No. 16-235

In the Supreme Court of the United States

GARY SAMPSON, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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The petition for certiorari presents an important constitutional question: whether a death sentence can rest in part on an aggravating factor that the prosecution failed to establish in a prior penalty-phase hearing in which it had a full and fair opportunity to litigate that factor. The government does not deny that the question is important, but it makes two arguments on the merits, contends that the court of appeals lacked mandamus jurisdiction to decide the question, and stresses the posture of the case. None of these points justifies denial of review. The government's merits arguments are not sufficiently strong to demonstrate that the ruling of the court of appeals was necessarily correct. The principal

issue the government identifies regarding mandamus jurisdiction (the supposed need to show that the right to issuance of the writ is "clear and indisputable"), rather than militating against review by this Court, provides a second subject that this Court could usefully address if it granted review, for the issue is one that current law leaves in a state of considerable uncertainty. Finally, although a jury was sworn on November 1 and the new penalty-phase hearing is now in progress, that is not a good reason to deny the petition, in part because the government is responsible for the fact that the petition was not considered earlier.

1. It Is Sufficient That the First Jury Determined the Government Had Not Proved the Two Aggravating Factors at Issue to the Satisfaction of All Twelve Jurors.

In contending that petitioner's claim of collateral estoppel was correctly rejected, the government for the first time argues that the doctrine does not apply because, where "a jury is the factfinder," the doctrine is limited to situations in which the jury "unanimously . . . decide[d] an issue in the defendant's favor," but here "the jury might have hung" as to the alleged aggravating factors of obstruction of justice and future dangerousness. Br. in Opp. 10, 12. The principal authority the government relies upon is *Yeager v. United States*, 557 U.S. 110 (2009), a case involving a prosecution for *noncapital* offenses. *Yeager* is inapposite, and the government's argument is unsound, because there is a critical difference between verdicts in federal capital cases and verdicts in noncapital cases such as *Yeager*. In noncapital cases, the jury can (i) return a verdict for the government, (ii) return a verdict for the defendant, or

(iii) hang. But in federal capital cases, in harmony with this Court's decision in *Jones v. United States*, 527 U.S. 373 (1999), juries are generally asked to choose between just two possible verdicts as to an alleged aggravating factor: (i) a unanimous verdict that the government has proven that factor beyond a reasonable doubt, and (ii) a verdict indicating that one or more jurors did not find the factor to have been proven beyond a reasonable doubt. When the jury returns the latter verdict, it does not hang but instead returns a verdict in favor of the defendant as to that alleged aggravating factor. There is no reason to deny preclusive effect to such a verdict if the other requirements for collateral estoppel are satisfied.

Ordinarily, when the jury does not unanimously agree in a criminal case, a mistrial is declared. The absence of agreement is deemed to be "an instance of 'manifest necessity' which permit[s] a trial judge to terminate the first trial and retry the defendant." *Richardson v. United States*, 468 U.S. 317, 323–24 (1984). It has been settled since *Jones*, however, that Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. §§ 3591–3598, departs from the practice of allowing declaration of a mistrial when a jury does not reach unanimous agreement. In its argument to this Court in *Jones*, "[t]he Government refer[red] to a 'background rule' allowing retrial if the jury is unable to reach a verdict, and urge[d] that the FDPA should be read in light of that rule." *Jones*, 527 U.S. at 418–19 (Ginsburg, J., dissenting) (quoting Br. for United States 29). But there were compelling reasons to conclude that the FDPA departed from that "background rule," and this Court, though dividing on another issue, unanimously

rejected the government's position. *Id.* at 380–81 (majority op.), 419–20 (Ginsburg, J., dissenting). As the *Jones* dissent explained, when a jury deadlocks, "retrial is not the prevailing rule for capital penalty-phase proceedings"; rather, "in life or death cases, most States require judge sentencing once a jury has deadlocked";[1] "the predecessor Anti-Drug Abuse and Death Penalty Act of 1988 had been construed to mandate court sentencing upon jury deadlock"; and the legislative history of the FDPA "suggests that Congress understood and approved that construction." *Id.* at 419. The *Jones* majority agreed that, "when the jury ... reports itself as unable to reach a unanimous verdict, the sentencing determination passes to the court," *id.* at 381, which under the statute has no authority to impose a death sentence absent a jury determination in favor of death.

Just as 18 U.S.C. § 3593(e) requires that the jury's selection of a death sentence be unanimous, 18 U.S.C. § 3593(d) similarly requires that each special finding by a jury concerning the existence of an alleged aggravating factor be unanimous. Accordingly, and in keeping with the recognition in *Jones* that the FDPA departs from the usual rule regarding failure to achieve unanimity, the

[1] *See, e.g.*, *State v. Hunt*, 558 A.2d 1259, 1286 (N.J. 1989) ("In a capital case, unlike the ordinary criminal prosecution, jurors need not reach a unanimous verdict. Thus, a decision not to agree is a legally acceptable outcome, which results not in a mistrial, but in a final verdict."); *Rush v. State*, 491 A.2d 439, 453 (Del. 1985) (holding that in penalty-phase hearing in capital case, "lack of unanimity *per se* results in a sentence of life imprisonment," and "the jury reached and announced an ultimate decision" when the foreman reported a deadlock).

court asked the jury, at petitioner's first penalty hearing in 2003, to return one of two verdicts as to each alleged aggravating factor: "ALL 12 JURORS SAYS YES" or "ONE OR MORE JURORS SAY NO." Pet. App. 81a–85a, 91a–95a. The leading treatise on federal jury instructions endorses precisely this procedure for FDPA cases. *See* 1 Leonard B. Sand, *et al.*, *Modern Federal Jury Instructions—Criminal* ¶¶ 9A.03, 9A.05 at 9A-29, 9A-55, 9A87–9A89 (2016); *see also, e.g.*, *United States v. Wilson*, 493 F. Supp. 2d 526, 532 (E.D.N.Y. 2007).

With respect to both obstruction of justice and future dangerousness, the jury chose the second alternative. Pet. App. 84a–85a, 94a–95a. There was no verdict available that was more favorable to petitioner than the one the jurors chose in each instance. There is therefore no reason to deprive petitioner of the protection provided by the collateral estoppel component of the Double Jeopardy Clause.

None of the cases cited by the government on this issue involved prosecutions under the FDPA. Br. in Opp. 13. In two of the three cases, moreover, the defendants received sentences of imprisonment, not death sentences. *See Harris v. Gramley*, 986 F.2d 1424, 1993 WL 55025, at *1 (7th Cir. 1993) (Tbl.); *People v. Hipkins*, 423 N.E.2d 208, 209 (Ill. App. Ct. 1981). The government also refers to certain citations in *Delap v. Dugger*, 890 F.2d 285, 318 n.43 (11th Cir. 1989), *abrogated on other grounds by Floyd v. Secretary, Florida Department of Corrections*, 638 F. App'x 909, 924 (11th Cir. 2016) (per curiam), but the only additional case cited therein that rejected a claim of collateral estoppel did so not because of a lack of unanimity but

because "the requirement of identity of issue is not satisfied." *Johnson v. State*, 495 A.2d 1, 18 (Md. 1985).

2. This Case Is Not Controlled by *Bobby v. Bies*.

The government does not dispute that the reasons for the essential-to-the-judgment requirement are that non-essential determinations "have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made." Restatement (Second) of Judgments § 27 cmt. h (Am. Law Inst. 1982). Nor does it dispute that special findings rejecting an alleged aggravating factor lack the characteristics of dicta and cannot be the subject of a government appeal regardless of whether they are essential to the judgment. The government suggests, however, that petitioner's claim of collateral estoppel fails because the statements in appellate opinions involved in *Bobby v. Bies*, 556 U.S. 825 (2009), "did not qualify as dicta," but this Court nevertheless held that they lacked preclusive effect. Br. in Opp. 14. The government stresses that the statements at issue in *Bies* "were made pursuant to a state statute that required the courts to conduct an independent weighing of aggravating and mitigating factors." *Id.* 15. The government's argument does not withstand scrutiny. Although the state statute did indeed require courts to conduct such a weighing, when a court concluded that aggravating factors outweighed mitigating factors, its statement that a particular mitigating factor existed constituted dictum because it was not necessary to the result, which would have been the same if the court had said that the mitigating factor did not exist. *See Am. Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 871–72 (1983); Pierre N. Leval, *Judging Under the*

Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1256 (2006) ("A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner.").

When the Supreme Court of Ohio stated that "Bies's personality disorder and mild to borderline mental retardation merit some weight in mitigation," *State v. Bies*, 658 N.E.2d 754, 761 (Ohio 1996), it knew that the statement did not affect the outcome. Similarly, the Ohio Court of Appeals knew that the outcome in that court was not affected by the statement that the three "psychological factors presented by Bies," one of which was his "mild mental retardation to borderline mental retardation," were "entitled to some weight in mitigation." *State v. Bies*, No. C-920841, 1994 WL 102196, at *9 (Ohio. Ct. App. Mar. 30, 1994) (per curiam). Thus, not only did "[n]either court devote[] detailed attention to the issue of retardation," *Bies*, 556 U.S. at 830, and not only was it "not clear from the spare statements of the Ohio appellate courts" in their opinions issued in the 1990s "that the issue of Bies' mental retardation under the [subsequently adopted] [*State v.*] *Lott* [779 N.E.2d 1011 (Ohio 2002),] test was actually determined at trial or during Bies' direct appeal," *Bies*, 556 U.S. at 834–35, but it had to be apparent to the judges who joined the opinions that the "spare statements," *id.* at 834, on the subject did not affect the outcome.

In contrast, when the jury in petitioner's first trial rejected the alleged aggravating factors of obstruction of justice and future dangerousness, it did not know, assuming that it followed the court's instructions, that it would nevertheless select a death sentence. As to each

count, the determination of whether a death sentence was appropriate came later in the jury's decision-making process. Pet. App. 88a, 98a. The court's instructions specifically directed the jury to address the questions on the verdict forms in order. Tr. of Dec. 19, 2003 (Jury Charge) at 102.

There is another critical difference, bearing on the appropriateness of according preclusive effect, between a jury's special finding concerning an alleged aggravating factor and the appellate-court statements at issue in *Bies*. "[T]he jury is required conscientiously to make a determination of aggravating factors in the [capital] sentencing trial satisfying the exacting standards of proof, and, indeed, to do so with even greater clarity, specificity, and solemnity than may surround its determination of the elements of criminal guilt . . . ." *State v. Koedatich*, 572 A.2d 622, 635 (N.J. 1990) (Handler, J., dissenting). The "spare statements" about mental retardation in the appellate court opinions in *Bies* are not comparable in terms of clarity, specificity, or solemnity.

3. The Decision Below Is in Conflict with *Delap*.

The government seeks to distinguish the Eleventh Circuit's decision in *Delap v. Dugger* on two grounds. One of the proffered distinctions is inaccurate, and the other is insubstantial.

The government is mistaken in arguing that "in contrast to *Delap*, petitioner was not acquitted of any offense." Br. in Opp. 16. Petitioner was not acquitted on either count in 2003, but neither was the defendant in *Delap* "acquitted of any offense." He was charged with "premeditated first degree murder" in a single count. *See Delap*, 890 F.2d at 288, 308 & n.27. Florida law

permitted "the prosecution to proceed on either a felony murder or premeditated murder theory when the indictment charges only the offense of first degree murder or premeditated murder." *Id.* at 308 n.28. The State "proceeded at Delap's first trial under both felony murder and premeditated murder *theories*." *Id.* at 308 (emphasis added). Delap was found guilty of first degree murder. *Id.* at 309. He prevailed not on any offense, but on a theory of liability—felony murder. *Id.* at 310–11.

The government's other asserted distinction—that the prior determination in *Delap* occurred during the guilt-or-innocence phase—is accurate, but it is not a weighty distinction since determinations relating to sentencing also can have preclusive effect. *See* Pet. 16–17 (citing cases).

4. The Procedural Posture of the Case Does Not Militate Against Review.

Finally, the government urges denial of the petition on the grounds (i) that, although the court of appeals reviewed the district court's ruling pursuant to its mandamus jurisdiction, it should not have done so because the requirements for issuance of a writ of mandamus are not satisfied; and (ii) that the case is in an interlocutory posture. Br. in Opp. 17–20. These do not constitutes good reasons to deny review.

Insofar as the government invokes statements in some of this Court's decisions that a party seeking a writ of mandamus must show that the right to issuance of the writ is "clear and indisputable," review by this Court actually could provide valuable clarification of the scope of any such requirement. A leading treatise cautions:

> The phrase most commonly used to confine discretion to exercise writ review power is that the petitioner must show a "clear and indisputable" right . . . . As with so many other phrases, this one need do no significant harm so long as it is not taken literally. . . . [A] "right" may become "clear and indisputable" only after the court of appeals has struggled long and hard with the legal question whether the district court acted correctly. Control by writ remains appropriate if the other criteria are satisfied, a conclusion that is essential to the occasional use of "supervisory" or "advisory" mandamus.

16 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3933, at 636–38 (3d ed. 2012) (footnotes omitted); *see, e.g.*, *In re Cavanaugh*, 306 F.3d 726, 728–29 (9th Cir. 2002) (Kozinski, J.) (exercising mandamus jurisdiction because "'order raises new and important problems, [and] issues of law of first impression'" (alteration in original) (quoting *Bauman v. United States Dist. Court*, 557 F.2d 650, 655 (9th Cir. 1977))); *United States v. Palmer*, 871 F.2d 1202, 1209 (3d Cir. 1989) (Becker, J.) ("'The "clear and indisputable" test is [to be] applied *after* the statute has been construed by the court entertaining the petition.'" (alteration in original) (quoting *Gov't of V.I. v. Douglas*, 812 F.2d 822, 832 n.10 (3d Cir. 1987))), *abrogated on other grounds by Taylor v. United States*, 495 U.S. 575 (1990); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1235 (10th Cir. 1986) ("[A] writ is appropriate . . . when the order raises new and important problems and issues of law of the

first impression.").[2]

Nor does the interlocutory posture of the case support denial of the petition. The court of appeals issued its opinion August 4, 2016. The petition for certiorari was filed 14 days later. If the government had responded within 30 days of docketing, as the Rules contemplate, instead of obtaining two extensions and finally responding 74 days after the petition was filed, the petition could have been considered much sooner. The government was entitled to obtain the extensions, but not to benefit from delay that its own conduct created.

The jury was sworn on November 1. The hearing is expected to continue well into December. In light of the extraordinary burdens associated with penalty-phase hearings in capital cases, as well as the extreme unlikelihood that the improper inclusion of an aggravating factor in the weighing of aggravating and mitigating factors could be deemed harmless error, the parties, the jurors, the victims' families, and the district court would all benefit by halting the hearing to await this Court's ruling, if the Court deems the question presented to be worthy of review.

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[2] The government also challenges the conclusion of the court of appeals that the question presented would evade review unless addressed, arguing that it could be raised in an attack on a new death sentence should one be imposed. Br. in Opp. 17–18. As the court noted, however, postponing review would "frustrate the appeal's central assertion: that Sampson should not have to defend against these particular allegations again. The claim would evade review because one of the most important protections of the Double Jeopardy Clause would be lost." Pet. App. 11a.

CONCLUSION

Permitting prosecutors to seek death sentences on the basis of alleged aggravating factors that they earlier failed to establish although accorded a full and fair hearing "introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980). Certiorari should be granted.

Respectfully submitted.

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