ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LOUIS JONES, Petitioner v. UNITED STATES.

CASE NO: 97-9361 c.1

PLACE: Washington, D.C.

DATE: Monday, February 22, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS JONES, :

Petitioner :

v. : No. 97-9361

UNITED STATES. :

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Washington, D.C.

Monday, February 22, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

TIMOTHY CROOKS, ESQ., Assistant Federal Public Defender, Fort Worth, Texas; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 97-9361, Louis Jones v. United States.

Mr. Crooks.

ORAL ARGUMENT OF TIMOTHY CROOKS

ON BEHALF OF THE PETITIONER

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

This case arises on direct review of the first Federal death sentence imposed under the Federal Death Penalty Act of 1994.

Of critical importance in this case is the fact that the FDPA is a weighing statute in which jurors are required to weigh any statutory and non-statutory aggravating factors they find against any mitigating factors.

In this case, the court of appeals found that two of the four aggravating factors found by the jury were constitutionally invalid, but then held that that error was harmless beyond a reasonable doubt.

The court of appeals erred in concluding that this error was harmless beyond a reasonable doubt because if the two invalid aggravating circumstances are removed from the mix altogether in this weighing jurisdiction,

this record simply cannot support a finding of harmless error beyond a reasonable doubt. There are several reasons why this is so.

First and foremost, there was an unusually powerful case in mitigation presented here. This petitioner had a stellar military record, including 22 years of service in the United States Army as an Army Airborne Ranger. He served in two foreign conflicts and was decorated extensively.

Furthermore, jurors in this case found that this petitioner, unlike many or most capital defendants, had no significant prior criminal record.

Jurors also found that at the time of the offense the petitioner was laboring under severe mental or emotional disturbance, duress and stress, and impaired capacity.

And the jurors also took the extraordinary step of writing in as a mitigating factor the name, Sandy Lane, who was petitioner's ex-wife, thereby indicating they believed that the break-up of petitioner's marriage with Ms. Lane was in some degree a mitigating factor for this offense.

It is also significant to look at the aggravating factors in this case which the jury did not find. The jury rejected fully three of the seven

aggravating factors submitted by the Government. The jury did not find that this offense was committed as the result of substantial planning and premeditation. The jury did not find that the petitioner had created a grave risk of death to someone else besides the victim, and significantly the jury did not find that the petitioner would be a future danger.

QUESTION: Were the objections that -- the instructions, rather, that you're talking about now, Mr. Crooks -- were those objected to by the respondent -- by the petitioner?

MR. CROOKS: Yes, they were, Your Honor.

It is also significant to look at --

QUESTION: On the express grounds of overlap or being duplicative?

MR. CROOKS: I don't recall whether there was an express objection at trial on the grounds of duplication, but definitely there was an objection on the grounds of vagueness and overbreadth.

QUESTION: Those are certainly the kinds of things that the prosecution could argue to the jury, and so this had the effect of focusing the jury's attention on a certain area. I would -- I would think they would be too imprecise for eligibility, but -- but this is the second stage, selection.

MR. CROOKS: This evidence is, indeed, admissible, Your Honor, as the Court pointed out in Payne, but the problem here is that this is a weighing jurisdiction. And as the Court pointed out in Stringer, it's especially important that aggravating factors in a weighing jurisdiction be defined with some degree of precision. And as the court of appeals correctly held, these factors were too vague and overbroad for use in a weighing jurisdiction.

QUESTION: Does the Government concede that the court of appeals was right in saying those two factors were invalid?

MR. CROOKS: It does not, Your Honor.

QUESTION: It doesn't now, but it did in its brief in opposition to the cert petition, didn't it? It didn't raise any question about the aggravating circumstances.

QUESTION: Well, that's not the same thing as --

MR. CROOKS: That's correct, Your Honor.

QUESTION: Yes.

QUESTION: So, we -- we take the case on the assumption that they were -- they were properly found to -- to -- to have been erroneously submitted to the jury.

MR. CROOKS: That is certainly our position,

Your Honor.

QUESTION: Yes.

MR. CROOKS: As the court of appeals noted, these factors failed to distinguish this homicide from any other because every victim has a background and every victim has personal characteristics. Therefore, by submitting these factors to the jury, the Government stacked the deck because the jury could not help but find these factors as they were worded, and once the jury found those factors, in this weighing jurisdiction it was required to weigh those factors on death's side of the scale.

As the court of appeals also noted, the mere use of terms like background and personal characteristics, without any further instruction, which there was not in this case, leave the jury with precisely the type of open-ended discretion this Court condemned in Furman v. Georgia. In fact, the two invalid aggravating circumstances -- had they been removed, it cannot be said beyond a reasonable doubt that the result would have been the same in this case.

QUESTION: Well, supposing that we -- we don't agree with the Fifth Circuit, that those -- those factors were invalid, are you prepared to argue that they were?

MR. CROOKS: We are prepared to argue that they

are invalid, Your Honor. The Fifth Circuit did correctly hold that they were both vague and overbroad and also duplicative because these factors are present in every homicide.

QUESTION: But if -- if -- if you can -- if Payne says you can put in victim evidence, in a sense that's true, every victim is going to have some sort of background, but isn't that exactly what Payne means?

MR. CROOKS: Payne does mean that the jury may hear about evidence of the victim's characteristics and the effect on the survivors, but we're not arguing that Payne should be overruled. What we're arguing is that in a weighing jurisdiction, the factors must be defined with some degree of precision and they can't be vague and overbroad, and the jury's discretion must be channeled in an appropriate way for a weighing jurisdiction.

QUESTION: It would seem to me to be very difficult to design mitigating factors for submission to the jury that had no overlap.

MR. CROOKS: I don't believe that's true, Your Honor. I think that the Government could and, in fact, did in its brief, make an attempt to draft -- redraft factors 3(B) and 3(C) in a fashion that would not be vague, overbroad, or duplicative, but the very extent to which the Government had to rewrite those factors in order

to make them even attempt to pass constitutional muster highlights the problems with the factors which were actually submitted to this jury.

QUESTION: Are you suggesting that perhaps the statutory aggravators are models because they certainly are discrete, the statutory aggravators?

MR. CROOKS: I'm sorry, Your Honor.

QUESTION: The statutory aggravators are discrete, one from another. They're not overlapping as these two. So, if those are the models for what additional aggravators are, models of the extent of precision and clarity, I suppose that that would support the Eleventh Circuit's view.

QUESTION: Fifth Circuit.

MR. CROOKS: That would be correct, Your Honor. The statutory aggravators certainly highlight the problems that are present in these non-statutory aggravators because the statutory aggravators are worded a good bit more clearly and give much more direction to the jury than these factors 3(B) and 3(C) that the Government drafted.

QUESTION: How is that? That is, what I'm having trouble in my own mind -- I take it it's constitutional. It's perfectly okay to have a statutory aggravator as heinous -- what is the words, you know -- heinous, cruel, and depraved, which is a little vague, but

I see the point.

But then why can't it be a statutory factor where you'd think of whether the -- the victim is vulnerable? And here what makes her vulnerable is her young age or -- you know, they go through. They say young age, slight stature, her background, and unfamiliarity with the region. That seems more precise, not less precise.

I mean, I -- I'm not taking a view one way or the other, but I'd like -- just looking at it directly, I read those three words, heinous, depraved, et cetera, and then I compare it to the four rather precise things that have to do with the victim. Why is the -- what's your argument that that's vaguer rather than more precise?

MR. CROOKS: First, Your Honor, I think it's significant that the statutory aggravator, heinous, cruel, and depraved, doesn't just stop at the words heinous, cruel, and depraved, but goes on to tie that definition to torture and makes it more specific than just the words heinous, cruel, and depraved, which under this Court's decisions in Godfrey and Maynard v. Cartwright might, indeed, pose a problem.

But what was problematic with the non-statutory aggravators is that whether or not it might have been permissible to tie the petitioner's culpability to the

special vulnerability of the victim, the aggravators as submitted, the non-statutory aggravators, did not do that. They simply required the jury to find her age, her background, her slight stature, and her youth and, once having found them, to treat that factor as aggravating, making the petitioner more death-worthy. As written, the factor didn't require the jury to find that she was more vulnerable and therefore that he was more culpable.

QUESTION: Would it have been all right, in your opinion, then if it added the words Tracie McBride's young age, slight stature, her background, and her unfamiliarity with San Angelo, Texas made her more vulnerable and therefore? Or it therefore made her more vulnerable, then it would have been okay?

MR. CROOKS: That might indeed pass muster, Your Honor, and that shows the very probably with this non-statutory aggravator, is the extent to which it has to be written in order to create that sort of nexus between the particular characteristic and the petitioner's culpability and death-worthiness.

QUESTION: Mr. Crooks, can I ask just -- I'm trying to clarify my -- about the facts here? The defendant in this case was an African American?

MR. CROOKS: That's correct, Your Honor.

QUESTION: And the victim?

MR. CROOKS: Was white.

QUESTION: And did this aggravating circumstance sort of highlight that relationship, that contrast, do you think?

MR. CROOKS: It certainly could have invited the victim to think -- or invited the jury to think about the respective races.

QUESTION: The vulnerability point and the young white girl who was killed by this black defendant.

MR. CROOKS: And especially the words background and personal characteristics are so open-ended, they certainly could have invited consideration of things like race or other --

QUESTION: Well, correct me if -- if I'm wrong. I thought the law specifically required the jury to say that -- that the race of the victim or the perpetrator were irrelevant to their considerations. Am I wrong about that?

MR. CROOKS: No, Your Honor. You're correct about that, but --

QUESTION: And the redrafting that you said could have -- could have made this okay, that -- would that any less have pointed out the fact that this was a white woman?

MR. CROOKS: It would not, Your Honor.

QUESTION: I mean, is this a new argument? Are you saying that this is invalid because -- because it invited the jury to consider race?

MR. CROOKS: No, Your Honor.

QUESTION: Is that your argument here?

MR. CROOKS: No, it's not, Your Honor. We contend that these non-statutory aggravating factors are invalid because they were overbroad in the sense that, as worded, the jury could not help but find them because those factors are present in every homicide, and thereby the Government stacked the deck because the Government had two factors the jury could not help but find, and then the jury was told you must treat these as aggravating and you must find that the petitioner is more death-worthy as a result of these non-statutory aggravating factors by definition.

QUESTION: Do we have to agree with you in order to find for you on this point? Because I thought one of your arguments was that regardless of how ultimately you should assess these particular factors, it was the failure of the circuit, in effect, to -- to discuss the issue in a -- in a comprehensive way to flesh out its analysis, which -- which made its treatment as a matter of process inadequate. Is that also an argument of yours?

MR. CROOKS: That is an argument, Your Honor,

and we do contend that the Fifth Circuit on this record simply could not have found that the error in the submission of these aggravators was harmless beyond a reasonable doubt.

QUESTION: Well, those are really two different points. I think Justice Souter's question is asking you, do you think the court of appeals should have had a longer part of its opinion dealing with this part of its analysis? And you're saying that regardless of how long an opinion it might have been, it could not have rationally reached that conclusion.

Now, on -- on the process point, do you think that the -- there's a certain minimum amount of space that a court ought to devote to a harmless error analysis?

MR. CROOKS: Yes, Your Honor.

QUESTION: What would that minimum be?

MR. CROOKS: At a minimum there should be, as the Court pointed out in Clemons, a detailed explanation based on the record, and as Justice O'Connor noted in her concurrence in the Sochor case, there should be a principled explanation of how the court reached the conclusion of harmless error and that a bald assertion of harmlessness cannot substitute for that sort of principled explanation.

QUESTION: Well, but supposing you go a little

further than that and agree that you can't simply say we find the error is harmless. But is there any fixed amount of greater explanation beyond that that you think the law requires?

MR. CROOKS: Yes, Your Honor. At a minimum, the court should discuss the evidence underlying the aggravating factors and particularly the mitigating factors. The court --

QUESTION: And you -- what opinion is it of -- of this Court that you say supports that?

MR. CROOKS: Both Clemons and Parker v. Dugger stress the importance of courts in conducting harmless error analysis in discussing the mitigating evidence particularly.

QUESTION: What -- what does this -- I mean, is this some special rule for -- for mitigating and aggravating factors? I mean, appellate courts often just reject an argument saying, you know, we have considered this argument and find it insubstantial. Period. That -- that is not enough?

MR. CROOKS: In this context it is not enough, Your Honor.

QUESTION: Why? What -- what special rule governs this context?

MR. CROOKS: The special rule is the

constitutional requirement of individualized sentencing which requires a new comparison of the aggravating and mitigating factors once --

QUESTION: So, the court could say, we -- you know, we have considered -- and I think it's clear from this opinion that the court considered -- aggravating and mitigating factors and found that -- that the determination the jury made was -- was okay. Does it have to say anything more than that?

MR. CROOKS: Yes, it does, Your Honor. It should discuss the evidence which underlies the aggravating and mitigating factors.

QUESTION: Why? Where do you get that from, it has to discuss the evidence?

MR. CROOKS: Because otherwise it's impossible to know whether this petitioner or any other defendant who has been the subject of invalid aggravating circumstances is, indeed, receiving the individualized --

QUESTION: What's the best Court opinion that supports the statement you just made?

MR. CROOKS: Clemons v. Mississippi in this particular context is the best opinion, Your Honor.

QUESTION: Mr. Crooks, do I understand that your principal argument, however, is that an aggravator of personal characteristics, effect on family is too vague

and it fits every case, rather than this process argument that you're now making? In other words, are any number of words -- any number of words could satisfy your objection that personal characteristics, effect on family wouldn't -- wouldn't pass muster.

MR. CROOKS: That's correct, Your Honor. And we do argue not only that they were vague and overbroad, but also that a court conducting harmless error analysis simply could not have found on this record that the particular error was harmless in this case.

QUESTION: Mr. Crooks, our own questions have kept you on this point, but are you going to go to the instructions?

MR. CROOKS: Yes, Your Honor.

QUESTION: Let me, if I may. I have a question that I want to ask you and maybe that can get the ball rolling.

On page 29 of the Government's brief, the Government quotes section 3593(b)(2), and the portion that the Government quotes is this. It -- the lead-in is that the -- the court may impanel a second sentencing jury. And the particular text that refers to the -- the further sentencing hearing points out that it may be conducted, quote, before a jury impaneled for the purpose of the hearing if the jury that determined the defendant's guilt

was discharged for good cause. And that's the end of the quote.

Do you take the position that the inability of the jury to disagree -- to agree, rather, unanimously on a penalty would be good cause for discharging that jury after it had had an opportunity to consider sentence? In other words, can you have a hung -- is it proper for the court, within the meaning of the statute, to discharge a jury which hangs up on -- on sentence?

MR. CROOKS: The jury would have to be discharged, but there would not be a further sentencing proceeding or a new sentencing proceeding following from that.

QUESTION: Well, why -- and I presume that's because that reason does not amount to good cause within the statute. Is that your argument?

MR. CROOKS: Our argument is that the statute must be read as a whole, and looking at section 35 --

QUESTION: I -- I don't want to cut off that argument, but I want to stick to my point for a minute. Do you take the position that the inability of the trial jury to agree unanimously on a sentencing recommendation is good cause or is not good cause within the meaning of the statute for discharging it?

MR. CROOKS: We take the position that that does

not fall within the discharge for good cause provision Your Honor is discussing.

QUESTION: And why not?

MR. CROOKS: Because the situation of a deadlock on a penalty recommendation is covered more specifically in section 3594 which provides that in the case of the jury's failure to reach agreement on the penalty recommendation, the court shall impose any lesser sentence which is authorized by law.

QUESTION: Well, but that can also be read, it seems to me, consistently with the text of this provision because this provision refers to the -- the court's capacity to impanel a successive jury by -- by using the -- the permissive term that he -- he may impanel one. And so, I suppose you could read the two statutes together by -- by saying that if the -- if the judge chooses to do so, the judge may impanel a -- a further sentencing jury and may submit the sentencing question to them. If the judge does not choose to do so, then the judge is in a -- in a position to make the determination by default. Why can't you read the statutes together in that fashion?

MR. CROOKS: The statutes cannot be read together in that fashion because the plain meaning of the term otherwise in section 3594 encompasses the possibility of a jury that is deadlocked between particular sentencing

recommendations, and that sentence clearly provides that the court shall impose sentence.

QUESTION: Well, it -- it -- I agree with you part way. I -- I guess it can properly be read to -- to refer to a case in which it simply proves impossible to get a jury that can agree on sentencing. I think I would agree with you.

Let's say if the -- if the judge had -- had impaneled two further sentencing juries, had discharged the trial jury, and then had discharged the second sentencing jury, and had put on a third, and it couldn't agree. At some point you got to stop. But I'm not sure that -- that the otherwise has to be read in such a way as to exclude the possibility of impaneling, let's say, at least one further sentencing jury.

MR. CROOKS: In that regard, it's important to look at the background to the FDPA, which is that the FDPA, in adopting this otherwise language, took it from a previous Federal death penalty statute, the Anti-Drug Abuse Act of 1988, which contained an identical otherwise sentence and a penalty provision like section 3594 which the courts had universally interpreted to mean that if the jury could not reach unanimity after one try, then there would be a default court sentencing. And it must be assumed that Congress, in adopting the identical sort of

otherwise language, intended to import that understanding into the FDPA.

QUESTION: Did the other statute have a provision in it which on its face seems to permit the impaneling of a successive sentencing jury as this statute does?

MR. CROOKS: I don't know that, Your Honor.

QUESTION: Can I ask you a question on -- on this part of your argument? Imagine that you're right, and I think you may be right on -- on the interpretation of the -- a statute, you know, that there isn't hung juries, et cetera. Imagine too that you can raise this because of the fact that you submitted an instruction.

It's prejudicial in your case for the reasons that you state, but would you state, but would you say ordinarily, if we followed your rule, it would be harmful to death penalty defendants for the reason that most statutes will permit a judge to sentence to less than life? And indeed, to require the jury to know of that fact is more likely to produce deadlocks and bargaining that will end up with the imposition of the death penalty rather than the jury doesn't know it and finally the jury gives up and it goes to the judge.

In other words, I'm asking you to think in your mind of comparing your case, which I know you have to

argue for, with the impact of the rule for which you argue.

MR. CROOKS: And our answer would have to be, Your Honor, I think that probably full disclosure of accurate information cannot be a bad thing in sentencing hearings. And in fact, the Court has drawn that distinction in several cases between the giving of accurate and inaccurate information. But in this case, as Your Honor pointed out, it was extremely prejudicial and, in fact, was likely to produce the sort of unreliability that the Eighth Amendment forbids.

QUESTION: Well, why was it -- why was it prejudicial? I mean, let's assume you have a jury deadlock six for -- six for death and six for life imprisonment, and you say that if the jurors know that failure to agree will produce a sentence that is lower than both, okay, it's going to -- going to hurt your client.

I don't know. I -- I would think that -- that what would probably happen is that the six who were voting for the death penalty, if they know that if the jury is deadlocked, the person won't even be put to prison for life -- he'll get something less than life -- I think they're more likely to switch from the death penalty to life than the life people are likely to switch to the

death penalty. Your argument is that this will induce the people voting for life imprisonment to switch to the death penalty. It seems to me it's more likely to go the other way, that the sword of Damocles, that unless we come to an agreement, he'll get less than life is more likely to induce the people who would like the death penalty to vote for life.

MR. CROOKS: First, Your Honor, as was pointed out in the plurality opinion in Simmons, the fact is that juror willingness to invoke -- to vote for death increases as the possibility of a less than life sentence also increases.

But even if it could go both ways, imagine, for example, the scenario Your Honor just described where jurors are deadlocked, six for life, six for death, but no one wants the lesser sentence. What's going to happen is if there are people who are just adamant about death, it's going to just turn into a game of chicken where the people who are the most stubborn are going to be the ones that prevail. And it's that sort of randomness that this Court has said cannot be tolerated in a capital --

QUESTION: You're -- you're the one who has to show it was prejudicial. The burden is on you to show that it was prejudicial. And I -- I certainly don't know which way it cuts. If anything, I'm inclined to think it

cuts against the death penalty, not in favor of the death penalty. I -- I don't know why -- the most you can say is that it's a game of chicken. We don't know which way it's going to come out.

MR. CROOKS: And that is sufficient to show prejudice, Your Honor, if the jury is going to make a sentencing decision based on erroneous information.

QUESTION: But you haven't said it's going to make that sentencing decision that way. You just say you don't know.

MR. CROOKS: If there are jurors who are deadlocked between death and life but no one wants a lesser sentence, their belief that they will produce a lesser sentence if they don't agree is going to drive one or the other over to the other side. And it's precisely that randomness that is the error.

QUESTION: But that sort of randomness happens in all sorts of jury deliberations. The -- you know, we want to come up with a unanimous jury if we can. Some people have to give in. There's nothing wrong with that, is there?

MR. CROOKS: There is a lot of give and take in jury deliberations, Your Honor, but that give and take should not be based on erroneous information.

If I could, I'd like to reserve the remainder of

my time for rebuttal.

QUESTION: Very well.

We'll hear from you, Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

I will begin with the issue of whether there were invalid non-statutory aggravating factors --

QUESTION: On this point, the Government did not file a cross appeal on the holding below that two of the non-statutory aggravating factors were invalid.

MR. DREEBEN: And we are not required to, Justice O'Connor, in order to defend the judgment below on a ground that we properly raised. It is true, as Justice Stevens pointed out --

QUESTION: It wasn't mentioned in the --

MR. DREEBEN: That's correct.

QUESTION: -- brief in response.

QUESTION: Not only was it not mentioned, we adopted your phrasing of the question we granted certiorari to decide, which is whether the court of appeals correctly held that the submission of invalid, non-statutory aggravating factors was harmless beyond a reasonable doubt.

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MR. DREEBEN: That was the question that petitioner presented in this case in attacking the ruling of the court below that there were -- there was harmful error resulting from the submission of these non-statutory factors. We argued that certiorari was not warranted to review that claim.

In briefing the issue on the merits in this Court, as in briefing the issue on the merits in the court of appeals, we developed a substantial amount of argumentation to showing that these factors were not invalid to begin with.

And I think that, although the Court has discretion not to reach that question, it should reach that question for two different reasons.

First, it should not review in the abstract a holding that certain errors occurred and whether they are harmful.

QUESTION: Well, but didn't -- didn't the Solicitor General's office in its response suggest a rewording of the questions on certiorari?

MR. DREEBEN: We did slightly reword them, but we --

QUESTION: And the court adopted it.

MR. DREEBEN: Correct.

QUESTION: And in the third question, the

question is whether the court of appeals correctly held that the submission of invalid, non-statutory aggravating factors was harmless beyond a reasonable doubt. Certainly we would have focused our attention on the assumption that they were invalid and did they perform the right harmless error analysis.

MR. DREEBEN: Well, I think that that's a fair reading of what we wrote at the brief in opposition stage. The question now for the Court on the merits is how it wants to resolve the harmless error holding that the court of appeals made below. It's very difficult to intelligently consider whether the court of appeals got that issue right or wrong unless you have an idea of what, if anything, is wrong with these factors because these factors address, as petitioner has conceded, legitimate areas for a sentencing jury to consider.

QUESTION: I guess if you take it on the assumption that there were two invalids -- we don't deal with it, we just assume it -- was their analysis adequate? I mean, that's what basically the petitioner is arguing based on Clemons, that it just wasn't a sufficient analysis.

MR. DREEBEN: Justice O'Connor, I'd like to answer that question on two levels. First, I'd like to address what the court of appeals actually did, and then

I'd like to address what we think would be the sounder resolution of this particular issue.

The court of appeals gave an explanation of why it believed that the submission of these two factors was harmless error by adopting a methodology that says we're going to redact the factors and consider whether, with the valid remaining factors, this jury would have, beyond a reasonable doubt, reached the same result. This is a court of appeals that is under a statutory obligation to review the entire record in the case, and its opinion makes clear that it did that because its statement of the facts reviews in some detail the procedural history of the case, the evidence surrounding the crime, the mitigating factors that the jury actually found, and the application that the jury reached based on those factors.

After the court of appeals declared, wrongly in our view, that two of the non-statutory factors were invalid, it went on to examine then whether that was harmless. It recalled in its opinion that there were mitigating factors, and it said it was considering those mitigating factors. It noted that the Government had placed primary stress on the statutory aggravating factors that the jury found and that the court of appeals did not invalidate, and it said that, reviewing that material, its conclusion was that the error in this case was harmless.

Now, this Court has reversed several State court determinations of harmless error upon consideration of the invalid aggravating factors when the court of appeals either summarily announced with nothing more that it found the error to be harmless or when the court of appeals -- the State court in those cases did not, indeed, make clear that it either acknowledged that mitigating evidence existed or that it was conducting harmless error analysis. Those things are clearly inadequate.

What the court of appeals in this case did is not in our view constitutionally inadequate under the standards that this Court has announced in its review of State court decisions.

Now, if one steps back from what the court of appeals actually did and asks whether these factors were invalid and if they were invalid what influence, if any, did that have on the jury, I think it's vital to understand that the two factors in question related to evidence that was properly before the jury. They related to factors that the jury was entitled to consider as petitioner concedes, and the error, if any, in them is in loose drafting.

The first factor refers to the victim's young age, slight stature, background, and unfamiliarity with the area. And these were things that the prosecution had

argued to the jury made the victim more vulnerable, made her an ideal victim for petitioner, and thereby exacerbated the culpability of the crime. And if the factor itself didn't spell out that that is the reason why it was an aggravating factor, the argument to the jury, which we have reproduced in appendix to our brief, surely made that clear.

Now, the second factor that petitioner has challenged adverts to the personal characteristics of the victim and the effect of the crime on her family. And that is language which is virtually verbatim out of this Court's decision in Payne v. Tennessee, which makes clear that the specific harm that a crime causes is a cognizable feature of the sentencing jury's consideration.

Now, this factor too could have been made more explicit. It could have said, indeed, this crime caused exceptional harm because of the victim's personal characteristics and the effect of the crime on her family, but the argument in this case, which was very briefly devoted to this point, made that clear. And I --

QUESTION: Mr. Dreeben, this is, as they said, a -- a weighing State. Even if you're right about the first factor, the second factor it seems -- personal characteristics. Well, what else is young age, slight stature? It seems as though the jury is given the chance

to double count, one, two, three, four, or one, two three. That might make a difference.

MR. DREEBEN: Justice Ginsburg, although the Federal jurisdiction is a weighing statute, the jury in this case was specifically given an instruction that it is not simply to count up the number of aggravating factors and treat the numerical significance of that number in comparison to the mitigating factors. It is a qualitative assessment, and the judge specifically instructed the jury, don't simply count.

Now, there is an argument, which I don't agree with, but there is an argument that there is some duplication between the factor of personal characteristics and background and the other things.

QUESTION: Well, if you don't agree with it, explain to me why young age, slight stature -- those are not personal characteristics.

MR. DREEBEN: They are personal characteristics, Justice Ginsburg, but the argument made clear to the jury that those were personal characteristics relevant to the culpability of this defendant in this particular crime. He was an Army Airborne Ranger with over 20 years of experience, and he has in his power a very vulnerable victim who was very inexperienced, very young, very small, and it was that -- that vulnerability to the crime that

the prosecution argued exacerbated his culpability and constituted an aggravating factor.

Now, in the area of personal characteristics and effect of the offense on the family, the evidence was brief, but it made clear that Tracie Joy McBride was the specific person who she was, who had the specific life that she had until it was taken by this defendant, and there was an effect on her family as a result of this crime.

QUESTION: But the problem with that is true in almost every case. I mean, there may be some instances of an orphan without relatives, but every victim is going to have a family. Every victim is going to have a personal life. And so, to list that as an aggravator, I mean, it just jumps out as being inappropriate.

MR. DREEBEN: Well, Congress interpreted this Court's decision in Payne v. Tennessee as permitting the consideration of this kind of victim impact evidence. And as you have observed, in a weighing State things to be alleged as an aggravating factor in order to be taken into account by the jury.

Surely when this Court decided Payne v. Tennessee, it did not think that the victim impact evidence and the evidence of the effect on the family was mitigating to the defendant. It surely must have

understood that these were things that, when the jury took it into account, may well tip it over from a life sentence to a death sentence. And Congress implemented that holding by providing that if the Government wishes to offer victim impact evidence, it must allege it as a non-statutory aggravating factor, give the defendant notice, and put it forward.

And I think that although it could have been made more explicit in the aggravating factor itself, it's hard to understand how that would have benefitted petitioner in any way if the jury were told you may find that this crime is particularly exacerbated because of the exceptional harm that it inflicted in taking this victim's life and causing these effects on her family.

As it is, it presents to the jury the opportunity of taking the evidence, which it heard and which petitioner concedes that it legitimately heard, and factoring that into its weighing analysis once it has crossed the threshold and determined that this defendant is eligible for a capital sentence because a statutory aggravating factor has been found.

QUESTION: But isn't it the case that in order to be an aggravating factor, the -- the evidence with respect to the victim's personal characteristics or the effect of the family or whatever has got to show that

there was something unusually bad, unusually harmful in this case? Because the whole point of the exercise, in effect, is -- is to determine whether -- whether in the final analysis the -- the individual should -- should be in the death category or the life category.

So that in -- I guess what I'm getting at is in order to phrase a proper aggravating factor, the factor has got to be phrased in a way not merely that it says, look to -- look to individual characteristics or look to family effect, it has got to be phrased in a way that says, look to what is unusually vulnerable about this victim or unusually grievous about the effect on the family. And if that is correct, then -- then these factors didn't do it.

MR. DREEBEN: I think the factors would be better phrased, Justice Souter, if they were phrased as you described, but I think that one significant point on which I would disagree with your formulation is that the fact that every crime, every murder has a victim, and every family of a murder victim suffers harm has to be unique or exaggerated in some way beyond the norm in order to be taken into account is not consistent with this Court's reading -- this Court's reading of the Constitution in Payne v. Tennessee. Every --

QUESTION: It's necessary for death eligibility

certainly.

MR. DREEBEN: Yes, it is.

QUESTION: But once there's death eligibility, in -- in weighing the factors, you can take into account routine factors, as well as extraordinary ones, I assume.

MR. DREEBEN: I think that that's absolutely correct. The narrowing that this Court has required to occur before a defendant may be eligible for a death sentence occurs in the Federal system when the jury considers the statutory aggravating factor. If no statutory aggravating factor is found, that defendant is not eligible for a death sentence.

Once a statutory aggravating factor is found, the jury considers all of the mitigating evidence and all of the mitigating factors that the defendant submits, and it can consider all of the circumstances of the crime formulated as aggravating factors by the prosecution in a non-statutory setting.

And although this Court has made clear that even at the selection stage, these factors have to be specific enough so that they are not basically masks for the consideration of arbitrary or invidious or capricious things, these factors, even if they are imperfect in their formulation, relate to legitimate characteristics that the sentencing jury may consider and, taken in context with

the argument, were not vague as to this jury. The jury must have understood that it was her vulnerability that was being targeted in the first factor and that the victim impact evidence related to the testimony of the mother that the jury heard.

QUESTION: It is sort of a misnomer -- and you would acknowledge that -- to call them aggravating.

MR. DREEBEN: The victim impact evidence I think is probably better understood as something other than purely aggravating. But again, when the prosecution introduced it to show that this defendant you have heard has a very particular life and he has a particular set of experiences, so did the victim. And his crime caused harm. This is the harm that it caused.

Those things are not going to be taken into account by the jury generally as things that argue in favor of leniency. They will balance the defendant's mitigating evidence by allowing it to understand this crime in its particular detail, and that is what the Court seems to have had in mind in Payne v. Tennessee.

QUESTION: But there's this kind of a converse problem, if you analyze it that way, and I -- I see the sense of -- of what you're saying. And the converse problem is that when, as Justice Scalia pointed out, these non-statutory factors are really not aggravating factors

in the sense of the statutory ones that go to eligibility. If you continue to call them aggravating factors, you are really putting a thumb on the scale because aggravating factor in the paradigm of what it -- of what goes to eligibility is a factor which really does differentiate this defendant from other defendants, says this is worse than other cases. And if you go on calling what are really not aggravating factors aggravating factors, you're giving an extra weight to those findings which in a non-weighing State they wouldn't have.

MR. DREEBEN: In a weighing State, the jury's deliberations are more channeled and focused by the necessity for finding that there is an aggravating factor before it may consider it. But that, if anything, would seem to provide more protection for the defendant because it focuses the jury's deliberations on what the prosecution alleges is aggravating. It doesn't detract from the fact that the jury must find that and determine, as the judge instructed, that an aggravating factor is a specified fact or circumstances which might indicate or tend or indicate that the defendant should be sentenced to death.

QUESTION: I guess these words are relevant, that anything is aggravating which tends to offset a mitigating factor. And of course, many of the mitigating

factors are not distinctive at all. You -- you can introduce the -- the life history of this defendant just to -- to personalize the defendant. You can introduce whatever you like. Many of those things are not at all extraordinary in the sense that they set him apart from the -- the vast bulk of mankind.

MR. DREEBEN: The Court has made clear that once a jurisdiction engages in the narrowing that is required under the post-Furman line of cases, at the selection stage, the decision maker can be given as much information as the jurisdiction chooses to do so, and as to mitigating evidence, it must be given the opportunity to hear all that the defendant chooses to put before it. In jurisdictions like Georgia, for example, once the eligibility phase has been crossed, there is no structured weighing and the jury doesn't have to enumerate what findings it makes.

QUESTION: And I suppose the alternative would have been for Congress to say nothing at all and just say the prosecution can argue such aggravating circumstances as it deems appropriate, and then there would be no notice, no way to focus the jury at all.

MR. DREEBEN: I think that that's correct, Justice Kennedy. And this system that Congress has devised was an attempt to implement in a fair manner this

Court's holdings under the Eighth Amendment and provide a structured method of decision making that would permit that to happen.

Now --

QUESTION: Mr. Dreeben, one part of your earlier argument that went by quickly was we know that the jury really emphasized the other factors. How do we know that? I mean, maybe the jury said, yes, to the statutory factors, but boy, we're giving him the death penalty because of her young age, whatever.

MR. DREEBEN: Justice Ginsburg, this Court has made clear that a reviewing Court may conduct harmless error review if a non-statutory -- if an aggravating factor that is improperly defined goes to the jury. It has not elaborated precisely how a reviewing court goes about that exercise.

What a reviewing court does have before it is the evidence that was offered to the jury and the amount of time that the parties spent on that evidence, the arguments that the parties made to the jury --

QUESTION: But if it's harmless beyond a reasonable doubt, it's very hard to say we can make this assumption and that assumption, and if we were the trier, this is what we would have come up with. We have to say that this jury, beyond a reasonable doubt, would have come

out the same way.

MR. DREEBEN: The court of appeals in this case chose what I think is the hardest method of harmless error analysis. It chose to redact the factors altogether and to determine whether the result would have been the same if the non-statutory factors had never been submitted.

This Court has made clear in Clemons v. Mississippi that there is an alternative method of harmless error analysis which asks whether it would have made a difference if the factors had been constitutionally defined in an adequate manner.

Here the distance, if any, between a constitutionally adequate aggravating factor and the imprecisely formulated aggravating factor that was submitted is not great, and whatever distance there is was crossed by the argumentation of the prosecution explaining exactly what was meant by those factors.

The jury furthermore certified -- and this is in response to a question Justice Stevens asked earlier -- that it did not take into account the race or gender of the victim or of the defendant in formulating its verdict. And it was instructed by the judge that it may not take those things into account. And petitioner concedes that no evidence in this case reached the jury that the jury would not have heard absent these factors.

Under that form of analysis, I think the Court can be confident that this jury verdict would not have been different if the factors had been formulated in the specific manner that petitioner now appears to concede would have been appropriate.

QUESTION: May I ask you --

QUESTION: Can I ask you --

QUESTION: -- a question on the hung jury that I wasn't sure of the Government's position from its brief? Is your position that the -- the judge has the option to have a new sentencing jury, or that when the jury is hung, the judge must? Is it optional for each particular district judge, or when a hung jury is present, it's mandatory to have a second jury?

MR. DREEBEN: Our position is that if the prosecution requests impaneling of a second sentencing jury, the judge should do that. If the prosecution concludes, after the first sentencing hearing, that this has been sufficient to us -- for us to attempt to have a jury reach a unanimous determination on a death sentence, then the prosecution can so state, and the sentencing process will go over to the judge.

QUESTION: So, the discretion is to prosecutors, not to judges.

MR. DREEBEN: Correct.

QUESTION: Where does that come from? The -- the --

QUESTION: I don't read that.

MR. DREEBEN: There's nothing explicit in the statute that addresses that issue, but I think that issue. But I think that it follows --

QUESTION: Well, it says, otherwise, and otherwise could -- it says, otherwise the judge will impose the sentence. And I would have thought that could encompass hung juries, as well as anything else.

MR. DREEBEN: Justice O'Connor, that language, as petitioner reads it, would encompass every situation in which the jury for any reason did not recommend life or death.

QUESTION: Right.

MR. DREEBEN: And it would thereby totally override the provision that allows a judge to impanel a new sentencing jury when he has cause to dismiss the prior jury. If the prior jury is --

QUESTION: How is the drug kingpin statute interpreted? It's very -- it's kind of the same language and scheme, isn't it?

MR. DREEBEN: Well, it's significantly different in one respect, and it hasn't been interpreted very much. There is no actual holding in which a jury hung and the

Government sought to impanel a new sentencing jury and the judge said, I'm not going to do that. There is dictum in a couple of cases that are cited by petitioner in which those court said, you can't impanel a new jury.

The significant difference between the drug kingpin statute and the Federal Death Penalty Act is that the drug kingpin statute required unanimity for a death sentence, and that was the only sentencing recommendation that the jury was given to make. It had no sentencing authority in any other respect.

Under the Federal Death Penalty Act, the sentencing jury should be told, when these options are available under substantive law, that it can unanimously recommend a capital sentence, it can unanimously recommend life without the possibility of release, or it can unanimously recommend a lesser sentence. And Congress wished to get unanimity as to any of those three recommendations by so emphasizing that the role of the jury under the Federal Death Penalty Act is not simply to determine up or down whether the defendant gets a capital sentence, but to reach a unanimous verdict as to what sentence he should get.

QUESTION: But that's what you're -- you're reading it, that they say, which -- one, the kingpin statute says, if you have a hung jury on the sentencing,

judge, you sentence. 25 out of 29 States that have -- say if there's a hung jury as -- as to punishment, judge, you sentence. The House report says, if there's a hung jury as to punishment, judge, you sentence. The next paragraph of the statute says, if there's a hung jury as to -- you know, judge, you sentence. And in addition to that, they asked the judge to tell the jury that. The judge said, no, I won't tell the jury that and then tells the judge some things that suggest -- then tells the jury some things suggest the opposite.

All right. So, unless we take the one sentence that favors you -- and it does -- which is somewhat ambiguous language in the main statute, if I don't agree that that's enough to overcome these other four things, then I have to reverse. Right?

MR. DREEBEN: Well, you would, Justice Breyer, if you believed all of those things, but I think that one of them in the list that you -- that you mentioned is absolutely inaccurate. The statute does not say that if there's a hung jury, the judge becomes the sentencer.

QUESTION: No. It says, otherwise the court shall impose any lesser sentence that is required of it.

MR. DREEBEN: That's right. If it had used explicit language, as does appear in the committee report, that says, if the jury hangs, then the judge becomes the

sentencer, we would not be here arguing today that the statute has another meaning. This is what the States that have provided for that result have put explicitly in their statutes. If the jury is unable to reach a unanimous verdict, then the judge becomes the sentencer.

Congress did not do that. What Congress did was adopt a statute that focuses far more on the jury's reaching a unanimous verdict as to any of its three sentencing options.

QUESTION: But what it didn't put in was what happens if there are successive hung juries, and that's where you're trying to split the difference. And I don't see where you get that from the statute.

MR. DREEBEN: I think, Justice Kennedy --

QUESTION: It seems to me that the easier course is to choose between having the judge sentence at the end of the first sentence, or having the juries go on and on and on until they're unanimous. Under the statute, it seems to me the hardest is the one you're suggesting, that the judge has some -- some sort of option. That makes a lot of sense, but it's difficult to find under the statute.

MR. DREEBEN: Well, the statute seems to presuppose that the prosecution will be the moving party in seeking a death sentence. The Government has to file

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the notice the triggers the process, and presumably if at any point the Government wishes to withdraw the notice, that is the end of the capital sentencing process under that statute. So --

QUESTION: Mr. Dreeben, I -- I really -- please help me with the statute. I, honest to goodness, don't understand how it makes any sense. If the jury is split over whether to give life or the death penalty, then the judge may impose something that is less than either of those? Why does that make any sense? I -- I don't understand that.

MR. DREEBEN: Well, I don't think it does make any sense if read that way, and we don't read it that way.

QUESTION: Well, how -- how do you read it?

MR. DREEBEN: We read it as providing for a separate sentencing jury to be reimpaneled and to allow that jury to attempt to reach unanimity.

QUESTION: But if that one doesn't reach unanimity.

MR. DREEBEN: If that one doesn't reach unanimity, then the judge does become the sentencer.

QUESTION: And -- but he must sentence below either the death penalty or -- or life imprisonment.

MR. DREEBEN: No. He doesn't have to because the section 3594 goes on to say that notwithstanding any

other provision of law, if a sentence of imprisonment is authorized up to life, he can make the sentence life without the possibility of release. So, he can go all the way up to the top.

QUESTION: But he can't give -- he can't give life.

MR. DREEBEN: He can give life and he can make it without the possibility of release. It's contradictory in its language because it says he must impose a lesser sentence, but then it goes on to make clear that he doesn't really have to impose a lesser sentence.

QUESTION: Well, lesser than death.

MR. DREEBEN: Lesser than death. That's correct.

QUESTION: How do you get the statute so that the second time the jury did this, the judge can sentence, but the first time that the jury does it, the judge can't?

MR. DREEBEN: Well, the judge can if the prosecution decides that at that point --

QUESTION: Where does it say the prosecution has the choice?

MR. DREEBEN: It doesn't, but implicit in the entire scheme is that there is prosecutorial discretion for the prosecutor to seek the death penalty or not.

QUESTION: Well, why -- rather than read all

that into it, why don't we just say, let's interpret it in light of what 25 of 29 States do and what the drug -- drug kingpin statute does? Isn't that a little simpler? Unless there's some reason for thinking that the Congress wanted to do something different, but the House report suggests there isn't.

MR. DREEBEN: You could, Justice Breyer, but our fundamental point here is that it would not entitle petitioner to a jury instruction to that effect even if he were right --

QUESTION: Why not?

MR. DREEBEN: -- within the meaning of the statute.

QUESTION: Why not? That's -- why not?

MR. DREEBEN: Most fundamentally because it is information that is an open invitation to any individual member of the jury to hang the jury. It goes far beyond simply the duty to deliberate instruction, which this jury was actually given, which informed each individual juror that he's not obligated to give up --

QUESTION: So, I -- I want you to -- is there any -- suppose I were to say, look, the reason we want to tell the jury this is because it's true, because that's what the law is, therefore tell them. Now, is there some authority --

MR. DREEBEN: Yes.

QUESTION: -- and -- good. That's what?

MR. DREEBEN: This Court's decision in California v. Ramos makes clear that when it comes to providing accurate information to the sentencing jury, States have a substantial amount of discretion --

QUESTION: Yes. This isn't a State. This is a Federal statute, and we're interpreting the statute, not the Constitution.

MR. DREEBEN: Well, that is true, but Congress is quite clear when it requires jury instructions as to particular matters to go to juries. In this very statute, Congress instructed that the jury shall be told that it may not take into account the race or the sex of the victim. It has no information in it that says that the jury shall be told about the effects of hung juries, which is a topic that's not even addressed in the statute.

QUESTION: But, Mr. Dreeben, in this case --

QUESTION: Let me ask you one question before you -- before you sit down very quickly. Do you agree with the proposition that Roman numeral I of their brief -- that there's a reasonable likelihood that on the record in this case that this jury thought that there was a possibility that the defendant might get his sentence less than life without parole?

MR. DREEBEN: No, Justice Stevens, we don't, and I have to be brief on this. But the jury was instructed at the outset of the weighing instructions that -- may I conclude?

QUESTION: You may finish your answer, yes.

MR. DREEBEN: That the jury had three sentencing options and that it had to be unanimous on any of those options. And the succeeding instructions that the judge gave it informed the jury about what specific consequences ensued from any of its recommendations. There is nothing in the instructions that says this is what will happen if you hang, and the judge made it clear at the conclusion of this instructions that that was a possibility by telling them that if they sent a note out, do not reveal your numerical division at the time.

QUESTION: You've finished your answer I think. Thank you, Mr. Dreeben.

Mr. Crooks, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF TIMOTHY CROOKS

ON BEHALF OF THE PETITIONER

MR. CROOKS: First, I would like to return to Justice Ginsburg's question about the question of harmlessness in this particular case. This was an extremely close and difficult decision for this jury because they took a day and a half to reach a penalty

decision.

And it's also significant to remember that if even one juror had weighed the balance between aggravating factors and mitigating factors differently, no death sentence would have resulted.

And on this record particularly, it simply can't be said beyond a reasonable doubt that the error was harmless.

With respect to the validity of the aggravating factors at issue, again we stress that we do not dispute the admissibility of victim characteristic and survivor impact evidence in capital sentencing hearings. The problem here is the use in this weighing jurisdiction of vague and overbroad aggravating factors. And as the factors were drafted and submitted to the jury, they allowed the jury to consider not only the things which the Government highlighted in its argument, but many other impermissible considerations that were very vaguely and broadly worded. And the jury, because this was a weighing jurisdiction, once having found them, was required to weigh them on death's side of the scale.

QUESTION: Well, I --

QUESTION: May I ask you a question about the -- the hung jury aspect of it? Suppose this judge has -- had told the jury correctly there are only two penalties

for this crime: death, life without release. You must be unanimous for either of them. Why would he have had to say one word about what happens if the jury hung? Why wouldn't that been -- have been a totally correct and complete instruction? There are two and only two sentences for this crime. For you to impose either one, you must be unanimous.

MR. CROOKS: Even that instruction might still invite the type of speculation that there might be a lesser sentence, but what happened in this case was --

QUESTION: If he said there are only two sentences possible for this offense, that's a truthful statement of what it was in this case.

MR. CROOKS: If the jury were told that those were the only two possible sentences, that might have obviated the prejudice in this case. But the instruction which was proposed by the defense in this case would likewise have taken care of the problem because the jury would have been told that no lesser sentence would result unless they unanimously voted for it and that the effect of a deadlock would not be the lesser sentence but would be life without parole.

QUESTION: I understand that, but my question is in terms of the cure. The cure doesn't -- in cases where there are only two sentences, doesn't involve telling the

jury hung what happens if they're hung.

MR. CROOKS: That is one cure, Your Honor, but another cure where, in fact, the lesser sentence option is, albeit erroneously introduced, is also to tell the jury that it will not be the result of a deadlock.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Crooks.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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BY: Ilona M. May
(REPORTER)