

In the

ORIGINAL

Supreme Court of the United States

WALTER ZANT, WARDEN,

Petitioner

v.

ALPHA OTIS O'DANIEL STEPHENS

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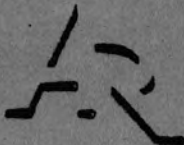
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1 IN THE SUPREME COURT OF THE UNITED STATES
2 -----:;
3 WALTER ZANT, WARDEN, :
4 Petitioner, :
5 v. :
6 ALPHA OTIS O'DANIEL STEPHENS :
7 -----:;
8 Washington, D. C.
9 Wednesday, February 24, 1982
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:54 o'clock p.m.
13 APPEARANCES:
14 DARYL A. ROBINSON, ESQ., Assistant Attorney General of
15 Georgia, Atlanta, Georgia; on behalf of the Petitioner.
16 JOHN CHARLES BOGER, ESQ., New York, New York; on behalf
17 of the Respondent.
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1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	DARYL A. ROBINSON, ESQ.,	
4	on behalf of the Petitioner	3
5	JOHN CHARLES BOGER, ESQ.,	
6	on behalf of the Respondent	22
7	DARYL A. ROBINSON, ESQ.,	
8	on behalf of the Petitioner - rebuttal	47
9		
10		
11		
12		
13		
14		
15		
16		
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19		
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22		
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Zant against Stephens.

Mr. Robinson, I think you may proceed whenever
you are ready.

ORAL ARGUMENT OF DARYL A. ROBINSON, ESQ.,
ON BEHALF OF THE PETITIONER

MR. ROBINSON: Mr. Chief Justice, and may it
please the Court, the case before the Court at this time
involves a death sentence of Alpha Stephens which
Petitioner here contends was lawfully imposed under the
death penalty statute enacted by the Georgia General
Assembly.

As this Court, I am sure, is aware, Georgia's
present death penalty law under which Respondent
Stephens was convicted and sentenced to death was a
response to the concerns voiced by this Court in another
Georgia case, Furman. The concerns expressed there
dealt with the unbridled discretion which was vested --
which this Court perceived was vested in the jury at
that time on the issue of whether or not a death penalty
could be imposed.

The statute which was enacted as a response
recognizes ten narrowly drawn circumstances, commonly
referred to as the statutory aggravating circumstances,

1 and upon a finding of one of those ten circumstances, a
2 jury in Georgia is authorized to consider imposing the
3 death penalty.

4 In this particular case at trial, the evidence
5 before the jury at the first or guilt phase showed that
6 Respondent Stephens was lawfully confined under some
7 earlier sentences, that he escaped from lawful
8 confinement, and that while he was on escape, he went on
9 what can only be described as a crime spree, generally
10 around the Bleckley County up to the Macon area, and the
11 crime spree culminated in the -- in a burglarly, and
12 then an armed robbery, and a kidnapping, and ultimately
13 in the murder by Respondent Stephens of a crippled man,
14 Roy Asbell.

15 Part of the evidence introduced at that phase
16 against Respondent Stephens was his confession. Upon
17 all the jury that was presented -- Upon all the evidence
18 that was presented to the jury at the guilt phase of
19 trial, the jury found guilt beyond a reasonable doubt.
20 Immediately thereafter, it went into the second phase of
21 Georgia's bifurcated procedure, the sentencing phase.

22 Generally, in Georgia, our sentencing phase
23 allows the jury to consider all of the evidence which
24 was before it during the initial stage of the trial, the
25 guilt stage. That was done in this case, and the jury

1 was so instructed, that they could consider that. Also,
2 Georgia law allows the introduction of other evidence at
3 the sentencing phase, both in extenuation, mitigation,
4 or in aggravation.

5 Now, the aggravating evidence which may be
6 introduced at this part of the trial, the sentencing
7 phase of the trial, is not limited by Georgia law to
8 those ten circumstances which are set forth in
9 27-2534.1, the so-called ten statutory aggravating
10 circumstances. Specific provision is made in Georgia
11 law for non-statutory aggravating circumstances to be
12 introduced into evidence at that phase of the trial, and
13 particular reference is made in Georgia Code Section
14 27-2503 to a prior criminal conviction or convictions of
15 a defendant which may be placed into evidence at the
16 sentencing phase of the trial if the district attorney
17 has given notice prior to trial of his intent to tender
18 evidence of such convictions.

19 That was done in this case. At the sentencing
20 phase of the trial, therefore, the evidence before the
21 jury was the rather gruesome nature of the crime itself,
22 the prior convictions, certified copies of which were
23 introduced by the district attorney, and also in
24 mitigation, I presume, the testimony of Respondent
25 Stephens himself, who took the stand and generally

1 admitted a participation in the crime, but denied
2 actually having pulled the trigger himself in murdering
3 Roy Asbell.

4 The trial judge instructed, and that
5 instruction is before the Court, of course, first of
6 all, that the jury was authorized to and should consider
7 all of the evidence before it. Second, the jury was
8 instructed by the trial judge that the jury must find
9 one statutory aggravating circumstance before the jury
10 was authorized to consider imposing the death penalty.
11 And finally, the trial judge made it clear to the jury
12 that even if a statutory aggravating circumstance was
13 found, a life sentence could be imposed. So, the charge
14 was proper under Georgia law.

15 The jury considered that evidence, and
16 returned with a finding of two statutory aggravating
17 circumstances, which are (b)(1) and (b)(9). (b)(1) in
18 effect is a two-part statutory aggravating circumstance,
19 dealing first with whether the defendant has a prior
20 record of capital felony offenses, and the second part
21 of (b)(1) is whether the defendant has a substantial
22 history of assaultive behavior.

23 The case proceeded from there to the Georgia
24 Supreme Court for its mandatory statutory review, and
25 the Georgia Supreme Court determined that the sentence

1 imposed was not imposed under an influence of passion,
2 prejudice, or other arbitrary factor, that it was
3 neither disproportionate nor excessive to other
4 sentences imposed in similar cases, but the Georgia
5 Supreme Court did indicate that in an earlier decision
6 of Arnold v. State, that portion of aggravating --
7 statutory aggravating circumstance be one which involved
8 showing a substantial history of assaultive behavior had
9 been declared vague by that court and could not standing
10 alone serve as the basis in Georgia for authorizing the
11 jury to consider imposing the death penalty.

12 The Supreme Court did determine that there
13 were the other two statutory aggravating circumstances,
14 either one of which would authorize the jury to proceed
15 to consider whether the death penalty was warranted.

16 QUESTION: Let me see if I have this --

17 MR. ROBINSON: Yes, sir.

18 QUESTION: -- relationship between the highest
19 court of Georgia and the court of appeals of the Fifth
20 Circuit. The highest court of Georgia has construed the
21 Georgia statute one way, and the court of appeals of the
22 Fifth Circuit has construed it another way. Is that
23 correct?

24 MR. ROBINSON: In effect, that's correct, Your
25 Honor, yes, and -- and the Fifth Circuit, at that time

1 the Fifth Circuit Court of Appeals, also --

2 QUESTION: Ordinarily, are we not bound by the
3 construction given to a state statute by the highest
4 court of the state?

5 MR. ROBINSON: I think so, Your Honor, and I
6 think in part of the opinion, in some of the other
7 issues that were raised below in the Fifth Circuit, the
8 court of appeals did recognize that principle, and felt
9 themselves bound by it. In this particular instance,
10 this single issue, they did not.

11 The Fifth Circuit's opinion is based upon two
12 things, both of which Petitioner contends are
13 erroneous. First of all, the court of appeals
14 determined that this Court's opinion in Stromberg v.
15 California was applicable in the context of the
16 sentencing phase of a death penalty case. Stromberg is
17 not applicable to the circumstances in this case before
18 the Court for several reasons.

19 First of all, in Stromberg, the Court was
20 concerned with a general verdict of guilt which had been
21 imposed on the defendant in a sedition case under
22 California's -- there was a three-pronged sedition
23 statute in that state, one of which was clearly
24 unconstitutional and could not serve as the basis for a
25 conviction. The jury returned a verdict simply of

1 guilty, and the reviewing court and this Court
2 determined that you could not tell from that simple
3 verdict whether the jury had made its decision in whole
4 or in part on an unconstitutional portion of the statute.

5 The case now before the Court is a different
6 case for a couple of reasons. First of all, we are
7 talking about a specialized procedure, the sentencing
8 phase of a bifurcated death penalty trial, but second,
9 and I think more important is that the jury did return
10 specific findings in this case. The jury found if you
11 divide (b)(1) into the two subparts -- the jury found
12 both of them -- then there were actually three statutory
13 aggravating circumstances which the jury found to exist
14 beyond a reasonable doubt.

15 Under Georgia law, any one circumstance serves
16 the function with which this Court was concerned in
17 Furman, that is, to narrow the class of cases for which
18 the death penalty can be imposed. Under Georgia law,
19 one is not sentenced to death because he has a
20 multiplicity of statutory aggravating circumstances. An
21 aggravating -- a statutory aggravating circumstance
22 authorizes the jury to consider imposing the death
23 penalty, but if the death penalty is imposed, it is
24 imposed not because the jury finds statutory aggravating
25 circumstance (b)(1). It is imposed because all of the

1 evidence which is before the jury at the sentencing
2 phase of the trial leads the jury to conclude that the
3 death penalty is appropriate. The discretion has
4 already been narrowed because the jury has found beyond
5 a reasonable doubt that a statutory aggravating
6 circumstance exists.

7 If you will, the circumstance itself set forth
8 in the statute simply serves as a bridge to get the jury
9 from this point of the general class of murders to this
10 point, having narrowed the focus of the jury's attention
11 on that particular class of murders which the General
12 Assembly of the State of Georgia has determined warrant
13 the death penalty.

14 QUESTION: Has the Georgia Supreme Court ever
15 articulated the matter like this?

16 MR. ROBINSON: The Georgia Supreme Court
17 implicitly has made that holding, not only in this case
18 but in several other cases over the last few years, Your
19 Honor.

20 QUESTION: Of course, if you thought for a
21 moment that the jury imposed the death penalty because
22 it added up three aggravating circumstances, and
23 decided, well, all of them together justify the death
24 penalty, but it might have been that if there was only
25 one or two of them, they might have come to a different

1 conclusion.

2 MR. ROBINSON: No, Your Honor. If I
3 understand the question, I don't think so. First of
4 all --

5 QUESTION: Well --

6 MR. ROBINSON: Excuse me.

7 QUESTION: -- couldn't you say that that is
8 true and still defend the result here by just saying
9 that under Georgia law the Georgia Supreme Court can
10 have an independent view of the death penalty?

11 MR. ROBINSON: And that is what occurs in this
12 case, but let me point out one thing that I think is
13 crucial to a determination of this case. That is, the
14 evidence that the jury considered --

15 QUESTION: I understand.

16 MR. ROBINSON: -- was properly before the jury.

17 QUESTION: Yes.

18 MR. ROBINSON: There was not a single piece of
19 the evidence, either in support of the circumstance
20 declared unconstitutional in another case or any other
21 circumstance, which was not properly before the jury and
22 considered by it.

23 QUESTION: Well, what is the jury's
24 instruction in Georgia, that if you find these
25 aggravating circumstances, you should consider whether

1 the death penalty should be imposed based on all the
2 evidence? Is that it, or not?

3 MR. ROBINSON: Yes, Your Honor. That's an
4 accurate summation of what the instruction would be.
5 First of all, generally, and in this case in particular,
6 the jury is told they must consider all the evidence
7 before it, either in aggravation or in mitigation. Then
8 the jury is instructed, and was in this case, that if
9 they found one -- that they could not impose the death
10 penalty unless they found at least one statutory
11 aggravating circumstance, and then thereafter even if
12 that circumstance is found to exist, they are not
13 mandated to impose the death penalty.

14 QUESTION: Counsel, the instruction isn't
15 phrased that way, is it?

16 MR. ROBINSON: The instruction is not phrased
17 in those precise terms.

18 QUESTION: I mean, your theory seems to be one
19 that certainly would be plausible, but it doesn't seem
20 to be spelled out that way to the jury in the
21 instructions.

22 MR. ROBINSON: Your Honor, the instruction
23 reads that, "If you recommend mercy," and I am reading
24 from the Joint Appendix at Page 18, "If you recommend
25 mercy for the defendant, this will result in

1 imprisonment for life of the defendant. In such case it
2 would not be necessary for you to recite any mitigating
3 or aggravating circumstances as you may find." And the
4 courts below which have considered that very question on
5 the issue of this instruction have indicated that that
6 is a proper instruction and was sufficient to indicate
7 to the jury that they could find an aggravating
8 circumstance and still not return a death penalty, and
9 so I think it is clear. Georgia's --

10 QUESTION: Is it also your position that the
11 Georgia Supreme Court could determine sentencing de
12 novo, regardless of what the jury did?

13 MR. ROBINSON: Your Honor, I am not sure if I
14 understand the precise -- a precise factual situation.
15 I think my answer to that would be no. That is not the
16 function of the Georgia Supreme Court, to sentence the
17 defendant. That is peculiarly the function of the jury,
18 and the purpose of Georgia's statutory review is simply
19 to determine whether that was imposed under passion,
20 prejudice, or some other arbitrary factor, and that was
21 done in this case. They conducted that review.

22 I think Georgia's statutes also contemplate
23 that same interpretation or the interpretation that we
24 are giving this in Georgia Code Ann. Section 26-3102. I
25 will read just briefly. "A sentence of death shall not

1 be imposed unless the jury verdict includes a finding of
2 at least one statutory aggravating circumstance and a
3 recommendation that such sentence be imposed." So, from
4 the clear reading of the statute, it appears to me that
5 that is what our statute contemplates, and that
6 obviously has been the interpretation given to it by our
7 supreme court.

8 QUESTION: In your view, if they give three or
9 four, and one of them is a valid one, the others are
10 irrelevant. Is that it?

11 MR. ROBINSON: They are irrelevant to the
12 determination of whether the jury can consider imposing
13 the death penalty. Yes, sir. Now, that would get you
14 into another question in another case of the type of
15 evidence which was admitted in support of those
16 statutory aggravating circumstances, but that is not a
17 question before the Court, because in this case the
18 evidence considered by the jury was properly before the
19 jury, and the convictions were -- there is no question --

20 QUESTION: The Fifth Circuit -- the Fifth
21 Circuit apparently, as I read the opinion, thought that
22 the consideration of the evidence on prior conduct
23 generally had an undue and inappropriate impact on the
24 weight of the record of convictions. Is that about it?

25 MR. ROBINSON: That is about the gist of their

1 amended opinion. Their first opinion, as we pointed out
2 to the Court, was simply a wrong interpretation of
3 Georgia law. The court below indicated that this
4 evidence was not properly considered by the jury,
5 because it was in support of the unconstitutionally
6 vague circumstance, and therefore they should not have
7 considered it. We petitioned for rehearing, and that
8 was granted. The opinion was changed, and they
9 thereafter said, well, so the evidence was properly
10 before the jury, but perhaps they considered it too
11 much. That in effect is what the opinion said.

12 QUESTION: In talking about the role of the
13 Georgia Supreme Court, at least you have to say, don't
14 you, that the Georgia Supreme Court has concluded in
15 this case and in others that the jury would not have
16 come to any different conclusion. At least, they have
17 not remanded the case. They did not after invalidating
18 one of these aggravating circumstances remand for a new
19 penalty trial. They themselves affirmed the death
20 penalty.

21 MR. ROBINSON: I think it is implicit in that
22 court's opinion that it would not be reasonable to --

23 QUESTION: Well, they certainly didn't remand.

24 MR. ROBINSON: That's correct. I would agree.

25 QUESTION: And they have in a lot of other

1 cases.

2 MR. ROBINSON: I would agree, Your Honor. Yes.

3 QUESTION: Yes.

4 QUESTION: Counsel, as you read this Court's
5 decision in Gregg, do you think that the Gregg opinions
6 assume that the aggravating circumstances that are
7 enumerated by the sentencer will in fact guide the
8 discretion?

9 MR. ROBINSON: Yes, Your Honor. I think I was
10 about -- I think I was anticipating Your Honor's
11 question, and was going to give you a different answer.
12 The purpose of a charge on the statutory aggravating
13 circumstances is, yes, to guide the discretion of the
14 jury in determining whether this case falls within the
15 class of cases for which a death penalty may be imposed,
16 but I don't think either the Georgia General Assembly or
17 this Court in its review in Gregg of the law as enacted
18 contemplated that a finding of a statutory aggravating
19 circumstance mandated a death penalty.

20 QUESTION: No, but do you think that Gregg
21 assumes that the jury, for instance in this case, would
22 be guided by the presence or absence of the enumerated
23 aggravating circumstances?

24 MR. ROBINSON: Your Honor, guided in the sense
25 that it would tell the jury whether if the evidence

1 supported that circumstance they could impose the death
2 penalty, but not in the sense that the court below
3 viewed it, as giving some kind of undue weight to the
4 evidence which supported it.

5 In that regard, as I have said, the evidence
6 was properly before the jury, and I am not sure a jury
7 can give undue weight to admissible evidence. There is
8 some point in any case, and in a death case, I think,
9 where there is some -- some discretion which remains in
10 the jury, and I think this Court recognized that in
11 Gregg, and Lockett, and in all the death penalty cases
12 that the Court has decided in recent times. I don't
13 think the purpose was to eliminate the jury's discretion
14 entirely.

15 I also think that this Court understood, as I
16 read the opinion in Gregg, I think that the majority of
17 the Court understood that the purpose was just as I have
18 stated, that there was a dual finding by a jury once you
19 got to the sentencing phase, and again, I use my
20 argument of the bridge. You have your statutory
21 aggravating circumstance which gets the jury into the
22 class of case for which they can consider all of the
23 evidence. Now --

24 QUESTION: And you think that is what the
25 majority in this Court was articulating in Gregg?

1 MR. ROBINSON: I think that's one thing that
2 this Court understood, yes, I certainly do, in that
3 opinion. Since then, the Court has indicated, in more
4 than one case, that the function of the death penalty
5 phase of a trial is to enable a jury to make a rational
6 and intelligent decision on whether the death penalty is
7 appropriate based upon the offense which was committed
8 and the character of the person who committed the
9 offense. Again, the evidence which was placed in
10 aggravation at the sentencing phase assisted the jury in
11 doing just that. It gave the jury some further guidance
12 on just exactly what sort of defendant they were dealing
13 with. It was evidence on the character of the defendant.

14 Mr. Chief Justice, I will reserve any
15 remaining time.

16 QUESTION: Let me just ask you one more
17 question.

18 MR. ROBINSON: Yes, sir.

19 QUESTION: Is there -- do you suppose the
20 necessity to find one or more of the specified or
21 charged aggravating circumstances would make admissible
22 evidence at the penalty trial that otherwise might not
23 be admissible?

24 I can ask the question another way. Do you
25 suppose ever invalidating an aggravating circumstance

1 would mean that a certain category of evidence that had
2 been admitted was not admissible at all?

3 MR. ROBINSON: It's conceivable that that
4 could happen, yes.

5 QUESTION: But you are careful in this case to
6 say that that wasn't so.

7 MR. ROBINSON: It is not true in this case.
8 And again, Your Honor, I think the very reason that a
9 statutory aggravating circumstance might be invalidated,
10 except for the particular one we are dealing with here,
11 would in all likelihood be because either of a failure
12 of evidence to support it or because some part of the
13 evidence which was introduced in support of the
14 circumstance was not properly --

15 QUESTION: Well, the prosecution might charge
16 a whole list of aggravating circumstances, and the jury
17 might only find one, but that wouldn't mean that the
18 evidence as to aggravating circumstances that weren't
19 found was inadmissible.

20 MR. ROBINSON: That's correct, and let me
21 point out, Your Honor, that the prosecution doesn't
22 charge, nor does the prosecution decide what statutory
23 aggravating circumstances are charged. The judge --

24 QUESTION: Well, but the jury is certainly
25 instructed as to what they are.

1 MR. ROBINSON: By the judge. Yes, that's
2 correct.

3 QUESTION: Yes. Well, suppose there was an
4 instance that you say you could conceive of, where the
5 invalidation of an aggravating circumstance would mean
6 that a certain part of the evidence before the jury was
7 absolutely inadmissible.

8 MR. ROBINSON: That wouldn't require an
9 automatic vacating of a death penalty, but that would
10 require some further review --

11 QUESTION: Then you would really get up
12 against as to what the supreme court would say, whether
13 the jury would arrive at the same conclusion or not.

14 MR. ROBINSON: You would get closer --

15 QUESTION: And whether that was consistent
16 with Georgia law or not.

17 MR. ROBINSON: You would get closer to
18 requiring the reviewing court to intervene in the
19 province of the jury.

20 QUESTION: Yes.

21 MR. ROBINSON: And I think it would be
22 necessitated under those circumstances.

23 QUESTION: Counsel, may I ask you one question?

24 MR. ROBINSON: Yes, sir.

25 QUESTION: Under Georgia law, would it be

1 error to charge on an aggravating circumstance with
2 respect to which no evidence had been introduced? Has
3 the Georgia court ever faced that question?

4 MR. ROBINSON: Your Honor, I don't believe --
5 in my knowledge, that -- a particular case involving
6 that has not arisen. I would assume -- well, I
7 shouldn't assume, since our court hasn't said whether it
8 is or is not.

9 QUESTION: In a way, that might be what
10 happened here. Although there is evidence supporting
11 it, they shouldn't have charged, and had they known that
12 the circumstance was invalid they wouldn't have charged
13 on that circumstance.

14 MR. ROBINSON: Well -- oh, of course, and had
15 the Arnold case been decided before trial in this
16 instance, the trial judge would simply have charged on
17 the first part of (b)(1).

18 I would like to point out one other thing
19 before I rest. That is, the evidence which was
20 submitted in support of (b)(1) even now, after Arnold
21 has struck down a portion of (b)(1), would still be
22 admissible, because the first part of our first
23 statutory aggravating circumstance allows you to
24 introduce evidence of prior capital felony convictions,
25 and the two armed robberies involved and the murder

1 would come in under the first prong of that statute.

2 So, even after Arnold, that evidence is still
3 admissible, and it is still admissible under (b)(1).

4 The burglaries would not have come in under (b)(1)
5 anyway, because generally that is not assaultive
6 behavior, and they would come in under 27-2503, and the
7 district attorney must have presumed he was submitting
8 them under 2503, because he tendered notice to the
9 defendant prior to trial as that statute requires.

10 Thank you.

11 CHIEF JUSTICE BURGER: Mr. Boger.

12 ORAL ARGUMENT OF JOHN CHARLES BOGER, ESQ.,

13 ON BEHALF OF THE RESPONDENT

14 MR. BOGER: Mr. Chief Justice, and may it
15 please the Court, let me begin by restating the central
16 fact of this case, which is that Alpha Stephens' jury
17 received an erroneous jury instruction which misguided
18 their deliberations on the question of whether he should
19 receive a life sentence or a death sentence.

20 The State of Georgia has conceded this point,
21 as they must, since the record makes it clear that the
22 instruction was given, that the jury was guided by it,
23 indeed, that they expressly relied upon it, at least in
24 part, in imposing a decision to give Mr. Stephens a
25 death sentence. The question presented --

1 QUESTION: In effect, did the Georgia Supreme
2 Court say that that was irrelevant?

3 MR. BOGER: The Georgia Supreme Court, Mr.
4 Chief Justice, made two determinations necessarily in
5 its opinion in Stephens on appeal.

6 QUESTION: Well, almost necessarily, too, they
7 had to decide that what you have just said was
8 irrelevant.

9 MR. BOGER: The first -- the first
10 determination they made is that the instruction was
11 erroneous, and should not have been given. The second
12 one, which I submit is a constitutional determination,
13 made without reflection, without any express discussion
14 by the court, is that this erroneous instruction made no
15 difference. So, yes, Mr. Chief Justice, I agree with
16 you that they did determine it was irrelevant, and I
17 think that presents --

18 QUESTION: Would that be another way of saying
19 it was harmless error?

20 MR. BOGER: I don't believe so, Your Honor.
21 They didn't discuss it in terms of whether or not there
22 was harm. They only said that since there were two
23 valid aggravating circumstances, the sentence remains
24 unimpaired. That presents the kind of questions which I
25 hope to discuss throughout the course of this argument,

1 raised in the Stromberg line of cases, raised in fact in
2 this Court's opinion --

3 QUESTION: Let me put to you the question I
4 put to your friend. Ordinarily, are we not bound by the
5 construction given to a state statute by the highest
6 court of the state?

7 MR. BOGER: You are bound by constructions of
8 the statute insofar as they do not rest upon a federal
9 constitutional ground. My submission is that the
10 Supreme Court of Georgia as a statutory matter
11 determined that this was an erroneous instruction. As a
12 constitutional matter, it determined that that made no
13 difference. It did not articulate that as a statutory
14 ground. It simply said, that makes no difference. Our
15 submission is that Stromberg versus California and the
16 line of cases that flow from that case, and the Eighth
17 Amendment cases, Gregg and Gardner and Beck, and so
18 forth, make it clear that that judgment, the
19 constitutional judgment is wrong.

20 The question presented for this Court, I
21 submit, is whether a death sentence admittedly imposed
22 in partial reliance upon an impermissible factor can be
23 allowed to stand. This is not a question wholly without
24 precedent, of course, for many juries have been
25 misinstructed in the past, and as I mentioned in

1 responding, Mr. Chief Justice, to your earlier argument,
2 this Court has developed a general rule over the past 50
3 years to govern just this question.

4 The rule is as follows. If it is possible
5 that the jury's verdict rests in whole or in part on an
6 unconstitutional or impermissible ground, if an
7 appellate court, in other words, cannot assure itself
8 that the impermissible factor did not play a part in the
9 jury's determination to reach that verdict, then the
10 verdict must be set aside, and another properly
11 instructed jury must reconsider the issue.

12 The irony of the State of Georgia's position
13 before this Court is that it must somehow contend that
14 this general rule, widely employed in state and federal
15 criminal cases, should not be employed in Mr. Stephens'
16 case, that somehow a lower standard must govern.

17 QUESTION: May I interrupt you with a question?

18 MR. BOGER: Surely.

19 QUESTION: Supposing that we set aside the
20 verdict or the penalty, sent it back for another trial
21 on the penalty phase, and the jury again returned a
22 death penalty verdict on the two permissible statutory
23 aggravating circumstances, and they had the same
24 evidence before them they had here. Then they added a
25 footnote to their verdict and said, we also relied on

1 the fact that in our judgment this man had an assaultive
2 history, or whatever the language is of the
3 impermissible aggravating circumstance. Would that be a
4 permissible thing for them to do?

5 MR. BOGER: I am sorry. Absent an instruction
6 by the judge on the impermissible --

7 QUESTION: That's right, but the same evidence
8 went in, and the jury -- and maybe the prosecutor
9 argued, because the argument need not be limited to the
10 specific aggravating circumstances, as I understand it,
11 just argued that one of the reasons you should consider
12 sentencing this man to death is that history shows, and
13 then they use the language of the impermissible
14 circumstance.

15 MR. BOGER: Well, assuming those facts, there
16 would be no constitutional violation.

17 QUESTION: Now, how is this case different?

18 MR. BOGER: This case is different because
19 what the instruction given to the jury did was focus the
20 jury's attention on this factor, this substantial
21 history, if one would, of serious criminal conviction.

22 QUESTION: What in the instruction focuses the
23 jury on that fact?

24 MR. BOGER: Well, let's look at the
25 instruction, at Pages 18 and 19 of the Appendix, because

1 I think it is important to be aware of the extent to
2 which the statutory aggravating circumstances under this
3 instruction are the focus of the jury's entire
4 deliberation. As counsel for the state pointed out, at
5 one point on Page 18 the judge briefly says, you may
6 consider any of the aggravating or mitigating factors
7 before you.

8 But then, he lists in order each of the
9 aggravating circumstances found in the statute on which
10 the prosecution has attempted to rely. He then says, at
11 the top of Page 19, "These possible statutory
12 circumstances are stated in writing, and will be out
13 with you during your deliberation on the sentencing
14 phase." He continues. "They are in writing here, and I
15 shall send this out with you. If the jury verdict on
16 sentencing fixes punishment at death, you shall
17 designate in writing," so they must rewrite themselves,
18 "signed by the foreman, the aggravating circumstance or
19 circumstances which you found beyond a reasonable doubt."

20 He goes on, and I need not repeat it -- the
21 Court can read for itself, three more times in the
22 course of his instruction to focus the jury's attention,
23 and one can presume its deliberations in the jury room
24 on the statutory aggravating circumstances. There is no
25 similar focus of the jury's deliberation on these

1 non-statutory prior convictions.

2 QUESTION: But the focus in the instruction
3 is, unless one or more of these is found to have been
4 proven, you cannot impose the death penalty.

5 MR. BOGER: That's correct, Your Honor.

6 QUESTION: It doesn't say that the number of
7 aggravating circumstances which you find shall affect
8 your deliberations on whether to impose the death
9 penalty. Or do you read it that way?

10 MR. BOGER: One of the deficiencies of the
11 Georgia statutory scheme is that it is not made clear,
12 and certainly this charge does not make clear to a jury
13 exactly what it is supposed to do with these statutory
14 aggravating circumstances in its deliberations. It is,
15 however, not at all unreasonable to suppose that the
16 jury in the jury room will be guided by the attention
17 that has been focused on these three factors which the
18 foreman himself must write out one by one if they find.

19 QUESTION: Well, hasn't the Georgia Supreme
20 Court, though, in effect said that the aggravating
21 circumstances just -- they serve the purpose of telling
22 the jury when you can consider the death penalty?

23 MR. BOGER: No, Justice --

24 QUESTION: Not whether you should impose it?

25 MR. BOGER: Justice White, I don't think that

1 is what the Georgia Supreme Court has said. Indeed, the
2 statutory scheme contemplates --

3 QUESTION: Well, it certainly doesn't agree
4 with you.

5 MR. BOGER: No, because I think --

6 QUESTION: How does it disagree with you?

7 MR. BOGER: I think the Georgia Supreme Court
8 has answered incorrectly the constitutional matter, the
9 effect of an impermissible factor being fed into the
10 jury's deliberations. The entire promise of the State
11 of Georgia when it came before this Court in Gregg was
12 that the statutory aggravating circumstances which had
13 been enumerated by the legislature would guide the
14 jury's discretion, would take it away from an unfettered
15 consideration of all of the evidence that had been
16 presented at the sentencing phase --

17 QUESTION: Well, why did they -- the Georgia
18 Supreme Court refuses to remand, it did in this case,
19 when it found an invalid aggravating circumstance.

20 MR. BOGER: That's correct, Justice White.

21 QUESTION: Why did it refuse?

22 MR. BOGER: Because it made an erroneous
23 constitutional judgment.

24 QUESTION: What did it say? What do you think
25 it concluded?

1 MR. BOGER: One of the difficulties with a
2 clear understanding of the Georgia Supreme Court's
3 opinion is that they do not address the question at
4 all. What they do not do --

5 QUESTION: Well, I think it is just as --
6 isn't it just as reasonable it went through the
7 catechism that your colleague described?

8 MR. BOGER: No, Justice White, my colleague
9 acknowledged that the State of Georgia either as a
10 statutory matter or as a matter of interpretation by the
11 Georgia Supreme Court has not adopted the theory that
12 you have articulated in Drake --

13 QUESTION: No, that isn't what I am talking
14 about. I am talking about -- I am talking about the
15 Georgia Supreme Court says, the only function of the
16 aggravating circumstances is to -- is to put the -- if
17 the jury finds one or more of them, they are then in a
18 position to consider the death penalty.

19 MR. BOGER: If that were the case --

20 QUESTION: And that then they decide on all
21 the evidence. That's the way it -- that's the way it
22 works in Georgia. That's his submission. Do you -- Is
23 it reasonable to think that the -- Isn't it possible the
24 Georgia Supreme Court was thinking on this line?

25 MR. BOGER: I suppose it is conceivable. They

1 certainly have never articulated it. It is contrary to
2 the statute. It is contrary to the way the charge is
3 given, because the charge does not tell the jury to stop
4 after it finds one aggravating circumstance.

5 QUESTION: It doesn't tell them not to,
6 either. Well, no, of course it doesn't tell them to
7 stop.

8 MR. BOGER: But they indeed must go on, and to
9 spell out each one of the three or four that they find.

10 QUESTION: Sure. I would think they would.
11 That is irrelevant to my point.

12 QUESTION: Supposing, Mr. Boger, the
13 instruction had a couple of sentences additional, and
14 said, the number of -- as long as you find one, the
15 number of aggravating circumstances that you find shall
16 be totally irrelevant in your deliberations. Supposing
17 they said that, because we want you to decide whether or
18 not to impose the death penalty on the basis of the
19 entire record, and the mitigating circumstances, and so
20 forth. Would there be constitutional error if there
21 were such an instruction given?

22 MR. BOGER: That would violate the Georgia
23 statute, which seems to contemplate that the --

24 QUESTION: They must identify each one they
25 find, but then the judge goes on and says, after

1 identifying each one, you may not let your judgment as
2 to whether or not to impose the death penalty be
3 influenced at all by the number you have found, so long
4 as you find at least one. Supposing that was the
5 instruction.

6 MR. BOGER: Well, I think under the system
7 that was presented to this Court at the time of Gregg,
8 that would probably be unconstitutional, because it
9 would have told the jury that it could not rely on
10 considerations articulated by the legislature as to the
11 particular factors which serve cumulatively to aggravate
12 a capital -- or a murder, and to make it -- In other
13 words, while the jury's processes are something that we
14 cannot retrospectively know, it is certainly reasonable
15 to assume, and now I am trying to draw on the line that
16 this Court developed in the Sandstrom versus Montana
17 case, it would certainly be reasonable for a juror
18 presented with the instruction that is here on Pages 18
19 and 19, sitting in a jury room, asked to write out every
20 aggravating circumstance that it found, to conclude that
21 the more aggravating circumstances that are found, the
22 more aggravated a case this is, and the more likely it
23 is that the legislature makes a judgment that this is a
24 case in which death is warranted.

25 Because we cannot know what the jury did,

1 because that is also a reasonable way to look at their
2 deliberations, the problem that Stromberg raises is --
3 is before us. Absent --

4 QUESTION: Well, Mr. Boger, you don't -- you
5 don't suggest that -- you don't suggest that it would be
6 unconstitutional for Georgia to vest the sentencing
7 authority in its -- just in its judiciary.

8 MR. BOGER: That may raise constitutional
9 questions which of course are not -- are not before us.
10 There may be a constitutional right in a capital case to
11 jury sentencing.

12 QUESTION: Well, that has never been -- we
13 have certainly upheld --

14 MR. BOGER: Well, you reserve that question
15 once again in the Lockett versus Ohio case, and as I
16 noted in our brief, the Fifth Circuit under very --

17 QUESTION: Well, we have never decided,
18 though, that there is a constitutional right to jury
19 sentencing.

20 MR. BOGER: That is correct, Justice White,
21 and that is really not before the Court. What is before
22 the Court, though, is a system --

23 QUESTION: Didn't we uphold -- Didn't we
24 uphold the Florida --

25 QUESTION: In Proffitt we upheld the Florida

1 scheme, which doesn't require the jury to be the last
2 word on --

3 MR. BOGER: That's correct. There is jury
4 input into the sentencing in Proffitt, and in Lockett
5 the Court specifically -- the question.

6 QUESTION: So it may not be Georgia law that
7 the Supreme Court of Georgia could decide that despite
8 the invalidation of an aggravating circumstance, that it
9 in its wisdom would sustain the death penalty. That may
10 not be Georgia law, but it wouldn't be unconstitutional.

11 MR. BOGER: It could pose constitutional
12 problems.

13 QUESTION: I know, but we have never decided
14 it. It would take --

15 MR. BOGER: That's correct.

16 QUESTION: You would have to vary somewhat
17 from Proffitt, wouldn't you?

18 MR. BOGER: That's correct. The reason it, of
19 course, need not be decided by this Court is that the
20 Attorney General's office here has conceded that the
21 Georgia system does not permit the Georgia Supreme Court
22 to sit as a de novo sentencer and to make the judgment
23 about whether an individual --

24 QUESTION: But it certainly takes the position
25 that the Georgia Supreme Court can in effect say that

1 the invalidation of this aggravating circumstance would
2 not have made any difference to the jury.

3 MR. BOGER: I don't believe that is what the
4 Georgia Supreme Court held. It simply held --

5 QUESTION: Well, what does it say? What do
6 you think it says?

7 MR. BOGER: It holds simply as a matter of law
8 that the verdict is unimpaired, and it is our judgment
9 that that is a constitutional question.

10 QUESTION: All right. All right. Any way you
11 want to put it.

12 QUESTION: Didn't it necessarily hold that if
13 one -- if one ground is valid, the position of the
14 others, no matter how many or how few, is irrelevant, or
15 harmless error, or whatever?

16 MR. BOGER: It necessarily held that, yes, Mr.
17 Chief Justice. But that question itself impinges on
18 constitutional values. One, I suppose, is a state
19 supreme court could not simply hold that the failure to
20 charge on an element of the crime would not require
21 reversal just because the state supreme court says so.
22 Indeed, Justice Frankfurter in the Bollenbach case,
23 which we have cited in our brief, makes the point that
24 the appellate court cannot simply read guilt out of the
25 record, that proper standards must guide a jury's

1 deliberation, and if in fact the jury has been misguided
2 on an essential element of the case, there is no way
3 that an appellate court can overcome that simply as a
4 matter of fiat or as a matter of state statutory
5 construction.

6 This is not -- this is not a case that
7 presents a statutory construction phase -- issue. It is
8 a case in which the issue is whether one can disregard
9 what is an admittedly erroneous finding which the jury
10 made in reliance upon an instruction which should not
11 have been given, which entered into its calculus in some
12 way that we cannot retrospectively determine in deciding
13 whether Mr. Stephens should live or die.

14 The whole thrust of this Court's Eighth
15 Amendment jurisprudence is that the information given to
16 the jury at a sentencing phase is not itself sufficient,
17 that there needs be, that there must be careful guidance
18 of the jury in its deliberations, as the opinion of
19 Justices Stephens and Powell and Stewart for the Court
20 said in Gregg, and if I may be permitted a short quote,
21 that "The provision of relevant information under fair
22 procedural rules is not alone sufficient to guarantee
23 that the information will be properly used, since
24 members of a jury have very little experience in
25 sentencing, they are unfamiliar and unlikely to be

1 skilled in dealing with the information they are given."

2 The response that this Court identified as
3 Georgia's response, which it approved in Gregg, was the
4 provision of guided jury discretion, telling the jury
5 exactly what factors, as it put it, "the state
6 representing organized society deems particularly
7 relevant to the sentencing decision."

8 And the Court in Gregg went on to point out
9 that it would be virtually unthinkable to follow any
10 other course in a system governed by prior precedents
11 and fixed rules of law. When erroneous instructions are
12 given, the Court said in Gregg, reversal is often
13 required. That is what we have before the Court here, a
14 matter of an erroneous instruction.

15 The state has attempted to avoid this central
16 question by simply making the argument that one
17 aggravating circumstance is enough. That argument would
18 be true if and only if death were required whenever the
19 jury found one aggravating circumstance, or if this were
20 a system under which multiple death sentences were given
21 for each aggravating circumstance found, much like a
22 multi-count indictment.

23 QUESTION: May I ask you in that connection,
24 if in this case the jury had come in and simply found
25 the first aggravating circumstance, nothing more, and

1 then imposed the death sentence, under Georgia law that
2 would be valid, I take it. Would you have any objection
3 to the validity of that?

4 MR. BOGER: As a Fourteenth Amendment matter,
5 there is no problem with that, because then we can know
6 that the jury did not rely at least in part on the
7 unconstitutional ground.

8 QUESTION: Yes.

9 MR. BOGER: As an Eighth Amendment matter,
10 there may be somewhat more problems, because an
11 irrelevant factor was introduced into their
12 consideration, but since they didn't return on it, and
13 didn't rely upon it, I suspect under that case that the
14 proper result would be, that would be a valid sentence.

15 QUESTION: Let me take the language of your
16 response. You said, "then we would know that the jury
17 didn't rely." Would it be more accurate to say, then we
18 would know that the jury said it did not rely? And is
19 there any way of psychoanalyzing a jury to really find
20 out what influenced them?

21 MR. BOGER: No, of course not, Mr. Chief
22 Justice.

23 QUESTION: We can't really ever find out.

24 MR. BOGER: Special findings are as close as
25 we can get. It is the state's position, it seems to me,

1 their necessary position is that somehow we can know
2 what the jury would have done. Indeed, insofar as this
3 is the Georgia State Supreme Court's opinion, it is the
4 Georgia Supreme Court's opinion which I submit is
5 unwarranted, that they can somehow know what the jury
6 would have done.

7 QUESTION: Mr. Boger, may I just ask this one
8 question? Is it correct that you are really not arguing
9 that it would be impermissible for them to rely on the
10 assaultive behavior which would be described in that
11 aggravating circumstance? Rather, as I understand your
12 argument, it is that they have perhaps mistakenly relied
13 on the fact that the legislature thinks that is a
14 special reason for imposing the death sentence?

15 MR. BOGER: That's correct. We have not taken
16 the position that this evidence could not have come in
17 under Georgia law.

18 QUESTION: Or that they couldn't rely on it
19 under a proper instruction.

20 MR. BOGER: We have not taken that position in
21 this case. That's correct. But the entire purpose of
22 jury instruction, and certainly these instructions, was
23 to focus their attention, in effect communicate them --
24 to them something about what the State of Georgia,
25 organized society thought made this case specially

1 aggravated. It is because of that impermissible factor
2 whose weight we cannot know, but whose weight we can
3 assume, at least with respect to some reasonable jurors,
4 made a difference, that we must reverse --

5 QUESTION: Mr. Boger, a number of times you
6 have spoken of the -- that the Court in Gregg said so
7 and so. That isn't technically correct, is it?

8 MR. BOGER: That's correct, Your Honor. I was
9 speaking of an opinion by three Members for the Court.
10 But in Justice White's opinion --

11 QUESTION: Well, three Members can't speak for
12 the Court, as Justice Blackmun has just implied. Three
13 Members speak for three Members in a plurality.

14 MR. BOGER: Justice White's opinion, as well,
15 though, for three additional Members of the Court also
16 highlighted and underlined the role that guided jury
17 discretion as a guarantor that the arbitrariness, the
18 capriciousness which had been identified by this Court
19 in Furman would not recur. It was precisely the role of
20 the statutory aggravating circumstances to channel, to
21 confine within boundries the jury's deliberation about
22 those factors which should be most important in its
23 judgment.

24 Justice White and, I guess, Chief Justice --
25 the Chief Justice and that opinion as well emphasized

1 the statutory purpose of these aggravating factors as
2 well, so that I feel confident in saying a majority of
3 this Court has understood those factors as being central
4 in avoiding the question of arbitrariness.

5 QUESTION: Mr. Boger, would you take the same
6 position any time the Georgia Supreme Court says the
7 evidence was insufficient to sustain a particular
8 aggravating circumstance?

9 MR. BOGER: Yes, I would, although the Court
10 need not reach that question.

11 QUESTION: I know, but the way you put it, it
12 would seem necessarily to reach that -- that --

13 MR. BOGER: If the court has relied -- if the
14 jury has relied on --

15 QUESTION: Well, the jury finds four
16 aggravating circumstances, and it has been instructed,
17 according to your theory, that -- that these aggravating
18 circumstances, each one of them is a special reason for
19 imposing the death penalty, and the Georgia Supreme
20 Court says, well, there is just not enough evidence to
21 sustain two of the four. I would think your position
22 is --

23 MR. BOGER: That's correct, Your Honor.

24 QUESTION: -- would be that there would have
25 to be a new sentencing trial.

1 MR. BOGER: That's correct. And that -- the
2 point which I wanted to proceed to that you have made
3 is, we are not talking about letting Mr. Stephens go
4 back --

5 QUESTION: No.

6 MR. BOGER: -- to receive a life sentence, but
7 simply to ensure ourselves that a jury which has been
8 properly instructed, which has relied on factors that
9 are properly before it, here factors as to which there
10 is sufficient evidence, has reached a determination that
11 appears just. This is really the point that the Court
12 made in Gardner, where it said a death sentence must be
13 and appear to be based upon reason rather than caprice
14 or emotion. If we can know to a certainty a jury relied
15 on a factor as to which there was no evidence, that
16 verdict is not based upon reason and must be reversed.

17 QUESTION: Counsel, has it been argued in
18 Georgia that assuming this were affirmed, that it is
19 invalid to simply return it for the sentencing phase,
20 because the jury is supposed to hear and rely on all the
21 evidence introduced at the trial? How do you handle
22 that?

23 MR. BOGER: Resentencings in Georgia are a
24 common occurrence, in cases in which for one reason or
25 another the sentencing proceeding is reversed. There

1 have been dozens of cases where prosecutors have
2 reproceeded either with the original evidence or in part
3 the evidence in addition to some transcript testimony
4 from the first trial. That would present no serious
5 problems under the Georgia system.

6 The real -- the real question before the
7 Court, which the state has attempted to avoid by two
8 arguments, is whether, as I have stated before, once we
9 are certain that an impermissible factor has interjected
10 itself, and lacking assurance as to how this factor
11 affected the jury, we can uphold that sentencing verdict.

12 The State of Georgia has proposed one argument
13 to avoid this question by saying that the evidence was
14 before the court and therefore, does it make any
15 difference that the sentencing instruction was
16 inappropriate? That argument, though, misses the whole
17 thrust that we have discussed over the last 15 minutes
18 of the role of sentencing instructions in a capital
19 case, the function of focusing the jury's attention on
20 matters that the state considers particularly important,
21 and should guide the jury's deliberations to avoid
22 arbitrariness. So, that argument really cannot be
23 sustained.

24 The argument that one or two aggravating
25 circumstances themselves suffice, and therefore we need

1 not concern ourselves generally with the third invalid
2 circumstance would prevail only if death followed
3 inexorably from the finding of one aggravating
4 circumstance or two, but of course it does not. The
5 Georgia court is required to simultaneously consider all
6 the factors which it has been given, and we simply can't
7 determine in retrospect how it may have carried out that
8 responsibility and weighed the impermissible factor
9 together with those which were permissible.

10 Therefore, we are left with the central
11 question. When we know the death penalty has been
12 imposed in part on an impermissible ground, may that
13 sentence be affirmed? The two grounds of authority upon
14 which we have relied in our brief and rely here today
15 are the Fourteenth Amendment ground first articulated by
16 this Court in *Stromberg versus California*, where the
17 Court held that if we cannot know but that the jury may
18 have rested its verdict on an impermissible ground, we
19 must reverse. That opinion in *Stromberg* has been
20 consistently followed. Indeed, it has been extended to
21 an extent in the *Street* case, where this Court held that
22 if it is possible that the jury may have relied even in
23 part on an unconstitutional factor, the verdict must be
24 reversed. Here we can go beyond *Street*, because we know
25 that it relied in part, it told us so in its sentencing

1 verdict.

2 QUESTION: Well, but this is not an
3 unconstitutional factor. The factor you are talking
4 about is the factor that the Georgia legislature may
5 have conveyed the impression that death ought to be
6 imposed when this factor is present. That is not
7 unconstitutional.

8 MR. BOGER: Well, the Georgia Supreme Court
9 has held that that factor itself introduces
10 impermissible arbitrariness, and therefore that factor
11 should not be considered.

12 QUESTION: Did they say it should not be
13 considered, or could not serve as a jurisdictional
14 predicate for the death sentence?

15 MR. BOGER: As a factor, I think they made it
16 clear that it should not have been charged.

17 QUESTION: Does that mean that if there were a
18 retrial -- now, here you have two theories for
19 admissibility, but if there were no -- say there was
20 evidence that would tend to show that the person was a
21 particularly bad man and ought to die, such as prior
22 assaultive behavior, but there is no statutory
23 aggravating circumstance that describes the evidence of
24 that character. Is that evidence admissible or
25 inadmissible as a matter of Georgia law?

1 MR. BOGER: As a matter of Georgia law, it is
2 admissible. Evidence of --

3 QUESTION: It is admissible.

4 MR. BOGER: Evidence of prior criminal
5 convictions is admissible, and other evidence may be
6 admissible to refute any mitigating evidence that is set
7 forward by the defendant.

8 QUESTION: And I suppose as a matter of
9 federal law anything goes at a sentencing hearing,
10 pretty much.

11 MR. BOGER: I am not convinced as a
12 constitutional matter that is the case. We mentioned in
13 our brief the Fifth Circuit has recently decided a case
14 involving somewhat different circumstances in Florida,
15 holding that under the Eighth Amendment, that non --
16 evidence of non-statutory aggravating factors may not be
17 admitted. We have not relied on that argument on behalf
18 of Mr. Stephens, and have conceded for purposes of this
19 case that the Georgia statute certainly would have
20 permitted the evidence which came in here.

21 Beyond, then, the Stromberg line extended to
22 Street, made in effect clearer than Street, because we
23 have the special sentencing verdict which shows us --
24 the special sentencing finding which shows us that Mr.
25 Stephens' jury did rely upon an impermissible factor, we

1 have the Eighth Amendment line, which of course we have
2 discussed to some extent.

3 The court of appeals acted faithfully, we
4 submit, to this Court's judgment in Gregg, that
5 statutory aggravating circumstances were part of a
6 system of guidance, of jury discretion which was
7 essential to avoid arbitrary and capricious jury
8 results. For that reason, we urge that the court of
9 appeals' judgment be affirmed.

10 CHIEF JUSTICE BURGER: Very well.

11 Do you have anything further?

12 ORAL ARGUMENT OF DARYL A. ROBINSON, ESQ.,

13 ON BEHALF OF THE PETITIONER - REBUTTAL

14 MR. ROBINSON: Yes, Your Honor. Thank you.

15 I think the argument of Respondent in this
16 case misses the point in that a death penalty in the
17 State of Georgia is not imposed, as was said several
18 times, based upon a statutory aggravating circumstance.
19 Rather, it is based upon the evidence which is adduced
20 in support of that --

21 QUESTION: How do you know that? Is it in a
22 statute or --

23 MR. ROBINSON: That's -- yes, 25 -- 26-3102
24 specifically tells a specific instruction that a jury
25 first must find an aggravating circumstance to exist,

1 and then consider whether to recommend imposing the
2 death penalty.

3 QUESTION: Based on what?

4 MR. ROBINSON: Based on all the evidence
5 before it, and that is what the jury was --

6 QUESTION: But it doesn't say to ignore the
7 fact that here is a statutory aggravating circumstance.
8 Your colleague suggests that the designation of an
9 aggravating circumstance is a message to the jury that
10 if it finds it, this is more of a reason to impose the
11 death penalty.

12 MR. ROBINSON: Your Honor, particularly in
13 this case, I don't think that is a --

14 QUESTION: I think the Georgia Supreme Court
15 has decided to the contrary, it must have.

16 MR. ROBINSON: And I don't think that's a
17 reasonable interpretation in this case anyway, to assume
18 that that one instruction which, as I am sure the Court
19 has already read the court's instruction, doesn't focus
20 on the statutory circumstances any more than just the
21 evidence in general. The court instructed the trial
22 jury to consider, first of all, all the evidence, the
23 non-statutory and the mitigating, and then it listed one
24 time these -- each of these three --

25 QUESTION: Well, Mr. Robinson --

1 MR. ROBINSON: Yes, sir.

2 QUESTION: -- this conviction was way back in
3 1975 or 1976?

4 MR. ROBINSON: Early -- January of 1975, Your
5 Honor.

6 QUESTION: 1975, and then there was state
7 collateral?

8 MR. ROBINSON: Yes, Your Honor, that's correct.

9 QUESTION: And now it's federal?

10 MR. ROBINSON: Yes.

11 QUESTION: And a lot of water has gone over
12 the dam since then in terms of aggravating
13 circumstances, invalidating aggravating circumstances.
14 When was (b)(7) declared invalid?

15 MR. ROBINSON: (b)(7) has never been declared
16 invalid.

17 QUESTION: I mean void, void for vagueness.

18 MR. ROBINSON: In the Godfrey case, Your Honor?

19 QUESTION: Yes.

20 MR. ROBINSON: That was -- I believe that was
21 1978.

22 QUESTION: Yes, that was after -- even after
23 this conviction.

24 MR. ROBINSON: Yes.

25 QUESTION: And the Georgia Supreme Court has

1 had a lot of experience with cases that involved (b)(7)
2 as just one of the circumstances.

3 MR. ROBINSON: Yes, Your Honor. That's right

4 QUESTION: Has there ever -- Is there any
5 subsequent case to the decision in this case where the
6 Georgia Supreme Court has articulated or spelled out the
7 reasons for its sustaining death penalties where one of
8 the aggravating circumstances has been declared invalid
9 or as not sustained by the evidence?

10 MR. ROBINSON: Your Honor, I cannot cite --

11 QUESTION: Haven't they written that at some --

12 MR. ROBINSON: I can't cite you to a case
13 where the Supreme Court of our state articulates the
14 exact reason that I am telling you right here in my
15 language; however, the thrust of all the cases in which
16 a circumstance has been found invalid and other
17 statutory aggravating circumstances exist plainly
18 indicate to me that that is what the supreme court's
19 reasoning is.

20 QUESTION: Well, they certainly have sustained
21 a lot of convictions since Godfrey where the (b)(7) was
22 just one of several -- is it (b)(7)?

23 MR. ROBINSON: (b)(7) is the --

24 QUESTION: Yes, where the -- where that was
25 just one of the aggravating circumstances the jury had

1 found.

2 MR. ROBINSON: Yes, Your Honor.

3 QUESTION: Mr. Attorney General?

4 MR. ROBINSON: Yes, sir.

5 QUESTION: Assuming in this case that in the
6 jury room one or more jurors said, we don't agree with
7 One and Two, but we do see some merit in Three, if you
8 don't include Three, we will not join the One and Two,
9 would that be all right?

10 MR. ROBINSON: Well, Your Honor, I think the
11 jury --

12 QUESTION: And I ought to warn you, my next
13 question is, while we can't be sure that happened, but
14 it could have happened.

15 MR. ROBINSON: Your Honor, I couldn't
16 speculate on what that jury may have said, of course.

17 QUESTION: But you can -- that it could have
18 happened.

19 MR. ROBINSON: Well, is it reasonable to
20 assume that that happens, particularly when the jury is
21 to return -- when all the jury is to return that
22 unanimous finding written down there? I think the
23 reasonable assumption must be that all jurors concurred,
24 and particularly --

25 QUESTION: Well, they did, according to my

1 imaginative story. They did agree, but they agreed only
2 because of the -- unconstitutional one. That is the
3 only reason they agreed, these One or Two.

4 MR. ROBINSON: Well --

5 QUESTION: It is sort of hypothetical.

6 MR. ROBINSON: Your Honor --

7 QUESTION: Mr. Attorney General, let's assume
8 for a moment hypothetically that there is some tension
9 between some prior opinion of the Georgia Supreme Court
10 and their opinion in this case. That tension, if there
11 is tension, assuming that, this is the latest
12 construction of the highest court of Georgia on what the
13 state law means, is it not?

14 MR. ROBINSON: Yes, Your Honor. That's
15 correct.

16 QUESTION: Well, it is still in 1976, and
17 there must be a lot of later ones.

18 MR. ROBINSON: But the same principle has been
19 stated, Your Honor, if I understood the Chief Justice's
20 question. That is what the present interpretation is,
21 and that is the latest interpretation. I see my time
22 has expired.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen.
24 The case is submitted.

25 (Whereupon, at 2:52 o'clock p.m., the case in

1 the above-entitled matter was submitted.)

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CERTIFICATION

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WALTER ZANT, WARDEN v. ALPHA OTIS O'DANIEL STEPHENS NO. 81-89

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BY Sharon Lynn Connelly

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