

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-246

TITLE GEORGE SUMNER, DIRECTOR, NEVADA DEPARTMENT OF
PRISONS, ET AL., Petitioners V. RAYMOND
WALLACE SHUMAN

PLACE Washington, D. C.

DATE April 20, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE SUMNER, DIRECTOR, NEVADA ;

DEPARTMENT OF PRISONS, ET AL., ;

Petitioners, ;

v. ; No. 86-246

RAYMOND WALLACE SHUMAN ;

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Washington, D.C.

Monday, April 20, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 o'clock a.m.

APPEARANCES:

D. BRIAN MCKAY, ESQ., Attorney General of Nevada, Carson City, Nevada; on behalf of the Petitioners.

M. DANIEL MARKOFF, ESQ., Las Vegas, Nevada; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: we will hear
3 arguments next in No. 86-246, George Sumner, et al.,
4 against Raymond Wallace Shuman..

5 General McKay, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF D. BRIAN MCKAY, ESQ.,
8 ON BEHALF OF THE PETITIONERS

9 MR. MCKAY: Mr. Chief Justice, may it please
10 the Court:

11 The State of Nevada is here today on a writ of
12 certiorari to the Ninth Circuit Court of Appeals. That
13 Federal Circuit Court of Appeals held a Nevada statute,
14 which provided for the mandatory imposition of a death
15 penalty under certain circumstances, unconstitutional.

16 That holding of the Ninth Circuit was contrary
17 to a holding of the highest court in Nevada, the Nevada
18 Supreme Court, which addressed the same question, and
19 held it to be constitutional under both the U.S.
20 Constitution, and the Nevada constitution.

21 Which brings us here this morning to the
22 issue, to the question that is presented for this
23 Court's determination this morning. Which is: Did the
24 imposition of a mandatory death penalty on an inmate,
25 convicted of premeditated murder while serving a

1 sentence of life in prison without the possibility of
2 parole, imposed for an earlier, unrelated first degree
3 -- first degree murder conviction, constitute a cruel
4 and unusual punishment as prohibited by the Eighth and
5 Fourteenth Amendments of the United States Constitution.

6 The State of Nevada submits that, no, it did
7 not. The imposition of a mandatory death sentence in
8 this case did not violate the Eighth Amendment, or did
9 not violate any other provisions of the United States
10 Constitution; and that the Ninth Circuit Court of
11 Appeals decision was incorrect for the following
12 reasons.

13 First, the Nevada statute is consistent -- was
14 consistent -- with the basic tenets, the basic holdings
15 of the Eighth Amendment, that in death penalty cases
16 there be an individualized consideration of the
17 character, in this case of the inmate, his record, and
18 the circumstances of the latest murder.

19 Secondly, Nevada submits that its statute, as
20 drawn at that time, narrowly defined the class of
21 persons who were eligible for imposition of a mandatory
22 death penalty.

23 Only the most incorrigible of people were
24 subject to this ultimate sanction; those who are
25 serving a life term, a life sentence, without the

1 possibility of parole who then commit another first
2 degree murder and are convicted of that.

3 There's been a societal decision to remove
4 these people forever from free society. Their criminal
5 behavior is so unacceptable that there has been a
6 determination that rehabilitation in these instances is
7 simply not possible.

8 QUESTION: Mr. McKay, does any State presently
9 have such a law in effect?

10 MR. McKAY: Your Honor, there are no mandatory
11 death penalties currently on the books today. I believe
12 all of the States reacted to this Court's decision in
13 Woodson and Roberts.

14 QUESTION: Do you -- you think that there
15 could, in theory, be some extenuating circumstances in
16 one of these cases, for example, when the penalty --
17 when the facts show a felony murder situation, for
18 example, where the individual found guilty of murder did
19 not actually do the killing?

20 MR. McKAY: Well, Your Honor, if we're talking
21 about the predicate offense that created the life
22 sentence in the first place --

23 QUESTION: No, I'm talking about the murder
24 for which the defendant is being tried after he's
25 previously been put in prison for life.

1 MR. McKAY: well, first of all, under the
2 Nevada statute and under the facts of this case, that's
3 not what occurred. But if it is a felony murder that
4 occurs within the prison walls during his incarceration,
5 I don't think that would make any differences. I don't
6 think that's an extenuating circumstance.

7 This individual -- any person who fits within
8 this category -- has already been placed within a very
9 narrowly defined category of eligibility.

10 So we believe that --

11 QUESTION: General McKay, you say a narrowly
12 defined category. But the statute, when it was enacted,
13 didn't limit the category to inmate murderers, did it?
14 That was one of four or five different subcategories,
15 and as I remember the statute, it says at the end of it,
16 anybody who commits any of these crimes, there will be a
17 mandatory death penalty.

18 MR. McKAY: Yes, Your Honor.

19 QUESTION: So the legislature never singled
20 out this subcategory and said, we want a death penalty
21 in this subcategory only.

22 MR. McKAY: The legislature singled out three
23 or four categories, that is correct, as seriously
24 aggravating crimes. The State of Nevada concedes that
25 the other categories, other than this, simply would not

1 pass Constitutional muster under this Court's
2 intervening decisions.

3 QUESTION: And the Nevada legislature has
4 never reexamined the question of whether this
5 subcategory should be treated differently from the other
6 subcategories, such as killing a police officer?

7 MR. McKAY: No, the Nevada legislature has not
8 done that. They reacted, again, to this Court's
9 decision in Woodson and Roberts, and they abolished all
10 mandatory death penalties in 1977 because Nevada
11 legislature, reacting to the people of the State, very
12 much wanted death penalty statute sanction on the books.

13 QUESTION: While I've got you interrupted, can
14 I ask you one other question? In your view, under
15 Nevada law as it's now constituted, and if -- say the
16 Court should affirm the decision here, could they have
17 a second sentencing hearing under the new statute, and
18 reimpose the death penalty on this particular litigant?

19 MR. McKAY: In this particular case, Your
20 Honor, I believe that that could occur under Nevada law,
21 as it exists today. But that would create significant
22 other problems, I think, in light of the length that
23 this case is in the appellate process.

24 QUESTION: I understand that. I understand
25 that.

1 MR. McKAY: So we believe that the statute as
2 defined and applied in this case is qualitatively
3 different than any other class of eligibility that could
4 possibly exist.

5 Nevada also submits that there is no other
6 sanction that could be adequate or meaningful if it were
7 not able to impose a death penalty in this particular
8 case.

9 Without a death penalty, the latest crime, the
10 latest murder, committed by this respondent would simply
11 go unpunished. We submit that there comes a time when
12 mere confinement is not longer a sufficient penalty.

13 We also believe --

14 QUESTION: What do the other states do? When
15 somebody in jail for life commits a felony and kills
16 somebody, what do the other states do?

17 MR. McKAY: Currently the other states do the
18 same thing as the State of Nevada, Justice Marshall, and
19 they provide --

20 QUESTION: I thought you said there was only
21 one of these, and that was Nevada. What do the other
22 states do?

23 MR. McKAY: The other states provide for the
24 bifurcated proceeding.

25 QUESTION: Well, why doesn't Nevada do the

1 same?

2 MR. McKAY: Nevada does the same today, Your
3 Honor. This statute was only in effect from 1973 --

4 QUESTION: So what are we dealing with, a
5 single case?

6 MR. McKAY: Yes, you're dealing with -- with
7 one individual who was charged --

8 QUESTION: One case.

9 MR. McKAY: One case.

10 QUESTION: And you just want to kill one man?

11 MR. McKAY: We want --

12 QUESTION: You just want to kill one man, is
13 that correct?

14 MR. McKAY: We want to uphold the integrity of
15 our criminal justice system in the State of Nevada.

16 QUESTION: (Inaudible) and you can never kill
17 another one.

18 MR. McKAY: Not according to the --

19 QUESTION: Under those circumstances.

20 MR. McKAY: That is correct. Not under the
21 procedure provided by Nevada law for that four-year
22 period between 1973 and 1977.

23 QUESTION: Of your own legislature?

24 MR. McKAY: That is correct. And that's the
25 next point that I was going to come to, Your Honor.

1 There has been a legislative determination, or there was
2 a legislative determination, by the elected
3 representatives of the people of the State that a
4 mandatory death penalty was in fact necessary to
5 enhance the valid goals of criminal justice that this
6 Court has recognized, the goals of retribution, of
7 deterrence, and of incapacitation.

8 And if that legislative judgment, provided of
9 course that it comports with the basic requirements of
10 the Eighth Amendment and the other constitutional
11 provisions that apply to death penalty cases, is
12 entitled to great deference by this Court.

13 Additionally, there is no question in this
14 case as to the personal culpability, the personal
15 responsibility, the moral guilt of the respondent;
16 that's been conceded.

17 This Court has also been greatly concerned
18 with the reliability of the process of the imposition of
19 the death penalty.

20 We would submit that the quality of the record
21 in this case makes clear that the process has been
22 reliable. There's been no wanton, arbitrary, capricious
23 or irrational imposition in this case.

24 Addressing the respondent's primary argument
25 that has been made, and his reliance upon *Eddings v.*

1 Oklahoma, I think revolves around this Court's holding
2 in Eddings v. Oklahoma.

3 The Court held in that case that when a
4 statute that provided for aggravating and mitigating
5 circumstances was on the books, and had to be addressed
6 before there could be an imposition of the death
7 penalty, that the sentencer was required to give weight
8 and to consider any and all mitigating circumstances,
9 and that they could not preclude consideration of
10 mitigating circumstances.

11 That was the major holding in the Eddings, and
12 citing back to Lockett v. Ohio. That case was not a
13 mandatory death penalty case. That case did not involve
14 the inmate who was serving a life sentence without the
15 possibility of parole.

16 I submit to this Court that Eddings v.
17 Oklahoma did not say that in each and every capital case
18 that any and all mitigating circumstances had to be
19 presented to the sentencer prior to the imposition of a
20 sentence at a separate sentencing hearing.

21 The Court simply didn't hold that. I believe
22 that the Ninth Circuit Court of Appeals has put words in
23 this Court's mouth that it has yet to utter on this
24 particular subject.

25 Therefore, because none of the constitutional

1 infirmities that have been found by this Court in the
2 past in Furman, in Woodson, in Lockett, in Coker, in
3 Inman, in Eddings, simply do not exist in the case, in
4 this particular case, because they simply are not there;
5 that Nevada's mandatory death penalty statute at that
6 time, imposing a mandatory death penalty on inmates who
7 commit a murder while serving a life sentence without
8 the possibility of parole is constitutional; and that
9 such a holding would be consistent with this Court's
10 prior holding on mandatory death cases.

11 We also submit that Shuman's death sentence is
12 valid as applied under the facts of this case, and that
13 the Ninth Circuit decision needs to be reversed.

14 Now the legal issue in this case has arisen
15 from the following facts, which I think are necessary
16 and appropriate to briefly go over.

17 In 1973 the respondent, Raymond Wallace
18 Shuman, was incarcerated in the Nevada State Prison,
19 where he was serving a life sentence without the
20 possibility of parole, having been convicted of a prior
21 first degree murder.

22 While incarcerated in prison in 1973, he
23 became embroiled in an argument with the inmate
24 occupying an adjacent cell. That argument was over the
25 opening and closing of a window.

1 Respondent elected to resolve that argument by
2 pouring flammable liquid all over the inmate and
3 lighting him on fire.

4 As a result of this burning, the inmate died
5 three days later. Respondent was charged with murder.
6 He was tried in 1975 by a jury. He testified on his own
7 behalf. He testified as to his character. He testified
8 as to the circumstances of the offense.

9 Other witnesses testified on his behalf.
10 Nonetheless, the jury found his guilty of capital
11 murder, and under Nevada law, in effect at that time, a
12 mandatory death sentence was required.

13 Also under Nevada law at that time, the
14 automatic appellate process began.

15 In 1978, the Nevada Supreme Court upheld both
16 the conviction of the respondent and the imposition of
17 the mandatory death sentence, specifically recognizing
18 this Court's intervening decisions in Woodson v. North
19 Carolina and Roberts v. Louisiana.

20 The court, the Nevada Supreme Court, held that
21 this was that rare and unique circumstance that the
22 Court had alluded to in Gregg, and had specifically
23 footnoted in Woodson and in Roberts.

24 The Court found that there simply could not be
25 any mitigating circumstances in a case such as this that

1 would allow for this latest crime, this latest murder,
2 to go unpunished.

3 As a result of that -- and the court also
4 found, for what it's worth, that the respondent was
5 entitled and not precluded from introducing mitigating
6 evidence or mitigating circumstances on his behalf.

7 Respondent then initiated post-conviction
8 proceedings --

9 QUESTION: What was the last thing you said?
10 He was not precluded from --

11 MR. McKAY: He was not precluded from
12 introducing any evidence of any kind --

13 QUESTION: Including mitigating?

14 MR. McKAY: Including mitigating, that is
15 correct.

16 QUESTION: What use would the mitigating
17 circumstances be?

18 MR. McKAY: Well, the mitigating circumstances
19 --

20 QUESTION: You can't acquit on the basis of a
21 mitigating circumstance.

22 MR. McKAY: No, but could -- there were lesser
23 --

24 QUESTION: So I mean, it's like saying he
25 could have sung songs or something. It was useless as

1 far as his defense was concerned, right?

2 MR. MCKAY: As far as this Court's later
3 holding, that in bifurcated proceedings of aggravating
4 versus mitigating, the answer to your question is, yes,
5 Your Honor.

6 QUESTION: So it's really irrelevant that
7 mitigating evidence was allowed in.

8 MR. MCKAY: Well --

9 QUESTION: It was allowed in, but it couldn't
10 be used for anything?

11 MR. MCKAY: Only to reduce a potential
12 verdict, because there were less included offenses at
13 the time.

14 QUESTION: Well, to make the jury sympathize
15 with the defendant, which I suppose what mitigating
16 evidence is used for in every case.

17 MR. MCKAY: Yes, Your Honor.

18 QUESTION: But in other cases, if you
19 sympathize with the defendant you can do something about
20 it by recommending a lesser sentence. There was no
21 option of a lesser sentence, right?

22 MR. MCKAY: That is correct.

23 QUESTION: (Inaudible) did the jury know that
24 the penalty was mandatory?

25 MR. MCKAY: Yes, Your Honor, they did.

1 QUESTION: They were instructed that way? How
2 do you know they knew?

3 MR. MCKAY: I am trying to recall what the
4 jury instructions were. Apparently the jury was not
5 instructed that it was mandatory.

6 QUESTION: But you think they knew?

7 MR. MCKAY: No, I don't know.

8 QUESTION: All right.

9 MR. MCKAY: No, sir.

10 QUESTION: So this was a single -- single
11 proceeding in which the issue of guilt and the issue of
12 penalty was determined by the jury? Or was just the
13 issue of guilt determined?

14 MR. MCKAY: Just the issue of guilt, because
15 then the sentence was mandatory if he --

16 QUESTION: So the judge says, you know, the
17 jury having returned a verdict of guilty, I know
18 sentence you to death. And he had no alternative, I
19 take it.

20 MR. MCKAY: Essentially, that is what has
21 occurred, yes, Your Honor. He had no alternative.

22 The respondent then commenced post-conviction
23 proceedings in the State district court--

24 QUESTION: Well, during the selection of the
25 jury were there any questions about jurors being opposed

1 to the death penalty?

2 MR. MCKAY: I believe that there were, Your
3 Honor, yes.

4 QUESTION: Thank you.

5 MR. MCKAY: After the State post-conviction
6 proceedings were unsuccessful, the respondent commenced
7 Federal habeas corpus proceedings in a Federal district
8 court for the District of Nevada.

9 A number of issues were raised in those habeas
10 proceedings. He attacked his 1958 conviction. He
11 attacked his 1975 conviction. And of course, the
12 imposition of the mandatory death penalty sentence.

13 Also during those habeas corpus proceedings,
14 respondent requested or asked to be allowed to present
15 evidence of mitigating circumstances, assumedly because
16 this Court had handed down its intervening decisions
17 that allowed and addressed that particular subject.

18 The Court ordered respondent to provide a
19 specification of proof before deciding whether to hold
20 an evidentiary hearing, and respondent never provided
21 any evidence that there were or could have been any
22 mitigating circumstances to lessen a death penalty
23 sentence in 1975.

24 Finally, I think it's appropriate to address
25 the whole concept of appellate review as it applies to a

1 death penalty case such as this. So that we can assure
2 that there has been -- the Court can be assured that
3 there has been no imposition of a death penalty without
4 the individual examination of the character, of the
5 record, and the circumstances of the offense.

6 This Court has held in its more recent
7 decisions, *Zant v. Stephens*, *Cabana*, even in *Pulley*,
8 that to some extent there is the availability of
9 appellate review to ensure that there have been no
10 constitutional violations before a death penalty, the
11 ultimate sanction is imposed.

12 In *Zant*, I believe the Court held that if
13 there is a narrow definition, if the class of
14 eligibility is so narrowed that you have only a small
15 class of people who are eligible, and if there has been
16 an individualized consideration, then certain findings
17 can be made at the appellate level.

18 We believe that the Court has the unusual
19 opportunity to look at the facts of this case as if it
20 were in a laboratory. There can be a microscopic review
21 of everything that occurred, everything that's finite.
22 There are no extraneous contaminations that come into
23 play.

24 There's a limited application. The statute
25 came into effect in 1973. Nevada's legislative response

1 to this Court's determination in Furman v. Georgia, and
2 it went out of existence in 1977, Nevada's legislative
3 response to this Court's determinations in Woodson and
4 in Roberts.

5 So we would submit that, again, there is a
6 narrow class of individuals who are qualitatively
7 different from any other conceivable class of
8 individuals who could be subject to the death penalty.

9 Only if an individual commits a first degree
10 murder and is convicted, and has been serving a life
11 sentence in prison, a life sentence that a jury
12 previously found was -- made him eligible for this
13 sentence, and the crime was so serious, and his
14 character and his record so required, that that life
15 sentence be without the possibility of parole, that he
16 should never be put in -- back into --

17 QUESTION: (Inaudible) before '77?

18 MR. MCKAY: Pardon?

19 QUESTION: And was committed before 1977?

20 MR. MCKAY: Yes, sir, and was committed prior
21 to 1977.

22 QUESTION: Well, that's one of the other
23 conditions.

24 MR. MCKAY: Yes, sir.

25 QUESTION: (Inaudible) one person.

1 MR. McKAY: That is correct. It applies to
2 one person and one person only.

3 QUESTION: It so happens, he was not the
4 triggerman in the other one?

5 MR. McKAY: In 1958, he was not the triggerman
6 for that first degree murder conviction, no, not for the
7 predicate offense. There is no question that he was the
8 perpetrator of the 1975 offense -- 1973 offense for
9 which the mandatory death penalty was imposed.

10 So we would submit that the Nevada mandatory
11 statute in effect at that time was constitutional, and
12 would not be inconsistent with this Court's other
13 determinations.

14 If there are no other questions, I would like

15 --

16 QUESTION: (Inaudible.)

17 MR. McKAY: Eddings v. Oklahoma, Your Honor.

18 QUESTION: It didn't -- it didn't save this
19 particular category of murders, did it?

20 MR. McKAY: Well, but it -- I would submit
21 that it didn't have to say this particular categories of
22 murders. Because it was quoting from Lockett, but
23 Eddings was not a mandatory death penalty case. It did
24 not involve a life -- an inmate serving a life sentence
25 without the possibility of parole -- of parole.

1 So I would just submit that in reducing the
2 quote for that case, that's what occurred, it certainly
3 was not a holding by this Court that that exception was
4 not extinguished.

5 That's what the Ninth Circuit believes that
6 this Court did, is extinguish Eddings. That's what
7 respondent has argued.

8 We respectfully submit that that is not what
9 the Court did in Eddings v. Oklahoma.

10 QUESTION: General McKay, you -- in your
11 presentation you pointed out that on collateral review
12 in Nevada, as I understand it, he was given an
13 opportunity to show mitigating circumstances, and he
14 came up with nothing.

15 But -- and you also rely heavily, of course,
16 on the '58 conviction for felony murder.

17 But your view of the law, I take it, is, that
18 even if during the period between 1958 and 1973 this
19 individual had a history of startling good works, he
20 just seemed to be a completely changed individual, and
21 then had a sudden misfortune in '73 -- or maybe not a
22 misfortune -- that would still all be totally irrelevant?

23 MR. MCKAY: Your Honor, yes, it is our
24 position that would be irrelevant. And let me just
25 carry that one step forward. He killed in 1958. He

1 killed again in 1973. Does that mean he's going to kill
2 again in 1988? Do we wait until he is on his normal
3 schedule?

4 He has been found to be a person who should be
5 removed from society. He then committed murder. There
6 simply can be no other sanction if the death penalty
7 cannot be imposed in this case.

8 The murder will go unpunished.

9 QUESTION: But your view is that that's
10 because you're pretty sure he's going to kill in 1988.
11 Supposing there was a lot of psychiatric -- all sorts of
12 expert testimony that the probability of this happening
13 are one in ten million.

14 That would still be irrelevant it seems.

15 MR. McKAY: It would still be irrelevant.

16 QUESTION: You don't have to rely on the
17 killing in 1988?

18 MR. McKAY: No, that is correct. That was
19 pure speculation on my part, and we would not --

20 QUESTION: You really don't need it for your
21 case, if you're right.

22 MR. McKAY: That is correct, Your Honor.

23 QUESTION: If this judgment is affirmed, the
24 individual just stays on for life?

25 MR. McKAY: That is correct. If this judgment

1 is affirmed and he remains, he is submitted to one more
2 life sentence without the possibility of parole. So he
3 has not --

4 QUESTION: Well, that's not what you told me
5 earlier, General. You told he would be eligible -- you
6 may not be able to do it -- for a resentencing hearing.

7 MR. MCKAY: Well, depending on the order of
8 the Court, that is correct; depending on the fashion of
9 the order. But --

10 QUESTION: Under Nevada law, he would be
11 subject to resentencing and getting the death penalty
12 again. If you can get your -- if you still have your
13 evidence and your witnesses and all that sort of thing.

14 MR. MCKAY: That's correct. Well, Nevada law
15 provided at that time, I might point out, that if the
16 death penalty was held unconstitutional, then it would
17 become a life without sentence.

18 But since that time we enacted our bifurcated
19 proceedings, so I would assume that we could go forward
20 on that. I'm not positive.

21 QUESTION: Similar to the Florida v. Dobbert
22 is what you have?

23 MR. MCKAY: Yes, sir. If the Court has no
24 additional questions, I would like to reserve the rest
25 of my time.

1 CHIEF JUSTICE REHNQUIST: Thank you, General
2 McKay.

3 We will hear now from you, Mr. Markoff.
4 ORAL ARGUMENT OF M. DANIEL MARKOFF, ESQ.,
5 ON BEHALF OF THE RESPONDENT

6 MR. MARKOFF: Mr. Chief Justice, may it please
7 the Court:

8 The issue, as we have looked at, really boils
9 down to something very, very simple here. And that's
10 whether a State can kill a person without at least
11 giving them a hearing first to show some mitigating
12 factors on his behalf.

13 As was previously indicated, every State in
14 the United States has repealed mandatory death penalty
15 statutes such as the one we are talking about here.

16 QUESTION: (Inaudible) that bears on the
17 constitutional question, Mr. Markoff. If they do that
18 in response to decisions such as Woodson, can you not
19 say that they're simply reacting to what they perceive
20 the Court's constitutional doctrine to be, rather than
21 this being the sentiment of the community?

22 MR. MARKOFF: I would suggest, Mr. Justice
23 Rehnquist, that the reason we had the mandatory death
24 penalties was a response not to Woodson but to Furman.
25 Up to 1963, as recognized by the previous

1 opinions of this Court, all states back then had
2 repealed mandatory death penalty statutes. We went
3 along, and then we had Furman in 1971. And then all of
4 a sudden, reaction to that decision, they passed
5 mandatory death penalty statutes.

6 Legislatures pass them. However, there is
7 another indicia as to how the people felt at
8 approximately that time, and that comes in the form of
9 opinion forms as well, perhaps not the most reliable
10 thing --

11 QUESTION: You're using opinion polls to prove
12 what?

13 MR. MARKOFF: That people at that point in
14 time did not favor mandatory death penalty statutes.

15 QUESTION: And how does that factor into the
16 constitutional equation, these opinion polls?

17 MR. MARKOFF: This Court has recognized that
18 there are several ways of gauging or using as a
19 barometer, how the people have felt.

20 The standard which we are concerned with here
21 are the evolving standards of human decency in a
22 maturing society. And the Court --

23 QUESTION: And how do the opinion polls factor
24 into that?

25 MR. MARKOFF: Well, that's what I'm leading

1 at. The legislators have indicated their feeling on it
2 by repealing all these statutes. The opinion polls --

3 QUESTION: But that's why I asked you the
4 question. Do you cite the repeal of a mandatory statute
5 as showing public opinion?

6 Because my question is, might it not just show
7 what the legislatures perceive what this Court's
8 constitutional doctrine to require, rather than
9 independently reflecting public opinion?

10 MR. MARKOFF: I would submit to the Court that
11 there is a long history in this country of abhorrence
12 with mandatory death penalties; that the history of this
13 country has demonstrated that, over the years, we have
14 -- if the death penalty is to be imposed, that it be at
15 least somewhat discretionary, and now it's guided
16 discretion.

17 And that is what the legislatures have done,
18 in effect; that's what the court has approved, this
19 Court has approved. And I wasn't pulling public opinion
20 polls out of my hat. That was referred to in the
21 Woodson decision, I believe it was, that -- just as
22 another indicia.

23 And they referred to a poll which was
24 conducted by the Harris Survey back in 1974 or '5 along
25 in there.

1 QUESTION: Mr. Markoff, am I not correct that
2 in some of the Furman opinions, mandatory death sentence
3 statutes were forecast, as a result of Furman?

4 MR. MARKOFF: They were forecast. My
5 recollection is that they were not approvingly forecast;
6 that they figured it just might be the end result of the
7 Furman decision.

8 QUESTION: Well, they weren't approved. But
9 they -- it was indicated this would be the result of
10 Furman at that time.

11 MR. MARKOFF: That it could be a possible
12 result of Furman, and indeed, it was. So we had these
13 things. But the states, I submit, were not comfortable
14 by these things, as is indicated by what has happened.
15 They have all disappeared, and we are left with this
16 relic of legislation out in Nevada.

17 QUESTION: Mr. Markoff?

18 MR. MARKOFF: Yes, sir.

19 QUESTION: I'm not sure you've described the
20 territory accurately as to what the situation was, at
21 least in 1964.

22 We said in Woodson --

23 MR. MARKOFF: '64 or '74?

24 QUESTION: '64, before Furman.

25 MR. MARKOFF: Woodson came after Furman.

1 QUESTION: I know.

2 MR. MARKOFF: Oh, I'm sorry.

3 QUESTION: I'm about to read you what we said
4 in Woodson --

5 MR. MARKOFF: Okay.

6 QUESTION: -- as to the earlier state of the
7 law. The only category of mandatory death sentence
8 statutes that appears to have had any relevance to the
9 actual administration of the death penalty in the years
10 preceding Furman concern the crimes of murder and
11 assault with a deadly weapon by a life term prisoner.
12 Statutes of this type apparently existed in five states
13 in 1964.

14 So our -- you know, our conclusion that the --
15 that the -- I forget how you described it, a maturing
16 society -- apparently maturation hadn't proceeded in
17 this area as it had in the other areas with regard to
18 the mandatory death penalty.

19 MR. MARKOFF: I submit that we were -- we
20 didn't have them all repealed by '64, we were certainly
21 going that direction in having them all repealed until
22 the Furman decision came out.

23 The vast majority of the states did not
24 approve this type of a sentencing procedure.

25 So what we then have is the standard as far as

1 the substantive law is under the Constitution, the
2 Eighth Amendment, of these evolving standards of human
3 decency in a maturing society.

4 We have also submitted to the Court that the
5 statute which we are concerned with procedurally
6 violates the Constitution, and that such a mandatory
7 death penalty, because of its unusual nature, cannot be
8 imposed in an arbitrary and capricious fashion, and must
9 give due consideration to the record and character and
10 circumstances of the offense.

11 QUESTION: Mr. Markoff --

12 MR. MARKOFF: Yes.

13 QUESTION: -- what's distinctive about this
14 case is, in all of our other cases, we've essentially
15 said to the states, you can't put the individual to
16 death. You have to give the jury the option of
17 considering some other penalty.

18 What you're asking us to say here is quite
19 different. That is, you can't put the individual to
20 death. You have to give the jury the option of imposing
21 no punishment at all, right?

22 What could be done to this prisoner who is in
23 prison for life without parole, if the death penalty is
24 not imposed? There's no penalty, right? No penalty
25 available?

1 MR. MARKOFF: That isn't correct, I submit.

2 QUESTION: Well, what would it be?

3 MR. MARKOFF: The best way to guage the
4 punishment that Mr. Shuman is continuing to suffer at
5 this point in time is by simply looking at the case on
6 which he was originally sentenced in 1958, where he was
7 given life without the possibility of parole.

8 As the Court has already noted, our client was
9 not the killer in that particular case in 1958. The
10 codefendant was. The codefendant received the same
11 sentence that Mr. Shuman did, which was life without
12 parole.

13 QUESTION: That's water over the dam. He has
14 that sentence now. What punishment will be imposed for
15 inclnerating his cellmate or the individual in the next
16 cell --

17 MR. MARKOFF: That's precisely --

18 QUESTION: -- if the death penalty is not
19 imposed here?

20 MR. MARKOFF: That is precisely what I am
21 referring to. The codefendant was released in 1977 on
22 parole. He is no longer under any sentence whatsoever
23 as far as incarceration is concerned. So he's been free
24 for 10 years.

25 Mr. Shuman, because of his actions involved in

1 this very case, has continued to be in prison now for 10
2 years, and in all likelihood, will be in prison for the
3 rest of his life.

4 QUESTION: What does without possibility of
5 parole mean in Nevada anyway?

6 MR. MARKOFF: That's a good question. Perhaps
7 the legislature should be compelled to speak English or
8 something. Because life without parole does not mean
9 life without parole, as is indicated in the facts of
10 this very case right here involving Mr. Shuman's
11 codefendant.

12 QUESTION: (Inaudible) whatever exception
13 there was in our cases, saving this -- saving this
14 possibility just doesn't apply in this case, because
15 this isn't a sentence to life without parole?

16 MR. MARKOFF: But that's exactly what the
17 situation is. The possibility of parole has always been
18 there, and always has been for other defendants.

19 Indeed, in the presentence report for Mr.
20 Shuman which was prepared, it recognized -- in the
21 presentence report that was prepared in 1975 for him
22 involving this case, it was recognized that but for this
23 action, he could have probably received a life with a
24 possibility of parole, or words to that effect.

25 QUESTION: What sentence would the jury impose

1 if he's retried under the bifurcated system, if it
2 doesn't impose the death penalty? Is that another life
3 without possibility of parole, is that's one of its
4 choices?

5 QUESTION: But we meant it? I mean, is that
6 what they would say? Life without parole, but we mean
7 it this time?

8 MR. MARKOFF: I don't know. I would submit
9 that that is a sentence that is a possibility. And of
10 course, what the state does with their sentence of life
11 without parole is up to the state. Mr. Shuman has no
12 control over that.

13 QUESTION: But your point is, even if they
14 don't mean it the second time, it is punishment that's
15 greater than he would otherwise suffer?

16 MR. MARKOFF: Yes, and it already has been.

17 QUESTION: And in support of that, you rely on
18 the fact that his codefendant in the '58 trial is
19 actually on parole. Does the record show that?

20 MR. MARKOFF: I don't believe it does.

21 QUESTION: It seems to me it's a rather
22 important fact, and I'm wondering why it isn't in the
23 record.

24 MR. MARKOFF: I submit that it is an important
25 fact, but it never came up in the lower court hearing.

1 The district court, when the thing was heard in front of
2 Judge Reed --

3 QUESTION: Well, is there any Nevada law of
4 which we could take judicial notice to support your
5 submission today, as I understand it, that life without
6 possibility of parole in Nevada does not really mean
7 that? Are there any cases that support that?

8 How do we know that -- I mean, I'm not
9 suggesting you're misrepresentating, but how can we
10 verify that what you tell us is true?

11 MR. MARKOFF: Off the top of my head, sir, I
12 don't know.

13 QUESTION: It's not in your brief either, is
14 it?

15 MR. MARKOFF: No, it's not.

16 QUESTION: Well, gee, this is an awfully
17 important thing to drop on us right now, isn't it?

18 MR. MARKOFF: I submit it is important, yes,
19 sir.

20 QUESTION: And you can't suggest where we
21 might look to, you know, to establish that without
22 parole in Nevada doesn't mean without parole?

23 MR. MARKOFF: Well, it's a matter which is up
24 before the Court.

25 QUESTION: Have you been talking to Rex Lee

1 about --

2 MR. MARKOFF: I submit that it is a matter --
3 the sentence which is imposed upon an individual remains
4 life without the parole until the Parole Board changes
5 it. And so what they do is up again to the state. I
6 can't say --

7 QUESTION: But isn't there even a Nevada
8 statute that gives the Parole Board the authority to do
9 this? Or do they just shoot from the hip whenever they
10 feel like it?

11 MR. MARKOFF: It's a Western way, I suppose.

12 QUESTION: Mr. Markoff, could you submit
13 something writing to this Court to substantiate your
14 statement here today?

15 MR. MARKOFF: I would be more than happy to.

16 QUESTION: I wonder why you didn't address
17 that in your brief?

18 MR. MARKOFF: Because we -- responding to the
19 state's arguments, what we saw in our response didn't
20 really -- or this particular type of a fact or a matter
21 was not directly responsive to what they were
22 representing.

23 QUESTION: Well, the state has represented to
24 us that this sentence to life without possibility of
25 parole was the very kind of a situation that was saved

1 in our opinion.

2 And now you say this isn't that situation at
3 all.

4 MR. MARKOFF: Well, perhaps if life without
5 the possibility of parole meant life without the
6 possibility of parole, it might come within that
7 exception. But we don't even have that situation.

8 QUESTION: How long had your client been in
9 prison before he committed this offense?

10 MR. MARKOFF: The '75 conviction? He was
11 originally sentenced in 1958. So that's '58 to '73, 15
12 years approximately.

13 QUESTION: And how about his codefendant?

14 MR. MARKOFF: His codefendant was released in
15 1977, according --

16 QUESTION: And he was subject to the identical
17 sentence?

18 MR. MARKOFF: As far as I know, yes.

19 QUESTION: And was that just an ordinary
20 parole, or was it because of health or what?

21 MR. MARKOFF: I have no further facts on which
22 --

23 QUESTION: Do you know of any other person who
24 has ever been released who has been subject to a
25 sentence like that?

1 MR. MARKOFF: I'm sure there's plenty of them
2 that have been. I can't point one to you off the top of
3 my head, but I'm sure it could be verified very quickly.

4 QUESTION: Mr. Markoff, I want to be sure of
5 one thing. If you prevail here, is your client subject
6 now to the system that is provided by the current
7 statute so that he might receive the death penalty?

8 MR. MARKOFF: It is possible. That could
9 happen. Judge Reed in the lower court, in the U.S.
10 District Court for Nevada, had sentence -- had referred
11 the matter back for resentencing in front of the state
12 courts. And then of course the state took their appeal
13 to the Ninth Circuit.

14 QUESTION: So he still may end up by being
15 executed?

16 MR. MARKOFF: It's possible. Depending of
17 course upon the way the Court prefers to remand it.
18 There is other possibilities that are available for this
19 individual as well.

20 People who have been sentenced under the
21 mandatory statute in Nevada have had their sentences
22 just made simply consecutive to any other life without
23 parole that they were doing.

24 For instance, if a person killed two policemen
25 or something like that, under the old mandatory statute,

1 he would have two consecutive life sentences then.

2 I submit to the Court also that there are a
3 number of mitigating factors that could have been
4 submitted to -- to the Court on behalf -- and I'm
5 talking about submitting to the state court on behalf of
6 Mr. Shuman if it had been allowed.

7 QUESTION: Mr. Markoff, now why don't you
8 answer my earlier question on the assumption that life
9 imprisonment without parole really means life
10 imprisonment without parole, okay?

11 If it really meant that, isn't it true that
12 you're asking us to say something that we've never said
13 before in other cases? In other cases, we've said, you
14 have to allow mitigating circumstances, so that the jury
15 may, if it wish, impose a lesser penalty than death?

16 But what you're asking us to do is to adopt a
17 different principle. You may allow -- you must allow in
18 mitigating factors so that the jury may if it wish
19 impose no penalty whatever for this murder?

20 MR. MARKOFF: No. What I am --

21 QUESTION: Well, what penalty could be -- the
22 man is in prison for life without possibility of parole
23 already, and you're -- you're asserting that the
24 Constitution requires that the jury be given an
25 opportunity to say, yes, you incinerated the man in the

1 cell next door, but no penalty whatever?

2 MR. MARKOFF: No, the possible penalty he'd be
3 subject to would be life without parole consecutive to
4 the one he's already doing.

5 QUESTION: Oh, you mean when he comes back?

6 MR. MARKOFF: That's in the next life. well,
7 the way it works, apparently --

8 QUESTION: Do you have jury sentencing in
9 Nevada?

10 MR. MARKOFF: Currently?

11 QUESTION: Yes.

12 MR. MARKOFF: The current system is one of
13 having a bifurcated system with mitigating factors being
14 presented.

15 QUESTION: By the jury, not the judge.

16 MR. MARKOFF: To the jury, yes, and they make
17 the decision.

18 QUESTION: Is that true all throughout your
19 criminal system, jury sentencing, as in most of the
20 Southern states?

21 MR. MARKOFF: No, sometimes there's a
22 three-judge panel that could be involved in a particular
23 case.

24 QUESTION: Suppose somebody is up for robbery;
25 he's convicted. Who imposes the sentence in Nevada?

1 MR. MARKOFF: Normally the judge, who has a
2 range of years from which he can pick.

3 QUESTION: But then -- just to be sure I
4 understand -- the jury participates only in capital
5 cases in the sentencing?

6 MR. MARKOFF: Right, that's correct.

7 As I was saying, these mitigating factors that
8 should be either examined --

9 QUESTION: (Inaudible) factors should have
10 been presented in this particular case to the judge?

11 MR. MARKOFF: In this particular case, it
12 would be to the jury, if it was a jury trial.

13 QUESTION: Well, but I know, in the mandatory
14 -- under the mandatory statute, the jury had nothing to
15 do with the sentence?

16 MR. MARKOFF: Well, that's correct. So we're
17 looking now perhaps if it's --

18 QUESTION: So you're saying that this statute
19 must -- that the Constitution required the jury to do
20 the sentencing?

21 MR. MARKOFF: The jury, under the old system
22 in Nevada, had nothing to say but guilty or innocent,
23 one or the other. Under the new system, the jury has
24 the ability to consider mitigating factors.

25 I submit that the Constitution --

1 QUESTION: But you are -- you don't suggest
2 that the jury -- that the Constitution requires the jury
3 to do the sentencing, do you?

4 MR. MARKOFF: No, I'm not.

5 QUESTION: So it would satisfy your argument, I
6 suppose, if the judge had the discretion to consider
7 mitigating circumstances?

8 MR. MARKOFF: We are asking for something very
9 minimal, and that's just the opportunity to present
10 something at the hearing.

11 QUESTION: And so the judge would have had the
12 discretion not to impose any penalty at all?

13 MR. MARKOFF: Perhaps. But that would be up
14 to the judge what he would feel under the circumstances.

15 QUESTION: Well, not perhaps. There's no
16 option, except no penalty at all, or another life
17 without parole next time around, right? There's nothing
18 else?

19 MR. MARKOFF: That's basically it. That's all
20 the law -- well, unless of course, the death penalty
21 still applies, and they could resentence and give him
22 that again, also.

23 But to this day, he has not even had any sort
24 of a hearing concerning anything in his life, which is
25 interesting. Because if you go back and look at the

1 1958 case, the jury set the penalty there.

2 Sure, there was perhaps some mitigating
3 factors that were introduced, as far as the actual
4 defense was concerned in 1958; and the same thing could
5 be said for '75.

6 But there was nothing presented that I am
7 aware of concerning this individual's background, his
8 psychological condition, his youth, anything. Even '58
9 he never got the hearing as far as those hearings are
10 concerned -- '75.

11 So we are looking here at a man who is about
12 to be killed, perhaps, and nobody has never heard
13 anything about life in detail at all.

14 QUESTION: Well, how old was he in '73?

15 MR. MARKOFF: Eighteen -- in '73?

16 QUESTION: Yes.

17 MR. MARKOFF: I think he was 38. I believe he
18 was 40 at the time of the trial.

19 QUESTION: Does the imposition of a second
20 death sentence under these -- a second sentence of life
21 without possibility of parole in Nevada have any
22 collateral consequences within the prison?

23 For instance, would it require solitary
24 confinement or any other prison conditions? Would it
25 have any other consequence at all?

1 MR. MARKOFF: I'm not aware whether solitary
2 confinement as part of the statutory scheme would be
3 available. However, certainly as far as administrator
4 framework, it may be available if he is considered that
5 big of a danger.

6 QUESTION: Well, only if he is a considered a
7 danger. The warden wouldn't be able to take upon
8 himself the judgment that this fellow should be punished
9 more and put him into solitary just to punish him.
10 Wardens don't have --

11 MR. MARKOFF: No, but perhaps wardens -- they
12 have what they often call administrative segregation.

13 QUESTION: Oh, if he's dangerous. I mean, if
14 he thinks he's going to kill somebody else, and there's
15 no other way to stop him from doing so except putting
16 him into confinement, I suppose.

17 But you wouldn't say that if we sent this
18 back, and the jury says, well, no punishment at all,
19 that a warden could say, I'm going to send you to
20 solitary anyway, because I think he shouldn't burn
21 somebody without some punishment?

22 MR. MARKOFF: Well, I would imagine that --

23 QUESTION: Mr. Markoff, do you know the rules
24 of the penitentiary?

25 MR. MARKOFF: Not in any detail.

1 QUESTION: I'm just wondering what this --

2 MR. MARKOFF: All I know is from a general
3 perspective, and that's --

4 QUESTION: Well, you're not asserting that the
5 warden has any authority to do that?

6 MR. MARKOFF: Not in terms of punishment,
7 perhaps. In terms of protection for other inmates.

8 QUESTION: Well, but that isn't really the
9 example here. The question is not whether the jury
10 finds no punishment. The question is whether the warden
11 dealing with a man whose been twice sentenced to life
12 without possibility of parole may treat him differently
13 from a man whose only been given that sentence once.

14 He would have certainly a basis for
15 differentiating between them, whether he would do so, I
16 don't know.

17 MR. MARKOFF: They might have a basis for
18 differentiating between them. But even at this point in
19 time, if my memory serves me correctly, Mr. Shuman is
20 not on death row. He's in general population.

21 QUESTION: Could the warden put him in a
22 fireproof cell, do you think?

23 MR. MARKOFF: I suppose he could.

24 QUESTION: I'm still confused by all this talk
25 about a second life sentence without parole. Because

1 the death penalty is still a possibility at the end of
2 whatever hearing comes along, is it not?

3 MR. MARKOFF: It is a possibility.

4 QUESTION: Isn't that the major risk that
5 you're running?

6 MR. MARKOFF: It is a major risk, yes.

7 QUESTION: Then why all this talk about a
8 second life sentence without parole?

9 MR. MARKOFF: Because that's another option
10 that's available if a jury is to hear, or the sentencer
11 whoever it may be, is to hear mitigating factors on
12 behalf of this person.

13 It just gives -- we want the hearing, if it's
14 to be sent back, so a jury can or a sentencer can
15 determine whether there are mitigating factors for this
16 person.

17 It's a small thing to ask, but the
18 consequences for Mr. Shuman are very severe.

19 QUESTION: Well, do you concede that if the
20 Ninth Circuit is affirmed, that the death sentence could
21 be imposed for this particular individual, lawfully?

22 MR. MARKOFF: Depending on the facts as they
23 were to be presented at a hearing. It's hard to
24 forecast exactly how it would come down at the state
25 court level again.

1 As perhaps --

2 QUESTION: What do you mean by that? Do you
3 concede that it would be lawful to remand this case for
4 a new sentencing proceeding, the results of which could
5 be the imposition of a death sentence?

6 MR. MARKOFF: we think that is one of the
7 options that is available to the Court.

8 QUESTION: Is your answer yes or no?

9 MR. MARKOFF: Yes.

10 QUESTION: Did not the district court, in its
11 conclusion, say that the case would be remanded for
12 resentencing?

13 MR. MARKOFF: That's what District Judge Reed
14 did do.

15 QUESTION: That would be under the new statute?

16 MR. MARKOFF: As I read it, that's correct.

17 QUESTION: What was the -- I guess I could
18 look it up -- but what was the precise remand? What did
19 it say? They couldn't say release him within a certain
20 time unless you resentence him.

21 MR. MARKOFF: It is further ordered that said
22 Ramond Wallace Shuman is discharged and released from
23 confinement on account of his sentence pronounced in
24 case No. 33-259, unless the State within 120 days of
25 this date orders, initiates, and completes a lawful

1 resentencing proceeding in accordance with this order.

2 QUESTION: You mean he's going to be released
3 from his sentence of life without parole?

4 MR. MARKOFF: No, no, the death sentence which
5 had been imposed at that time.

6 I submit some of the mitigating factors that
7 the court would consider would be his mental and
8 emotional condition, his age, his youth and background
9 such as it was before he went to prison, the fact that
10 the codefendant was released in 1977, ten years ago; the
11 conduct of the victim as well in this case, which is
12 sometimes, under some of the state death penalty
13 statutes, one of the mitigating factors to be
14 considered; as well as his record in the institution,
15 and whether or not the system itself contributed in
16 anyway to this whole incident coming about.

17 QUESTION: What mitigation did you introduce?
18 I mean, we're talking about enough mitigation to justify
19 no penalty at all, right? You're going to be put in
20 something that is sufficiently significant that it will
21 induce a jury to impose no penalty for killing somebody?

22 MR. MARKOFF: That's certainly a possibility,
23 Justice Scalia.

24 QUESTION: It's the only possibility other
25 than death.

1 MR. MARKOFF: Uh-huh.

2 QUESTION: And what mitigating evidence did
3 you seek to introduce?

4 MR. MARKOFF: We did not seek to introduce
5 anything. This came to us on a writ of habeas corpus to
6 the Federal system.

7 He was represented by the state public
8 defender --

9 QUESTION: No, but he's complaining about the
10 inability of the jury to consider mitigating evidence.
11 What mitigating evidence did he proffer?

12 MR. MARKOFF: None was proffered because it
13 wasn't permitted.

14 QUESTION: In his habeas proceeding, what did
15 he bring forward? Has he asserted the existence of
16 any? I mean, one of the points made by the state is
17 that he hasn't come forward with any mitigating evidence?

18 MR. MARKOFF: well, the fact is that that was
19 not really the issue that was being litigated at the
20 time.

21 The issue was whether or not he should ever
22 even have a hearing to present it in the state court.
23 And Judge Reed concluded that he hadn't been given that
24 opportunity, and he should be.

25 QUESTION: Well, still, on habeas, you'd

1 expect him to come forward and say, you know, had I had
2 the opportunity, what I would have said is --

3 MR. MARKOFF: Well --

4 QUESTION: You would expect him to point to
5 some mitigating evidence that existed.

6 MR. MARKOFF: Well, I'm pointing to some of
7 them right here, and the fact that the codefendant was
8 released, for instance, ten years ago; that life without
9 parole doesn't mean life without parole.

10 QUESTION: That's mitigating evidence on his
11 part?

12 MR. MARKOFF: No, no, it's mitigating evidence
13 as to why the death penalty shouldn't be imposed. They
14 say he's in this particular class of people that are
15 never, ever to be released in society again.

16 And yet here you have a codefendant in the
17 same situation who is released into society again. And
18 certainly a jury should be able -- or a sentencer should
19 be able to take that into account as well.

20 I submit, however, that the district court,
21 the U.S. district court, was not concerned with the
22 actual facts, but whether there should be an opportunity
23 for a hearing to hear these mitigating factors in the
24 state court before a sentencer.

25 I submit to the court, also, that there are

1 numerous policy reasons, and therefore, supporting our
2 position that the Constitution mandates a mitigation
3 hearing in these cases, as to why you should be entitled
4 to have a mitigation hearing.

5 First of all, the only person to lose anything
6 as a result of this sentence, if you will, is going to
7 be Mr. Shuman. He will be executed, and that will be it
8 for him.

9 If you have a mitigation hearing, the state
10 doesn't lose anything. They could still seek perhaps
11 the same punishment. So they're not out of the
12 ballpark, so to speak.

13 The state interests are also served by a
14 discretionary death penalty statute, if you order having
15 a mitigating hearing. Because they can still seek the
16 same thing, as I indicated. They're not going to lose
17 out on making their arguments.

18 And it's also an interest of a state, I
19 submit, that they hear whether a life is worth saving; I
20 submit that they cannot close their ears and bury their
21 head in the sand before they hear about a person's life
22 and just send him off to be executed.

23 Another extremely important factor is that no
24 legislature can ever forecast all the mitigating factors
25 of a person's life. The state, in effect, has conceded

1 this by changing the law in Nevada 10 years ago, in
2 1977, by allowing the hearing of mitigating factors.

3 The argument that the state has raised, in
4 saying that these types of individuals should never,
5 ever have the possibility of being out in society again,
6 and should be automatically executed, is belied by the
7 -- and contradicted by the own conduct of the state in
8 providing for the present scheme that they now have.

9 I submit to the Court, also, that not all
10 people who do life are necessarily murderers. You could
11 be an aider and abetter, perhaps, or it could come under
12 the felony murder rule, or something of that nature.

13 Finally -- thank you very much.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Markoff.

16 Mr. McKay, Attorney General McKay, you have
17 seven minutes left.

18 REBUTTAL ARGUMENT OF D. BRIAN MCKAY, ESQ.,

19 ON BEHALF OF THE PETITIONERS

20 MR. MCKAY: Yes, sir, that's the first thing,
21 Your Honor, I was going to do.

22 Under the state -- under the laws of the State
23 of Nevada, then and now, life without the possibility of
24 parole means life without the possibility of parole.

25 There are only two circumstances in which it

1 does not: If clemency is granted by the pardons board;
2 or if the sentence has been reversed by an appellate
3 court at any level.

4 Those are the only circumstances --

5 QUESTION: How did this codefendant get out?

6 MR. McKAY: This codefendant, I suspect, being
7 imprisoned for 20 years, made an application to the
8 pardons board. And if his record was such that they
9 felt --

10 QUESTION: Well, why did the pardon board --
11 oh, the pardon --

12 MR. McKAY: The pardons board.

13 QUESTION: He was pardoned? He was pardoned?

14 MR. McKAY: Yes, sir. Yes, sir.

15 QUESTION: By the executive?

16 MR. McKAY: Yes, sir.

17 QUESTION: I see.

18 MR. McKAY: The parole board has no authority
19 under Nevada law, did not then, does not now, to reduce
20 a life without sentence.

21 QUESTION: Do you know this as fact, or is
22 that your supposition of what happened?

23 MR. McKAY: That is my -- oh as to what
24 happened to --

25 QUESTION: The codefendant.

1 MR. McKAY: It is my supposition that that is
2 what happened.

3 QUESTION: Well, you say that's all that could
4 have happened.

5 QUESTION: Well, can't you find out for us
6 what in fact did happen?

7 MR. McKAY: The fact of the pardon, Your
8 Honor, we can find that out. But it was not a parole
9 board making a determination that that sentence could be
10 reduced.

11 QUESTION: Well, whoever it was.

12 MR. McKAY: Yes, sir, we can.

13 QUESTION: Do you know that he's out?

14 MR. McKAY: Yes, we know that he's out.

15 QUESTION: And you can tell us why he's out?

16 MR. McKAY: Yes.

17 QUESTION: Is there any official material that
18 tells us how often this sort of relief is granted to
19 prisoners under this sentence?

20 MR. McKAY: I'm not sure if the pardons board
21 has those statistics. I sit on the pardons board --

22 QUESTION: Are their decisions officially
23 reported in any publication?

24 MR. McKAY: They are not officially reported
25 in any publication. They are not. The state, I assume,

1 keeps records of that. As I said, I am -- the pardons
2 board is the governor, the attorney general, and the
3 five justices of the supreme court. Those are the
4 composition of that board; it meets twice a year.

5 QUESTION: Well, do the -- do inmates, I
6 suppose, just apply for a pardon, don't they?

7 MR. McKAY: Yes, they do.

8 QUESTION: And do they get a hearing?

9 MR. McKAY: Yes, they do.

10 QUESTION: And do they have a right to a
11 hearing?

12 MR. McKAY: They have an absolute right, yes,
13 they do, under --

14 QUESTION: So that it's sort of like asking
15 for parole?

16 MR. McKAY: It is asking for -- it is a
17 clemency proceeding that is not a matter of right.

18 QUESTION: Well, I know, but if he's guilty,
19 he certainly isn't going to have that right very long.

20 MR. McKAY: That is correct.

21 QUESTION: General McKay, do you serve on that
22 board.

23 MR. McKAY: Yes.

24 QUESTION: And just within the last year, how
25 many favorable rulings have you made in cases like this?

1 MR. McKAY: Reducing a life without to a life
2 with. I don't know of any. If any, there's been one,
3 and it's been for health reasons.

4 QUESTION: But there has been at least one
5 other one?

6 MR. McKAY: I can't tell you for sure if it's
7 been within the last year. I've served on that board
8 for five years.

9 QUESTION: Well, say, take five years, how
10 often does it happen? Do one or two of these people get
11 reduced sentences?

12 MR. McKAY: From life without to life with,
13 yes, it's probably happened one or two times.

14 QUESTION: Each year?

15 MR. McKAY: No, since I've served on the board
16 in that five year period.

17 QUESTION: So this codefendant is really quite
18 exceptional when he got this relief?

19 MR. McKAY: I can't tell you statistically,
20 Your Honor, if that is the case.

21 QUESTION: And you don't know, in the one or
22 two times it's happened since you've been on the board,
23 you don't remember why? Was it ever just because he had
24 a good record, or do you know?

25 MR. McKAY: I'm just -- I just can't answer

1 that question for sure. I can't tell you if a life
2 without has been reduced to a life with.

3 QUESTION: I take it an additional option
4 would be to reduce it something even further.

5 MR. McKAY: That is correct.

6 QUESTION: Does that happen once in awhile?

7 MR. McKAY: Again, without looking at the
8 statistics, I can't tell -- I cannot tell you from my
9 own knowledge.

10 QUESTION: Well, let me put it this way. They
11 have a statutory right to a hearing before your group?

12 MR. McKAY: They do not have a statutory right
13 to a hearing.

14 QUESTION: Under your rules, they have a right?

15 MR. McKAY: Under the policy of the board,
16 they are entitled to a hearing.

17 QUESTION: Roughly how many of these hearings
18 have you had in the last five years?

19 MR. McKAY: Two -- ten.

20 QUESTION: Pardon me?

21 MR. McKAY: Ten. We have two a year.

22 QUESTION: Two a year, I see. And just one
23 applicant at each of those hearings?

24 MR. McKAY: No, there are anywhere from three
25 to seven applicants on the average.

1 QUESTION: So in two hearings there might be
2 15 a year, 10 or 15 people.

3 MR. MCKAY: That is correct.

4 QUESTION: So over five years, there would be
5 60 or 70 people might have these hearings. And they
6 are -- with only one or two exceptions, they've
7 uniformly been denied, any relief at all?

8 QUESTION: That's just in these life without --

9 MR. MCKAY: We're just talking about life
10 without.

11 QUESTION: Yes.

12 MR. MCKAY: There are not very many life
13 withouts that come on before the pardons board.

14 QUESTION: I see.

15 MR. MCKAY: It covers any type of -- any type
16 of clemency is the purpose of the board, and this is
17 just one particular area.

18 Let me go -- let me please address one other
19 issue. You're correct, Justice Scalia, the crime in
20 this instance would simply go unpunished.

21 There's no collateral impact, there's no
22 collateral method of punishment within the prison system
23 that would do anything to the contrary.

24 And I submit that single-celling an individual
25 or putting them in solitary confinement is like saying,

1 go to your room. And that's fine for certain
2 violations. That's not fine for the crime of murder.

3 Additionally, in the condition that our
4 prisons are in today, single-cell confinement might be
5 considered a reward. And I don't say that facetiously;
6 it's a very serious problem that we face.

7 One final point that I'd like to make: The
8 respondent had the opportunity at habeas corpus
9 proceedings to present any mitigating circumstances, if
10 they exist.

11 He did not. He was ordered to by the court;
12 did not. And I submit there simply were not any.

13 Therefore, I suggest that the imposition of
14 the death sentence in this case, mandatorily imposed by
15 the Nevada statute, on an inmate serving a life sentence
16 without the possibility of parole, was constitutional
17 and did not violate his Eighth Amendment rights.

18 CHIEF JUSTICE REHNQUIST: Thank you, General
19 McKay. The case is submitted.

20 (Whereupon, at 12:02 p.m., the case in the
21 above-entitled matter was submitted.)

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25

CERTIFICATION

Idemson 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:

#86-246 - GEORGE SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL.,

Petitioners V. RAYMOND WALLACE SHUMAN

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

BY Paul A. Richardson

(REPORTER)

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