other words, the best you can, put everything aside with regard to emotion, carefully weigh the facts and the law, and render a just and fair verdict. We believe that the State of California, consistently with the Ramos decision and the Eighth Amendment, may ask the jury to render a just verdict based on the facts and the law, and for that reason the judgment of the California Supreme Court should be reversed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bloom.

The case is submitted.

(Whereupon, at 1:56 o'clock p.m., the hearing in the above-entitled matter was submitted.)

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1563 - CALIFORNIA, Petitioner V. ALBERT GREENWOOD BROWN, JR.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)