ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JAMES SAFFLE, WARDEN, ET AL., Petitioners V. ROBYN LEROY PARKS

CASE NO: 88-1264

PLACE: WASHINGTON, D.C.

DATE: November 1, 1989

PAGES: 1 - 41

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES SAFFLE, WARDEN, ET. AL., :

Petitioners, :

v. : No. 88-1264

ROBYN LEROY PARKS, :

Respondent. :

Washington, D.C.

Wednesday, November 1, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

ROBERT A. NANCE, ESQ., Assistant Attorney General of Oklahoma, Oklahoma City, Oklahoma; on behalf of Petitioners.

VIVIAN BERGER, ESQ., New York, New York; on behalf of Respondent.

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PROCEEDINGS

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-1264, James Saffle versus Robin Leroy Parks.

Mr. Nance, you may proceed.

ORAL ARGUMENT OF ROBERT A. NANCE, ESQ.

ON BEHALF OF PETITIONERS

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

In this case we ask the Court to decide whether the state may prohibit jury sympathy in capital sentencing or, conversely, whether the Eighth Amendment requires defendants be permitted an appeal to the sympathy of the jury.

Because we believe that a sympathy plea is not constitutionally required, we ask this Court to reverse the judgment of the court of appeals.

The respondent was convicted in the shooting murder of a gas station attendant in Oklahoma City. During the sentencing phase of the trial, the court told the jury that it must consider eight minimum mitigating circumstances, and, in addition, that the jury should consider any other or additional mitigating circumstances.

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if any, that they may find from the evidence to exist in the case.

Thus, consistent with Oklahoma law, this instruction to the jury left the jury's consideration of mitigating evidence wide open, based upon the testimony at trial.

The prosecutor discussed in his closing each of the eight minimum mitigating circumstances in turn and told the jury that they had to consider them. In addition, the prosecutor told the jury that they could consider anything else they found in the record that might outweigh the aggravating circumstances in the case. This much we assume is unobjectionable.

QUESTION: Mr. Nance, the case originated -- the case that we're hearing -- as a habeas review petition --

MR. NANCE: It did --

QUESTION: -- collateral review?

MR. NANCE: It did, Your Honor.

QUESTION: Do you think, then, that we have to determine whether the rule sought would be applied retroactively, as suggested in Teague?

MR. NANCE: Your Honor, I've thought some about that, and, of course, we did not consider that in the court below. But under Teague, before adopting the rule that the respondent asserts, I think you need to

determine, yes, whether as a new rule and whether it is dictated by --

QUESTION: Yes. And what's your position on that? I know it isn't discussed in the briefs, and obviously Teague came out only last term. But since it's something that we may have to look at, I'd be interested in knowing your views.

MR. NANCE: Your Honor, if you feel that you need to look at it, I think Teague would compel the conclusion that the rule advanced by the court of appeals is a new rule because that rule was not dictated by precedent in force at the time Mr. Parks' conviction became final.

QUESTION: And why do you say that? On what do you rely in making that assertion?

MR. NANCE: Your Honor, I'm unaware of any authority from this court that existed when his -- Mr. Parks' conviction became final which would have prohibited, or which would have required, a sympathy plea that would have barred the state -- put on the state essentially the duty of permitting a sympathy plea.

QUESTION: Well, I suppose the argument on the other side is that Locket and Eddings were already on the books and they require that you -- that the jury be permitted to consider and give weight to evidence in

mitigation. Now, does the anti-sympathy instruction negate that, do you suppose?

MR. NANCE: I don't think the anti-sympathy instruction negates the consideration of mitigating evidence. Clearly the rule was that the jury had to consider the mitigating evidence.

I don't think until the California versus Brown there was any hint from this Court that sympathy had to be a part of that consideration. And, of course, I don't think California versus Brown compels the conclusion that sympathy is required anyway.

QUESTION: California against Brown surely said that an instruction talking about mere sympathy was perfectly permissible, didn't it?

MR. NANCE: That's entirely correct, and if the Court were to reach a rule in this case that sympathy -- a sympathy plea was required, as the court of appeals felt it was, I think that would be a new rule, because it wouldn't be dictated by any precedent that existed when Mr. Parks' conviction --

QUESTION: Well, Mr. Nance, is it fair to say that the court of appeals said the sympathy instruction is required, or did they merely say that an anti-sympathy instruction is prohibited?

MR. NANCE: I think the latter is the more

precise formulation of what they said, Your Honor.

QUESTION: And if it was prohibited, the reason for prohibiting it is that they interpreted, whether rightly or wrongly, Locket as saying an instruction which interferes with the jury's consideration of all mitigating circumstances is invalid.

So, if they're right, it's because they correctly interpreted Lockett. If they're wrong, it's because they incorrectly interpreted Lockett. Isn't that correct?

MR. NANCE: Well, Mills more than Lockett. I mean, I'd concede Lockett says you have to consider mitigating evidence.

QUESTION: And it -- Lockett invalidated an instruction which prohibited the consideration of all mitigating circumstances.

MR. NANCE: That's correct.

QUESTION: And that's what this court thought it was doing, was invalidating an instruction which interfered with the consideration of mitigating instruction. It may have been wrong, I'm not saying that. But if they're right, it's because they correctly interpreted a case that had been on the books for many years.

MR. NANCE: If they're right --

QUESTION: Yes.

MR. NANCE: -- I think that would be correct, and --

QUESTION: If they're right. But, of course, I'm not -- and I understand you've, of course, argued to the contrary on the merits. But I think if it's -- if they're right, it's not a new rule. That's all.

MR. NANCE: Well, I -- I may need to back up on that, Your Honor, because I don't think Lockett talked about the emotional state or the sympathy element of consideration. And I think that the rule the court of appeals in this case announced went beyond Lockett. I'd still think it would be a new rule.

QUESTION: If they went beyond Lockett, obviously it is. If it's within Lockett, obviously it's not.

MR. NANCE: I think I'd have to agree with that.

QUESTION: So the question really is whether it's within Lockett or beyond Lockett.

MR. NANCE: And -- and -- yes. And, of course, our view is they went beyond Lockett.

QUESTION: What do you mean within or beyond? Are you saying the only new rules are wrong rules?

MR. NANCE: No, Your Honor, I don't.

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QUESTION: The -- the only time -- you're saying no lower court can ever -- can ever fashion a new rule because a lower court would only be, as you say or as you acknowledged, interpreting Lockett? Is there no difference between interpreting and projecting?

MR. NANCE: I don't know if there is a difference, Your Honor, between interpreting and projecting. I think the court of appeals in this case put upon the state a burden that did not exist previously and that was to permit a sympathy plea to the jury. That's why I say this would be a new rule.

QUESTION: Do you think any -- any interpretation of Lockett that is a valid interpretation can be said to be something dictated by Lockett?

MR. NANCE: Well, if -- yes. If it is -- If it is a valid interpretation of Lockett, I think it's dictated by Lockett. I don't think that this rule is dictated by Lockett. QUESTION: So the only reason you say it's new then is because you think it's wrong? If you thought it was right, it wouldn't be new.

MR. NANCE: Well, no, Your Honor. I think even if I thought it were right, it would be a new -- it would be a new rule, it would impose a new duty on the states.

QUESTION: I see. But not if we base it on Lockett? We would have to say we're inventing a new rule.

We couldn't say, well, you know, Lockett has this general objective and we think this sort of furthers that so we think it really follows from Lockett. If we said that, it's not a new rule. You really expect us to pluck a new rule out of nowhere and not rely on any prior case?

MR. NANCE: Oh, no.

QUESTION: I mean, if that's all that Teague means, and you evidently think it is, then it really doesn't mean very much.

MR. NANCE: No, I think to be a new rule it has to be -- it has to be something that was not dictated.

QUESTION: But you say anything that could be projected from a previous case is dictated by it even though a reasonable mind might project five or six different things and quite contradictory.

MR. NANCE: No, I don't think I --

QUESTION: All five are dictated by it?

MR. NANCE: No. I think cases like Eddings and Skipper were dictated by Lockett because they dealt with the consideration, the fact of the consideration of mitigating evidence. I think this case is not dictated by Lockett because it deals with the manner in which that evidence was considered, which is essentially sympathetically, and I don't see that as being dictated by Lockett.

QUESTION: Well, you really haven't come here prepared to argue the Teague point and it's probably not fair to press you on it.

QUESTION: Your position on that, I take it, would be true under Teague whether this Court were to agree with the Court of Appeals for the Tenth Circuit on the merits or disagree. There is a category of cases, I presume, under Teague where even though this Court ends up saying, yes, the Eighth Amendment does require the state courts to do such and such a thing, nonetheless, it will also say that this could not have -- this was not dictated by prior cases under Teague. MR. NANCE: That's correct. That would be my position, Your Honor. Right or wrong, I don't see that this was dictated by Lockett, the court of appeals rule.

The jury in this case -- what the court of appeals found unconstitutional about this instruction was that portion, of course, that said that you shall not let any influence of sympathy, sentiment, passion or prejudice enter into your deliberation or any other arbitrary factor.

That instruction went on to say that you should discharge your duties impartially, conscientiously and faithfully under your oaths and return such a verdict as is warranted by the evidence when measured by these

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instructions.

We think that unlike the cases in which this Court has struck down death penalties based upon questions of mitigating evidence, this instruction, either from the court or from the prosecutor, did not construct any artificial barrier to the fact of the consideration of mitigating evidence. The respondent was completely free to introduce any mitigating evidence he chose. The jury heard that evidence, and was told to consider it.

We don't think that this instruction can fairly be considered as one which would trick the jury into not considering the mitigating evidence.

As I say, by its terms the instruction did not affect the fact of consideration or weighing or reporting to the court, as was the case in Mills or in Penry, but merely dealt with the manner in which the evidence should be weighed. We think a reasonable juror in this case would have no difficulty in interpreting the language challenged. They would understand it clearly and that understanding would be this: the jury had a duty to consider the evidence both aggravating and mitigating conscientiously, impartially and faithfully, and not with sympathy, sentiment, passion, prejudice, or any other arbitrary emotional state.

We think this instruction resulted in a sober

and conscientious exercise of the duty to weigh the evidence and to reach a sentence, and that the instruction told the jury how to consider that evidence.

We think the instruction told the jury how to consider the evidence in a way which is entirely consistent with this Court's law on rational and reliable capital sentencing based upon objective factors.

If we must go beyond the specific language challenged, we believe that Instruction No.6 on the eight minimum mitigating circumstances and the wide open catchall provision of that instruction adequately informed the jury of its obligation to consider mitigating evidence. Thus, we believe the constitutional prerequisite which is consideration of the evidence rather than sympathy was met in this case.

The court has said, and I think said correctly, that capital sentencing should be a reasoned, moral response to the crime and to the criminal. In reaching that reasoned, moral response, the sentencing jury should hear whatever element the defendant might advance from his character or his record or the circumstances of the offense which might reduce his moral culpability or his guilt, which should be the focus in sentencing.

This produces a sentencing procedure which is sensible to the uniqueness of the individual and permits

the jury to know whatever the defendant wants to offer about himself or his background or the crime. This sort of sentencing procedure which is, I think, advanced by this instruction, helps eliminate the caprice or emotion which the court has struck down on one extreme, or helps avoid a mechanistic or unreasoning automatic death sentence which the court has struck down on the other hand.

The respondent could and did submit mitigating evidence in this case. His father testified that he was a happy-go-lucky sort of fellow, that he had had a troubled home life growing up. The jury heard that without impediment from either the court or the prosecutor.

There is nothing in this record that we think leads us to believe fairly that the jury failed to consider that evidence. Nothing detracted from the consideration of that evidence. We merely submitted to that jury an instruction which diverted their consideration away from extraneous emotional factors and toward the evidence which had been submitted.

We think that emotional response to the evidence, which is what we understand sympathy to be, in no way contributes to the reasoned moral response that capital sentencing should be. We think that sympathy, as the court said in Brown, is among a catalog of things

which could improperly influence the sentence, and we need not have permitted the jury to consider it -- or, to employ it in its consideration of the evidence.

The court has said, and again I believe correctly, that sentencing should not be based on emotional factors which are wholly unrelated to the blameworthiness of the defendant. We want the jury to soberly consider that blameworthiness, the factors in aggravation and in mitigation, and come to a reasoned sentencing decision.

We think this instruction is proper in a case -- in a system of sentencing in which the punishment is directly related to the moral culpability or guilt of the defendant. We think it helped advance the reasoned moral response to the crime to the criminal, which should be the hallmark of capital sentencing, rather than an emotional response to the evidence. We think this case presents something of a fork in the road for the Court. The road, of course, leads to consideration of mitigating evidence and the sort of objective sentencing which this Court has sought in capital cases.

One fork in the road would invalidate death penalties which are otherwise complete and acceptable in their consideration of mitigating evidence. If the jury was not permitted to hear the sympathy plea, that fork in

the road increases the discretion of appellate courts to set aside death penalties if they find, as this court of appeals found, that the sentencing jury did not fully consider the evidence with the proper emotional or mental framework.

The second fork in the road, and we think the sounder course, would leave intact death penalties in which the jury was properly instructed and did in fact consider the mitigating evidence and, in which the state, as here, guided that consideration in a way that makes the sentencing decision more rational and reliable. Again, this instruction told the jury how to consider the evidence. The duty to consider mitigating evidence in this case was clear and unequivocable.

We think that only if the sympathy ploy is constitutionally required could this jury sentence be set aside.

We think the irony of all of this is that the court of appeals abandoned the protection for capital defendants which has been built into capital sentencing in the form of rational and reliable sentencing based upon objective factors which are plain in the record and open to sensible appellate review. Instead of taking that approach, the court of appeals said that the jury should be able to hear the evidence in the natural and

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significant way, which was sympathetically.

We think that, as the court said in Brown, sympathy is far more likely to cut against the defendant than for him.

We also think that in a sense, capital sentencing is not a natural proceeding for a lay jury. It's not something that they should do spontaneously and without direction. Quite the contrary. It's something unnatural in that this Court has said that their discretion should be guided and directed by the state. And we think properly so in this case. A natural --

QUESTION: On that approach, why don't you have judges make the sentence in Oklahoma?

MR. NANCE: I suppose we could do that, Your Honor, but --

QUESTION: Many states do, don't they?

MR. NANCE: I'm aware that they do, but it's just been our historical approach to permit jury sentencing in Oklahoma, and that's been our approach since long before this body of Eighth Amendment law evolved. But since we have chosen in Oklahoma to use jury sentencing, I think we can properly channel that discretion toward a more rational and reliable sentence.

We think the natural response to the evidence in sentencing would be more likely to give vent to the

community's outrage and concern over the crime than to somehow sympathize with the defendant.

We find nothing in this instruction which barred giving effect to the respondent's mitigating evidence. There was no external barrier to the jury's consideration of that mitigating evidence. There was no external barrier to the jury giving effect to that mitigating evidence.

Under these instructions, the jury had to consider the evidence, mitigating evidence, and simply weigh it conscientiously, faithfully, and soberly against the aggravating factor which they found. They were entirely free to do that and we find nothing in this record which indicates that they did not do it.

We think that only by getting into the mental and emotional status of the jury did the court of appeals find any reason whatsoever to set aside this jury's sentence.

The constitutional prerequisite, which is consideration of mitigating evidence, was fulfilled. This instruction contributed to rational and reliable sentencing based upon objective factors, and we believe is entirely appropriate.

We ask the Court to reject the invitation of the court of appeals to what we think would be more subjective

capital sentencing and to adhere to the sounder precedence requiring objective sentencing. We, therefore, ask the Court to reverse the judgment of the court of appeals.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nance.

Ms. Berger, we'll hear from you now.

ORAL ARGUMENT OF VIVIAN BERGER, ESQ.

ON BEHALF OF RESPONDENT

MS. BERGER: Mr. Chief Justice and may it please the Court:

The issue before you today, I believe, is a fairly narrow one. Whether reasonable jurors could have understood sympathy, as referred to in the anti-sympathy instruction in this case, and in related comments by the prosecutor, to be a proxy for respondent's mitigating evidence concerning his background and could thereby have believed, unlike the jurors in California versus Brown, that they could not give effect in their verdict to Mr. Parks' mitigating case.

Now, as the court of appeals majority clearly recognized -- and this I believe also was the tendency of Justice Stevens' remarks -- Mr. Parks asserts no constitutional right to a sympathetic or emotional jury. What he does assert under Woodson, Lockett, Eddings and their progeny is the entirely familiar claim upheld consistently by this Court of a right to a sentencer who

has not been precluded from considering as a mitigating factor any aspect of a defendant's background, character or record in addition to the circumstances of his offense that he proffers as a basis for a sentence less than death.

It is for that reason as well that we are not contending for a new rule in the sense of Teague. Mr. Parks' cutoff date, if you will, in certiorari was denied from his direct appeal; the judgment in the court of criminal appeals was January 17th, 1983.

Thus, for purposes relevant under Teague, it is noteworthy that Mr. Parks finds himself in the precise position as Mr. Penry who, of course, was also asserting a Lockett claim which the majority of this Court held was permissible to assert, not withstanding Teague.

In other words, Mr. Parks, like Mr. Penry, has the benefit of the decisions in Woodson and in Lockett and in Eddings, and those are the decisions that in fact support his claim.

I would only add in that respect, unless the Court wishes to discuss Teague further, that --

QUESTION: So, --

MS. BERGER: Yes, your --

QUESTION: -- Ms. Berger, you think that the rule sought by your client was dictated by precedent at

the time concerning this particular instruction?

MS. BERGER: Well, Your Honor, of course the answer to a question like that would always depend on how narrowly or broadly one frames the rule.

QUESTION: Exactly, and I think -- would you acknowledge that it was at least open to question whether an instruction like this is in violation of some concept expressed in Lockett and Eddings?

MS. BERGER: Well, with respect, Your Honor, I believe that virtually any issue that comes through the courts in these test cases, and certainly one that ends up in this Court, involves something that is open to question. You, of course, wrote --

QUESTION: Well, we have to do some -- some line-drawing. And certainly in California versus Brown, the Court upheld an anti-sympathy instruction.

MS. BERGER: Yes, Your Honor, but notably it did so. And I would believe in this line-drawing that the rationale for a decision is very important. That the whole rationale of California versus Brown flowed directly from the Woodson, Lockett, Eddings line of cases. That the --

QUESTION: Yes, but it concluded that that instruction didn't violate the Constitution.

MS. BERGER: That was because that instruction,

Your Honor, as read by the Court, simply precluded factually untethered sympathy and I believe certainly the majority opinion may explain, as of course does the dissent, that factually tethered sympathy under this long line of precedence would have to be considered.

QUESTION: Well, that isn't altogether clear that this instruction should be considered as untethered sympathy in any event.

MS. BERGER: Oh, yes.

QUESTION: The instruction goes on to say "or other arbitrary factor." It's clear that what the court had in mind was the purely arbitrary factors that it chose to list.

MS. BERGER: , with respect, what is more important than what the court had in mind -- and you may well be correct as to what the court had in mind -- is, of course, what a reasonable juror could understand. And it seems to me that in every respect deemed relevant in the court's opinion in the Brown case, this instruction differs in a way favoring our interpretation or certainly making our interpretation of what a juror could understand plausible, both in what it puts into the instruction and in what it omits.

What the instruction omitted here, which Chief Justice Rehnquist's opinion found so crucial, was the word

"mere sympathy" which certainly does tend to convey an arbitrariness like sentiment or passion or prejudice.

But not only did the instruction here not contain the word "mere," it very clearly equated sympathy with other arbitrary factors. In other words, it is not mere sympathy that is an arbitrary factor. It is all sympathy.

And while of course this Court may read the instruction as it will, I think it is interesting that, as far as I understand my opponent's argument, he concedes our reading at least as a plausible reading of the instruction.

QUESTION: Had California versus Brown even been decided when this conviction became final?

MS. BERGER: No, Your Honor.

QUESTION: No.

MS. BERGER: It was decided, I guess in 1987.

QUESTION: Right.

MS. BERGER: And --

QUESTION: It came later and it upheld an anti-sympathy instruction. So it's a little -- it certainly is difficult to see how the rule you want established could be said to be dictated by precedent existing at the time.

MS. BERGER: , at least some members of this

Court thought that the rule for which Mr. Penry was contending was a little bit difficult to say was dictated by precedent in light of the Jurek precedent, quite on point in relation to the Texas system. It would seem to me that having crossed that Rubicon, whatever the precise meaning of dictated is -- and, as you know, the court used other formulations like clear break or imposing new obligation on the states, somewhat more generous formulations.

But certainly it seems that if Penry's rule is not a new rule in light of Jurek that came before, our rule --

QUESTION: I suppose --

MS. BERGER: -- cannot be either.

QUESTION: I'm sorry, I thought you had finished the sentence.

MS. BERGER: Excuse me.

QUESTION: I assume that where you draw the line ought to depend on what the purpose of the Teague rule is. I thought the purpose was to assure that habeas was something that was used to bring state courts into line when they are making a sincere effort to follow federal law, not when they happen to have made a mistake about federal law.

Now, if that's the purpose of Teague, which I

understood it was, then I suppose we have to adopt the line that is closer to what Justice O'Connor expressed earlier, whether indeed it was reasonably open to question whether that was federal law or not.

MS. BERGER: Well, Your Honor, I would take it that the purpose of Teague must flow from the purpose of habeas corpus. To draw on Mr. Justice Harlan's comments over the years, certainly he alluded, as I believe you are alluding, to the deterrence or incentive function of habeas corpus, if you will, bringing state judges into line to act constitutionally. But Justice Harlan also alluded to the broader purpose of essentially enhancing the accuracy of procedures and in this case, of course one mainly talks about convictions in this context.

But the rule that we are contending, which once again we believe is firmly grounded in Woodson and Lockett, those early decisions, tends to enhance the accuracy of sentencing in terms of the reliability. Because if there is one thing that this Court has said over and over and over and over in various contexts is that the sentencer may not be precluded from considering mitigating evidence, from considering it as Justice O'Connor said in Penry and as others have said at other times, fully.

And, of course, the whole point of this is that

after considering evidence fully -- not just hearing it -- but having no barriers to its full consideration -- then the jury may arrive at a reasoned moral response.

QUESTION: Ms. Berger, if California versus Brown was rightly decided, as we have to assume it was, that the trial court instructing a jury to disregard mere sympathy is consistent with the Eighth Amendment, and if we were to affirm this judgment here of the Tenth Circuit that a trial court instructing a jury to disregard the influence of sympathy, et cetera, et cetera, or other arbitrary factor is upheld, you're really -- I would think a trial court would be at sea as to know.

It seems to me there is virtually nothing to distinguish -- and I find much to make of Judge Anderson's dissent in the Tenth Circuit -- that it's almost impossible to distinguish on the merits an instruction that says you must -- you may not pay attention to mere sympathy, and an instruction that says you must avoid the influence of sympathy or other arbitrary factors.

Well, what is that distinction? I mean, are we just going to write a code of instructions like state courts do, that have to be given in capital cases?

MS. BERGER: No, Your Honor. But, of course, you were the author of the majority opinion in California versus Brown and you know best precisely what you --

QUESTION: No, I don't speak with special authority on that subject.

(Laughter.)

MS. BERGER: Well, then perhaps I had better -- drawing simply from the opinion itself and not attempting to mind-read each other, it seems to me that the opinion said that the word "mere" was very important, was indeed crucial. And while it is not the object of this Court to write a code of instructions or to be highly technical or so forth, inevitably in reading instructions one must of course parse the language and then the broader surroundings, the other instructions and so forth, in the case.

Here, unlike in Brown, it was not mere sympathy, it was all sympathy that was equated with arbitrary factors. That was precisely the problem. And there are also other things.

QUESTION: But I don't know that you need read the instruction that way. You could say it says don't consider sympathy when it's an arbitrary factor.

MS. BERGER: Well, that is how --

QUESTION: And to be useful --

MS. BERGER: -- Judge Anderson read it, Your Honor. I happen to believe that that is not a very natural reading of the language. But even if it were a

plausible reading, as Your Honors know, two competing plausible readings are not sufficient when one would lead to an unconstitutional result, which is our claim.

QUESTION: Well, but that assumes the point in issue really. Are we to say that if a plausible reading can be given to an instruction that might allow it to be considered error we must assume the jury followed that even though there is an equally plausible reading that would not have been constitutional error?

MS. BERGER: , I believe the tests recently stated and adhered to by the Court are as follows, and they probably boil down to the same thing: California versus Brown, drawing on Francis versus Franklin, Sandstrom versus Montana looked to what a reasonable juror could understand.

If a reasonable juror could understand the instruction in the impermissible way, then the instruction cannot stand. In Mills, the court talked with various formulations going to possibility, I think -- probably settled on the formulation of a substantial possibility that the instruction was read in the wrong way.

I don't know if that means anything different, but I am certainly willing to rest on the notion of what a reasonable juror could have understood.

Also look at other differences from California

versus Brown. Another thing that the court relied on heavily in Brown was the surrounding circumstances. Mr. Brown had put in 13 witnesses in mitigation -- three days of mitigating testimony -- and the court understandably said -- this Court -- this isn't the kind of thing that a jury would probably think it ought to ignore.

Whereas, the evidence in this case, while clearly classical evidence of mitigation going to respondent's disadvantaged background, was definitely sparse. It was contained in fact in five pages of direct testimony by Mr. Parks' father.

To use Justice Brennan's words, a jury might well have thought that this was simply an instance where the defendant went too far in hearing the injunction that they were supposed to avoid sympathy.

It has always been interesting to me in this case that the state has relied on the prosecutor's comments in the case to fix matters while I think it's imminently clear that what the prosecutor's comments did was to make matters much worse, because he very clearly not only delivered his own anti-sympathy charge a couple of times, but made it very clear that background evidence was just a pitch for sympathy and you promised me in voir dire you wouldn't do that, said the prosecutor in his closing penalty summation.

Equally, the fact that the prosecutor did kind of a routine cook's tour through the so-called minimum mitigating circumstances didn't help in any way because all of those minimum mitigating circumstances in Oklahoma but one, go only to the circumstances of the offense or the defendant's condition at the time of the offense.

Equally, other mitigation such as Mr. McKinney, the prosecutor, dealt with extremely briefly. Mr. McKinney in no way mentioned any of this troubled background evidence. Mr. McKinney simply mentioned what Mr. Nance mentioned about the happy-go-lucky nature of the respondent in this case, as his father called it, and also commented on respondent's criminal conviction and other bad acts in his past.

There was nothing in this case that would lead this jury, really, to believe anything other than sympathy type evidence was something you couldn't consider and --

QUESTION: Well, how about the other instructions that the trial court gave? We have a rule, among many other rules, you know, that you consider the instructions as a whole and you don't single out one from the others.

MS. BERGER: Okay. And, in fact, turning to those instructions, the instructions to which you're referring, Chief Justice Rehnquist, are contained both in

No.9 which also contains the anti-sympathy instruction, and No.6, which are set forth generally in the Joint Appendix at pages 10 to 13.

I am now looking at page 13 and just picking out one myself in addition. At the bottom of the first paragraph there, after talking about the fact that these are all the instructions in the case, they give you the law, and then the court says, "You must consider them all together and not a part of them to the exclusion of the rest."

In other words, of course there is this boilerplate language about look at the facts, look at the evidence, and listen to the instructions. But notably also, listen to the anti-sympathy instruction.

And even in that instruction itself, which is the next paragraph down on page 13, like most instructions, it's a mixture of language, as Mr. Nance pointed out. After the anti-sympathy part, yes, the court says discharge your duties impartially, look at the evidence, return such verdict as the evidence warrants when measured by these instructions.

Well, the cat's turning on its tail again because these instructions include not only the anti-sympathy instruction given immediately before, but also, by virtue of an earlier pickup charge, include any

and all of the guilt phase instructions that the jurors may happen to think applicable. The jurors were not further guided. And in the guilt phase as well, there was an anti-sympathy instruction.

So it seems to me one can say really two things. In order to say that the rest of the instructions cured any problem with the anti-sympathy instruction, you would either have to say essentially that the general controls the specific, which would be the opposite of the usual approach, or would have to rest frankly with conflicting instructions.

That, too, as this Court has often stated, is impermissible when one of the instructions in context could be read in a constitutionally impermissible manner.

QUESTION: Well, but that argument assumes that the two instructions are contradictory. And I think really what this case is about is whether it is reasonable to interpret an instruction which says in one place you may take into account all mitigating circumstances, and in another place that you will not be swayed by sympathy -- whether it's reasonable to interpret the sympathy portion as contradicting what is said in the other portion -- or, rather, whether a reasonable juror would say, well, mitigating circumstances are one thing and sympathy is something quite different from specific factors that

justify being merciful.

MS. BERGER: Well, I agree --

QUESTION: And it seems to me that a reasonable juror would interpret in the latter fashion and would believe that the individual's difficult youth is a mitigating factor and not something that's just mere sympathy.

Why wouldn't a juror interpret it that way? Why would a juror interpret the two to contradict each other? The court clearly says at one point, you may take into account all mitigating circumstances. Why would a juror think, well, when he says I can't take into account sympathy, that means some mitigating circumstances I can't take into account?

MS. BERGER: Well, of course, that goes also to what a juror believes mitigating circumstances are which were not otherwise defined in these minimum mitigating circumstances which happen to go to the circumstances of the offense.

But here I think is where, in a sense, psychology enters in. I think Judge Ebel said wisely and correctly for the majority below, "sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character." So I think that at least some jurors,

reasonable jurors, might have been left somewhat at sea.

QUESTION: Well, the judge said this. Now, he listed certain mitigating circumstances that existed in this case, but he said you're not limited in your consideration to the minimum mitigating circumstances set out and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case.

What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine.

Now, I think a reasonable jury would say that means I need a fact or circumstance to be -- I need a fact or evidence to establish a mitigating circumstance. And that's up to me to determine. But once I find fact or evidence, then it's a mitigating circumstance if I want it to be. On the other hand, I can't use mere sympathy. That means I can't just feel sorry for the guy on the basis of no facts or evidence.

Why isn't that the only sensible reconciliation of the two provisions?

MS. BERGER: Well, Your Honor, with respect, it was you, not the court, that added the term "mere

sympathy."

I think the problem is that sympathy may be the way in which people, at least some people, some jurors, some reasonable jurors, process the kind of mitigating evidence that we're talking about here, evidence of the defendant's disadvantaged background, process that through their minds in order to arrive at a moral response which can be both reasoned and reasonably sympathetic at the same time.

I think we have to look at this through the eyes of lay jurors. So, if on the one hand they were being told to take everything into account, whatever you want, yet on the other hand they are being told that they cannot consider that anything, that mitigating evidence, in the way which it is most natural to consider it if you are inclined, (a) to believe it, and (b) to give it any mind at all, then, as I say, a juror is left in a quandary. And this is --

QUESTION: Isn't it a little different --

MS. BERGER: -- a juror who I'm assuming is following directions.

QUESTION: Isn't the point just a little different than that, Ms. Berger? That if the fact or circumstance that the jury is trying to decide whether or not it qualifies as mitigating, is a fact that evokes

sympathy for the defendant, then the fact that it evokes sympathy would disqualify it from being mitigating under this instruction?

MS. BERGER: Well, I think that's why --

QUESTION: So there really isn't the tension that Justice Scalia finds difficult understanding.

MS. BERGER: Well, I think you have put it better than me because what we are really confronted here, if the instruction is read in the wrong way and followed, as we must assume it is followed, is essentially an all or nothing situation.

QUESTION: Do you think that's a reasonable interpretation, Ms. Berger? You think that a juror would think if any mitigating evidence produces sympathy in me, well, then I can't -- then I can't consider it?

Do you think a juror would really think that that's what the judge was saying? You can consider all mitigating circumstances unless they produce sympathy in you, in which case you can't consider them.

MS. BERGER: , I think, again, that's a little further twist on it. I think a juror confronted with evidence, including this rather sparse mitigating evidence concerning the defendant's background and saying, well, that's in the case too, how do I react to it, and then remembering well, it's there, but I was told I couldn't

feel any sympathy. And then I think the juror just sort of stops and scratches his or her head in some sense.

That's the problem, because this instruction interferes with the full consideration of mitigating evidence. It is possible, Justice Scalia, that a juror could look at this evidence and somehow approach it extremely rationally and ask himself or herself, well, does this or does it not in some very reasoned way reduce culpability or not and in that sense could consider it.

On the other hand, it is also extremely plausible that many people, many reasonable people, respond to this sort of evidence with sympathy and that is the way in which they in a sense say there is less culpability here. There is not less culpability because the juror feels sympathy, that's not the argument. But rather that simply, particularly lay people, tending to respond with sympathy, do so because that is their way of giving weight to the mitigating evidence in the culpability scale.

Yes, here it is. While preparing I came across what I think is a good statement in an en banc court of appeals decision in a different context from the Eleventh Circuit. In Brooks versus Kemp, the en banc court was considering whether certain prosecutorial argument in the penalty phase was constitutionally impermissible because

it appealed too much to emotion. The court rejected that claim and said, I think, some things that are also applicable in this context. Said that reason alone cannot adequately explain a jury's decision to grant mercy to a person convicted of a serious murder because of that person's youth or troubling personal problems. Nor can reason alone explain fully the reaction of a juror upon hearing the facts of a particular crime described in their tragically specific detail.

Empathy for a defendant's individual circumstance or revulsion at the moral affront of his crime, reactions accepted as basis for capital sentencing decisions, are not susceptible to full explanation without recourse to human emotion.

Then the court concludes, in the context of that case, the propriety of argument rests primarily in the relation of its content to issues relevant to the sentencing jury's concern.

I would rephrase it to our context as follows: the propriety of sympathy rests primarily in the relation of it to mitigating evidence relevant to the sentencing jury's concern. So, sympathy is not sentiment. Sympathy is not passion. Sympathy is not prejudice. Sympathy is not sentimentality. It is simply a way in which many people, many reasonable people, will respond to the sort

of mitigating evidence at issue here if indeed they are inclined to respond to at all.

I think the problem, Justice Scalia, is that at least some jurors would have been impeded in reacting to mitigating evidence if they were to follow, as we must assume they followed, this instruction.

Finally, I would say --

QUESTION: Do you think people don't understand the difference between he doesn't deserve it and I feel sorry for him? It seems to me the two are quite different. Mitigating evidence means he doesn't deserve it; there is some reason why he doesn't deserve this penalty. Sympathy means I feel sorry for him. You may think he entirely deserves it and still feel sorry for him knowing that this person before you fully deserves the maximum penalty, he's a horrible person, but you can see him confronting that fate and say, gee, I feel sorry for him.

I don't see -- I don't see the equation you're trying to insist exists between whether there is -- the defendant is morally worthy of the sentence imposed and whether you feel sorry for the defendant.

MS. BERGER: The moral worthiness, Your Honor, is the ultimate question, and if one were having a dialogue such as we were having now with a juror, perhaps

one could make these points very expressly.

But I do believe, in light of human nature and psychology and the fact that lay jurors are not experienced in sentencing, they may simply tend to express a view that someone deserves a bit less than death, deserves life imprisonment through the medium of -- perhaps even empathy is a better word than sympathy which is not equivalent to some kind of wild irrationality.

I would simply want to end by placing the case in what I think is a very important context: the fact that this was essentially a marginal case for death. By that I do not mean that a properly instructed juror was not entitled to impose the death penalty. The jury would have been.

However, this was a case with extremely light aggravation and very sadly routine murder, sadly routine criminal, where the one aggravating factor found by the jury was the one that was already instinct and obvious in the verdict on guilt, that Mr. Parks had killed in order to avoid arrest or prosecution.

This was not a case where the prime problem, as I see it, was likely tremendous passion on the side of the victim other than, of course, the natural sympathy which flows to the victim of a murder. Rather, the problem in this case was very light aggravation --

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

MS. BERGER: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Nance, do you have rebuttal? You have ten minutes remaining?

MR. NANCE: Your Honor, unless the Court has some further questions, I have no rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you.

The case is submitted.

(Whereupon, at 10:50 a.m., the case in the above-entitled matter was submitted.)

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BY alan friedman

(REPORTER)