Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

WILLIAM L. MAXWELL, Petitioner; vs. O. E. BISHOP, Superintendent, ARKANSAS STATE PENITENTIARY, Respondent.	Docket No. 13

Place Washington, D. C.

Date May 4, 1970

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C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Anthony G. Amsterdam, on behalf of Petitioner	3
Don Langston, Esq., on behalf of the State of Arkansas	47
Albert W. Harris, Jr., on behalf of Respondent	73
REBUTTAL ARGUMENT OF:	
Anthony G. Amsterdam, on behalf of Petitioner	98

- - -

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

WILLIAM L. MAXWELL,

Petitioner;

vs. No. 13

O. E. BISHOP, Superintendent, ARKANSAS STATE PENITENTIARY,

Respondent.

Washington, D. C.
May 4, 1970

The above-entitled matter came on for argument at 11:19 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

Anthony G. Amsterdam, Esq.
Sranford Law School
Palo Alto, California
Attorney for Petitioner

Don Langston,
Deputy Attorney General of the
State of Arkansas
Little Rock, Arkansas

Albert W. Harris, Jr.,
Assistant Attorney General of the
State of California
6000 State Building,
San Francisco, California 94102
Attorney for Amicus Curiae

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We move now to No. 13 for argument in Maxwell against Bishop.

ARGUMENT OF ANTHONY G. AMSTERDAM

ON BEHALF OF PETITIONER

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

The Court is thoroughly familiar with this case, which has been the subject of one prior oral argument here and of voluminous briefing by the parties and various amici curiae. As I see the matter, there are at this time four questions before the Court.

The first two are the questions on which this Court granted certiorari in December of 1968: Number 1) Whether the Arkansas practice of giving its juries unlimited, unguided, and unreviewable power to sentences persons convicted of rape to live or die violates the rule of law fundamental to the due process clause of the Fourteenth Amendment. 2) Whether the Arkansas practice of trying simultaneously, in a capital case, the issues of guilt and of punishment also violates the Fourteenth amendment. Those are the questions which in the jargon of this case are known respectively as the standard issue and the single verdict issue.

The third question is one which arises from this Court's decision in Boulden vs. Holman. In that case, as in

this one, a state prisoner condemned to death brought a federal habeas corpus proceeding, in the course of which he presented no claim -- prior to the appearance of the case in this Court -- challenging the selection of the jury that condemned him to die.

Notwithstanding that issue had not been presented in the lower courts and was not included in the application for certiorari here, this Court held that it could note that the record in his case disclosed a violation of the rule of Witherspoon vs. Illinois, in the process by which jurors had been death qualified in the selection of his jury. And the Court therefore vacated and remanded the case to the district court for further consideration of that Witherspoon claim. That I will refer to in this case as the Witherspoon issue.

The fourth question presented to the Court is not a substantive one. It is simply which and how many of the first three questions this Court will address.

Now I would like if I may to begin with that fourth question, lest I waste the Court's time ---

Q I didn't get your last point there, what was that?

A The fourth question is not a substantive question, Mr. Justice Harlan, it is which of the first three the Court is to reach. Rather than launch into a discussion of the first three, I would like to talk a little

about that fourth. Now, I recognize in talking about the fourth that this is uniquely a matter for the judgment and for the discretion of this Court. But I do want to state some facts that I think it is important that the Court know in exercising that discretion.

To my knowledge there are somewhat more than 67 death cases pending on petitions for writs of certiorari in this Court. In the past weeks I have caused examination to be made of all of the ones that we could identify, and we have examined 67.

There are 45 cases out of that 67, coming from 18 states, which present either the standards issue or the split verdict issue. To be specific, the standards issue is presented in 43 cases; the split verdict issue is presented in 18.

Again, to the best of my current information, there are currently on the death rows of this country approximately 510 condemned men. The decision of this Court in the Maxwell Case on the standards issue would potentially affect all but 5 of those 510 men, that is better than 500.

The decision of this Court ---

Q Mr. Amsterdam, may I ask why the 5? Were they convicted in a state that does have juries instructed with standards, or what?

A No, Mr. Justice Stewart, although there are on

on the statute books in several states mandatory capital crimes, there is only one active mandatory capital crime, in the sense that people are being tried for it and there is not anybody on death row for it. The 5 people to whom I refer are 5 California convicts who are presently on death row because of conviction of a crime which carries a mandatory death punishment ---

Q Where the jury did not have any discussion, I see.

A --- the death penalty with standards is a mandatory death penalty.

Q I see, thank you.

A The split verdict issue would potentially affect, to the best of my calculations -- and this is very rough -- 380 to 390 of the 510 men on death row. And this, Mr. Justice Stewart, is, of course, because several of the states including those with major death row populations, such as California, have split verdicts, so that the number is very significantly reduced.

Q How many states have split verdicts?

A To the best of my knowledge, Mr. Justice Brennan, five: Connecticut, New York, California, Pennsylvania -- and Texas has it, and here is what causes my difficulty in figuring out how many men are involved. Texas has it but only put it in recently, so that some people on death row in Texas were

convicted under a single verdict procedure, but Texas now has it.

Q How long has New York had it?

A New York put it in, I believe, as a result of the interim report of the committee whose final report led to abolition, and that would have been back around 1965. However, there are very few people on death row in New York, as a result of the almost total abolition now of the death penalty in that state.

Q That Texas statute is the one we noticed -- peripherally, perhaps -- in Spencer, wasn't it?

A I think the split verdict for capital trials wasn't involved in Spencer. Texas, since Spencer, has revised both the procedure for recidivist trials and the procedure for sentencing in capital cases.

One other area that I think I want to bring to the Court's attention in connection with the question of what issues it should reach comes from experience of about five years in dealing with these cases. Prior to the time when this Court granted review in Maxwell vs. Bishop, the job of getting stays of execution for condemned men was an incredibly difficult, perilous job.

On occasions courts would stay executions. Occasionally, we would have to come to the Justices of this Court to get stays of execution a day, 2 days, before the execution dates

were set, as we did in this Maxwell Case.

Since the grant of review in Maxwell vs. Bishop, it has been far easier to get courts to be willing to stay an execution until this Court finally disposed of the issues in this case. The question of getting stays of execution is a vital one, literally, of course, but also a troublesome one, because many of the men on death row are still not represented. And those of us who are trying to represent them very often don't learn until the last minute that an execution date has been set.

Since Maxwell v. Bishop was brought before this Court, the governors of several states--Arkansas, Massachusetts, Washington--have agreed to hold up all executions in their states, pending decision of these issues by this Court.

However, if this Court should dispose of the Maxwell vs. Bishop Case on a ground which does not resolve the standards and the single verdict issues, and if it does not simultaneously grant review on those issues in one of the other pending cases, the problem of getting stays of execution will not be even what it was before the grant of review in Maxwell vs. Bishop; it will be far worse.

The reason for that is this: That in recent years, and, in most part, since the grant of review in Maxwell vs. Bishop, the highest courts of 17 states -- including the states with the 8 largest death row populations in this country --

have rejected the standards claim. There are on the death rows of those states about 380 condemned men. And the claim has also been rejected by the federal courts of appeals of the eighth, ninth and tenth circuits, with the result that federal stays of execution and habeas corpus would also not likely be available.

The split verdict issue has at the same time been rejected by the highest courts of 11 states, having about 220 men on their death rows.

Q How many states have still got capital punishment?

A All but 13, Mr. Justice Harlan, and, of course that is simply a pragmatic answer. That is I am not treating states which have it for treason but don't use it.

What this means, in effect, is that if ever there were an issue of grave national importance, it is the issue presented in the questions on which this Court granted review in this case in December of 1968.

It may well be that the constitutional contentions raised by Maxwell and by these other condemned men are not going to be sustained, but I would only ask that this Court pass upon those issues, in this case or in another, before the executions which will surely follow.

Q If only the split verdict issue were determined and not the standards issue, what then would be the situation?

A If the split verdict issue, and not the standards issues, were decided, Mr. Justice Brennan, I would estimate that there would be 130 men on death row in, principally, 3 states -- the other 2 states that have split verdict don't have very many men on death row -- but there would be approximately 130 men in three states who would still go to their death with the issue of standards unresolved.

Q Which would be California and ---?

A California, which has 85-90 men on death row, Pennsylvania, which has 20 men on death row, and whatever number in Texas were tried under the new split verdict decision.

Q Mr. Amsterdam, would it be fair to say that your burden here is not to persuade us that the trial of split verdict and the standards to guide the jury are a wise and a sound thing, but that the Constitution requires that they be provided? That is the narrow issue, isn't it?

A Mr. Chief Justice, I am asserting only that the Constitution compels the procedure providing standards of some sort to guide a jury in its discretion, and that it requires some form of trial -- not necessarily the single verdict trial, that is a matter for the state to decide what procedure it wants to use -- but that the Constitution requires some form of trial which does not whipsaw a capital defendant between his privilege against self-incrimination and his right to provide the jury with adequate information to make an informed

sentencing choice.

I want to make that very plain, because I think in the last oral argument I failed to do so, and I am not at all clear we have done so in the briefs. I do not regard this case as a case which poses any new-fangled notions of due process or any notions of an expanding, collapsing concept of due process into which I am asking the Judges of this Court to pour their own penological judgments. That is not this case, and that is not this kind of due process.

The kind of due process that is involved in this case is the most fundamental, basic, traditional, classic concept of due process -- simply due process as the law of the land, in the meaning of Magna Charta, a requirement of legality, a requirement of lawfulness.

And, Mr. Chief Justice, it is our assertion not that the procedures we are urging are better procedures, or more humane procedures, or even more beneficial procedures to the defendant. Several points have been made on several occasions that some of the procedures that we are arguing for might be worse for defendants. Defendants who have worse backgrounds and worse histories would be worse off if there were standards which led the juries to take those things into account.

I am not standing here asking for something better for defendants or worse for defendants, or more humane or a better way of doing it. What the Constitution requires is law. It

requires a regularized system for the adjudication of issues by courts. That is what the procedure we are challenging in this case lacks.

If I may focus in on that procedure and talk then first about the standards question. I think there is something of a misconception in the approach to the jury sentencing in capital cases which suggests that what the jury is doing in a death case is to exercise some sort of clemency, or mercy, or, as Mr. Harris called it in the last argument here, compassion.

I think that an examination both of the practice in Arkansas and elsewhere and of the statutes in Arkansas and elsewhere make very clear that the kind of determination that is being made when juries choose between the penalties of life and death, it is a very different business than the release of some few people from what is otherwise a mandatory, or even a normal, punishment for the offense for which they have been convicted.

What the statute in Arkansas does is not to make death the penalty for rape; it is not to make death the penalty for any and all varieties of rape, or even for some special varieties of rape. It is to make it an available penalty, with an equally available penalty of life imprisonment.

Q When did Arkansas put the death penalty in the hands of the jury?

A In 1915, Mr. Justice Harlan.

Q And before that, Mr. Amsterdam?

A Before that it was mandatory.

Q A mandatory death sentence.

A That is correct.

Q And that, typically, is historically the fact in most of these states, is it not, that the states moved from a mandatory death sentence upon conviction of first degree murder, or in this case rape, moved from a mandatory death sentence upon conviction to giving the jury discretion to avert that death sentence in their verdict? Isn't that historically the way this developed in most of the states?

A Yes, Mr. Justice Stewart, if there were any states that didn't follow that course, I don't know of them. The ordinary practice in every state that I know of was exactly that; that after the mandatory death penalty became, for some reason, intolerable or impossible to maintain, legislatures, instead of attempting to define sub-classes of cases in which it might be permissible to sentence a man to death, simply said let the jury have it, the jury can decide.

I am tucking nothing under the rug. It is a general practice. It is the universal practice for the states to have simply turned it over to the jury. For the most part, this is a twentieth century phenomenon. This doesn't go back much further than that.

Q And in some states it takes affirmative action of the jury to avert the death penalty. In some states it takes affirmative action of jury, nowadays, to impose the death penalty. In some states it is verbalized in terms -- as in my state of Ohio -- of a jury recommendation of mercy, but the jury is instructed by the judge what the effect of that so-called recommendation of mercy will be -- it will be to convert the death sentence into a sentence of life imprisonment and so on. But basically the historical pattern or development is as I described it, is it not?

A That is right. The differences are matters of detail. The matters of detail, I may add, may be critical for constitutional purposes, such as the detail as to whether or not the judge may review the jury's determination. But for a general, overall description of the kind of institution we are talking about, we are talking about one that in virtually all states is the same and involves exactly the process that Your Honor has described.

Q Is that also true, Mr. Amsterdam, in the non-death cases? Is jury sentencing in other cases likewise relatively recent?

A No, Your Honor. There is jury sentencing in non-capital cases in a number of states. I am not a student of this, but my impression is they are largely southern states. Arkansas is one such state.

Q Is that practice older than jury sentencing in death cases?

A My belief is that it is, but I would not be sure of that. There is a parallel development, Mr. Justice White. It is true in penology, generally, that the law has moved from mandated, legislatively fixed sentences for specified crimes to a range of sentences available for the crime. Now I am quite sure that it was in the process of that the juries were given discretion in the states in which they now have it. But whether it came earlier or later than the development in capital cases, I am not sure, because there are so many other devices in non-capital cases that came in too: giving the judge a range of sentences, a maximum and minimum, the indeterminate sentence, all of those things. I am not sure historically when that came in.

Q Mr. Amsterdam, it is only about ten years ago that Congress, as the legislative body for the District of Columbia, abolished mandatory capital punishment and created a mechanism somewhat like the one you have described, the more flexible one, is that not true?

A That is right. The District of Columbia was one of the last 3 jurisdictions in this country to have a mandatory death penalty. Again, I am talking about a mandatory death penalty for murder. There are still some mandatory death penalties on the books, but they simply are not used. And

the reason they are on the books is that not being used, that there is no pressure to take them off.

Q For purposes of this argument, it doesn't make any difference, or does it, in your view, what the crime is, but only what the punishment? Isn't that true?

A Let me put it this way, Mr. Chief Justice, I had no hesitation in contending that any time that a legislature gives a jury completely arbitrary powers to single out from among the total number of people convicted of any crime some who will live and some who will die without standards for that determination, without guide lines, that it does violate the Constitution. But I could see a distinction being drawn between crimes.

I would not draw it, but I would urge that in this case, the case of rape, you have a somewhat easier case than you do of first degree murder. And the reason for that is that the amount of discretion that may be tolerable -- I keep saying discretion; it isn't discretion in any legal sense-- the amount of raw, naked power to take a life or save a life that can be given may depend on the range of cases within which the jury can exercise it.

Now what is rape is a very broad range of offenses. It ranges from anything, from a fellow and a girl, who have been going together, getting into a situation and he going to far for resistance, to a brutal beating of a child with permanent

physical injury or a torture rape or something like that. There is just a tremendous range of factual situations encompassed within the notion of rape.

So that the idea that the offense of rape sets any limitation, or gives any guidance, to the jury is just totally chimerical. There are within the total gamut of cases in which convictions of rape come down an infinite variety of factual circumstances.

Now the theory seems to be that the jury somehow -- that 12 men brought off the street, who have never sentenced anybody else and will never sentence anybody else again, who have no way of making the judgment passed in this case consistant with judgment that has been passed or will be passed on any other human being convicted of this crime -- that they somehow will look at all the facts of this case, come out with circumstances that warrant the death penalty and impose it.

Q Is that any different from the traditional function of the jury which passes on the damages in an automobile accident case or breach of contract that they have never before or never again will deal with that kind of a problem?

A Yes, it is vastly, vastly different.

Q I am talking about their function. In terms of the function, is it any different?

A Yes, the function is vastly different and explicitly stated by Arkansas and California to be different.

When a jury passes on a question of negligence, they go in and they hear the evidence on both sides, and the judge says to them, "Ladies and Gentlemen of the jury, if you find that the defendant failed to exercise toward the plaintiff that amount of care that a reasonable man would have exercised, you must find for the plaintiff."

Now, of course, reasonable man is a standard which is not as specific as Section 3355 of the Revenue Code, but it does direct the jury's attention to an issue. It is a very different question from saying to the jury, "If you find that the plaintiff should win this case, you should find for the plaintiff." At least telling him that the defendant must exercise care, which a reasonable man would exercise, lets them go back and talk about something. One juror can say to another juror, "Well, what is the amount of care, in this particular automobile case, a reasonable man would have exercised? It is more the amount of care that has to be exercised with regard to a trespasser, and it is less than the amount of care that has to be exercised with regard to, for example, somebody to whom you owe a special duty of care."

The whole law is based on making those kinds of distinctions. And the fact that not any one of them will bring you out computer-like to a conclusion, doesn't mean that there are not standards involved.

When the jury goes out to talk about the death penalty

in a rape case in Arkansas, they can't ask whether or not it is reasonable to impose a death penalty or anything else. One juror may vote for the death penalty because the defendant was black and the victim was white.

I think this is a very important matter also in describing the function, Mr. Chief Justice. It would shock me, and it would demonstrate, I think, that our entire court system is not functioning at all, if you did a study of cases in which plaintiffs had sued defendants and juries had come up with a verdict, in negligence cases, and you found that there was no correlation whatever ascertainable between the facts of the case and the juries' verdicts.

I think you would find, and inevitably find, that the higher the rate of speed of the car with which the defendant hit the plaintiff, or the murkier the night on which it was occurring, or the worse the brakes, the more you are going to find plaintiffs recovering from defendants.

Such a study was done in Arkansas. Three factors emerged to characterize the cases in which persons get the death penalty: race, the commission of a contemporaneous offense, a prior record of imprisonment. The prior record of imprisonment may have nothing to do with the jury's determination rationally, because the jury ordinarily doesn't know about a prior record of imprisonment.

So that I think that both in legal theory and in fact

this is a very different business from the juries going out in a negligence case and saying, "Well, did the defendant have a duty of care? What was that duty of care? Did he cact the way a reasonable man would act?" In Arkansas none of those questions need to be asked, and in performance the juries do very different things.

In the one case the jury acts consistently with a pattern, a system defined by law and ordained by law. And in death sentencing juries act simply -- except for the factor of race -- irrationally.

Q You say that the history of this transition from the mandatory death sentence to the jury fixing of death sentence was a product, as I understood it, of disquietude of mandatory death sentences without regard to the question of whether there was any element of compassion entering into it. Is that borne out by the history of this change-over?

A Mr. Justice Harlan, this is one of those questions of history that turn on what your personal point of view is. I would put it this way, from my personal point of view: It became simply intolerable for society to uniformly sentence to death the total number of people convicted for any offense.

Q That is what I gathered. There is no documentation that you can bring to bear on this?

A No, there isn't. There is not. We know as a phenomenon that at some point in time legislatures in large

numbers began to take the mandatory death penalty off the book and replace it with the discretionary form.

Q As I understand it, today your argument would be the same if Arkansas had never changed to allowing the jury to exercise this discretion with reference to what you call the demand for standards?

A No, Mr. Justice Black, our argument would be vastly different. What Arkansas had prior to allowing juries discretion was a mandatory death sentence for all persons convicted of a crime. Now mandatory death sentences would raise serious constitutional questions, but they are not the constitutional questions of this case.

Q What would they raise? Cruel and unusual punishment?

A I think cruel and unusual punishment.

Q That is the only constitutional question raised, isn't it?

A There may be procedural questions, but in terms of the major question, I think cruel and unusual is the only question that it might raise.

Q That plus a question that has already been more or less decided in the Witherspoon Case. You would have that issue, the jury selection, but you wouldn't have either of your basic arguments if Arkansas law was the way it used to be before the turn of the century.

A No, you would not. You wouldn't have two issues to try, so you wouldn't have the single verdict issue ---

Q Precisely, and you wouldn't have any standards for the jury to follow.

A I quite agree.

Q Mr. Amsterdam, how many jurisdictions provide for judicial review of the imposition of the death penalty?

A That is very difficult to say. I cannot say that courts have exercised judicial review of a death sentence in more than 11 or 12 jurisdictions. Now, there are ---

Q Doesn't the new District of Columbia statute have something like this in it, and Arkansas?

A Arkansas has the statute that has been pointed out, it is 432310, I believe -- and this is common in many states. This is why I have to give an uncertain answer.

Q What I meant was any explicit provision; even though the jury imposes the death sentence, the judge can cancel it and impose life?

A There you have to distinguish between trial judges and appellate judges. I would guess ---

Q I am speaking of trial judges.

A I would guess 8 or 10 states.

Q Is that a fairly recent innovation?

A A relatively recent innovation. It takes 3 different forms which one has to watch out for, but I don't

think they make much difference. One is that the judges -- this is the Maryland situation -- the judges charge with actually passing the sentence, and the jury has made a recommendatory one, but, as a matter of practice, the judge follows the jury.

The Illinois version, a very recent thing, is that judge and jury must concur; that is it puts the initial onus on both. They both independently -- in theory at least -- have to come out with a judgment.

Then the third is a form that is a little older, but still I think largely a recent innovation that says that the judge may set aside a jury verdict, even though he finds no error in it, but if he simply disagrees with the penalty imposed.

Now it is that latter form that is very difficult to determine by head count how many states have, because there are a number of states which -- for example, Arkansas has the statute that seems to give the judge the power to reduce jury sentences. Now it is couched in language that I think does not apply to capital cases. There has never been a case in which the Arkansas Supreme Court has said that it applies to capital cases. And in the last argument here counsel for the state said he knew of no cases in which a judge had ever done that. And I have made inquiry of Arkansas counsel, and we know of no cases in which a judge has ever done it. So I would deny that

in Arkansas that there is such a thing. But one couldn't by looking at the statute books of the state come out with it.

The general practice, Mr. Justice Brennan, I am confident is that there is no judicial review. In some states we know there is -- California, we know there is, not by statute but because the California Supreme Court has said so. But in most jurisdictions I would think there was not.

Q Do these questions and exchanges, Mr. Amsterdam, suggest that legislative bodies have considerable advantage over this Court, for example, in terms of flushing out all the facts, getting all the information, finding out precisely what is done and what these experiments and innovations have led to? As, for example, was done ten years ago when the Congr Congress conducted extensive hearings and then abandoned mandatory capital punishment.

A It certainly does, Mr. Chief Justice. Indeed, my whole position is that they ought to do that. I am not suggesting for one moment that this Court ought to set standards or that this Court ought to review any legislative judgment. No legislative judgment has been made, except the legislative judgment that no judgment can be made.

I am asking this Court to determine whether it is consistent with the rule of law which is fundamental to due process for a legislature to say, "We are going to kill people, and we are not going to undertake an investigation to determine

which classes of people should live and which classes of people should die. We are not going to set down rules. We are simply going to let a jury determine, like rolling the dice, which person is going to live and which person is going to die."

I can see the benefits of legislative judgment here. And a ruling by this Court that lawlessness in the process of killing people is unconstitutional will precisely put back to the legislature the kind of question that it is uniquely fitted to deal with.

Q If we start with your conclusion, which you seem to pose as a premise, that there must be standards, Mr. Amsterdam, then, while you are not quite "home free", you are a long way down the road. Isn't there a very, very large question of judgment whether any standards at all are feasible? Isn't that a large question, however it is answered?

A It is, indeed, Mr. Chief Justice, a large question, but the Court's review of that question is a different matter than reviewing a legislature's judgment as to standards, because ---

Q You are asking the Court to make that judgment when we have ---

A No, I am not sure that the legislature has made that judgment. I am not sure that ---

Q You are asking us to make the judgment that

standards are imperatively required under the Constitution?

A I am asking this Court to say that standards are imperatively required under the Constitution, but I am not asking it to review a judgment of a legislature that standards are not practicable, which is, I thought, the question Your Honor asked.

Q Both are involved. But if you say to us as your are, if I understand you, that we must mandate that the Constitution requires some standards -- but leaving it to someone else to decide what the standards should be -- isn't that quite a large blank constitutional blank check?

A In terms of what is left later, Your Honor, yes, I think that the legislatures do have a fairly large blank check. I have no doubt about that. The primary power of the legislature to fix sentences for offenses is a very broad check, constitutionally. This Court has a very limited review over what legislatures do in determining sentences. It has a very limited review over the penological judgments they make in defining crimes.

The only power that this Court has is to enforce the Constitution, and the only thing I am asserting the Constitution requires is a rule of law. And I do not think that this Court is being asked thereby to review any legislative judgments that standards are not practicable.

In the absense of somebody asserting to a legislature

that they are desirable or necessary -- we don't even really know that any legislature has made the judgment that they are impractical.

Q Do you have any doubt whatever that if we follow your course and the legislatures of the several states undertook to carry that out, that the first time the death penalty was invoked, someone would be up here saying, "Those standards are not adequate."

A Mr. Chief Justice, I agree with that, and I admit that I will probably be among the people who will be up there asserting that, but I don't think that that is the question that is before the Court. This Court, back in the early 1930's, had the question of whether or not a city which wanted to control parading on its streets could simple say, "You have got to get a permit from the chief of police. It is illegal to parade without a permit. Get a permit, and you can parade."

Now, of course, it is a fact that if this Court said standards are required for the issuance of a permit, that 25 years, or 30 years, of litigation -- which we have had -- would ensue with regard to what the kind of standards should be.

Now, I don't know how much litigation is going to ensue from a decision requiring standards, but I do know that the only question before the Court at this point is the question that was before the Court back in 1930 in the permit case,

as to whether any kinds of standards are required.

The legislature may do a very good job, and this Court may be able to decide within a year, or 2 years, that the standards which have been defined are adequate. It may do a very bad job, and, certainly, the standards will be challengeable. It is the very function of the rule of law to have things that can be tested legally. That is what we don't now have, and that is what we are contending for.

Q Could I put a hypothetical to you? It is prompted by the colloquy between you and the Chief Justice. Supposing a legislature said that the jury is to fix the death penalty based only upon the record and only upon the evidence that is introduced that is relevant to guilt, would you regard that as a standard?

A I would regard that as "a" standard and far better than what Arkansas has, but I would not regard it as an adequate standard.

Q Well, that opens up the question the Chief Justice asked you, because I would assume that your answer would be that it was a standard but it is not good enough. And that plunges the Court, doesn't it, into what the Chief Justice is suggesting?

MR. CHIEF JUSTICE BURGER: I will let you ponder on that during the lunch hour.

(Whereupon, the argument in the above-entitled matter was recessed, to be resumed at 1:03 p.m. the same day.)

burg/
lsj

OPELAND/
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urg
1

(The argument in the above-entitled matter resumed at 1:03 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Amsterdam, you have had a chance to ponder on Justice Harlan's question, if you want to address yourself to it.

xxxx FURTHER ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.

MR. AMSTERDAM: I have indeed, and I do. Thank you, Mr. Chief Justice.

Mr. Justice Harlan, I believe that the Court will not be setting its foot on a primrose path if it demands that the States set some standards for the penalty determination. I believe that statutes are draftable which will provide adequate constitutional standards.

I say that in view of two major considerations. First, I think we already have some models. I think that the ALI Model Penal Code, model for a capital punishment statute, although I might not agree with all of its details, is a workable model.

Secondly, again, I would like to advert, if I may, to the history of the Court's experience in dealing with ordinances that regulate parades and that sort of thing. I think that it may have been arguable and it might have looked very plausible before this Court's decision in 1938 in Lovell and Griffin that said that you could not draft an ordinance that would take account of all of the imponderables that have to do with the question of whether or not you ought to let a parade go down a street. You

have to worry about traffic. You have to worry about crowd control. You have to worry about the availability of police. You have to worry about emergency vehicles. You have to worry about a thousand contingencies.

Nevertheless, it was not three years after this Court's decision in Lovell vs. Griffin requiring standards that this Court sustained a statute as having standards in Cox and New Hampshire in 1941.

The fact that there has been 30 years experience in which this Court has had to knock down various ordinances for lack of standards is not because it was impossible to draft standards but simply because there was a willful refusal to comply with what this Court demanded.

I say willful advisedly because the considerations that kept openhanded discretion in the hands of police chiefs to regulate parades is very much the same thing that is being given to juries in capital punishment.

There is simply a feeling that, if you really brought up to the surface and articulated the considerations that the legislature was intending to affect juries like race, they wouldn't stand the light of day.

I think that it is possible to draft a statute which will withstand the constitutional scrutiny of this Court. And, I think that an insistence by this Court that the legislature address itself, turn its undoubtedly greater wisdom and its

undoubtedly more appropriate penalogical judgment to that question will advance the cause of the drafting of adequate statutes. I think that if this Court hadn't decided in Lovell and Griffin that it was necessary the legislatures never would have tried.

Now that they have tried, they have succeeded. I think that if this Court insists that the rule of law requires the drafting of standards in this area that it will be possible to do. I think that the Model Penal Code, although I had some questions about the details of it and although it is applicable to murder and not to rape, is a fair example of what legislatures can do if they try.

There is, though, a second answer to that question. If I were to conclude that it was impossible to draft a statute which would impose the rule of law on the decision whether or not a man should live or die so that it was impossible to reconcile the basic requirement of lawfulness in proceedings with the death penalty, I have no doubt which of the two institutions the constitution said should prevail.

If the cost of a system of capital punishment is lawlessness in its administration, the constitution forbids that kind of lawlessness. And, that causes me to revert to what I think is essentially wrong with Arkansas procedure for determining who lives and who dies in a capital case.

That is a decision, as I have said, which is not the dispensation of mercy. On this record, it appears that less than

a quarter of the total number of persons convicted of a crime of rape or sentenced to death and that appears to be a very high figure.

The general statistics that are available -- we put them in the appendix to our brief and they have a great deal of trouble analytically, but nevertheless one can draw some implications from them -- appear to show that not more than 10 percent of people convicted of capital rape or, in fact, sentenced to die. For murder, it may be up in the neighborhood of 20 percent.

Now, the process by which jurors take out of all of the persons convicted of a like crime one-tenth or one-fifth of those persons and subject them to the most extreme penalty known to our law has got to be under the constitution, I submit, a rational, regular and lawful process.

I do not think that this Court for one moment would sustain a State enactment of a statute that said that out of every five persons convicted of murder and out of every 10 persons convicted of rape they shall meet in the State penitentiary and draw straws to see who will die.

Q You don't think that this is like that, do you?

A I think this is worse, Mr. Justice Black.

Q You do?

A Yes, it is, because it is every bit as arbitrary in that the factors which determine whether or not a person lives or dies, although they are subject to the appraisal of a

particular jury rather than a straw with the dice are not subject to that jury's consideration in light of any rules that are applied in this case and the next. There is no assurance that what makes this jury sentence this man to death, pick him from nine of 10 other people exactly like it, responds to any rule applied in any other man's case or that ever will be applied in any other man's case.

What is worse ---

Q You are saying exactly like it, but you are not on the jury, you didn't hear the evidence. Those jurors are supposed to have some knowledge of the facts of life. Evidentally they were of the opinion, whether they be right or wrong. They were of the opinion that this was an extraordinarily bad case of rape.

A Mr. Justice Black, I don't think one can fairly draw that inference, and I will tell you two reasons why I don't think ---

Q Why can't they draw that inference?

A Because we have examined the factors that bring about death verdicts in the State of Arkansas, and we have not found that any of the characteristics that you or I or 12 jurors could agree made those casesbad cases, in fact bring about the death verdict.

What we found is that there are three factors that show up in death cases as distinguished from rape cases, race,

6

prior imprisonment which the jury doesn't know about unless the defendant forgoes his privelege and takes the stand and commission of a contemporaneous defense which didn't happen in Maxwell's case.

So that I think that if you examine the performance of juries, you must conclude that they are not, in fact, reserving the death penalty for the most serious kinds of offenses or a particularly bad kind of an offense. They are applying it, in fact, in light of those factors randomly exactly the way a roll of the dice would.

But, what they are doing is worse than that, because the dice at least don't discriminate racially and Arkansas juries do. At least with the dice, a black man would have an even chance of getting the death penalty with a white man.

In fact, in Arkansas 50 percent of the blacks charged with interracial rape get the death penalty and 14 percent of persons with intraracial cases get the death penalty.

Q Have you looked up the statistics in every State of the Union on that effect of race on the verdicts by juries?

A They are not of record, Mr. Justice Black. We have put in our brief, however, every statistic that has ever been produced which the Court can properly, judicially notice. Every one points to the same conclusion. We have other information ---

Q I am talking about with reference to all of the

States. Are you saying that that never enters into the matters in other States?

A I think it does, Mr. Justice Black. I think it enters into the matters in all the States, and that is exactly why we argue for a constitutional ruling that is applicable to all of the States.

Q What would you say where the death penalty is put in the hands of the sole discretion of the judge? Would you say standards are necessary there too?

A Mr. Justice Harlan, I would say that the constitution forbids arbitrary discretion in the hands of the judge as it does with the jury.

But, again, I can see a distinction between the two cases, and I believe that a holding with regard to juries would not necessarily apply with regard to judges. Again, I do not think Giaccio vs. Pennsylvania, which says that a jury can't have an utterly free hand in setting costs means that the judge doesn't have a free hand in setting costs in a case. I think that the fact that you have 12 men brought in for a particular occasion who are not professional sentencers who do not have even the consistency of their own performance from case to guide them creates a different background for the exercise of that discretion. Therefore, it may be constitutionally impermissible to give it to a jury but not to a judge.

My own view is that it is equally bad to give it to a judge, but I don't think that issue is presented in this case.

Q How about the non-capital cases, Mr. Amsterdam, whether the judge or the jury imposes the penalty where there is not standard to guide either one of them?

A The rule for which we are contending in this case is limited to capital cases and I ---

Q That is what you say, but I wonder how you would really rationally distinguish the death case from the non-capital case?

A On several grounds, the most significant one, I think, is simply that where more is at stake for the defendant the requirements of due process for a regularized decision-making procedure are more exact.

Q Well, of course, Lovell, we didn't have death involved in the parade cases or anything. We just had a question of whether somebody could have a parade on the street.

A I quite agree. But, there we have a First Amendment concern as well. I think ---

Q Here you have got possibly life imprisonment, the range of penalty from one year to life, say, and no standards whatsoever to guide a jury in jury sentencing States or a judge, if he has sole discretion.

A Mr. Justice White, my own personal position, again, would be that standards are required of juries and of judges in non-capital sentencing under the constitution.

But, I think that since Skinner and Oklahoma it has

been clear that this Court has drawn a distinction. In Skinner the Court said that you couldn't sterilize thieves unless you sterilized embezzlers. Now, nobody has ever argued that you can't punish theft by 15 years imprisonment and punish embezzlement by 10. Those kinds of penalogical judgment are simply of a different order of magnitude than the choice of life or death and the Court has required different degrees of regularity in the procedures and even-handedness in the procedures for imposing the penalty.

A second consideration, I think, that is vitally important is this one. When you are talking about non-capital sentencing, you have a consideration that just doesn't enter into the equation when you talk about capital sentences and that is the rehabilitative aspect.

Now, I am not asserted -- I will make this very clear that the constitution requires that States take rehabilitation into account in their sentencing. I am asserting that inevitably States do take rehabilitation into account for the simple fact that if you send a fellow away to prison he is going to come out and everybody wants him to come out better rather than worse from the point of view of society.

We simply do not have the calibers at this stage of the science to reduce the rehabilitation factor to categorical judgment which permit themselves to be articulated in standards. When you make the decision, however, to sentence a man to die

instead of to live, you are making the decision to take him out of the rehabilitation regime entirely and that kind of standard, it seems to me, can't borrow the benefit of what we don't know about rehabilitation.

I think that, again, non-capital sentencing has a factor. It has wild card. It has a joker that justifies ---

Q So, you would say that in the non-capital cases the State simply came out and said our theory and punishment is serving rehabilitative goals only that it could just do that without any standards at all?

A No, I don't. Again, Mr. Justice White ---

Q You just said they couldn't be articulated.

A I think that it is a rational line to draw that the Court could say that where rehabilitation is an issue that a great of tolerance would be allowed because of the imprecision of the art of sentencing in the light of rehabilitation. My own view if not that, but I think ---

Q You could say that if it be permitted to tell a jury of a judge rehabilitation is our goal now make up your mind. That would be sort of like saying make up your mind what due care is as a reasonable man.

A It would be midway between due care and what we have in capital sentencing because at least the focus would be on something, rehabilitation. And, that is exactly what is wrong with the Arkansas procedure.

11

It is unclear whether a jury which goes back, unclear to any one of those 12 jurors whether he is to take, for example, the possible reformation of the defendant into account in deciding whether he shall live or die. It is perfectly consistent for one juror to ask himself the question, "Well, is this man rehabilitatable," and to sentence him to death if he is not.

Another juror might go back and simply ask the question, "Is he black and was his victim white?" Another one might go back and ask the question, "Is this a particularly heinous case of rape in one sense or another?" The legislature hasn't even focused in on what the general purpose of capital punishment is so that the jurors can talk meaningfully about it, and jurors from case to case can act meaningfully in light of it, some general purpose for capital punishment.

Now, the black-white business has one additional very important implication in this case, that emerges from this Court's decision in Pierce vs. North Carolina. Pierce is a decision in which this Court has required standards for sentencing where a particular kind of danger was perceived. And, that was the danger that a judge viewing a defendant's success on an appeal with disfavor would be vindictive in penalizing him to death.

It would be, to me, an anomaly of the highest degree if this Court were willing to exact the more demanding requirement of Pierce not simply that there be standards for the

decision but that the reasons for the application of those standards be articulated where the risk is -- and although I think there is a risk I think it is not a terribly great one -- that a judge will be vindictive and not to require standards where the danger is that a person will be sentenced to death on account of his race where in Arkansas specifically and in this country generally everybody who has examined this question has concluded that in fact jurors are racially discriminating in the imposition of the death penalty.

The danger of that of a flagrant and otherwise unpreventable violation of the equal protection clause of the constitution should require this Court to assure that the procedure comes up to visibility in way in which that racial factor will not have the effect we know it now has in captial sentencing.

Q You think that standards would help avoid that where the jury sentences at all? Do you think if you drafted a set of standards and permit the jury to sentence, you think those standards would really get you far along the line on ----

A Yes, Mr. Justice White, for two reasons. First of all, I am not only talking about the kind of discrimination that occurs from perverse and willful disregard of a legal requirement.

In Arkansas a juror might believe that it is legal and permissible under the charge he is given to take account of the fact that the defendant is black and that the victim is white.

13

That at least would be flushed out. Juries would not openly be able to say to each other, "Let us sentence this man to death because he is black and his victim was white."

Q You could solve that then, I gather, that phase of the case, the only standard that you would need was an instruction that you must not let race be taken into account in this case.

A I think that any instruction would help. I think that an instruction to that effect would help, but then we get into the second ---

Q Is that all that would be necessary to eliminate the racial part of this?

A No, I think it would not.

The reason for that is this. I think that juries may well discriminate on account of race in finding defendants guilty of crimes as well as convicting them. But, there are all sorts of judicial methods of control that are available there that are not available in the absence of standards.

The only way in which a judge can determine whether there is a rational basis in the record, whether the jury could have decided to impose a death penalty in this case on another ground than race is if there is some standards.

There is no doubt that if all the other factors which allowed the imposition of the death penalty under appropriate standards existed in a case the jury might still discriminate on

account of race as they may now in finding guilt if the evidence is sufficient to make out all of the elements of the crime.

Q You are going to get to the item of a split verdict. Are you going to get to that in your argument?

A I am afraid my time is ---

MR. CHIEF JUSTICE BURGER: Mr. Amsterdam, I was just coming to that. You are practically out of time. We will enlarge your time 10 minutes and enlarge your friend's time the same degree. Perhaps you had better address yourself to that point now.

MR. AMSTERDAM: Mr. Chief Justice, I thank you and I shall.

I simply would want to inquire whether there is also any purpose in addressing myself to the Witherspoon point. I think the Witherspoon point is open and shut on this record, and I would prefer to, unless the Court has questions,in connection with Witherspoon, simply pretermit discussion of that. Seven jurors were excluded.

Q If you don't get any questions, you can assume that it can be submitted on the brief.

A Fine.

Now, again, with regard to the split-verdict issue I want to make very clear that we are not relying on some general notion of fairness which is to be spelled out of the due preocess clause of the constitution. We are relying in this case on what,

I think, is a palpable inconsistency between the Federally protected privelege against self-incrimination of the defendant and his equally protected set of Federal constitutional rights in assuring a rational sentencing decision.

Those latter rights include a right to a hearing on a question which is as considerable as the question of life or death and the opportunity to present defensive evidence addressed to that question.

In a single-verdict trial, a defendant who, like William Maxwell, exercises his constitutional privelege against self-incrimination allows the jury to decide whether he shall live or die without presenting the slightest bit of evidence relevant to the choice of life or death except, except the evidence that comes in on the guilt issue.

Now, again, I am not asserting and it is not the basis of our constitutional submission that a State is constitutionally precluded from permitting the decision as to life or death to be made on the facts of the offense. If the State does that, but the State of Arkansas does not do that. It is very clear that the State of Arkansas permits the decision as to life or death to be made on a broad basis, including background information and any other material that may in the unfettered discretion of the jury effect its choice.

This means that a defendant is paid a very high price for giving up the privelege against self-incrimination. If he

chooses either to plead guilty and limit the trial to the issue of punishment or to take the stand, raise the whole question of background, talk to the jurors, show them that he is a human being, show them that he has a voice, explain what led him to what he did, and ask for mercy in light of those considerations, he stands a far better chance that the decision will be made on a full and rational basis than if he simply exercises his privelege and does not testify.

Q Have you considered this question of bifarcated trial as you all have been calling it from the point of what might loosely be called the right of allocution, whether in the technical sense of that term or whether in the sense of, as it has developed in some States at least, a right to put in evidence in litigation that is not relevant to the issue of guilt? I didn't see anything in your brief that touched that.

A I am sorry, Mr. Justice Harlan, we do see the right of allocution as sort of a comprehensive summary of what we think the constitution entitles a defendant to in a capital case. Again, we don't quarrel with the observations of this Court in Hill, that in certain kinds of cases allocution may not arise to constitutional dimensions. What we say is that in a capital case where allocution has been historically recognized as far more significant, where more is at stake for the defendant, where the practise not only precludes, as the Arkansas practise does, his talking to the jury but his presenting any

evidence or his counsel even meaningfully arguing that issue in light of a full record that the constitution does require more allocution than the Arkansas procedure allows to a fellow who claims his privelege.

Q Arkansas has got a general allocution statute. How does it operate in these capital cases where the jury and not the judge fixes the penalty?

A It does not.

Q Does it have any at all?

A There is no right of allocution in a capital case. The issue is submitted to the jury on both guilt and punishment after trial of the guilt phase. The defendant has no opportunity to make a statement either of technical allocution nor to present any evidence that goes to sentencing as such after verdict.

Now, he might present evidence relevant to sentencing before a verdict with all of that implies to giving up the privelege against self-incrimination and prejudicing himself on the guilt issue.

Q I was just coming to that on another form of Justice Harlan's question; namely, would it solve your purposes, would it meet your problems if the defendant could either under oath or not under oath be permitted to address himself by his own testimony, by his own statements to the question of mitigation and then apply the familiar rule that cross-examination would be limited to the scope of the direct testimony in the single trial? This gets out, I think, perhaps what Justice

Harlan was probing at in terms of a right to speak to the jury.

A It would help, but I don't think it would satisfy the constitutional requirement because there would still be -- I don't know what such a rule would do for impeachment, for example, because I assume that his credibility would in issue with regard to even those factors that he spoke simply going to mitigation.

Q Do you think it should not be an issue?

A I think that it should be an issue, most assuredly. Therefore, if he were permitted to make such a statement after the jury had determined guilt, I would have no problem. But, the difficulty is that in Arkansas impeachment involves the admission against the defendant of literally every bad act in his life.

I think that, again, the tension that is created that would persuade the defendant not to take the stand, to give up his right to speak in mitigation because of the tremendously prejudicial impact of that on the guilt phase would be constitutionally intolerable.

However, that, again, is not this case and although I would have my constitutional doubts about that, the Court doesn't even have to reach that question. Again, as in the question of standards, what we have here is an Arkansas procedure which permits arbitrariness and irrationality by giving no standards to the jury in sentencing and then virtually requires that

the decision be arbitrary if the defendant doesn't take the stand because there is simply no basis for the jury's determining the facts relevant to that critical sentencing decision.

Now, any of those factors could change and we have a different constitutional case. What we have in Arkansas is the irrational trial process at its worst.

If I may reserve ---

Q If I may ask you one question before you leave this phase of the argument, does Arkansas permit the State itself, as distinguished from the defendant, to introduce in this case in chief evidence that is relevant to sentencing but would not be admissible on the issue of guilt?

A No, Mr. Justice Harlan.

Q It does not permit that?

A No, and that is what creates the constitutional dilemma. If the State could do that whether or not the defendant testified, then you would not have the tension between constitutional rights but the defendant subjects himself to that only if he makes character an issue or if he testifies.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Attorney General?

xxxx ARGUMENT OF DON LANGSTON, ESQ., ON BEHALF OF THE STATE OF ARKANSAS

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

As the 8th Circuit Court of Appeals in this case said when it was before them, guilt or innocence is not the issue in this case.

Our State Supreme Court has held in this case that the evidence met in overwhelming fashion all of the requirements for conviction for the offense of rape as it was defined in 1962. Of course, our rape statute has been changed since that time. In 1967, it was changed for three degrees of rape and the penalty was changed from first degree rape, which this would have fit into if had occurred after 1967. The new penalty for rape, first degree rape, is 30 years to life or death in the discretion of the jury, which this offense would fall into.

The facts of this particular case did not appear to be an issue that as the 8th Circuit characterized it that the circumstances of this crime, as usual, are sordid.

A few of the background facts are that on November 3, 1961, in the early morning a 35 year old white woman was brutally beaten and raped by the petitioner in this case and a 90 year old helpless father was also beaten. She was then dragged to a vacant lot down the street and attacked.

We feel that guilt or innocence is not an issue in this case as are other issues which Mr. Amsterdam has mentioned in his brief and in his oral argument here.

In Arkansas, there are five offenses which are punishable by death. One is kidnapping, also rape, murder in the

first degree, treason and burning of prisons by convicts. As originally enacted in Arkansas, these statutes provided automatically for the death penalty.

In 1915, the Arkansas legislature, as Mr. Amsterdam has mentioned, enacted Arkansas Statutes 432153, which gave the jury the discretion of imposing a sentence of life imprisonment instead of death.

Petitioner in some of the briefs that were filed on his behalf by others contend that the death penalty should be voided and abolished as cruel and unusual punishment. While the State of Arkansas recognizes that there may be some movement in that direction, that issue is not before this Court.

Q Does there have to be a unanimous verdict of the jury or is it something less than unanimous on the question of life or death?

A Unanimous, Your Honor. All verdicts in criminal cases have to be unanimous. In civil cases, nine can bring in a verdict.

For what it is worth to this Court, in 1967 a bill was introduced in the Arkansas legislature to abolish capital punishment, public hearings were held and the issues were debated and the bill got nowhere. It was defeated overwhelmingly. Also, since this case ---

Q What was the vote? Did it show a vote? What was it?

A I don't remember, Your Honor.

Also, since this case was argued last year, there have been some-eight death verdicts returned in Arkansas. I believe six of them were white people, two of them were black people.

Q If you can get those statistics, would you mind getting them?

A The vote on the bill, Your Honor?

Q Yes.

A Also, in this case in the briefs and also in the argument here today by Mr. Amsterdam, they want to inject the issue of discrimination in race in this case. Petitioner in some of the briefs filed in his behalf devote a lot of their argument on this point.

We can only state that discrimination in the imposition of this death penalty was advanced by Petitioner in his petition for certiori and was rejected by this Court. It was rejected by the District Court and it was also rejected by the 8th Circuit Court of Appeals.

What this case actually concerns itself with is the validity of procedural means used in imposing the death penalty on a criminal defendant whether he be white or black. We contend that this case in effect really involves the issue of whether the jury system is a workable procedure in capital cases.

Q Were there any charges asked in this case on that question?

A No, Your Honor.

Q What do the judges do down there if someone says you should not consider the race of a person, of the witness or the person raped? Is there any history of what the judge charges the jury if requested in that field?

A I know of no case where that has ever been requested, Your Honor.

I have read it in some of these briefs or in some of the statistical studies that from the transcripts in the case that you could not tell the race of the victim or the race of the defendant.

Q Well, they know it, don't they, if they are there, I suppose.

A I mean you can't tell it from the transcript whenever they were gathering their statistics for the District Court trial. Yes, sir, the jury can tell.

Q Your point is, I take it, merely that measurement of this therefore becomes very difficult because you don't lable the record as one way or the other?

A That is correct, Your Honor.

The decision of the District Court on standards held that the United States Constitution did not make it necessary to trial courts in Arkansas charge or instruct juries regarding standards or guidelines to guide them in assessing life or death.

The Court reasoned that Arkansas procedure rested the decision in the discretion of the jury to be exercised in the light of judgment, common sense and experience of the jurors and that the jurors are presumed to be persons of good judgment and common sense. We advance that argument here today also.

On the single-verdict procedure, the District Court held that while some States may have split verdicts, no court has held or it does not think it is constitutionally required that any court have a split verdict. The decision of the Court of Appeals went along the same line. It rejected the petitioner's contention in these cases, and we recommend that opinion to this Court in deciding this case.

Q May I ask you if the statutory definition of rape is in the record somewhere in Arkansas?

A Yes, sir, it is defined in the jury instructions and ---

Q Where is it in this record, do you know?

A It was in the jury instructions. We have filed the transcript of the original case with the Court and I suppose it still has it. The court defines rape ---

Q Is that in the same -- is that definition of rape in the same statute that fixes the punishment for rape?

A I believe that they are separate, Your Honor.

Q You don't know?

A No, I don't recall because we have changed our

rape statute since.

Q Would you mind letting us know?

A Since this case was argued before this Court, some Federal and State courts have decided these two issues against the petitioner, and we recommend those cases to the Court. They are cited on pages 31 and 32 of petitioner's supplemental brief to enlarge the issues.

Q Can you waive jury trial in a capital case in Arkansas?

A No, Your Honor, you cannot. If you plead guilty, a jury would have to be impaneled and the State puts on a prima facie case.

Q Of guilt?

A Yes, Your Honor.

Q And what do you about penalty? If there is a plea of guilty and then there is a jury convened, do you have to put on a prima facie case of guilt, but does it go any further in that case than it does if there is a bona fide trial in terms of the factors that go into penalty?

A Ordinarily the trial would be very short and it would probably be the fact that in a murder case a murder has occurred and that the defendant has confessed to it.

Q How do you view Arkansas' theory of punishment in this kind of a case? Is it that the jury must decide the penalty based on the facts of the crime only? I suppose, or at

least the facts that come out in connection with the deciding of guilt or innocence?

A I think those factors are quite enough for a jury to make an intelligent decision.

Q Well, yes, but what is -- do you think the jury should confine itself to that?

A That is our position, yes, Your Honor.

Q Well, what if in a non-capital case, does the judge ever sentence in Arkansas for felonies?

A In felonies only in cases where the jury cannot agree, then he can set the punishment. What they have ---

Q And when he so, do you have pre-sentence reports?

A No, Your Honor, we do not.

Q You just go on the record that is made on deciding guilt or innocence?

A That is correct. What happens is the jury goes out and decides guilt and then it reports back to the judge that it has decided on guilt or innocence but cannot reach a verdict on punishment and then the judge takes the verdict of guilty and then he sets the punishment within statutory limit.

Q And all he knows is what is in the transcript?

A What he has heard is what the jury has heard.

Q So there are no pre-sentence reports in Arkansas?

A There is a stattute in Arkansas that whenever a person is sentenced to the penitentiary that there will be --

the judge will send along with the prisoner his remarks, the prosecuting attorney will send his remarks along with it. It is sort of a pre-sentence report.

Q I know, but it isn't used for the purpose of deciding the length of time for which the person is committed to prison.

A That is correct.

Q Mr. Langston, is there any allocution out in Arkansas at all?

A There could be some under this statute that we have cited if when the defendant would file a motion for a new trial which is the overruling of this motion is what you appeal from in Arkansas is from the denial motion for a new trial if the judge in his discretion wants to he may hear some evidence in allocution, but I don't think it is very common in Arkansas.

Q It is not required?

A That is correct.

Q And Arkansas does not normally give any instruction on disregarding race?

A No, Your Honor, we do not.

Q And, so, they don't give any instructions on the proper person to be sentenced to the proper number of years or anything at all about sentencing.

A That is correct.

Q And that is left to the "untrammeled discretion"

of the jury.

A Ordinarily, there ---

Q And, is it true that under the law of Arkansas a juror can use any whim he wants in sentencing?

A It is an unfettered discretion. Ordinarily the judge instructs them on ---

Q Well, how could you find -- you agree you can normally find a decent discretion from a judge, can't you? Was there way to find abusive discretion from the judge?

A I doubt it, Your Honor.

Q Kind of hopeless, isn't it?

A I didn't get your last question.

Q Kind of hopeless, isn't it?

A Well, we think that discretion of the jury is a good thing.

Q I presume that there were facts in this case from which the jury could discern something about it, were there not?

A Yes, Your Honor.

Q What were those facts that caused the jury that must have had something to do with the sentencing to death? How did this crime occur?

A Your Honor, in the early morning hours of November 3, 1961, the defendant, the 35-year old white woman who was living with her invalid 90-year old father, heard someone trying to

break into her house. She went to the door and told the man to leave and said she had called the police. He had a stocking he was trying to pull down over his head and he kept advancing toward her. So, she got on the telephone and got the operator who -- the man attacked the woman, she started screaming. So, the operator connected the telephone with the police and the police heard the screams over the telephone and they were struggling there and her invalid father came in to assist her. The defendant put his hand over her mouth. She bit his finger, bit his hand.

Q Bit whose finger?

A Bit the defendant's finger. Her father couldn't help her so he went to the window and started yelling for help. Of course, the police were trying to locate where the telephone call was coming from. The defendant then dragged the victim from her house down the street up an embankment up to a vacant lot. There were cuts and bruises on her feet. She was in her pajamas and there were cuts all over her. They struggled with her up there in the lot and then he threatened to kill her if she told That is basically the facts.

Q What about the attack on the father? You referred to that before.

A He beat the father too. So the father said I just can't help you anymore and so he went to the window and tried to yell for help. And he dragged the victim on out the

house.

Q How did he beat the father? What with?

A Just his fist.

Q How old was the father?

A 90, 90 years old, and he was an invalid.

Q Was he killed?

A No, sir.

Q Tell me, since your statute, as I understand it, puts all criminal offenses in the hands of the jury, sentencing, is that right?

A Yes, Your Honor.

Q Does that mean that there is no allocution anymore in Arkansas at all?

A That is correct.

Q What about the situation, you say, in a non-capital case, if I understood correctly, the jury can't agree on the penalty -- perhaps that is true also in capital cases -- what happens then, does the judge fix the sentence?

A That is correct.

Q So that in this case if the jury had said they couldn't agree on life or death, the judge would have fixed the sentence?

A No, Your Honor, you can't do that in capital cases.

Q Not in a capital case, but in a capital case you

can.

A That is correct.

Q What happens in those situations? Under your statute, does the defendant have the right of allocution?

A I don't believe so, Your Honor. I don't know of any case that would hold that.

Q Your Allocution Statute is a nullity is it as far as having any applications ---

A I believe you are correct.

Q But it is still on the books.

Q It applies only to cases where the sentence is fixed by the judge, that is what you are telling us?

A Your Honor, I don't believe that they ever have any allocution in our State courts.

Q You mean when the judge sentences?

A That is correct.

Q But you have got a statute, haven't you?

A I wasn't aware of it. Mr. Amsterdam says we do, but I wasn't aware of it -- an allocution statute.

Q I had it looked up and I thought you had. So it was told to me that you did have. Maybe that is wrong.

Q Have you read the statute to which he referred now?

A I don't know of the statute myself.

Q Aren't you familiar enough with the day-to-day practice so that you can say that you know the right is not

accorded to a defendant when the judge is sentencing?

A I know that I have tried some criminal cases and it is never done.

Q You mean you have never asked the defendant to say anything in connection with the sentence that has been imparted?

A Well, whatever he sentences, Your Honor ---

Q I am not talking about a formal allocution. Do you mean that he never, the judge who tries a man, before he sentences him never asks him or gives him a chance to say anything about it at all?

A Your Honor, he brings in a judgment, if the judge is trying it himself, trial before the court, he brings in the judgment. Of course, then he waits the statutory limit of time before he sentences him and then he does ask him if he has anything to say on his behalf. Ordinarily nothing is said.

Q Well, that is allocution, isn't it?

Q That is allocution.

Q In one sense of the word.

Q He does ask him?

A Yes.

Q Is he required to do that by your statute?

A I don't think so, Your Honor.

Q But it is regularly done?

A Yes.

Q Is there a time lag the judge must wait before he sentences?

A 48 hours.

Q 48 hours.

Q I don't get this, Mr. Langston. You say it is regularly done? It is never done in a jury case, is it, where the jury fixes the penalty?

A By statute in Arkansas, you have to wait 48 hours before you can sentence him.

Q No, no, but when the jury fixes the sentence.

A The jury fixes the punishment and the judgment is entered on that verdict and then ---

Q There is no allocution then, is there?

A No, Your Honor.

Q I think that answer came in response to my question, Mr. Justice Brennan, relating non-jury penalties.

Q Only where juries have been waived, is that it? You are just talking about bench trials, now, are you?

A Yes, Your Honor.

Q Not jury trials?

A No, they always, a judge always asks, whenever he sentences in any trial, he asks him if he has anything to say before sentence is passed.

Q Do they have a right to make a motion for a new trial?

A Yes, Your Honor.

Q On what grounds?

A There are several, newly discovered evidence, any errors that occur during the trial ---

Q Do they have a right to make a motion for new trial and argue it before the judge?

A And put on evidence.

Q And argue that it was wrongful and erroneous to convict him or sentence him at all?

A Yes, Your Honor.

Q I am confused. The jury finds a man guilty of crime of robbery and fixes the sentence at 20 years and the judge calls him in and says, "Do you have anything to say?" What can the judge do? Regardless of what the man said.

A Of course, he could set the verdict aside, if he desires.

Q What is the reason for saying what do you have to say before I give you the sentence, which I am going to give you?

A Your Honor, I just know that that is done. I don't know that it has any effect at all ordinarily ---

Q I am asking you what effect could it have?

A I suppose anything he said that would be relevant to his sentence could be said.

Q Well, the judge couldn't change the sentence, could he?

A The 43-2310 says if the judge in cases of conviction doesn't think that the punishment assessed is correct he has the power to reduce the extent or duration of the sentence.

Q Well, then, the jury doesn't finally fix the sentence?

A In effect, in Arkansas the jury does.

Q I understand that was a dead letter, that statute.

A As far as I know, it has never been interpreted by our Supreme Court.

Q That was my understanding from the last argument.

A Yes, sir.

Q You mean it is in the statute but the judge has never exercised that authority, is that it?

A Your Honor, it has never been interpreted by our Supreme Court.

Q Never been interpreted, but has it every been used to your knoweldge by a trial judge to change the sentence imposed by a jury?

A I haven't found any cases on it, but I have been told some of the judges that it has been done.

Q That is has been done?

A Yes.

Q And so the judge has the right to reset the punishment, if he doesn't agree with the jury?

A That is correct, Your Honor.

Q The judge could do that on a motion for a new trial, couldn't he?

A He could, Your Honor.

Q But you can't do it in a capital case? In capital cases he couldn't do it I understood you to say.

A I am advised that it has been done, but the case didn't go to the Supreme Court. Maybe there was something in the trial that the judge was -- I don't know what could have occurred during the trial but the judge thought that on motion of the defendant that he should reduce from death down to life and that has been done.

Q Did he do it in this case?

A No, Your Honor.

Q Did he give him any chance to speak in this case after the jury came in?

A I don't recall whether he did or not.

Q Mr. Langston, if what you have said is so we have a very different case here than I thought we had. I assume that I get this correctly, are you telling us that under your statutes the trial judge who is satisfied with the sentence imposed by the jury whether the case is a capital or a non-capital case can change the jury sentence?

A That is what this statute appears to say, Your Honor, 43-2310.

Q Would you read that to us so we can get it before us? Would you mind?

A "The Court shall have power in all cases of conviction to reduce the extent or duration of the punishment set by a jury if in the opinion of the Court the conviction is proper and the punishment is set greater than under the circumstances of the case ought to be inflicted so that the punishment be not in any case be reduced below the limit prescribed by law in such cases."

Q If you take that on face value it would seem to give to the judge the right, if he didn't agree with the jury, the jury's death sentence, that he can set it aside.

A That is what I argued the last time we were up here, but there has been no interpretation by our Supreme Court of this statute. It would appear on its face to allow him to reduce the verdict, if ---

Q It makes a great deal of difference in the -- as to what this case is about whether that statute is a dead letter or whether it means what it says. Is there no way we can find out whether the statute has got any life in it or ---

A I don't know of any way, Your Honor. I don't know of any Arkansas Supreme Court cases on it. The only way you could do it would be probably to survey the -- make a survey of the Circuit judges in Arkansas and see if they have ever done it, the current ones.

Q Well, that is what the statute seems to say on its face, though, doesn't it?

A Yes, Your Honor.

Q Do you know whether a judge, even if he didn't reset the sentence, if he disagreed with it, could order a new trial because he thougt the sentence was improper?

A I think he could, Your Honor.

Q You think he could, but how about the practice? Do you know if it is ever done, if the judge says, "I am dissatisfied with the sentence and I will order a new trial."

A I would think if he were dissatisfied with the sentence he would just modify it and not have a complete new trial.

Q But there is no provision in Arkansas for a judge giving a new trial only on the penalty, if he disagrees with the penalty, he has either got to set it or order a complete new trial?

A I would believe so, Your Honor.

Q Is that right? You have just told us that under that statute if death had been imposed, under that statute, the judge could fix it at life instead, is that right?

A Yes.

Q He can?

A That is my interpretation of the statute.

Q And he doesn't have to order a new trial, does he?

A No, Your Honor.

Q He doesn't have to but if he didn't want to take the responsbility himself I suppose he could -- his only alternative would be to order a new trial complete because he couldn't order just a penalty trial?

A That is correct.

Q When was the statute enacted?

A I suppose it has been in the revised statute, Chapter 45, so it is as old -- I imagine it was back when Arkansas came into the Union.

Q You don't have any idea and you are Deputy Attorney General and you have never heard of it ever being used?

A That is correct.

Q And you know it has never been interpreted.

A It has never been interpreted by the Supreme Court. I have been advised that the Circuit judge has reduced one from death to life.

Q Once in the whole history of the State.

A That is all I know of, Your Honor.

Q Is there any procedure under your statutes whether there is real doubt about this thing where this Court could ask for a certificate from the Arkansas court as to what that statute means? They have such a procedure in other States notably Florida where we have resorted to it a couple of times. Have you got anything like that in your State?

A Not that I know of. Our Supreme Court has held in this decision and it does not give advisory opinions only where there is a case of controversy.

Q Can a judge set a judgment aside. I presume he can I thought he could in every State in the Union on the ground that it is contrary to the weight of the evidence, can he set aside a conviction on the ground that it is contrary to the weight of the evidence, and set aside the sentence?

A I think he can, Your Honor.

Q You think but you don't know it?

A I know he can, yes.

The Supreme Court of Arkansas, as the Petitioner has cited in his brief says that the Supreme Court of Arkansas can set aside a death verdict whenever there is not enough evidence to support it. But, just ordinarily they can't do like this statute here says. They have said that they, themselves, do not have the power unless the evidence is not enough to support a change in the death penalty.

Q That is contrary to the weight of the evidence?

A That is correct.

Q But you talk about not enough evidence to support a death penalty. You mean not evidence to support Rape 1?

A Those cases are ---

Q You mean enough to support the judgement, not the sentence?

A Yes, Your Honor.

Q The sentence without a judgment wouldn't be worth much would it?

A That is correct.

Q Isn't under the Arkansas statute the sentence part of the judgment when the jury has made a combined verdict of guilty and fixed the penalty? You don't have two documents for the judgment, do you?

A No, Your Honor.

Q Just one judgment.?

A Yes, one judgment. The court enters judgment upon the verdict of the jury which is entered.

Mr. Justice White asked Mr. Amsterdam concerning other felonies or other criminal conduct in Arkansas on the standards. We believe in this particular case that to accept their argument that standards must be applied in capital punishment or life imprisonment cases that are set by the jury that the court would have no alternative but to order standards in cases say of larceny or burglary. In Arkansas, burglary is two to 21 years, larceny is one to 21 years.

We can see, if the Court accepts it here, they would perhaps -- the next step would be to put it in those type of cases. We would, in Arkansas, of course, we would almost have to try every one of our cases over again.

Q Because the jury sentences in all felony cases?

A Yes, sir.

Q Unless a jury is waived?

A That is correct, Your Honor.

Q And in non-capital cases you can waive the jury?

A That is correct.

Q And try it before the judge and then the judge sentences?

A Yes, sir.

Q But in those cases, if I understand you, the judge sentences only on the record that is made in determining guilt or innocence?

A That is correct.

On the single-verdict procedure, the way I gathered from petitioner's argument he was saying either, one, he would have a separate penalty trial with the same jury, or, two, he would have a separate jury for penalty, or, three, that he would have the judge set the penalty after a hearing and allocution.

We submit that this Court has never held that any State should have to have a double jury, have a double hearing on this particular aspect of the case.

Q Petitioner did not take the stand, did he?

A That is correct.

Q In your experience, when an accused does take the stand, what is the scope of the cross-examination permitted to prosecutors?

A He is treated as any other witness would be,

Your Honor.

Q What does that mean?

A He can be asked about prior acts of misconduct, felony convictions and things of that nature.

Q Not alone prior convictions but also prior acts of misconduct whether or not they resulted in prosecutions of crime?

A That is correct, Your Honor.

Q Is there any cautionary instruction?

A Yes, the judge gives a cautionary instruction that it is only to go to test his credibility as a witness.

Q It is just not limited then to prior convictions of crime but any acts of misconduct all his life?

A That is my understanding of the law, Your Honor.

Q May a prosecutor without knowledge of any actual acts of misconduct employ a form of examination to elicit -- did you ever get in trouble before? Did you ever get in trouble in school and that sort of thing?

A If the defendant answers in the negative that ends the matter, though, Your Honor. He can't come back and introduce independent evidence that he did do this act.

Q He has made him his witness for that purpose?

A That is correct. He must take his answer. He cannot come back and then introduce -- he can ask him if he has been convicted of a felony -- excuse me. He can ask him if he

has been guilty of acts of misconduct. If he denies and says he did not, then he can't bring in a witness and say yes he did do it.

Q But if a prosecutor says, "Did you ever engage in a demonstration against the Vietnam War?"

A The cases in Arkansas sort of go more to acts of misconduct towards moral turpitude than anything else, like indecent conduct or things of that nature.

Q Was anything like that asked in this case about the Vietnam War?

A The defendant did not take the stand, Your Honor, in this case.

Q Did the State try to bring anything like that in at all?

A No, Your Honor.

I would like to turn the rest of the time over to Mr. Harris.

MR. CHIEF JUSTICE BURGER: Mr. Harris?

ARGUMENT OF ALBERT W. HARRIS, JR.

ON BEHALF OF RESPONDENT

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

The interest of California in this case is a fairly narrow one in terms of the issues that were set forth by Mr. Amsterdam at the start of this argument. We are not concerned about the single verdict procedure, because we have, in common with a number of other states, a bifurcated trial. We have separate verdicts for both guilt and then a verdict for the penalty in capital cases only. Otherwise, almost all sentencing in California is by the judge and usually with a pre-sentence report and a number of other things.

Q How many states besides California have different juries to pass on the evidence with reference to guilt and with reference to sentence?

A Mr. Justice Black, first of all, we don't a a different jury; it is normally the same jury.

Q But a different trial?

A It is a different trial; it is a different phase of the trial.

Q How many states besides California do that?

A I don't know, categorically, Your Honor. Mr. Amsterdam said about 8 this morning, and I would accept that.

Q Has there been any change in California law

since the Anderson opinion?

A Well, there are always changes in California law, Your Honor.

Q I mean that decision hasn't been qualified or modified?

A No, I don't believe it has, at least nothing connects at the moment.

Q I take it, Mr. Harris, that if the defendant takes the stand at the guilt trial, he cannot have cross-examination, be asked about, as in Arkansas, acts of misconduct or prior convictions and that sort of thing?

A No, he can only be asked the same questions any other witness could be asked. You could ask about a prior felony, insofar as that would impeach his credibility. He could be asked questions that might reflect on bias and so forth, but he couldn't be asked, generally, about prior misconduct.

Q But he could be asked about prior convictions?

A To impeach his credibility, any witness can with a prior felony conviction in California.

Q So he is up against the same difficulty about taking the stand then as ---

A No, I don't think he is up to anywhere near the same difficulty. He doesn't have to take the stand in the guilt phase, of course. No comment can be made on it if he

doesn't. He can take the stand in the penalty phase, after guilt has already been determined, and give whatever explanation he has. By the same token, the people can show in that proceeding any history or background that, in their judgment, reflects adversely on him.

Q But he does have something of a dilemma at the guilt trial, whether or not to take the stand if he had previously been convicted.

A That is true, and that is true of any witness who might be called by anyone. He is subject to cross-examination, and his credibility has to be assessed just like any other witness' credibility. We don't have any special rules as to criminal defendants, except that I think there is more of a tendency to limit cross-examination so that you don't get beyond the scope of what he has waived by taking the stand.

Q At the penalty phase the state can introduce prior conduct, whether the defendant takes the stand or not?

A That is correct, Your Honor. The state can prove prior crimes. If they do, they have to prove them beyond a reasonable doubt; the jury is so instructed and things of that nature.

We are also not concerned with the Witherspoon question that has been presented here, leaving that to the parties. Our interest in this case, and the reason we are appearing here, is solely on the question of whether the Constitution somehow

requires that juries be given some limiting and restricting standards in deciding on the question of whether life imprisonment or a death sentence should be imposed in capital cases.

Q You mean some standards in addition to the standards they have set up defining the crime?

A That is correct, Your Honor. Those standards, of course, are very clear and specific as to whether or not there is a murder in the first degree. I presume a rape in Arkansas -- or whatever the crime might be. These would be standards and really limitations and restrictions going solely to the question of penalty, having nothing to do with guilt, that having been determined already by definition.

It is done formally in California. In Arkansas it isn't, and I don't want to enter into that dispute. I would like to clarify one point because of the national implications that were made clear by Mr. Amsterdam, and that is another reason why we are here.

In California there is a process by which the judge can pass in his discretion -- and it is the same kind of absolute discretion without reference to any formal standards that the jury is supposed to exercise -- when there is a death penalty. And he can, if he sees fit -- in light of all the evidence, all of the factors that are involved -- reduce it to a life sentence, and there it is, forevermore, a life sentence.

Q That is the trial judge?

A That is the trial judge.

Q In his discretion without giving any reasons of any kind?

A He doesn't have to give any reasons and it is probably better if he didn't. But he has the same scope of discretion that the jury has, that is my point. There is judicial review at the trial level.

Q General Harris, does the appellate court up there have the right, too? It seems to me we saw one recently.

A No, Your Honor, the appellate court can, of course, find, for example, the evidence is insufficient for murder in the first degree and so make it murder in the second. But they have said -- although Justice Peters of the court takes a contrary view -- that they will not, as a matter of discretion and judgment, reduce a death sentence to a life sentence.

Q What they ought to do, in my observation, is to affirm the conviction that set aside the death sentence imposed in the penalty phase of the trial because of error occurring in that phase of the trial.

A That very commonly occurs, Your Honor.

Q Then when he goes back, he has a different jury?

A That is correct. They have a different jury, or

you can waive a jury if you are so inclined, provided that the people waive it as well.

Q I suppose this absolute, unreviewable discretion of the trial judge to reduce from death to a life sentence must mean, of course, that if there are some judges who have conscientious objections and scruples about the death penalty, they would set aside death penalties more readily, andno one could review that, is that correct? No one can question the judge about his decision?

A No one can question the judge in terms of an appeal from his judgment, that is correct, Your Honor.

Q Some of Mr. Amsterdam's arguments that bordered on unequal protection, a denial of equal protection, might reach your situation, too. Of course, that is not our case here today, so I won't burden you with it.

A I think there is another facet of the situation in California that distinguishes it from the single verdict situation and meets some of the objections that have been raised here. And that is the objection, generally, that what the jury does on penalty is an uninformed judgment. Maybe it is arbitrary, maybe it is even discriminatory.

In California the procedure is such that evidence can be introduced by both sides -- and commonly is -- psychiatric evidence can be introduced, sociological, anything that in the opinion of the district attorney or the defense attorney might

carry some weight with the jury on the matter of penalty. All of this evidence comes in, and the only restrictions that I am familiar with are those upon the prosecution, which cannot show certain things. For example, you can't prove a crime, unless you can prove it beyond a reasonable doubt. This would be his prior crimes.

Q Certainly, you could just produce documentary evidence of a conviction?

A Yes, you could do that. What I had in mind were crimes that have not necessarily been reduced to a conviction. Those can be proven too. Or the defendant can prove his good record, or whatever he thinks may be in his behalf. He may call witnesses. He can call clergymen, psychiatrists, as I say, and the like.

Q Is there a summing up to the jury by counsel for each side after the evidence on this penalty phase?

A There is very commonly a very protracted summing up, yes. Full argument on both sides, and then at that point the case is submitted to the jury.

Q Under what kind of instructions?

A Well, the instruction is based, basically, upon the statute, and in light of Mr. Amsterdam's remarks this morning about the lack of legislative determination of some of these problems, I took a look at our statute, which is Section 190.1 of the Penal Code. A rather long section, but it

explains in a good deal of detail the nature of the penalty hearing, what kind of evidence can be introduced, and what the jury is supposed to do. They are not left in the dark by any means. It is provided, specifically, that evidence may be produced at the penalty trial of the circumstances surrounding the crime, of the defendant's background and history, and of any facts and aggravations or mitigation of the penalty.

The determination -- and this is what they say to the jury and to the judge; this is what our legislature has said --"the determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict."

Now I think it is clear that this does not anticipate any kind of an arbitrary judgment by the jury or the judge. He or the jury is to make the decision on the evidence presented.

Q What sort of instruction is that? Does the judge, normally, just quote the statutory language that you read to us, "In reaching your decision, ladies and gentlemen of the jury, you should consider the circumstances of the crime, the defendant's background and history, and any other facts or circumstances that may..." whatever you read to us. Does he say that?

A That is essentially it. You may consider all of the evidence of those things that you just mentioned, Your

Honor. It is phrased in terms of, "You may do this, and you may do that," but basically it is the statutory language. They are also told this -- and this seems to be the heart of the petitioner's complaint: "However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other." And this, of course, more or less represents the historical process that was discussed this morning.

They are also told this, and I think this excludes arbitrariness, and I think it excludes any of the things that we heard this morning: "Notwithstanding facts, if any, proved in mitigation or aggravation in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience and absolute discretion." That verdict must express the individual opinion of each juror.

Q So you do in California have some kind of standards then? Maybe not enough to satisfy Mr. Amsterdam, but you have something.

A I think that is true, Mr. Justice Harlan, and I think we perhaps too readily accepted the working proposition, for purposes of argument, that there are not standards.

Q "Absolute discretion," are those the closing words?

A Those are the two words.

Q Is that a standard?

A Well, it is a standard as standards have developed in this kind of ---

Q It is the legislative determination of what the legislature in California wants a jury to consider in this penalty phase of the trial, is it not? To consider that statutory language, but ultimately saying that it is entirely up to your discretion. At least that is clear expression of the legislature that that was their intent. You don't have a situation that has been created by inadvertence, do you?

A Certainly not. I can't imagine an any more specific statement of the legislative intent and a clear recognition of the problem. Now it may not be the best solution. It may be better, it may be more logical, it may give added symmetry to the law to say, "You have to have mandatory death standards," or "standards for a mandatory death sentence."

It may be that the Constitution requires for this Court to move back a 100 years and say where you have a death sentence, it must be a mandatory sentence with no discretion. I find that hard to believe.

The decision of the Court over 70 years ago in Winston against the United States today, as well, I think, as anything I have ever read, sums up the kind of considerations that I think any of us would agree should be considered by a jury. Now I am not talking about impermissible considerations.

You will recall in Winston, this Court rejected a

standard and held that a standard should not be applied, that death should be returned in the absence of mitigating circumstances. Now that is a standard of sorts, perhaps not a very specific one, but it is a standard. This Court held that that did not express the intent of Congress as manifest in the legislation.

But in discussing this, the Court pointed to some of the things that they thought should be considered, and it would seem to me that they should be considered today. They said, "How far considerations of age, sex, ignorance, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question of whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury and of the jury alone."

Q That is a shaping of standards, in a way, isn't it?

A It is certainly a discussion of the factors, Mr. Chief Justice.

Q Mr. Harris, your brief refers throughout to your standards as procedure in this connection, doesn't it?

A Yes, it does, Your Honor.

Q Standards as procedure. And you read somewhere in the language of this Court from the Witherspoon Case -- as I read your brief -- that a juror that must chose between life imprisonment and capital punishment can do little more and must do nothing-less than express the conscious of the community on the question of life or death. That is what you quoted?

A Yes, we quoted that. That is right, and we think in doing that, the legislature in setting up the structure for doing that, is not required to limit, or restrict, the discretion of the jury in any way. That is essentially what "standardless" means in this context, I think. It certainly doesn't mean that anyone can be taken off the street, and because the jury doesn't like him, execute him. The whole question arises only after a conviction of a capital offense, and after that the standards are very strict.

Historically, it is clear that the motivation here was to permit juries to draw distinctions in terms of humane and emotional considerations, and I think a thought in the minds of legislators that we can't list everything that might be material, that we cannot anticipate everything, and we don't want to limit the discretion of the jurors.

Q Do you allow judicial sentencing on pleas of guilty?

A That is -- Pardon me, in capital cases?

Q Yes.

A It is up to the defendant.

Q What if he waives the jury?

A He has a right to a jury. If he waives it, we permit sentencing by the judge.

Q What standards are provided for him?

A None, except those that I have alluded to and that are supplied to the jury.

Q If the judge is sentencing, does he have the pre-sentence report or not?

A Well, in a capital case, I don't think a capital case would be handled exactly that way. I think he would have a more formal proceeding than simply a pre-sentence report.

Q But if he waives the jury trial of the sentence part of it, why the judge would just try that on the same evidence that a jury would hear it.

A I believe that is true, yes, sir. That is not uncommon to have a trial before the judge on this issue of penalty with the same evidence, with the same considerations in mind.

Q May there also be a waiver just for the plea of guilty to the crime, but then a jury trial on penalty?

A Exactly, and that happens not infrequently. There seems to be underlying this whole argument of

the petitioner here the notion that unless there is uniforme treatment handed out to convicted criminals, that there has been some violation of some provision of the Constitution. Now if there is one thing that is clear over the last half century, it is -- and this Court expressed it very clearly and noted with approval the practice of fitting the punishment not to the crime but to the offender. And it is not uncommon to have a whole variety of penalties handed out to a number of people who have committed precisely the same crime, because you look to their background, you look to their role in the crime, you look to the nature of what each of those persons did. And the Court has found nothing of constitutional dimensions, in any way, to bar this kind of procedure.

We think that leaving to the jury the opportunity to extend mercy to a man who is convicted of a crime potentially involving capital punishment is simply an application of fitting the punishment to the offender and not to the crime.

Not only is there nothing wrong with that, and I think there is general agreement among people who know about these things, that this is what science has taught us, this is what every thing we have learned has taught us. And the capital sentencing is very typical of other sentencing in that respect, in fitting the punishment to the offender.

Q You said the judge could disagree with the jury on its sentence in a capital case and give life instead?

A That is correct.

Q Does a jury also sentence in non-capital cases?

A Hardly ever.

Q Is there a procedure for it?

A There is no procedure for it. There are a couple of statutes that provide alternative penalties, depending on jury findings.

Q I see, but it is not a general practice?

A Very uncommon.

Q In a death case when a judge has the power to disagree with the jury, does it ever happen?

A It certainly does happen.

Q In California it does happen?

A It has happened on numerous occasions. It has happened in cases of great notoriety, and I think it is a matter that a trial judge gives the very greatest and careful consideration to.

Q Do you know of any case that might be pending here in this Court now or in the recent past in which there is a transcript of the penalty phase of a trial in California?

A I would be glad to supply that.

Q We had one in the Gilbert Case, didn't we?

A I think you probably did.

Q We had a penalty phase in the Gilbert Case.

A I am sure there was.

Q Was the transcript there with the instructions?

A I am sure it would, but it is just that that is the normal practice, I am not familiar with the record in that case.

I think it is easy to say that there should be standards. In California there was a lot of talk about ships without sails and so forth and no maps and what have you. The trouble is that this isn't an area where we are concerned with the specific findings of fact, but with the application of human feelings.

For example, the model penal code is about the only thing that has been referred to as coming up with standards that would meet to some degree what the petitioners object to in the present practice.

When you look at the model penal code, what you find is a whole list of things, and they are all fine as far as they go. But one of the aggravating circumstances is in language referring to the atrociousness of the crime. An atrocious crime is aggravating; a non-atrocious crime is not, with no definition of what that means.

In the list of what is mitigating there are 5 or 6 things mentioned all of which are probably fine as far as they go. And there is no mention of something that would strike me as one of the most mitigating circumstances, and one of the reasons why I would not want to impose a death penalty, and

that would be any reasonable -- not a reasonable doubt in the legal sense -- but some doubt, less than reasonable, as the Court in Winston said -- some apprehension that maybe something will turn up that will cast a little more light on the case. That sort of thing isn't mentioned in the model penal code at all in terms of what the jury may consider. There is some mention as far as the judge.

Now this is the problem. You try to list these things and you don't get everything. Then a case comes along, and there is something that we would all agree should be considered as mitigating and yet it wasn't provided for.

Q Well, wouldn't that be caught up in review of the weight of the evidence? If there is a problem about the weight of the evidence, you deal with that in terms of the guilty verdict not in terms of the penalty, isn't that right?

A That is true, Your Honor, but these are standards. And, as I understand it, where mitigating circumstances are listed, as in the model penal code, that is it. If you don't come under one of those, there is no way you can go to the jury and say, "This poor man should have his life spared because he was good to his mother," and something like that. And we can do that in California.

The only limitation on the defense in California is the ingenuity and the resourcefulness of the defense. If he can think of something that might appeal to one person on the

jury -- which is really all you need, because you need a unanimous jury -- he is free to urge it. And we see nothing wrong with that, and we don't see anything that necessarily, or even logically, would result in arbitrariness. We think it is fair, and it has worked pretty well over the years.

Q If the jury can't agree on death, does he automatically get life, or what happens?

A There are alternative provisions. If the jury disagrees, the judge can either impanel a new jury, or he can take the case and give him a life sentence.

Q The judge can?

A Yes.

Q But he cannot do more than that?

A No, he can't do any more than that.

I think we have to look to what is it that a state should do, and what should the Federal Government do, if what we do now is wrong, in terms of standards -- and I am not talking now about the single verdict -- but in terms of standards, if what we are doing now is wrong, what is it we should do? Now this is something that was covered in Witherspoon very carefully, at least in noting what was not forbidden in Witherspoon and giving the states guide lines as to what to do with these cases when they came back.

In listening to the argument today and in reading the briefs, I haven't seen anything that specifically points to

what the state could do to meet the standards that the petitioners submit have to be established. They say if you look at the model penal code, you will find you have limited the defendants; there are things they can't urge. And I don't think the people want that situation.

Even under the model penal code, you get down to formulations like this -- it is easy to talk about standards, but what is the final formulation to a jury under the model penal code -- well, if you found an aggravating circumstance which could be, for example, he killed more than one person, or he committed a felony in connection with the killing -- if you find an aggravating circumstance, you may return a death sentence -- you don't have to -- you may. But then you have to determine whether the mitigating circumstances are not sufficiently substantial to call for leniency. Now that is what the jury is told. That is the instruction.

And it would be my guess that a jury would go back and talk about these mitigating circumstances and come back to the judge and say, "Well, you told us what we could consider, but how do we weigh each of these items and how do we determine when a particular circumstance is sufficiently substantial to call for leniency?" And I think the judge would have to say, "Well, you use your discretion. That is within your sound discretion."

So where are you, except that you have limited the

defendant, and you have set up a kind of artifical structure that meets what the petitioners think all statutes should consist of, and you ignore the experience of all of the states that have the death sentence -- and the United States Government -- and for what end?

I think that the end would be a jury still left with having to come to that fundamental decision: Is this man going to die, or is he going to live? And bear in mind that it is a man who has committed a capital offense and been found guilty; it is not someone off of the street.

One thing that has been emphasized in California -- and there are a number of cases that repeat this theme; it runs through all of the death penalty cases; we have many, many cases that deal only with penalty procedures; we have countless retrials solely on penalty -- but a theme that runs through all of those decisions is this: You have to convince the juror that it is his individual responsibility for that verdict. When he goes out of that courtroom and when he comes back with a verdict, it is his decision that this man should die. He cannot leave the decision in someone else's hands. You can't tell him the governor may grant clemency, because he is not supposed to think about such things. If you mention anything about parole, he is not supposed to worry about the parole board making a mistake. It has to be his individual decision. And anything that has impeached that individual

decision has been held bad in California.

Now I think this is the best way to administer this system, if the death penalty is to continue -- its validity as such is not an issue in this case -- if it is going to continue and if you are going to conclude that not every person who commits murder 1 should be executed, then I think that what we do is the fairest and the most rational -- if I may use that word -- way of concluding who should be executed.

What I have heard about it, I think it is far preferable to the model penal code. And I certainly think the legislature would reject notions of mandatory death sentences in the light of our whole experience.

Emphasizing this individual responsibility, I think, gives the defendant the fairest shake. Emphasizing to the jury that they have to consider the evidence, that they have to consider things that are produced in court excludes, I think, the possibility of any of the arbitrariness that has been mentioned here earlier.

I have no doubt that a jury in California -- I can't point to any decision -- but I have no doubt that if a defendant thought that racial prejudice, status, class position, or anything of that sort might possibly influence any single juror, that he could ask the judge to please instruct them to get such things out of their minds. I don't think it is very likely that that would enter the minds of the jurors, but if there were

possibility, that could certainly be excluded. You wouldn't have any more of a standard, but you would be telling them they can't rely on these things. That could be done. Whether it could be done in Arkansas, I don't know.

Q May I ask you a question? We have had various reports about how many there are on death row in California. Do you know how many there are?

A I think Mr. Amsterdam gave the figure of 85-90 which is about the last I heard. I could get the precise figure for you, Your Honor, but it is in that dimension.

Q That seems to be a great many more than in any other state.

A Yes, sir, it does.

Q Does that indicate that there are more executions in California than in other states according to the population?

A I don't know about the statistics over time. I think that the accumulation at the moment is due to the stays over the last 8 years.

Q There is no doubt about that.

Q But the stays have been applicable in a great many other states, too, have they not?

A Yes, they have. I think the last figure for jury verdicts of death that I saw was around 20.

Q Do you know whether there has been any effect on the amount of death sentences by dividing it up, as you do,

between the original trial and the sentencing trial?

A In terms of numbers, I don't, Mr. Justice Black. I have no information on that as far as the number.

Q I wonder if you could inquire.

A I could certainly try to.

Q Excuse me, Mr. Harris, I didn't understand. Did you say 20 was the number of jury imposed sentences?

A I think that is the last figure I saw.

Q Who imposed the rest of them?

A These go back, my gosh, they go back 10 years. I mean for one year there were some 20.

Q In a single year?

A In a single year. The 80 or 90 or whatever it is go -- I know of some that go back at least 10 years. I think that is typical of the situation arising from stays.

I think the submission of the petitioner here that this Court --as far as the standards issue goes, as I understood Mr. Amsterdam this morning -- in effect, or let's face it, directly set aside 505, approximately, death sentences imposed throughout the United States for some defect that it is also submitted cannot be corrected, at least in terms of anything we have been able to discuss here today, and anything that you could tell to the states and to the Congress of the United States in terms of this is what you should do, instead of what you have done. I think this would be a very unfortunate

situation.

The inability to articulate standards, I think, doesn't show a lack of resourcefulness. What it show is that the qualities that are involved here, and the problems that are involved here, are just such that we cannot reduce the problem to specific factors and weigh each in any arbitrary manner.

Q Talking about standards, the basic standard, of course, for any crime is the definition of the crime. You have a definition in your state, for instance, for rape. Now I could assume that there is no purpose for standards except to try to divide up the types of crime with reference to their atrocity, their ruthlessness, the defendant's past experience. But can you think of any way, as an attorney general, that you could do that without simply saying you have got to divide the crime of rape up into a number of different crimes of different degrees, according to the circumstances?

A I think you have to redefine the crime and say, in effect, we will only allow the death penalty in a smaller class of cases, as Your Honor said, in certain kinds of rape or, by the same token, in murder. There has been no suggestion here that the State of California here has gone too far in defining first degree murder or have brought in cases that constitutionally cannot be brought in. And as I understand the argument, there would be no objection whatever, as far as this argument goes, if the State of California said, "Humane

considerations don't concern us. We'll impose a death penalty straight out as to every man convicted of murder in the first degree."

I can't believe that the Constitution of the United States requires that the people of California take that view, which a 100 years might have been acceptable, but is not acceptable today, simply for these artificials reasons.

Q How can you define standards without having some kind of a steadfast step as to the enormity of the crime that has been committed, and how can you get that in any language that could be administered in a decent way in the court?

A I don't think you can, Mr. Justice Black, and meet the needs of the society and anticipate giving the defendant every opportunity to s ow that his life should be spared. I don't see how you can put qualities -- as I mentioned a year ago -- of mercy and compassion in a scale of standards and assign some arbitrary weight, or even if you please define what mercy or compassion mean. I don't think that judges are any more capable of extending mercy than the citizens on a jury.

Q Does your adult authority play any part in this death sentencing?

A No, it plays no role whatever in the death sentencing.

Q Is there any debate going on in California now

as to the abolition of the death sentence?

A I am sure there is.

Q You have it perennially, I know.

A I think a bill has been introduced. One always is. I don't think it is really a major public issue at the moment.

MR. CHIEF JUSTICE BURGER: Thank you, General Harris.

Mr. Amsterdam, you have just a few minutes left.

REBUTTAL ARGUMENT OF ANTHONY G. AMSTERDAM

ON BEHALF OF PETITIONER

MR. AMSTERDAM: I would like to speak to 3 questions of Arkansas law that came up and not reopen constitutional questions. First, with regard to Mr. Justice Brennan's question, we have dealt at pages 66-69 of our brief with the kind of evidence that comes in for impeachment and that sort of thing.

It is indeed very broad. For example, the Wright Case we mentioned here in which a defendant was asked whether several persons had not told him to quit hanging around their places of business because he made indecent proposals to women. That is the kind of thing.

There is one limitation, though. I don't want to say there are no limitations. Apparently, if a negative act, a bad act, an evil act, is not reduced to conviction, and it is too remote, it may not be shown. But what that means we

don't know. A twenty year old misdemeanor liquor violation has come in to impeach. So really, even that, there is just no limitation. The answer is that, in effect, it is the whole defendant's life on rebuttal for impeachment if he takes the stand.

Mr. Justice Harlan asked at one point whether the jury had to be unanimous in Arkansas. The answer that Mr. Langston gave, as I understand it, was that they did. But I want to make clear that it has to be unanimous either way. It is not the kind of situation you have in California where one juror can prevent the death penalty. If the jury hangs, the jury is discharged, and they try the case again.

That also, I want to make clear, tends to point the way to construction of this statute, that Mr. Langston has twiced mentioned, this 432310, which he says gives trial courts the power to set aside verdicts on the ground that they find outrageous, or some such thing, a jury death verdict.

To start with, I don't think the statute allows that. It pre-dates the 1915 statute which created discretion in capital cases and would seem to apply in non-capital cases only.

There is another statute which the Court might want to take a look at, 432306, which provides that when a jury finds a verdict of guilt and fail to agree on the punishment, or do not declare such punishment, then the judge renders judgment. Now Mr. Langston admits that doesn't apply

in capital cases, phrased in the same terms as the power to reduce the verdict. And the reason it doesn't is for the same reason that 432310 doesn't. It was enacted before the 1915 statute. It was not designed to deal with capital cases.

I am not asserting that as a matter of Arkansas law I can tell you that that statute doesn't give judges the power to set aside verdicts. It doesn't look that way. I have asked questions of Arkansas lawyers as well as to whether they know of any case in which a judge has done so, and the answer has been no. Mr. Langston was asked the question last time up in oral argument, and he said he didn't think they had ever done so. I am not denying that they may have done so; I have never heard of it.

I know in California they have that power, and I know it for two reasons: 1) The California Supreme Court has said so in an opinion. 2) Judge Phillips, for example, in Oakland has done so, and I can name the judge, and I can name the time, and I know the case. In Arkansas that has never happened. That is one of the several things that differentiates Arkansas from California.

Most of the things we have heard from Mr. Harris seem to me to demonstrate, if anything, the entire lawlessness of the procedure in Arkansas ---

Q Excuse me, go ahead and finish what you were going to say. I just wanted to ask you a question.

A I was simply going to reserve for a California case, Mr. Justice Harlan, as to whether the California procedure was good or bad. But, as Mr. Harris has told us, it is far better than Arkansas. And everything he says about what California has done suggest the deficiencies in Arkansas procedure.

Q I take it there is no appellate review of sentences in Arkansas?

A In Arkansas, no. That is one thing I can assert about Arkansas law clearly. If the conviction is not supported by sufficient evidence, then of course the court will set aside the verdict. That means, for example, if the evidence only makes out second degree, then a death penalty based on first degree goes, but only because the first degree conviction is upset. As long as the evidence is sufficient to sustain a verdict of guilt for a capital offense, the Arkansas Supreme Court has told us very clearly that there is no appellate power to set aside a jury imposed death penalty.

Q Mr. Amsterdam, the figures -- of course, the statistics cited in this case, I am sure you would agree, are not very firm, or clear, or hard in any direction -- but just on the surface these figures of the number of people in California now on death row do not argue that a bifurcated trial has been of any great assistance in avoiding death penalties.

A Not at all. California is the most populous

state in the nation. And the major reason for the most crimes there are there are the most people there. Secondly, Governor Brown didn't execute anybody for years. The reason for pile-up on death row has virtually nothing to do with the stay or anything else. It has to do with the fact that there was a governor in that state for many years who let very few executions go on.

Q You have made the point I was trying to make, that none of these figures are really very reliable to demonstrate anything, or very reliable in terms of drawing inferences from them, on the surface.

A I think they require more analysis.

Q They are subject to explanation. That may be true of all these figures we have been given in the briefs amicus and elsewhere.

A Except the race figure, Mr. Justice Burger. The race figure is reliable, because a controlled study has been done on that. None of the other factors are reliable. But the fact that black people are consistently sentenced to death for rape, that is reliable.

Q Have any of these studies been subjected to an advisare type process with cross-examination as to the bases?

A Yes, the twenty year study done in the State of Arkansas and presented in the record in this case.