ORIGINAL

In the

Supreme Court of the United States

HARRY ROBERTS,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT,

No. 76-5206

Washington, D.C.
March 28, 1977

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STATE OF LOUISIANA,

Respondent.

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Monday, March 28, 1977

The above-entitled matter came on for argument at 11:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

GARLAND R. ROLLING, ESQ., 319 Metairie Road, Metairie, Louisiana, 70005, for the Petitioner.

LOUISE KORNS, ESQ., Assistant District Attorney for the Parish of Orleans, 2700 Tulane Avenue, New Orleans, Louisiana, 70119, for the Respondent.

JULES E. ORENSTEIN, ESQ., Assistant Attorney General of the State of New York, Two World Trade Center, New York, New York, 10047, amicus curiae.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-5206, Roberts against Louisiana.

Mr. Rolling, you may proceed whenever you are ready.

ORAL ARGUMENT OF GARLAND R. ROLLING, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROLLING: Mr. Chief Justice and members of the Court, and may it please the Court:

My name is Garland Rolling. I am here in behalf of the Petitioner, Harry Roberts.

Harry Roberts was a young, nineteen year old black lad who was convicted by the Criminal District Court for the Parish of Orleans for the killing of a police officer, under Statute RS 1430 which was a mandatory death penalty statute, part of which has been approved in the predecessor to this case, Stanislaus Roberts v. Louisiana.

I find myself in a rather unique position of having to call to the Court's attention the possible jurisdictional problem on a writ that I applied for in accordance with 28 USC (a)1257.

If it may please the Court, Harry Robert's case was argued and submitted in the Supreme Court of Louisiana. The death sentence was affirmed. A rehearing was applied for. It was denied.

During the 90-day writ period, of course, the

Stanislaus Roberts case came down from this Court. It was too late to have any further hearings before the state court so we went ahead with the writ in this particular Court.

I am concerned, if it may please the Court, that had the Louisiana Supreme Court had the benefit of Stanislaus Roberts at the time they decided Harry Roberts, possibly a different result would have occurred.

Stanislaus Roberts, as you know, struck down Section 1 of the RS 1430 statute, the mandatory death penalty for the killing during an armed robbery.

This may be merely academic, the question of the finality of judgment, because certainly if the Supreme Court of the United States sends this back to the Supreme Court of Louisiana, then the state or the individual could apply for writs and be back up here in six months to a year, but I do want to call it to the Court's attention for whatever consideration they may want to give it.

The second and more basic consideration that we are asking the Court for on behalf of Harry Roberts are the procedural objections that we have to the matter of the caption of the first degree murder statute in Louisiana which, of course, has been reamended and reaffirmed since the decisions in Proffitt v. Florida and Gregg v. Georgia and the other cases which came down some time ago.

The statute provides, of course, for built-in

aggravating circumstance, the killing of a police officer. It would have been interesting in the outcome of this case if we could have presented the various mitigating circumstances. One particular interesting thing about the case is the defendant took the witness stand in his own behalf and he has continually and vehemently denied his guilt in this case and said it was a case of misidentification.

There was evidence both ways. The jury resolved the facts against him. There were numerous mitigating circumstances. The boy had a long juvenile record. He had a problematical home. He had a long history of mental problems.

Possibly, if we had had an opportunity to present this to the jury in accordance with those standards set forth in Gregg v. Georgia and the other cases, we would have had a different result here and wouldn't have had the death penalty.

The state got the benefit of the one aggravating circumstance which was resolved against the defendant, but the defense did not have the benefit of the many mitigating circumstances which we were not allowed to present.

I am concerned about the whole question of cruel and unusual punishment, and I may take the minority view. Quite frankly, I personally feel that cruel and unusual punishment by giving someone life imprisonment is far more severe than putting someone to death in a capital case. If I had the choice, I would much rather be put to death.

I am deeply concerned about the Johnson Washington case which has not been bound into the United States reports, wherein my good friend, Attabury, who resides in St. Charles Parish and who was a police officer, was shot down and killed and his assailant was given life imprisonment by this Court less than six months ago, when the Court here held that the killing of a deputy sheriff did not constitute cruel and unusual punishment -- I beg your pardon, the killing of a deputy sheriff requires a life sentence and to put him to death would be cruel and unusual punishment, and this is just six months ago by this Court.

The case, Washington, is cited right here in my brief and arose -- the two killings arose less than ten miles apart in two different parishes in the same state, and it is very difficult for me to understand, now, how a few months later Hary Roberts could be possibly jeopardized by being executed.

QUESTION: Is there anything in the jury system that -- very often juries on the same criminal conduct will reach different results. Manslaughter in one state might be murder in another, depending on attitudes that vary.

MR. ROLLING: If it please the Court, your point is well taken. The jury can reach different results but the Supreme Court of the United States should not reach different results, may it please the Court, three months apart.

One man can be put to death in March 1977 and one man gets life in December 1976.

QUESTION: We don't sit as a jury to review.

MR. ROLLING: Yes, sir, but you sit as a Court to tell us what the law of the land is, and the law of the land for killing a deputy sheriff four months ago was life imprisonment. And now we are up here today to discuss what the law of the land will be for the death of a policeman.

I am very disturbed. I don't have a solution to it, I just want to present the problem to the Court for your consideration.

QUESTION: Each of these was a mandatory death sentence?

MR. ROLLING: Yes, same statute. Murders took place --

QUESTION: Same statute, same state, both mandatory where the jury didn't have any --

MR. ROLLING: RS 1430, killing of a police officer. Same situation, just a couple months apart, December or November, whatever it was, it was life imprisonment and now we examine whether it should be death.

QUESTION: In both cases, the death penalty was imposed, but in the Washington case this Court set aside the death penalty.

MR. ROLLING: This Court set aside the death penalty in November or December and sent it back to the Louisiana Supreme

Court and said that the death penalty for killing a deputy sheriff --

QUESTION: That's the mandatory death penalty.

MR. ROLLING: The mandatory death penalty. That's what we are dealing with here today. The death penalty for killing a deputy sheriff in November or December --

QUESTION: Was unconstitutional.

MR. ROLLING: -- was unconstitutional, life imprisonment. In March, we are discussing whether the death penalty for killing a policeman in an adjoining parish is constitutional or not.

QUESTION: What you are saying is that you think this case should be treated exactly the same as Washington v. --

MR. ROLLING: I don't think there is any question about it, it should be.

QUESTION: You think we made a mistake in taking it for the issues that are proposed here for discussion?

MR. ROLLING: Well, I don't think we can change a decision of this magnitude in three days, at least in three months. As I say, it hasn't even been bound into the legal volumes and we are up here now, today, again talking.

When we applied for writs in this case, we expected a perfunctory reversal of the death penalty, as did the state, as did the legal community.

QUESTION: What was the order in the case you are

talking about?

MR. ROLLING: I beg your pardon, sir? The Johnson Washington case?

QUESTION: Yes.

MR. ROLLING: The Johnson Washington --

QUESTION: What was the order of the Court?

MR. ROLLING: The order of this Court --

QUESTION: What did it say?

MR. ROLLING: That Johnson Washington, who was a black male who had been convicted --

QUESTION: Just what did the order say?

MR. ROLLING: The order said that the death penalty, under RS 1430, which is the same statute we are dealing with here today, was inherently unconstitutional, it constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. The case was reversed. It was remanded to the Louisiana Supreme Court.

QUESTION: The case was reversed or the sentence was reversed?

MR. ROLLING: The sentence was reversed.

QUESTION: What did it ask the Supreme Court of Louisiana to do?

MR. ROLLING: It simply said to proceed consistent with your opinion, which was a reversal, which was a set-aside of the death penalty for killing a deputy sheriff.

QUESTION: To proceed not inconsistent.

MR. ROLLING: Right, to proceed not inconsistent. Yes, sir. That is correct.

So we set the penalty aside.

QUESTION: The penalty was set aside in this Court and the case was remanded for reconsideration?

MR. ROLLING: It was remanded for resentencing, that's right. And your specific holding in the Johnson Washington case, may it please the Court, was that the --

QUESTION: Do you have it here?

MR. ROLLING: No, sir, I don't. It is cited in my brief.

QUESTION: And, really, that's what you are asking us to do here.

MR. ROLLING: Well, it is exactly right. I don't see how we can turn this case on the same statute.

QUESTION: I, for one, will be interested in your opponent's reaction to this inquiry.

MR. ROLLING: I would like to just call -- and this, of course, is the crux of the argument. Johnson Washington is printed in all the advance sheets and the Court is much more familiar with it than I am. I do see the possibility of an equal protection argument, the problem of who do we protect and who don't we protect. Our particular statute we are dealing with here today protects the deputy sheriff, the policemen.

It protects the game warden, for example, and it provides death if a game warden is killed but it doesn't protect me because I am just a lawyer. I am not the game warden.

So what do we do with the list? Am I denied equal protection because the game warden is protected and I am not protected? I, personally, feel slighted by the statute.

If it may please the Court, I may further go on to say that there are some Witherspoon problems in the Harry Roberts case which are not made a part of this record but which we would like to reserve in case they require further proceedings.

Thank you, very kindly.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rolling.

Mrs. Korns.

ORAL ARGUMENT OF LOUISE KORNS, ESQ.,

ON BEHALF OF THE RESPONDENT

MRS. KORNS: Mr. Chief Justice and may it please the Court:

The State of Louisiana is of the respectful view that Louisiana Revised Statues, Statute RS 1430, Paragraph 2, which provides for the mandatory death sentence for first degree murder or the intentional killing of a police officer in the performance of his lawful duty --

QUESTION: I wonder if you would respond to his views about the jurisdictional issue that he has now raised.

MRS. KORNS: Your Honor, the state's view about that, as we set out in our brief, is that if he wanted more consideration in the Louisiana courts his recourse was to ask for habeas corpus in setting aside the death sentence, then to edge all these questions relating to Louisiana courts in the Louisiana courts, and not to come up here and apply for certiorari.

We feel that he has waived all of this by applying for certiorari, and particularly after this Court issued its narrowing order on November 28th, saying that the sole issue before the Court on this grant of certiorari would be limited to the constitutionality of the death penalty, the mandatory death penalty, for the intentional killing of a police officer under the Louisiana first degree murder law. This Court said it.

QUESTION: Mrs. Korns, how do you distinguish this from Washington v. Louisiana?

MRS. KORNS: Distinguish it very easily, Mr. Justice Blackmun. That was -- the Court didn't write an opinion in that case, didn't address itself to the issues. It just said the sentence was set aside as cruel and unusual, that it couldn't be carried. It would be cruel and unusual to carry it out. See Stanislaus Roberts v. Louisiana. That's all.

The Court never addressed itself to the issues and, frankly, you know, you wouldn't know what the case contained unless you went back and read the application for certiorari

and the Supreme Court of Louisiana's opinion. It is an order without -- It is not even a pro curem opinion. It is an order of this Court. And the State doesn't see how an order, without reasons, can be binding -- there was no oral argument on it, no presentation of the issues. Even when you read the application to certiorari in Johnson Washington, it doesn't focus on Section 2 of the statute. It just, you know, attacks the whole statute.

QUESTION: Are there any differences in the cases?

MRS. KORNS: Factually, Your Honor, there is not.

QUESTION: So, either the Court was wrong there or it has to change its mind.

MRS. KORNS: Right.

QUESTION: Will you face that way. We can't hear you here.

Did you say that there is no factual distinction?

MRS. KORNS: Justice Blackmun, there is none. In both cases, the accused killed a police officer. In both cases, he was prosecuted for first degree murder under our Louisiana Revised Statutes 30, Section 2.

QUESTION: My impression, and I just wanted your concession and you have conceded.

MRS. KORNS: That's right. I have conceded it. It is identical.

However, the State of Louisiana feels that this

blanket order of this Court which could have been an oversight. At least the Court was not thinking -- Let's put it in the words of all the Gregg, and it surprised me, the Court didn't focus on the specific issues which are presented to the Court here, that is, the difference between the second paragraph of Article 30 and the first paragraph under which Stanislaus Roberts had been convicted which was a felony murder doctrine.

Therefore, the citing of Stanislaus Roberts was a dismissal of the Stanislaus Roberts -- for the granting of -- for the setting aside of the imposition of the death penalty in Johnson Washington just was not in point because Staislaus Roberts deals with the first section of Article 30, which is a broad, sweeping felony murder statute which says that anyone who commits a murder while engaged in the commission of a recited number of felonies, like armed robbery, shall be mandatorily sentenced to death.

QUESTION: May I interrupt with one other question? If the Court did make a mistake in the Stanislaus, or the Washington case, did not the State of Louisiana make precisely the same mistake in its reponse to the petition for certiorari? Did not the state also construe the first Roberts case as covering this case?

MRS. KORNS: Your Honor, I wrote that application and I didn't give any thought either to the problem of differentiating out the two. I just -- I think I --

QUESTION: In other words, you read the prior Roberts opinion as covering this situation?

MRS. KORNS: I think I said that if this Court didn't grant a rehearing in Stanislaus Roberts, the State of Louisiana probably could not execute Harry Roberts. That's what I said in my application. No doubt about it.

Then this Court granted certiorari and two weeks later announced its order that the issue for decision in this case on certiorari before this Court would be the constitutionality of the mandatory death sentence, under Louisiana law, for the intentional killing of a police officer.

Now, the State of Louisiana believes that this case can be very easily distinguished from the Stanislaus Roberts case.

Article 30 of the Louisiana Criminal Code before it was amended last summer, following this Court's Gregg et al decisions, provided that first degree murder is the killing of a human being.

Now the first subparagraph of that article was the Stanislaus Roberts case, the felony murder doctrine, which this Court through out in Stanislaus Roberts.

The second paragraph is the one under which the present case and Johnson Washington was brought. When the offender has a specific intent to kill or inflict great bodily harm upon a police officer who was engaged in performance of his

duties.

Now, the State of Louisiana's position is that this is clearly distinguishable from the Stanislaus Roberts case because this statute is narrowly drawn, it incorporates the statutory aggravating circumstance.

It is the State of Louisiana's position that there are no mitigating circumstances possible when a person intentionally kills a police officer in the performance of his lawful duty.

And fourth, we feel that because of the trial judge's very careful instructions to the jury in this case in plain, every day language, the responsive verdicts did not give the jury unfettered discretion, and that no appellate review was necessary on the narrower issue of jury capriciousness, and so forth, by the Louisiana Supreme Court, because of the narrower statute that was presented to the jury.

In other words, to bring in a verdict of guilty in this case which would necessarily and mandatorily result in a sentence of death; as it did, the jury had to sharply focus on a very narrow set of circumstances, and that is whether the accused intentionally killed a police officer who was in the performance of his lawful duty.

The facts in this case -- there could be no clearer facts in such an issue. It was Mardi Gras Day in 1974 and Harry Roberts started shooting various people in his neighborhood

and wounded a little boy. The neighbors called the police and Officers John Tobin and Dennis McInerney answered the call, dressed in uniform and in a marked police car.

As they approached the scene of the shooting, they were told by a bystander that the person they wanted was dressed in blue trousers, beige shirt, and was wearing a red cap and he was going over that way.

They proceeded in that direction and just turning the corner they saw Harry Roberts taking a red cap off of his head. They parked the police car at an angle, right in front of Roberts to get out and talk to him. Roberts walked up to the police car and shot Officer McInerney as he -- Officer Tobin as he sat in the car. Officer McInerney jumped out and was shot and mortally wounded by Roberts at this time, died within a few seconds.

Officer Tobin, although wounded, was able to draw his service revolver and wound Roberts in the leg. Thereupon, Roberts ran off, limping and leaving a trail of blood and took refuge in a neighboring house, where he was captured a few minutes later by police officers who were brought to the scene by the wounded officer, John Tobin.

Now, the State feels that if ever there is a factual circumstance presenting the intentional killing of a police officer in the performance of his lawful duty, this is it -- not even any questions to the man, nothing to irritate him or

throw him off. He just -- when he saw the police car stop, he went up to it and shot the first officer sitting in the car, the second officer, killed him as he got out to question him.

The State of Louisiana feels that under this Court's decision in Gregg v. Georgia, Proffitt v. Florida, and so forth, Stanislaus Roberts v. Louisiana, in which this Court time and again in footnotes and in dicta, cut out from its opinion narrower specifically drawn statutes which focused on particular circumstances that the jury would have before them. Time and again this Court cut those out. That's what we have here.

Moreover, this Court, in those cases, specifically approved Georgia's and Florida's bifurcated jury in which the jury was to consider various circumstances, aggravating and mitigating. One of the aggravating circumstances approved by this Court in those cases was the circumstance which provided that the jury must consider under Florida and Georgia law and under the Uniform Criminal Codes that are universally approved, that is, that the murderer could, either during the course of a lawful arrest or that the person killed, intentionally killed, was a uniformed police officer or a police officer on duty, it all amounts to the same thing, a police officer in the performance of his lawful duty.

The Louisiana statute presents this very clearly to the jury. So it is narrowly drawn, it incorporates an aggravating circumstance.

Now, the State of Louisiana takes the position that there are no mitigating circumstances that need to be given to the jury when a police officer on duty is killed. It is as simple as that.

If our society is to exist, and if one or two policemen are going to control groups of violent people, mobs, and so forth, continually being called to investigate dangerous situations, such as we have in the present case, that there are no mitigating circumstances which will excuse a person gunning down a police officer engaged in the performance of his duty, and that, therefore, the lack of mitigating circumstances having been presented to the jury in a special sentencing procedure -- Of course, all these mitigating circumstances can always be presented to the jury during the trial on the merits.

In argument to the jury, anything like insanity or drunkenness or youth or first offender can always be presented to the jury at the trial on the merits. It is not as though they don't hear mitigating circumstances.

The State of Louisiana further believes that the responsive verdict system which this Court seemed to disapprove of in Stanislaus Roberts, in no way invalidates the present mandatory death sentence because of the trial judge's instructions which we have forwarded to this Court which were not included in the record but we have sent to this Court.

This Court will see that the trial judge very

patiently and in every day language explained to the jury about first degree murder and that he would be sentenced to death if you find so and so and so and so. If you find that he was not a police officer, second degree murder. If you find that there was provocation, manslaughter, and so forth.

And for the same reason we feel that the lack of appellate review by the Louisiana Supreme Court does not invalidate the mandatory death sentence here either because of the fact that the jury, in effect, was given such strict guidelines for its deliberations and whether it should bring in a verdict of guilty as charged which would result in a mandatory death sentence that there was no leeway for capriciousness and so forth, which this Court deplored in Gregg v. Georgia and Stanislaus Roberts, and so forth.

So, if the Court has no questions --

QUESTION: I have one question: Has the Louisiana Supreme Court construed the statute on the intent element to require that the defendant know that the victim was a police officer?

MRS. KORNS: Mr. Justice Stevens, such a question has never presented itself, as far as I know. You see, in the instant case, the officers were dressed in uniform and they were riding in a police car, and there is no doubt about it.

Now, the trial judge in the present case said that the difference between first degree -- the difference between

the guilty verdict, guilty as charged, which would result in the mandatory death sentence, and the first responsive verdict of guilty of second degree murder, that the one element of difference in the crimes would be that the victim was a police officer.

QUESTION: But it hasn't answered the question of, say, you had an officer in plain clothes in ambiguous circumstances.

MRS. KORNS: I am sure you would have to -- I would say that it would have to be reasonably apparent that the man was a police officer. I would think, but the court hasn't passed on it, no.

QUESTION: Mrs. Korns, I have a question.

MRS. KORNS: Yes, Mr. Justice Blackmun.

QUESTION: In the Washington case, the death penalty was -- well, what has happened in the Washington case? Have you filed a petition for rehearing?

MRS. KORNS: Yes, Your Honor, there is pending an application for rehearing in the Louisiana Supreme Court, on application of the state.

QUESTION: It remains unacted upon at the present time?

MRS. KORNS: Yes, Your Honor.

QUESTION: It is not in this Court.

MRS. KORNS: We applied for a rehearing in this Court

at the same time we applied for rehearing in Stanislaus Roberts.

QUESTION: And what happened?

MRS. KORNS: This Court denied the rehearings in both of them.

QUESTION: There is no petition for rehearing pending here?

MRS. KORNS: Not here.

I understood Mr. Justice --

QUESTION: It was directed to the Louisiana Court and that is still pending.

MRS. KORNS: It's pending.

QUESTION: And that's in the Washington case?

MRS. KORNS: It is in the Johnson Washington case, he being also convicted of the murder of a police officer, a Sheriff Attabury.

QUESTION: Do you think they are holding that pending --

MRS. KORNS: I am sure they are.

QUESTION: -- the result here?

MRS. KORNS: Yes.

Any further questions from the Court? The State of Louisiana will rest.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Orenstein.

ORAL ARGUMENT OF JULES E. ORENSTEIN, ESQ.,

ON BEHALF OF THE RESPONDENT AS AMICUS CURIAE

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

I am Jules E. Orenstein and the Assistant Attorney General of the State of New York, of counsel to the amicus curiae in this case, The Honorable Louis J. Lefkowitz, Attorney General of the State of New York.

We appear here in support of the position of the State of Louisiana and in support of the concept that a mandatory death penalty for the killing of a police officer is constitutionally acceptable.

Of necessity, our argument must be of an empirical or pragmatic nature. Our starting point, I think, as far as our position is concerned, has its genesis in the plurality Footnote Number 7, I believe, in the case decided last July in Woodson v. North Carolina.

As we read that footnote and the opinion of the plurality and the comments by other justices of this Court in their dissents, there was reserved for a future day the determination of the question of whether or not a unique category of homicidal offense could, in certain circumstances, justify the imposition of the death penalty.

We say that the killing of a police officer is

another one of those few narrow situations in which the infliction of the death penalty, mandatorily will sufficiently justify, under today's contemporary standard, the infliction of this particular death penalty.

Just this last week, within the last week, last Tuesday, in the Gardner v. Florida case, there were some words by the plurality in that decision which I think are very pertinent here.

This Court's plurality opinion stated: "It is of vital importance to the defendant and to the community that any decision to impose this death sentence be and appear to be based on reason, rather than caprice or emotion."

I think if we have ever had a situation where the death penalty could be imposed mandatorily,, based upon reason, we have those reasons here in the situation, the limited narrow situation, where a police officer has been killed in the line of duty by a person who knew or should have known that the gentleman whom he killed was a police officer.

Empirically, we have seen some statistics cited by our fellow amicae, the joint -- as I term it, the joint law enforcement amicae brief by the National District Attorneys Association, Americans for Law Enforcement, the International Conference of Police Chiefs and the National Sheriffs Association. I think the thing that really screams and cries out for a ruling of protection for this class of victim, the police

officer, are the statistics that have been compiled, namely, from 1966, through 1975, inclusive, you had twelve hundred and three police officers killed in the line of duty. The numbers doubled between 1966, when you had fifty some-odd officers killed. They went into the one hundred and twenties and one hundred and thirties by the time we hit the seventies. I think the latest figure in '74 was one hundred and thirty-two. We had one hundred and twenty-nine in '75.

This ought to tell us something.

We have been speaking in terms, and I believe the plurality opinion, and most of the opinions of this Court since last July, have spoken in terms of the need for protection of society or the general need to protect society, but I think here we have a special category, group,which deems it necessary to have a specific protection of that group.

These people are exposed. Their exposure is terrible and it is constant. The figures justify this statement.

If, as this Court has stated, with regard to the correctional officer, that he may be deemed a unique circumstance if he happens to be killed in the line of duty while guarding some prisoners in a correctional setting, the exposure of those correctional officers is far less than the exposure of the police officer who is in the line of duty.

QUESTION: Except for the fact that a correctional officer is unarmed.

MR. ORENSTEIN: Some may be, Mr. Justice --

QUESTION: You know they are unarmed inside the walls.

MR. ORENSTEIN: Well, there may be -- I think there is a justifiable reason for that if they are unarmed --

QUESTION: All I said is you don't need that for your policeman's point, I don't think.

MR. ORENSTEIN: Well, you do have a controlled setting. I think one of the reasons this Court set forth --

QUESTION: This one is out there. That's the difference.

MR. ORENSTEIN: Exactly. That's the point I make, Mr. Justice Marshall. He is exposed. Certainly, there would be no deterrence in the correctional officer situation, if the officer was killed by a life termer. What does the perpetrator have to look forward to in anticipation of further increased punishment? You have done, actually, nothing to him. In fact, all you've done is encourage him to possibly kill or murder the correctional officer.

QUESTION: What does Maine do when one of them is murdered?

MR. ORENSTEIN: Yes.

QUESTION: And the other states that don't have death penalities.

MR. ORENSTEIN: Well, Your Honor, I don't know what they do in the other states, but I know certain states, such as

the state I represent, certainly have a problem in the criminal justice field and we certainly have problems which are unique and different, not only in the number of crimes committed but in the type of crimes committed.

Our urban areas, I think, have far greater problems than, say, like a state, with all due respect to our sister state of Maine, they don't have the situation we have. They don't have the constant headlines screaming about homicides, not only of correctional people or police officers, but ordinary citizens who have been the subject or victim of a homicide.

I would also like to emphasize, and I have set forth certain portions within our brief, of the experience factor that certain police officer personnel have experienced. Now, they say, from their experience, statistics aside, that when they have talked to possible perpetrators or perpetrators in the past, they have found that the threat of the possible death penalty may very possibly and, in fact, in cases has stayed that trigger finger, or whatever other weapon was to be used, from inflicting the assault or murder upon the police officer.

In addition, I think the statistics of the California and the Joint Law Enforcement amicae brief set forth the number of assaults upon police officers in the year 1975, alone, exceeded over 44,000 assaults. I think it was 44,800 some-odd number of assaults, close to 45,000.

In addition, the plurality of this Court in the

Woodson and the Stanislaus Roberts cases, spoke in terms of the fact that the -- that it was defective in the plurality opinion, the fact that in a mandatory situation there was no one to really pass upon the nature of the crime, the character or record of the particular defendant.

I say, and we say in this particular situation, dealing with law enforcement personnel, the nature of the crime speaks for itself. You have a police officer, the elements are there, the intentional killing of a police officer on duty.

The act, itself, by the defendant or perpetrator, of killing a police officer, under these circumstances, certainly gives us an idea as to his character.

Another interesting statistic, I think, which may fill the gap in the minds of some members of this Court with respect to the lack of knowledge of the record of the perpetrator, can be found in those statistics on page 12 of the amicae brief, the Joint Law Enforcement brief, where they set forth a very telling factor of 1438 persons identified in the killing of law enforcement officers between 1966 and 1975, 76% of them had records of prior encounters with the criminal justice process. And of that number, 56% had previous records, convictions.

So, taking these factors all together, we are of the opinion that one can harmonize these particular groups of

peace officers and their particular situation with the recent July opinions of this Court, including the plurality opinion.

We think we can satisfy and have satisfied the fact that these factors are present, they are built-in, they are subsumed by a jury verdict finding a particular perpetrator not guilty beyond a reasonable doubt.

In New York, in many of our jurisdictions, there is fair opportunity to present many of the conventional defenses that one finds in the criminal trial process.

QUESTION: Mr. Orenstein, what do you do with the Court's recent decisions in the three cases of Green v. Oklahoma, Sparks v. North Carolina and Washington v. Louisiana?

MR. ORENSTEIN: I suggested in our brief, Mr. Justice Stewart, that one, it was very possible for this Court to have overlooked the situation that we were dealing with peace officers. I pointed out that at the time, on July 6th, I believe it was, this Court came down with many, many orders. I think I counted 34 to 36 in which numerous petitions for certiorari which involved the death penalty from North Carolina, Louisiana and Oklahoma were summarily reversed.

I see my time is up. Do you wish me to continue?

MR. CHIEF JUSTICE BURGER: Just to -- You've answered the question.

MR. ORENSTEIN: That is my answer, sir. I think there was a mistake made, otherwise we wouldn't be here today.

Thank you, for the honor and privilege of appearing --

Yes, Justice Blackmun.

QUESTION: (inaudible) has confused the New York situation, under your statute, for you, hasn't it?

MR. ORENSTEIN: Well, it has. We do presently have two people on death row, one for the killing of an officer, police officer in the line of duty, the other for the killing of a correctional officer by a person who was already charged with murder.

Thank you for the honor and privilege of appearing here.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Rolling.

REBUTTAL ORAL ARGUMENT OF GARLAND R. ROLLING, ESQ.,
ON BEHALF OF THE PETITIONER

MR. ROLLING: If it please the Court, I'd like to just call the Court's attention to one or two factors. One is on the finality of the Johnson Washington case and the re-hearing in the state court.

I think, if it may please the Court, that the law is that the Johnson Washington case is final. When you denied your rehearing here, it certainly supersedes any potential opinion that the Louisiana Supreme Court could render.

I think that Johnson Washington will be in jail for whatever time the law prescribes, but there is no way that this

Harry Roberts case can in any way affect Johnson Washington case because of your previous denial of a rehearing.

I would like to further call the Court's attention -- and I have a basic disagreement with my colleague, Mrs. Korns, on my right, under this existing law, to submit mitigating circumstances to the jury during the trial. There is no way that I could get up there or any other counsel could get up there and spend four hours before the jury and tell the jury, during the course of the guilt or innocence trial, thirty reasons why you shouldn't execute this particular individual without saying, "Look, ladies and gentlemen of the jury, this man is guilty, and here's why you shouldn't execute him."

In fact, we wouldn't even have a guilt or innocence trial, if that was true. You are prohibited from doing it unless you want to place yourself in that particular procedural position.

The last thing is, at my conclusion, all of us are opposed to crime. God only knows I don't want to see anybody killed, particularly police officers, or particularly agents of the state, or anybody at all, but possibly if we give it an opportunity to have these sentencing hearings which this Court has announced was the principal law of the land, possibly we can get some testimony, possibly we can look into the background of some of these criminals, possibly we can find out why Officer McInerney was killed.

And remember my particular client denied his guilt at all times. But possibly we could find out what's wrong, what we can do, as individuals, as human beings, to correct these people, to prevent this from happening in the future.

If we don't look into the cause of the crime, we are never going to find out what to do to prevent the crime.

QUESTION: One question on the merits which you pressed for the second time. Do you challenge Mrs. Korns' statement that your client was trailed right from the place where he shot the police officers and was found in a house with the gun? Is that in question?

MR. ROLLING: May it please the Court: My client testified, got on the witness stand and took the witness stand, and remember, this a nineteen year old, uneducated youth, versus the full force and effect of the intellect of the Attorney General's office of the State of Louisiana, and matched wits with the Attorney General for an hour or two hours, and he always said that he was not the one who did it. This is Mardi Gras in New Orleans. There are 9,000 people that wear red bandanas on their head, everybody costumes. There were a million people on the street.

QUESTION: Was he shot in the leg?

MR. ROLLING: He was shot in the leg and his testimony was that he was shot in the leg by an unknown assailant and he ran into this particular house to use the phone to call the

police, and to call for help.

Now, the jury resolved the facts against him. I don't know who is right. I don't know who is wrong. I don't know what facts are correct or what facts are incorrect, but there was a very serious factual dispute in this case.

We lost and I can certainly understand how a reasonable man could have resolved the facts against him, just as I think a reasonable man could have resolved the facts in his favor, and nobody really knew what the jury was going to do. But they are against us and that's why we are here.

Thank you, very kindly for the pleasure of pleading here.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:43 o'clock, a.m., the case in the above-entitled matter was submitted.)