OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHANDLER CLEMONS, Petitioner, v.

MISSISSIPPI

CASE NO: 88-6873

PLACE: Washington, D.C.

DATE: November 28, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

CHANDLER CLEMONS,

Petitioner

v. : No. 88-6873

MISSISSIPPI

Washington, D.C.

Tuesday, November 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:46 p.m.

APPEARANCES:

KENNETH S. RESNICK, ESQ., Cincinnati, Ohio; on behalf of the Petitioner.

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

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P R O C E E D I N G S

(1:46 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-6873, Chandler Clemons v. Mississippi.

Mr. Resnick, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. RESNICK

ON BEHALF OF THE PETITIONER

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

In this appeal, Petitioner contends that the decision of the miss -- the Mississippi Supreme Court's decision to save Petitioner's sentence of death from constitutional error violates his Fourteenth Amendment right to have a jury weigh and balance permissible aggravating circumstances against the mitigating circumstances, as required by state law, and violates his Eighth Amendment right to have the lawful sentencing authority consider and give effect to his evidence in mitigation.

Mr. Clemons was convicted of capital murder for his involvement with two others in a felony murder in Mississippi. Following the conviction, the court held a sentencing hearing, and at this hearing Mr. Clemons offered substantial evidence in mitigation that was

sufficient to support findings of a number of statutory and non-statutory mitigating circumstances under Mississippi law.

These mitigating circumstances included the youth of the defendant -- Mr. Clemons had just turned 18 at the time of the offense; his expression of remorse at trial; his substance abuse, both chronic and at the time of the crime; organic brain damage sufficient to impair his judgment; his chances of benefitting from a rehabilitation program while incarcerated, and his lack of any prior criminal history.

The prosecution did not offer any additional evidence at the sentencing hearing, choosing instead to argue the evidence that was presented at the guilt trial in support of the two aggravating circumstances that were submitted to the jury by the court. Those two aggravating circumstances were the robbery and the especially heinous, atrocious or cruel aggravating circumstance.

The trial court did not provide the jury, in giving the instructions, any limiting construction of the especially heinous aggravating circumstance. No definition whatsoever of those terms were given to the jury as they considered the capital sentencing determination in this case.

In closing argument, the prosecution focused

virtually exclusively on the especially heinous aggravating circumstance in urging the jury to impose a death penalty. After deliberating overnight, the jury in fact returned a verdict of death, and in particular the jury specifically rejected the prosecution's trial theory that Mr. Clemons actually killed, or even intended to kill, the victim. The jury expressly found that Mr. Clemons contemplated lethal force.

The jury found both aggravating circumstances to exist, and found that the mitigating circumstances were insufficient to outweigh the two aggravating circumstances. While Mr. Clemons' appeal was appending to the Mississippi Supreme Court, this Court decided Maynard v. Cartwright. In light of this development, the Mississippi Supreme Court requested supplemental briefs on the issue of the constitutionality of the especially heinous aggravating circumstance in Mississippi.

The bottom line of the Mississippi Supreme Court's opinion in this case is that the invalidity of an aggravating circumstance will not suffice to overturn a sentence of death, as long as a single valid aggravating circumstance remains. The state contends that the Mississippi Supreme Court could employ two methods, two alternative methods, to reach this result. First, the state contends, or claims, that the Mississippi Supreme

Court may independently reweigh the aggravating circumstances against the mitigating circumstances in an effort to cure the constitutional error in this case.

Second, the state has also contended that the Mississippi Supreme Court may apply a Zant v. Stephens analysis to the facts of this case to show that the jury's consideration of the especially heinous aggravating circumstance was harmless.

It is Petitioner's contention that neither alternative is constitutionally sufficient to save the penalty of death in this case. First, there is no evidence whatsoever that the Mississippi Supreme Court actually reweighed in a meaningful fashion the one remaining aggravating circumstance, that is the robbery, against the mitigating circumstances to eliminate the constitutional error in this case.

The only hint, the only hint of reweighing by the Mississippi Supreme Court comes in the proportionality review section of the Mississippi Supreme Court's opinion below, that is at the joint appendix page 50. In that section, the Mississippi Supreme Court wrote, in our opinion, after a review of those cases coming before this court and comparing them to the present case, the punishment of death is not too great, when the aggravating and mitigating circumstances are weighed against each

other, and the penalty will not be wantonly or freakishly imposed in this case.

QUESTION: Do you think that the court must do more than that, in order for -- you say they didn't really reweigh. But do you think they should devote several paragraphs to it?

MR. RESNICK: Your Honor, it's Petitioner's contention in this case that the Mississippi Supreme Court does not have the authority under state law to reweigh, and --

QUESTION: Well, but if they say they have the authority under state law to reweigh, or they do in fact reweigh, that concludes that question, doesn't it?

MR. RESNICK: Your Honor, the only reweighing, it is Petitioner's -- the reweighing that was spoken of in the proportionality review section of the opinion speaks only to proportionality. In other words, when the circumstances, or the balance struck in this particular case was compared to the balance struck in other cases in Mississippi, the court found that this case was not disproportionate. What I am suggesting, what Petitioner is suggesting, is that the court cannot eliminate the constitutional error in this case, and the Mississippi Supreme Court has never said that it has the ability to reweigh.

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As a matter of fact, in the text of the opinion, the court specifically stated, when reviewing the sufficiency of the jury's finding in aggravation and the balance that was struck, that they are bound by the jury's determination. That appears in the opinion. They are bound by the factual findings of the jury, suggesting that you do -- they do not undertake a reweighing, an independent reweighing of the evidence, as, for example, this Court noticed in Barclay and in Goode.

The Florida courts have a different procedure. Under those procedure -- under Florida procedure, the trial court, the sentencing authority, makes findings of fact, both in aggravation and in mitigation, and justifies those findings of fact by their review of the record. And then the case goes up on appeal. In this case, the Mississippi Supreme Court, when it receives the case on appeal, does not have any findings of fact on the issue of mitigation. The only findings of fact are made in aggravation in Mississippi.

QUESTION: Would the case be different here, constitutionally, in your view, if the supreme court of Mississippi had said in its opinion we have the authority to reweigh these factors, and we now reweigh them and find that the result is justified?

MR. RESNICK: No, Your Honor. The reason being is

that the Mississippi Supreme Court has time and time and time again said specifically that it will not find facts. It may have the --

QUESTION: So the -- no matter, even if they had said what I just said in this opinion, you would say, citing the earlier opinions in which they have said we don't have authority to find fact, that they were simply mistaken as to their authority under state law in this case?

MR. RESNICK: I don't believe, Your Honor, that they were mistaken as to their authority under state law in connection with their ability to look at the balance struck in this case and compare it as part of a proportionality review with other cases. What I am suggesting is that the Mississippi Supreme Court, and the Mississippi Supreme Court has said, as a matter of state law, that they cannot find facts. In other --

QUESTION: Mr. Resnick, why is that a question of fact? I thought it was a question of community sense or sentiment, or something. But why is whether the aggravating outweighs the mitigating, is that a question of fact, do you think that that is what the Mississippi court was referring to when it said it can't determine facts?

MR. RESNICK: What the Mississippi Supreme Court

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has referred to in this case and other cases, is that it will not find facts on appeals. And as a matter of fact, the Mississippi Supreme Court has said that they lack the practical ability to find fact, and that chances of error of any factual finding --

QUESTION: Was there a factual issue as to -- as to any of the mitigating circumstances or the aggravating circumstances?

MR. RESNICK: In this case?

QUESTION: Yes. What, what factual issues were --

MR. RESNICK: Well, for example, Mr. Clemons testified in his own defense at this case, and part of his testimony was offered in mitigation, his expression of remorse, his background. The jury, which is the only lawful sentencing authority in Mississippi, could accept or completely reject that testimony on the basis of its credibility. It could assign a relative weight to it.

There were a number of factual issues. A psychologist testified as to Mr. Chandler's -- Chandler Clemons' background. Once again, the jury could accept or reject all of that testimony. So that when the jury makes its decision, the decision-making process in Mississippi, it makes certain specific findings in aggravation, it makes findings in mitigation, and then, according to the instructions in this case, weighs the two.

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QUESTION: You mean it makes the findings, it doesn't recite the findings.

MR. RESNICK: It doesn't -- I am sorry. That is correct, Your Honor. The problem is that there are no express written findings in mitigation. Those are subsumed within the weighing process. And there is evidence in this case from which the jury could find mitigating circumstances, because evidence was presented sufficient to give the jury the ability to weigh in this case.

QUESTION: Well, the Fifth Circuit seems to agree that the Mississippi Supreme Court has the authority under state law to do just what it did in this case, the Skargy case, it seems to say so.

MR. RESNICK: What the -- excuse me, Your Honor. What the Fifth Circuit has said is that the Mississippi Supreme Court, after reading Maynard, the court there distinguished Maynard on the basis that in --

QUESTION: I know that, but this was no more than a -- before Maynard the Mississippi courts were doing this, and the Fifth Circuit has more than once seemed to recognize it as a practice under Mississippi law.

MR. RESNICK: What the Fifth Circuit has said is that the Mississippi Supreme Court has from time to time, in dicta -- it was never the holding of the court, because

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they had always found that the specially heinous aggravating circumstance was found -- in dicta has said where one aggravating circumstance, or more aggravating circumstances, is invalid, either under state law or under the federal constitution, a remaining valid aggravating circumstance will be sufficient to uphold the death penalties.

QUESTION: Well, it said that Mississippi -- Mississippi law is clear, that one invalid aggravating circumstance will not suffice to a return. That is what the Fifth Circuit said.

MR. RESNICK: That is what the Fifth Circuit said, and it is Petitioner's contention -- I am sorry; excuse me.

QUESTION: There was a Mississippi judge on the panel.

MR. RESNICK: It's Petitioner's contention that when the Mississippi Supreme Court has applied this rule, in other words, where one aggravating circumstance does not outweigh -- or, excuse me, where one aggravating circumstance, or insufficient or invalid aggravating circumstance, will not outweigh -- I am sorry, will not invalidate the death sentence, it's Petitioner's contention that this is being applied in a mechanical fashion. It is an automatic rule of affirmance.

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The problem in this case is that the Mississippi -- and in the other cases cited by the Fifth Circuit, that the Mississippi Supreme Court has not made any particularized analysis of prejudicial effect on the jury, or any effect on the jury. It is an automatic rule of affirmance. The Mississippi Supreme Court has said that it will affirm the death penalty where there are sufficient aggravating circumstances remaining. The problem here --

QUESTION: Well, why -- why is that unconstitutional?

MR. RESNICK: The problem is -- is that -- the constitutional problem here is that, in this case, and under the Mississippi statutory scheme, aggravating circumstances play a very important role in guiding the discretion of the jury. Unlike the Georgia scheme, which was before this Court in Zant, the aggravating circumstances, in this case the jury was instructed to consider two, the label of aggravating circumstance sticks with the jury throughout their consideration.

In this case they considered one aggravating circumstance, in exact language of the especially heinous circumstance in Oklahoma, that this Court has already declared unconstitutional. One of the two factors upon which the jury could predicate a death sentence, has been

declared unconstitutional, because it goes to the heart of arbitrariness under the Eighth Amendment.

In this case there is every reason to believe that the jury relied upon this aggravating circumstance in coming to its conclusion that death is the punishment that should be imposed in this case. The prosecution obviously thought that this was its strong point. It argued the especially heinous aggravating circumstance virtually to the exclusion of the robbery circumstance, in urging the jury to come to a death sentence.

Moreover, in arguing the especially heinous aggravating circumstance, the prosecution used the broad, and exploited the broad nature of the especially heinous aggravating circumstance as a vehicle to put before the jury evidence of personal sympathetic characteristics of the victim. The prosecution argued, as a reason to impose the death penalty under the especially heinous rubric, the fact that the victim was an honest person, that he was law abiding, he was a good person, worked hard, educated. Indeed, the prosecution stated that this victim would have done more, and would have accomplished a lot more in life, if it were not for the senseless, heinous, atrocious and cruel murder.

This is precisely the reason why an automatic rule of affirmance, without any particularized analysis as to

prejudicial effect, is unconstitutional. It does not say --

QUESTION: Mr. Resnick, did the court employ also a harmless error analysis, do you think, in its opinion?

MR. RESNICK: The federal harmless error analysis?

QUESTION: That met the Chapman standard. I assume it was a state standard, but one meeting perhaps the Chapman standard.

MR. RESNICK: The court did state in its opinion that it found that the same result would occur had the jury not considered the especially heinous aggravating circumstance, and they found that beyond reasonable doubt. So the answer to the question is yes. However, what we are asking this Court to do, since this is a federal question with constitutional error here, is to reexamine that conclusion. If one looks at the circumstances presented in this case and compares them to those in Johnson, in Johnson v. Mississippi, decided last term, in Chapman, in Satterwhite, and the factors that this Court relied on, in particular in Satterwhite, to determine whether or not something was harmless error under a federal standard, we have the same type of factors present.

In this case, as in Chapman, Satterwhite and Johnson, the especially heinous aggravating circumstance was argued; it became the centerpiece of the prosecution's

argument to the jury. The especially heinous aggravating circumstance was the vehicle for introducing the victim evidence. The -- this is a case, this is not a case such as those in Florida where there is zero mitigation or no mitigation. There is substantial mitigation in this case. The defendant's youth, his expression of remorse, the brain damage. And moreover, the fact that the jury found that he was not the actual killer. The jury rejected that proposition, even though that was the premise of the prosecution's trial theory.

QUESTION: Well, you don't take the position that the Mississippi Supreme Court could not apply a harmless error standard to a sentencing error, do you?

MR. RESNICK: That's correct, as long as that harmless error analysis was consistent with this Court's expression of that standard in the cases such as Satterwhite and Johnson and Chapman, Your Honor. The --

QUESTION: Well, if it went, if it really carried that out in detail it would be probably exactly what they would do if they expressly reweighed.

MR. RESNICK: Your Honor, I can't come to that conclusion for one particular reason. It's that the --

QUESTION: Well, it may be they would have had to do more on the harmless error than they would just by reweighing.

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MR. RESNICK: Your Honor, the problem with reweighing, the constitutional problem with reweighing, is that the Mississippi Supreme Court has already professed the fact that it is practically incapable of finding fact.

And -- let me -- let me start over by saying what is involved in the decision to impose death in Mississippi. As I stated earlier, aggravating circumstances must be found. Mitigating circumstances, to the extent evidence was submitted, must be found. A decision must be made by the sentencing authority as to the relative weights for both the aggravating and the mitigating circumstances, and they must be weighed. The sentencing authority, which is the jury in Mississippi, must be convinced beyond a reasonable doubt and unanimously that the aggravating circumstances do indeed outweigh the mitigating circumstances. The problem --

QUESTION: Mr. Resnick, the Supreme Court of Mississippi, towards the end of the majority opinion at page 49 of the joint appendix, says that Mississippi law holds one invalidating -- one invalidated aggravating circumstance will not suffice to overturn a death penalty where one or more valid aggravating circumstances remain. Now, we have to take that as Mississippi law, do we not?

MR. RESNICK: That is precisely what the Mississippi Supreme Court is expressing, and it is

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Petitioner's contention that that construction of its own law is unconstitutional.

QUESTION: Under the federal constitution.

MR. RESNICK: Correct.

QUESTION: And why, again, is that?

MR. RESNICK: For a number of reasons. First, Mr. Clemons is asserting before this Court a Fourteenth Amendment right to have the jury make the particular findings that death is the appropriate punishment in this case. It --

QUESTION: Well, but we have certainly held in other cases, in Spaziano, that the jury is not a necessary part of the sentencing phase of a death case.

MR. RESNICK: In -- that's correct. In Spaziano this Court did hold there is no constitutional right to have a jury just make that question. What we are suggesting is that it must be somebody at the trial level. Spaziano does not say that an appellate court may make the particular findings that death is an appropriate --

QUESTION: Well, in Cabana we said an appellate court could make findings in connection with sentencing.

MR. RESNICK: In connection with proportionality analysis of the Edmund findings, that that is the type of appellate fact finding that would be permissible.

QUESTION: Why is that -- why is one type

permissible and the other not, under the federal constitution?

MR. RESNICK: Because in this case what we are asking the sentencing authority to do is to make a moral judgment and factual finding with respect to multiple issues, with respect to multiple issues in aggravation. The -- excuse me, in mitigation.

QUESTION: Well, any court that reweighs, like the Florida court, is going to make some sort of a moral judgment. That is made by the supreme court of Florida. So long as you allow reweighing on appeal, the appellate court is going to make some sort of a moral judgment, is it not?

MR. RESNICK: That's correct, as long as it is a well-informed judgment. For example, the courts in Florida may reweigh because they have findings in mitigation and aggravation, and the trial court's justification for making those factual findings. And, as the Court expressed in its per curiam opinion in Goode, and in the (inaudible) opinion in Barclay, there was nothing wrong with the Florida Supreme Court reweighing the findings the aggravation and the findings in mitigation.

In this particular case we have no findings in mitigation for the Mississippi Supreme Court to reweigh.

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That court itself has professed an inability to make factual determinations. It has said itself that any factual findings they may make, the chances of error are infinitely greater than had those same factual findings been made by a jury that had heard the evidence and seen the argument.

In addition, this Court also stated in Caldwell, in the opinion in Caldwell, that the consideration, when this Court enunciated the right, or developed the right of a defendant to have mitigating evidence considered, it was contemplated that that consideration of mitigating evidence would occur among those who were before the court, who saw the witnesses testify, heard the evidence and heard the arguments of counsel. That would not be the case if the Mississippi Supreme Court were independently to make its own factual findings in mitigation, assess relative weights to the aggravating and the mitigating and then reweigh themselves. They don't have the practical ability to do that, and they have professed that themselves on a number of occasions.

The essence of Petitioner's argument is that the Mississippi Supreme Court cannot apply an automatic rule of affirmance to federal constitutional error. That is, federal constitutional error is, of course, a federal question, and that this Court has the power and

jurisdiction to review Mississippi's determination to determine whether or not there has been any prejudicial effect upon the jury.

Even in Zant v. Stephens, this Court did not end its analysis with the discussion of the structure of the Georgia sentencing scheme. It went on to determine whether the error in that case, and once again it was a vague invalid aggravating circumstance, whether the -- that vague aggravating circumstance may have had an effect upon the jury. There, the evidence was properly before the jury, the evidence of the prior conviction was before the jury. So Zant v. Stephens doesn't compel a rule of automatic affirmance. The Court still looked to determine whether or not the unconstitutional factor had an effect upon the jury. And the Mississippi Supreme Court has not done that in this case.

It should not be forgotten that the function of an aggravating circumstance in Mississippi sticks with the jury throughout their deliberation process. That, in contrast to cases such as Zant, that aggravating circumstances, and the instructions in this case, placed a particular emphasis on the role of the aggravating circumstances in the jury's ultimate decision. The -- so that, in this case, the aggravating circumstance channel and guide the jury's discretion in coming to their

conclusion. And in this case federal constitutional error tainted that process and left the balance unskewed.

I will reserve the remainder of my time.

QUESTION: Very well, Mr. Resnick.

Mr. White, we'll hear now from you.

ORAL ARGUMENT OF MARVIN L. WHITE, JR.

ON BEHALF OF THE RESPONDENT

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

Of course, the issue is very clear here, whether the Mississippi Supreme Court can interpret its own laws, as I think that this Court has said many times that it can, to allow it to affirm a death case or sentence where there is the presence of one aggravating circumstance that is invalid.

QUESTION: Does it have just a flat, automatic rule, so long as one aggravating circumstance remains, it will affirm a death penalty?

MR. WHITE: No, Your Honor.

QUESTION: No?

MR. WHITE: That has been most recently graphically pointed out in the remand in Johnson v. Mississippi. There they also found, and -- in the state cited in my brief, they found the other two remaining aggravating circumstances were the avoidance of lawful arrest and

heinous, atrocious and cruel. The court looked at that again and said although there remains one aggravating circumstance that is not invalid, that of the to avoid lawful arrest, because of the problems with heinous, atrocious and cruel, we will -- and then the invalidity of the one that this Court set aside, the prior conviction that was overturned, the Mississippi Supreme Court said we cannot, with the invalidity of two, with this one remaining, we cannot say that it, what the jury would have done at that time. But we -- we reaffirm --

QUESTION: But does it have an automatic rule that if there are two aggravating circumstances, and one drops out, that it will affirm --

MR. WHITE: No, I don't think there is any automatic rule in effect here. I mean, the Mississippi Supreme Court has --

QUESTION: You don't read the opinion as suggesting that's its rule, then?

MR. WHITE: No. I mean, I don't read the opinion that way. I mean, it seems -- I guess when it says the invalidity of one will not disturb a sentence of death, they do look at that, that aggravating circumstance though, and --

QUESTION: Do they say that in the opinion anywhere? Did I miss it?

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MR. WHITE: No, I don't think they said it in this particular opinion.

QUESTION: Is it plausible to read this opinion as resting on a harmless error analysis and not on a reweighing analysis?

MR. WHITE: I think that, with the expression on page 50 of the joint appendix, of the Mississippi Supreme Court saying that, using a harmless error analysis, really, we likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same without, with or without the especially heinous, atrocious, cruel aggravating circumstance. I think they have applied a harmless error analysis to this case.

QUESTION: Meeting the Chapman standard?

MR. WHITE: I think meeting the Chapman standard.

QUESTION: Did they refer to that?

MR. WHITE: They did not refer to it, but I think --

QUESTION: How would we know that it did, because it isn't set forth, is it?

MR. WHITE: Just the citing, the citing of Chapman?

QUESTION: Well, the factors are not set forth expressly in the opinion, so how do we know they followed the Chapman --

MR. WHITE: Other than the fact that they have said

beyond a reasonable doubt, you may come to that conclusion. I think that is what we have to rely on that they did so.

QUESTION: But in your view it is plausible to read this opinion as a harmless error analysis and not as a reweighing analysis?

MR. WHITE: Well, I think -- I think that there is not a great deal of difference between harmless error and reweighing. This Court has approached that --

QUESTION: All right, then it is all the more plausible to read the opinion that way, correct?

MR. WHITE: Yes.

QUESTION: And, if the Mississippi court does not meet the Chapman standard, or if we disagree with the harmless error analysis, then the case has to be reversed, correct?

MR. WHITE: Unless -- unless there is the reweighing. I mean, that --

QUESTION: Well, you just conceded that a plausible way to read the opinion is to say there is no reweighing, that it is just harmless error. And I say if you are wrong on harmless error, then it has to be reversed. Right?

MR. WHITE: Well, I would have to agree with you there, I guess, in that situation. If the Mississippi

Supreme Court's rule does not meet a harmless -- the Chapman standard there on that point, I think the Mississippi Supreme Court has relied on several bases here. And the one not granted -- the cert was not granted on the issue of whether or not they could apply a limiting construction of heinous, atrocious and cruel after the appellate stage, as is indicated in Godfrey, and say this, the sentence here. As -- and they go through that analysis also in this particular case.

The -- of course, the cases that we rely on are those that are most evident, that of Zant, Barclay and Goode --

QUESTION: May -- before you get on, may I -- may I ask you one question. The critical paragraph on page 49 does seem to list a number of different grounds for the decision, that they have placed a limiting construction on their -- their the (inaudible) circumstance.

And then the second one, the Chief Justice referred to this earlier, that Mississippi law holds one invalid aggravating circumstance will not suffice to overturn a death penalty where one or more valid aggravating circumstances remains.

Now, you say that is inconsistent with Johnson, which it clearly is. But is it, is there any case prior to Johnson, which is later than this one, where they

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failed to follow that rule? I would have read that as kind of a rule of law. In Mississippi, if you've got one aggravating circumstance, we'll affirm. Was there law, up to Johnson, consistent with that interpretation?

MR. WHITE: I think that they have, the court has not found the presence of an invalid, or an aggravating circumstance not supported by the evidence, prior to that time.

QUESTION: I see.

MR. WHITE: But the --

QUESTION: Then why would they -- well then, why would they have said this if there's no precedent for this statement. They just pulled it out of the air then, I guess?

MR. WHITE: No, the -- there is a long line of precedent in Mississippi of the court stating that -- arguendo saying that the challenge has been made and they say, they address the, make the analysis of saying but even if this was invalid --

QUESTION: I see. As long as there is one valid sort of --

MR. WHITE: Yes, right. They have gone through that. It only takes one aggravating circumstance in Mississippi to support a death penalty.

QUESTION: I see.

QUESTION: Mr. White, on page 45, earlier in the opinion, it looks to me, there, the Supreme Court of Mississippi says the same thing that we are talking about, and there they do seem to cite a number of Mississippi cases for the proposition.

MR. WHITE: Right. They cite for all the way back to the beginning, where it was first stated, in Evans v. State in '82, where that first came in, and they were talking -- in fact, the very same aggravating circumstance here, they said that the challenge was made to the heinous, atrocious and cruel aggravating circumstance at that point. And they said that they went through an analysis and said that it was all right, but even if it wasn't, there is only one aggravating circumstance --

QUESTION: May I then follow up with this question. If we put Johnson to one side, because I agree with you, that seems to be inconsistent -- and assume this was the sole ground of decision for just a moment, that is not true, there are multiple grounds, but if they had relied on that ground alone, do you think that would be a constitutionally tenable position for the state court to take? That regardless of what else is involved in the case, as long as there is one aggravating circumstance properly found in the record, we will uphold the death penalty.

MR. WHITE: Well, I think that they probably -- the analysis that they take there -- I mean, they look at it under a, I think, a harmless error or reweighing --

QUESTION: But they have kind of a per se harmless error analysis is what it amounts to.

MR. WHITE: Well, that is similar to the one in Clausen on sentencing, I guess, in some regards. That's -- may even be suggested by Barclay and Zant, both.

QUESTION: Yeah.

QUESTION: Mississippi's -- under the statute, Mississippi is a weighing state. You weigh aggravating against mitigating.

MR. WHITE: That is right.

QUESTION: And, unless somebody does the weighing, they aren't following the statute. And if the Mississippi court is saying this is just a rule of law, we don't have -- if we invalidate two of three aggravating circumstances, but nevertheless affirm, without going through a weighing process or even saying the aggravating circumstance nevertheless outweighs the mitigating, they are then seemingly disregarding their own statute that is still the law in Mississippi.

MR. WHITE: That would be correct there. Of course, the Mississippi statute differs from both Florida and Georgia in the respect that it is like Texas on the

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front end. That there, you have to commit a specific crime, one of eight enumerated crimes, to even be charged with capital murder in Mississippi. It is not --

QUESTION: But Zant was about Georgia, wasn't it?

MR. WHITE: Right.

QUESTION: And that is not a weighing state.

MR. WHITE: No, it is not. Barclay and Goode were both --

QUESTION: Mississippi is.

MR. WHITE: -- weighing states -- in Florida, where it was a weighing state. And Mississippi, the instructions here, and also they have -- in addition, the jury, much like the argument previous to this, the jury has to go additionally --

QUESTION: Well, I suppose in Georgia, the -- a rule of law is proffered, if there is one aggravating circumstance, even though there are two others invalidated. Is that Zant?

MR. WHITE: That seems to be right, the way I read Zant, that the court can look at that again --

QUESTION: The difference in Mississippi is that it is a weighing state.

MR. WHITE: That is correct. And I think that the -- and the decisions of this Court since that time have tended to obliterate the distinction, especially the

opinion in Franklin, between weighing and non-weighing states there, in that regard. Franklin has talked about that there is not a great deal of difference.

Even in Georgia, where the aggravating circumstance takes you across that threshold, and then they can consider everything that they, that can be put in in Georgia, there is, the jury does something with all of that. At that point it is a weighing process there with the jury, at that point. And in any harmless error analysis, I think, there is an amount of weighing by the appellate court when the harmless error analysis is used.

In addition to the weighing process in Mississippi, of course, there is always, as the instruction in this case, the jury then has to make a determination that the death penalty is appropriate in this case. This, of course -- the evidence underlying this aggravating circumstance that is vague because of the instruction, was certainly admissible in all respects. So we have a similar situation that we have in Barclay, Zant and Goode, where the evidence that went to the jury was certainly admissible for all respects before the jury. It is just how the jury was to apply that that we have problems with here.

The Fifth Circuit, as Justice White mentioned a while ago, the Fifth Circuit has approved this in several

cases. In fact, in one case, instead of -- it went ahead and made the analysis of itself, and held that this aggravating circumstance did not -- the invalidity of this aggravating circumstance did not require reversal of the case, and affirmed, and that was in Stringer v. Jackson, and affirmed a death penalty sentence there on the federal level. So, the Fifth Circuit has recognized Mississippi law and upheld it in several situations, Edwards v. Skargy, and in the latest, of course, is Stringer v. Jackson.

The other circuits that have looked at this, the Eighth and the Tenth and the Eleventh, have all agreed. The Ninth Circuit for a while had agreed, and I think with the ruling in Adamson v. Ricketts they have, the en banc ruling, has changed that. The new Shafer ruling had been before that, and had adopted a, this, the Zant type analysis.

The -- of course the Court has said, in Satterwhite, that the -- that it held that a state supreme court can, or appellate court can apply harmless error analysis to capital sentencing errors. And of course, this culminates in a line of Adamson -- Adams, Franklin and Penry, that there is not really a great deal of difference between weighing states and non-weighing states. So we contend that the Satterwhite harmless error

analysis should apply in this case.

The invitation was there in Maynard, in the concluding paragraphs of Maynard, the -- this Court invited the courts to reconsider, and it said that it was for the states to determine what effect an invalid aggravating circumstance would have on a death sentence. They -- the point being in there, in Maynard, was that the federal appellate court was not to do what the state supreme court would not do at that time. Of course, the Arizona Court of Criminal Appeals has changed its standpoint at that time, and now follows much the same as the Mississippi Supreme Court, by affirming if there are invalid aggravating circumstances, after a reconsideration.

The Mississippi statute, of course, does require jury sentencing at the initial situation. But the Mississippi Supreme Court has interpreted that it can review and affirm a death penalty case even though there is an invalid circumstance. And we would submit that that is -- is a matter of state law, an interpretation of state law in that regard.

QUESTION: Can you explain how they can do that reweighing without having any fact-finding power?

MR. WHITE: I dispute the fact that --

QUESTION: I mean, you can't reweigh unless you

know what mitigating circumstances there are, and they have no idea what mitigating circumstances the jury found.

MR. WHITE: Well, I -- the first respect of that, I would dispute the fact that the Mississippi Supreme Court has ever said that it cannot. It says that it is a difficult task, but it has never said that it cannot find facts, because it does find facts and substitutes its own factual finding sometimes for lower court factual findings, occasionally.

Here, I think they look at the record. They take the totality of it, and I think they say, as a given, say that they found all of these mitigating factors, and they look at it again and consider the situation, and then do a -- their analysis that way.

QUESTION: If they reweigh, isn't that the function you perform when you are doing the sentencing? And I think you say in your own brief, they could not impose a sentence themselves.

MR. WHITE: No, they could not have imposed a sentence themselves.

QUESTION: And isn't the reweighing necessarily a part of the process of sentencing?

MR. WHITE: I think it is, but that's -- the sentence has already imposed. They are only correcting any errors in that sentence at that point, if that's --

QUESTION: I can understand your saying that it is harmless error, after they study it all the way through, but I really am a little, little uncertain -- I am not sure I exactly capture your position on what the reweighing process is. It isn't a way of finding that there was no error, because they only do it after they decide there was some error.

MR. WHITE: Yes.

QUESTION: And it isn't a sentencing itself, because they have no power to do that. And it isn't a finding of harmless error. So I am really not quite sure what it is.

MR. WHITE: Maybe it is a combination of all of it. I think they look at it as a reweighing and a harmless error situation there, both, if they are at all separate in the long run there.

But, as long as the information that goes to the jury, in the concurrence in Barclay, as long as the federal Constitution does not bar introduction of the evidence underlying those aggravating factors, it does not require the death penalty be set aside. There -- the existence or non-existence of mitigating factors is one of those things that the court considered in affirming in Barclay, and the balance struck -- I mean, can the court look at that and balance those issues again. And the

court, I think, clearly said that in -- in Barclay and Goode both, that they could do that, that the state courts could do that.

QUESTION: Is it clear that the rebalancing that the Mississippi court made here was a rebalancing without taking into account the heinous and aggravating circumstances factor?

MR. WHITE: I don't know that it is absolutely clear that they did that, since they did say that, as an alternative ground, that they were applying it, their own limiting construction in finding this -- the -- that this was a properly submitted thing also --

QUESTION: That is what I find confusing. If they had just said, you know, their thing reads Mississippi -- considering that Mississippi law holds one invalid aggravating circumstance will not suffice to overturn a death penalty, and that doesn't trouble me, because it won't suffice; it is not sufficient where one or more remains. Had it then gone on to say and considering that this, that this -- what was the other aggravating circumstance, that this was -- killing occurred in the commission of a robbery and was committed for pecuniary gain --

MR. WHITE: Right.

QUESTION: Then I would think they were balancing

without the heinous factor. But that is not what they say. They go on to say and considering the brutal and torturous facts surrounding the murder of Arthur Shorter. That sounds as though they are doing the balancing still taking into account the heinous factor. Doesn't that trouble you?

MR. WHITE: Well, I think -- I think that those are, maybe a separate analysis. Because that is -- that is clearly properly before the jury. That was admitted during the brutal facts of the crime, or admitted during the guilt phase of the trial.

QUESTION: But that is not the one remaining aggravating factor that they are balancing, supposedly.

MR. WHITE: No. I agree.

QUESTION: So what relevance --

MR. WHITE: Of course, then they go on, on the next page, talking about the, it is not too great when the aggravating and mitigating circumstances are weighed against each other, and the death penalty will not be wantonly or freakishly imposed. That's that -- the additional ground in both Zant and Barclay that the court has relied on, not just the fact that the issue, or the evidence that went to the jury was not inadmissible. The other is the mandatory appellate review that is performed by the states, and I think that's -- for the wantonness

and freakishness in proportionality, that the Mississippi Supreme Court does perform.

And, as I think we go on to say, that the -- in this case, contrary to Petitioner's view, heinous, atrocious and cruel is not per se unconstitutional, as long as it is approached with the proper instructing devices. And we do contend that the limiting construction was applied in this case.

Thank you.

QUESTION: Thank you, Mr. White. Mr. Resnick, you have five minutes remaining.

QUESTION: One thing puzzles me, you say that the Mississippi court can't review facts, but on page 50 of the joint appendix, the Mississippi Supreme Court, in every capital case, I gather, complies with the provision of the Mississippi code that requires it to make an independent finding that the punishment of death is not too great when aggravating and mitigating circumstances are weighed against each other, and the death penalty will not wantonly or freakishly be imposed. How can they make that finding without reviewing facts?

REBUTTAL ARGUMENT OF KENNETH S. RESNICK

ON BEHALF OF THE PETITIONER

MR. RESNICK: Your Honor, there is a history to that, that provision, because that question occurred to

me. This language, in the further review opinion, predates the 1977 statute in Mississippi. Before 1977, there was a -- and let me back track. Prior to 1977, there was a statute in Mississippi that required a mandatory death sentence. In Jackson v. State, the Mississippi Supreme Court construed their state -- their statute so as to make it constitutional. And based upon this Court's opinion in Gregg and in Proffitt, the Mississippi Supreme Court, in the absence of any specific statutory prohibition, gave themselves the authority, construed their statute to give them the authority, that existing statute to give them the authority that they could undertake this type of analysis.

Since 1977, when the -- when the Mississippi legislature and the people of Mississippi committed the death sentence determination to the jury, this language has appeared almost as if in boilerplate in the Mississippi Supreme Court's opinions from time to time. But the history of it dates back to a time when the Mississippi Supreme Court did not have, there was no statutory prohibition against it, undertaking some sort of proportionality reweighing to compare the balance in this case against the other cases that come before it.

But that doesn't -- that does not cure the constitutional error. The state has conceded that the

weighing here, and of course this is aggravating and mitigating circumstances in the plural, that if indeed there was a reweighing here, what the court did was include the very unconstitutional factor that it was trying to cure. That's no cure at all.

In Barclay v. Florida, one of the principles that this Court relied upon in affirming the death sentence, was that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. That was crucial to this Court's opinion in Barclay.

I would urge the Court to take a look at the case decided at footnote 6 in the state's opinion, page 31. A reading of that -- those opinions will show that what the Mississippi Supreme Court has done, although, as the state agrees, that is all dicta in the sense that it wasn't necessary to the opinion because they affirmed the especially heinous aggravating circumstance in any event, what they have done is automatically affirm, that one remaining aggravating circumstance is sufficient, notwithstanding the fact that, for example in this case, it undercuts half of the state's case at the death penalty phase.

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In conclusion, Petitioner requests this Court to reverse the judgment of Mississippi, and vacate the death sentence. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Resnick.

The case is submitted.

(Whereupon, at 2:32 p.m., the case in the above-entitled matter was submitted.)

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No. 88-6873 - CHANDLER CLEMONS, Petitioner V. MISSISSIPPI

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BY Lona M. May

(REPORTER)