No. 97-9361

In the Supreme Court of the United States

OCTOBER TERM, 1998

LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment.

2. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

3. 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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STATEMENT

After a jury trial in the Northern District of Texas, petitioner was convicted of the capital offense of kidnapping with death resulting to the victim, in violation of 18 U.S.C. 1201, and of the non-capital offense of assaulting a different victim, in violation of 18 U.S.C. 113. After a separate sentencing hearing, the jury recommended that petitioner be sentenced to death for the capital offense. J.A. 57-58, 84, 88. The district court sentenced petitioner to death on the capital count and to 57 months of imprisonment on the non-capital count. The court of appeals affirmed. J.A. 82-123.

1. Petitioner kidnapped and bludgeoned to death Tracie Joy McBride, a 19-year old Army private who had been transferred to Goodfellow Air Force Base in San Angelo, Texas, just eight days before her kidnapping and murder. On the evening of Saturday, February 18, 1995, petitioner abducted McBride from a building on the Base in which she had been doing her laundry. 16 R. 816, 864-868, 875-880, 887. Army Pvt. Michael Peacock witnessed the kidnapping and tried to prevent it, but petitioner struck him on the head

with a handgun and left him bloodied and unconscious. 16 R. 883-884, 900-902, 904-908; 23 R. 2310.

Petitioner then brought McBride back to his house, where he raped and sodomized her. (Although petitioner told a defense psychiatrist that the abducted McBride willingly engaged in sexual relations, 23 R. 2316, the injuries and trauma to McBride's genital area were not consistent with consensual sex. 17 R. 1141-1142.) Petitioner later forced McBride into his bedroom closet, where he tied her up with white nylon rope and used two socks to gag her. 16 R. 957; 23 R. 2319-2320. At approximately 10:00 p.m., while McBride was in the closet, petitioner was visited by a friend named Margaret Rodriguez. 17 R. 1010. Petitioner made sexual advances (which Rodriguez rejected) and said he had to wash himself. 17 R. 1011-1014. Rodriguez, who left a short while later, testified that the bedroom door was closed and that she heard no sounds from inside. 17 R. 1017.

Petitioner decided to kill McBride after Rodriguez left because McBride had heard Rodriguez mention his name. 16 R. 957. After forming that plan, petitioner washed McBride's clothes and made her clean herself to remove evidence of the rape. 21 R. 2030-2031; 23 R. 2325. Petitioner then made McBride walk out of the house on towels that he had placed on the floor, because he believed that, if she did so, no fibers from his residence would be on her clothes or boots. 23 R. 2328. Petitioner forced McBride into his car, drove until he reached a remote bridge some 20 miles away, J.A. 83-84, and struck McBride several times on the head while she was still in the car. 16 R. 957-958. McBride apparently had not yet lost consciousness, and petitioner led her underneath the bridge. 16 R. 958. There, petitioner struck her again until she fell, and he continued to strike her several more times after she was down, shattering her skull and killing her. *Ibid.*

McBride's dead body was not found, and petitioner was not apprehended, until two weeks later. On March 1, 1995,

petitioner was arrested after his ex-wife Sandra Lane (who was also McBride's drill sergeant) filed a complaint charging that petitioner had kidnapped and sexually assaulted her two days before McBride's abduction. 16 R. 962-965. After being advised of his *Miranda* rights, petitioner admitted that he had kidnapped and murdered McBride. 16 R. 948, 955-958. In the early morning hours of March 2, 1995, petitioner directed law enforcement agents to a bridge 20 miles outside San Angelo, under which McBride's dead body was found. 16 R. 952-954.

The medical examiner testified that McBride died from "injuries to the head and brain." 17 R. 1159. There were at least nine major lacerations to McBride's head, consistent with her having been struck repeatedly with a tire iron or similar tool. 17 R. 1157. Splattered blood on the walls and ceiling of the bridge underneath which McBride's dead body was found also suggested that she had repeatedly been struck by a blunt instrument. 17 R. 1065-1066. Large pieces of bone were missing from underneath McBride's scalp, and her brain was exposed. 17 R. 1136, 1154. The medical examiner opined that it would have taken "a tremendous amount of force" to cause those fatal injuries: "We hardly even see that with our major traffic accidents." 17 R. 1154.

2. A special jury sentencing hearing was held on the capital count in accordance with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.* The jury found, beyond a reasonable doubt, that petitioner intentionally killed McBride and also that he intentionally inflicted serious bodily injury that resulted in her death. J.A. 85. The jury next found beyond a reasonable doubt two of four statutory aggravating factors alleged by the government: that petitioner caused the death during commission of another crime (kidnapping), and that petitioner committed the offense in an especially heinous, cruel, and depraved manner. See 18 U.S.C. 3592(c)(1) and (6) (1994 & Supp. II 1996); J.A. 86. The jury also found beyond a reasonable doubt two of three non-

statutory aggravating factors that the government had alleged: McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and McBride's "personal characteristics and the effect of the offense on her family." The jurors individually decided whether any mitigating factors, including the 11 factors proposed by the defense, existed. One or more jurors found the existence of ten of the 11 proposed factors, and seven jurors found the existence of an additional mitigating factor. Finally, the jury weighed the aggravating factors against the mitigating factors, J.A. 86-88 & n.3, and unanimously recommended that petitioner be sentenced to death. J.A. 88. The district court followed that recommendation and imposed a death sentence on the capital count. See 18 U.S.C. 3594.

3. Petitioner appealed the sentence, and the court of appeals affirmed. J.A. 82-123. After addressing other issues that petitioner has not renewed before this Court, J.A. 88-96, the court of appeals rejected several challenges by petitioner to the jury instructions. First, the court of appeals rejected petitioner's contention that the trial court erred by not instructing the jury that its failure to reach a unanimous recommendation on the death penalty would result in the court automatically imposing a life sentence without possibility of release. See J.A. 96-98 & n.8, 103. The court concluded that the instructions proposed by petitioner were legally incorrect, because a hung jury on the death penalty could result in empanelment of a new sentencing jury: "life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered." J.A. 97. The court further explained that "federal courts have never been affirmatively required to give such instructions." J.A. 103. The court therefore held that "no constitutional violation occurs when a district court refuses to inform the

jury of the consequences of failing to reach a unanimous verdict." *Ibid.*

The court also declined to reverse petitioner's sentence based on his challenges to instructions that, he asserted, misled the jury. J.A. 98-106. The court rejected petitioner's argument that the instructions produced a reasonable likelihood that jurors would have believed that the trial court would automatically impose a sentence of less than life imprisonment in the event of jury deadlock:

> Reading the instructions in their entirety, the [trial] court clearly stated that the jury must reach a unanimous verdict. At no time were the jurors ever informed that the failure to reach a unanimous verdict would result in the imposition of a term less than life imprisonment. As such, we hold that the district court did not abuse its discretion by failing to repeat the unanimity requirement [each time the court mentioned the lesser sentence option in the instructions].

J.A. 102.

The court of appeals also rejected petitioner's argument that "the disparity of the verdict forms," which had to be signed by all 12 jurors in the event of a death or life imprisonment recommendation but only by the foreperson in the event of a lesser recommendation, would have misled the jury about the consequences of deadlock on the death sentence. J.A. 102-103. Noting that petitioner did not object to the verdict forms, the court found no plain error because "any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction." *Ibid.* Finally, the court rejected, as precluded by the rationale of Federal Rule of Evidence 606(b) and federal case law, petitioner's proffer of juror affidavits in an attempt to show that jurors in fact were confused by the instructions. J.A. 104-105.

The court also rejected petitioner's claim that the trial court committed plain error by allowing the jury three options—death, life imprisonment without release, or some other lesser sentence. J.A. 106-111. After examining "the disparate sentencing options" described in the FDPA, 18 U.S.C. 3593(e), which provides for all three possibilities, and the kidnapping statute, 18 U.S.C. 1201, which provides only for death or life imprisonment, the court concluded that "the substantive criminal statute [i.e., the kidnapping statute] takes precedence over the death penalty sentencing provisions." J.A. 110. The court also found that, because parole and early good time release for life offenders have been abolished in the federal system, "no meaningful distinction exists between 'life' [as mandated by the kidnapping statute] and 'life without the possibility of release.'" *Ibid.* Although the court held that "the district court committed error by informing the jury of the lesser sentence option available under § 3593," the court declined to find that the mistake constituted plain error because no "clearly established law" resolved the issue, and "the error was not * * * obvious, clear, readily apparent, or conspicuous." J.A. 110-111.

The court next rejected petitioner's challenges to the two statutory aggravating factors found by the jury—that petitioner caused the death during commission of another crime (kidnapping) and that petitioner committed the offense in an especially heinous, cruel, and depraved manner that involved torture and serious physical abuse. J.A. 111-117. In contrast, the court held that the two non-statutory aggravating factors found by the jury—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," and her "personal characteristics and the effect of the offense on her family"—were invalid, both because they were "duplicative" of each other and because they were "vague and overbroad." J.A. 117-119.

Although the court held that the non-statutory aggravating factors found by the jury were not valid, the court concluded that the jury's consideration of those factors was harmless beyond a reasonable doubt. J.A. 119-123. The court explained that, "[u]nder a weighing statute [such as the FDPA], affirming a death sentence when an aggravating factor has been found invalid requires the appellate court to scrutinize the role which the invalid aggravating factor played in the sentencing process in order to comply with the Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." J.A. 119-120. After detailing the possible methods of appellate analysis, the court decided to "redact the invalid aggravating factors" and "inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factors." J.A. 121. The court explained that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury," whereas "jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty." J.A. 122. "[E]ven after considering the eleven mitigating factors found by one or more jurors," the court concluded, the erroneous nonstatutory aggravating factors were "harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." J.A. 122-123.

SUMMARY OF ARGUMENT

I. The jury instructions in this case correctly informed the jury that, to return a penalty recommendation, it had to be unanimous. The instructions did not, as petitioner claims, lead the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment. At the outset of its description of the weighing process, the court informed

the jury of its penalty options—to recommend death, life without the possibility of release, or some lesser sentence—and stated that each required unanimity. Although the court did not repeat the word "unanimous" in each later reference to the option of recommending a lesser sentence, the court did not state or imply that a court-imposed lesser sentence would result from a hung jury. The court said nothing about the result of a hung jury at all. Nor would the instructions and verdict forms have left the jury with the impression that the jury was compelled to recommend a lesser sentence if the jurors found themselves irreconcilably divided between death and life without release. The notion that the jury as a whole would be required to recommend a more lenient sentence than any juror desired is counterintuitive, and no language in the instructions implied such a requirement. When the instructions are read as a whole, the ambiguity that petitioner perceives disappears, and there is no "reasonable likelihood" that the instructions misled the jury.

Relief is particularly unwarranted here because petitioner did not make his present objection before the jury retired to deliberate. Under those circumstances, he must show plain error, *i.e.*, an obvious error that caused him prejudice. He cannot make that showing, because there was no clear error and because the instructions were as likely to have helped as to have harmed him. Nor is he aided by affidavits purporting to describe the jury's deliberations; here, as elsewhere, such post-verdict recollections are properly excluded from judicial review. And he errs in claiming that he preserved the error here by proposing a different instruction or that plain-error limitations are rendered inapplicable by the FDPA's provision for review of any "arbitrary factor." Petitioner's claim is one of legal error in the instructions given, and that claim was not properly preserved in the trial court. Because the claim is inconsistent with the instructions as a whole, the claim entitles him to no relief.

II. Petitioner was not entitled to an instruction that the court would impose a sentence of life imprisonment without release if the jury could not unanimously agree on a sentencing recommendation. First, such an instruction is not a correct statement of the law. The FDPA directs that the sentencing jury must act unanimously to recommend a sentence, and it accommodates the background principle that, following a hung jury, the government is entitled to empanel a new jury. A hung jury, therefore, does not necessarily require the court to impose a sentence of life without release. Second, even if petitioner's reading of the FDPA were correct, there is no basis in the statute, this Court's supervisory authority, or the Constitution to require an instruction about the consequences of deadlock. Society has a strong interest in encouraging the jury to deliberate with a view toward reaching a unanimous sentencing decision, because such a verdict enables the jury to express the conscience of the community on the ultimate question whether a capital defendant should live or die. A jury charge on the consequences of deadlock threatens to undermine deliberations seeking unanimity. It is therefore inconsistent with the purposes and traditions of our jury system.

III. Petitioner is not entitled to relief on the theory that the submission of two non-statutory aggravating factors that the court of appeals found vague and duplicative was harmful, rather than harmless, error. As an initial matter, the factors in question were neither vague nor duplicative. Rather, they were constitutionally valid means of guiding the jury to consider the victim's vulnerability and the impact of petitioner's crime on the victim and her family. Both considerations are entirely proper ones for a capital sentencing jury to weigh. Even on the assumption that the factors were invalid, the submission of them to the jury was harmless beyond a reasonable doubt. The jury clearly would have returned the same verdict if those two non-statutory aggravating factors had been more precisely defined.

Alternatively, as the court of appeals found, the verdict would have been the same if the factors had never been submitted to the jury. Although the court of appeals' discussion of harmless error is brief, its stated reasons sufficiently support its conclusion that the error (if any) in submitting the two non-statutory aggravating factors was harmless beyond a reasonable doubt.

ARGUMENT

I. THE JURY INSTRUCTIONS DID NOT LEAD THE JURY TO BELIEVE THAT DEADLOCK ON THE PENALTY RECOMMENDATION WOULD AUTOMATICALLY RESULT IN A COURT-IMPOSED SENTENCE LESS SEVERE THAN LIFE IMPRISONMENT

Petitioner contends (Br. 17-32) that his sentence must be reversed because, in his view, the jury instructions and verdict forms improperly led the jury to believe that if the jury deadlocked on the penalty recommendation, the court would automatically impose a sentence of less than life imprisonment without possibility of release (life without release). The jury instructions contain no express statement to that effect. Petitioner argues, however, that the jury would have formed such an "impression" by drawing "inference[s]" from the instructions and by comparing the language used to describe the jury's possible verdicts in different parts of the instructions and verdict forms. Pet. Br. 20-24.

A defendant who claims on appeal that the jury instructions are susceptible of an erroneous interpretation must demonstrate "a reasonable likelihood that the jury has applied the challenged instruction[s]" erroneously. *Boyde* v. *California*, 494 U.S. 370, 380 (1990); *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991). Such a claim requires the assessment of the jury instructions not "in artificial isolation, but * * * in the context of the overall charge," *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973), and "with the commonsense under-

standing of the instructions in the light of all that has taken place at the trial." *Boyde*, 494 U.S. at 381. The burden is even heavier here because petitioner did not object to the relevant instructions or verdict forms in the district court. See *United States* v. *Park*, 421 U.S. 658, 676 (1975). He therefore must show: "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights'" and that "(4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)).

Petitioner cannot meet those burdens. The jury instructions and verdict forms, interpreted as a whole and in a common-sense fashion, do not give rise to a reasonable likelihood that the jury would have thought that its inability to return a unanimous verdict of death or life without release required it to recommend, or the court to impose, a "lesser sentence." Especially in light of petitioner's higher burden under the plain error standard, his "court-imposed-lesser-sentence" claim does not justify invalidating the jury's unanimous recommendation of a capital sentence.

A. Petitioner Has Not Demonstrated A Reasonable Likelihood That The Jury Instructions And Verdict Forms Misled The Jury

Petitioner argues that the jury was reasonably likely to have drawn "two separate, though related," conclusions from the instructions and verdict forms about what would happen if it failed to reach a unanimous recommendation of a sentence of death or life without release: first, the judge would have to impose a sentence less severe than life without release; and, second, the jury itself would be required to recommend a sentence less severe than life without release.

Pet. Br. 20. No "reasonable likelihood" exists that the jury would have read the instructions that way.[1]

1. The interpretational issue centers on the instructions that the court gave the jury about the weighing phase of the sentencing proceedings. The court instructed the jury that, based on weighing the aggravating and mitigating factors found to exist:

> [Y]ou the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.
>
> If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.
>
> If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of

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[1] Petitioner suggests that a less demanding standard than "reasonable likelihood" applies to challenges to instructions on direct appeal of federal capital cases. See Pet. Br. 18-19 n.12 (relying on *Andres* v. *United States*, 333 U.S. 740 (1948)). In *Boyde*, however, the Court "made it a point to settle on a single standard of review for jury instructions—the 'reasonable likelihood' standard—after considering the many different phrasings that had previously been used by this Court." *Estelle*, 502 U.S. at 72-73 n.4. The Court in *Boyde* cited *Andres* as a case that had used one of the different phrasings that the "reasonable likelihood" standard was intended to supersede, see 494 U.S. at 379, and it gave no indication that the "reasonable likelihood" standard would not apply to federal capital cases like *Andres* and this one.

> release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine 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 you conclude that a sentence of death or life without the possibility of release should not be recommended.

J.A. 43-44.

Relying on the last sentence quoted above, petitioner argues (Br. 21) that the court "told the jury in no uncertain terms that the jury's failure to agree on a sentence of death or life without the possibility of release would result in the court's imposing sentence." Petitioner also contends (*ibid.*) that "a natural inference is that the court's sentence would be such a 'lesser sentence'" because the lesser-sentence option was mentioned previously. And he argues (*ibid.*) that the inference was strengthened because, four paragraphs later, after discussing the jury's responsibility to make credibility determinations, to decide the case on the evidence without passion or prejudice, and to weigh the aggravating and mitigating factors in a non-mechanical fashion, the court reiterated that jury recommendations of death or life without release had to be unanimous but did not mention a third sentencing option. See J.A. 45.[2]

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[2] Petitioner also states that, in light of the available sentences for his kidnapping crime, the inclusion of any lesser-sentence option in the instructions was error (Br. 17-18, 19 n. 13). He does not contend, however, that the instructions' erroneous reference to a lesser sentence by itself warrants reversal of his capital sentence. Br. 18-19. Although we agree with petitioner that the only sentences that could have been imposed are death and life without release (because the kidnapping statute, 18 U.S.C. 1201, authorizes only death and life imprisonment, and neither parole nor

2. There is no reasonable likelihood that the jury parsed the instructions in that fashion. At the start of the instructions on the weighing phase, the court explained in the clearest possible terms that the jury should recommend one of three possible sentences and that any of those three recommendations had to be unanimous. See J.A. 43 ("you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence"). The court went on to explain that jury recommendations of death or life without release would be binding on the court, but a jury recommendation of "some other lesser sentence" would not. Such a recommendation would, instead, authorize the court to impose any lawful sentence other than death. J.A. 44 ("If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law."). Immediately afterwards, the court instructed the jury that, in deciding among those three recommendations, the jury should not concern itself with the sentence that the court would impose if the jury chose the third option. *Ibid.* ("In deciding what recommendation to make, you are not to be

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good-time credits could reduce the life sentence), that conclusion was certainly not settled at the time of trial and, even today, is not beyond all dispute. See J.A. 110-111. In view of the fact that petitioner expressly requested the court to include the lesser-sentence option in the instructions at "each and every time during the body of the court's instructions wherein that noted language [*i.e.*, the jury determines whether the defendant should be sentenced to death] is used," J.A. 26, as well as the fact that petitioner could have derived strategic advantages from that option, see pp. 21-25, *infra*, there is no basis for finding the lesser-sentence language, by itself, to be grounds for reversal here.

concerned with the question of what sentence the defendant might receive in the event you determine 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 you conclude that a sentence of death or life without the possibility of release should not be recommended.").

The cumulative meaning of those instructions is that (1) the jury could make its sentencing recommendations only by acting unanimously; (2) two types of recommendations (death or life without release) would dictate the court-imposed sentence, but the third type (lesser sentence) would not; (3) if the jury made the third recommendation, the court would impose an "authorized sentence," not necessarily a "lesser sentence"; and (4) the jury was not to consider at all what the court would do in the event that the court was acting as sentencer. The instructions do not address the effect of a hung jury, and they do not state that the jury could make any sentencing recommendation non-unanimously.

In light of the instructions as a whole, when the court stated that the sentence "is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended" (J.A. 44), the jury is not reasonably likely to have inferred that the court would impose a "lesser sentence" if the jury hung. The quoted statement came on the heels of the instruction that the jury must act unanimously in making a sentencing recommendation, and nothing in the instructions indicated that the court would impose sentence in the absence of a unanimous jury recommendation. In contrast, the jury instructions had earlier expressly addressed a situation in which the jury could act non-unanimously. In discussing mitigating factors, the court pointedly noted that, in contrast to the requirement of unanimity on findings of aggravating factors: "Quite the opposite is true with regard to mitigating factors. A finding with respect to a mitigating

factor may be made by any one or more of the members of the jury * * * regardless of the number of other jurors who agree that such mitigating factor has been established." J.A. 43. Given the court's direct attention to the distinction between required unanimous actions and permissible non-unanimous actions, the jury would reasonably have expected the court to underscore and make explicit any situation in which non-unanimity produced sentencing results. The jury would not have taken its cue from the "subtle shades of meaning" argued by petitioner. *Boyde,* 494 U.S. at 381.[3]

3. There is no greater merit in petitioner's argument (Br. 21-24) that the instructions and verdict forms suggested that the jury itself was required to recommend a sentence less severe than life without release if the jury was hung on the life-or-death decision. Petitioner relies (Br. 23-24) on the verdict forms, which, he notes, required a unanimous vote and the signatures of all jurors for a recommendation of death or life without release, but required only the fore-person's signature for a jury recommendation of a lesser sentence. J.A. 57-59. He also claims (Br. 24) that the judge's instructions about the forms would have led jurors to conclude that a "deadlock as to penalty would require them to return the verdict form with Decision Form D [the lesser-sentence option] signed by the jury foreperson."

Petitioner's claim that the jury is reasonably likely to have read the instructions to require that the jury as a whole recommend a sentence that not one single juror individually supported is counterintuitive. The jurors are not likely to

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[3] For the same reason, petitioner is not assisted by the observation (Br. 21) that, when the instructions later reiterated the unanimity requirement for jury recommendations of death or life without release (see J.A. 45), the instructions omitted to state that the jury could recommend a lesser sentence, but only unanimously. The jury would not have attached any significance to the omission, because the court had already stated quite clearly that the jury could make any of three recommendations, and any recommendation had to be unanimous. J.A. 43.

have concluded that the judge would direct them to recommend a sentence more lenient than any of them desired. It is far more likely that the jury instead would have understood that, if it could not reach a unanimous recommendation on death or life because its members were divided on that issue, it should report that fact to the court. The language of the instructions lacks any clear and definite indication that might have led jurors to infer the contrary conclusion, with the strange result that disagreement on the two most severe penalties would require them all to recommend a lesser one.

The court stated as follows about the verdict forms:

> The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor. Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because: (1) you do not unanimously find that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; or (2) you do not unanimously find that the aggravating factor or factors found to exist are themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors, you are not unanimous in recommending that a sentence of death should be imposed. Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed.
>
> Decision Form D should be used if you recommend that some other lesser sentence should be imposed.

J.A. 47-48. Those instructions contain no language requiring a jury divided between life and death to recommend a lesser sentence. Although the court did not use the word "unanimously" in mentioning Decision Form D, the jurors would not have thought that the omission negated the court's prior unequivocal requirement of jury unanimity for any verdict. The jury instructions previously stated that "you the jury, by unanimous vote," shall recommend any of the three sentencing options. J.A. 43. Moreover, only three paragraphs before describing the verdict forms, the court had noted that "[i]t is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so." J.A. 46. Petitioner's conclusion that, under the instructions, a hung jury would have had to subscribe to a lesser-sentence recommendation ignores the court's express instruction that a lesser-sentence recommendation must be unanimous and that the jury should deliberate with a view toward reaching unanimous agreement.[4]

Petitioner asserts (Br. 24) that *Mills* v. *Maryland*, 486 U.S. 367, 383 (1988), stands for the proposition "that 'juries do not leave blanks and do not report themselves as deadlocked . . . unless they are expressly instructed to do so.'" That reading of *Mills* is neither accurate nor in accord with other authority. The Court in *Mills* stated only that juries do not leave blanks or report themselves deadlocked "over mitigating circumstances" (*ibid.*), not that they do not

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[4] Petitioner also puts more weight on the differences in the signature requirements of the verdict forms than those differences can bear. Although the lesser-sentence form required only the foreperson's signature, in other instances, the foreperson alone signed the verdict forms to report the jury's findings even though those findings clearly had to be unanimous. See J.A. 50-53 (only foreperson's signature required to indicate jury's unanimous finding of the existence of aggravating factors). And the lesser-sentence form itself referred to a sentence that "[w]e the jury recommend"—not to a sentence recommendation that reflected only the jury's inability to agree on which greater sentence to recommend.

report themselves deadlocked over the ultimate sentence. Moreover, in *Mills*, the jury was not instructed that unanimity was required to reject a mitigating circumstance. See *id.* at 379. Here, in contrast, the jury was instructed that unanimity was required to recommend a lesser sentence. See J.A. 43. The jury in this case was also instructed to make "an effort to reach agreement if you can do so * * *. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with." J.A. 46. Juries typically receive no more pointed instructions than those on what to do if they cannot agree on a verdict. Yet juries nonetheless frequently report themselves deadlocked on that ultimate issue—a fact that is evidenced by the continued vitality, in one form or another, of the supplemental charge that this Court approved in *Allen* v. *United States*, 164 U.S. 493, 501 (1896), to urge juries that report themselves deadlocked to deliberate further. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 238 & n.1 (1988) (some form of *Allen* charge employed in every federal court of appeals).

4. In sum, petitioner's argument reduces to the proposition that a concededly correct specific instruction requiring jury unanimity for each of the jury's three possible sentencing options was fatally undercut by ambiguous inferences arising from the court's later omissions of the unanimity instruction in referring to the third sentencing option. He cites no authority, however, holding that an express instruction can be rendered unclear by ambiguous inferences drawn from other instructions. To the contrary, this Court has held that even affirmative instructions that might be "ambiguous in the abstract" can be cured when read "in conjunction with [other instructions]." *Victor* v. *Nebraska*, 511 U.S. 1, 14-15 (1994) (problematic "moral certainty" language in reasonable doubt instruction cured by remainder of instruction); see also *Estelle*, 502 U.S. at 74-75 (although "instruction was not as clear as it might have

been," there was no reasonable likelihood that jury interpreted it as pure propensity instruction given another specific instruction that "guarded against possible misuses of the [challenged] instruction"); *Bryan* v. *United States*, 118 S. Ct. 1939, 1949 (1998) (single instruction that "read by itself, contained a misstatement of the law," would not likely have misled jurors "in the context of the entire instructions"). Likewise, courts of appeals have held that "one ambiguous part of an instruction may be made clear by another unambiguous part of the same instruction." *United States* v. *Gaviria*, 116 F.3d 1498, 1510, 1511 (D.C. Cir. 1997) (per curiam) ("[I]f a sentence can mean either A or B and another sentence in the instruction clearly says A, then one does not say that the first sentence must mean B; one says, rather, that the first sentence must therefore also mean A."), cert. denied, 118 S. Ct. 865 (1998); *United States* v. *Eltayib*, 88 F.3d 157, 170-71 (2d Cir.) (finding no plain error when "even if the instruction may be deemed ambiguous with regard to a finding that the defendants participated in the conspiracy, another instruction made it clear that the finding of participation had to be explicit"), cert. denied, 117 S. Ct. 619 (1996). In light of those principles, there is no basis for holding that the express unanimity instruction was overcome by subsequent omissions that, at worst, are ambiguous in the abstract.

B. Petitioner Did Not Object To The Instructions And Cannot Show That They Rise To The Level Of Plain Error

Reversal of petitioner's death sentence based on his "lesser sentence" claim would be particularly unwarranted in light of the plain error rule. Fed. R. Crim. P. 52(b). Petitioner failed to object to the relevant instructions and verdict forms before their submission to the jury, see Fed. R. Crim. P. 30, and thus cannot prevail unless he can establish an obvious error, which resulted in prejudice, and which justifies relief as a matter of the court's discretion. See *United*

States v. *Olano*, 507 U.S. 725, 734 (1993). Petitioner has not carried that burden.

1. Given the complexities in petitioner's reading of the jury instructions, his claim of error is hardly "clear" or "obvious" within the meaning of the plain-error rule. *Olano*, 507 U.S. at 734. Indeed, the absence of a contemporaneous objection suggests that "the participants in the trial did not perceive the challenged instruction in the manner [petitioner] now proffers." *Waters* v. *Thomas*, 46 F.3d 1506, 1527 n.9 (11th Cir.), cert. denied, 516 U.S. 856 (1995).

Nor can petitioner meet his burden of showing prejudice. *Olano*, 507 U.S. at 734. Petitioner contends that he was prejudiced by the instructions because the jurors may have compromised on a death sentence to avoid the possibility that their failure to agree would lead to a sentence less severe than life without release. "[T]he almost invariable assumption of the law," however, is "that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). Here, the district court instructed the jury: "In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release." J.A. 44. The jury is presumed to have followed that instruction. See, *e.g.*, *Shannon* v. *United States*, 512 U.S. 573, 585 (1994) (jury presumed to have followed instruction not to consider consequences of finding defendant not guilty by reason of insanity). Thus, even if the jury had believed that the court would impose a lesser sentence if the jury reported itself deadlocked, the instructions required it to set aside what the court might do and report that it was unable to agree, if in fact that was the case. Alternatively, if the jury had believed that its only option, upon the failure to agree unanimously on death or life without release, was to return a (non-unanimous) lesser sentence recommendation, it should have returned that recommendation if it in fact

failed to agree. That result would have been to petitioner's benefit.

Even if the jury disregarded its instructions and allowed its recommendation to be influenced by an erroneous understanding of the effect of deadlock, petitioner cannot establish prejudice. As the court of appeals noted, "the outcome could just as easily have turned out the other way with the jurors not supporting the death sentence convincing the death-prone jurors to impose life without the possibility of release." J.A. 106. When the effect of any error is so uncertain, petitioner cannot meet his burden to show actual prejudice. *Olano*, 507 U.S. at 739-740; cf. *Romano* v. *Oklahoma*, 512 U.S. 1, 14 (1994) (rejecting claim that improperly admitted evidence rendered sentencing fundamentally unfair because "[i]t seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so").

In an effort to show prejudice, petitioner has submitted two affidavits purporting to show that some jurors agreed to the death recommendation because they were concerned that a hung jury would result in a sentence less severe than life without release. See J.A. 66-68, 78-79. The court of appeals correctly ruled that petitioner could not rely on those affidavits to undermine the jury's verdict.[5] Post-trial juror affidavits regarding internal deliberations, and the effect of instructions on those deliberations, are precluded by Federal Rule of Evidence 606(b). Although the rules of evidence are not applicable to capital sentencing proceedings, see Fed. R. Evid. 1101(d)(3), Rule 606(b) codifies a

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[5] Petitioner did not seek, nor did this Court grant, certiorari on that distinct legal issue. Compare Pet. (i) (Questions Presented) and Pet. Reply Br. 7 n.4 (claiming the juror affidavit issue was fairly included) with J.A. 126 (limiting questions presented). Therefore, this Court should not review the ruling of the court of appeals that the affidavits cannot be used "to undermine the jury verdict." J.A. 104. See Sup. Ct. R. 14.1(a), 24.1(a); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984).

longstanding rule of federal practice predating enactment of the federal rules. See *Tanner* v. *United States*, 483 U.S. 107, 121 (1987); *Mattox* v. *United States*, 146 U.S. 140 (1892) (applying rule in federal capital case and admitting affidavits concerning *external* influence). The policies behind Rule 606(b) and the pre-codification rule apply with equal strength to capital sentencing proceedings. Use of juror affidavits to impeach a sentence would promote harassment of jurors, chill frankness and freedom of discussion in the jury room, deter jurors from returning unpopular verdicts, undermine the community's trust in a system that relies on the decisions of lay-people, and disrupt the finality of capital sentencing. See *Tanner*, 483 U.S. at 120-121; *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915).

The requirement of heightened reliability in death penalty cases, on which petitioner relies (Br. 25 n.19), in fact supports application of the rule in capital sentencing. There is no reason to assume the accuracy of the statements in the affidavits on which petitioner relies, and there may be reason to question it. As the court of appeals explained:

> Jury deliberations entail delicate negotiations where majority jurors try to sway dissenting jurors in order to reach certain verdicts or sentences. An individual juror no longer exposed to the dynamic offered by jury deliberations often may question his vote once the jury has been dismissed. Such self-doubt would be expected once extrinsic influences bear down on the former jurors, especially in decisions of life and death.

J.A. 105-106. Because of that complex dynamic, reliance on post-verdict affidavits may decrease, rather than increase, the reliability of the capital sentencing process.

2. Although petitioner does not dispute that he did not object to the instructions he now attacks, he mistakenly maintains (Br. 19 & nn.13 & 14, 26-28 & n.22) that he is nonetheless free from the constraints of plain error review.

When a party forfeits a claim, however, the plain error rule limits an appellate court's power to grant relief. *Olano*, 507 U.S. at 731. That principle applies to petitioner's claim of instructional error because he failed to object to the instructions before the jury retired to consider its verdict on the sentence. See *Johnson*, 520 U.S. at 465; Fed. R. Crim. P. 30.

Petitioner argues (Br. 19 n.14) that he did not forfeit the claim that the jury instructions actually given were erroneous because he requested a separate instruction that the jury's failure to agree on the sentence would result in a court-imposed sentence of life imprisonment without release. The denial of the requested instruction is preserved as an independent claim (which he now asserts before this Court, see Part II, *infra*). But it cannot do service for a timely objection to other instructions actually given. See 2 Charles Alan Wright, *Federal Practice and Procedure*: *Criminal* § 484, at 702 (2d ed. 1982) ("A party who has requested an instruction that has not been given is not relieved of the requirement that he state distinctly his objection to the instruction that is given."); *e.g.*, *United States* v. *Wong*, 40 F.3d 1347, 1373 (2d Cir. 1994) ("we have made it clear that a defendant's requested instructions do not substitute for specific objections to the court's instructions") (quotation marks omitted), cert. denied, 514 U.S. 1113 (1995).

After petitioner's requested jury instruction was denied, he could have made a separate objection to the instructions that remained, explaining to the court his theory that they would have misled the jury about the effect of deadlock. He did not do so. A party is required, however, to object to "any portion of the charge or omission therefrom * * * stating distinctly the matter to which that party objects and the grounds of the objection." Fed. R. Crim. P. 30. By remaining silent about the alleged misleading instructions before the jury retired to deliberate, petitioner deprived the district court of an opportunity to cure the supposed ambiguity.

Petitioner admits that he was aware of the alleged flaws in the jury instructions but chose not to object to them (Br. 7, 9). Indeed, petitioner contributed to any error that did exist in the instructions: petitioner requested instructions and verdict forms that presented a lesser-sentence option to the jury, both in his preliminary requests (3 R. 616-619, 625-626, 650-654) and in his final requests (6 R. 1144, 1151). Petitioner continued to advance the lesser-sentence option in his written and oral objections to the court's charge. See J.A. 18, 25-26, 107 n.10.

If a request for one instruction could substitute for an objection to a different instruction, litigants could reap the benefit of potentially erroneous instructions without also accepting the risks of those instructions. The instructions to which petitioner declined to object gave the jury the third option of recommending a sentence less severe than life without release, an option that offered a possible strategic benefit to petitioner. Although petitioner contends (Br. 17-18, 19 n.13) (and we do not dispute), that the third option was not available for the murder petitioner committed, see note 2, *supra*, the court of appeals explained that, at the time petitioner was sentenced, "no clearly established law answered the question of whether § 3593 [which provides for a lesser sentence option] or the substantive criminal statute under which the defendant is convicted [18 U.S.C. 1201, which does not authorize a lesser-sentence option,] provides the correct sentencing options." J.A. 110-111. If in fact the jury had chosen the lesser-sentence option, petitioner could have argued that the option was available on the theory that the sentencing provisions of the FDPA take precedence over the provisions of 18 U.S.C. 1201.

For the same reason, the fact that petitioner raised the claim that the jury instructions were misleading in a motion for a new trial and a motion to reconsider the denial of that motion does not excuse his failure to raise the issue before the jury retired to consider its verdict on the sentence. See

Fed. R. Crim. P. 30. Failure to raise a potential problem in jury instructions until after the jury has rendered a verdict frustrates the interests in judicial economy and fair play that underlie the objection requirement. Petitioner is not assisted by his reliance (Br. 19 n.14) on *Leary* v. *United States*, 395 U.S. 6 (1969). In that case, the defendant raised the alleged error in a motion for directed verdict, before the jury retired to consider its verdict. *Id.* at 32.

Petitioner also contends (Br. 19 n.14, 26-28 & n.22) that plain error review is inapplicable because the alleged instructional error was an "arbitrary factor" under 18 U.S.C. 3595(c)(2)(A), and reversal for arbitrary factors is required even absent an objection.[6] Section 3595(c)(2)(A) provides that a reviewing court shall remand for resentencing if it finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." The phrase "arbitrary factor" "gathers meaning from the words around it." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). In context, an "arbitrary factor" is an irrelevant consideration akin to passion or prejudice, not a misunderstanding of the jury instructions. That meaning is confirmed by examination of the origin of the phrase. As petitioner notes (Br. 26), the concept of review for "passion, prejudice, or any other arbitrary factor" was drawn from the Court's opinions in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), which approved a similar review mandated by the Georgia death penalty statute. The *Gregg* Court described that review as a check to ensure that similar cases were treated similarly, not an examination for ordinary error. See 428 U.S. at 204-205

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[6] Petitioner did not raise that statutory claim in his petition for certiorari, and it is therefore not properly before this Court. See note 5, *supra*.

(opinion of Stewart, Powell, & Stevens, JJ.); *id.* at 223-224 (opinion of White & Rehnquist, JJ., & Burger, C.J.).[7]

Section 3595(c)(1) governs the court of appeals' disposition of a death-sentence appeal. In separate clauses, it requires consideration of "all substantive and procedural issues raised on the appeal of a sentence of death," and "the influence of passion, prejudice, or any other arbitrary factor." The statute also provides for reversal based on "legal error" (Section 3595(c)(2)(C)) or "the influence of passion, prejudice, or any other arbitrary factor" (Section 3595(c)(2)(A)). Petitioner's attempt to recast an ordinary legal error in the instructions as an arbitrary factor is inconsistent with the distinction drawn in the statute. Further, if petitioner were correct that "arbitrariness" can sweep in generic claims of legal error in the sentencing proceeding and that it requires reversal without regard to the plain error rule, it would vitiate the requirement of timely objection to preserve legal error, which Congress clearly intended to apply under the FDPA. See 18 U.S.C. 3595(c)(2)(C) (authorizing reversal for "any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure").[8]

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[7] Petitioner argues (Br. 26-28 & n.22) that "arbitrary factor" as used in Section 3595(c)(2)(A) should be construed to include instructional errors because Congress must be presumed to have adopted the interpretations given that term by courts in other jurisdictions that modeled their statutes after the Georgia statute upheld in *Gregg*. There is no such presumption. Although the interpretation that the courts of *Georgia* had accorded the phrase might be relevant to its meaning as it is used in Section 3595, see *Carolene Prods. Co.* v. *United States*, 323 U.S. 18, 26 (1944); but see *Shannon*, 512 U.S. at 581-582, the interpretation by courts of other jurisdictions is not. Petitioner has not cited any Georgia law holding that an instructional error is an arbitrary factor.

[8] Even if petitioner were correct that an instructional error may be an arbitrary factor, an objection would still be required to preserve the error for appeal. Fed. R. Crim. P. 52(b). Petitioner incorrectly argues (Br. 27 n. 22) that Congress must be presumed to have adopted Georgia's procedural

II. PETITIONER WAS NOT ENTITLED TO AN INSTRUCTION THAT THE COURT WOULD IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT RELEASE IF THE JURY COULD NOT UNANIMOUSLY AGREE ON A SENTENCING RECOMMENDATION

The court of appeals correctly upheld the district court's refusal to instruct the jury that its failure to agree on a unanimous sentencing recommendation would result in a court-imposed sentence of life without release. Petitioner's claimed entitlement to that instruction requires him to show both that: (1) the FDPA mandates that the court impose sentence if the jury deadlocks; and (2) jurors must be instructed when they begin deliberations on what will happen if those deliberations ultimately fail to achieve unanimity. Each premise is incorrect.

A. The FDPA Permits A New Capital Sentencing Hearing If The Jury Fails To Return A Unanimous Sentencing Recommendation

Petitioner's proposed instructions (J.A. 13-15) incorrectly state the law, because, if a jury fails to make a unanimous sentencing recommendation, the government may seek a new capital sentencing hearing. "It has been established for [175] years, since the opinion of Justice Story in *United States* v. *Perez*, [22 U.S. (9 Wheat.) 579] (1824), that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of

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rule that review for passion, prejudice, or any other arbitrary factor must be conducted even when the defendant has not objected. That is particularly true because, under the Georgia statute, appellate review for arbitrary factors was mandatory, see Ga. Code Ann. § 27-2537(c) (Harrison 1978); *Gregg*, 428 U.S. at 204, but, under the federal statute, appellate review occurs only "upon appeal by the defendant." 18 U.S.C. 3595(a).

public justice would otherwise be defeated.'" *Richardson* v. *United States*, 468 U.S. 317, 323-324 (1984) (citation omitted). "The Government, like the defendant, is entitled to resolution of the case by verdict from the jury." *Id.* at 326. Thus, although no federal statute or procedural rule expressly allows retrial following a hung jury on a substantive criminal charge, it has long been the rule that the government is entitled to retry a case if the jury cannot reach a unanimous verdict.

The FDPA accommodates that background rule. Section 3593(b)(1) provides that the penalty phase hearing ordinarily should be conducted "before the jury that determined the defendant's guilt," but Section 3593(b)(2) permits the penalty phase to be conducted "before a jury impaneled for the purpose of the hearing if * * * the jury that determined the defendant's guilt was discharged for good cause." The phrase "discharged for good cause" encompasses the discharge of the guilt-phase jury because it has been unable to agree on a unanimous sentencing decision. Cf. *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978) ("mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict" has "long [been] considered the classic basis for a proper mistrial").

Moreover, the FDPA requires jury unanimity for any sentencing recommendation. See 18 U.S.C. 3593(e) ("jury by unanimous vote * * * shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or [to] some other lesser sentence"). By the specific terms of the statute, therefore, there can be no jury sentencing recommendation without unanimous agreement. The legal theory underlying petitioner's proposed instructions—that "Unanimity [is] Required Only for [a] Death Sentence [Recommendation]" (J.A. 14)—thus contravenes the plain statutory language. The proposed instructions themselves embodied the same error. J.A. 13 (requested instruction that if "any" juror "is not persuaded

that justice demands Mr. Jones's execution, then the jury must * * * fix Mr. Jones' punishment at life in prison without any possibility of release."); J.A. 14 (requested instruction that if "even a single juror" is "not persuaded beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death.").

Contrary to petitioner's argument (Br. 34-35), his interpretation is not compelled by the second sentence of 18 U.S.C. 3594. That Section provides:

> Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. *Otherwise, the court shall impose any lesser sentence that is authorized by law.* Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. 3594 (emphasis added). Read in the context of the preceding sentence and the statute as a whole, the italicized sentence means that, if the jury, in accordance with Section 3593(e), unanimously recommends "some other lesser sentence," 18 U.S.C. 3593(e), rather than death or life in prison, the court shall impose "any lesser sentence that is authorized by law," 18 U.S.C. 3594.[9] In other words, if the jury unanimously recommends death or life in prison, the judge must impose the recommended sentence. If the jury unanimously recommends less severe punishment, the court, not the jury, fixes the actual term of imprisonment.

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[9] The "notwithstanding" sentence that follows empowers the judge to impose a sentence of life without release (rather than a "lesser sentence") if the substantive criminal statute carries a maximum imprisonment term of life.

Petitioner contends (Br. 34) that the italicized sentence serves an additional purpose, beyond providing that the court (rather than the jury) shall fix the actual term of imprisonment in cases when the jury recommends punishment less severe than life in prison. In his view, the sentence also means that jury deadlock on the more severe sentencing options requires the court to impose the least severe punishment option. Petitioner's reading of the sentence is incorrect, not simply because it overlooks the background rule that retrial is generally permitted following a hung jury, but more importantly because it fails to take account of the remainder of the statute. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569-570 (1995) (statute must be read as a whole).

Petitioner's default sentencing rule would nullify the jury-unanimity requirement in Section 3593(e), which applies to all sentencing recommendations under the statute, including imprisonment for a term of years less than life. Petitioner's rule also runs counter to Section 3593(b)(2)(C), which allows sentencing by a specially impaneled jury when "the jury that determined the defendant's guilt was discharged for good cause." See generally *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (court should not read statute in a way that would "emasculate an entire section"); *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 698 (1995) (noting "reluctance to treat statutory terms as surplusage").[10]

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[10] The sentence in H.R. Rep. No. 467, 103d Cong., 2d Sess. 9 (1994), on which petitioner relies (Br. 34-35), does not purport to interpret the second sentence of 18 U.S.C. 3594 and is included in the explanatory material not for that Section but for 18 U.S.C. 3593. The Court should not rely on that remark to defeat the understanding of the statute that is clear from the language of the statute as a whole, construed in light of the background rule permitting retrial after hung juries. Cf. *Shannon*, 512 U.S. at 583 ("To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process.").

In notable contrast to the FDPA, the provisions of many capital punishment statutes in States using juries to decide or recommend the appropriate punishment reflect petitioner's proposed default procedure in the event of jury deadlock. Most capital punishment States that use a binding jury sentencing procedure provide in simple and direct language that jury deadlock as to the appropriate sentence results in a court-imposed sentence. See App. A, *infra*. A few other state statutes also suggest that result in far clearer terms than those on which petitioner relies here, because those statutes establish a life or other prison term as the presumptive sentence absent unanimous jury findings and a death sentence recommendation. See App. B, *infra*. California's death penalty statute expressly provides for a new capital sentencing hearing in the event the first jury deadlocks in its findings or recommendation. Cal. Penal Code § 190.4(a) and (b) (West 1988). In Kentucky, where the statute is silent, the failure of a jury to reach a unanimous verdict on the sentence results in a new sentencing hearing. See *Skaggs* v. *Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985), cert. denied, 476 U.S. 1130 (1986). In Connecticut, the trial judge has discretion to order a new sentencing hearing. See *State* v. *Breton*, 663 A.2d 1026, 1043, 1049-1050 n.40 (Conn. 1995).[11]

Congress could have used language as simple and direct as that used in state statutes had it meant to preclude a second sentencing hearing and to return the matter to the court to impose a non-death sentence if the jury deadlocks. Instead, Congress expressly required that a jury decide "by unani-

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[11] States employing juries in a purely advisory capacity either allow non-unanimous recommendations, see Del. Code Ann., tit. 11, § 4209(c)(3)(b) and (c)(4) (1995); Fla. Stat. Ann. § 921.141(2) and (3) (West 1985 & Supp. 1996), leave the matter entirely to the court in the event of deadlock, see Ind. Code Ann. § 35-50-2-9(f) (Michie 1994 & Supp. 1998), or expressly allow a new jury to be empaneled, see Ala. Code § 13A-5-46(g) (1994).

mous vote" before it could recommend either death, life without release, or a lesser sentence, 18 U.S.C. 3593(e), and permitted the penalty phase to be conducted "before a jury impaneled for the purpose of the hearing if * * * the jury that determined the defendant's guilt was discharged for good cause," 18 U.S.C. 3593(b)(2). Coupled with the background rule that the prosecution may seek a new trial following a hung jury even absent express statutory authority, those provisions refute petitioner's proposed reading of the statute to preclude by implication a new sentencing hearing if the first jury hangs.

B. The Jury Need Not Be Instructed On The Consequences Of A Breakdown In Its Deliberations

Even if the court is required to impose a sentence other than death if the jury hangs, petitioner has no right to an instruction informing the jury of that requirement. Nothing in the Constitution or federal law mandates that jurors be told of the consequences of their failure to achieve unanimity. To the contrary, such an instruction would undermine the strong societal interest in obtaining a unanimous recommendation in a capital case, in order for the jury to serve as the conscience of the community in deciding whether the defendant should live or die. See *Lowenfield*, 484 U.S. at 237-238 (citing *Allen*, 164 U.S. at 501-502, and *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968)).

1. Petitioner does not have a statutory right to an instruction on deadlock. When Congress wishes to require a jury instruction, in capital and non-capital cases alike, it plainly knows how to do so. See, *e.g.*, 21 U.S.C. 848(k) (jury "is never required to impose a death sentence and the jury shall be so instructed"); 18 U.S.C. 3501(a) (trial court "shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances"). In this very statute, Congress expressly required the jury to be instructed not to consider race, color, religious beliefs, na-

tional origin, or sex in determining the appropriate sentence, see 18 U.S.C. 3593(f), but Congress nowhere even hinted that the jury should be instructed on the consequences of deadlock. Cf. *Shannon*, 512 U.S. at 580 ("The Act's text * * * gives no support to Shannon's contention that an instruction informing the jury of the consequences of an [not-guilty-by-reason-of-insanity] verdict is required.").

Petitioner mistakenly asserts (Br. 36-37) that an instruction is required by the statutory provision that, if the defendant appeals his sentence, the court of appeals shall remand for resentencing if it finds that the sentence was imposed based on "passion, prejudice, or any other arbitrary factor." See 18 U.S.C. 3595(c)(2). That language, which speaks only to appellate review upon the election of the defendant, cannot support the construction petitioner would put on it. Indeed, petitioner cites no case so interpreting that or similar language. The few courts that have required an instruction of the type petitioner seeks have done so either under their supervisory authority, see *State* v. *Ramseur*, 524 A.2d 188, 284 (N.J. 1987), or under the mistaken belief that an instruction is required by the Eighth Amendment, see *State* v. *Williams*, 392 So. 2d 619, 634-635 (La. 1980); *Whalen* v. *State*, 492 A.2d 552, 562 (Del. 1985).

2. Nor is there any basis for requiring the instruction that petitioner seeks as an exercise of supervisory power. Congress has crafted a comprehensive set of procedures to govern imposition of the death penalty and has declined to mandate an instruction on deadlock. "Under these circumstances, [the Court is] reluctant to depart from well-established principles of criminal practice without more explicit guidance from Congress." *Shannon*, 512 U.S. at 587 (rejecting use of supervisory authority).

In most capital punishment States that have addressed the issue, statutory or decisional law precludes or discourages informing jurors that the result of their failure to achieve unanimity will be a court-imposed sentence. See,

e.g., Tenn. Code Ann. § 39-13-204(h) (1997 & Supp. 1998) ("The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment."); Tex. Crim. P. Code Ann., art. 37.071.2(a) (West Supp. 1999) (similar); *State* v. *McCarver*, 462 S.E.2d 25, 42 (N.C. 1995), cert. denied, 517 U.S. 1110 (1996); *Oken* v. *State*, 612 A.2d 258, 265 (Md. 1992), cert. denied, 507 U.S. 931 (1993); *People* v. *Kimble*, 749 P.2d 803, 825-826 (Cal.) (decided under prior version of statute requiring court-imposed sentence in event of deadlock), cert. denied, 488 U.S. 871 (1988); *Brogie* v. *State*, 695 P.2d 538, 547 (Okla. Crim. App. 1985); *Coulter* v. *State*, 438 So. 2d 336, 346 (Ala. Crim. App. 1982), aff'd, 438 So.2d 352 (Ala. 1983); *State* v. *Adams*, 283 S.E.2d 582, 587 (S.C. 1981), cert. denied, 464 U.S. 1023 (1983); *Justus* v. *Commonwealth*, 266 S.E.2d 87, 92 (Va. 1980), cert. denied, 455 U.S. 983 (1982). Contra *Ramseur*, *supra*; *Whalen*, *supra*; *Williams*, *supra*; Mo. Ann. Stat. § 565.030.4 (West 1979); cf. Or. Rev. Stat. § 163.150(2)(a) (1990 & Supp. 1998) (quoted at p. 5a, *infra*).

State cases rejecting such instructions have explained that they involve a "procedural matter" addressed to the court and not to the jury. *E.g.*, *Justus*, 266 S.E.2d at 92. Courts have also recognized that the instructions would be "an open invitation for the jury to avoid its responsibility and to disagree." *Ibid.* As a result, the instructions would frustrate the strong interest in jury unanimity, which is a bedrock principle of our jury system.

3. The Constitution does not override considered legislative and judicial judgments that instructions such as those proposed by petitioner here would not further, but would undermine, the goal of meaningful jury deliberations in capital sentencing cases. Every federal court of appeals considering the matter has rejected the argument that the Constitution requires a jury instruction on the consequences of jury deadlock. See, *e.g.*, *Coe* v. *Bell*, 161 F.3d 320, 339-340

(6th Cir. 1998); *United States* v. *Chandler*, 996 F.2d 1073, 1088-1089 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994); *Zettlemoyer* v. *Fulcomer*, 923 F.2d 284, 309 (3d Cir.), cert. denied, 502 U.S. 902 (1991); *Evans* v. *Thompson*, 881 F.2d 117, 123-124 (4th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

The Eighth Amendment to the Constitution imposes two broad limitations on capital sentencing schemes: (1) either the guilt determination or the sentencing process "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Lowenfield*, 484 U.S. at 244 (quotation marks and citation omitted); and (2) the sentencing decision must rest on an "individualized inquiry" under which "the character and record of the individual offender and the circumstances of the particular offense" are considered, *McCleskey* v. *Kemp*, 481 U.S. 279, 303 (1987). See *Romano*, 512 U.S. at 6-7. To prevent arbitrariness, the Constitution precludes some instructions that "improperly describe[ ] the role assigned to the jury by local law" and thus mislead the jury "in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Id.* at 9. Due process may also require instructions or other information on the consequences of a particular sentence, if necessary to prevent a prosecution argument in favor of the death penalty from creating a false or misleading impression. See *Simmons* v. *South Carolina*, 512 U.S. 154 (1994) (because prosecution relied on defendant's future dangerousness to support death penalty, defendant was entitled to instruction or other information that life sentence carried no possibility of parole).

This Court has never suggested, however, that the Constitution requires that the jury be instructed on the effects of a breakdown in the deliberative process that precludes jury unanimity. To the contrary, the Court has held that,

even in a jurisdiction in which jury deadlock returns the matter to the judge for sentencing, "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Lowenfield*, 484 U.S. at 238 (quoting *Witherspoon*, 391 U.S. at 519). The Court in *Lowenfield* thus approved the giving of an *Allen* charge to a capital sentencing jury that initially reported an inability to agree on the appropriate sentence. It approvingly quoted the *Allen* Court's observation that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." 484 U.S. at 237 (quoting *Allen*, 164 U.S. at 501). The Court explained that the interest in encouraging full deliberations aimed at achieving jury unanimity exists "even in capital cases such as this one and *Allen*." *Id.* at 238. Although *Lowenfield* differed from *Allen* because a jury sentencing deadlock under the Louisiana statute precluded a death penalty retrial, and deadlock at the guilt phase in *Allen* would have required a new jury trial, the Court did not find that distinction "dispositive." *Ibid.*

Lowenfield illustrates that, as long as a capital sentencing system meaningfully narrows the class of death-eligible defendants and allows individualized consideration of all relevant mitigating circumstances, this Court will defer to legislative and judicial judgments regarding what information should be presented to a capital sentencing jury. See also *Romano*, 512 U.S. at 7 ("Within these constitutional limits, 'the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.'") (citation omitted); *Buchanan* v. *Angelone*, 118 S. Ct. 757, 761 (1998) (recognizing discretion to tailor instructions in selection phase of capital case as long as "restrictions on the jury's sentencing determination [do] not preclude the jury from being able to give effect to mitigating evidence"); *Simmons*, 512 U.S. at 168 (plurality opinion of Blackmun, J.)

(acknowledging "the broad proposition that we generally will defer to a State's determination as to what a jury should and should not be told about sentencing"); *California* v. *Ramos*, 463 U.S. 992, 1013 (1983) (deferring to state judgment permitting jury to be informed of governor's power to commute life sentence because such an instruction "does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation").

Petitioner's claim in this case has even less foundation than those this Court has rejected, because his proposed instruction had nothing to do with mitigation (as in *Buchanan*) or sentencing consequences (as in *Ramos*). The instructions given by the district court in this case fully apprised the jurors of their obligation to consider mitigating circumstances and of the legal effect of their recommendation. The Constitution does not require that jurors be given additional, purely procedural, information about what will happen if their internal deliberations break down.[12]

III. THE SUBMISSION TO THE JURY OF ALLEGEDLY DUPLICATIVE AND VAGUE AGGRAVATING FACTORS DOES NOT ENTITLE PETITIONER TO RELIEF

As petitioner acknowledges (Br. 41), Congress has expressly provided that federal death sentences are not to be

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[12] Petitioner argues (Br. 38-39 n.30) that the absence of an instruction explaining the result of jury deadlock forced the jury into an impermissible "all or nothing" choice (as in *Beck* v. *Alabama*, 447 U.S. 627 (1980)), and gave the jury "materially false" information (as in *Townsend* v. *Burke*, 334 U.S. 736 (1948)). Neither proposition is sound. *Beck* applies only to an improper "all or nothing" choice between innocence and a capital conviction, see *Schad* v. *Arizona*, 501 U.S. 624, 647 (1991), which was not the case here. The jury's possible sentencing verdicts were laid before it and jurors were not forced into an "all or nothing" verdict by lack of information about the consequences of deadlock. Nor was there was any misleading instruction on the topic of deadlock.

set aside based on errors that are found to be harmless beyond a reasonable doubt. 18 U.S.C. 3595(c)(2) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless"); see also Fed. R. Crim. P. 52(a). This Court has recognized that such harmless error review is permitted by the Constitution. See *Clemons* v. *Mississippi*, 494 U.S. 738, 752-754 (1990). A reviewing court may affirm a death sentence, despite the jury's weighing of vague or otherwise improper aggravating factors if the court determines beyond a reasonable doubt that the sentence would have been the same either if the factor had never been submitted or if the factor had been "properly defined in the jury instructions." *Id.* at 753-754.

Petitioner contends (Br. 39-49) that the court of appeals improperly conducted harmless-error analysis after finding invalid aggravating factors and that the record cannot support a harmless-error finding. In fact, there was no error in the non-statutory aggravating factors that the district court submitted to the jury. Those factors—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," and her "personal characteristics and the effect of the offense on her family"—were neither vague, duplicative, nor overbroad.[13] If any such flaw did exist, however, it is beyond a reasonable doubt that petitioner's sentence would have been the same even if those two non-statutory aggravating factors had been more precisely defined or had never been submitted to the jury.

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[13] As the prevailing party in the court of appeals, the United States is entitled to defend the judgment on any ground properly raised in the court of appeals. See, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). In that court, the government argued that the non-statutory factors are valid. Gov't C.A. Br. 77-87.

A. The Non-Statutory Aggravating Factors Were Constitutionally Valid

1. Aggravating factors may have two roles in a capital sentencing system. First, an aggravating factor may be used to narrow the class of defendants who are eligible for the death penalty. *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983). Second, an aggravating factor may be considered by the sentencer in the selection decision, *i.e.*, the determination whether a defendant who is eligible for the death penalty will in fact be sentenced to death. *Id.* at 878-879. An unduly vague aggravating factor violates the Eighth Amendment because it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U.S. 238 (1972)." *Maynard* v. *Cartwright*, 486 U.S. 356, 361-362 (1988); *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994) (the "controlling objective" in vagueness analysis is the need to "ensure that the [capital sentencing] process is neutral and principled so as to guard against bias or caprice in the sentencing decision").

A sentencing "factor is not unconstitutional if it has some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" *Tuilaepa*, 512 U.S. at 973 (quoting *Jurek* v. *Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring in the judgment)). The Court has invalidated as unduly vague "only a few factors," which are "quite similar" to each other. *Id.* at 974. See, *e.g.*, *Maynard*, 486 U.S. at 363-364 (whether murder was "heinous, atrocious, or cruel"); *Godfrey* v. *Georgia*, 446 U.S. 420, 427-429 (1980) (whether murder was "outrageously or wantonly vile, horrible and inhuman"). In contrast, the Court has upheld many other factors against vagueness challenges, in recognition of the authority of legislatures to "rely upon the jury, in its sound judgment, to exercise wide discretion." *Tuilaepa*, 512 U.S.

at 974 (collecting cases). "Because the proper degree of definition of eligibility and selection factors often is not susceptible of mathematical precision, our vagueness review is quite deferential." *Id.* at 973 (quotation marks and citation omitted).

2. The non-statutory factors in this case are consistent with the requirements of the Constitution. Factor 3(B) asked the jury to consider as an aggravating factor the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas." J.A. 53. Those considerations focused on the special vulnerability of the victim. Factor 3(C) asked the jury to consider as an aggravating factor the victim's "personal characteristics and the effect of the instant offense on [her] family." *Ibid.* Those considerations focused on the uniqueness of the victim and the specific harm caused to the victim's family. The jury's consideration of both of those subjects is authorized by the FDPA. See 18 U.S.C. 3593(c) (allowing presentation at sentencing of information "as to any matter relevant to the sentence"); 18 U.S.C. 3593(d) (allowing jury to consider not only statutory aggravating factors but also "any other aggravating factor for which notice has been provided" by the prosecution). The FDPA treats other reasons for victim vulnerability as a statutory aggravating factor. 18 U.S.C. 3592(c)(11) ("victim was particularly vulnerable due to old age, youth, or infirmity"). And the statute expressly authorizes victim impact as an aggravating factor. 18 U.S.C. 3593(a) (non-statutory factors "may include factors concerning the effect of the offense on the victim and the victim's family"). The jury's consideration of those factors is entirely proper under the Constitution. See *Payne* v. *Tennessee*, 501 U.S. 808, 817, 827 (1991) (allowing capital sentencing jury to hear and consider evidence of the "personal characteristics of the victim and the emotional impact of the crimes on the victim's family").

Although the court of appeals recognized that capital sentencing juries properly may consider "vulnerability and victim impact evidence," it held that "the language used in 3(B) and 3(C) does not accomplish this goal." J.A. 117-118. The court believed the factors as drafted were invalid because they were "duplicative" and "vague and overbroad." J.A. 118-119. They were duplicative, according to the court, because the "plain meaning of the term 'personal characteristics,' used in 3(C), necessarily includes 'young age, slight stature, background, and unfamiliarity,' which the jury was asked to consider in 3(B)." J.A. 118. They were vague and overbroad, according to the court, because they "fail[ed] to guide the jury's discretion, or distinguish this murder from any other murder" and were not accompanied by any "further definition or instruction" necessary to limit "the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*." J.A. 118-119 (quoting *Maynard* v. *Cartwright*, 486 U.S. at 361-362). Those conclusions are incorrect.

Duplication. The factors in this case were not duplicative. A jury that found both of those factors would reasonably understand that the specific victim characteristics listed in Factor 3(B) (the victim's youth, small size, background, and newness to the area) were those that made her a vulnerable victim, while the reference to her "personal characteristics" in Factor 3(C) was intended to capture separately her uniqueness as an individual human being. The latter reference accords with this Court's use in *Payne* of the phrase "personal characteristics" to denote the victim's "uniqueness as an individual human being," which a jury may consider to understand the "specific harm caused by the crime in question." 501 U.S. at 817, 823, 825. There is no reason to think that the jury would have understood the reference to "personal characteristics" differently, particularly since Factor 3(C) went on to refer to the impact of the crime on the victim's family and thus made clear that it covered the effects of the crime.

Vagueness. Eighth Amendment "vagueness review is quite deferential" and is satisfied if the factors have "some common-sense core of meaning." *Tuilaepa*, 512 U.S. at 973 (quotation marks and citation omitted). Under that standard, the factors at issue are not vague. The jury would have had no difficulty understanding the meaning of the references to McBride's "young age," "slight stature," "background," and "unfamiliarity with San Angelo, Texas." Those characteristics were "phrased in conventional and understandable terms." *Tuilaepa*, 512 U.S. at 975-976 (factors including "circumstances of the crime," "presence or absence of criminal activity by the defendant," and "age of the defendant" not vague). The jury had a particularly concrete understanding of McBride's characteristics as described in the aggravating factor, because, without objection, the jury had heard testimony during the guilt phase that McBride was only 19 years old; was tiny—5 feet 2 inches tall, weighing only 105 pounds, with a 20 or 22 inch waist; had entered the Army after only spending six months in college; had been in the Army only one year; and had been transferred to San Angelo only eight days before her murder. See 16 R. 804-808. The jury also heard evidence of how petitioner used his size and strength to overpower her; ambush a would-be rescuer and beat him into unconsciousness; confine her in a closet after sexually abusing her; force her to accompany him on a drive some 20 miles out of town while searching for a place to murder her and dispose of her body; and then strike her with a tire iron to take her life. See pp. 1-3, *supra*. McBride's diminutive size and unfamiliarity with her surroundings doubtless heightened her terror and feelings of vulnerability while petitioner held her captive and drove her to the scene of her murder.

The jury also would have had no difficulty understanding the meaning of McBride's "personal characteristics and the effect of the offense on her family." As noted above, this Court itself has used those phrases to describe permissible

evidence that the capital sentencer may properly consider. *Payne*, 501 U.S. at 817, 827. In light of the evidence presented to it, the jury could readily form a judgment on the degree of specific harm caused by petitioner's crime and determine how much weight to accord to that harm in its deliberations on whether to recommend a capital sentence.

It is not constitutionally problematic that the jury was not given specific guidance about how to ascertain and weigh the factors. Although death-eligibility aggravating factors "must require an answer to a factual question" to perform their narrowing function, selection-stage factors need not conform to such a rigid model in order to satisfy Eighth Amendment vagueness standards. *Tuilaepa*, 512 U.S. at 978. In the FDPA, non-statutory factors are not needed to fulfill the narrowing function required by the Eighth Amendment; that function is instead fulfilled by the requirement that the jury must find at least one statutory aggravating factor. 18 U.S.C. 3593(d) ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law."). The non-statutory factors then form part of the weighing of aggravating against mitigating factors in the selection stage. 18 U.S.C. 3593(e). In the selection stage, a capital jury may be directed to a general subject matter, *Tuilaepa*, 512 U.S. at 978, and "need not be instructed how to weigh any particular fact in the capital sentencing decision." *Id.* at 979. The factors here provided more specific direction to the jury than that, because each referred to a specific factual area and required that the jury find that it aggravated the crime before the factor could be weighed.

Overbreadth. The factors also are not overbroad. The court of appeals suggested that the factors at issue fail to "distinguish this murder from any other murder." J.A. 118. Unconstitutional overbreadth in this setting, however, means only that the "sentencer fairly could conclude that an aggravating [factor] applies to *every* defendant eligible for

the death penalty." *Arave* v. *Creech*, 507 U.S. 463, 473-474 (1993) (giving as examples the undefined adjectives "heinous," "vile," etc. in *Maynard*, *supra*, and *Godfrey*, *supra*). It is true that all murders have victims and all killings cause pain to survivors. But it is hardly accurate to say that, in each and every murder, the victim's age, size, and background, contributed to her vulnerability in a way that exacerbated the character of the killing, as in this case. Nor is it accurate to say that, because each murder extinguishes a particular life and causes pain to surviving friends and family, juries are barred from considering the loss of the unique individual who was killed and the particular suffering experienced by her family. These factors are inherently individualized in every case.

B. Any Error In The Submission Of The Non-Statutory Aggravating Factors Was Harmless Beyond A Reasonable Doubt

Alternatively, assuming error in the non-statutory factors, any such error was harmless beyond a reasonable doubt. The Court has stated that "[a] vague aggravating factor used in the weighing process * * * creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer* v. *Black*, 503 U.S. 222, 235 (1992). But the Court has also ruled that such an error is subject to harmless-error analysis. See *id.* at 237; *Clemons*, 494 U.S. at 752-754. In this case, the error is harmless under an approach that asks either (1) whether the jury would have imposed a death sentence if the invalid factors were defined properly, or (2) whether the jury would have imposed a death sentence in the absence of the invalid factors.

1. A reviewing court may find harmless error if it determines "beyond reasonable doubt the result would have been the same had the [invalid] aggravating circumstance been

properly defined in the jury instructions." See *Clemons*, 494 U.S. at 754. In this case, with minor changes, the factors at issue could have been drawn more precisely to set forth specific propositions for the jury. For example, Factor 3(B) could have been written to allege that "Tracie Joy McBride [was a particularly vulnerable victim because of her] young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and Factor 3(C) could have alleged that "[The murder caused exceptional harm because of] Tracie Joy McBride's personal characteristics and the effect of the instant offense on [her] family."

If the court had reformulated the instructions in that manner, it might have facilitated the jury's deliberations, but there can be no real doubt that the result would have been the same. A jury that gave dispositive sentencing weight to McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," no doubt would have reached the same conclusion had it been required to find that McBride was particularly vulnerable for those reasons. Likewise, a jury that gave dispositive sentencing weight to McBride's "personal characteristics and the effect of the offense on her family" would have reached the same conclusion had it been required to find that McBride's murder caused exceptional harm for those reasons. The government's closing arguments on the factors, while brief, conveyed to the jury McBride's vulnerability, her uniqueness as a person, and the loss suffered by her family.[14] And petitioner does not claim that the factors brought inadmissible evidence before the jury or were improperly inflammatory.[15]

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[14] We have reproduced in Appendix C, *infra*, the government's references to the factors in its argument at sentencing.

[15] Any vagueness problem with the factors would not have caused the jury to recommend the death sentence based an "illusory circumstance," *Stringer*, 503 U.S. at 235, because the factors pointed (even if imperfectly) to relevant, permissible considerations that were given concreteness by

Likewise, the purported duplication between the factors was harmless beyond a reasonable doubt. The error (if any) consisted in the improper double counting of McBride's personal characteristics. That error could not have infected the jury's sentencing decision because the district court specifically instructed the jury that the weighing process "is not a mechanical" one and that the jury "should not simply count the number of aggravating and mitigating factors and reach a decision on which number is greater" but "should consider the weight and value of each factor." J.A. 45. The jury must be presumed to have followed that instruction. See *Shannon*, 512 U.S. at 585; *Richardson* v. *Marsh*, 481 U.S. at 206. Indeed, reviewing courts have relied on similar instructions in determining that the submission of duplicative factors was harmless in particular cases. See *United States* v. *Tipton*, 90 F.3d 861, 900-901 (4th Cir. 1996) (duplicative intent factors), cert. denied, 117 S. Ct. 2414 (1997); *Chandler*, 996 F.2d at 1093 (aggravating factor duplicative of finding at guilt phase). In any event, any double reference to McBride's personal characteristics did not increase the number of aggravating factors, for Factor 3(C) also referred to the separate subject of the effect on the victim's family.

2. The same harmless-error finding results from considering whether the jury would have reached the same verdict in the absence of the aggravating factors. *Clemons*, 494 U.S. at 753. Neither non-statutory factor was a significant part of

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the evidence and argument at sentencing. See pp. 42-44, *supra*; 19 R. 1526-1539; App. C, *infra*. Nor is there any danger that vagueness allowed bias to infect the sentencing decision, see *Tuilaepa*, 512 U.S. at 973. As required by the statute, 18 U.S.C. 3593(f), each member of the jury certified that "consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decisions, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim would have been." J.A. 59.

the government's sentencing case. Although the government "placed great emphasis on the two statutory aggravating factors found unanimously by the jury" (J.A. 122), it did not dwell on the two non-statutory aggravating factors later held invalid by the court of appeals. At sentencing, the government offered again the evidence from the guilt phase and called 13 additional witnesses (18 R. 1222-1354; 19 R. 1354-1540)— only one of whom (McBride's mother) provided new information relating to the non-statutory aggravating factors at issue here. See 19 R. 1526-1539. None of the government's six rebuttal witnesses provided information relating to those non-statutory aggravating factors. See 23 R. 2346-2463; 24 R. 2464-2698.

The government also made comparatively little mention of the victim-related non-statutory aggravating factors in its argument to the jury at sentencing. Each factor was addressed in a single paragraph of the government's opening that did little more than restate the factor. See 18 R. 1203. The government's closing argument on those factors was also relatively brief. See 25 R. 2733-2734. There was more mention of the factors in rebuttal, but discussion of them did not consume a major part of the argument. See 25 R. 2773, 2775-2776, 2784-2785.

Considering the lack of emphasis on Factors 3(B) and 3(C), the jury must have relied far more heavily on the statutory aggravating factors involving the extremely aggravated circumstances of the crime: petitioner kidnapped McBride without provocation, raped and sodomized her, kept her bound and gagged in his closet while he made sexual advances toward another woman, forced her to clean herself to eliminate signs of the rape, and then brutally murdered her with extreme physical force because he feared she might identify him. See pp. 1-3, *supra*. Contrast *Clemons*, 494 U.S. at 753 (in which "the State repeatedly emphasized and argued the [invalid] factor during the sentencing hearing" but "placed little emphasis on the [valid]

factor"). It is therefore clear, beyond a reasonable doubt, that the jury would have reached the same recommendation even if Factors 3(B) and 3(C) had never been submitted for its consideration.

C. The Court Of Appeals Conducted An Adequate Harmless-Error Inquiry

In affirming petitioner's sentence, the court of appeals elected "to redact the invalid aggravating factors and reconsider the entire mix of aggravating and mitigating circumstances presented to the jury." J.A. 121-122 (quotation marks and citation omitted). On that basis, the court of appeals concluded that "the error was harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." J.A. 122-123. Petitioner argues (Br. 47) that the court of appeals failed to give an adequate explanation of its harmless-error finding. The harmless-error analysis of the court of appeals, however—although not as detailed as might be desired—satisfied the requirements of the Constitution.

This Court's cases make clear that a court of appeals must make "a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Stringer*, 503 U.S. at 230; *Clemons*, 494 U.S. at 753. Contrary to petitioner's contention, however, the Court has not held that the Constitution requires "an articulation of how much weight [the reviewing court] believe[s] the jury assigned to each aggravating and mitigating factor" (Br. 43) or a detailed discussion of "the evidence admitted to establish the invalid aggravating factor, and the nature, quality, and strength of the mitigating evidence" (*id.* at 43 n.33).

The court of appeals carefully reviewed and correctly stated the applicable legal standards for harmless-error review. J.A. 119-121. The court then considered the number and strength of the remaining, valid aggravating factors

(J.A. 122), the mitigating factors (*ibid.*; see also J.A. 86 & n.3), and the prosecutor's argument at sentencing (J.A. 122). The court noted that the jury found two statutory aggravating factors—that petitioner "caused the death of the victim during the commission of the offense of kidnapping; and the offense was committed in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse of the victim." *Ibid.* The court also observed that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory factors found unanimously by the jury." *Ibid.* The court might have discussed those considerations in more detail, and might have discussed the evidence presented at the sentencing hearing, but its failure to do so does not render its analysis constitutionally inadequate. Contrast *Clemons*, 494 U.S. at 753 (state supreme court's opinion contained only one sentence stating that error was harmless without any explanation); *Sochor* v. *Florida*, 504 U.S. 527, 539-540 (1992) (state supreme court's opinion did not even mention harmless error).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATE STATUTES EXPLICITLY PROVIDING FOR COURT-IMPOSED SENTENCE IF CAPITAL SENTENCING JURY CANNOT AGREE

1. Ga. Code Ann. § 17-10-31.1(c) (Harrison 1997) ("Where a jury has been impaneled to determine sentence and the jury has unanimously found the existence of at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole.")

2. Kan. Stat. Ann. § 21-464(e) (1995) ("If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of imprisonment as provided by law.")

3. La. Code Crim. Proc. Ann. art. 905.8 (West 1997) ("If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit or probation, parole or suspension of sentence.")

4. Md. Code Ann., art. 27, § 413(k)(2) (1996) ("If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.")

5. Miss. Code Ann. § 99-19-101(3)(c) (1994) ("If, after the trial of the penalty phase, the jury does not make the findings requiring the death sentence or life imprisonment without eligibility for parole, or is unable to reach a decision, the court shall impose a sentence of life imprisonment."); *id.* § 99-19-103 ("If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.")

6. Mo. Ann. Stat. § 565.030.4 (West 1979 & Supp. 1998) ("If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death.")

7. Nev. Rev. Stat. Ann. § 175.556(1) (Michie 1997) ("In a case in which the death penalty is sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the supreme court shall appoint two district judges * * * who shall with the district judge who conducted the trial * * * conduct the required penalty hearing * * * and give sentence accordingly.")

8. N.H. Rev. Stat. Ann. § 630.5(IX) (1996) ("If the jury cannot agree on the punishment within a reasonable time, the judge shall impose the sentence of life imprisonment without possibility of parole.")

9. N.J. Stat. Ann. § 2C:11-3(c)(3)(c) (West 1995 & Supp. 1998) ("If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b," (which provides for a variety of lesser sentences depending on the circumstances.))

10. N.M. Stat. Ann. § 31-20A-3 (Michie 1994) ("Where * * * the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment.")

11. N.Y. Crim. Pro. Law § 400.27.11(c) (McKinney Supp. 1999) ("In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant" to a non-capital sentence.)

12. N.C. Gen. Stat. § 15A-2000(b) (1997) ("If the jury cannot, within a reasonable time, unanimously agree to its sen-

tence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.")

13. 21 Okla. Stat. Ann. tit. 21, § 701.11 (West 1983 & Supp. 1999) ("If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.")

14. 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v) (West 1998) ("[T]he court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.")

15. S.C. Code Ann. § 16-3-20 (Supp. 1997) ("If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).")

16. Tenn. Code Ann. § 39-13-204(h) (1997 & Supp. 1998) ("If, after further deliberations [following the jury's inability to agree on death sentence and the trial judge's instruction to consider only non-capital sentences], the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and such judge shall impose a sentence of imprisonment for life.")

17. Tex. Crim. P. Code Ann., art. 37.071.2(g) (West Supp. 1999) ("If the jury * * * is unable to answer any issue submitted under Subsection (b) or (e) of this article, the

court shall sentence the defendant to confinement * * * for life.")

18. Utah Code Ann. § 76-3-207(4)(c) (Supp. 1998) ("If the jury is unable to reach a unanimous decision imposing the sentence of death, * * * the jury shall then determine whether the penalty of life in prison without parole shall be imposed. * * * If ten jurors or more do not agree upon a sentence of life in prison without parole, the court shall discharge the jury and impose the sentence of life imprisonment with the possibility of parole.")

19. Va. Code Ann. § 19.2-264.4(E) (Michie 1996) ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.")

20. Wyo. Stat. Ann. § 6-2-102(e) (Michie 1997) ("If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.")

APPENDIX B

STATE STATUTES PROVIDING BY IMPLICATION FOR COURT-IMPOSED SENTENCE IF CAPITAL SENTENCING JURY CANNOT AGREE

1. Ark. Code Ann. § 5-4-603(c) (Michie 1997) ("If the jury does not make all findings required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.")

2. 720 Ill. Comp. Stat. Ann. 5/9-1(g) (West 1993 & Supp. 1998) ("Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment * * * .")

3. Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1996) ("If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following" non-capital sentences.)

4. Or. Rev. Stat. § 163.150(2)(a) (1990 & Supp. 1998) ("Upon the conclusion of the presentation of the evidence, the court shall also instruct the jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, [which includes whether the defendant should receive a death sentence,] the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole * * * ."); *id.* § 163.150(1)(c)(B) (1997) ("The court shall instruct the jury to answer the question [whether the defendant should receive a death sentence]

"no" if, * * * one or more of the jurors believe that the defendant should not receive a death sentence.")

5. Wa. Rev. Code Ann. § 10.95.080(2) (West 1990) ("If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4) [*i.e.*, whether jury is convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to warrant a sentence less severe than death], the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1)."); *id.* § 10.95.060(4) (West 1990) ("In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.")

APPENDIX C

REFERENCES BY THE PROSECUTION IN ITS SENTENCING ARGUMENT TO THE NON-STATUTORY AGGRAVATING FACTORS HELD INVALID BY THE COURT OF APPEALS

1. References in Opening Argument:

As to Factor 3(B), the prosecutor stated:

> You can look at such things as Tracie McBride's physical characteristics, her slight stature, 5'1", 100 pounds, her unfamiliarity with the San Angelo area, her training and background in relation to this defendant. Those are things that you can look at in deciding whether this is an aggravating factor you should find beyond a reasonable doubt.

As to Factor 3(C), the prosecutor stated:

> You may look at such things as the impact of the crime on the victim's family, and the characteristics of this particular victim. What made Tracie McBride Tracie McBride. How was she different than other people, what her past was like, what her future was going to be like. Those are things that our law says you can consider. And again, after each of these items, if the government has proved them to you beyond a reasonable doubt and you unanimously agree on that, then you sign your verdict by each of those special aggravating circumstances yes, that you do find those aggravating factors exist.

18 R. at 1203.

2. References in Closing Argument:

As to Factor 3(B), the prosecutor argued:

> You can consider Tracie McBride's young age, her slight stature, her background, her unfamiliarity with the San Angelo area. Again, you recall the testimony concerning Tracie. She is barely five feet tall [and] weighs approximately 100 pounds. He picks the ideal victim. Someone that is small, certainly has no semblance of the training that he has. He gets someone that has recently come to the San Angelo area so she has no familiarity. I mean, once she gets off the base she has no idea where she is. And all these are factors that you may consider.

25 R. at 2733-2734

As to Factor 3(C), the prosecutor argued:

> And finally you can consider as an aggravator Tracie's personal characteristics and the effects of the instant offense on her family.
>
> Let me talk a minute about Tracie McBride. You heard about this young woman, you heard about her from her mother, you heard [in the guilt phase] from her friends that knew her. She was special, she was unique, she was loving, she was caring, she had a lot to offer this world, but not anymore thanks to the defendant. The effect on the family, you have seen her mother on the stand. You have heard that her father has nightmares about trying to put her head back together again. You have seen the effect that it had on the mother, her brothers and sisters, her friends. You know, what can I say that could drive that home having witnessed the mother having to testify as to the loss of a daughter.

25 R. 2734.

3. References in Rebuttal Argument:

As to Factor 3(B), the prosecutor argued:

> You can look at her training and her experience in relation to this 22-year Army ranger. Those are things you can look at. The court, the law says you can. And you can ascribe them whatever weight you want. If you think they are important, say so by your verdict.

25 R. at 2776.

As to Factor 3(C), the prosecutor argued:

> There are other aggravators that the law also says you can look at, and we have alleged those because we have to allege them before we can bring them to you. We can talk to you, there is a forum in this country for victims too, and we can bring you things about Tracie McBride. In fact, I think just about everyone of you on your questionnaires talked about how you would want to know something about the victim, what kind of person she is. And that is admirable, because I think they are forgotten. A lot of what [defense counsel] said is absolutely right. They are forgotten a lot. But you wanted to know information and we brought you that information. I am sorry that I can't bring commendations that Tracie McBride got from Desert Storm and Grenada and all of her experiences in the Airborne Rangers because Louis Jones didn't let her get there.

25 R. 2775.

Later, the prosecutor responded to defense arguments by arguing:

> They want you to walk a mile in his shoes. You are allowed to walk a mile in Tracie McBride's boots for a minute. You are allowed to do that. She was a special person. I didn't know her. I feel like I know her, but I

> didn't know her. Thanks to Louis Jones, we never will. So the best we can do is bring precious photographs that this family has provided, and we can hear about all she contributed in her 19 years. We can hear about that. And then we can hear about her wanting to get married, and wanting to have kids, wanting ironically enough to be either a teacher of maybe even an airborne ranger. The irony is amazing.

25 R. 2783-2784.

Finally, the prosecutor reminded jurors of the victim at various times in addressing a statutory aggravating factor, the defense mitigation, and the ultimate issue of whether defendant should be sentenced to death. See 25 R. 2773 (arguing that defendant caused grave risk of death to another (Peacock): "If you don't think that that man sitting right over there when he is wielding a blunt instrument to somebody's head isn't causing a grave risk, tell Tracie McBride's parents that"); 25 R. 2775 (responding to defense mitigation regarding defendant's allegedly abused childhood: "Maybe it would have been better if Tracie McBride had been set on the stove and sexually assaulted, abused all her life. Would people feel sorry for her then."); 25 R. 2785 (arguing against non-capital sentence, noting that Tracie McBride's parents did not have option of having their daughter alive but in prison).

APPENDIX D

RELEVANT FEDERAL RULES

1. Fed. R. Crim. P. 30 provides, in relevant part:

* * * * *

No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

2. Fed. R. Crim. P. 52 provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

3. Fed. R. Evid. 606(b) provides:

Inquiry into validity of verdict or indictment. Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence

was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

4. Fed. R. Evid. 1101(d) provides, in relevant part:

> **Rules inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:
>
> * * * * *
>
> **(3) Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation * * * .