ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAMES R. STRINGER, Petitioner V. LEE ROY BLACK COMMISSIONER MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.

CASE NO: 90-6616

PLACE: Washington, D.C.

DATE: December 9, 1991

PAGES: 1 - 32

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES R. STRINGER, :

Petitioner :

v. : No. 90-6616

LEE ROY BLACK, COMMISSIONER, :

MISSISSIPPI DEPARTMENT OF :

CORRECTIONS, et al. :

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Washington, D.C.

Monday, December 9, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

KENNETH J. ROSE, ESQ., Durham, North Carolina; on behalf of the Petitioner.

MARVIN L. WHITE, JR., ESQ., Assistant Attorney General of Mississippi, Jackson, Mississippi; on behalf of the Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-6616, James R. Stringer v. Lee Roy Black.

Mr. Rose.

ORAL ARGUMENT OF KENNETH J. ROSE

ON BEHALF OF THE PETITIONER

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

James Stringer was convicted and sentenced to die in Hinds County, Mississippi for a killing during the commission of an attempted robbery. The jury found three statutory aggravating circumstances, one of which was the especially heinous, atrocious, or cruel aggravating circumstance. The jury then found that statutory aggravating circumstances were not outweighed by mitigating circumstances. The Mississippi supreme court affirmed Mr. Stringer's conviction and sentence after a review of the aggravating circumstances.

The court below, the United States Court of Appeals for the Fifth Circuit, again affirmed Mr. Stringer's sentence, relying on what it perceived to be Mississippi's rule of automatic affirmance. That is, where there's at least one valid aggravating circumstance, despite the fact that the jury may have also relied on an

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invalid or unconstitutional aggravating circumstance, the Mississippi supreme court would automatically affirm the sentence of death without individualized review.

This Court vacated Mr. Stringer's sentence and remanded the case for further consideration in light of Clemons v. Mississippi. The Fifth Circuit again affirmed the sentence, this time relying upon the nonretroactivity of Clemons v. Mississippi and Maynard v. Cartwright. Clemons and Maynard represent no new law. We rely on two fundamental principals central to this Court's Eighth Amendment jurisprudence.

QUESTION: Counsel, just at the outset, and you can just do it in the course of your oral argument, but it seems to me the briefs don't meet very well. Mississippi is arguing that even if Clemons was dictated by Godfrey as to the content of the aggravating factor, Mississippi wasn't the kind of State that Georgia was or that Florida was or that Oklahoma was. And that I didn't see addressed in your brief. So I hope during the course of your argument you'll make that clear what your position is.

MR. ROSE: Your Honor, I could go ahead and address that now. Mississippi has always contended that it is a State like Florida, that is, it requires a finding of at least one statutory aggravating circumstance, and then the jury is required to weigh statutory aggravating

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circumstances against all mitigating circumstances, and the jury is required to make a unanimous finding that statutory aggravating circumstances are not outweighed by mitigating circumstances. Mississippi has compared itself to Florida and has relied upon Florida law in several cases; Coleman v. State, Evans v. State, Gilliard v. State.

The State contends that Mississippi is not like Florida, because it says that there is a narrowing done in Mississippi at the definition of capital murder. Our contention is even if that is true, even if Mississippi has defined capital murder in a way similar to Texas where it makes a subclass of persons that may have committed murders eligible for the sentencing phase, that is not -- that does not solve the constitutional problem, because Mississippi then allows vague statutory aggravating circumstances to be relied upon by the sentencer, and puts emphasis on those circumstances.

In order to be eligible for the death penalty in Mississippi, you have -- the jury must make that unanimous finding that aggravating circumstances are not outweighed by mitigating circumstances. So the fact that Mississippi has allowed a vague aggravating circumstance to be considered and relied upon by the jury is a constitutional violation.

QUESTION: But of course, the further question is whether or not that's a new rule under Teague. And it seems to me that Mississippi makes an important point that it has to be -- that you have to counter when it says that this simply was not anticipated as of the time of Clemons because of the differences in the States, in the two States' sentencing schemes.

MR. ROSE: Your Honor, Florida has narrowing. And I think that's a -- that may be a misconception that Mississippi has narrowing, Florida does not. And then there's balancing in Mississippi and in Florida. Florida has narrowing by the initial finding of an aggravating circumstance. Mississippi has narrowing either by the definition of capital murder or by the initial finding of a statutory aggravating circumstance. But then they both require a weighing. So they're similar in the respect that both have some initial narrowing. But then they both require aggravating circumstances -- statutory aggravating circumstances to play a central role.

And if -- this Court has always held that if a statutory aggravating circumstance is vague, even if it's at that point where it's determining eligibility for the death sentence, where aggravating circumstances are weighed with mitigating circumstances, then there's constitutional error.

This Court held in Zant where there was an initial narrowing by an aggravating circumstance, a valid aggravating circumstance, that there still needed to be an individualized determination of the effect of an unconstitutional aggravating circumstance. And this Court accepted Georgia's representation that the effect was inconsequential in Georgia because statutory aggravating circumstances played no special role under the Georgia -- played no role under the Georgia scheme beyond the initial narrowing.

So the problem in Mississippi and the problem in Georgia that the Court discussed in Zant that was a cause of constitutional error in Zant was not that there was no narrowing at all; the problem was that there a consideration by the jury of a vague statutory aggravating circumstance that introduced an arbitrary and capricious factor.

QUESTION: Mr. Rose, I understand Mississippi says it relied on Zant. Clemons has been decided. We know that Mississippi is a different situation from Georgia in that respect. But so far as a new rule under Teague, I think you have to show that Mississippi was not entitled to rely on Zant, that, if you would, come as a surprise or whatever Teague said. And to simply show that the two systems are somewhat different I don't think

suffices.

MR. ROSE: Your Honor, I would agree. I think -- I think that first of all, Godfrey said that you cannot consider vague aggravating circumstances.

QUESTION: Yes, but that's your Maynard point, that's not your Clemons point, to go back to the Fifth Circuit's analysis.

MR. ROSE: Your Honor, our Clemons point is that there must be some individualized cure once the sentencer has considered a vague statutory aggravating circumstance. And that has always been the case. That was the case even in Georgia, where the statutory aggravating circumstance, the vague statutory aggravating circumstance played no role. So our position is that Georgia required individualized review and this Court approved Georgia's application of its statute in part because it did require some individualized review.

QUESTION: You know, that probably shows your case is different from Zant, but I think you have to go further in Teague and show that Clemons was not a new rule.

MR. ROSE: Yes, Your Honor, we do have to show Clemons is not a new rule. And I think we can. I think if you look at California v. Ramos as just an example, this Court said that there had to be some

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substantive -- there are some substantive limitations on the factors that the sentencer can consider in determining whether death is the appropriate punishment. And it says what those substantive limitations are. It says those limitations are consideration of eight factors. That's apart from any consideration of the narrowing rule, the initial narrowing rule that every statute must provide.

In other words, there's a procedural requirement that every death penalty statute must be, and that is it must circumscribe the persons eligible for the death penalty. And then it may allow the sentencer to consider a myriad of factors in determining punishment. But one factor we know, and we've known it since Zant and we've known it since California v. Ramos, one factor it may not allow juries to consider are vague aggravating circumstances. And the reason that is so is because it introduces an arbitrary and capricious factor into the sentencing proceeding. We don't know what the juries considered when they considered vague aggravating circumstances.

QUESTION: Are you talking about Maynard now or --

MR. ROSE: Your Honor, I'm talking about what was applied in Maynard. It was a rule that was not even discussed, I might add.

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QUESTION: But you're going to get to Clemons pretty soon, I guess.

MR. ROSE: Yes, Your Honor. The -- I'll go on to Clemons.

QUESTION: That's all right. I just thought you were about to talk about Clemons.

MR. ROSE: Clemons had stated that there is some requirement of individualized review. And in particular, it said a weighing State may allow the State appellate court to either reweigh or apply a harmless error analysis as long as there is some individualized review of the facts and circumstances of the case. That is not new law. That has been in the rules since Eddings, Zant, and Barclay.

In Barclay, for example, this Court reviewed an invalid aggravating circumstance that was not constitutionally invalid, but was invalid as a matter of State law. This Court said in Barclay that the critical question was whether the invalid aggravating circumstance so infected the balance in process created by the Florida statute that it was constitutionally impermissible to allow the sentence to stand. Now that requires individualized review, because it looks at the statute, the Florida statute, the balancing process that has been established, and it requires the State appellate court to

do some individualized consideration of the factors that were presented in the court below.

QUESTION: Do you deduce all of that just from that one sentence in Barclay?

MR. ROSE: Your Honor, no, sir. There was more language in Barclay. They talked about Barclay applying a harmless error test. They considered the fact that there were no mitigating circumstances introduced in Barclay, and said that the court, the Florida court did do individualized review and said that was what was important. The specific language in Barclay that supports our position that said what is required is some individualized review -- some individualized consideration of the facts and circumstances of the case.

The vast majority of State and Federal courts since Zant and Barclay have understood the required analysis. They've understood first you had to determine whether or not there were vague aggravating circumstances employed in the sentencing determination. If there were, then the court had to do some determination, individualized determination of the effect of those aggravating circumstances. That individualized consideration had to also include a consideration of the mitigating factors that were introduced in the court below. Mississippi has done none of that. And it stands

alone in doing none of that until Clemons.

This Court's decisions on retroactivity during the last 3 or 4 years had one unifying theme, and that is similarly situated persons must be treated alike. And for that reason it's particularly important that the two basic principles that James Stringer asked to be applied in his case have already been applied in a postconviction context.

In Parker v. Dugger, this Court applied in a postconviction context the principle that there must be some individualized review of error. There was a question of whether there was error. The State of Florida said yes, there is error under State law, and apparently did not apply an individualized review, either a harmless error test or a reweighing. And this Court said that at a minimum some individualized review is required applying the principles in Clemons. That is the same principle that James Stringer seeks to have applied in his case. It has already been applied in a postconviction context.

Secondly, in Lewis v. Jeffers, this Court applied the basic principal that James Stringer seeks to have applied in this case -- in his case, and that is you cannot use a vague statutory aggravating circumstance in determining sentence. Now, the question again in Lewis v. Jeffers was on the periphery. Well, had Arizona developed

a case law that has narrowed the construction of its equivalent of the especially heinous, atrocious or cruel aggravating circumstance in such a manner that it was not applied in a vague way. And the Court answered that question yes. But the basic principle that you cannot use vague statutory aggravating circumstances was accepted and there was no debate that that principle should be applied in Lewis v. Jeffers.

In conclusion, this Court was right to apply on habeas review the long-established principles that were the premise for Cartwright and Clemons, including that the sentencer cannot rely upon vague statutory aggravating circumstances. And if the sentencer does rely on such circumstances, there must be some type of individualized review by the State appellate court to cure the error. That was a law -- that is the law now and that was clearly the law in 1985 when James Stringer's conviction became final.

QUESTION: Thank you, Mr. Rose.

Mr. White, we'll hear from you.

ORAL ARGUMENT OF MARVIN L. WHITE, JR.

ON BEHALF OF THE RESPONDENTS

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

In Gregg and in Zant both, this Court stated

that each distinct scheme for imposing the sentence of death on a defendant must be examined on an individual basis, and that's what we're asking you to do with the Mississippi scheme here. In order to answer the question that is before the Court today, that is whether Clemons or Maynard are to be retroactively applied, we must examine how the Mississippi statutory scheme works and operates in the imposition of a death sentence. This is because the scheme found in Mississippi is almost unique. There's only one other State that has a statute like that, and that is Louisiana.

QUESTION: And was Lowenfield v. Phelps from Louisiana?

MR. WHITE: Yes, ma'am -- yes, Your Honor.

QUESTION: And did we say there that only one narrowing procedure is constitutionally required?

MR. WHITE: You said that, there in Lowenfield, that -- and I interpreted as saying yes -- that in Lowenfield that the Constitution -- the last sentence of the opinion says that the narrowing, constitutional narrowing is done by the finding of guilt of one of the narrowly defined crimes, and the Constitution requires no more.

QUESTION: So then, the State is permitted to use vague aggravating circumstances thereafter if it wants

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to, is that the theory you offer?

MR. WHITE: The -- that is not the theory. That the -- it does not infringe on the Constitution to have those aggravating circumstances if they're even vaguely defined in comparison with Godfrey even, or Zant, I should say, is that --

QUESTION: Well, your position is that they can be vague, and under a standard that you would apply to a constitutional inquiry, but still stand up.

MR. WHITE: That's correct.

QUESTION: That's your -- so that Maynard doesn't apply at all.

MR. WHITE: That's correct. And because as in Johnson v. Thigpen, as the Fifth Circuit found, and as we have argued contrary to counsel opposite, that we have always said we were like Florida, we have not. The decision in Johnson v. Thigpen would not be there had we argued otherwise.

QUESTION: Well, in this case it was still necessary to find an aggravating circumstance.

MR. WHITE: That's correct, under State law.

QUESTION: Yes, and so the jury had to find an aggravating circumstance.

MR. WHITE: That's correct.

QUESTION: In addition to the narrowing.

MR. WHITE: That's correct.

QUESTION: And you say the jury could be -- could satisfy that requirement by finding an aggravating circumstance that's just plain outright vague.

MR. WHITE: That's correct, because it's not constitutionally required.

QUESTION: Well, your brother, I think --

QUESTION: But the State law requires it.

MR. WHITE: That's correct.

QUESTION: I think your brother is arguing that you've got a two-step narrowing procedure, and he is saying, at least I think he's saying implicitly, that if you do employ a two-step narrowing procedure, the standards applicable to, we'll say the second step, should be the same applicable to the first and there's nothing new about applying a given standard. The only thing different about your situation is that you have a two-step process rather than a one-step process.

MR. WHITE: Well, if in Lowenfield -- and the Mississippi statute operates as does the Louisiana statute -- if the narrowing -- that all the Constitution requires is that narrowing to limit the class of people for who the death penalty may be imposed is constitutionally completed or established by the finding of guilt of one of the narrowly defined crimes -- and

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Lowenfield said the Constitution requires no more. If we on the State law basis go further and require a further narrowing, we contend it doesn't --

QUESTION: Well, didn't the Fifth Circuit find this instruction invalid for vagueness?

MR. WHITE: In this case?

QUESTION: Yes.

MR. WHITE: No. Well, I mean they never reached that. They just said it was -- that Teague did not apply -- I mean that Teague barred its application on remand. The first time through, they said that if it isn't vague or invalid in this particular case, yes, that there were other valid aggravating circumstances that allowed this to be affirmed.

And the issue, of course, going back to the Fifth Circuit's opinion in Johnson v. Thigpen, we say that even if this is to be looked at this way, that Lowenfield -- I mean Lowenfield and Johnson v. Thigpen both allow us to rely on this as a new rule, especially in Maynard. I mean, and Maynard coming from Godfrey, and the Fifth Circuit held in Johnson v. Thigpen that this very instruction was not even cognizable in habeas.

QUESTION: Well, in your view are Lowenfield and Clemons contradictory?

MR. WHITE: To some extent. When you say that

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the aggravating circumstances in Mississippi take on a constitutional significance, then it conflicts with Lowenfield in that respect, in that we have to do -- they also have to meet the same test as the narrowing factors that the Court held required by law in Lowenfield.

QUESTION: Of course you didn't argue that in Clemons and we didn't address it in Clemons.

MR. WHITE: You didn't address it in Clemons. It is argued not as forcefully as it is here, but it was argued that the aggravating circumstances in Mississippi do not have the same constitutional significance as they do in Georgia, Florida, and Oklahoma. That as I say, the argument is made there in Clemons, and it was made before that in Johnson v. Mississippi.

QUESTION: It would seem that if it were a matter of a new rule of the significance you say, that we would have addressed it in Clemons.

MR. WHITE: Probably so, but we weren't discussing, I don't think, new rules at that point, of whether this was a new ruling. Clemons, as the Court started off its opinion by saying, that we are now addressing the question that we left open in Zant. I mean I think that is almost a total answer of the question whether it's a new rule or not there, because if the Court has never spoken to this issue and they speak to it, and

that's what the Court said, the opinion says in Clemons, we now address that question we left open in Zant. And our court had been relying on Zant all this time in doing so. And now Clemons comes down and says that you have to do it another way, that you have to do a reweighing or a harmless error analysis now instead of just what you have been doing under Zant -- or relying on Zant in doing that.

So the -- of course as we said, the aggravating factors under the Mississippi statute act as actually a second filter that's not constitutionally required, and of course, reading Lowenfield, I think it is consistent with the way the Mississippi statute operates is that these aggravating factors take on a different significance under the Mississippi statute -- under the Louisiana statute than they do in Georgia, Florida, and Oklahoma. We define narrowly as does Texas. We define narrowly as does Louisiana. And this Court has said that no more was required.

So if Clemons stands for the fact that yes, there is -- these aggravating circumstances in Mississippi do have constitutional significance, then that is a new rule because it has not been stated before. And as relying on the ruling in Johnson v. Thigpen out of the Fifth Circuit where they said the aggravating circumstances had no constitutional significance, we're

not even cognizable in Federal habeas, and that takes care of both Maynard and Clemons as being new rules there, because both of them address aggravating circumstances and the same aggravating circumstance, for that matter.

In other words, the Court is actually for the first time saying that relevant admissible truthful evidence presented during -- to the jury during a sentence phase of a capital trial was given constitutional significance because it was denoted in aggravating circumstance. In Georgia, the statute there -- the court has said there that narrowing is performed by the aggravating circumstance. And then the jury can consider anything. It doesn't have to be defined. It's wide open. They consider a whole myriad of aggravating factors, but they're not statutorily listed. And they can consider any evidence before them that's relevant. Why does it change because we denoted an aggravating factor, and basically limit that to that respect?

QUESTION: Well, I gather that the Mississippi supreme court has compared itself really more to Florida. I don't -- and it has assumed that Maynard and Clemons apply to it.

MR. WHITE: Yes.

QUESTION: I think you're arguing a position not taken by your State supreme court.

MR. WHITE: I think that they took that tack after --

QUESTION: Isn't that right?

MR. WHITE: Well, in Clemons, it's the first time they actually took that tack, that said yes, it is. Up until that time, the court said no. And in the concurring opinion in Johnson -- Jones v. State, Montecarlo Jones v. State, the concurrence talks about Johnson v. Thigpen and says the Federal courts, being neutral observers, have found no constitutional infirmity or even constitutional necessity in our aggravating circumstances.

Yes, I think on a State law basis they have looked to Florida somewhat in the aggravating circumstance area. But they stand for different purposes. I mean, Florida's aggravating circumstance -- and our State has given some significance to these, you know, under State law, this is the way that it has to be. And we have -- you have to find these things in order to take that second step and weigh those aggravating and mitigating circumstances, and then the jury must find whether or not death is the appropriate sentence after, and if the aggravating circumstances outweigh I think, in this particular case, it must outweigh the mitigating circumstances. Under the statute, the mitigating have to

outweigh the aggravating, but that's no -- just here it's just turned around.

But we're considering evidence -- we don't have evidence coming to the jury that they couldn't have before them in any other -- you know, it was totally admissible, everything that was considered in relation to the especially heinous, atrocious or cruel aggravating factor -- photographs, the argument, everything in support. Even had it not been denoted an aggravating factor, the jury still could have considered it. And Mississippi does allow for the consideration of nonstatutory aggravating factors, they have to find the others, but the jury can certainly consider those.

They have said in Jordan v. State, and just most recently in Hanson v. State, that the jury certainly can consider nonstatutory aggravating circumstances. They can't rest the death penalty solely on that as a finding there, but they can certainly consider them in assessing whether or not the death penalty should be imposed. And that's the ones that they have mentioned, mainly, as future dangerousness.

So we look to that. They can consider these other factors other than that, but they do have to find at least one aggravating circumstance. And as we contend under Mississippi law, is contrary to Godfrey, a jury in

Mississippi could never return a death sentence based solely on especially heinous, atrocious, and cruel. They have first always found that defendant guilty of one of the narrowly defined crimes set out -- and there were seven crimes set out in our statute that carry or elevate the crime to a capital murder offense. And then after they have been convicted of that, then the jury must look at aggravating factors. We have never had a jury come back with a verdict even at that, and have solely the especially heinous, atrocious, and cruel aggravating factor as the only aggravating factor that they considered.

So even if you had a, as Justice Souter was talking, the second narrowing or a double narrowing statute -- and we've called it a double narrowing statute. That's not something that we have not used a term in describing our statute, that is a double narrowing statute. Even so, when you look at that, it's what makes that second one the finding of one aggravating circumstance, then you get into a Zant-type analysis then and what is the effect of the invalid aggravating circumstance at that point. Does it then skew that balance to the point, and of course, looking at Barclay and Goode, and the type of analysis this Court and the Florida court made in both those cases, it's no different

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than what the Mississippi supreme court has been doing all these years in those cases. It's not what was stated in Clemons.

Petitioner brings up Parker v. Dugger; of course, retroactivity is not raised in Parker v. Dugger. It was not addressed in the briefs. It was not addressed in oral argument. And whether that was an oversight -- whatever it was, we do not feel that it is compelling or a binding precedent that Clemons has to be applied in this case. The cases are differently situated anyway. Because -- basically because of the way the statutes operate and because of the manner in which they do.

QUESTION: Am I correct that you did not make the Teague argument in Clemons?

MR. WHITE: Teague was a direct appeal case and we could not --

QUESTION: Oh, that's correct.

MR. WHITE: There was no Teague argument to make there. This, in fact, this case, Smith v. Black, and Hill v. Black, all came to the Fifth Circuit after Clemons, or either were -- had hardly been decided in this Court, sent back for reconsideration in light of Clemons. And our argument there was that this case in fact, this is a new rule and that it is, you know, Teague barred from

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retroactive effect of these opinions, both Maynard and Clemons. The Fifth Circuit's main opinion in this, of course, is not in this case. It is in Smith v. Black where Judge King has written a quite lengthy analysis of why these precedents -- this precedent especially, the Clemons precedent, is not retroactive. In the particular case, bar, the Fifth Circuit basically just said we adopt and we reaffirm and reinstate our earlier judgment based on Smith v. Black, the same thing they have done also in a case called Hill v. Black, which was also sent back for reconsideration in light of Clemons.

So we have two other cases, at least two other cases pending on this same issue in the Fifth Circuit, before this Court, in fact. Smith is already before this Court.

But that is where the full opinion is delineating how the Fifth Circuit arrived at that. And I think Judge King's analysis there is very clear that this is the first time that constitutional limits had been put on how aggravating factors ought to be considered in Mississippi because of the difference in the statutes. And because we do have, and this Court's precedent allows for, difference in the manner in which we apply our statutes or the statutes that are operating, then we can say -- we contend that we have to look at the individual

statute and how it operates in order to decide whether or not certain precedents would have retroactive effect on that particular statute.

And of course, we would further contend that the -- that this is simply a procedurally -- and it doesn't fit into the exceptions of Teague either. First, it doesn't outlaw any private conduct or anything like that. It's not a watershed rule. Both our decisions relating to procedurally flawed contemplation or review are relevant evidence, and that's not something that would kick in the second exception to Teague.

Thank you.

QUESTION: Thank you, Mr. White.

Mr. Rose, do you have rebuttal?

REBUTTAL ARGUMENT OF KENNETH J. ROSE

ON BEHALF OF THE PETITIONER

MR. ROSE: Yes, Your Honor, I do. The State's basic premise is that a State could reasonably permit, before Clemons and Cartwright, could reasonably permit the jury to consider vague statutory aggravating circumstances to determine eligibility under its State's statutory scheme. Certainly a State can define its statutory scheme within broad contours. But if that State has determined that statutory aggravating circumstances play an important role in determining eligibility for sentence, as

Mississippi has, each statutory aggravating circumstance must meet a constitutional narrow standard derived from Furman.

QUESTION: And Lowenfield is not controlling on that point because?

MR. ROSE: Your Honor, Lowenfield is not at all controlling, and that has no relevance to the question, because Lowenfield just defines the point where there has to be -- what is constitutionally permitted for a State to do. Louisiana was permitted to use the equivalent of aggravating circumstances at the definitional stage of first-degree murder. Mississippi was not permitted, and Lowenfield does not address what has happened in Mississippi, and that is -- and in this case -- and that is after the initial narrowing stage is met, there is then injected a vague statutory aggravating circumstance which the jury is told to put emphasis on and rely upon in determining further eligibility for a sentence. Lowenfield has nothing to do with that.

Johnson v. Thigpen, in answer to Justice White's question, did the Fifth Circuit find that Mississippi's construction of especially heinous, atrocious, or cruel, was vague. The Fifth Circuit found that it was vague in Johnson v. Thigpen, and in later cases assumed that it had no narrowing construction that had been consistently

applied. And it was only after it had got to that point that it then decided that well, it didn't make any difference that this vague aggravating circumstance played a role in determining eligibility for punishment.

QUESTION: They were wrong about that in Clemons?

MR. ROSE: Your Honor, they were wrong on that under Zant.

QUESTION: Well, yes, yes.

MR. ROSE: Because Zant said that it was constitutional error for the sentencer to consider vague statutory aggravating circumstances. Chief Justice Rehnquist, in his opinion in Barclay, called what this Court did in Zant a constitutional harmless error test. In other words, there was constitutional error, and what the Court did in Zant was determine whether it had an effect on the sentencer. And the determination had to be made after careful scrutiny.

QUESTION: Yes, but didn't we, in Zant, didn't it just leave open the question of the significance of the invalidity of one of several aggravating circumstances in a balancing State, in a weighing State?

MR. ROSE: Your Honor, the question --

QUESTION: Is it yes or no?

MR. ROSE: Your Honor, the question is yes, but

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what was left open was whether or not a State was required to automatically reverse based on a vague stat -- in a weighing State, we know that each statutory aggravating circumstance found by the jury plays an important role. That's the question this Court answered against the petitioner in Clemons v. Mississippi. And in Zant, that was the question the Court was also asking. Under Georgia law, did -- was the State of Georgia required to automatically reverse when the sentencer considered a vague aggravating circumstance? And it said -- and the Court answered the question about --

QUESTION: Well, surely Clemons was, in that respect was a new rule on the Fifth Circuit, wasn't it?

MR. ROSE: Clemons reversed the Fifth Circuit, Your Honor. The Fifth Circuit was wrong.

QUESTION: So it was a new rule somewhere and it --

QUESTION: It did not reverse the Fifth Circuit in that case, since that came from the supreme court of Mississippi.

MR. ROSE: Yes, Your Honor.

QUESTION: It disagreed with the Fifth Circuit, and obviously when we disagree with the Fifth Circuit, the Fifth Circuit was wrong.

MR. ROSE: That's right, Your Honor.

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(Laughter.)

MR. ROSE: And not a single Justice on this Court differed on the analysis that the Court applied in Clemons. It was understood that once a sentencer relies upon a vague statutory aggravating circumstance, that there is error and the State must --

QUESTION: Well, that's the Maynard. That's the Maynard argument.

MR. ROSE: The counsel opposite has argued that Mississippi does not limit consideration, the weighing stage, to just statutory aggravating facts supporting the statutory aggravating circumstance. And that's incorrect. In Mississippi has interpreted its laws very narrowly constraining what the jury may consider at the weighing stage. It said -- it has said in Coleman v. State that it can only -- the jury can only consider facts relevant to the statutory aggravated circumstance.

And that's significant. Because in Zant the question asked was what is the function -- the constitutional question is controlled by the function of aggravating circumstances under the State law. Well, Mississippi said, we have a prominent function under our law, and yet we're still going to ignore the effect of the vague statutory aggravating circumstance without any individualized review. That was impermissible as of Zant,

that was impermissible as of Barclay v. Florida.

And specifically in California v. Ramos, this Court said that what Gregg meant is that are substantive limitations on factors that a sentencer may consider. And it didn't matter what --

QUESTION: Mr. Rose, you've mentioned California v. Ramos a couple of times in your oral argument. Apparently you don't cite it in your brief?

MR. ROSE: No, Your Honor.

QUESTION: You don't?

MR. ROSE: I do not cite it in my brief. But the State cites it in their brief, and that's why I'm responding in this manner.

The State has -- the State has raised a point that we do not address, as Justice Kennedy stated before, we do not address because we considered it fundamental. The fundamental principle -- and this Court considered it fundamental in Maynard v. Cartwright and Clemons -- the fundamental principal that if a vague aggravating circumstance is injected into the jury's consideration, there is constitutional error. Because that's what -- that's what the problem was in Furman. That's what this Court tried to cure, or allowed to be cured, in Gregg v. Georgia and Proffitt v. Florida. And found that it had not been cured in the particular case in Godfrey v.

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Georgia.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rose.

The case is submitted.

(Whereupon, at 1:39 p.m., the case in the above-entitled matter was submitted.)

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