
CASE # 05-8914

In The Supreme Court Of The United States

MAURICE HARRIS,
Petitioner

Vs.

CALIFORNIA

RESPONDENT

CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

Motion for Leave to file *amici curiae* Brief and
Amici Curiae Brief of Friends of Maurice Harris in
support of Petitioner

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
4144 WINDING WAY, # 4
SACRAMENTO, CA 95841-4413
OFFICE: (916) 485-8807
EMAIL: JJLYNCHSR@SBCGLOBAL.NET

COUNSEL FOR AMICI CURIAE THE FRIENDS OF
MAURICE HARRIS IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE AMICI CURIÆ BRIEF

The Friends of Petitioner move for leave to file a brief in support of the petitioner on the grounds there are issues, and refinement of issues, not adequately dealt with in the Petition, the brief will aid this court in reaching a just result in this case, and a capital Petitioner should have as much help as possible.

Permission of Counsel for Petitioner was sought. It is unknown what Counsel's position is. Counsel for respondent was not available at the time this brief was prepared.

The interest of Amici is set forth at page 1 of the brief.

Dated February 4, 2006

James Joseph Lynch, Jr.
Attorney At Law (SBN 85805)
4144 WINDING WAY, # 4
SACRAMENTO, CA 95841-4413
OFFICE: (916) 485-8807

Email: jjlynchsr@sbcglobal.net

STATEMENT OF ISSUES

Amici curiae believes that the following issues should be considered to be subsumed in the issues raised in the petition:

1. In view of this court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), given a defendant’s right to a jury trial, is California death penalty law unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, and the appropriateness of a death sentence.

2. Whether, in light of ring, where trial Counsel attempted to argue, “What would be one of the most fundamental concerns you are going to have? Is society protected?” and cut off by the trial judge, did California court err in finding that it was harmless error?

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF..... I
TABLE OF CONTENTS..... III
TABLE OF AUTHORITIES..... IV
STATEMENT OF INTEREST OF *AMICI CURIAE* 1
SUMMARY OF REASONS FOR GRANTING CERTIORARI 1
REASONS OF GRANTING CERTIORARI..... 2
**I. GIVEN THE RIGHT TO A JURY TRIAL, AND THE TRADITIONAL
“BEYOND A REASONABLE DOUBT” STANDARD,
CALIFORNIA’S DEATH PENALTY, AS APPLIED IS
UNCONSTITUTIONAL 2**
II. SOCIETY MAY ONLY USE REASONABLE FORCE IN ITS DEFENSE 3
CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES

<i>Adams v. Storey</i> , 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817)	4
<i>Bank of the United States v. Deveaux</i> , 5 Cranch (9 U.S.) 61, 85 (1809)	4
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	6
<i>Brown v. Bd. of Education</i> , 347 U.S. 483 (1954) (<i>Brown I</i>)	6
<i>Brown v. Bd. of Education</i> , 349 U.S. 289 (1955) (<i>Brown II</i>)	6
<i>Brown v. United States</i> , 256 U.S. 335 (1921)	5
<i>Field v. Clark</i> , 143 U.S. 649, 691 (1891)	6
<i>Garland, Ex Parte</i> , 71 U.S. (4 Wall.) 333 (1867)	6
<i>Gibbons v. Ogden</i> , 9 Weat. (22 U.S.) 1 (1824)	4
<i>INS v. Cardozo-Fonesca</i> , 480 U.S. 421 (1987)	6
<i>Locke v. New Orleans</i> , 4 Wall (71 U.S.) 172 (1866)	4
<i>Lowenfield v. Phelps</i> , 484 U.S. 231 (1988)	3
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982)	4
<i>People v. Ghent</i> , 43 Cal.3d 739 (1987)	7
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	6
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	ii, 1, 2, 3
<i>Scott v. Sanford</i> , 60 U.S. (19 How.) 393 (1857)	4
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1986)	5, 7
<i>The Nereide</i> , 13 U.S. 388 (1815)	6
<i>United States v. Block</i> , 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1867)	4
<i>United States v. Classic</i> , 314 U.S. 707 (1941)	4
<i>United States v. Harris</i> , 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866)	4
<i>Veazie Bank v. Fenno</i> , 8 Wall (75 U.S.) 533 (1869)	4
<i>Winship, In re</i> , 397 U.S. 358 (1970)	3
<i>Wright v. United States</i> , 302 U.S. 583 (1938)	4

CONSTITUTIONS

Federal

Preamble	4, 5
Art. I, § 1	7
Art. I, § 8	5

Art., §§ 9 & 10	4
10th Amend	5

INTERNATIONAL

<i>United Nations Charter, Chapter VI [commencing with Article 33]</i>	6
--	---

CODES

California	
Govt.C. § 100(a)	5

MISCELLANEOUS

<i>3 Rotunda, Treatise on Constitutional Law, § 23.33, p. 512 (1986)</i>	6
<i>Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2</i>	5
<i>Breyer, ACTIVE LIBERTY (Alford A. Knopf, New York 2005)</i>	2
<i>Cheshire, THE MODERN LAW OF REAL PROPERTY</i>	5
<i>Farrands 28-33</i>	4
<i>Foster, CROWN LAW 273-277 (1762)</i>	5
<i>Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) §§ 6.1 n.2, 15.11 n.4, & 23.8</i>	5
<i>Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532,</i>	4
<i>Perkins, CRIMINAL LAW AND PROCEDURE (Foundation press, 4th Ed., 1972),</i>	5
<i>Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) § 3.12 n.2</i>	5
<i>Rotunda, TREATISE ON CONSTITUTIONAL LAW (Vol. 1) §§ 3.1, 3.2</i>	5
<i>The International Covenant on Civil and Political Rights, Part III, art. 6(2)</i>	7
<i>United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43, 53</i>	7
<i>Verdross, Forbidden Treaties in International Law, 31 AJIL 571</i>	5
<i>Verdross, Forbidden Treaties in International Law, 31 AJIL 571 (1937)</i>	7
<i>Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 AJIL 55 (1961)</i>	5, 7

STATEMENT OF INTEREST OF AMICI CURIAE

The Friends of Petitioner are an unorganized group of individuals scattered throughout the United States, unrelated to the petitioner, who are opposed to capital punishment generally. Amicii are concerned that a decision in this court will affect the sentencing procedures in each of the several; States, and therefore seek to uphold and defend the Constitution of the United States.¹

Friends believe that human life should not be taken without substantial justification, that is, deadly force should be used only when reasonable, and that the protection of society may be adequately protected by incarceration.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

1. In view of this court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), given a defendant’s right to a jury trial, the decision of the California Supreme Court, slip opinion at page 61, raises a serious federal issue as to whether California’s death penalty law is unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, and the appropriateness of a death sentence, given the traditional rule that “beyond a reasonable doubt” is an ingrained part of the American criminal justice system inherited from the common law, and such a rule, as applied to capital sentencing, is justified by seriousness of the penalty, and the need to carefully narrow the application of the death penalty.

¹ No counsel for a party authored the brief in whole or in part and no person or entity, other than the Amici curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief on behalf of *amicii curiae*. The brief is being submitted *pro bono publico*.

2. In light of *Ring v. Arizona*, 536 U.S. 584 (2002), where trial Counsel attempted to argue, “What would be one of the most fundamental concerns you are going to have? Is society protected?” and cut off by the trial judge, Slip opinion, at page 51, the California Court’s decision raises a serious federal issue as whether, given the that sovereignty resides in the people,² common law notions of sovereignty have been abolished, the powers of government are delegated from the people, and right of the people to use deadly force only if reasonable, that the Court below erred because death should be imposed, if at all, only if the State can show that it cannot protect society by incarceration.

REASONS OF GRANTING CERTIORARI

I.

GIVEN THE RIGHT TO A JURY TRIAL, AND THE TRADITIONAL “BEYOND A REASONABLE DOUBT” STANDARD, CALIFORNIA’S DEATH PENALTY, AS APPLIED IS UNCONSTITUTIONAL

Capital sentencing is unique in that, generally speaking, it is a judge, within statutory limitations, that imposes a sentence, whereas in capital sentencing, it

² “The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself. When Jefferson wrote, “I know no safe depository of the ultimate powers of the society but the people themselves,” his concern was for abuse of government power. But when he spoke of the rights of the citizen as “a participator in the government of affairs,” when Adams, his rival, added that all citizens have a “positive passion for the public good,” and when the Founders referred to “public liberty,” they had in mind more than freedom from a despotic government. They had invoked an idea of freedom as old as antiquity, the freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation's public acts.” Breyer, *ACTIVE LIBERTY* (Alford A. Knopf, New York 2005), p. 3.

is a jury, which ought in the interest of justice, be given guidelines that insure that the death penalty is imposed, if at all, only for appropriate reasons. This Court recognized, as such in *Ring v. Arizona*, 536 U.S. 584 (2002), when it held in summary that “*Walton* and *Apprendi* are irreconcilable; this Court’s Sixth Amendment jurisprudence cannot be home to both. Accordingly, *Walton* is overruled to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U. S., at 647–649. Because Arizona’s enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense,” *Apprendi*, 530 U. S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury. Pp. 597–609.” For instance, except for prior convictions, this court has consistently held that factors in aggravation must be proved beyond a reasonable doubt. *In re Winship* (1970) 397 U.S. 358, 364; *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

As will be shown in point II, *infra*, this court has refined death penalty law to the point, that the emerging standards of decency require that the death penalty be sparingly used, if at all. It thus remains for this court to determine the correct standard to be applied by the jury in determining the facts necessary to weight in the balance whether to impose the death penalty, and the court should do so in this case.

II.
SOCIETY MAY ONLY USE REASONABLE FORCE IN ITS DEFENSE

Trial Counsel attempted to argue, “What would be one of the most fundamental concerns you are going to have? Is society protected?” The judge cut him off. In affirming the judge’s decision, California Court raises a serious federal issue.

Sovereignty resides in the People. U.S. Constitution,³ Preamble [“We, the People”].⁴ The federal powers are expressly recognized as being delegated

³ In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817) . The constitution and the law are to be expounded without leaning one way or the other, according to those general principles that usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85 (1809) . No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938) . Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the constitution and the amendments were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869) ; *Locke v. New Orleans*, 4 Wall (71 U.S.) 172, (1866) ; *Gibbons v. Ogden*, 9 Weat. (22 U.S.) 1, 188-189 (1824) ; *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866) ; *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877) ; *Pardoning Power of the President*, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) . Where there are several possible meanings of the words of the constitution, that meaning that will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 314 U.S. 707 (1941).

⁴ While the result in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), may be correct, its *ratio decidendi* does not square with the Preamble and Article I §§ 9 & 10. Clearly, the President does not stand in the shoes of the King, because titles of nobility were abolished for an intended purpose. Farrands 28-33; Federalist Papers, ## 32, 39;. The framers placed sovereignty in the People. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) .

powers. U.S.Const. 10th Amendment. 1 Rotunda, Treatise on Constitutional Law §§ 3.1, 3.2. By its terms, the 10th Amendment implies that powers are delegated by the People to the State, and the concept is written into the California Constitution's Preamble.⁵

It has always been recognized that a Person could only grant that estate which he possessed. Blackstone, Commentaries on the Laws of England, Vol. 2, page 290;⁶ Cheshire, THE MODERN LAW OF REAL PROPERTY, p. 660 (Citing common law principles). At the time the constitution was drafted, an individual could use only reasonable force for self-defense, and deadly force only when met with deadly force and its use is reasonable. If the attacker retreats or abandons the fray, then the victim can no longer use deadly force. Foster, CROWN LAW 273-277 (1762); *Brown v. United States*, 256 U.S. 335 (1921); Perkins, CRIMINAL LAW AND PROCEDURE (1972) 660-667; *Tennessee v. Garner*, 471 U.S. 1 (1986).

Because an individual at common law could only use reasonable force, and deadly force if reasonable [*Foster*], that is all the power the individual

⁵ The United States was established in the light of the Hobbs/Locke Theory of Social Contracts wherein the Government is established to protect the welfare of its citizens at home. 1 Rotunda 3.12 n.2. This is an internationally recognized duty of Nations. Verdross, *Jus Dispositivum land Jus Cogens in International Law*, 60 AJIL 55 (1961); Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937) ;. and recognized in the Preamble; and Art. I, § 8; of the U.S. Constitution. See also, California Constitution, Preamble ["We, the People"]; Cal. Govt. C. § 100(a).

⁶ Blackstone; is a recognized source of the common law in aid of interpreting the U.S. Constitution. 1 Rotunda §§ 6.1 n.2, 15.11 n.4, & 23.8; n.1, para. 5 (p. 484, left column).

collectively can delegate to the States, hence the State may only use reasonable force, and deadly force if reasonable.⁷ *Garner*.

The rules of self-defense apply to states in International Law.⁸ United Nations Charter, Chapter VI [commencing with Article 33]. It is considered a

⁷ Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, *Treatise on Constitutional Law* § 23.33, p. 512 (1986). The Court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by the Court, the Court overruled, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown I*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown I*, 347 U.S., at 488-89, 496 (1954); *Brown v. Bd. of Education*, 349 U.S. 289, 294, 298 (1955) (*Brown II*) (Nature of remedy to be utilized).

⁸ Courts are bound by the law of Nations which is part of the law of the land. *The Nereide*, 13 U.S. 388 (1815); *INS v. Cardozo-Fonesca*, 480 U.S. 421 (1987) ; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980).

rule of *jus cogens*, vis peremptory norm of international law, from which no state may derogate. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1961), 60, #3; Id, *Forbidden Treaties in International Law*, 31 AJIL 571-77.⁹ The concept is preserved in the United States Constitution, Art. I, § 1 (No State shall, ... engage in War, unless actually invaded ... imminent Danger ...). It has been tacitly recognized by *stare decisis*. *Tennessee v. Garner*, 471 U.S. 1 (1986) [Striking down State's fleeing felon statute].

Once an individual is incarcerated, that is all the force required to protect society from further harm therefore the death penalty¹⁰ would be cruel and

⁹ In *People v. Ghent*, 43 Cal.3d 739 (1987), the court rejected an argument that the United Nations Charter and Declaration on Human Rights precludes the imposition of the death penalty, and in any event before those documents may be utilized, they must be either be implemented by Congress or self-executing. However, rules of *jus cogens* are recognized by multinational pact. The United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43; [Obligations imposed independently of treaty], Art. 53 [*jus cogens* and void treaties], U.N. Doc. A/Conf. 39/11. Moreover, Verdross points out that these laws, by their very nature, are self-executing. The argument made here centers on what process is due before it may be imposed.

¹⁰ The International Covenant on Civil and Political Rights, Part III, article 6(2), declares: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime" Ratified by the United States and 71 other countries, effective March 23, 1966. *E.g.*, *People v. Ghent*, 43 C.3d 739 (1987) (Dissenting Opinion by Broussard and Mosk, JJ).

unusual punishment, unless the State shows that society cannot be protected by incarceration.

Based on the foregoing, there is a serious challenge to the appropriateness of the death penalty, which this court ought consider and resolve.

CONCLUSION

Wherefore, this court ought to grant certiorari, and on consideration of the issues raised in the petition and this *Amici curiae* brief, reverse and remand for further proceedings

Dated: February 4, 2006

RESPECTFULLY SUBMITTED,

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
4144 WINDING WAY, # 4
SACRAMENTO, CA 95841-4413
OFFICE: (916) 485-8807
EMAIL: JJLYNCHSR@SBCGLOBAL.NET

CKOUNSEL FOR *AMICI CURIAE*