OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PAUL PALALAUA TUILAEPA, Petitioner v. CALIFORNIA and WILLIAM ARNOLD PROCTOR, Petitioner v. CALIFORNIA

CASE NO: No. 93-5131 and No. 93-5161

PLACE: Washington, D.C.

DATE: Tuesday, March 22, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL PALALAUA TUILAEPA, :

Petitioner :

v. : No. 93-5131

CALIFORNIA :

and : CONSOLIDATED

WILLIAM ARNOLD PROCTOR, :

Petitioner :

v. : No. 93-5161

CALIFORNIA :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, March 22, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:49 a.m.

APPEARANCES:

HOWARD W. GILLINGHAM, ESQ., North Hollywood, California; on behalf of the Petitioner Tuilaepa.

WENDY COLE LASCHER, ESQ., Ventura, California; on behalf of the Petitioner Proctor.

WILLIAM GEORGE PRAHL, Deputy Attorney General of California, Sacramento, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:49 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 93-5131, Paul Palalaua Tuilaepa v. California and Proctor against California.

Mr. Gillingham.

We'll run until noon, Mr. Gillingham, and then resume at 1:00.

MR. GILLINGHAM: Thank you, Your Honor. All things considered, I'd rather have a sandwich, but I'm ready, Your Honor.

ORAL ARGUMENT OF HOWARD W. GILLINGHAM

ON BEHALF OF THE PETITIONER TUILAEPA

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

We come here today relying upon our record and the clear, firm, unequivocal mandate of this Court. If a State chooses to use aggravating factors in the penalty determination phase and they play a critical role, they're subject to vagueness analysis under the Eighth Amendment, because vague, aggravating circumstances -- vague, aggravating circumstance increases the risk of arbitrary and capricious sentencing, and therefore it gives no guidance.

Did California choose to use an aggravating

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circumstance? It did. Are the factors in California central to the decision? They are. Is that centrality manifested in a weighing scheme? Absolutely.

And we know by those factors what happened here. We look to the record. We start with the verdicts. We, the jury, find the aggravating circumstances outweigh, substantially outweigh the mitigating circumstances, and the penalty should be death. That was the death verdict. There was one other, the opposite conclusion coming to life if the aggravating circumstances did not outweigh the mitigations.

The instructions from the court -- as, Justice Kennedy, you just referred to how important they are when they come from the court -- told the jury to weigh the aggravating and mitigating circumstances, to assign a value to those factors. The argument of the prosecutor, second most important person in the courtroom. The factors are the essence of the case, the fundamental issue. You'll be weighing those factors.

QUESTION: But, Mr. Gillingham, how could the vagueness of one of those factors produce any more random decisions than not giving the jury any factors at all and just saying having found one of the necessary conditions for imposing the death penalty, which California says is prior to the -- to this stage of the case, just telling

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the jury once you've found guilt with one of these statutory factors that enable the imposition of the death penalty, it's up to you to propose the death penalty or not. Surely the vagueness of one of the factors can't be any more arbitrary than that, any more random than that.

MR. GILLINGHAM: On the contrary, Your Honor.

QUESTION: You think it's more random.

MR. GILLINGHAM: On the contrary.

QUESTION: The vague factor is more random than saying do what you like, we won't tell you any factors at all.

MR. GILLINGHAM: Your Honor is referring basically to Georgia, in the sense of the jury is allowed, after the aggravating circumstance is found, to rely on their own common understanding, deliberations, discussions. But what happens in California -- again though not required, but California has chosen to give the jury a menu, a shopping list perhaps, a lens to evaluate the evidence through. And when that lens is distorted by vagueness, it distorts the process.

QUESTION: But isn't there a significant difference between the use that California makes of the factors and the use that we have -- the uses that we have been concerned with in past cases when we have said that in weighing States, the vagueness of the factors infects

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the weighing process.

And isn't -- in our prior cases, wasn't our rationale that the fact that the State had identified a certain kind of propositional aggravating circumstance, like it was cruel, there was torture in the commission and so on -- the fact that the State has weighed -- has identified a statement like that, when found to be true as an aggravating factor, and that statement is also vague so that, in fact, it's kind of a wild card, we really never can tell whether it's really true or not, it is the use of that factor which the State has given emphasis to by its identification in the narrowing stage which is what skews the weighing process.

But here the aggravating factors that are being used at the weighing stage are not the aggravating factors which have been used at the narrowing stage. It's an entirely different set of propositions.

MR. GILLINGHAM: And it's exactly what was argued in Stringer, Your Honor, and that is not the distinguishing point because if that were the case, basically Stringer would have overruled Zant. Because in Zant, as in Stringer, there were otherwise two valid aggravating factors.

QUESTION: No, but the point in Stringer was -- there was no problem at the -- by the use of an

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aggravate -- of a vague aggravator at the narrowing stage because you had a nongrave -- nonvague aggravator, that's all. The problem in Stringer, as I recall it, was that by using an aggravator which the State had identified as being especially important despite its vagueness, that skewed the weighing process.

Here you're not using the same aggravator to weigh that you did to narrow, and you're not using an aggravator which states a proposition like "it was cruel." Instead, you're using an aggravator that simply looks to subject matter, and aren't those the two distinguishing factors between this case and Stringer?

MR. GILLINGHAM: They are distinguishing without a difference, Your Honor, in this -- in some ways, but in other ways, to use Justice Kennedy's description in Stringer, it's worse in the penalty phase determination, it's absolutely worse. It's at this time that the jury is sitting there needing the guidance, just about ready to decide life or death, and we give them not a narrow -- not a narrow aggravator, as all the States have, we give them not even a singly directed aggravator such as in Maynard, the "heinous, cruel, and atrocious" or the "outrageously vile," and those are vague. We give them only circumstances of the crime and the special circumstance found true.

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QUESTION: In other words, we identify a subject matter which it is relevant for them to consider, and that is exactly the same thing that the jury in a State like Georgia, which does not go through a formal weighing process, can do. Once the narrowing is done in Georgia, the jury in effect can consider everything it knows in deciding whether or not, at the penalty phase, to impose that penalty.

And what California, it seems to me, is doing is to say you may consider the following subjects: age, circumstances, and so on. It seems to me that if we accept your argument, then schemes like Georgia are going to be unconstitutional too, which I think is the implication of Justice Scalia's question.

MR. GILLINGHAM: Absolutely not, Your Honor. Georgia -- what happens is those States that choose -- those States that choose to give the jury additional direction, additional guidance, have a responsibility to give guidance that's not illusory.

For example, in this case --

QUESTION: Well, wouldn't it be more precise to say that if they are going to identify certain subject matters which ought to be considered at the weighing stage, they at least ought to be relevant subject matters. Do you claim that there is anything irrelevant, as a

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matter of theory, to the sentencing decision in the subject matters that have been identified by California at the weighing stage? Is age irrelevant? Are the circumstances of the crime irrelevant?

MR. GILLINGHAM: They are not irrelevant in themselves, Your Honor. It's a question of what the jury thinks they mean. This is the problem. When the State chooses to identify --

QUESTION: But, it's -- with respect, isn't this -- isn't the instruction to the jury basically, consider this subject matter.

MR. GILLINGHAM: But to weigh factors -- what we have to keep in mind, Your Honor, is the difference between the evidence, the data base, and the fact that these factors are a lens through which the jury is told to look at this evidence. In juror -- in Georgia --

QUESTION: Well, I'm sorry, I don't understand what you mean. They are told to look at it in the sense that it is obviously relevant to the decision that they are coming to. I don't see what you mean by a lens.

MR. GILLINGHAM: What happens is it's obviously aggravating in these cases. That is, that's how it turns out. These are --

QUESTION: Well, it may be, it may not be. I mean they -- I don't know how they view age. They view

age as -- the age of 19 at the commission of crime as aggravating or as mitigating. I don't see anything in the identification of that subject as something to be considered or in the instructions given here that make it aggravating or mitigating. In fact, one of the arguments is that you can't tell from the instructions whether you're supposed to treat it as aggravating or mitigating.

MR. GILLINGHAM: Your Honor --

QUESTION: All the State is doing is saying consider this for what it's worth.

MR. GILLINGHAM: Your Honor, factor (k) tells the jury to consider the mitigating or extenuating circumstances of the crime.

QUESTION: Uh-hum.

MR. GILLINGHAM: If there's going to be any mitigation element to the factors in California, it's going to be in factor (k), which is the fifth factor in our case, in Tuilaepa.

QUESTION: Uh-hum.

MR. GILLINGHAM: That's where the entrance of mitigation is. There's no question that (a) is the aggravation from a common sense understanding, but the difference between jury -- from Georgia and California is California has taken upon itself to give additional benefit, to give additional guidance, and they do it in

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illusory fashion so that it's not inconsistent with Georgia; Georgia is different.

QUESTION: So you agree that California could have dispensed entirely with the list of factors, since it narrows it in a different way.

MR. GILLINGHAM: Absolutely.

QUESTION: You have -- I want to be clear on that point. You are not challenging in any way the determination of the death-eligible category, that is the factors that go into determining who then gets to the penalty stage.

MR. GILLINGHAM: I'm not, Your Honor. If I understand, we're talking about the special circumstances, what we call special circumstances.

QUESTION: Yes. Do you think that's an adequate way of defining the death-eligible category?

MR. GILLINGHAM: Absolutely.

QUESTION: Okay.

MR. GILLINGHAM: And, in fact, many of those factors are actually taken to the penalty phase in many of the weighing States and called aggravating circumstances in the weighing phase.

QUESTION: Which was the case in Stringer.

MR. GILLINGHAM: But the point is one of them was vague, Your Honor, and what we're saying is under

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Maynard and Godfrey where there was an additional -- additional description and effort to define, quote, the circumstances of the crime, that is heinous, atrocious, this Court said well, wait a second, that could apply to any court -- any case, that could apply to every single murder.

QUESTION: Yeah, and what was wrong with it is that it gave the illusion that you were stating a proposition about that case which was capable of being shown to be true or false, and because of the vagueness of the statement that really wasn't true. But here you're not presenting the jury with a statement which they can find or not find, as the case may be, apparently true or false or provable true or false. You're simply saying to the jury consider the circumstances.

QUESTION: You can answer that after lunch, Mr. Gillingham. We'll stand in recess.

(Whereupon, at 12:00, the oral argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.)

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AFTERNOON SESSION

(1:00 p.m.)

QUESTION: We'll resume the arguments in Tuilaepa.

Mr. Gillingham.

ORAL ARGUMENT OF HOWARD W. GILLINGHAM

ON BEHALF OF THE PETITIONER TUILAEPA (RESUMED)

MR. GILLINGHAM: Thank you, Mr. Chief Justice.

Justice Souter, in California there simply is no way, given the verdict, given the instructions, that this jury didn't believe that as a general absolute principal, that the aggravating factors were critical. That's one.

Two, they had to know. Indeed, they couldn't know anything else, but they had to put some value on those factors and they had to weigh them. And, in the fact -- to the extent that they had to weigh --

QUESTION: Well, they had -- it's clear that they had to weigh the subjects which the so-called factors referred to, no question about that, but isn't it true that the factors were different from the kinds of factors which are expressed in just propositions of fact like it was cruel?

MR. GILLINGHAM: I think not, Your Honor, other than to the extent that they're much more vague and illusory.

QUESTION: They're much more vague in the sense that they, generally speaking at least, do not state propositions which the jury has to find in order to address those subjects.

MR. GILLINGHAM: I don't understand. You lost me.

QUESTION: Well, if the -- if the -- let's take the age factor. As it stands now, the California scheme says you may or should consider the age of the defendant in the process of doing your weighing.

MR. GILLINGHAM: Yes.

QUESTION: It doesn't tell you whether that age should be regarded as mitigating or as aggravating. It might have said you may determine whether the defendant was at an age of youthful indiscretion, or you should determine whether the defendant was at an age of youthful indiscretion. That, in effect, in the latter case would have required the jury to make what seemed like, at least, a finding of fact; he was young and indiscreet or he wasn't young and indiscreet.

The prior cases that we've had, like the Stringer cases, have involved aggravating factors of the -- what I've called the proposition kind of aggravating factors; he was young and indiscreet. California just says you should consider age, for whatever

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it's worth. It may be aggravating, it may be mitigating, so far as the California statute is concerned, and it seems to me that that is a distinction from the Stringer cases.

MR. GILLINGHAM: Practically speaking, what happens in the court is that each and every one of those factors are aggravating or argued aggravating, as you've seen in the amicus briefs, I'm sure. And --

QUESTION: And argued mitigating too. I mean, the defendant can get up and say, okay, consider his age, whatever it was, 19. That's a mitigating factor, because he was young and he's going to get older and wiser as he gets older. Each side could argue the mitigating or aggravating affect as that side saw fit.

MR. GILLINGHAM: And I have made that argument. I have made it time and time again. And the argument that if he was old enough to do this crime, for me to stand up and successfully argue -- I have men on death row who can testify to the efficacy of my argument in those regards. Each and every time, Your Honor, there's only one factor really that is mitigating for the defendant, and that's (k). And that's (k).

QUESTION: Which is (k)?

MR. GILLINGHAM: (K) is the one at the end, Your Honor, the last one in my case also, that has any other

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circumstance that could extenuate the crime --

QUESTION: I see.

MR. GILLINGHAM: -- And now added through common law with the other background record, et cetera, to satisfy Lockett.

QUESTION: So you're saying if they consider the subjects of everything up to (k) as a practical matter, they're going to be considering aggravating factors.

MR. GILLINGHAM: Absolutely.

QUESTION: All right. What then -- let me ask you another question. Does the list from (a) through (j) pretty much exhaust the possibility -- the field of relevant considerations except for mitigation?

MR. GILLINGHAM: California --

QUESTION: Do they single anything out?

MR. GILLINGHAM: The "they," the reference of "they."

QUESTION: Yeah, in the list of factors --

MR. GILLINGHAM: Yes.

QUESTION: If the jury really considers all of those factors, (a) through (j).

MR. GILLINGHAM: Yes.

QUESTION: Will it have considered pretty much the universe of possibly aggravating factors?

MR. GILLINGHAM: Well, if I understand your

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question correctly, in California they are limited, the jury is limited to the statutory factors.

QUESTION: That's right, yeah.

MR. GILLINGHAM: Okay.

QUESTION: But if it considers all of them, will it pretty much have canvassed the possible scope of relevant aggravating factors?

MR. GILLINGHAM: It absolutely will.

QUESTION: Okay.

MR. GILLINGHAM: And as you'll see in the next argument, even when there's no evidence of some, we'll have those used as aggravators in California, but that's not my case.

QUESTION: Mr. Gillingham, your comment about age being only an aggravating factor, or at least not being a good mitigating factor, certainly would contradict a couple of our cases where we've said that -- like Edmunds, where the court has said that the jury has to be permitted to consider age as a mitigating factor in the sense of youth.

MR. GILLINGHAM: And, indeed, in every State, I think perhaps other than California, it's indicated and described as a mitigating factor. In California it's not described at all.

QUESTION: Well, but certainly -- nothing

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prevents you, as I gather you say you've done unsuccessfully -- from arguing to the jury that a person of say 19 years old or 18 years old should be considered in mitigation.

MR. GILLINGHAM: But what I'm saying, Your Honor, it's one thing for me to argue it -- and I must say it is an uphill battle in each and every case, given the fact that when you get there you have a first-degree murder with a special circumstance. It's one thing for me to argue that, especially without the age factor being there at all, and it seems to me that's fair game and a jury on their own can consider that and do with it what they will. But in California the State has said age has -- is something special, so the jury has to go down that list. Perhaps this answers --

QUESTION: But if says that, in effect, everything else is special too, then, in effect, nothing is special. That's why I was asking you whether these various aggravating factors pretty much cover the whole scope of possible aggravation. And if they do, then I think it's hard to say that California is singling something out.

MR. GILLINGHAM: Well, we -- of course, we address them, I do on behalf of Tuilaepa, one by one. It's not a global attack necessarily, it's one by one, and

my --

QUESTION: Mr. Gillingham, suppose the way it read was the jury may consider the following aggravating circumstances, (a) through (j), and then, in addition, the jury may consider (k), whatever mitigating circumstances it considers relevant, would that be constitutional?

MR. GILLINGHAM: Well, I'd need to know what the factors were.

QUESTION: The same ones, the same ones, (a) through (j), just what you have now.

MR. GILLINGHAM: That would not cure of vagueness of (a), for example. It would not cure the Maynard problem with (a) at all. And this Court has said -- even in States like Oklahoma and other States that have tried to embellish what we would call factor (a), California is the only State -- and I want to be sure that the Court is clear that we're not saying that they can't consider circumstances of the crime.

QUESTION: But it would cure that vagueness, as you've said, simply to not say anything at all.

MR. GILLINGHAM: Well, I'm not sure --

QUESTION: Not list any factors at all.

MR. GILLINGHAM: I'm not sure we're talking about the same vagueness. I'm talking about the vagueness of (a). Am I on track?

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QUESTION: Whatever vagueness you think infects (a) through (j).

MR. GILLINGHAM: All right. And now, again, Your Honor, if I might.

QUESTION: That's all right. I understand your position on that.

MR. GILLINGHAM: Okay. I'd like to reserve.

QUESTION: Well, go ahead and reserve.

MR. GILLINGHAM: Thank you.

QUESTION: Thank you, Mr. Gillingham.

Mrs. Lascher, we'll hear from you.

ORAL ARGUMENT OF WENDY COLE LASCHER

ON BEHALF OF THE PETITIONER PROCTOR

MS. LASCHER: Mr. Chief Justice, may it please the Court:

I'd like to return to the subject of the process the jury in California is directed to go through, because I think the process that is involved in these cases may answer some of Justice Souter's concerns.

The jury is told that it must weigh 11 enumerated factors. And, indeed, in Mr. Proctor's case it was told that the result of its weighing process would produce a mandatory result. And so the very nature of the numerating factors leads us into the constitutional difficulty that existed both in the Tuilaepa case and even

more so in the Proctor case, because now you're not merely telling the jury to look at the wealth of evidence it's already heard and make a determination about that and see if anything mitigating outweighs it, which is what you would have in a Georgia scheme.

But you're telling the jury to put the factor -- factors -- as it were, the evidence into little boxes and to look at each one separately and to give independent weight to each of those boxes, however much or little weight the jury chooses, but still to give them weight, put them on the balance.

And so the jury has to go through a tangible process. We know that happened in the Proctor case because the prosecutor told the jury it was going to do that, the defense lawyer told the jury it was going to do that. The judge not only instructed the jury orally to do that, but it said to the jury, here are the written instructions; you may take them into the jury room and you may read along with me as I go through these factors.

And the California Supreme Court itself, at Joint Appendix 152, said that the jury would have understood they were required to determine the penalty by weighing the enumerated factors.

And at page 1 -- page 77 of the record, a very interesting jury instruction, when the judge does read the

factors to the jury, he says, first: "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case." And then a new -- and then there's a little more in that sentence on exception. Then he goes on to a second sentence: "You shall consider, take into account, and be guided by the following factors, if applicable."

So the jury is led into a formula it almost has to follow. It's not a precise mathematical formula, but it is required to go through these steps, and that's why vagueness in any factor brings this case squarely within not only Stringer, but the whole line of cases that brought us to this --

QUESTION: But, Ms. Lascher, if you take three statutory schemes, Texas, Georgia, California, and assume that you do not prevail on this case and that all of them are constitutional in their broad outline and in the specifics that you challenge here. If you have a defendant guilty of first degree murder, under which of the three statutory schemes would you prefer to have the sentence imposed?

MS. LASCHER: Your Honor, I believe I would -- it would depend on the specific case, but I think I would choose --

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QUESTION: Your case, Proctor.

MS. LASCHER: All right, the Proctor case. I think I would choose Georgia, and this is why. In Georgia where the jury is not given any kind of direction except that it's given mitigating evidence to weigh, when the jury goes into the jury room there's a collective process. That's what we count on, that's why we have all this litigation about jury instructions in death penalty cases. The jurors have to negotiate with each other, they have to look one another in the eye, they have to decide, okay, now we're really at the crunch, what are we going to do, is this murder a serious enough one to impose a death penalty and not another.

If you give the jury a list of factors or any other kind of instructions that guide them through a process, you're, in effect, giving them a yardstick, and giving them a yardstick gives them a sense of confidence. We sort of -- the Court sort of heard about that in the mentally ill defendant this morning. But if you give them a rubber yardstick, which is what you do in California when you use factors that are of such vague content, then you're giving them a very false sense of confidence.

QUESTION: So of the three systems that I asked you about, you prefer the system which gives the least guidance to the jury from the court.

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MS. LASCHER: Under the -- I prefer that to a system which gives vague guidance to the jury, which gives illusory guidance to the jury, which gives really misguidance rather than simply nonguidance, yes, Your Honor.

QUESTION: All right --

QUESTION: What if the California scheme simply said there are, whatever it is, 12 relevant subjects of evidence that you ought to consider, and I'm going to list them: circumstances of crime, age, et cetera, Would that be violative either of Stringer or of any constitutional standard?

MS. LASCHER: Well, Your Honor, that's, in effect, what the California jury instructions do, just as --

QUESTION: Well, I thought maybe -- in fact, I'm assuming something that you did not, yourself, argue. I was assuming the argument that was made by counsel for the other petitioner here that as a practical matter everything, what, through (l) or (j) or whatnot are patently aggravating factors, and then there's sort of a catchall at the end, consider any mitigating factors.

And if -- I guess what I was trying to suggest by my question was what if California, in effect, went out of its way to say we're not talking about mitigation or

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aggravation, we're just talking about relevance; you should consider the following subject matters, factors, whatever they might call them, as being relevant when you go through the weighing process.

MS. LASCHER: I think the key to the answer, Your Honor, is the phrase "the weighing process." I think as soon as you direct the jury to do something with those subject matters or factors or whatever you call them, that's where you'll get into trouble.

QUESTION: Well, but that's what Georgia does.

MS. LASCHER: If you say consider --

QUESTION: Georgia says you're supposed to weigh all -- in effect, all the evidence that you deem to be relevant. And on my hypo, California would be saying the same thing, except that California would identify the particular subjects of that relevant evidence which pretty much canvass the universe of relevance.

MS. LASCHER: Well, actually, I disagree somewhat because what Georgia does is it says you shall weigh these subject matters, but it doesn't say the thing that California says, which is if you find that aggravating outweigh mitigating, that you shall impose the death penalty. And what happened --

QUESTION: Well, isn't that the only rational way they could possibly behave? I mean, it's assumed that

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juries are not going to say we find the mitigating evidence overwhelming here, but we think we'll impose the death penalty anyway.

MS. LASCHER: No, I think the jury can decide in Georgia for whatever reason, because it is exercising this negotiating function, this conscience function, not to impose the death penalty because at the end of the process there's no consequence attached to the weighing. Now, what juries will, in fact, do as a matter of common sense, Your Honor may be right, and there may be many cases where they will come to the end of the process and they'll say well, of course, this leads us, on our own, to the conclusion that there should be a death penalty.

But then the decision is the jury's and the decision is in no way infected by the jury instructions. And where California goes astray is in the --

QUESTION: This is the same jury that --

MS. LASCHER: Where California goes astray is in guiding the jury to that result. It's as if we ask the jury to paint a landscape and we give them canvas and paints, that's one situation, and the jury can go in and they can decide how big the trees should be and whether they should have leaves or not, and that kind of thing. What the court in California does is to give the jury essentially a paint-by-number kit so that it's sort of

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determining how the landscape is going to look at the conclusion of the process.

And it will feed -- what happens in a system like California -- Justice Rehnquist asked a question earlier that I thought was very descriptive of the problem we have. It lists a number of factors, it tells the jury to treat them as aggravating or mitigating, it allows the jury to treat them any way they want. Because at least six of those factors are introduced by the phrase "whether or not," so the jury has no guidance whatsoever and can treat factors in some cases as aggravating and in other cases as mitigating, even though the evidence in the two cases is exactly the same. It allows the prosecutor to argue, as he did here --

QUESTION: But I thought your point was the jury has too much guidance.

MS. LASCHER: The jury has --

QUESTION: Now you're saying it doesn't have enough.

MS. LASCHER: It's an unfortunate combination of both, Your Honor. It has guidance into a process, and then being told it has to follow this process, it's free to do anything it wants. And the danger of it, and the reason it's a bad --

QUESTION: I thought you liked the Georgia

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system because the Georgia system jury is free to do what it wants.

MS. LASCHER: Oh, but the difference is in Georgia the free jury has no false confidence that it's the law directing them to a particular result by following a formula. In California, the court says we're going to give you a formula, here are the 11 factors, weigh them against one another, and then the jury has a sense, gee, we've got factors, you know, we can be comfortable in the decision we make, when, in fact --

QUESTION: We can be comfortable with the decision we make because we've talked about things that have a rational bearing on guilt, whereas --

MS. LASCHER: Well, you know, here's --

QUESTION: Where in Georgia we have kind of a Quaker prayer meeting, everybody's quiet, and they just raise their hand and vote for death. That could happen under the Georgia scheme.

MS. LASCHER: Could happen.

QUESTION: You're making really quite an amazing argument, based on our precedents, that the jury should have no guidance. I had thought that was the whole point --

MS. LASCHER: Well let me -- oh, no.

QUESTION: -- Of about 15 years of cases from

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this Court.

MS. LASCHER: I don't know if I should say thank you for saying I'm making an amazing argument, but let's go back to -- let's go all the way back to Furman and see what we're trying to do here. What we're -- Furman's basic notion was to avoid arbitrary imposition of the death penalty.

QUESTION: May I interrupt you. I know you're not -- you have more to say to Justice Kennedy, but I really want to understand a basic point here. Do either you or your colleague, Mr. Gillingham, contend that the special circumstances do not adequately narrow the people eligible for the death penalty?

MS. LASCHER: For purposes of this case, Your Honor, we both assume that the special circumstances perform the narrowing function. Now, we're one step beyond --

QUESTION: Are there any murders that aren't covered by the special circumstances?

MS. LASCHER: Well, there are 29 categories of murders covered by the special circumstances, that California voters --

QUESTION: And you think that -- you're assuming that adequately narrows the universe so you get into the next step.

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MS. LASCHER: I'm not assuming it. I'm assuming it for purposes of the issue that the Court granted certiorari on.

QUESTION: Let me ask, when you answered that question, that you are not challenging whether there's a sufficient --

QUESTION: That's right.

QUESTION: -- Narrowing to get to the death-eligible category.

MS. LASCHER: That's right, not --

QUESTION: And you're not either.

MS. LASCHER: I'm not challenging it either.

QUESTION: And did you challenge it at any stage in the proceedings?

MS. LASCHER: I don't think we did in this case, Your Honor, but I would have to refresh my recollection on that.

QUESTION: Well, then, I think it's fair to say that you assume that it's sufficient, constitutionally sufficient.

MS. LASCHER: No. With respect, Your Honor, I don't think it's fair, and let me say -- let me go back to Furman and say why I think that this is very important, that we look at Stringer, we look at Gregg, we look at Maynard, we look at Clemons, we look at the subject -- the

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notion of the illusory factor on death's side of the scale.

Because if you have, let's say, 20 juries evaluating identical sets of facts that involve some of the factors involved -- that the prosecutor argued in our case: was the defendant intoxicated or not; did he have an accomplish or not, a factor that the California Supreme Court itself can't even agree on. When you have that situation of the 20 juries, you might have 10 juries whose reaction to the evidence is this is an aggravated, horrible crime, it does not outweigh mitigation, and this defendant should be put to death; and you may have 10 who conclude the defendant should not be put to death.

And it is inevitable in our constitutional scheme that juries will react differently to facts, and as long as we're going to have a death penalty and have juries making the decision, that will happen and defense lawyers will have to contend with it. However, what happens when you outline factors, as we do in California, and you outline them in a vague way, is that you can have the same 20 juries looking at the same set of facts and coming to totally opposite conclusions, 10 one way and 10 the other, not based on the facts, not based on their reaction to the facts, but solely based on their personal interpretations of the jury instructions.

And that's arbitrariness, because we don't expect jurors to know the law. The very bare minimum we need to satisfy the Eighth Amendment is that we know what the law is in advance and we all apply it in the same way from case to case.

QUESTION: Do you believe the argument that you just made is true, for example, with respect to the way age is treated under the California scheme? I mean the California factor simply, in effect, says consider the age of the defendant. Now, some jurors may consider it mitigating, some may consider it aggravating in a given case, but how would it be true -- how -- under what circumstances do you think it would be true that they would come to their disparate conclusions based on the way the factor was treated by the statute as opposed to their view of the facts?

MS. LASCHER: Well, I think we have two perfect cases to illustrate that, Your Honor, because Mr. Proctor was 20 and Mr. Tuilaepa was 21 at the times of their respective crime, and in the Proctor case the jury was -- the prosecutor stipulated that age was mitigating, and in the Tuilaepa case the prosecutor argued it was aggravating, and their prior records were not that dissimilar.

QUESTION: Well, my question, though, I think

stands. Doesn't -- how can you say that that is a result of the way the California statute is written or the way the factors are described for the jury, as distinct from the way the jury, and before them counsel in the case, view the facts?

MS. LASCHER: Because -- I think -- actually, I think the State does need to take a position, even on age, but certainly on some other factors such as accomplice status.

QUESTION: Well, and that may be -- I don't mean to cut you off from that. But I -- so far as facts are concerned, you really can't say, can you, that the articulation of the so-called age factor, as distinct from the way the jury views age in a given case, is going to tip the jury's view of age one way or another?

MS. LASCHER: You can't say it in an abstract fashion. In a practical sense, because of how it's used almost universally in California murder trials, you can, because it's almost always argued as an aggravating factor against the defendant. If you take a factor like intoxication --

QUESTION: Well, how is the -- how is it argued as an aggravating factor against the defendant, Ms. Lascher, the age?

MS. LASCHER: He's old enough to know better.

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QUESTION: Well, but I mean, would that -- would the prosecutor highlight that fact if the defendant were, say, 17?

MS. LASCHER: I -- prosecutors do argue that and highlight that, yes, Your Honor.

QUESTION: And do defense attorneys argue contra, that it's -- that's a sufficiently tender age or young age to be mitigating.

MS. LASCHER: Yes, they try.

The -- you know, I want to return to the subject of the circumstances of the crime, touchy as that is, because apart from the failure to label the fact -- let me start over again.

Let me talk about labeling the factors for a moment, because we're acting as if it's a very difficult process to label specific factors as aggravating or mitigating, and it isn't. In all other criminal sentencing in California, there are rules of court. One rule says these are factors to be consider in aggravation, another rule says these are factors to be considered in mitigation. So judges, who after all have legal training, are given the benefit of that in every criminal sentencing process. It's just jurors who, as we know, are unskilled in sentencing, who have to grapple with the broader unspecified concepts.

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QUESTION: But, what should our legal training tell us about whether age should be mitigating or aggravating?

MS. LASCHER: I don't know what it should tell us, but I know that we're capable of being told because we do it. I think this is not a decision -- that this -- what we're talking here about, the process of instructing the jury, the substantive decisions --

QUESTION: Well, your proposition is that the State must commit itself as to every listed factor as to whether it's aggravating or mitigating. I thought that was your argument.

MS. LASCHER: It is.

QUESTION: And I want to know what you -- what we should do with age.

MS. LASCHER: Well, if I were passing the law, I would probably choose arbitrarily an age, as the legislature would, and it might be 25 or 30, I don't it would be 17 or 18. And I would say above that it's aggravating, below that it's neutral, or below that it's mitigating and above that it's neutral.

QUESTION: But what about 60 or say 65?

MS. LASCHER: I think that if I answer that question I'll just be in trouble, no matter how I answer it.

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(Laughter.)

QUESTION: Not with me.

(Laughter.)

MS. LASCHER: Let me return briefly to the subject of circumstances of the crime, because I think it capsulizes --

QUESTION: There's one question I would like to ask you before you proceed there, going back to the question about the special circumstances. Are there any figures that indicate out of the universe of first-degree murders, how many would fit into one of those special circumstance categories?

MS. LASCHER: I don't know. Yes, there are -- I'm sure there are figures, Your Honor. I don't have them at my fingertips. Probably the California Appellate Project keeps track of them. But the 29 categories probably encompass 90 percent of the murders in California, but it's just a guess, because they talk about virtually every species of crime.

QUESTION: And, even so, you haven't challenged that as not being sufficiently narrowing.

MS. LASCHER: Not for purposes of being here today, Your Honor, no. I would like to see it challenged, but that's not why I'm here.

Every crime has circumstances --

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QUESTION: Are you suggesting some other lawyer may have another habeas petition later on down the line who'll make that challenge?

MS. LASCHER: I hope so, Your Honor.

QUESTION: You hope so.

QUESTION: I question whether you could make that as a first step to the argument that you're now making?

MS. LASCHER: I think it would be a great argument to make. I would like to make the argument. If I didn't feel constrained by the --

QUESTION: Well, why didn't you, why didn't you make the argument? If you'd like to make the argument, why didn't you?

MS. LASCHER: The nature of this case and the strategy of presenting it to the California Supreme Court. There were three special circumstances found; they were probably appropriately found under the facts presented to the jury, if you believe the prosecution's view of the evidence. This did not seem to be the case to make that challenge, whereas it seems to be a very good case to point out some of the other flaws which would exist in the California scheme whether or not the special circumstance is adequately narrow.

I'm -- I think it should be challenged. I just

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don't think that procedurally I'm allowed to do so here. If Your Honors tell me I may --

QUESTION: Well, not if you haven't raised it at all, but I must confess I'm puzzled as to why no one has --

MS. LASCHER: It is actually --

QUESTION: -- Especially if it makes -- as you say, 90 percent of the murders are covered by your so-called, quote, special circumstances, they're not very special.

MS. LASCHER: It is actually raised in Mr. Gillingham's brief, I believe, at least noted in his brief and in the amicus curiae brief of the California Appellate Project, the breadth of those special circumstances. It's not a secret subject in California. It's simply that it is not within the grant of certiorari in this case.

QUESTION: Well, a second question: is California's death penalty statute vague as written and applied and under violation of Stringer?

MS. LASCHER: I think -- I think it is, Your Honor. I think it's vague because the special circumstances are so broad, and I also think it's vague even if the Court held that that adequately defines the crime.

Because once you tell the jury that it can make

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the decision between life and death based on the circumstances of the crime and you don't tell the jury what the word "aggravating" means and you don't tell the jury what the word "mitigating" means and you don't tell the jury how to tell whether the circumstances are aggravating or mitigating, obviously the jury's already considering the circumstances of the crime. But when it starts piling things up and weighing them, putting them in a balancing process, the circumstances of the crime is always going to be a factor in favor of the prosecution, because it always exists. And if that were all it took for the jury to make the determination, the State wouldn't need to list it as a factor.

One way to solve -- save the California statute would be to eliminate factor (a) and then to label the other factors as aggravating or mitigating to the -- at least to the extent that's possible.

I think the main point that I want to leave with the Court is that -- one I stated before, if the jury -- if juries come to different decisions based on their different reactions to the facts of the case, it's inevitable or at least it's understandable. But if they do it because the law purports to give them guidance but in fact misguides them, that is unconstitutional.

QUESTION: Thank you, Ms. Lascher.

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Mr. Prahl, we'll hear from you.

ORAL ARGUMENT OF WILLIAM GEORGE PRAHL

ON BEHALF OF THE RESPONDENT

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

The key to a resolution of the issue before this Court was explored during a series of questions to Mr. Gillingham posed by Justice Souter dealing with the differences between the Cal -- between California's unique death penalty statute and that of the Mississippi statute at issue in this Court's Stringer case.

It's critical to an understanding of the case before you that you understand -- that the fundamental difference between these two statutes is examined. In Mississippi, the narrowing factor is found at the penalty trial and plays a dual role. It not only -- the aggravating circumstance not only narrows -- the propositional aggravating circumstance not only narrows, but it also plays a role within the jury's sentencing determination.

In California, the special circumstances are found during the guilt phase of the trial. These are the narrowing factors that make the defendant death-eligible. Unlike Mississippi, in California when a defendant's penalty trial begins, he is completely and fully and

finally death-eligible. This is at the start of the penalty trial. This is a significant difference.

Like the aggravating circumstances, as they're called, in Georgia, the special circumstances in California, these narrowing factors virtually disappear at the sentencing phase, and instead the jury is told at the sentencing phase to consider, take into account, and be guided by a number of relevant factors on the issue that's before the jury at that time, whether death is the appropriate punishment.

QUESTION: General Prahl, perhaps I shouldn't take your time with this, but I do want you -- at the end of the guilt phase these become death-eligible if any one of the circumstances have been found.

MR. PRAHL: That's correct, Your Honor.

QUESTION: Am I -- do I read correctly circumstance 3, that if he's found guilty of two second degree murder offenses, he's death eligible?

MR. PRAHL: No, Your Honor, that would not be correct. That's one point we did want to clarify. This notion about the -- while it's not at issue here, I think it deserves a comment, and that is, for example, ordinary premeditated deliberate first degree murder, premeditation and deliberation, first degree murder, is not a special circumstance in California which makes the defendant

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death-eligible.

So what a lot of people would regard as the most -- one of the more serious forms of first degree murder, premeditation and deliberation, in the absence of the commission of a felony, in absence of one of the other enumerated factors, just premeditation and deliberation alone is not enough to make a defendant death-eligible. Second degree murder, for example, the whole category of second degree murder, a number of felony murders other than felony murders --

QUESTION: The third circumstance is the defendant has -- oh, has in this proceeding been convicted of one -- of more than one offense of murder in the first or second degree. That doesn't mean that if he's convicted of two second degree murders at the same time --

MR. PRAHL: Oh, a multiple murder in the same proceeding, yes, Your Honor, that's a multiple murder.

QUESTION: Two second degree, I see, I get it.

MR. PRAHL: That's a multiple murder. That's if you killed more than one person within this indictment.

QUESTION: But it had -- two second degree murders in the same proceeding would make him death-eligible.

MR. PRAHL: Yes, Your Honor. But, again, a number of felony murders, absent the felony murder -- the

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felony specified in our statute in the special circumstance, a number of those are -- I would seriously dispute -- I don't have the figures here because we were -- we were never told that we were going to be discussing the eligibility factors, but in close to 17 or 18 years of working with our death penalty statute, we have slightly more than 400 convictions. So if we're talking about 90 percent of the murders being death-eligible, those numbers just don't work out in my mind.

I mean just on a priori sense, that's just not even close. We have so many more murders than that in California that it's --

QUESTION: And how many do you have on death row, Mr. Prahl?

MR. PRAHL: Right now we have a little over 400, I believe, in total. We have approximately 200 and some cases that would be affected directly by the decision in this particular case.

QUESTION: Yes, but is it not true -- just, again, I realize that you didn't want to spend your time on this, but is it not true that there could be murder cases which if the prosecutor elected to allege in the indictment a special circumstance, that are not actually tried as capital cases?

MR. PRAHL: Pardon me, Your Honor?

QUESTION: I'm not making myself clear. Are there not murder cases in which the facts might come within a special circumstance, but in which the prosecutor did not seek the death penalty or allege the special circumstance.

MR. PRAHL: Oh, certainly, Your Honor. I mean, again, the prosecutor is making a -- not only a statutory -- taking a statutory look at a case, but he's also looking at it from a practical sense --

QUESTION: Right.

MR. PRAHL: As to whether or not he has basically the horses to pull the wagon, and if they're not there he's not going to charge it.

California is not arguing in this case that vagueness or overbreadth has any role in the eligibility phase of a death penalty case. However, this Court has consistently applied different rules to the sentencing phase of a capital case. At this stage of the proceedings, the inquiry may be far-reaching and actually should involve a myriad of factors relevant to the question of whether death is the appropriate punishment. The two phases of a case are simply different.

And California's -- California is actually a hybrid statute. It's unfair to characterize California as

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a weighing State, as that term has come to be -- or as that term has been adopted as a term of art within this Court's Eighth Amendment jurisprudence. California -- indeed, this Court has observed on a number of occasions that basically whatever statutory scheme is involved, be it Texas, be it Georgia, be it Louisiana, whatever State, basically when it gets right down to it, the juries weigh, the juries consider the facts -- the evidence that's before them on this very important question of life or death.

QUESTION: So, given that explanation, could California add to one of the factors for the jury to consider at the sentencing phase whether or not the murder was heinous, atrocious, and cruel?

MR. PRAHL: California, in fact, has heinous, atrocious, and cruel within its statutory scheme. But, again, heinous, atrocious, and cruel is a special circumstance in California that's basically been judicially declared invalid by the California Supreme Court.

QUESTION: But my question is could it be added at the sentencing phase?

MR. PRAHL: I don't think so, Your Honor. The -- theoretically it might be possible to do it, but, again, the nature of heinous, atrocious, and cruel already

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comes in under factor (a), which are the circumstances of the offense. In other words, the circumstances of the offense --

QUESTION: Well, suppose California just added this phrase to the considerations that the jury has in front of it when it is in the sentencing phase?

MR. PRAHL: It wouldn't -- it wouldn't be consistent with California's statutory scheme.

QUESTION: But I'm -- why not -- why is that?

MR. PRAHL: Because California does not have, as Justice Souter pointed out, what are called propositional circumstances or propositional sentencing factors. California asks the jury -- and, in fact, that's another point that I think I should clarify here. Mr. --

QUESTION: Well, California -- go ahead, please.

MR. PRAHL: Mr. Gillingham indicated, for example, that in practice all of the factors except the last one, factor (k), the extenuating evidence, character, background material, are in fact aggravating. That's simply not the case. That's not the way the jury is instructed, nor is it, in fact, the case the way either of these two cases was argued.

I think you have to take a good, long look at how these cases were argued. Age, for example, in this case -- in neither case was age presented as an

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aggravating circumstance. Age was argued in Proctor -- in fact, age was acknowledged by the prosecutor in Proctor to be a mitigating factor.

Look at the argument closely in the Tuilaepa case. In Tuilaepa the prosecutor argued first and argued only once. He was not able to rebut the defense argument. He was faced with a situation of anticipating what the defense counsel would argue and trying to deal with that evidence or that material in his own argument. His argument was not that age should be considered by the jury to be an aggravating circumstance or an aggravating sentencing factor. What he argued was look at Mr. Tuilaepa's background and decide whether this rises to the level of a mitigating factor.

He argued against the jury's consideration of this as a mitigating factor, and certainly he has a right to do that. These can't be so all or nothing at all that the prosecution can't even simply comment on whether they're legitimately considered as mitigation. The prosecutor never argued in Tuilaepa -- and certainly in Proctor he acknowledged that it was a mitigating factor.

And that goes to what I think Justice Souter -- the point that was made during the questions you asked to Mr. Gillingham regarding the nature of the sentencing factors in California. They basically are factors that

guide -- allow the jury to consider and take into account. They're not the kinds of things on which the jury is asked to make a finding and then balance that finding against findings on other evidence.

The question of whether death is the -- or the question on whether there are limits to the types of evidence which may be presented --

QUESTION: Well, Mr. Prahl, some of them, the thrust are clear, The presence or absence of a prior felony conviction; the presence of a felony conviction can't be considered in any way, shape, or form mitigating, can it?

MR. PRAHL: No, Your Honor, but certainly the absence of -- and that was, in fact, the case in the Proctor situation. I think -- are you referring to factor (c)?

QUESTION: Uh-hum.

MR. PRAHL: That factor, I believe, was acknowledged -- well, in Proctor, I'm sorry, he did have a prior felony conviction. But as to (b), the presence or absence of evidence of prior violent conduct, it was acknowledged by the prosecutor to be mitigating evidence. It's consistently argued that the absence, for example, of prior felony conduct can be -- can be a mitigating factor.

In other words, prior to the California Supreme

Court's decision in Davenport, there was some confusion about whether the absence of a factor could be argued for the reverse of the proposition. However, once Davenport was decided by the California Supreme Court after the Proctor case -- following Proctor, the California Supreme Court held that certain of these factors, as a matter of State law, should be considered only in mitigation. So Mr. Gillingham's statement that, in fact, all of the factors except for (k) are aggravation is simply not true under California law. They're not true under the facts of these cases and they're not true as a matter of California law.

California's decision on how to handle these, though, is a matter of State law. The Constitution does not limit - neither the Eighth Amendment nor the Fourteenth Amendment limits how the States can allow the jury to consider this evidence. Yes.

QUESTION: Are you saying all these factors are -- as a matter of State law must be mitigating?

MR. PRAHL: No, Your Honor. I'm saying factors --

QUESTION: Oh, I'm sorry, just the youth and the circumstances -- not the circumstances of the crime.

MR. PRAHL: Oh, no, Your Honor, the circumstances of the crime can be either mitigating or

aggravating.

QUESTION: I see.

MR. PRAHL: As can factor (b) or (c). If you look at the appendix to the Proctor brief on page --

QUESTION: So it's only age that you're saying can -- must be mitigating. I may have failed to follow part of your argument. I'm sorry.

MR. PRAHL: I'll see if I can go through these. (A), (b), and (c) can either be mitigating or aggravating.

QUESTION: Right.

MR. PRAHL: And the jury is specifically told that. (D), (e), (f), (g), and (h) under State law are all mitigating. They have to be mitigating -- they have to be considered mitigating. (I), age, can be either. (J) is generally regarded to be -- or it must be mitigating, and (k) is only mitigating by its very terms. So a majority of the -- of the -- the largest number of the factors are essentially limited by State law or by their very terms to mitigation. Now, Mr. Gillingham --

QUESTION: I'm afraid I'm not quite I understand. As to (e), for instance, "whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act," it seems to me that could be aggravating or mitigating. If he consented and he was an active participant, that's aggravating. If

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he didn't, that's mitigating. Well, why is it only -- and I thought I understood you to say it's only mitigating.

MR. PRAHL: Under the California Supreme Court's decision in People v. Davenport, the California Supreme Court has decided -- as a matter of State law, not based on any Federal constitutional interpretation, but just as a matter of supervision over the State's statute -- that those factors would only be mitigating.

And that's what's led to what's called Davenport error. Davenport error in California is where the prosecutor suggests that the absence of a mitigating factor makes it aggravating. That in the absence of mitigation -- the fact that, for example, whether or not the victim was a participant. Well, if it shows that the victim was not a participant, that would seem to aggravate.

And we certainly wish Your Honor had participated in the Davenport decision, because I think we might have a different rule in California. But, in fact, the California Supreme Court, out of an abundance of caution and in the interests of fairness, has decided to limit certain of these factors.

QUESTION: How does this work in practice? Is the prosecuting attorney instructed that he cannot argue to the jury that the defendant was a participant in the

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crime, that would be Davenport error?

MR. PRAHL: No, whether the victim was a participant, Your Honor.

QUESTION: Pardon me, whether the victim was a participant. He -- the prosecutor cannot argue that.

MR. PRAHL: He -- that factor -- yes, Your Honor, the prosecutor -- and that would -- and the defense counsel would -- if there were an argument along those lines, defense counsel would object and the jury -- or the judge would instruct the jury accordingly. But that's since Davenport.

Now, it's important to realize that Davenport was -- had not been decided when the Proctor case went to trial. But there is an instruction in the superior court, Judge Grossfeld, that handled the retrial, in his wisdom specifically anticipated the Davenport decision and specifically told the jury if -- this is from the Proctor Joint Appendix at page 80.

"If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor, you must be satisfied beyond a reasonable doubt that the factor does exist and that it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the

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factor to be aggravating."

QUESTION: Mr. Prahl, going back to factor (e) for a moment -- I take it these are supposed to state things that might be expected to occur in more than one case. What would be a prototypical example of a case where the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act?

MR. PRAHL: Oh, that's probably a situation where there's some type of drug deal where there's two or more people involved in some sort of criminal activity and something goes wrong. It's -- all of these factors are anticipatory in the sense that they -- what they have tried to do is anticipate the circumstances that may arise in a capital case, to give the jury some kind of guidance.

When California's -- the legislative history of the California statute is interesting in that California basically adopted this format in 1977 as a result of this Court's 1976 -- the five cases decided in 1976. California's statutory scheme is basically a hybrid. If you want to have to -- if you have to give it a name, we'd look through -- and you can best characterize California not as a weighing State, not as a special issue State like Texas; California is more of a guiding State.

What we tried -- what California tried to do, and it's fairly clear from the legislative history, is

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adopt the best factors or the best aspects of the Georgia statute and the Texas statute and the Florida statute. There are comparisons all through both this Court's prior cases and through the California Supreme Court's prior cases where there are allusions, for example, to the somewhat analogous factors of the California statute that relate to various other State schemes.

California tried to draw on what this Court had said were the constitutional aspects of a death penalty statute in arriving at its own hybrid system which, again, places the special circumstance determination, the eligibility determination in the guilt phrase, begins with a penalty phase where the defendant is completely death-eligible, and then gives the jury something to look at in arriving at that decision.

I agree with Your Honor. I agree with Justice Kennedy that I think it's remarkable that defense counsel would actually prefer a system like Georgia as opposed to a California system. If you look at, for example, the argument in the Proctor case, in Proctor under circumstance (a) which the defendant's -- which is really the heart of what's at issue here. Age is really not at issue here, because in Proctor the prosecutor agreed and in Tuilaepa he didn't argue that it was aggravating, he argued against a finding of mitigation.

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I can -- I'll talk a little bit about (b) in a moment. Factor (b) is really not at issue in Proctor. The prosecutor acknowledged in the Proctor case that (b) was a mitigating factor, that the lack of any prior violent conduct by Mr. Proctor was not a factor in aggravation, it was mitigating. (B) is only raised by petitioner Tuilaepa, and we -- I can talk about that in just a moment.

But it's (a) that is common to both of these cases and is really the heart of what's being challenged as being too vague in these two cases. If you look at (a) in both cases, you'll see that defendant -- or Mr. Proctor, petitioner Proctor, in fact argued very strenuously that under (a) there were factors -- or circumstances of this offense that mitigated his culpability and were things that the jury should consider in arriving at a penalty other than death.

What were those factors? He argued that if the victim had been -- had predeceased the torture, if she had died before he stabbed her around her breasts and around her neck, before he beat her and before he raped her, if she died -- if she was dead or unconscious, well she didn't suffer all that pain. That's not an aggravating factor then, that's mitigating, he was kind enough to have killed her first. If --

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QUESTION: Any -- are you aware of any death case in which the defendant has argued that the circumstances you just described were mitigating? I can understand arguing they're not aggravating because she's dead, but I've never heard anyone argue that scenario would be a mitigating circumstance.

MR. PRAHL: The defendant in the -- that was the argument in Proctor. He argued that they -- that they certainly weren't aggravating -- that they didn't rise to the level of aggravation.

QUESTION: Well, I understand that, but then he also affirmatively argued that that scenario is mitigating?

MR. PRAHL: No. He did argue, with regard to mitigation, the possible involvement of the other young man involved in the case. He said, you're not really sure, you can't really be 100 percent positive, that Mr. Proctor was the one who made that terrible bloody palmprint in the bedroom, or he's not the one that did it while he was killing her. But he argued that the possibility of Mr. Manley's involvement in the case was sufficient to rise to the level -- or at least, again, take this out of the area of an aggravating factor.

There were substantial arguments made under factor (a) in the Proctor case regarding the circumstances

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of the offense. And in Tuilaepa, even that case, it's interesting to see how the defense attorney argued factor (a) there. He argued that Mr. Tuilaepa had no intention of killing anyone when he went into that tavern that afternoon; that it's only because one of the patrons started to fight with his codefendant that Mr. Tuilaepa was drawn into this to kill. I think there's a reference in that argument to the fact that Mr. Tuilaepa only brought a .22 to the confrontation rather than an aggressive weapon like an assault rifle or a .357 Magnum.

Well, that's clearly -- I mean there's -- that's not an aggravating -- that doesn't rise to the level of aggravation. There's --

QUESTION: You'd say that's mitigating?

MR. PRAHL: Pardon me, Your Honor?

QUESTION: You'd say that's mitigating evidence.

MR. PRAHL: Well, I think you can attempt to characterize it -- it's fair to characterize that as an attempt to lessen the aggravating impact of it and to draw it more to the mitigating side of the question. I mean, it's -- this is not a question where the -- that the circumstances of the offense all -- especially (a), that it all pulls in one direction. That's just simply not true, and it's not true in either of these cases.

Now, there are always going to be circumstances

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of the offense, that's true, but those are the factors which this Court has consistently demanded -- not just suggested but demanded be placed before the jury at the sentencing phase. So California certainly can't be faulted for allowing the jury to basically consider, take into account, and be guided by these factors at the sentencing phase.

QUESTION: Perhaps this is repeating what Justice Kennedy asked, but I want to be sure. Supposing in that circumstance (a), they said the circumstances of the crime, so forth and so on, including whether or not the crime was cruel, heinous, and atrocious, would that still be valid?

MR. PRAHL: Well, again, that changes the basic nature of the California statute. It would be -- it would not be in keeping -- I don't know whether that would be -- whether that would be valid or not. Again, we have heinous, atrocious, and cruel within our special circumstances and we have judicially declared that to be invalid in California and it's no longer used.

Now, if we were to duplicate that within the aggravating factors, California has held, as a matter of State law, that we are limited to only those sentencing factors that are mentioned in the statute. There are no nonstatutory aggravating factors, although the defendant

can argue anything in response in mitigation.

So the same limitation is not applied to the defense that's applied to the prosection. The prosecution cannot argue nonstatutory aggravating factors beyond those that are -- anything that's listed in the statute. The defense can argue anything it wants, in addition to the factors listed here.

Again, California has gone out of its way and has vigorously tried to meet the concerns expressed by this Court and the Eighth Amendment to avoid arbitrary and capricious findings of death. And we feel very strongly that California's statute -- that the hybrid nature of it is especially geared to allowing for what this Court has called an individualized penalty determination where you look at both the nature of the offense and the nature of the offender.

Again, these factors are distinguishable, clearly distinguishable from those at issue in Stringer and those earlier cases which dealt with the so-called weighing States. In that sense, California is not a weighing State. It's -- the California penalty determination is much -- if it's closer to any State, it's closer to Georgia in that the eligibility determination is made early on and then basically drops away and then the jury has a guided amount of discretion to look at certain

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relevant factors.

Now, the California Supreme Court in its Bacigalupo two decision, following this Court's remand of the original Bacigalupo case, addressed specifically, as this Court had asked the Mississippi Court to do in Stringer -- and I believe there was an earlier certified question in Zant.

The Court has specifically addressed the issues about the nature of the California statute, and has found that California is not a weighing State within the meaning of this Court -- as that term is used in Stringer. The California Supreme Court went on to say, however, that there are certain limitations that do apply to the sentencing phase, that they should be relevant and specific.

And the court -- the California Supreme Court announced that as an Eighth Amendment test. We see that as an unwarranted expansion of this Court's Eighth Amendment jurisprudence. The Eighth Amendment now has two basic tests that have been in place for a number of years: the death penalty eligibility should be narrowed, and the defendant should be able to present any mitigating evidence and the jury should be able to act on that evidence.

The relevance and specificity requirements for

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sentencing factors, as the California Supreme Court announced them, are much closer to this Court's Fourteenth Amendment types of questions, and I think that's what the Delaware v. Dawson basically held, that when you look at certain types of evidence that is introduced at a penalty phase, that what you're really looking at when you get right down to relevance is a question of Fourteenth Amendment notice and basic understanding, not an Eighth Amendment consideration.

And to expand this Court's Eighth Amendment jurisprudence beyond where it has existed for years we feel is unwarranted since that is basically covered already within this Court's -- or within the Fourteenth Amendment's proscription against irrelevant considerations. I think Delaware v. Dawson adequately addresses this question, and certainly the relevance criteria, which this Court has applied on several occasions, adequately addresses that.

And although we don't basically have a problem with the semantics of the test announced in Bacigalupo two, we do have some concern over the constitutional underpinning of that test. Again, that's the California Supreme Court's determination and this Court is here to look at that and decide whether or not there is a basis for expanding the Eighth Amendment.

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Unless this Court has any further questions, we're prepared to submit the matter. We feel very strongly, again, that if the Court -- with the Court's understanding of the special and unique nature of the California statute, its hybrid character, the roles of the special circumstances in California which are basically not challenged here, and the relevance and materiality of those sentencing factors, that the defendants in this case received a fair trial; that the material that the juries considered was not vague or overbroad, it was directed to the very issue before them; and we ask this Court to affirm both of the decisions by the California Supreme Court.

QUESTION: Thank you, Mr. Prahl.

MR. PRAHL: Thank you.

QUESTION: Petitioners have 2 minutes remaining.

REBUTTAL ARGUMENT OF HOWARD W. GILLINGHAM
ON BEHALF OF THE PETITIONER TUILAEPA

MR. GILLINGHAM: Justice Scalia, you smiled when there was a reference to the possibility of there being a mitigator, and indeed I've seen juries almost do the same thing. Because what happens -- and we have it in Proctor's case -- is that we have these factors put up there by the State of California, and it's not as counsel paints it. If he paints it -- if it's that way in

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California, this is a barn and not a courtroom, in the sense that it is not what it appears to be.

The case -- the Proctor court itself said the jurors would have understood that they had to weigh these factors, aggravating and mitigating. Let's talk about what happened in the courtroom. The jury was told they had to weigh these factors and the man stands here and says it's not a weighing State.

If this Court is prepared -- and I don't think it is -- to turn its back on Stringer, on Maynard, my God, to say that these factors are not used. Age, he only argued age; he didn't argue it as a aggravator. He was old enough to plan and execute a robbery, he was sophisticated enough to execute a robbery, and a human being, a rifle, squeezed the trigger, hunk of lead tore through flesh. So when you think about the defendant's age, think about what he did. So even age can creep up into circumstances of the crime. Oh, he wasn't arguing it in aggravation, was he. Ladies and gentlemen of the jury, I wonder what they would think. They would think it was aggravating, and they think it every time I've tried the case, Your Honor.

The California Supreme Court itself, Justice Kennedy, has identified (d), (e), (f), (g), and (h) as only being mitigating.

Funny thing, Justice Scalia, they don't tell the jury. The jury doesn't get told. It's a facade. I'm embarrassed to say that. I don't say that with hostility. It's a facade.

The California Supreme Court says those factors, whatever one things of the judgment, can only be mitigating, but we don't tell the ladies and gentlemen of the jury, and the prosecutor is able to stand up -- I've been there time and time again -- there's no evidence that the victim consented. He did it in Proctor. Do you think Mrs. Stendal consented to being raped and stabbed? Now, ladies and gentlemen, there's no evidence of that. Ladies and gentlemen, there's no evidence of mental disease. You saw what Mr. Tuilaepa did, ladies and gentlemen.

QUESTION: That's just sort of saying that you can argue against the existing of a mitigating factor and always make it sound like an aggravating factor.

MR. GILLINGHAM: Your Honor --

QUESTION: I mean, are you going to say this defendant is too young to appreciate this crime. No way this defendant is too young. I mean you're really just denying the mitigating effect, but you can make it sound aggravating, I suppose.

MR. GILLINGHAM: Your Honor, I'm going back to a courtroom --

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CHIEF JUSTICE REHNQUIST: If you think there's a question, answer it, but otherwise your time has expired, Mr. Gillingham.

MR. GILLINGHAM: I didn't.

CHIEF JUSTICE REHNQUIST: Okay, then the case is submitted. Thank you.

(Whereupon, at 2:05 p.m., the case in the above-entitled matter was submitted.)

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PAUL PALALAUA TUILAEPA, Petitioner v. CALIFORNIA and WILLIAM ARNOLD PROCTOR, Petitioner v. CALIFORNIA

CASE NO.: 93-5131 and 93-5161
and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)