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Case at a Glance

In this case the Supreme Court has its first opportunity to interpret the Federal Death Penalty Act of 1994. Here a convicted defendant argues that federal juries considering the death penalty should be told that if they fail to agree on whether the defendant should be executed or sentenced to life imprisonment, the judge will impose a sentence of life imprisonment without the possibility of release.



Must Jury Instructions Clearly Explain the Consequences of a Jury's Failure to Reach a Unanimous Verdict as to Either Life Imprisonment or Death?

By Rachel A. Van Cleave

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Louis Jones Jr. had the dubious honor of being the first defendant tried under the Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. § 3591-98. The FDPA dictates that if the government intends to seek the death penalty, it must prove the existence of one or more statutory aggravating circumstances during the sentencing phase of the trial. During this phase, the FDPA allows the defendant to submit evidence relevant to eight statutory mitigating circumstances, including "other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigates against imposition of the death sentence."

As to aggravating factors, the jury must unanimously determine that an aggravating factor exists. However, jurors individually decide on mitigating factors; thus one or more members of the jury may find a mitigating factor. If the jury finds at least one aggravating factor, the

jury must decide whether the aggravating factors outweigh any mitigating factors to justify a sentence of death. The jury then recommends by unanimous vote a sentence of death, of life imprisonment, or of "some other lesser sentence."

In his argument before the Supreme Court, Jones takes issue not with the validity of the FDPA itself but with the trial court's jury instructions that could have led the jury to believe that the lack of a unanimous verdict for either life or death would have allowed the judge to impose a less severe sentence. The FDPA states that if the jury recommends a sentence of either life imprisonment or of death, "the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law." 18 U.S.C. § 3594. Thus the statute, argues Jones, lim-

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its the options of the jury to a sentence of either life imprisonment or death. Where the jury does not recommend either of these, the only remaining option is to allow the judge to determine "some other lesser sentence" according to relevant law. Yet some crimes, such as kidnapping resulting in death—the offense committed by Jones—require a punishment of death or life imprisonment; no lesser offense is legally authorized. 18 U.S.C. § 1201(a).

This case raises the question of whether the judge's instructions, the instructions on the jury forms, and the judge's refusal to clarify his sentencing obligations could have confused jurors about the consequences of their recommendation. Specifically, the question is whether individual jurors who favored life imprisonment but were in the minority could have concluded that their failure to vote for death with the majority would lead to a verdict lacking unanimity, thus allowing the judge to impose a sentence less than life imprisonment.

ISSUES

The Supreme Court must decide whether it is reasonably likely that the jury instructions in this case led the jury to believe that its failure to decide upon either life imprisonment or death would result in a court-imposed sentence less than life imprisonment and whether Jones was entitled to a specific instruction that federal law would have required a court-imposed sentence of life imprisonment.

In addition, the Court must decide whether the submission to the jury of two aggravating factors relating to the victim's physical and personal characteristics, which the Fifth Circuit found invalid, constituted "harmless error," not requiring a reversal of Jones' death sentence.

FACTS

On February 19, 1995, Louis Jones Jr. kidnapped, sexually assaulted, and bludgeoned to death Tracie Joy McBride, a 19-year-old Army private who had arrived only eight days earlier at Goodfellow Air Force Base in San Angelo, Texas. The day before, Jones' ex-wife had made a final break with him. After repeatedly listening to a recording of this conversation with his wife and consuming a substantial amount of alcohol, Jones went to Goodfellow Air Force Base where he believed his ex-wife was on duty. Instead he found Private McBride, who bore a strong physical resemblance to his ex-wife. Jones was convicted of kidnapping resulting in the death of McBride and of assaulting Michael Peacock, an Army private who had attempted to prevent the kidnapping.

At the sentencing hearing, the government presented evidence on the four statutory aggravating circumstances that it alleged: that Jones had caused the death of McBride while committing the offense of kidnapping; that in the commission of the offense Jones knowingly created a grave risk of death to one or more persons; that Jones committed the offense in an especially heinous, cruel, and depraved manner involving torture or serious physical abuse; and that Jones committed the offense after substantial planning and premeditation. In addition, the government submitted evidence on three nonstatutory aggravating circumstances: Jones as a future danger to the lives and safety of others; McBride's young age, slight stature, background, and unfamiliarity with San Angelo, Texas; McBride's personal characteristics and the effect of the offense on her family.

Jones presented evidence to support the following 11 mitigating circumstances: that Jones did not have a

significant prior criminal record; that his capacity to appreciate the wrongfulness of his conduct was significantly impaired; that Jones committed the offense under severe emotional distress; that Jones had been subjected to physical, sexual, and emotional abuse as a child; that Jones served the United States well in the Army for 22 years; that Jones is likely to be a well-behaved inmate; that Jones is remorseful; that his daughter will suffer emotional trauma if he is executed; that Jones was under substantial stress at the time of the offense; that Jones suffered from numerous neurological or psychological disorders; and that other factors about his background militate against the death penalty.

Before the case was submitted to the jury for sentencing, Jones asked the judge to instruct the jury that failure to reach a unanimous decision as to life imprisonment or death would result in a judge-imposed sentence of life imprisonment without the possibility of release. The reason for this request was to ensure that the jury did not think that the option of "some other lesser sentence" would allow the judge to sentence Jones to a sentence less severe than life. In addition, Jones requested an instruction that would have required the jury to return a verdict of life imprisonment without the possibility of parole if any one of the jurors was "not persuaded that justice demanded Jones's execution." The district court judge rejected these proposed instructions.

After explaining to the jury the process of weighing the aggravating and mitigating circumstances, the judge instructed the jury to come to a unanimous verdict as to one of the three options—death, life imprisonment without the possibility of

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release, or some other lesser sentence. The judge then told the jury that a recommendation of either death or life imprisonment without the possibility of release required the judge to impose the jury's recommended sentence. However, instructed the judge, if the jury recommended some other lesser sentence, the court would be required to impose a sentence authorized by law.

The judge instructed the jury "not to be concerned with the question of what sentence the defendant might receive in the event [the jury] determine[s] not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event [the jury] conclude[s] that a sentence of death or life without the possibility of release should not be recommended." At a later point in the instructions, the court reminded the jury that "in order to bring back a verdict recommending the punishment of death or life without possibility of release, all twelve of you must unanimously vote in favor of such specific penalty."

The judge gave the jury four verdict forms with which to record a decision. The jury was to use Form B if it "unanimously recommend[ed] that a sentence of death should be imposed." The judge further instructed the jury to use either Form C or D if it determined that a sentence of death should not be imposed because the aggravating factor or factors did not outweigh any mitigating factor or factors, the aggravating factors or factors were insufficient to justify a sentence of death, or the jury was unable to reach unanimity in recommending a death sentence. The court then reiterated that the jury should use Form C if it "unanimously recommend[ed] that a sentence of life

imprisonment without the possibility of release should be imposed ..." and Form D was to be used if the jury "recommend[ed] that some other lesser sentence should be imposed."

While Jones had requested clarifying instructions, he did not expressly object to the instructions given by the court or to the language in the verdict forms.

The jury found that the government had proven beyond a reasonable doubt the existence of two statutory aggravating circumstances: that Jones caused the death of McBride during the commission of the offense of kidnapping and that Jones had committed the offense in an especially heinous, cruel, and depraved manner. The jury also made unanimous findings as to two of the nonstatutory aggravating circumstances: McBride's young age, slight stature, background, and unfamiliarity with San Angelo and McBride's personal characteristics and the effect of the offense on her family. Members of the jury found the existence of 10 of the 11 mitigating circumstances submitted by the defendant and wrote in the name of Jones' ex-wife as an additional mitigating factor. The jury returned a unanimous verdict recommending death.

Jones appealed to the U.S. Court of Appeals for the Fifth Circuit. *United States v. Jones*, 132 F.3d 232 (1998). The Court of Appeals rejected Jones' arguments regarding the jury instructions given by the district court as well as the failure to give the clarifying instructions he had requested. The Fifth Circuit panel stated that a district court does not commit a constitutional violation when it refuses to instruct the jury of the consequences of failing to reach a unanimous verdict. The panel conceded that the jury

forms could have confused the jury but said that such confusion was cured by the judge's instructions.

In addition, the panel stated that because the FDPA does not supersede substantive criminal provisions, the district court erred when it told the jury of the lesser sentence option. However, since Jones failed to object to the instruction at trial, the court applied the more difficult "plain error" standard. The court concluded that since this was the first case to interpret the FDPA, the error was not "plain"—in other words, not "clear or obvious." The Fifth Circuit also held that the affidavits of two jurors used to establish jury confusion were barred under the Federal Rules of Evidence. Jones did not appeal the determination as to the affidavits.

However, the Fifth Circuit agreed with Jones that both nonstatutory aggravating factors regarding McBride's physical and personal characteristics were duplicative, vague, and overbroad. Nonetheless, the Court of Appeals affirmed the death sentence, finding that the errors as to these nonstatutory aggravating factors were harmless. That is, "the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury."

The Supreme Court granted certiorari on October 5, 1998.

CASE ANALYSIS

Jones' arguments with respect to the jury instructions involve issues regarding the correct interpretation of provisions of the FDPA, the Supreme Court's supervisory role over the lower federal courts, and Eighth Amendment jurisprudence. In addition, his appeal raises complex issues as to the appropriate level of review of alleged errors.



Essentially, the argument regarding the jury instructions poses the question of their possible effect in the following scenario. What if most of the jurors were in favor of the death penalty for Jones, but a few were holding out for a sentence of life imprisonment without possibility of release? That is, if the jurors were deadlocked and could have reasonably believed that their inability to come to a unanimous verdict would have resulted in a court-imposed sentence less than life without the possibility of release, the concern is that the few who were in favor of life imprisonment might have changed their vote to death in order to avoid the judge imposing a less severe sentence. Jones' argument is that there is a reasonable likelihood that the instructions and the verdict forms caused such jury confusion. In fact, Jones submitted affidavits from two jurors confirming that the jury was confused.

Jones argues that the FDPA requires appellate review for "passion, prejudice, or any other arbitrary factor" and that an erroneous interpretation of the jury instructions is such a factor. This language mirrors that of the Georgia death penalty statute approved by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). State courts interpreting similarly worded statutes have held that the possibility that the jury misinterpreted the jury instructions makes the finding by the jury arbitrary. See e.g., *State v. Lindsey*, 404 So.2d 466 (La. 1981). Given the possible confusion in this case, Jones argues that the Supreme Court should reverse his death sentence even though he made no specific objection to the instructions or to the language in the verdict forms. Alternatively, Jones argues that the Supreme Court should correct the instructional error based on the Court's supervisory role over the lower federal courts.

Jones also makes two constitutional arguments with respect to the jury instructions. He argues that the Eighth Amendment prohibition against cruel and unusual punishment and the Fifth Amendment due process clause require that juries be given accurate information during the sentencing phase to "minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189.

With respect to the instructions requested by Jones at trial, his argument centers on an interpretation of the FDPA. To demonstrate that his offered instructions correctly stated the law, Jones asserts that under the FDPA, if the jury is deadlocked—that is, if it is unable to reach a unanimous verdict as to a sentence of death or of life imprisonment—the judge is to impose a sentence authorized by law. Jones points to the provision quoted above, which states that the judge is to impose either life or death as recommended unanimously by the jury. "Otherwise, the court shall impose any lesser sentence." In addition, Jones cites the Judiciary Committee's Report on the FDPA, which states, "If the jury is not unanimous, the judge shall impose the sentence. ..."

Based on this interpretation, Jones argues that his offered instructions correctly stated the law and that they were necessary to ensure that the jury had accurate sentencing information and did not speculate on the effect of a nonunanimous sentence. Jones argues the trial court's refusal to give the requested instructions correcting the error requires reversal based on essentially the same statutory and constitutional reasons set out above.

The government responds first by arguing that it is unlikely that the jury misinterpreted the instructions of the trial judge in the way Jones

claims. Further, the judge initially told the jurors that they had to find unanimously as to one of the three sentencing options. The mere fact that the judge did not repeat the unanimity requirement each time he referred to "some other lesser sentence" would not have led the jury to conclude that a lack of unanimity as to life or death would have automatically resulted in a less severe judge-imposed sentence. In addition, the government claims that any lack of clarity with respect to the sentencing forms was cleared by the same initial instruction that the jury return a unanimous verdict as to one of the three options.

The government further argues that even if there could have been jury confusion, Jones did not object to the instructions, and thus the Supreme Court should not reverse due to the plain error rule. The purpose of the plain error rule is to ensure that parties make objections at trial so that the trial court has an opportunity to correct any errors. If a party does not object at trial, he or she must show that the error was obvious and that it prejudiced the party. As to the obviousness of the error, the government claims that since there had been no prior interpretation of the FDPA, it was not clear whether Jones could have received a lesser sentence under the Act when this would have conflicted with the provision requiring a minimum of life for kidnapping resulting in death.

As to Jones' burden to show prejudice, the government essentially argues that, in contrast to the hypothetical suggested by Jones' arguments, quite the opposite could have occurred. That is, the jury instructions could have benefited Jones because a majority of jurors could have been in favor of life, and the few in favor of death changed

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their vote to avoid a less severe sentence imposed by the court. Given the uncertainty as to the effect of any error, contends the government, Jones failed to show prejudice.

As to the statutory bases for review argued by Jones, the government claims that erroneous jury instructions do not constitute an “arbitrary factor,” but merely a legal error to which an objection at trial must be made.

Finally, as to the instructions offered by Jones, the government argues that these do not accurately state the law. The government claims that the FDPA clearly states in one provision that the jury is to reach a unanimous finding as to one of the three options—death, life, or some other lesser sentence. Thus, a lack of unanimity would not automatically result in a lesser sentence. Rather, such an occurrence would simply require a retrial as to sentencing.

In support of this argument, the government points to another provision that allows the court to impanel another jury for the sentencing phase upon determining that “good cause” exists to discharge the prior jury. This provision indicates that Congress intended to accommodate the general rule that the prosecution may seek a retrial on the sentence if the jury is deadlocked. The government cited to the statutes of 20 states that expressly provide for a judge-imposed sentence if the jury is unable to agree on a sentence of either life or death and four that imply such a result. Furthermore, the government contends that Jones is not entitled to an instruction regarding the consequences of a jury deadlock when there has been no indication that the jury is in fact unable to reach a unanimous verdict.

In his petition before the Supreme Court, Jones relies on the determination by the Fifth Circuit that the trial court erred when it allowed the prosecution to submit two nonstatutory aggravating factors relating to the personal and physical characteristics of the victim. However, Jones disputes the Fifth Circuit’s conclusion that such error was harmless. Jones argues that the harmless-error analysis by the court of appeals was insufficient and conclusory because it did not discuss the evidence presented on the aggravating and mitigating factors, the weight the jury might have given such factors, or the 11 mitigating factors found by the jurors. Furthermore, Jones claims that the government failed to meet its burden of showing that the errors were harmless beyond a reasonable doubt.

The government first disputes the Fifth Circuit’s finding that it was error to submit the two nonstatutory aggravating factors to the jury. The government argues that the factors relating to the victim’s “young age, slight stature, background, and unfamiliarity with San Angelo” and her “personal characteristics and the effect of the offense on her family” did not give the jury the type of open-ended discretion invalidated by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972). Second, the government claims that even if the erroneous aggravating factors had not been submitted to the jury, it is beyond a reasonable doubt that the jury would have still recommended the death penalty. The government claims that the prosecutor relied primarily on the statutory aggravating factors and therefore the nonstatutory factors were not of very much importance.

SIGNIFICANCE

Most of the arguments in this case are narrow and factually specific. The case is nonetheless significant because it is the first case tried under the Federal Death Penalty Act of 1994. The Court might use this case to shed some light on how it will interpret certain provisions of the FDPA. First, the Court may decide whether the third option of “some other lesser sentence” requires jury unanimity. One provision states that unanimity is required as to all three options. However, another provision requires the judge to impose the jury’s recommended sentence of either life or death and then states that “Otherwise, the court shall impose any lesser sentence that is authorized by law.” This language suggests that the jury’s failure to reach unanimity will result in a default jury recommendation of “some other lesser sentence.”

Second, the FDPA does not contain a provision setting out what is to happen if the jury is deadlocked. If the FDPA requires jury unanimity and the jury does not reach a unanimous sentence, does the court impose a sentence or is there a retrial on the issue of sentencing? The government itself cites to at least 20 jurisdictions that follow such a procedure rather than require the judge to order a retrial on the issue of sentencing.

In addition, this case presents the Supreme Court with an opportunity to issue an opinion signed by a majority of the justices on the question of the effect of the jury’s possible consideration of what might happen to the defendant if the jury fails to reach a unanimous recommendation of death. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Supreme Court held, in a plurality opinion, that when a defendant’s future dangerousness is



at issue during the penalty phase of a capital trial, the jury should be told that the defendant is not eligible for parole under state law. In *Jones*, the court told the jury that a recommendation of life imprisonment meant imprisonment without the possibility of parole. However, the judge did not inform the jury that, given the crime Jones was convicted of—kidnapping resulting in death—the judge could not impose “some other lesser sentence” but could only impose life imprisonment.

In the *Simmons* case, four justices were concerned that the jury was confused about the meaning of a term of life imprisonment and that the trial court’s failure to clarify this put the defendant at a disadvantage. In another opinion regarding a denial of a writ of certiorari, four justices were troubled by a Texas law that prevents a judge from telling the jury that the defendant would not be eligible for parole for 40 years should the jury not sentence the defendant to death. *Brown v. Texas*, 118 S.Ct. 354 (1997). In that opinion, Justice Stevens wrote that such a law “tips the scales in favor of a death sentence.” In addition, such a rule makes it likely that a jury will speculate erroneously as to what will happen to the defendant if the jury fails to sentence him or her to death. In such a situation, the jury will likely err on the side of death. In *Jones v. United States*, not only is it *likely* that the jury erred on the side of death, but affidavits from two jurors confirm that this is what actually happened.

Finally, this is the first case in which the Supreme Court is asked to evaluate nonstatutory aggravating factors for a weighing jurisdiction. Typically, only aggravating factors approved by the legislature are used in death penalty cases. Even where

such factors have been legislatively enacted, courts review them to ensure that the jury’s discretion is guided to avoid arbitrary imposition of the death penalty. Thus the Court may indicate the constitutionality of the specific aggravating circumstances alleged in this case.

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AMICUS BRIEFS

In Support of the United States Criminal Justice Legal Foundation (Kent S. Scheidegger (916) 446-0345)