

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JILL L. BROWN, WARDEN, :

4 Petitioner, :

5 v. : No. 04-980

6 RONALD L. SANDERS. :

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8 Washington, D.C.

9 Tuesday, October 11, 2005

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11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:03 a.m.

14 APPEARANCES:

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16 Sacramento, California; on behalf of the Petitioner.

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18 this Court on behalf of the Respondent.

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P R O C E E D I N G S

[10:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next
in Brown vs. Sanders.

Ms. Kirkland, proceed, please.

ORAL ARGUMENT OF JANE N. KIRKLAND

ON BEHALF OF PETITIONER

MS. KIRKLAND: Thank you. Mr. Chief Justice,
and may it please the Court:

Whether a capital sentencing statute is
categorized as "weighing" or "non-weighing" determines how
courts assess the impact of an invalid death eligibility
factor on a jury's sentence selection. To decide whether
a statute is "weighing" or "non-weighing," we look to the
function, if any, of an eligibility factor in the
statute's sentence-selection process.

In a "weighing" scheme, as this Court first
stated in Zant, a jury is specifically instructed to weigh
the statutory eligibility factors, along with any
mitigation, to choose the sentence. In a "non-weighing"
scheme, the eligibility factors have no role above the
role of "all other sentencing evidence."

California is a "non-weighing" State, for two
primary reasons. First, the only reference whatsoever to
"eligibility factors" in California's statutory list of 11

1 open-ended sentencing factors is in its sentencing factor
2 (a), but that reference has no significance, because,
3 under the language of the statute and the holdings of the
4 California Supreme Court, factor (a) means the jury is to
5 consider, if it's relevant, the facts and circumstances of
6 the offenses, including the facts and circumstances that
7 underlie the eligibility factors.

8 JUSTICE SOUTER: Isn't the difficulty with that
9 argument that that, at least, is not the way the jury was
10 instructed in this case? As I understand it, the -- and I
11 don't have it in front of me, but I looked when I was
12 going through the briefs -- the jury was instructed to
13 consider the special circumstance, or -stances, as such.
14 They were not instructed that, "You will simply consider
15 the facts that underlay whatever conclusion you drew at
16 the -- at the earliest stage about special circumstances."
17 They are instructed to consider special circumstances.

18 MS. KIRKLAND: They're instructed in the
19 language of the statute. And in that sentencing factor
20 (a), there is a reference to those special circumstances.

21 JUSTICE SOUTER: As such. I mean --

22 MS. KIRKLAND: So that --

23 JUSTICE SOUTER: -- it calls them special
24 circumstances, right?

25 MS. KIRKLAND: Correct.

1 JUSTICE SOUTER: Yes.

2 MS. KIRKLAND: But it's not reasonably likely
3 that the jury would have understood that to mean that they
4 should accord any special weight to the title of special
5 circumstances, apart from the overall umbrella of the --

6 JUSTICE SOUTER: Well --

7 MS. KIRKLAND: -- special circumstances that --

8 JUSTICE SOUTER: -- well, that may be an
9 argument for the way we have looked at special
10 circumstances, is as something -- as factors that do carry
11 a special weight, but I don't see any reason to
12 differentiate the instruction to consider special
13 circumstances here from the instructions in law to
14 consider eligibility factors in other States, which we
15 have called "weighing" States.

16 MS. KIRKLAND: Well, in "weighing" States, the
17 eligibility factors form the primary aggravation for the
18 jury to consider at sentencing. In California, the
19 reference to the eligibility factors is that one subpart
20 of one of otherwise completely distinguished from
21 eligibility factors --

22 JUSTICE SOUTER: Well, I --

23 MS. KIRKLAND: -- sentencing factors --

24 JUSTICE SOUTER: -- I know what you're saying,
25 because, in California, you've got a long list of other

1 things, and you're entirely right. But, as I understand
2 it, in the States that we have classified as "weighing"
3 States, the juries were not -- were not strictly limited,
4 on the aggravating side, to consider only the special
5 circumstances or the aggravating factors, as they have
6 been previously defined; they could consider other things.

7 And that's the case here. So, I don't see how we can
8 draw a categorical distinction between California's
9 situation and that of States we've called "weighing"
10 States.

11 MS. KIRKLAND: There's two differences between
12 that. In any of those "weighing" States -- well, in
13 Mississippi and Florida, for example -- the eligibility or
14 aggravating factors are -- are the sole aggravation at
15 sentencing, and --

16 JUSTICE SOUTER: I thought in --

17 MS. KIRKLAND: -- that's really --

18 JUSTICE SOUTER: -- I thought in Mississippi
19 they could take into consideration other facts.

20 MS. KIRKLAND: Well, they couldn't at the time
21 of Clemons and Stringer. Apparently, in the interim, in
22 the 1990s, as is discussed in our brief, they --
23 Mississippi changed the interpretation of its statute, so
24 it now has, sort of, an overarching circumstances-of-the-
25 crime aggravation consideration in its sentencing. But

1 that was not the time as of Clemons. And, in the footnote
2 in Clemons, which -- this Court referred to the statute of
3 Mississippi -- it was clear that, at least at the time of
4 Clemons, the eligibility factors were the sole
5 aggravation. But the --

6 JUSTICE GINSBURG: So, you would say Clemons
7 should come out the other way, given the current state of
8 the Mississippi statute?

9 MS. KIRKLAND: It depends how else the
10 aggravating factors are; what kind of a role the
11 aggravating factors play now under Mississippi
12 statute. If the role is de minimus, then it's probably not
13 a "weighing" State. But the "weighing" States -- in the
14 "weighing" States, the eligibility factors are the
15 lynchpin of the sentencing decision.

16 JUSTICE KENNEDY: Well, I suppose the reason
17 behind this distinction -- and it's, in a sense,
18 artificial, because we made it up -- I suppose the reason
19 is that, in the "weighing" State, the concern is that if
20 there is an ineligible -- or an invalid factor in the
21 eligibility determination, it carries over with a degree
22 of force and weight -- it's almost -- it's a presumption
23 that the jury is liable to treat it -- or, at least the
24 jury is liable to treat it as such. And I see that same
25 aspect to this case, when the instructions refer -- as you

1 indicated in your colloquy with Justice Souter -- that the
2 instructions specifically say "any special -- any special
3 circumstance which has been found."

4 MS. KIRKLAND: It's -- that is a --

5 JUSTICE KENNEDY: Am I right that the special --

6 MS. KIRKLAND: That's what it says. It's a --
7 it's a phrase, just as it's in the California statute,
8 that directs the jury, as a sentencing factor, to consider
9 the facts and circumstances of the crime along with any
10 special circumstances found to be true. And this Court's
11 made it clear, in Stringer and in other cases, that how
12 the State court sees its statutory language ought to be
13 dispositive. And California has repeatedly held -- and we
14 submit it's not reasonably likely a jury would interpret
15 it any other way -- that that means that the jury is to
16 consider the facts and circumstances of the case, all of
17 those facts and circumstances, including those that
18 underlie the special circumstances. That --

19 JUSTICE BREYER: See, I'm not -- this is a
20 fairly complex area.

21 MS. KIRKLAND: I'd agree.

22 JUSTICE BREYER: And, as I understand, at this
23 moment -- and I hope you'll correct me if I'm wrong -- in
24 a "weighing" State, we look at the aggravating side, and
25 there seem, let's say, to be three factors that you could

1 take into account and weigh them against all the
2 mitigation. I'm imagining that. And you might have
3 thought, if factor one turns out to be invalid, the reason
4 that that's a big mistake, because the jury would have
5 weighed something against all that mitigating evidence
6 that it shouldn't have. And what's something? There
7 would be a lot of evidence on it, so it took it --
8 evidence into account it shouldn't have. So, I might have
9 thought that was so.

10 But when I read the cases, that isn't so,
11 because I think it's -- in Clemons the evidence would have
12 come in anyway. So, if that isn't so, what could be wrong
13 with this problem in the "weighing" State? And the
14 answer, I guess, has to be that the prosecutor or the
15 State said, "Jury, you look to these three things," with a
16 tone of voice that really made them important. And the
17 jury then weighed one and two and three. It didn't have
18 anything to do with the evidence.

19 Well, if that's the problem, California seems to
20 have that problem, because one of the things it says to
21 weigh is, "Weigh circumstances of the crime." And that
22 means that's not everything. That's not the history of
23 this defendant.

24 And so, the problem that existed in Clemons and
25 in Stringer and in Zant that led to constitutional error

1 seems to be there in California's case, too.

2 Now, I probably have made five mistakes in my
3 little recitation here, and I'd ask you to point them out.

4 [Laughter.]

5 MS. KIRKLAND: In California -- well, first of
6 all, if this is new jurisprudence to you, or unfamiliar,
7 the critical difference is that most States, and most of
8 this Court's jurisprudence, uses the term "aggravating
9 factor" and "eligibility factor" interchangeably, because
10 in most States, and particularly in the "weighing" States,
11 "aggravating factor" is the eligibility factor that makes
12 the defendant eligible for death, but it's also the sole,
13 or primary, factor that the jury is to take into
14 consideration on the side militating in favor of death.

15 In California, we have "eligibility factors,"
16 which are the special circumstances, and those happen at
17 the guilt phase of the trial. And then we have
18 "sentencing factors," 11 factors that are totally
19 different from the special circumstances or --

20 JUSTICE GINSBURG: They're not totally
21 different, because one of them is special circumstances.

22 MS. KIRKLAND: Well, one part of one of them.
23 In factor (a), there is one reference to special
24 circumstances, and that's --

25 JUSTICE GINSBURG: And it distinguishes those

1 from circumstances of the crime, and then it -- then it
2 says, "and special circumstances." So, it seems to me
3 that "special circumstances" is a discrete factor,
4 different from "circumstances of the crime."

5 MS. KIRKLAND: The way that California has
6 interpreted that -- in fact, there is a case that's cited
7 in these briefs, People versus Cain, and Morris -- which
8 is on our merits brief, in page 27, and in our reply
9 brief, on page 6 -- where a defendant in California argued
10 that that reference to "special circumstances" ought to be
11 excised from the direction to the jury of what they're to
12 consider at sentencing. And in rejecting the idea that
13 that should be excised, the California Supreme Court said,
14 "An instruction not to consider the special circumstances
15 would defeat the manifest purpose of factor (a) to inform
16 jurors that they should consider, as one factor, the
17 totality of the circumstances involved in the criminal
18 episode that's on trial."

19 JUSTICE SCALIA: It is, indeed, very
20 complicated, Ms. Kirkland. And, I forget, which provision
21 of the Constitution is it that contains this complexity?

22 [Laughter.]

23 MS. KIRKLAND: All of this jurisprudence is
24 based on the eighth amendment requirement --

25 JUSTICE SCALIA: That says?

1 MS. KIRKLAND: -- that says that, "A valid
2 death-penalty statute must provide sufficient narrowing"
3 --

4 JUSTICE SCALIA: Is that what the eighth
5 amendment says?

6 MS. KIRKLAND: That's the way the eighth
7 amendment has been interpreted in its application of cruel
8 and unusual --

9 JUSTICE SCALIA: Cruel and unusual punishments
10 are forbidden. And this is where that comes from?

11 JUSTICE STEVENS: And may I ask you a question
12 about the California statute, if I may, please? In
13 subsection (a) of 190.3, it says that the trier of fact
14 "shall" take into account any of the following factors, if
15 relevant. And one of those is the existence of any
16 special circumstance found to be true, pursuant to 190.1.
17 And under 190.1, one of the special circumstances is
18 number 14, "heinous, atrocious, or cruel." Does that mean
19 the statute required in the weighing process -- that the
20 jury take into account that factor? And is it not true
21 that factor was held invalid?

22 MS. KIRKLAND: That factor was held invalid, but
23 what --

24 JUSTICE STEVENS: So, they were -- they were
25 directed to take into -- they "shall" take into account an

1 invalid factor.

2 MS. KIRKLAND: Well, yes. "Shall" -- as
3 interpreted in California versus Brown by this Court and
4 in the California Supreme Court jurisprudence, "shall" is
5 a directive, it's not -- it's not -- California does not
6 have a mandatory statute. In fact, none of these factors
7 are labeled as either aggravating or mitigating. It's
8 possible --

9 JUSTICE STEVENS: No, but the -- number 14
10 clearly is not mitigating.

11 MS. KIRKLAND: No. But whether or not a crime
12 is heinous, atrocious, and cruel is part of -- apart from
13 its labeling as a special circumstance, that's certainly a
14 valid consideration for the jury to be thinking about when
15 it's engaged in its normative process of choosing
16 sentencing. The only thing that's different under the
17 California statute -- when "heinous, atrocious, and
18 cruel," as a special circumstance, is out of the mix -- is
19 whether it can be labeled "heinous, atrocious, and cruel,"
20 and whether that label has any independent weight. But
21 all of the evidence and the --

22 JUSTICE STEVENS: All of the evidence --

23 MS. KIRKLAND: -- description of the crime --

24 JUSTICE STEVENS: Would you agree, though, that,
25 if you had a separate sentencing jury, one that did not

1 have all the evidence, and that jury was instructed that
2 at the guilt phase a determination has been -- that has --
3 it has been found that the crime was especially heinous,
4 atrocious, and so forth, that that finding might tip the
5 scales in favor of imposing the death penalty?

6 MS. KIRKLAND: I don't think so, Your Honor,
7 since that --

8 JUSTICE STEVENS: Because the underlying facts
9 are already before the jury, and they can make their own
10 judgment about them.

11 MS. KIRKLAND: Right. And that instruction
12 specifically directs the jury to all the facts and
13 circumstances of the crime; and so, not only the
14 characteristics of all those facts, but it would even be
15 appropriate for the prosecutor to refer to the crime as
16 "heinous and atrocious."

17 JUSTICE STEVENS: See, one of the -- one of the
18 things that concerns me about this case -- unlike Zant,
19 most of the cases in which we have found the label of
20 aggravating -- immaterial -- or findings like prior
21 criminal histories -- robbery, or something like -- but
22 whenever a pejorative factor of this kind has been found,
23 we've generally found it did tilt the scales a little bit
24 on the -- on the -- in favor of death. Clemons and the
25 other were cases of this kind of aggravating --

1 MS. KIRKLAND: Well, but --

2 JUSTICE STEVENS: -- circumstance.

3 MS. KIRKLAND: -- but Clemons is a "weighing"

4 State, where those --

5 JUSTICE STEVENS: I understand.

6 MS. KIRKLAND: -- aggravating or eligibility

7 factors are at the core of the sentencing decision. And

8 that's not the case in California. They're -- these are

9 not the --

10 JUSTICE STEVENS: Are there any --

11 MS. KIRKLAND: -- the lynchpin of it.

12 JUSTICE STEVENS: -- cases in which we have held

13 a fact of -- a finding of the fact of this kind was

14 irrelevant, was harmless? I think the cases are all the

15 other --

16 MS. KIRKLAND: Well, in "weighing" States,

17 that's true, but --

18 JUSTICE O'CONNOR: Ms. Kirkland, assume for a

19 moment -- I know you don't agree, but assume that the

20 Court, or a majority of it, were to hold that California

21 appears to be a "weighing" State. This case arose before

22 the enactment of the Federal law that we call AEDPA. So,

23 I guess pre-AEDPA law governs. And we would then have to

24 consider -- what? -- whether this is harmless error? But

25 the third question that you raised was -- apparently did

1 not incorporate any consideration of the Brecht standard.

2 Is that what would be applied if we had to address the
3 consequence here, of holding it to be a "weighing" State?

4 MS. KIRKLAND: No. We believe the Brecht
5 standard would not apply --

6 JUSTICE O'CONNOR: Why?

7 MS. KIRKLAND: -- in this instance, and that's
8 because what happens --

9 JUSTICE O'CONNOR: Wasn't that the pre-AEDPA
10 standard?

11 MS. KIRKLAND: Yes, that's the pre-AEDPA
12 standard, and --

13 JUSTICE O'CONNOR: So, why wouldn't that apply?

14 MS. KIRKLAND: Because, in this -- if California
15 were a "weighing" State -- and therefore, the Clemons
16 ruled applied -- in the first instance, the State court
17 has the opportunity to cure the error. And if the error
18 is cured by re-weighing -- appellate court re-weighing the
19 evidence, or appellate court harmless-error analysis, then
20 there is no error to be assessed under the Brecht
21 standard. And when it comes to the Federal court on
22 habeas corpus, the error has been cured. And so, Brecht
23 does not apply.

24 JUSTICE SOUTER: In this case --

25 JUSTICE KENNEDY: I have one background

1 question. And maybe I've missed something. Number 14,
2 "murder was especially heinous, atrocious, and cruel" --
3 taken alone, that would be vague. But I thought that in
4 Profitt we said that if it were -- if there were a gloss
5 given by the courts in interpreting that standard so that
6 it was made more specific, evidenced in a pitiless
7 attitude, pitiless crime, that then it was valid.

8 Has a Federal court, or have we said, that this
9 provision is unconstitutional? Or do we just assume that
10 in this case?

11 MS. KIRKLAND: Do we --

12 JUSTICE KENNEDY: Or am I missing --

13 MS. KIRKLAND: -- assume that the "heinous,
14 atrocious, and cruel" special circumstance in this case
15 was invalid?

16 JUSTICE KENNEDY: Yes.

17 MS. KIRKLAND: Yes, it -- we assume that,
18 because, in this case, the California Supreme Court held
19 that to be invalid. In Profitt -- and that's Florida
20 statute --

21 JUSTICE KENNEDY: Invalid as a matter of Federal
22 law?

23 MS. KIRKLAND: It's invalid as a matter of State
24 law.

25 JUSTICE KENNEDY: Okay.

1 MS. KIRKLAND: So, the -- California's holding
2 on "heinous, atrocious, and cruel" in its Engert case,
3 which is cited in these briefs, pre-dates this Court's
4 holding in Maynard that "heinous, atrocious, and cruel"
5 was invalid under the eighth amendment.

6 JUSTICE KENNEDY: So, now we have an extra layer
7 of complexity, because something that's been held
8 unconstitutional under State law is said to skew the
9 weighing, if it is weighing, as a matter of Federal law.

10 MS. KIRKLAND: Yes, it can be looked at --

11 JUSTICE KENNEDY: All right.

12 MS. KIRKLAND: -- that way. But the other thing
13 that I wanted to say about your question about Profitt is
14 that Florida, like some of the other States, after Maynard
15 v. Cartwright declared that "heinous, atrocious, and
16 cruel" was an inappropriate eligibility circumstance under
17 the eighth amendment, some States have fashioned either
18 instructions or changes in their law to tailor their
19 "heinous circumstance" to meet the concerns that are
20 expressed in Profitt. But California has never done that,
21 because --

22 JUSTICE KENNEDY: Was it --

23 MS. KIRKLAND: -- it held it invalid under
24 California law --

25 JUSTICE KENNEDY: -- was it this case in which

1 the Supreme Court of California made the definitive
2 interpretation --

3 MS. KIRKLAND: No.

4 JUSTICE KENNEDY: -- that this is -- what was --

5 MS. KIRKLAND: That case is Engert, which is --

6 JUSTICE KENNEDY: Engert. I can find it, thank
7 you.

8 MS. KIRKLAND: It's in the -- it's cited in the briefs.

9 JUSTICE SCALIA: What did -- what did the
10 California Supreme Court hold? Did it hold that
11 considering the "heinous, atrocious, or cruel" nature of
12 the crime as part of the totality of the balancing was
13 improper, or did it hold that that language is
14 insufficient to form one of the narrowing functions that
15 the aggravating circumstances provided.

16 MS. KIRKLAND: The Engert case specifically held
17 that the "heinous, atrocious, and cruel" circumstance was
18 only invalid as an eligibility determinant, because it
19 failed to adequately narrow. So, it specifically --

20 JUSTICE SCALIA: So, if I think something is
21 "heinous, atrocious, or cruel," I can use that in the
22 balancing, even though I can't use it as one of the
23 narrowing factors.

24 MS. KIRKLAND: That's correct. And in the Engert case
25 itself, the California Supreme Court indicated that

1 "heinous, atrocious, and cruel" would be a valid
2 sentencing consideration; it just wasn't a valid narrowing
3 consideration.

4 JUSTICE KENNEDY: Well, of course, this goes to
5 a question, really, for the Respondent. It helps -- there
6 is a paradox here. To the extent that a State attempts to
7 guide and to limit what the jury can consider in the
8 selection phase, it's held to a higher standard. There is
9 -- there is certainly a paradox there.

10 MS. KIRKLAND: Yes.

11 CHIEF JUSTICE ROBERTS: Counsel, I was confused
12 by your answer to Justice O'Connor's question. Do you
13 think the -- we should review the California Supreme
14 Court's harmless-error analysis, or should we undertake a
15 Brecht analysis?

16 MS. KIRKLAND: In this case --

17 CHIEF JUSTICE ROBERTS: Assuming you'd -- we'd
18 --

19 MS. KIRKLAND: Yes. Assuming --

20 CHIEF JUSTICE ROBERTS: -- you lose on the first
21 question.

22 MS. KIRKLAND: -- California is a "weighing"
23 State --

24 CHIEF JUSTICE ROBERTS: Yes.

25 MS. KIRKLAND: -- then the first step is for

1 this Court -- as the Ninth Circuit did, is to look at
2 whether California performed a proper Clemons review,
3 which is that the appellate court looks to see whether
4 there is a principled and complete harmless-error review.

5 The Ninth Circuit held that there was no such principled
6 and complete review, because --

7 CHIEF JUSTICE ROBERTS: I would have thought
8 that that might have collapsed into the Brecht analysis.

9 MS. KIRKLAND: It could have, but it -- the
10 court did it in two steps, and we believe it's because the
11 Ninth Circuit recognized that it couldn't get to Brecht
12 unless it found that California's attempt to cure the
13 error under Clemons failed.

14 JUSTICE GINSBURG: In other words, you said that
15 the error was harmless under Chapman, the higher standard
16 --

17 MS. KIRKLAND: Yes.

18 JUSTICE GINSBURG: -- and that the California
19 court so ruled. And if that ruling is correct, then you
20 would never get to any Brecht standard; the Federal court
21 would have to say California applied the proper harmless-
22 error analysis, and that's the end of the case.

23 MS. KIRKLAND: That's correct.

24 JUSTICE GINSBURG: So the -- so the second
25 question, once we get past weighing, is whether

1 California, in fact, did do what Chapman said. Is that
2 right?

3 MS. KIRKLAND: That's correct, that they not
4 only have to have applied the appropriate standards --
5 that is, the "beyond a reasonable doubt" standard, which
6 is the same as California's "reasonable possibility"
7 standard -- they not only have cried -- applied the
8 correct standard, but they have to have done so in a
9 principled and complete way so the reviewing court can
10 make sure that they've actually cured the error.

11 JUSTICE GINSBURG: Well, the problem --

12 MS. KIRKLAND: And --

13 JUSTICE GINSBURG: -- here is that the
14 California Supreme Court decision is rather skimpy once
15 you get to harmless error.

16 MS. KIRKLAND: Well, we think that their
17 analysis of the error was fairly complete. They refer to
18 the critical aspect of it. They talked about the standard
19 that should be applied. And they made clear, as they have
20 -- consistent with their holdings, that because all the
21 other evidence that related to the burglary, felony
22 murder, special circumstance, or eligibility factor and
23 the "heinous, atrocious, and cruel" eligibility factor,
24 since all of that evidence was properly before the jury
25 and the prosecutor, and nothing about the arguments or the

1 instructions emphasized the independent weight of those
2 eligibility factors in the sentencing, that, therefore,
3 there was no harm.

4 JUSTICE SOUTER: You're --

5 JUSTICE GINSBURG: What was -- the argument was
6 that, in California, the burden of proof is on --

7 JUSTICE SOUTER: Right.

8 JUSTICE GINSBURG: -- the defendant, instead of
9 on the prosecutor for the harmless-error inquiry?

10 MS. KIRKLAND: We think that the burden-of-proof
11 argument is illusory here, that the way that these things
12 are analyzed, just as they were in this very case, is that
13 it's the court who performs the analysis, and there's no
14 discussion of which side has to prove what. It's the
15 court who determines whether -- what standard's to be
16 applied and whether that standard is met by all of the
17 facts and circumstances --

18 JUSTICE KENNEDY: Maybe --

19 MS. KIRKLAND: -- of the case.

20 JUSTICE KENNEDY: -- so, in this -- or, weren't
21 there previous California cases -- or, again, correct me
22 if I'm wrong -- where California says the reasonable-
23 possibility test requires the defendant to establish that
24 the error was prejudicial? I thought that was the
25 California law. Or am I wrong?

1 MS. KIRKLAND: Well, the California -- the
2 California Supreme Court has said that "reasonable
3 possibility" and "beyond a reasonable doubt" are the same
4 thing. And those burden cases are in a completely
5 different context than this. In this case, in this kind
6 of circumstance, when we're talking about capital-case
7 sentencing, it's the court who does the analysis. There's
8 no discussion of burden, and there's --

9 JUSTICE SOUTER: Well, but don't --

10 MS. KIRKLAND: -- no placement of burden.

11 JUSTICE SOUTER: -- don't we assume that the
12 court follows California law on the -- on the burden? And
13 isn't it clear that, under California law, the burden is
14 on the defendant?

15 MS. KIRKLAND: No. In this case, the court --
16 there is no discussion of burden. There --

17 JUSTICE SOUTER: I know there is no discussion
18 of burden. But when there is no discussion of burden,
19 isn't the reasonable assumption for us to make, as a
20 reviewing Court, the assumption that the California
21 Supreme Court followed its own law, and its own law is
22 that the burden is on the defendant?

23 MS. KIRKLAND: Well, I don't think it's fair to
24 assume that in this instance, since burden didn't play any
25 role in this, that there was -- neither side had any

1 MS. KIRKLAND: No, it's the same process. And
2 in California, too, a critical thing is that that
3 "aggravating circumstances" mean the sentencing factors
4 that militate in favor of death; it doesn't mean that
5 "eligibility circumstance." It refers to those sentencing
6 factors.

7 I'd like to reserve the rest of my time for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, Ms. Kirkland.
9 Ms. Rivkind.

10 ORAL ARGUMENT OF NINA RIVKIND

11 ON BEHALF OF RESPONDENT

12 MS. RIVKIND: Mr. Chief Justice, and may it
13 please the Court:

14 I would like to focus on the observation that we
15 need to look at what the jury was instructed, because I
16 think that will clarify for the Court that California's
17 1978 law is, indeed, a "weighing" statute under the
18 established law of this Court.

19 In Mr. Sanders' case, the jury was instructed in
20 the language of section 190.3, and this language gave the
21 jury a very explicit roadmap as to how it was to undertake
22 its sentence selection in this case.

23 Section 190.3 assigns a specific role to the
24 aggravating factors. It tells a jury that, "In
25 determining the penalty, you shall consider, take into

1 account, and be guided by the listed enumerated factors."

2 The special circumstances, as the questions from the
3 Court have noted, are specifically included. Factor (a)
4 has two independent components, and one is the existence
5 of any "special circumstance" finding.

6 As Justice Stevens noted, this could only be
7 considered aggravating. It is, after all, the reason that
8 California has said that this case moved from being an
9 ordinary murder to being one that was worthy of either
10 death or life without parole.

11 JUSTICE KENNEDY: But it's not -- it's prefaced
12 by circumstances of the crime.

13 MS. RIVKIND: I --

14 JUSTICE KENNEDY: And this State, and other
15 States, can determine, "Oh, the victim was in fear for a
16 long time, or was tortured." It seems very odd that a
17 State, which is a so-called "non-weighting" State, could
18 allow all of this same evidence to come in, but
19 California, which tries to give some structure, is suddenly
20 held to a higher standard. That's paradoxical.

21 MS. RIVKIND: Well, no, I think it's not, and I
22 think it's very consistent with what we see in
23 Mississippi. In California, factor (a) contains two
24 independent components. One is the "circumstances of the
25 crime," and one is the "special circumstances." The

1 California Supreme Court, both before it affirmed Mr.
2 Sanders' death sentence and after -- before, in a case,
3 People versus Hamilton, and after, in People versus Benson
4 -- in the context of assessing invalid special
5 circumstances, said that it presumes the jury follows its
6 instructions, and considers the special circumstances
7 independently of their underlying facts.

8 JUSTICE KENNEDY: Of course, it's -- it's
9 invalid only because it's too vague for eligibility. It's
10 not invalid because it's too vague for selection.

11 MS. RIVKIND: I don't think that distinction
12 holds up. And I think that we see that both in Clemons
13 and in Stringer.

14 And this takes us to a misunderstanding of the
15 Mississippi statute. In Mississippi, the statute has not
16 changed since the time of Clemons, except for one
17 provision, and that is the addition of another category of
18 capital murder. In Mississippi, death eligibility is
19 decided by the definition of "capital murder" in section
20 97-3-19. And the State lists, I think, now nine -- I
21 think it was eight at the time of Clemons -- categories of
22 capital murder. The defendant then goes to a penalty
23 phase, and the statute sets forth aggravating
24 circumstances in Mississippi's statute, section 99-19-101.

25 There is a correlation between many -- at the

1 time of Clemons, all of the categories of capital murder
2 and the aggravating circumstances, much as there is in
3 Louisiana. However, there are two additional aggravating
4 factors at the sentence-selection phase, and those are the
5 "heinous, atrocious, and cruel" aggravator, which, in
6 Mississippi, is only a selection factor, and whether the
7 defendant had a prior conviction.

8 And so, in this sense, we -- the Mississippi
9 statute is very comparable to California. And it goes
10 further, because, in Mississippi -- in Clemons' case, if
11 you look at the joint appendix, at 24, and also in
12 Stringer's case, at joint appendix 10 -- the juries were
13 instructed, pursuant to the Mississippi standard capital-
14 sentencing instructions -- the very first opening
15 paragraph tells the juries that, "In determining penalty,
16 you must objectively consider the detailed circumstances
17 of the crime." And I think this instruction helps explain
18 the court's footnote 5 in Clemons, which I think is very
19 important in terms of understanding why this whole focus
20 on circumstances of the crime is not relevant to the
21 distinction between "weighing" and "non-weighing."

22 CHIEF JUSTICE ROBERTS: Why is --

23 JUSTICE SCALIA: Ms. Rivkind, I really don't
24 understand what harm is done here. I can understand
25 you're saying that there is harm done when a statute says,

1 "The jury shall weigh the aggravating circumstances,"
2 which are -- have been specified and which are narrowing
3 circumstances; there are only five named in the statute --
4 "shall weigh the aggravating circumstances found to be
5 true against the mitigating," and it turns out that one of
6 those five aggravating circumstances is unconstitutional.
7 Okay? Then you have the jury weighing something that it
8 shouldn't have weighed, because that aggravating
9 circumstance was bad.

10 I don't see why any harm is done where you have
11 a statute that lists aggravating factors, one of which is
12 "heinous, atrocious, or cruel," and that is later found
13 invalid by the State supreme court. But then, in the
14 weighing process, the jury is told, "Don't just weigh
15 aggravating factors, weigh all of the circumstances of the
16 crime."

17 Now, it seems to me that the same jury that
18 erroneously found, as one of the aggravating factors,
19 "heinous, atrocious, and cruel," would also have found
20 that "heinousness, atrociousness, and cruelty" to be one
21 of the circumstances to be weighed. So, what harm is
22 done?

23 MS. RIVKIND: I think the harm is -- there is
24 harm. I think the fact that the jury considers the
25 circumstances of the crime, in California, as an

1 aggravating factor. It may go to prejudice. Certainly,
2 the nature of a statute will inform a court's prejudice
3 analysis. But Mr. Sanders went into the penalty phase
4 essentially with four weights on death's side of the
5 scale, based solely on the special circumstances, and two
6 of those weights should not have been there. And his jury
7 was given a very --

8 CHIEF JUSTICE ROBERTS: But the -- but the
9 evidence supporting them was perfectly admissible. So,
10 the jury could consider that evidence and come to the same
11 conclusion; it's just the label that seems to be giving
12 you the most concern.

13 MS. RIVKIND: I have two responses, Your Honor.
14 First, the rule -- the distinction between "weighing" and
15 "non-weighing" is not an evidentiary rule. It is a rule
16 about the statutory labels that a State gives to the
17 factors that the jury puts on death's side of the scale.
18 Even in a "non-weighing" State, as Zant made clear, if and in
19 where a harmless-error review need not be done, because
20 the court has concluded there will be -- the aggravating
21 circumstances have an inconsequential impact, because the
22 jury is not required to consider them in the selection
23 decision -- even there, if an invalid aggravating
24 circumstance permits the introduction of evidence that
25 would otherwise have been inadmissible, we have error.

1 And that's the conclusion that the --

2 JUSTICE SOUTER: Okay, but aren't we in, sort
3 of, the converse situation here? There isn't any question
4 about the admissibility of evidence that shouldn't
5 otherwise have come in. I thought your argument here is:
6 the error proceeds from the fact that, by using this label
7 -- by referring to the circumstance as a "special
8 circumstance," having been found at the eligibility stage
9 -- that circumstance, and all the evidence that might
10 support it, is given extra weight, and that's where the
11 thumb on the scale comes. Isn't that your point here?

12 MS. RIVKIND: My argument is that the "special
13 circumstance" finding, itself, is the invalid aggravating
14 factor on death's side of the scale. That is what the
15 California Supreme Court --

16 JUSTICE SOUTER: But that's what I thought I was
17 trying to say. I mean, am I getting it wrong? Because
18 this is the --

19 MS. RIVKIND: No.

20 JUSTICE SOUTER: -- time to correct me, if I am.

21 MS. RIVKIND: No, the -- the jury could consider
22 the facts of the crime, as in Mississippi. The jury is
23 told to consider all the crime facts when deciding the
24 penalty. And in California the jury could have considered
25 the manner of the killing and who was killed and how the

1 crime proceeded.

2 The harm to Mr. Sanders was that the jury was
3 told that it had a process that was mandated for reaching
4 its decision, and that process required the jury to put
5 two special circumstances on death's side of the scale,
6 that should not have been there, and then required the
7 jury to reach the penalty decision by balancing.

8 JUSTICE GINSBURG: Are you saying -- because
9 this can get pretty complex -- simply, that because
10 special circumstances are a discreet category, that, in
11 effect, what went -- what the court is instructing is
12 double counting that factor? It's a factor in all the
13 circumstances how the -- how the crime was committed is a
14 factor of all circumstances; and then, in addition, it is
15 a special circumstance. So it is, in effect, counted
16 twice. Is that the essence of your argument?

17 MS. RIVKIND: I think it's more than that,
18 because I -- I think if -- the harm is --

19 JUSTICE SCALIA: I hope so.

20 [Laughter.]

21 MS. RIVKIND: It is more than that, because we
22 have to think of how the jury is understanding this. To
23 ordinary citizens who are called to stand in ultimate
24 judgment --

25 CHIEF JUSTICE ROBERTS: Well, didn't the

1 California Supreme Court answer that in --

2 MS. RIVKIND: Yes.

3 CHIEF JUSTICE ROBERTS: -- its Bacigalupo --

4 MS. RIVKIND: No.

5 CHIEF JUSTICE ROBERTS: -- decision, where, as I
6 read it, it says juries don't give special circumstances
7 any extra weight in considering all the variety of factors
8 listed in the statute?

9 MS. RIVKIND: I don't read Bacigalupo as saying
10 that. Bacigalupo did not deal with the question of
11 invalid special circumstances being weighed at the penalty
12 selection. I think the more appropriate authority of the
13 California Supreme Court are its Hamilton and Benson
14 decisions, wherein, addressing exactly the situation, a
15 claim that invalid special circumstances tainted the death
16 sentence, the court said, specifically, "We presume the
17 jury weighs those special circumstances, apart from the crime"
18 --

19 JUSTICE BREYER: The word "special
20 circumstances" is ambiguous, because it might refer to
21 something in the world, in which case it's about evidence,
22 or it might refer to something in the law, in which case
23 it's a statement by a prosecutor to look at some of this
24 evidence and give it some special weight. Now, that
25 what's confusing me throughout.

1 As I understood this area, to go back to what
2 Justice Scalia was saying -- no, wait, just -- I'll back
3 up to try to get you to correct my misunderstanding --
4 Zant is the key, because Zant says, "Judge, if you have a
5 'non-weighing' State" -- that is, everything's relevant
6 but the kitchen sink -- "the fact that the prosecutor made
7 a mistake at the eligibility stage by including something
8 he shouldn't is beside the point." Is that right?

9 MS. RIVKIND: That is correct.

10 JUSTICE BREYER: Fine. Then we look at Stringer
11 and Clemons, and they're making exceptions to Zant. And
12 they're making exceptions for "weighing" States. So, even
13 if the evidence in all three cases is identical and it
14 made no difference to the evidence -- that is, to what
15 really happened in the world -- still, says Clemons and
16 Stringer -- still, you're not home free yet, State.
17 Rather, you have to back up and do harmless-error
18 analysis.

19 So, the answer, I think, to Justice Scalia, if I
20 understand it, is, Justice Scalia, you may be right, maybe
21 all this is harmless, but we don't have before us the
22 product of harmless-error analysis, because you didn't
23 grant cert on it, among other reasons.

24 Now, if I'm right so far, and if we want to
25 straighten all this out, why not go back and say all three

1 cases are wrong? What you really ought to do is say,
2 "Court, always conduct harmless-error analysis. Conduct
3 it whether you're in 'non-weighing,' conduct it whether
4 you're in 'weighing.' We'll simplify."

5 Now, what would be so terrible about that?

6 MS. RIVKIND: Your Honor, if I were able to
7 write on a clean slate, that is the rule I would propose.

8 I think that if you -- the whole idea of Zant was carving
9 out an exception from conducting harmless-error review,
10 and the court was assured that because the aggravating
11 circumstance, which was only a death eligibility factor,
12 fell away at the selection stage, there was really -- it
13 was -- the impact of that aggravating circumstance was
14 likely to be inconsequential, as the Georgia Supreme Court
15 found, and as this Court found in Zant. The simple
16 approach would be to apply harmless-error review, no
17 matter what the structure of the statute --

18 JUSTICE BREYER: Then we would not have this
19 crossword puzzle, which probably only five people in the
20 United States understand, and the worst thing that would
21 happen would be, you'd always conduct harmless-error
22 analysis, and thus, if Justice Scalia is right about it,
23 you would lose, and if -- because it would be harmless --
24 and if he's wrong about it, you'd win.

25 JUSTICE SCALIA: Assuming --

1 MS. RIVKIND: I think -- I --

2 JUSTICE SCALIA: -- assuming the district court
3 does the -- the district court in the Ninth Circuit does
4 the harmless-error analysis correctly.

5 MS. RIVKIND: And --

6 [Laughter.]

7 MS. RIVKIND: And I --

8 JUSTICE GINSBURG: But isn't it the California
9 Supreme Court that has to do the harmless error, in the
10 first instance? And here, this is puzzling about this
11 case. Defendant said, at trial, to his lawyer, "Don't
12 argue any mitigators. I'd just as soon die as spend my
13 life in prison." So, no mitigators were argued. So then,
14 even if you have a wrong aggravator, you have other
15 aggravators that are right, and there's nothing to weigh
16 against those correct aggregators. So, what mitigation is
17 there to weigh against the valid aggravators?

18 MS. RIVKIND: Your Honor, I think we first need
19 to distinguish between the lack of a formal mitigation
20 case and the absence of mitigating factors. In this case,
21 in reviewing a different claim, the California Supreme
22 Court -- and I refer the Court to joint appendix 108, I
23 believe is the cite -- the California Supreme Court found
24 that Mr. Sanders' decision to refuse to take part in the
25 penalty phase did not necessarily make a death sentence

1 more likely, and it also found that the jury could have
2 found mitigating factors from the guilt-phase evidence.
3 Indeed, the jury was instructed to consider the evidence
4 from all parts of the trial.

5 JUSTICE GINSBURG: Well, what were those? I see
6 that sentence. The jury --

7 MS. RIVKIND: So, I think there was a --

8 JUSTICE GINSBURG: Yes, but what were the
9 mitigating factors from the evidence presented at the
10 guilt phase?

11 MS. RIVKIND: The main mitigating evidence was a
12 powerful mitigating factor which went to the personal
13 culpability of Mr. Sanders, and that was that the
14 prosecutor, in his closing guilt-phase argument, told the
15 jury, "We don't know whether Mr. Sanders was the actual
16 killer or whether his co-defendant, Mr. Cebreros, was."
17 And there was evidence from the surviving victim that
18 there was a conversation between the two assailants,
19 before the surviving victim was struck, in which one of
20 the men said he wanted to leave the apartment. And,
21 again, there was no evidence as to which defendant this
22 was.

23 This Court, in Green versus Georgia, has
24 realized that whether someone is an actual killer or an
25 accomplice is of critical importance in deciding between

1 life and death. That was the main powerful mitigating
2 factor in this case. And --

3 JUSTICE SCALIA: I've never heard that described
4 as a mitigating factor before. I mean, it's certainly
5 worse if you're a triggerman, but I don't know what makes
6 it -- somehow it's mitigating if you were not the
7 triggerman. I would say that you're not guilty of
8 something even worse. But to call that a factor of
9 mitigation --

10 MS. RIVKIND: I think it is mitigating, and the
11 fact that there is a question about one of the people,
12 perhaps the accomplice, which very well could have been
13 Mr. Sanders, wanting to leave before the murder occurred
14 was basis enough to give the jury pause. And if we look
15 at the deliberations, we realize that there was a jury
16 note, about three-quarters of the way through its
17 deliberations, asking the jury the consequences if it
18 could not reach a unanimous jury verdict.

19 JUSTICE GINSBURG: But now you're getting into
20 what has sometimes been called "residual doubt." You
21 point out that a juror asked, "What if it were not
22 unanimous?" And you also pointed out that there was an
23 earlier hung jury in this case. But you didn't argue,
24 below, that residual doubt counts. It's one thing to say,
25 "If defendant argues it, the court should take it into

1 account." But there was no such argument made in this
2 case.

3 MS. RIVKIND: You mean in the trial court.

4 JUSTICE GINSBURG: At any time.

5 MS. RIVKIND: No, in the -- in the ninth
6 circuit, residual doubt was argued. It is a mitigating
7 factor in --

8 JUSTICE GINSBURG: But in the trial court, it
9 wasn't, because that's when it would count.

10 MS. RIVKIND: No, in the trial court, nothing was
11 argued, because trial counsel acquiesced to Mr. Sanders'
12 request that there be no penalty defense.

13 And I want to make it clear, this is not a case
14 because Mr. Sanders wanted death. As his trial counsel
15 told the court, Mr. Sanders insisted he was innocent and
16 wanted to go home. The trial court made it very clear to
17 him, that wasn't an option.

18 JUSTICE GINSBURG: Didn't -- wasn't there a
19 statement that he was indifferent between death and life
20 imprisonment?

21 MS. RIVKIND: It -- there was a statement that
22 he did not want either penalty.

23 JUSTICE KENNEDY: Do you -- do you defend that
24 the difference in -- our distinction between balancing and
25 non-balancing -- or, pardon me, "weighing" and "non-

1 weighing" States -- your answer to Justice Breyer
2 indicates the -- that you would not be disconsolate if we
3 jettisoned the whole -- the whole distinction. And isn't
4 it true that it's paradoxical that a State which tries to
5 structure the selection phase by giving specific factors
6 as held to a higher standard than a State that doesn't?
7 That seems to me very odd.

8 MS. RIVKIND: Well, I don't -- I don't think
9 that's odd. I think what that recognizes is that the
10 Court has said, "While you do not have to give a -- we do
11 not need a guided-discretion statute" -- that, as Zant
12 holds, a jury can have complete, absolute discretion in
13 choosing between life and death -- that when a State does
14 regulate that, it must be done within the contours of the
15 Constitution. The essential wisdom in the distinction
16 between "weighing" --

17 JUSTICE KENNEDY: But it is within the contours
18 of the Constitution if, in a "non-weighing" State, the
19 same evidence could be considered.

20 MS. RIVKIND: But it -- I don't -- again, I
21 don't think it's a question of evidence, I think it's a
22 question of what are those factors that are being put in --
23 on -- in death's side of the scale, and how are they being
24 balanced --

25 JUSTICE BREYER: Yes, and I can imagine, in

1 "non-weighing" State, a prosecutor banging on and on, at
2 the eligibility stage, on factor X, and really fixing that
3 in the mind of the jury, and it turns out that factor X is
4 not an aggravator. Now, the jury might have been
5 prejudiced.

6 And I can imagine, in a "weighing" State that,
7 because the evidence is the same, and because there were
8 so many factors just like it, the fact that they used the
9 wrong factor didn't really make any difference.

10 So, it seems to me the lineup between harm --
11 real harm in a case, and weighing/non-weighing, it doesn't
12 line up terribly well. But you have the experience. And
13 that's why I'd like your reaction.

14 MS. RIVKIND: In terms of the rule of --

15 JUSTICE BREYER: Yes. Yes. I mean, a serious
16 effort to go back and say, "Look, harmless error
17 throughout." I mean, I'm pushing the same thing I said
18 before.

19 JUSTICE SCALIA: He wants to know whether you
20 would like to be thrown --

21 JUSTICE BREYER: Yes.

22 JUSTICE SCALIA: -- into the "Breyer" patch. I
23 think --

24 [Laughter.]

25 JUSTICE SCALIA: -- I think the answer is yes.

1 [Laughter.]

2 MS. RIVKIND: I -- I'd like harmless-error
3 analysis. I think -- I think that would be a simpler
4 approach. It would accommodate competing interests,
5 because each State's statute would be informing the
6 prejudice analysis, and you would be looking at how many
7 different sentencing selection factors were before the
8 jury.

9 JUSTICE KENNEDY: In that --

10 MS. RIVKIND: I --

11 JUSTICE KENNEDY: -- analysis, would you use, as
12 one factor, the circumstance that an eligibility
13 determination was made by the jury, was focused on by the
14 prosecutor, and that that was impermissibly vague? Would
15 that be a component of your harmless-error analysis?

16 MS. RIVKIND: I'm sorry, Your Honor, I don't --
17 I didn't --

18 JUSTICE KENNEDY: Would it be a --

19 MS. RIVKIND: -- get the question.

20 JUSTICE KENNEDY: Well, we have the rule,
21 already, that if there is an invalid eligibility factor
22 and it's a "weighing" State, that there's -- that the
23 process is defective. Would you carry over that same
24 argument just as one component of the harmless-error
25 analysis?

1 MS. RIVKIND: I think if we had -- well, I first
2 would like to clarify something you said. I think, under
3 the existing law, it's not -- it is not just eligibility
4 factors, the invalidity of eligibility factors -- that
5 create -- arbitrarily skew the sentencing, that, as we see
6 in Mississippi, the "heinous, atrocious, and cruel" was
7 only a selection factor. So, I think it -- this focus on
8 an equivalence or a overlap between eligibility and
9 selection factors is just not found in the Court's case
10 law.

11 JUSTICE KENNEDY: But that was the whole basis
12 -- correct me if I'm wrong -- for the Ninth Circuit's case
13 in your -- Ninth Circuit decision in your favor in this
14 case. In this case, it certainly --

15 MS. RIVKIND: Well, in --

16 JUSTICE KENNEDY: -- is an accurate description
17 of --

18 MS. RIVKIND: -- in this --

19 JUSTICE KENNEDY: -- what the rule is.

20 MS. RIVKIND: -- case, yes. The special
21 circumstances that are the invalid aggravating factors
22 were eligibility requirements. But that is not -- as the
23 Federal death penalty shows, that is not a prerequisite in
24 the weighing/non-weighing distinction.

25 And I think I didn't answer the second part of

1 your question, but, I'm sorry, I can't remember it --

2 JUSTICE KENNEDY: Well, I --

3 MS. RIVKIND: -- about --

4 JUSTICE KENNEDY: -- I was just asking if we can
5 import the same formal rule we now have and reach -- and
6 -- if we don't consider the same things in harmless-error
7 analysis.

8 MS. RIVKIND: Well, I think they would be. I
9 mean, the way I would envision it is that if the jury
10 weighs an invalid factor -- and under Sochor, the
11 invalidity does not have to be based on Federal
12 constitutional law. State-law invalidity creates the same
13 harm; you're arbitrarily skewing the process toward death.

14 CHIEF JUSTICE ROBERTS: But it --

15 MS. RIVKIND: If --

16 CHIEF JUSTICE ROBERTS: -- but it's only invalid
17 as an eligibility factor. It's not invalid as a selection
18 factor.

19 MS. RIVKIND: In Sochor.

20 CHIEF JUSTICE ROBERTS: In this case.

21 MS. RIVKIND: In this case, it's invalid as to
22 both, because it serves both purposes. It's -- first,
23 sees it as an eligibility factor, and then the -- the
24 provision says -- it doesn't say just consider special
25 circumstances in some vague, undefined way; it

1 specifically refers the jury back to its findings at the
2 guilt phase. Section 190.3, subsection (a), says,
3 "Consider the existence of an -- any special circumstances
4 found true at the guilt phase." That's telling the jury,
5 "Your -- the findings that made the defendant get the
6 death penalty" --

7 JUSTICE SCALIA: It's the same jury. It's the
8 same jury. The same jury that found it atrocious and
9 cruel in the guilt phase would find it atrocious and cruel
10 in the weighing stage. I don't see --

11 MS. RIVKIND: In --

12 JUSTICE STEVENS: But in -- would you clarify
13 something? Is it the correct interpretation of the
14 California law that the -- the California court held, in
15 effect, that you may not consider the fact that the crime
16 was heinous and atrocious for purposes of deciding whether
17 he's eligible for the death penalty, but you may consider
18 that fact for the purpose of deciding whether to impose
19 the death penalty?

20 MS. RIVKIND: No, I think if it's invalid for
21 one, it's invalid for the other.

22 JUSTICE STEVENS: But is that what the
23 California court would say?

24 MS. RIVKIND: The California -- the -- in
25 Engert, the question was eligibility. In this case, the

1 question was only selection. And the California Supreme
2 Court -- the State conceded that the "heinous, atrocious,
3 and cruel" circumstance was invalid, and the court, in
4 this case, addressed its use as a selection factor.

5 JUSTICE SCALIA: But what -- the specificity you
6 need for the narrowing factor does not exist with respect
7 to mitigating factors. We've said anything can be a
8 mitigating factor. I find it impossible to believe that
9 the California Supreme Court said not only is the phrase
10 "heinous, atrocious, and cruel" too -- you know, too vague
11 for the narrowing factor, but, when you get to the
12 weighing phase, the fact that the murderer sliced up his
13 victim with a thousand cuts of the knife cannot be taken
14 into account by the jury. That's unbelievable.

15 MS. RIVKIND: Well, the eighth amendment, as
16 this Court said in Tuilaepa, does apply to the selection
17 factors. It looks as -- at whether there's a commonsense
18 core meaning.

19 JUSTICE SOUTER: No, but isn't -- I want to
20 throw you a suggestion -- isn't the answer to that problem
21 that anything may be considered as mitigating evidence,
22 but a mitigating factor is a conclusion that evidence has
23 a certain significance, and not everything may be taken
24 into consideration as a mitigating factor? Isn't -- the
25 problem that Justice Scalia raises addressed by

1 distinguishing between evidence -- consider it all -- and
2 factors, a characterization of evidence which may not
3 necessarily be considered.

4 JUSTICE GINSBURG: You mean aggravating --

5 MS. RIVKIND: Yes, I'm confused.

6 JUSTICE SOUTER: Yes. Yes. Yes.

7 MS. RIVKIND: Okay. Because we're --

8 JUSTICE SOUTER: Yes.

9 MS. RIVKIND: Okay. Because we're talking about
10 aggravating factors.

11 JUSTICE SOUTER: Yes. Yes. I misspoke. But, I
12 mean, the distinction between "evidence" and "factor" is
13 the -- is the key, isn't it?

14 MS. RIVKIND: It's the key, because the
15 consideration of the circumstances of the crime is not the
16 problem that we have. What we have is that the jury's
17 told to consider this fact or this finding that the jury
18 understands makes the defendant -- because the State has
19 said this is a reason both to make him death-eligible and
20 a reason to impose death -- creates a weight on death's
21 side of the scale.

22 JUSTICE SOUTER: All right. That means the
23 answer to my question is yes, right?

24 MS. RIVKIND: Yes.

25 JUSTICE SOUTER: Okay.

1 JUSTICE SCALIA: But the statute does not say
2 "the finding of any special circumstances found to be
3 true." It says "the existence of any special
4 circumstances found to be true." That's what they're --
5 that's what they're instructed to consider. The
6 existence. In determining the penalty, the trier of fact
7 take into account the following, (a), it says, the
8 "existence" of any special circumstances found to be true;
9 not the "fact" that they were found to be true.

10 MS. RIVKIND: Well, I think the prosecutor's
11 argument in this case shows that they understood it as the
12 finding. The prosecutor here argued -- in the precise
13 language of the special circumstance, argued that this --
14 "the heinous, atrocious and cruel nature of this crime,"
15 parroting the language of the special circumstance.
16 Clearly, the jury, I think --

17 JUSTICE SOUTER: And that was correct under the
18 law, wasn't it? In other words, "special circumstance"
19 means the same thing when it's referred to -- the term
20 means the same thing when it's referred to in the statute
21 on selection as it means in the statute on eligibility.

22 MS. RIVKIND: Yes.

23 JUSTICE SOUTER: Okay.

24 MS. RIVKIND: In this case, what we have under
25 the law that exists now is that California assigned a

1 specific role to the aggravating circumstances that
2 included the special circumstances --

3 CHIEF JUSTICE ROBERTS: Thank you, Ms. Rivkind.
4 Ms. Kirkland, you have two and a half minutes
5 left.

6 REBUTTAL ARGUMENT OF JANE N. KIRKLAND
7 ON BEHALF OF PETITIONER

8 MS. KIRKLAND: I'd like to make three quick
9 points in rebuttal.

10 The first is that, as to the claim -- Ms.
11 Rivkind's claim, that she's reiterated here, that the
12 California Supreme Court has determined that the "special
13 circumstances" label has some independent weight that it's
14 important for the jury to consider at sentencing -- she's
15 only cited half of the sentence in Benson and Hamilton.
16 The other half rebuts her claim.

17 The sentence is, "Although we presume that the
18 jurors followed their instructions and considered the
19 invalid special circumstances finding, independent of thier
20 underlying facts" -- that's what she relies on -- they
21 say, then, as they've said in a number of cases, "we
22 cannot conclude that they could reasonably have given them
23 any independent significant weight."

24 So, it's just the point we're making. It's just
25 a label that does not carry with it any independent

1 significant weight, because the evidence, the argument,
2 the circumstances are all before the jury in the same way.

3 The second point is that, while there may be
4 some doubt as to whether Mr. Sanders was the actual killer
5 in this case, there's no question as to his complete
6 culpability in the crime. He was the leader. He led
7 Cebreros there. He was the one who incited the crime in
8 order to cover up for a prior botched robbery.

9 JUSTICE GINSBURG: Do you agree that such
10 residual-doubt factors are appropriately considered if the
11 defendant didn't raise them? I mean, the question of --
12 that, yes, the jury found the defendant guilty beyond a
13 reasonable doubt, but maybe there's something that makes
14 that determination doubtful.

15 MS. KIRKLAND: I don't think that's an
16 appropriate consideration here, where it wasn't raised,
17 ever.

18 The third point is that we wouldn't be here,
19 except for the overlap in factor -- sentencing factor (a).

20 That subclause, which the California Supreme Court has
21 repeatedly held, means only that the jury is to consider
22 all the facts and circumstances of the crime, including
23 the facts and circumstances underlying the special
24 circumstance, or eligibility factor. If that subclause
25 wasn't in there, our eligibility factors in the special

1 circumstance, and our sentencing factors, would be
2 completely mutually exclusive and there would be no issue
3 whatsoever.

4 CHIEF JUSTICE ROBERTS: Thank you, Ms. Kirkland.

5 MS. KIRKLAND: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is submitted.

7 [Whereupon, at 11:03 a.m., the case in the
8 above-entitled matter was submitted.]

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