ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-6756

TITLE JAMES ERNEST HITCHCOCK, Petitioner V. LOUIE L. WAINWRIGHT SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

PLACE Washington, D. C.

DATE October 15, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES ERNEST HITCHCOCK, :

Petitioner :

v. : No. 85-6756

LOUIE L. WAINWRIGHT, SECRETARY, :

FLORIDA DEPARTMENT OF :

CORRECTIONS :

- -x

Washington, D.C.

Wednesday, October 15, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

CRAIG S. BARNARD, ESQ., West Palm Beach, Florida; on behalf of Petitioner.

SEAN DALY, ESQ., Daytona Beach, Florida; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Barnard, you may proceed whenever you're ready.

ORAL ARGUMENT OF

CRAIG S. BARNARD, ESQ.

ON BEHALF OF PETITIONER

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

Mr. Hitchcock was sentenced to death by a process that precluded the consideration of compelling mitigating evidence, and the reason for that was that he was sentenced to death in February of 1977 in Florida, during the period of time when the Florida death penalty statute stood most authoritatively construed and enforced to restrict the consideration of mitigating factors strictly to a narrow statutory list.

QUESTION: Mr. Barnard, the Court of Appeals for the Eleventh Circuit in this case I think made a finding that the State of Florida law at that time on whether you could introduce non-statutory mitigating circumstances was ambiguous.

Do you disagree with that or do you think I'm incorrect in saying that?

MR. BARNARD: I disagree with the Eleventh Circuit in saying that.

QUESTION: You agree that the Eleventh Circuit said it, but you disagree with the Eleventh Circuit?

MR. BARNARD: I disagree with the Eleventh Circuit.

QUESTION: Ordinarily, of course, we take the view of a Court of Appeals as to the law of a state in which that court sits.

MR. BARNARD: The same Court of Appeals had previously expressed the view that the Florida statute was limited, at least after the Cooper decision in 1976. It was in this case that they said that there was some ambiguity.

And I think that, looking at the law of Florida at the time, there can be very little question that the statute was interpreted to restrict the consideration of mitigating factors to the statute in the same manner as Ohio, for the same reason.

And the restriction of mitigating factors violates the most basic Eighth Amendment principle applicable to capital sentencing enforced by this Court, and that is the need for individualization, individualized considerations of the unique factors in a particular case, in deciding whether someone should live or die.

The constitutional question that's presented

in this case in essentially three areas, or the effect is seen in three ways. The first that we -- I'd like to mention the three first:

The first concerns the constitutionality of the statute, just as in Lockett, during this period of time;

Second, that the effect of that unconstitutionality can be seen in this case from the trial record on its face;

And finally, that counsel, defense counsel in this case, was restricted in the presentation of mitigating factors by reasonable adherence to that statute, with the result of this process that the sentencer in this case did not know James Ernest Hitchcock when it came to decide whether he should live or die.

With regard to the statute's unconstitutionality at the time, it's quite clear now and it was then that Florida was in a closely parallel position to Ohio at the time of Furman. Florida, as Ohio, passed its capital sentencing statute for the reason or with the intent to meet the then-perceived requirement of Furman versus Georgia.

This was -- at the time the contemporary commentators all recognized this, including those

advising the legislature, the Florida legislature, and this intent to limit the consideration of mitigating factors to the statute was borne out and made very clear in 1976 when the Florida Supreme Court announced its decision in Cooper versus State.

In Cooper, the court spoke with uncommon clarity. The court there said that: mitigating factors in our statute are limited to the statute; evidence concerning other matters has no, no place in the capital sentencing in Florida.

The language cannot be misconstrued. It is clear and direct. And that, incidentally, is the pericd of time when this case was tried. This case was tried in February 1977.

So the Florida statute restricted the sentencer in making the difficult determination as to whether to impose the death sentence or nct strictly tc the narrow list of mitigating factors, in the same way as the Ohio statute, the Ohic legislature, had done with its statute and several other states had done.

QUESTION: Well, Mr. Barnard, in this case I take it the defense counsel did offer mitigating evidence that went beyond the purely statutory mitigating factors?

MR. BARNARD: Yes, that is correct.

QUESTION: And how is a reviewing court to determine whether other mitigating evidence would have been obtained or offered? How would we ever know as a reviewing court anything like that? Because the attorney clearly didn't feel restricted at the time, having introduced some evidence that went beyond the mitigating factors.

MR. BARNARD: Perhaps I should take a moment, because that is the Respondent's chief contention here as concerns the facts. I think we need to -- I need to be clear as to the relevancy of presenting or having non-statutory mitigating factors in the record, in the trial record itself.

We have to look at it both legally and factually. First, legally, the fact that there are non-statutory -- evidence on non-statutory mitigating factors in the record, is not the key or central constitutional question.

There were non-statutory mitigating facts in the record in Lockett and in Eddings and in Skipper. But that was not the determinant fact. The determinative issue there was whether that evidence could be given independent mitigating weight, could be considered on its own as a reason calling for a life sentence.

So, first I would question just the relevancy under the Court's Eighth Amendment standard with regard to those facts. It doesn't matter if the facts couldn't be considered under the process of the section.

QUESTION: Well, if that isn't the key, as you put it, to the constitutional question, what is the key to the constitutional question? I mean, if one were to show that a defense attorney had gotten in all the evidence that he wanted to get in, would it make much difference what the state supreme court said the trial court might have excluded if the trial court didn't exclude anything?

MR. BARNARD: It has to do, Mr. Chief Justice, with what could be considered by the sentencer under the statutory framework. In Eddings, the statute provided that all evidence of mitigation could be introduced, but it wasn't clear whether it was considered.

In Ohio, the Ohio legislature had liberally interpreted its statute to indicate that evidence not falling within the statute could be considered by the sentencer, but only as it bore upon statutory mitigating factors.

So the prevailing plurality there spoke very clearly that the concern was whether it could be given indendent mitigating weight.

QUESTION: Mr. Barnard, your contention here is that it wasn't introduced effectively; it was introduced, but that the judge told the jury they couldn't consider it. Isn't that your contention?

MR. BARNARD: Yes.

QUESTION: Aren't you relying on the statement of the judge that they could only consider the identified mitigating factors?

MR. BARNARD: That is correct.

QUESTION: So in effect, everything the lawyer had said was washed out by the judge, just as though he had given the jury an instruction to disregard it. So your contention is that it didn't get in for any effective purpose?

MR. BARNARD: Yes, because the relevancy under this question legally is whether the evidence was being given independent mitigating weight under the system.

QUESTION: And the judge here said it couldn't be.

MR. BARNARD: The judge here said it couldn't be, and there's nothing in our record to indicate that it was. And in making that evaluation, we have followed the statutory history and the prevailing practice at the time, and I think it's fairly clear that it could not be considered.

But I do want to address the issue factually also --

QUESTION: Mr. Barnard, how many Florida inmates are in the same position as Hitchcock?

MR. BARNARD: Well, we have presented in appendix B, I believe, the post --

QUESTION: Well, roughly how many?

MR. BARNARD: Twelve that are still pending in some manner, that were tried after Cooper. In addition, there were 14 others -- I believe the figure's right; I hope I'm not misleading the Court; I think the figure is right -- who were sentenced prior to Lockett and also prior to Cooper.

QUESTION: So roughly --

MR. BARNARD: Depending where the line is drawn.

QUESTION: Roughly in the twenties, then?

MR. BARNARD: Yes.

I do want to address the issue, because it is central, concerning the non-statutory mitigating facts in this record, because if we address it as a factual matter, as opposed to a legal matter, if a careful reading of the record actually supports the claim we have made, the lawyer did not present new non-statutory mitigating facts.

The lawyer presented what the lawyer had already been able to present in the guilt phase, and no further. The record, I would submit, shows that the lawyer had a, if you will, a leash from the law restraining the lawyer from presenting evidence. The lawyer pulled that leash, perhaps, but did not use the non-statutory mitigating evidence that is in the record as a reason calling for a life sentence.

The lawyer simply said: I offer it to you for whatever purpose you deem appropriate. As opposed to when the lawyer was talking about the statutory aggravating and mitigating circumstances, the lawyer analyzed them in great detail.

Secondly, the lawyer also told the jury that the jury would be instructed under mitigating that it would be able to consider, and then discussed only the statutory mitigating circumstances.

So the fact that there were non-statutory mitigating circumstances in the record of this case proves nothing. I submit that it is legally not the inquiry and it does not alter the nature of our claim.

QUESTION: Mr. Barnard, did the Eleventh Circuit majority opinion treat your assertion that the trial judge had charged the jury that they might not consider non-statutory mitigating circumstances?

MR. BARNARD: They did not separately in this case, other than at the beginning of the panel brief, where they just generally set out the issue that we were alleging denial of individualized consideration.

QUESTION: But of course, denial of individualized consideration is quite general, as opposed to claiming that the trial judge charged the jury that it might not consider non-statutory mitigating circumstances.

MR. BARNARD: Well, I think the claim is actually the constitutionality of the statute. The jury instructions are reflective of the statute, and the constitutionality has been the core issue throughout this litigation.

QUESTION: Well, but the statute --

MR. BARNARD: And the jury instructions are reflective of --

QUESTION: Let's assume that the statute was, or the operation of the statute was vague, as the state claims. If we should agree with that, there there'd be a difference between a case in which the judge instructed the jury that it could only consider the statutory factors and a case in which a judge gave no such instruction and the lawyer argued other factors. Isn't that right?

MR. BARNARD: That is true. The Eleventh Circuit had previously treated this issue. The Eleventh Circuit had felt bound, incidentally, on the constitutional question by the Court's decision here in Proffitt versus Florida.

We have also alleged here in this case that the lawyer, the defense lawyer, reasonably followed the statute and believed that he was limited in his representation of his client to statutory mitigating circumstances.

We alleged, but have not yet been given an opportunity to prove, both that this was true, that the lawyer was limited, and that had the lawyer not been limited he would have been able to present a compelling case in mitigation concerning Hitchcock.

QUESTION: One way to get around all of that is to make a proffer of proof.

MR. BARNARD: To make a proffer of proof, that is correct.

QUESTION: I say that's one way to do it.

MR. BARNARD: It is.

QUESTION: But they didn't?

MR. BARNARD: At the trial of this case there was no proffer.

QUESTION: They didn't?

MR. BARNARD: Did not.

QUESTION: They did or they did not?

MR. BARNARD: Did not.

QUESTION: Well, isn't that the end?

MR. BARNARD: It is not the end because of the status of the law at the time. Our contention is that it was the law at the time of this trial -- or under the law at the time of this trial, it was a well-founded belief, both under the Constitution and certainly the state law, that Furman had required a restriction to statutory, legislatively defined mitigating circumstances.

The Court held or noted in Lockett that the Ohio legislature was reasonable in that view, and the lawyer here was reasonable in that view. In this regard, our claim as to counsel is somewhat analogous to -- certainly we draw upon the analogy -- to a case where a lawyer represents conflicting interests and represents a defendant.

And that is a legal restraint upon how counsel represents a client.

QUESTION: How do we determine between the lawyer that believed it and the lawyer that didn't know it?

MR. BARNARD: I don't know that there would be

a legal difference at that time.

QUESTION: Is there any difference? We've got to take the lawyer's word, haven't we?

MR. BARNARD: You have to take the lawyer's sworn testimony.

QUESTION: I'm a little puzzled at your argument. Why do you have to take the lawyer's testimony if, as Justice Scalia suggested, there is an erroneous instruction by the judge? Isn't that the end of the ball gave, if the judge says to the jury, you can't consider anything but statutory mitigating instruction?

And as I read the record, that's what he said. Isn't that plain constitutional error, and why do we have to get into all this other stuff?

MR. BARNARD: We submit that it is plain constitutional error. We have submitted -- I am speaking now as to, I'll call it, the third aspect of our claim, which has to do with counsel's conduct that we had offered to allege -- I mean, that we had offered to prove and have been denied a hearing.

QUESTION: Of course, if the jury's role is advisory in Florida and if it turned out that the judge in imposing the death penalty had said, I am considering all the mitigating evidence that there is, I'm not sure

his instruction to the jury would be very relevant.

MR. BARNARD: Well, of course, that's not the situation we have here.

QUESTION: Well, I know it certainly isn't. You do have to get around -- and I think your habeas corpus petition did allege very clearly that the judge himself did not consider any but the statutory mitigating circumstances.

MR. BARNARD: Yes, under the statutory scheme, yes.

I think the importance of the jury's role, however, in Florida I think might distinguish that, and the Court didn't decide, but in dicta in Baldwin versus Alabama observed that that might be the case, that where deference is given to a jury the constitutional principle --

QUESTION: Yes, but in this case is it not clear that we have both the erroneous jury instruction and we also have the judge in his own sentencing order saying that he based his decision on the statutory circumstances and that's it?

So whichever approach you take, don't you have to find that it's harmless error or you're got a plain -- I don't understand what the argument's about in this case, frankly.

MR. BARNARD: Well, the argument is -- has been brought about through the evolution of Florida law and constitutional law.

QUESTION: And this case was tried at a time when they weren't under -- before Lockett. That's the whole problem, yes.

Well, I'm sorry. You make your argument.

MR. BARNARD: I agree that it's that simple, but we haven't been able to convince other courts that it's been that simple.

(Laughter.)

QUESTION: But the thing that puzzles me is that you're arguing things that might be necessary to argue in other cases, but seem to me to be kind of an interesting detour in this case.

Well, go ahead. You present your own case.

MR. BARNARD: The Florida statute, thus we are submitting, operated to deny what we have proffered is very relevant character evidence concerning Mr. Hitchcock, and that is evidence concerning his emotional history and his family background, in order to prove specific relevant character traits that are relevant to sentencing, that are at the core of the capital sentencing determination.

Mr. Hitchcock, this sentencer did not know,

grew up in a nightmarish reality of poverty and grief and turmoil. He came from a large family of tenant farmers, living in tenant housing with no indoor plumbing.

They were poor such that they were just on the border of starvation. He had to work in the fields when he was ten years old, sometimes ten hour days. His father died when he was young, which was something that created a great deal of problems for both the family because the father was the breadwinner and they went further and further into poverty, and it also led Mr. Hitchcock, this young boy, into a feeling of no longer belonging to his family.

He stuck it out. His mother remarried. His stepfather became an alcoholic and began beating his mother, and he couldn't stand it any longer. So he left home at 13, a 13 year old adult.

The point of this information for a capital sentencing is not simply to show him as a human being, but as our expert testimony would allege, would show, is that despite the harshest of environments that this young man could grow up in, he overcame and developed very solid character traits that were to stick with him.

This jury did not know James Hitchcock's

capacity for rehabilitation, did not know his devotion to hard work, did not know his generosity and sensitivity. It could not judge Mr. Hitchcock fairly. Those are the central concerns at the heart of that sentencing decision.

A sentencer is attempting to make a judgment on the moral guilt and whether this person needs to die. They have this young man sitting in front of them they're trying to judge, but they don't know anything about him.

So the result of the statute's unconstitutionality in this case is very clear. The Florida statute operated at that time, just as the statute in Lockett, and it operated in this case.

QUESTION: Mr. Barnard, was there any objection made to the instruction to the sentencing jury?

MR. BARNARD: No.

QUESTION: Nor to the statement that the judge made when he imposed the sentence that he was limiting it to the mitigating factors?

MR. BARNARD: No. Our contention is, of course, that the lawyer at the time would not -- would not have known to do that. I mean, that's the merits of our contention, is that the lawyer could not have done

it at the time.

And I might note that when you ask objection it worries me. There is no default in this case. These issues were raised in the Supreme Court and dealt with, the Florida Supreme Court, in the direct appeal. So there isn't a default.

The question -- our proof is that the lawyer wouldn't have known to object.

QUESTION: What do you do with the Court of Appeals' decision that they looked at the facts and said, well, all the -- there's no proof that anything else would ever have come out? Isn't that what they said?

MR. BARNARD: Yes.

QUESTION: And that so they concluded that your client wasn't denied an individualized sentencing hearing, just on their analysis of what happened and what your proof was or allegations at the habeas hearing.

What do you do with that, just say they're wrong?

MR. BARNARD: If that judgment had been made after an evidentiary hearing, that might be a valid judgment to make.

QUESTION: Well, I know, but they said that

after reading your habeas corpus petition.

MR. BARNARD: I also say they're wrong.

QUESTION: And they said that there was a failure to indicate how things would have been different.

MR. BARNARD: Our allegation was that things would have been different because of the evidence that I've just summarized to you, all of which was in the record --

QUESTION: So to reverse we have to say they were just wrong in reading the record in the habeas court?

MR. BARNARD: Well, our allegation is that they too narrowly construed the mandate of Lockett, which allowed them to reach that result.

QUESTION: That's not what you say, Mr. Barnard. I think what you say is that you don't need proof that anything more would have come in. Your basic complaint is that what did come in was taken away from the consideration of the jury.

MR. BARNARD: That's true.

QUESTION: Even if you can't prove that anything more would have come in, those statements about mitigating factors that the attorney made were not allowed to be considered by the jury. So even if you

couldn't prove any more, you'd still have a case, wouldn't you?

MR. BARNARD: Yes.

QUESTION: And I suppose you would also argue that if constitutional error was committed, the Court of Appeals here plainly applied the wrong harmless error constitutional standard. It didn't find that the error was harmless beyond a reasonable doubt; it just said it may not have hurt him any.

That's hardly the harmless error standard that's normally applied in constitutional error.

MR. BARNARD: That's correct.

My time has almost expired and I think I should move to the second issue. The second issue in this case rests upon the same constitutional underpinnings as the McCleskey case that you've just heard, so I do not want to and we have not in our brief separately addressed the constitutional question.

I simply want to point out in the minute or so remaining the differences in our case and McCleskey, and that difference is primarily procedural posture. We have never had any evidentiary consideration of this issue. We're here after a summary dismissal, a summary dismissal that was based upon a reading of -- which has been based upon a reading of the early decisions and has

been handed down with regard to Florida throughout the years since Spinkellink.

We have established a prima facie case, we submit, for four reasons:

First, we have shown just the overall sentencing disparity in Florida, that 57 percent of homicides involve white victims, 43 percent black victims, yet death sentences are imposed in 88 88 percent of the death sentences imposed involve white victims and 12 percent involve black victims.

The study that we're primarily relying upon also goes further as the second part of our prima facie case and controls in studies common non-discriminatory reasons for imposing the death penalty, to determine whether there is some other explanation for this disparity.

They used variables which literature and research has been shown to be the most predictive of death sentences. Yet within that group, the studies show that the likelihood of a death penalty is five times greater where the victim is white.

There are two other factors within our prima facie case. One is the unique opportunity for discrimination in a capital sentencing proceeding, as the Court recognized last term in Turner. And lastly is

the history of race disparity in Florida, which is well documented.

My time has expired.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Barnard.

We'll hear now from you, Mr. Daly.

ORAL ARGUMENT OF SEAN DALY, ESQ.,

ON BEHALF OF RESPONDENT

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

The question to be decided here is the propriety of the Eleventh Circuit's case by case analysis test to address those few particular Florida cases that involve the application of Lockett, Cooper, and the Songer decision.

Addressing first the issue raised by the Petitioner as to the constitutionality of the statute, we note that the Florida Supreme Court has removed any possibility of an attack in that manner in its interpretation of its consideration of the statute and non-statutory mitigating circumstances. In its Songer decision, it made clear that Cooper was in no way intended to act as a limitation on non-statutory mitigating evidence.

It cited a number of cases where in fact

non-statutory mitigating evidence had been received and considered in various capital cases. That interpretation is of course binding and precludes an attack on the constitutionality of the statute.

QUESTION: That of course came down after Hitchcock's sentence, didn't it?

MR. DALY: It does beg the question as to the ambiguity that counsel or judicial officers may have been faced with in trying to interpret these decisions.

QUESTION: Well, even if you're right that the statute shouldn't be declared unconstitutional, the issue is about the constitutionality of this particular death sentence.

MR. DALY: Yes, sir.

QUESTION: And do you agree that the trial judge limited his consideration to just the statutory mitigating circumstances?

MR. DALY: No, sir, and we submit that the district court's --

QUESTION: Well, how about his instruction to the jury?

MR. DALY: His instruction to the jury is interesting in that it limits only those aggravating circumstances which may be considered. The language that he instructed the jury is completely different.

While he did provide that you shall consider the following statutory mitigating circumstances, that language did not in turn limit the consideration of other mitigating circumstances.

QUESTION: That's not what he said. He said the mitigating circumstances which you may consider shall be the following. I take that to mean these are the only mitigating circumstances that you may consider.

MR. DALY: This of course must be read in contrast to the instruction just prior to that, which specifically limits their consideration of statutory aggravating circumstances in much more specific language.

QUESTION: Well, perhaps, but I consider that specific enough: "The mitigating circumstances which you may consider shall be the following," not included among the mitigating factors, or you may consider the following mitigating factors.

MR. DALY: Well, of course, the district court did not read it that way. They do not determine and specifically make the finding, as apparently conceded by the --

QUESTION: Well, Mr. Daly, shouldn't we look at the plain language of the instruction, as any juror

would be expected to do? And when the trial judge himself was sentencing the Petitioner, he only discussed the statutory mitigating circumstances and stated there were insufficient mitigating circumstances as enumerated in the statute.

MR. DALY: The court also noted --

QUESTION: And doesn't that at least suggest that the judge didn't think consideration of other factors was appropriate?

MR. DALY: While it might suggest that, it is certainly balanced by the fact that, as noted again by the district court in a detailed analysis of each of these issues, that the trial court also specifically noted that, the court has weighed and considered the total evidence received in this case.

And we also submit that you've got to consider that the fact that the jury was specifically -- that the argument presented to them was in no way limited in terms of non-statutory mitigating circumstances.

QUESTION: You mean the argument by defense counsel??

MR. DALY: By defense counsel.

QUESTION: Mr. Daly, the charge to the jury also said, in addition to saying the mitigating circumstances you may consider shall be the following

and then listing the statutory list, the judge went on to say later: After you've considered all the aggravating circumstances, then you are to consider the mitigating circumstances and consider them by number.

Now, what do you think "by number" means?

MR. DALY: Well, it certainly refers to the statutory mitigating circumstances.

QUESTION: Well, what do you do with the non-statutory ones that you say they were free to consider? They consider them number zero?

MR. DALY: Well, once again, they were not instructed that they could not consider them. Defense counsel, despite argument to the contrary, also specifically argued to the jury at the sentencing phase, that, after giving his rundown on the character and the historical problems that this defendant had suffered and all of these other matters, which are clearly non-statutory aspects and for which no attempt to limit him was presented, he then said: And I want you to consider the whole ball of wax in this case, the whole picture.

And that whole picture necessarily encompasses those non-statutory mitigating circumstances.

QUESTION: Was this same kind of an argument made or arise in the Court of Appeals?

MR. DALY: Yes, sir, it did.

QUESTION: I find it very strange that the Court of Appeals' opinion on this phase of the case didn't even mention what the trial court's instruction was to the jury, to the jury or what he considered himself in imposing sentence.

MR. DALY: Well, of course, as noted by the district court, that issue had already been resolved by the Court of Appeals, and that's why it wasn't specifically addressed by the --

QUESTION: You mean in the prior -- in the prior Hitchcock decision?

MR. DALY: No, in prior decisions on that same issue, because this issue -- what happened in this case is you have the standard jury instruction being read. So this is not the first time that this case has come before the Eleventh Circuit. It has come before them in a number of contexts.

It was not the argument which anybody focused upon, because everyone was aware of the decision of --

QUESTION: Well, let's just assume that there is just no argument whatsoever that the judge plainly told the jury: You may consider these five mitigating circumstances and no others, and in your balancing aggravation, aggravating circumstances, against

mitigating, you just must consider these five mitigating and no others.

And then the jury comes back with a recommendation, and then the judge himself decides, proceeds to decide whether to impose the death penalty. And he specifically says: I am limiting my consideration of the mitigating circumstances to the following.

Now, if that happened in this case wouldn't you say that's a real problem under Lockett?

MR. DALY: Yes, Your Honor, it would be.

QUESTION: And should we reverse.

MR. DALY: If that had happened in this case.

QUESTION: All right. If we interpret what happened in this case that way, then there's going to be a reversal. I know you don't agree with that interpretation.

MR. DALY: I definitely do not agree. The district court did not agree. The Eleventh Circuit has not agreed. And we note that in other cases, applying this same case by case analysis, the Eleventh Circuit has in fact sent back for an evidentiary hearing or reversed for a new sentencing hearing where a judge did make it clear that he felt himself limited.

There is no indication along these lines in

this case. And we submit that --

QUESTION: Was that your only defense of the Court of Appeals' decision? Because they said -- well, what if the Court of Appeals has said, well, it's perfectly plain that if this lawyer or judge hadn't been mistaken that they would have been a lot of other mitigating circumstances that could have been presented?

What if the Court of Appeals had thought that?

MR. DALY: Well, I don't necessarily know that it would affected this case. This case comes --

QUESTION: Well, their rationale was there's no proof here that any different -- that there would have been any different evidence.

MR. DALY: That is exactly --

QUESTION: Well, what if they had thought there would have been different evidence? What would they have said?

MR. DALY: I'm sure they would have analyzed that in their case by case analysis test, which incorporates all of those factors.

One of the factors to be evaluated is just what would you have presented. Certainly, if you would not have presented anything but what the judge heard,

then what is the problem with the case?

QUESTION: Well, what the problem is is that what the judge heard were a lot of non-statutory mitigating circumstances that he didn't consider.

MR. DALY: That he potentially didn't consider.

QUESTION: Yes, all right.

MR. DALY: Of course, we have a finding by the district court that that is not the case, to the contrary, that the evidence of record to his mind indicated that the judge did not feel himself so limited.

In other cases, of course, we have had judges make specific pronouncements that, I felt myself limited and was confused by the Cooper-Lockett difficulty. And in those situations, both the Florida Supreme Court and the Eleventh Circuit Court of Appeals have sent cases back.

We do not have that situation in this case. Instead, we have a situation where the state would submit that it was clear that they did not -- that the parties at issue, at least, did not perceive themselves limited.

If you look at all of the non-statutory mitigating factorss that were --

QUESTION: So it's a case of agreeing or disagreeing with the Court of Appeals on their interpretation of what the judge said and what the defense attorney believed?

MR. DALY: It's a case of evaluating all of the factors involved in their case by case analysis test to see if that adequately protects the individualized capital sentencing determination right of the Petitioner.

QUESTION: Well, what do you have that indicates that this language doesn't mean what it seems to me it says, other than the fact that non-statutory mitigating elements were allowed to be referred to by the defense counsel?

Is there anything else in the charge to the jury that specifically makes clear they can consider these mitigating factors, or is there anything in the judge's statement when he imposed the sentence that indicated that he did consider those other?

MR. DALY: Well, of course, in defense counsel's -- not in the charge instructions. I mean, the charge instructions are pretty much laid out, and it's just a matter of whether you want to read ambiguity into them or whether you do not.

The district court and the Eleventh Circuit

Court of Appeals has chosen not to read that ambiguity into them.

QUESTION: Well, I don't think the Court of Appeals even addressed it in this case.

MR. DALY: Not in this case. But of course, the reason they didn't find it necessary --

QUESTION: Well, it's a case by case analysis. Why didn't they? If they had found that the judge just plain out said, I can't possibly consider non-statutory mitigating circumstances, they would have reversed.

MR. DALY: I would submit it was because the tenor of the argument submitted by the Petitioner in this case at both levels was not typically addressed to the trial judge's instruction. He was focusing in on defense counsel, because he had talked to defense counsel and, in the Court of Appeals at least -- or at the district court level, had an affidavit from counsel.

That's what he made his argument, and that's why the focus of the Eleventh Circuit Court of Appeals is addressed to that argument. His case, while it contained a number of bits and pieces of a challenge saying, well, if Lockett didn't do this, then maybe it did this in this case, or maybe it did this.

The Court of Appeals looked to all of the circumstances. They looked and they said in this case, we find that if you look you're going to find that defense counsel did not perceive himself limited, that in his argument to the jury he specifically asked the jury to consider all of these non-statutory mitigating factors that were brought out both at trial and in sentencing.

If you look, for instance, during the trial phase of this case, you're going to find a number of relevancy objections lodged by the prosecutor when the defense counsel tried to bring out the fact that this young man minded his mother, that he was always good to his family.

And despite repeated objections and many times being sustained, defense counsel persisted in bringing those factors in front of the jury, and did and was able to do so. When he went into sentencing, no objection was raised, the judge did not attempt to limit consideration, and once again he pounded on those non-statutory aggravating factors.

QUESTION: Was an objection ever raised and overruled?

MR. DALY: At trial level, to the relevance at that point in time to these factors, it was, An

objection was in fact sustained. At other times, objections were overruled based upon a relevancy determination.

But none of these were raised in the context of the sentencing. They were raised in the context of the trial phase itself.

But of course, defense counsel did not limit the jury's consideration of these factors at sentencing to only those he presented. He simply used Hitchcock's brother to present the icing on the cake, then referred back to all of the other factors that had been brought out.

And as conceded by the Petitioner, if you look at those factors you're not going to be able to place them within any of the statutory circumstances. They are in fact non-statutory mitigating factors. They are pleas that this man can be rehabilitated, that there are other circumstances that you don't know about: he came from a poor sharecropper's family.

All of these other things are of no consequence under Florida's statutory aggravating and mitigating circumstance scheme. They are surely non-statutory factors, and the jury was made aware of them and the defense counsel specifically argued to them: Listen, you've got to look at the whole picture.

And there was no objection raised to that.

And we submit that that, in the context of the jury instructions that seem to give this Court question, should be enough to demonstrate that this man was not deprived of an individualized sentencing determination. He got it.

He brought out virtually everything that he says now he wished he could bring out. If you look at what defense counsel said in his affidavit, he doesn't say he would have done anything differently. He doesn't even say that, I didn't think that I could bring these out. My opinion now reviewing the record is that I perceive that I may have felt myself limited.

QUESTION: Is that harmless error, then?

MR. DALY: It is basically a harmless error argument.

QUESTION: So you say there was error?

MR. DALY: No, I don't.

QUESTION: But harmless?

MR. DALY: I submit that in the context of this Lockett case that the case by case analysis adopted by the Eleventh Circuit is adequate to determine whether an evidentiary hearing is called for in the post-conviction context.

The context of this case is truly an

ineffectiveness of counsel case. We have an excuse for counsel raised and, alternatively by the defendant, we certainly have the argument that even if counsel knew that he could present non-statutory, he didn't do a good enough job.

But given that context, we submit that the standard of review is a two-stage standard. Let us assume that there is error. Then we must go and say, did it determine or affect probably the outcome of this case?

That is truly what this case is all about. It's just ineffective assistance under another cloak.

QUESTION: Well, in your view who has the burden of demonstrating that the error did or did not affect the outcome?

MR. DALY: It still lies with the Petitioner, given the post-conviction context and given the challenge to the efficiency of counsel. As counsel -- as this Court has noted, there wasn't any objection. If you read the Petitioner's brief in this case, he's going to say that everyone should have known that Florida limited consideration of non-statutory mitigating circumstances when they read the statute, when the Dixon decision came out.

Well, if that's the case, then why didn't

counsel know that in this case? He doesn't say he knew that. As a matter of fact, he doesn't tell us when this perception came up.

QUESTION: Well, don't you agree that in the guilt phase of the trial there were a lot of facts brought out about this Petitioner?

MR. DALY: Oh, very true.

QUESTION: And a lot of them aren't listed in the statutory mitigating circumstances.

MR. DALY: And they weren't argued as a basis for --

QUESTION: Isn't that true?

MR. DALY: That's true.

QUESTION: Well, and yet the jury was told, don't consider any except A, B, C, and D.

MR. DALY: And no argument --

QUESTION: Just forget all the mitigating circumstances that you might have heard in the guilt phase.

MR. DALY: Well, we'd also note that no argument --

QUESTION: So it's sort of, it's really no complete answer to say that the lawyer might not have offered anything more than he did. He might have already offered a lot of things or there might have been

a lot of facts in the case that the jury and the judge might not have considered in mitigation.

MR. DALY: If you look in this case, you're also going to note that the prosecutor never argued any of these extraneous facts as non-statutory aggravating circumstances at the sentencing phase, nor did he in his responsive argument at sentencing say, listen, you've all heard this other stuff, you can't consider that, that's non-statutory mitigating evidence and you can't consider it.

The jury was never told that. The jury was instead told by defense counsel, without objection and without limitation, that --

QUESTION: Well, what are they going to do, disobey their instructions from the judge?

MR. DALY: I don't believe that the instruction limited them.

Addressing, if there are no further questions, the second point, the State of Florida submits that this case is of monumental importance both in the State of Florida and in other states that now have a capital sentencing structure.

What it basically amounts to is a challenge or an indictment of the system as a whole, where the defendant seeks to come in and, without specifying where

the erroneous, invidious prejudice exists, simply wants to shut down the system and say, well, in ten more years, maybe in 15 years, we'll start it up again, and after we have the requisite number of cases for a statistical analysis we'll go back in and see if society is still, you know, devaluing the life of -- the value of the life of black victims.

If you look at the statistical analysis in this case, it does not even attempt to rise to the level of the Baldus study. It simply asserts that, well, we've got a lot of data here from all homicide cases. This is every case in which a death has resulted. It doesn't have to be a first degree murder case. And we submit to you that, based upon those statistics, without any attempt to control for a multitude of variables inherent in any individualized capital sentencing scheme, that you must through out the statute as a whole, because we don't know where this discrimination takes place.

If you look at the Gross and Morrow study, which is the cornerstone upon which the Petitioner's argument is base, you're going to find that, as far as the statisticians in that case are concerned, they cannot pinpoint any area in which this discrimination is taking place.

They seem to submit, though, that it is in the jury area. The jury, which is the foundation of our criminal justice system, we must basically do away with because we cannot trust our citizens to not discriminate in sentencing, despite what this Court has already noted are very specific instructions on how you're supposed to do it, instructions which include in Florida at least the idea that you do not consider prejudice or other aspects in sentencing.

QUESTION: I suppose what we do in the McCleskey case will affect what we do here on this issue, won't it?

MR. DALY: It certainly will, sir. The State of Florida's position is that we would like to see a bright line rule adopted by this Court, a basic finding that in the regression analysis, statistics analysis test, it cannot serve as a basis for even the granting of an evidentiary hearing, because this situation, as noted by counsel for the State of Georgia, is inherently different from a Title 7 case or a jury construction case.

QUESTION: You think your case is any different and, if so, in what respects from the Georgia case?

MR. DALY: It's certainly different in that

the Florida scheme is different, in that the Florida scheme does not follow the jury's recommendation to have a judge involved.

But in this case, if you look at the study, that's the most important analysis. The study in this case would be considered feeble, I would submit, in comparison to the Baldus study. They control for only a few factors.

QUESTION: Well, I take it your position is that any study isn't going to be very --

MR. DALY: Yes, sir, exactly.

QUESTION: So statistics should be thrown out completely?

MR. DALY: This type of regression analysis in the capital sentencing context cannot work. The reason it cannot work is because we cannot have mandatory death penalty sentencing, and the reason we can't have that is because we must have discretion inherent in the system.

That discretion, that possibility -- the first issue in this case is the reason why you can't have a statistical analysis.

QUESTION: Well, some states thought for a while they could have mandatory death penalties.

MR. DALY: That's exactly right. And of course, the State of Florida has been working for more

than ten years under the assumption that we can expend the dollars and the time in trying to implement our system and not have the rug pulled out from underneath us by statisticians down the road who cannot control, who admit that they cannot control, for all of the inherent variables in the capital sentencing context.

QUESTION: You don't like statisticians.

MR. DALY: Not in this context. I think they have no value, because they cannot do what they say they have to do. They cannot control adequately enough to tell us that this system is discriminating, and they can offer us no way to adjust the system.

If you look at the Gross and Morrow study, the only remedy that the statisticians can offer is that, well, we'll just have to wait for time to correct this invidious societal discrimination, or do away with juries, one or the other, because we cannot correct.

The state submits that the potential prejudice that they argue exists can be corrected, very simply. It's a mechanism that already exists. If it's a jury problem, why are not defense counsel asking jurors? Now, admittedly this is a strange case to do it in because you have a white defendant who kills a 13 year old -- his 13 year old white step-niece after raping her.

And for some reason, we must invalidate a death penalty sentence that has been imposed by the jury in accordance with Florida law and the judge, because if that had been a black victim somehow they would have given life? We submit that that's a preposterous rationale, and that --

QUESTION: Wasn't it true in Florida up until about 25 years ago?

MR. DALY: I have no way of knowing.

QUESTION: Well, you ought to look it up some time.

MR. DALY: I just know now that this Court --

QUESTION: No Negro was ever executed in any of the southern states or northern states for killing a Negro until around about the thirties or forties.

MR. DALY: Of course, that's not the case in the State of Florida now.

QUESTION: I know, but you were getting so broad. I just wanted to pull you back a little.

MR. DALY: I understand. The basic analysis that we have here is that we have come a long way since then, and we have a statute that this Court has specifically validated against claims of arbitrariness and discrimination in application.

We have a situation where we cannot control

who our murderers murder. We cannot control how our jurors think, although the potential is certainly there for defense counsel, if he perceives a societal prejudice in the State of Florida, to question potential jurors on that prejudice.

He questions them on a potential prejudice againt a black defendant. Why cannot he do that in this case?

QUESTION: What about the prosecutors?

MR. DALY: Well, prosecutors, we submit --

QUESTION: They make a decision of whether to make a capital case out of a set of facts.

MR. DALY: Well, they make the decision of whether to present it for indictment, certainly. But we have only indictment for first degree murder in --

QUESTION: Well, how about, is there some choice made after the finding of guilt as to whether to proceed to a sentencing hearing?

MR. DALY: Yes, there is that discretion.

QUESTION: By the prosecutor?

MR. DALY: By the prosecutor.

QUESTION: Uncontrolled?

MR. DALY: Uncontrolled. Well, of course. He has to evaluate the evidence.

QUESTION: He has to evaluate the evidence.

MR. DALY: Right. And that is why we cannot conduct this type of analysis in this case, unless you are going to send someone into every case, someone that both people agree will do an adequate job in evaluating the case, and can, you know, basically compare apples to oranges.

How do you compare the mitigating factor of Hitchcock's sucking gas to the mitigating factor of someone else's potential mental incapacity? You can't. How do you do that?

How do we know how the jury did it? We cannot do that. We have to basically rely on our jury system, and on a system --

QUESTION: I assume the statistician's answer to that is that all those variables will likely break out even.

MR. DALY: They certainly can assume that.

QUESTION: And that where you have a statistical result that is wildly disparate, you can come to the conclusion there's something wrong.

MR. DALY: Well, one of the aspects --

QUESTION: I know you can't take account of all the factors, but why shouldn't you assume that all the factors you can't take account of more or less even out? At least you don't end up with a result eleven

times different, or whatever.

MR. DALY: The reason is because you're making a basic attack on the punishment system in the state.

QUESTION: Well, on the whole system; you're making the mistake of looking at the forest instead of the trees?

MR. DALY: I submit that that's exactly true. This is -- I mean, you cannot do it, and that's why we suggest that a bright line rule is necessary, to prevent --

QUESTION: There have been several studies made of juries. Professor Calvin of the University of Chicago made one, and there are at least several others. So it's not absolutely unstudied.

MR. DALY: I'm sure that's true. I'm sure that in specific cases --

QUESTION: Well, have you read them?

MR. DALY: I'm sure in specific --

QUESTION: Have you read them?

MR. DALY: No, sir.

QUESTION: Well, don't you think you should?

MR. DALY: I submit that it would be impossible to condemn the system as a whole. If a defendant wishes to come in here and claim that in his particular case he has suffered intentional and

purposeful discrimination because of his particular jury or his particular prosecutor, he is certainly free to make those allegations and present the proof necessary to require an evidentiary hearing.

But for Mr. Hitchcock in this case to come in and say, well, I'm not saying I don't deserve my penalty, but you can't execute me because someone else might have gotten more lenient treatment for killing a black, when there is no way to qualitatively compare the circumstances in those two cases, it cannot be done. And there is no way to correct the system in this case.

If you create -- you are basically going to create a quagmire of evidentiary hearings where the bottom line is always going to be, as it was in Spinkellink -- the Florida courts have addressed, at least partially in Spinkellink, an analysis of evidentiary admissions.

And at that point in time, the State presented evidence that, just as the State of Georgia submitted, that typically the black victim situations are barroom brawls or quarrels or perhaps mutual combatant situations.

QUESTION: Mr. Daly, what if federal had a statute that said the death penalty shall not be imposed in cases like this if the victim is black? Would this

defendant have standing to complain about the situation

MR. DALY: I believe so. If on its face there was a discriminatory impact, certainly I think that the challenge could be made.

The situation in this case, of course, is that the State of Florida was informed in 1976: Go ahead, you have a fine system; you have a number of checks and balances, for instance, that the Georgia courts do not have inherent in their system.

In order for a discriminatory impact to have taken place in our state, it has to go not only through the trial court level, but also through a mandated direct appeal and a proportionality review that is not even required under the Constitution.

Basically, the State of Florida bends over backwards to assure the propriety of its system. And we submit that this kind of attack is basically untenable, and that the trial court, the district court, and that the Circuit Court of Appeals properly rejected it on a matter of law determination saying, listen, that might be fine in Title 7 cases, that might be fine in limited criminal aspects, but in the context of a death penalty case a certain amount of discretion is mandated and you cannot control for that discretion.

The system must survive until it is

demonstrated beyond a doubt and beyond a situation that the statistical analysis is going to be able to do, that it has an intentional discriminatory impact. Hitchcock doesn't even assert that there is any intentional discrimination on behalf of the state in this case. He simply wishes to take advantage of a statistical, an alleged statistical disparity which is not totally explained.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Daly.

The case is submitted.

(Whereupon, at 12:00 o'clock noon, oral argument in the above-entitled case was submitted.)

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85-6756 - JAMES ERNEST HITCHCOCK, Petitioner V. LOUIE L. WAINWRIGHT,
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nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)