TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES SUPREME COURT

ORIGINAL

LESLIE LOWENFIELD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-6867
	)	
C. PAUL PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.	)	

PAGES: 1 through 38

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Washington, D.C.

Wednesday, October 14, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 o'clock a.m.

APPEARANCES:

DAVID KLINGSBERG, ESQ., New York, New York; on behalf of the petitioner.

JOHN M. MAMOULIDES, ESQ., District Attorney, Parish of Jefferson, Gretna, Louisiana; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

(10:57 a.m.)

CHIEF JUSTICE REHNQUIST: Mr. Klingsberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID KLINGSBERG, ESQ.

ON BEHALF OF THE PETITIONER

MR. KLINGSBERG: Mr. Chief Justice, and may it please the Court, this is an appeal on writ of certiorari limited to two issues as to which the Court of Appeals for the Fifth Circuit with one dissent denied petitioner's application for writ of habeas corpus to set aside the death sentence imposed upon him.

Petitioner was convicted of three counts of first degree murder, and with the Court's permission I propose to begin with the facts and the legal argument relating to the first issue, which concerns coercive procedures threatening the impartiality of the jury during the sentencing phase and then move later to the facts and legal argument on the second point, which is premised on the absence of a meaningful finding of at least one valid statutory aggravating circumstance at the sentencing phase.

During the sentencing phase on the second day of deliberations after about nine hours a note came from the jury indicating that the jurors were in great distress, there was a great unbalance in the voting, and that the jurors were

unable to reach a decision at this point. The Court then undertook a procedure whereby each juror was asked to put his name on a piece of paper indicating yes or no as to whether further deliberations would be helpful in obtaining a verdict. Four jurors indicated no.

The jurors then indicated that some had misunderstood the question and the procedure was repeated, changing the language to whether further deliberations will enable the jurors to reach a verdict. At that point the no votes were whittled down to one juror.

Finally, the Court delivered a modified Allen charge, telling the jurors when they enter the jury room it is their duty to discuss the evidence with the objective of reaching a just verdict. Some time between 30 minutes and 55 minutes after that, the jurors came in with a unanimous verdict recommending the death sentence.

QUESTION: Was there some sort of a stipulation as to what the judge should do or say when the jury came back and said they were in great distress?

MR. KLINGSBERG: There is reference to a discussion in chambers which is not on the record in which it appears that there is a stipulation as to the polling procedure. However --

QUESTION: If it isn't in the record, how do you know about it?

MR. KLINGSBERG: The judge stated on the record that there was a discussion in chambers where there was a stipulation --

QUESTION: As to how he should proceed?

MR. KLINGSBERG: That's correct, Your Honor, and I might also add in that connection that earlier that morning, right after the jury came in with the note, and right after the vote, there were motions for a mistrial in which defense counsel objected to the entire procedure of continuing on in the face of a Louisiana code provision which expressly provided that in the event of a lack of unanimity on the part of the jury or the jury's inability to agree that a sentence of life without parole or probation must be imposed.

Counsel also asked the Court on the record to instruct the jury that there is no obligation under the law to reach a verdict, and that application was denied, and an objection was taken thereto.

Now, in assessing --

QUESTION: May I ask, since you have been interrupted, on this point about, we don't know the specifics of the stipulation, but generally the procedures to be followed, is it your understanding that the stipulation contemplated that the jurors who voted each way on this issue would be identified?

MR. KLINGSBERG: It appears that way from the

record, Your Honor.

QUESTION: Was any specific objection made on the record by the petitioner to the polling of the jurors by name?

MR. KLINGSBERG: No, Your Honor, there was not.

QUESTION: That was not raised in the Fifth Circuit, either?

MR. KLINGSBERG: That was not -- that has not been raised, and indeed, as indicated in our reply brief at Note 6, it does not under the law of Louisiana and this Court result in any lack of preservation of that point because the Louisiana courts consider on death penalty cases all matters, whether objection was raised, and this was dealt with on the merits in the state and federal habeas proceedings as well as in the Supreme Court of Louisiana.

Now, in assessing whether or not the procedures used here had a coercive tendency, it is necessary to consider that the jury in a capital sentencing hearing is peculiarly sensitive to being swayed by pressures from the trial judge. Unlike a guilt determination, where a jury is determining, based on what it sees and hears, some objective fact in deciding whether to impose the death penalty the jurors are formulating a reasoned moral response and engaging in highly subjective, unique, individualized assessment of whether a particular person deserves to die, and here the reliability of this sensitive and unique procedure and inquiry was

threatened by the pressure which was inevitably placed on those four minority jurors and later one lone juror who had to publicly identify themselves as being opposed to the continuation of deliberations. Yes, Your Honor?

QUESTION: When you said minority, do we know that the four who said that there would be no use in continuing were the four, were four who were voting against the death penalty?

MR. KLINGSBERG: We don't know for sure, but we know this --

QUESTION: I mean, I might have been in the majority and thought there would be no use going any further.

MR. KLINGSBERG: Well, we know, Your Honor, that there were some jurors who opposed the death penalty being recommended in this case. Now, who were those jurors? It is hypothetically possible that they were on one side or the other, but logic dictates that the jurors who said let's stop deliberation, which under the Louisiana statute meant that a life sentence would be imposed, that among those jurors were the jurors who opposed the death sentence being recommended in this case.

QUESTION: I don't see why logic would dictate that, unless you assumed that the jury was not following the court's instructions, which we normally don't assume. The court didn't ask them, how many of you want to quit now, so that, you know, so that you will prevail. He asked them,

you know, search your soul, really, do you think it is any use going on, and it may well be that someone who was opposing the death penalty thought, we haven't talked it out all the way, just as someone who was in favor of it might have thought, it is no use going on further, the people opposed are so stubborn that nothing will come of it. I don't know how you can assume that, you know.

MR. KLINGSBERG: Well, one might draw an analogy, Your Honor, to the Adams versus Texas situation where this Court said that it was hypothetically possible that the juror who stated his views on the death penalty might be believing in an eye for an eye, but it was undeniable and logical that among the jurors who identified themselves as being subject to influence by the death penalty were likely to be those who opposed it, and I think the same logic would prevail in this particular case.

Moreover, as Justice Stone indicated in Brasfield --

QUESTION: How do you account for the fact that it goes from just four to one after the second vote? I mean, you obviously have some of the people who -- apparently they hadn't changed their view on the death penalty in the interim. There had been no more deliberations. And yet some of them must have voted in the second vote to say we will -- it would be worthwhile to deliberate further. So if some of them were there in the second vote, I don't know how one can say

that none of them were there in the first vote.

MR. KLINGSBERG: One can say, and all we need to establish here is a risk or a probability that there was an improper influence on the jury, that when the court instructed the jury that if they voted to stop deliberations or if they couldn't reach an agreement that a life sentence would be imposed, and then the court engaged in these repetitive procedures and didn't call a halt, that a message was coming from the judge that the judge favored the death penalty, and this was emphasized in the modified Allen charge where the judge said the jury should have the objective of reaching a just verdict, a verdict only being necessary to impose death, cessation of deliberations leading to an imposition of life sentence.

QUESTION: That may be. I am not saying that that argument is gone. I am just saying it doesn't seem to me you can categorically say that one of the indications of pressure is that those who were voting against the death penalty were singled out. It doesn't seem to me you can say that the four were the four who were voting against the death penalty.

MR. KLINGSBERG: Well, as Justice Stone recognized in the Brasfield case and Chieft Justice Burger recognized in Gypsum, there is no way to ascertain for sure what the effect of these practices are on the jurors, and what this Court has to ascertain, and this is consonant with the Court's death

penalty jurisprudence is whether there was a risk. In this case we certainly submit that there was a risk. And the risk was especially serious in light of the finality of the death sentence. As the Court indicated in Booth against Maryland, regarding victim impact statements, the Court must avoid the risk that a death sentence will be based on considerations that are constitutionally irrelevant or impermissible.

An analogy may be drawn to the Bruten case or the recent Cruz case this Court decided where the Court also talked about risks, and the consequences of failure so vital to the defendant that the practical and human limitations on the jury system cannot be ignored, so that if this one lone juror was opposed to the death sentence, and it is apparent that somebody was, because otherwise there would have been a unanimous verdict, so that would indicate that that juror was one who indicated that there should be a cessation, and therefore there should be a life sentence. Certainly he was under a great deal of pressure, having put his name down on a piece of paper, with the risk of that being public, and was in a particularly sensitive situation when the judge delivered the Allen charge.

QUESTION: Again, we don't really know that. We don't know that there was one juror at that stage who was waivering, do we? All we know is that there was one juror who thought that further deliberations wouldn't help.

MR. KLINGSBERG: That's correct, Your Honor, but

QUESTION: That may have been one of the -- the jury may have been split eleven to one in favor of capital punishment. One of the eleven may have thought that this one fellow who had been opposed was so stubborn that it was no use talking to this thickhead any more. Whereas the supposed thickhead himself might have thought, you know, I'm a pretty open fellow, and I'd like to talk about it. We don't know that that's not the case, do we?

MR. KLINGSBERG: That --

QUESTION: You are just assuming that the one individual is the one that was voting against capital punishment. We don't really know that.

MR. KLINGSBERG: We can't ever know for sure in these situations, and that is why this Court has consistently said that it is going to examine into the probability of improper influence on the jury. The Court is going to examine into the nature of the procedures and to ascertain whether those procedures are inherently coercive, and also to ascertain whether or not the procedure serves any useful purpose.

In Gardner, for example, dealing with the pre-sentence reports, the Court said there was insufficient state interest of purpose in not disclosing the pre-sentence report, and in Adams against Texas and in Turner v. Murray the Court has always inquired in, for example, to the ease with which

the risk could have been miminized. Here the risk could have been minimized very easily. The trial judge could have ascertained the jury situation without counting, without public identification, and the court simply could have avoided the blasting charge, and particularly in light of the Louisiana code provision which said that if there is no unanimity a life sentence is then imposed, and there is no need to have a retrial, as you would in a guilt phase trial. The court undertook a practice which was inherently coercive, had a potential for coercion, without any useful purpose.

QUESTION: You acknowledge, at least, Mr. Klingsberg, that it is a lot less threatening to the jury for the judge to look at them and say, how many of you think it will be of any use to deliberate further than it is to say to them, how many of you voted against, you know, how many of you are in the minority voting against the majority verdict? That is a lot more threatening, isn't it, a question?

MR. KLINGSBERG: Yes, Your Honor, although --

QUESTION: And that is not the question that was asked here.

MR. KLINGSBERG: That's correct, Your Honor, but I think that compared, for example, to Brasfield, there the Court did not ascertain which side each one on the count was. Here, we knew which jurors wanted to continue, which jurors didn't want to continue, and there were two polls, and it was

followed by the admonition to come and reach a just verdict, and under those circumstances I would respectfully submit not that Allen charges should be banned in all cases, for example, in a guilt phase trial where the societal purpose to do so, avoiding retrials, but that in a sentencing phase of a capital punishment situation the Court should impose some limits. Those limits are not intrusive, and do not -- would not interfere with the effective conduct of sentencing phase proceedings, particularly where you have a statute, as you do in Louisiana, as you do in three other states, Florida and others we have cited in our brief, where Supreme Courts have held that giving an Allen charge in the face of such a statute has a tendency to coerce and have reversed death sentences.

I would like, if I may, to turn to the second point, which is that at the end of the guilt or innocence phase trial the Court instructed the jury in accordance with the Louisiana code that in order to convict for first degree murder it must find that the defendand had a specific intent to kill or inflict bodily harm on more than one person.

The trial judge also cautioned the jury at the guilt phase, and this is important because it shows that in making this finding the jury was not making the individualized assessment of whether or not the death sentence was reasonably justified during the guilt phase, the trial judge said, you are not to discuss in any way the possibility of any

penalties whatsoever. It is only in the event the jury reaches a verdict of first degree murder that there is any subsequent hearing dealing with the penalty.

At the separate sentencing hearing, the prosecutor told the jury that one of the statutory aggravating circumstances on which the state was relying was that the offender knowingly created a risk of death or great bodily harm to more than one person, and then said, now you will notice that is also an element of first degree murder that you have already found in this case.

On two of the counts that was the only aggravating circumstance found, and on the other count a second circumstance was found and set aside by the Supreme Court of Lousiana so that the sole aggravating circumstance supporting the death sentence was the same as the element already found, as the prosecutor told the jury, in order to convict for first degree murder.

Based on these facts, we contend that as applied to petitioner, the Louisiana capital punishment scheme failed to meet the Eighth and Fourteenth Amendments requirement of providing a meaningful basis for distinguishing the cases in which the death penalty is imposed from those in which it is not.

Following Furman, Louisiana enacted a mandatory scheme which was struck down in Roberts where the Court, the

plurality opinion said that this procedure lacks standards to guide the jury in selecting among first degree murderers. And that standard is not met by the circumstances here. And the Court said as to the North Carolina scheme in Woodson, "There are no standards provided to guide the jury in the exercise of its power to select those first degree murderers who will receive the death sentence."

Now, Louisiana sought to cure this deficiency by requiring at least one statutory aggravating citcumstanace to be found at the sentencing stage, modeling its scheme after Gray, and as this Court stated in Zant, the approval in Gregg of Georgia's capital punishment scheme rested on the feature being that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing. Not only was it essential to have aggravating circumstances, but a fundamental requirement was that each statutory aggravating circumstance satisfy a constitutional standard derived from the principles of Furman.

The Court would not have been concerned with the standards for aggravating circumstance if that were not an essential element of a constitutional death sentence. And as the Court said in Zant, the aggravating circumstance must genuinely narrow the class of persons eligible and must reasonably justify the imposition of a more severe sentence.

Since, as this Court held, the aggravating

circumstance must reasonably justify the imposition of a more severe sentence on petitioner than others found guilty of first degree murder, that narrowing and channeling function cannot be fulfilled meaningfully where precisely the same circumstance is an element of the finding of guilt of first degree murder in the first place.

QUESTION: Well, why isn't that narrowing provided by the fact that the jurors have to consider mitigating circumstances at the sentencing hearing, and tailor the decision to this individual after consideration of those mitigating circumstances.

MR. KLINGSBERG: As this Court recognized in Zant, Your Honor, it is the aggravating circumstance which provides the narrowing function. It is the aggravating circumstance which must be found beyond a reasonable doubt and identified, thus creating this threshold narrowing or gatekeeping function. Then the jury goes on, according to the statute, and just considers mitigating circumstances.

QUESTION: Do you think Zant and Jurek stand for the proposition that the sentencer has to consider the aggravating circumstances as opposed to having the legislative body define which aggravating circumstances would narrow?

MR. KLINGSBERG: Well, in Jurek there was some suggestion in the Court's opinion that some narrowing occurred at the guilt phase. However, there were these three

questions under the Texas statute whichi had to be found beyond a reasonable doubt, and in three or four subsequent decisions which we cite this Court has said, those three questions are, and indeed they are, equivalent to finding aggravating circumstances.

Now, is it possible constitutionally for a legislature to say, we are only going to do the narrowing at the field phase? Well, that is not what Louisiana did here, and the jury here was not engaged in the kind of individual assessment, subjective inquiry, and so forth which this Court has held must be made in the sentencing hearing. They were not focusing on guilt.

QUESTION: They certainly were with regard to mitigation, weren't they?

MR. KLINGSBERG: I am sorry, Your Honor?

QUESTION: They certainly were with regard to mitigating circumstances.

MR. KLINGSBERG: Yes, Your Honor, but Number One, this Court has never held that it would be constitutional to have, say, a mandatory statute that certain types of crimes are mandated to first degree murder and only in mitigating circumstances, because the jury here just has to consider mitigating circumstances.

QUESTION: We didn't hold that, but on the other hand, last term we had a case somewhere in which the issue

was precisely that.

MR. KLINGSBERG: Yes.

QUESTION: It was a much easier case. What it was was a statute that said, if you are serving a life sentence without the possibility of parole and commit first degree murder, you automatically are subjected to capital punishment. We struck that down, but only because -- the reason we struck it down was that the statute did not allow mitigating circumstances to be considered.

What we are saying is, that statute was bad on its face and mitigating circumstances are not because it didn't allow aggravating circumstances to be considered. But we made no mention of that. It seemed like a harder case than you now tell us it really was.

MR. KLINGSBERG: Yes. There was also a case of Baldwin against Alabama, where the judge had to make an independent finding of the aggravating circumstance which was the same as at the earlier phase, but there you had a separate body, a judge who was able to focus on what he was doing, who wasn't told by the prosecutor that he already made the finding so he didn't have to make it again.

Here what we have is basically standardless and unchanneled --

QUESTION: What is your answer to Justice Scalia's question? How do you distinguish the Court's analysis

in the Nevada statute last year struck down because it failed to consider mitigating circumstances? There was no intimation that the mandatory aspect in the Court's opinion would have been bad had mitigating circumstances been allowed.

MR. KLINGSBERG: The only thing that the Court decided in that case --

QUESTION: I am talking about the Court's analysis, not what it decided.

MR. KLINGSBERG: Yes. The Court's analysis was focused on whether all mitigating circumstances, statutory or nonstatutory, should be permitted, and this Court in a long series of opinions has held repeatedly that there should not be a limitation on the mitigating circumstances to be considered, and that human decency requires that. That is quite different from saying, and I don't think there is any analysis on that case which says that there does not have to be something, some element, some keystone which performs this threshold narrowing and gatekeeping function in the context where the jury is focusing.

QUESTION: In your view, would the Nevada statute have been unconstitutional even though it allowed for consideration of mitigating circumstances?

MR. KLINGSBERG: The Nevada statute would be constitutional if it provides at some point when the jury has in mind that it is engaged in, or a judge has in mind that he is

engaged in a sentencing function and engaged in the kind of individual assessment that this Court has repeatedly said is required for capital punishment sentencing, that there is some narrowing, some principled narrowing, some standards.

QUESTION: Mr. Klingsberg, I wonder if you could answer the question more specifically. Supposing the Nevada statute stood just as it did, a lifer who commits murder suffers the death penalty, but the statute goes on to say in my hypothesis, unlike the actual Nevada, the jury may consider any mitigating circumstances. Would that be constitutional in your analysis?

MR. KLINGSBERG: In my analysis, Your Honor, it would not be constitutional unless the jury has to make some finding at a time when it is focusing on death sentence or not, that there is some standard, some finding that it has to make apart from just going out and considering all the mitigating circumstances that there are, which is a totally discretionary activity. There has to be first, as the Court said in Zant, a channeling, narrowing, and going back to Furman, that has to be principled, it has to be based on standards.

I would like to reserve the rest for rebuttal if I may, Your Honor.

CHIEF JUSTICE REHNQUIST: Okay. Thank you, Mr. Klingsberg.

Mr. Mamoulides, we will hear from you now.

ORAL ARGUMENT BY JOHN M. MAMOULIDES, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. MAMOULIDES: Mr. Chief Justice, and may it please the Court, I would like to address at this time the second phase of the two issues, the constitutionality of the Louisiana state statute on the death penalty, and go back to the first issue afterwards.

THe allegations by petitioner make it clear that they feel that the Louisiana statute should fall. Louisiana is one of those states that chose to narrow the threshold for those crimes that can be determined to be and carry with them the possibility of a death sentence in the definitive stage of their statute, and in doing so they -- in this definitive stage Louisiana has said that capital murder, or in this case first degree murder, is defined as three circumstances or facts. Those facts, of those three facts -- correction, five circumstances or facts -- this case deals with the third factor, that is, the intentional killing of a person with a specific intent to kill or inflict great bodily harm to one or more persons -- to more than one person, Your Honor. I am sorry.

The state statute by setting that out has in effect narrowed the threshold, the requirement of the Eighth Amendment of the Constitution, by saying that you can only

have first degree murder when you find this particular small, narrow threshold. That is, you must find first the guilt of someone who commits this crime. We maintain that that, in the case of Zant and Jurek and Gregg, that the states were not required to have the aggravating circumstances per se in the death penalty phase. Louisiana is a bifurcated state. That is to say, we have a statute of the criminal court -- correction, of the criminal code which sets out in Article 905 those provisions which are required for a sentencing hearing.

We maintain that the narrowing necessary to meet Eighth Amendment statute was done in the definitional stage of the crime, particularly in this particular crime.

After Jurek, Zant came, and we maintain that this narrowing is sufficient in Louisiana. The Criminal Code of Procedure, which is a procedure act, sets out the policy and the rules for governing the sentencing phase of the Louisiana statute. And in the Louisiana statute in the sentencing phase the Court goes further than just mitigating circumstances. It ads, the law adds that the jury must consider, it must find at least one aggravating circumstance from a list of ten enumerated in the statute along with a consideration of all the mitigating circumstances that are enumerated plus any other that the defendant may present.

We maintain that this narrowing, if you will, although it may be the same or similar to the definitional

phase of the crime which is outlined in the definition of the crime, although it may be the same or similar, its use is different. The jury is told that they must find in writing one, at least one aggravating circumstance. The Louisiana sentencing procedure forces that jury to use as a threshold that particular aggravating circumstance to channel and focus its view of the individuality of the crime and the punishment of that particular defendant along with all of the mitigating circumstances that are enumerated and any that he may bring up.

But it is not a requirement of the Eighth Amendment, a constitutional requirement, that the State of Louisiana must say that this additional narrowing, if you will, must fall because it is identical to, similar to the initial narrowing in the definitional phase of the statute, which in this case is the killing of two or more persons.

We maintain that the Louisiana statute, by having this additional narrowing in the penalty phase, goes beyond the requirement of what the Eighth Amendment maintains is necessary. It goes beyond the mere killing of people arbitrarily or capriciously. It narrows that class to only those death eligible persons who meet the elements of the crime as outlined in the definition of first degree murder, in this case Section 3.

The Louisiana Supreme Court has compared those two

particular statutes to being used together in parallel with the guilt phase of the definition phase being used by the jury to prove beyond a reasonable doubt, the state must prove each and every element of the crime, and in the definitional phase it is used for guilt for the narrowing of the class of persons who would be death eligible, and in the penalty phase it merely is a tool to assist the jury in its discretion in determining which defendant should die and which should live.

Both of these statutes, even though they are similar, do not in any way take away the narrowing effect of the definition of the crime of murder as set out in this particular case. The fact that the aggravating circumstance is the same does not in any way lessen the narrowness of the class, which is all that is required in the Eighth Amendment.

QUESTION: May I ask you a question about the Louisiana procedure at the sentending phase? The statute provides that any other relevant mitigating circumstance may be received. Does the statute impose any requirement on the trial judge with respect to instructions pertaining to mitigating circumstances?

MR. MAMOULIDES: The statute merely says that the judge will allow the, if I recall, will allow the list of mitigating circumstances and aggravating circumstances to be taken into the courtroom, into the deliberation room with them, and that is a change in Louisiana. It is normally not done

in other charges.

QUESTION: I see.

MR. MAMOULIDES: The jury had access to those items while it was deliberating.

Now, Your Honor, turning to the issue in the first argument of petitioner, that is, whether or not there was coercion in this case by the court in administering a modified Allen charge and polling the jury, Louisiana allows the use of a modified Allen charge. As a matter of fact, the state has a legitimate reason, a valid reason to use a modified Allen charge even in a sentencing procedure.

After all, jurors have taken an oath, they have taken an oath of responsibility to reach a verdict, to attempt to reach a verdict. In a capital case, that oath is even more severe because they are deciding life or death of an individual The jury as a representative of the people, maybe the conscienc of the commjnity, has in fact the life or death of an individual person in their hands.

In Louisiana, the judge in this case was well within his discretion when for the first time this jury indicated that it had any problem at all, he called in -- and that was done by virtue of the note that came in at 3:00 o'clock on the afternoon of the 16th of April, the judge then called the defense attorney and the prosecuting attorney to discuss how they would handle the note.

On Page 52 of the joint appendix you will see discussion about the stipulation. It was stipulated between counsel and the judge that this procedure of polling would be used. It was stipulated that he would call the jurors in, that they would be asked whether or not any further deliberation would be useful, and it was further stipulated that the charge to be given if the Court determined that there would be more deliberation would be the last portion of the original charge, now referred to as the modified Allen charge.

It is important to understand that this was the first time this jury had indicated it was having any problem, and the charge, the so-called Allen charge was only given one time other than in the original charge to the jury when they went out to deliberate.

QUESTION: May I ask at that point, I asked your opponent this, too, but on Page 52 there is a description. Mr. Lentini says, "Yes, Your Honor," and then there are a couple of paragraphs. I gather that is still Mr. Lentini talking. And he says that each juror will have a piece of paper on which they can write their opinion concerning the advisability of further deliberation.

Where does the record show that it was contemplated that the jurors would be identified?

MR. MAMOULIDES: It doesn't indicate that. The count was never given to the jury. That is the normal

procedure in Louisiana. Under Article 812 of the Louisiana Code of Criminal Procedure, in Section 2, and I quote, "The procedure for the written polling of the jury shall require that the clerk hand to each juror a separate piece of paper containing the name of the juror and the words 'Is this your verdict?'"

Now, in this situation they weren't talking about a verdict, but there is no other area dealing with polling the jury except this statute.

QUESTION: Yes, but that is polling them after they have returned a verdict. That is restricted to the procedure for polling after a verdict has come in.

MR. MAMOULIDES: Yes, but when they decided they would poll the jury, it was decided that it should not be done orally to identify them, that it should be done by them writing it down, and the only thing the judge had to go on to determine whether or not that procedure was valid was Article 812, and that's the reason the names are put down.

QUESTION: I understand, but at least as far as the record tells us about the stipulation, I don't find that there was a stipulation that the names of the jurors would appear on these pieces of paper. I understand that is done in polling juries, but this is a different situation.

MR. MAMOULIDES: The stipulation was agreed to by counsel, Your Honor. That is all, and it is in the full

record of the proceedings, and you would find it in the full record. But the stipulation was agreed to -- I think it is in the full record. I have to correct myself. The stipulation was agreed to by the counsel as well as the so-called Allen charge, and what is more important here, Your Honor, is that the jury did not know about it, and that the time sequence that we are talking about where they talk about the eight and four and the eleven and one, what took place in reality was, when the tally was made, the tally was made of the eight and four, they were talking to the judge in open court. The jury was in the box. At that time the defense attorney asked the judge that he would like to reurge his motion for a mistrial.

The judge then ordered the jury removed for the purpose of hearing the motion for the mistrial. As the jury left, it was being removed for that purpose, almost immediately the second note came saying that some of the jurors misunderstood. This is indicated in the record of the Fifth Circuit and in the Supreme Court decision.

And that recount, the judge called them back, put them back in the box, gave them the same question, changed it slightly so that they would not misunderstand it, and the count was eleven to one to continue the deliberation.

That is when the judge, based on the stipulation of what he would do, gave the so-called Allen charge, which was

really a portion of the original charge, and there was no objection by the defendant.

The reason I bring up there was no objection by a defendant at that time was not so much that he couldn't object now but to show that there was no atmosphere of coercion, there was no atmosphere of this Court or this judge or anyone trying to pressure this jury. If you look at the Allen charge that was given, the judge reiterates the fact that this jury is not required, if they are unable to reach a unanimous decision, that the Court would sentence the defendant to life imprisonment.

Further on, in the bottom of the charge, the judge says, do not surrender your honest belief merely, in effect merely for the purpose of rendering a verdict. He does tell to go and to talk to each other.

The thing that makes this important is that if we rea it as an entire -- in its entirety considering the circumstance, it is not anywhere near the objectionable items of so-called Allen charges in the past or in Braswell cases. There was no open counting of those who were for a death penalty or against death penalty. There was no demand by the judge that you go out and reach a verdict.

There was no discussion that this jury, this trial has been seven days and cost a lot of money.

QUESTION: But Mr. -- but there was none of that in

Braswell, either.

MR. MAMOULIDES: There was an open counting. There was a count of the minority and the majority. There was none of that in this case. As a matter of fact, this particular case was the killing of five people. This jury had deliberated and determined that two of those homicides were not first degree, but would be manslaughter, and that three would be first degree murder. All three were killed in different methods. One lady got three shots, two in the chest and one in the head, while she was running, in the back of the head, one in the face, one in the side of the head. These jurors were then instructed in the penalty phase that they must consider death or life imprisonment on all three of those separate counts.

We don't know what went on in that jury room, whether one juror said, well, I am not interested in this being a death penalty or this not being one. We don't really have any idea. The question before the Court concerning coercion of this jury is similar to the one the Court used in, although it has nothing to do with polling or Allen charge, but that the Court used in Brown versus California, where the entire instruction and the entire structure that was given was looked at to see if a reasonable juror would have been affected by this type charge under these circumstances. I think not.

QUESTION: May I ask you one other question about Louisiana procedure? Is it permissible as a matter of state law for the trial judge to indicate to the sentencing jury in a case like this what he feels the appropriate penalty would be?

MR. MAMOULIDES: No, Your Honor.

QUESTION: He must maintain a neutral aspect with regard to that?

MR. MAMOULIDES: Absolutely, and as a matter of fact I think in his charge and in the Allen charge to be able to say that the judge's charge leaned toward death penalty is just not correct. I believe that the fact that he starts it off by saying that if you are unable to reach a decision the state will impose life imprisonment, and if you talk to the jurors, do not give up your particular reason just for the purpose of reaching a verdict, that is another reason why the Allen charge itself in this case is not and cannot and should not be coercive or prohibitive, because those jurors had an oath and an obligation to attempt for the purposes of the public and their oath to try to reach a unanimous verdict, not to shirk that responsibility because it is a tough question of life and death. And this judge --

QUESTION: Would he have --

MR. MAMOULIDES: Yes, sir?

QUESTION: Would he have given the Allen charge if

it were eleven to one for acquittal?

MR. MAMOULIDES: If he knew that, Your Honor, no, but I don't think anyone could have told what the number or the count was.

QUESTION: I thought that the defense did make one objection to that charge. He said that he would request that the court specifically state to the jury that there is no obligation under the law that they reach a verdict, and that was denied, so he didn't approve the whole charge, did he?

MR. MAMOULIDES: Well, what the attorney was requesting was not proper and was not legal. The judge could not give that order because the law requires the jury to try to reach a verdict, and if it cannot --

QUESTION: He did object to it.

MR. MAMOULIDES: Yes, Your Honor, he objected to that for the reason that he wanted --

QUESTION: All right, that --

MR. MAMOULIDES: -- but I don't think that the charge or the judge's telling this jury on several occasions that if they could not reach a verdict the state would grant a unanimous verdict -- correction, the state would grant a life imprisonment verdict was something that they didn't understand.

QUESTION: When it was eleven to one there was automatically going to be life imprisonment.

MR. MAMOULIDES: If they could not --

QUESTION: If it had stayed eleven to one.

MR. MAMOULIDES: Absolutely, Your Honor. It would automatically be life imprisonment.

QUESTION: So knowing that, the judge gave the Allen charge.

MR. MAMOULIDES: Your Honor, the --

QUESTION: Knowing that the jury had already given him life imprisonment.

MR. MAMOULIDES: This was the first time this jury had indicated it had any problems at all. A judge is not required on the first sign of trouble to say that, oh, wait, we are going to stop and let you be hung. The judge has an an obligation to determine in his own mind, his own discretion, whether or not this jury was in fact hung, and the defense attorney and the prosecutor and the judge agreed on the method to do it. Once he found it was eleven to one, to deliberate further, they didn't say, Your Honor, it is hopeless. They said, we think eleven persons out of the twelve thought it would be valuable to deliberate further, and he gave this modified, mild charge which was given in the original charge to the jury. We find and think that the conviction should stand, that there was no coercion on the part of this court in either the Allen charge or the polling.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mamoulides.

Mr. Klingsberg, you have four minutes remaining.

ORAL ARGUMENT BY DAVID KLINGSBERG, ESQ.

ON BEHALF OF THE RESPONDENT - REBUTTAL

MR. KLINGSBERG: Thank you, Your Honor.

I would like to say just a word about the Sumner case which Your Honor was questioning me about.

QUESTION: Mr. Klingsberg, before you get to that, I have a question about, I don't know, I guess it almost goes to standing to complain about the absence of aggravating circumstances. I mean, I can -- assuming that it is the law that juries must be allowed to consider both aggravating and mitigating circumstances, how could violation of that in this case possibly hurt your client?

It seems to me you are in the posture of coming before us and saying, my client is wronged because this jury was not allowed to consider the fact that he tortured each of these people before he killed them. Now, the jury -- you were certainly allowed to tell the jury, my client did not torture each of these people before he killed them. He killed them as cleanly and quickly as possible.

But you are coming before us and the graveman of your complaint is that -- what, that you were not allowed to tell the jury how cruel your client was, or that the prosecutor was not allowed to tell the jury how cruel your client was? Why do you have any standing to complain about the jury's -- I

would think you would delight in the fact that the jury cannot consider aggravating circumstances.

MR. KLINGSBERG: The basis for our claim, Your Honor, is that the jury did not meaningfully undertake to engage in a fresh finding of fact regarding this aggravating circumstance, and where you have a jury which deliberated for ten hours it certainly cannot be a foregone conclusion that if they had been directed to make a meaningful finding and hadn't been told by the prosecutor that they had already found that so they don't have to bother with it again, what that result might be, and where there is a legal element which is lacking in the procedure, particularly in a death sentence case, that does not seem to me to be the kind of thing, as the Court indicated, for example, in Gray against Mississippi, that should be -- that is so basic that it should not be treated as a harmless error type of situation.

If I may just say a word about the Sumner case, which Your Honor asked me about earlier, the Court there in its analysis as well as its holding focused only on the discretionary aspect of the proceeding, that is, that mitigating circumstances regarding character and record of the offender and so forth were not allowed to be considered, and neither the Court's analysis nor the holding focused on whether, if there had been mitigating circumstances allowed, and you just have sitting out there a mandatory death sentence in a particular

circumstance, and there it was extremely narrow, only where someone is serving a life sentence, and you had mitigating circumstances, whether or not the Court would nevertheless continue to hold, as it has emphasized in numerous cases since Furman, that there is a necessity for finding beyond a reasonable doubt a specified statutory aggravating circumstance in order to perform this narrowing and channeling function.

In Nevada, there was an indication that the statute defined capital murder, and it is not clear whether the jury when it was considering whether to find the defendant guilty of capital murder from the decision, the court didn't focus on it, whether the jury was engaged in the individualized assessment and process of determining whether the death sentence was reasonably justified.

Indeed, it may well have done so, but in our case it is clear that the jury was told at the guilt phase that it is not to consider sentencing, and it is not to engage in that kind of process of deciding whether death was reasonably justified.

It is clear from, for example, Adams against Texas, from Zant, that the process of assessing or considering mitigating circumstances involves a wide range of discretion. In the Furman case and all the cases since then have indicated that there must be some kind of procedure, some element, some keystone for channeling and narrowing on the basis of

standards on a reasonable basis there is discretion, and that, we submit, was not done here.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klingsberg. The case is submitted.

(Whereupon, at 11:48 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-6867

CASE TITLE: Leslie Lowenfield v. C. Paul Phelps, Secretary, Louisiana Department of Corrections, et al.

HEARING DATE: October 14, 1987

LOCATION: The Supreme Court of the United States

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: October 20, 1987

Margaret Daly
Official Reporter

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