ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

BANKERS LIFE AND CASUALTY COMPANY,)
)
Appellant,)
)
v.) No. 85-1765
)
LLOYD M. CRENSHAW,)
)
Appellee.)

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Appellant, :
v. : No. 85-1765
LLOYD M. CRENSHAW, :
Appellee. :

Washington, D.C.
Monday, November 30, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:51 p.m.

APPEARANCES:

THEODORE B. OLSON, ESQUIRE, Washington, D.C., on behalf of the Appellant.

BRUCE J. ENNIS, JR., ESQUIRE, Washington, D.C., on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

(1:50 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Olson, you may begin whenever you are ready.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQUIRE

ON BEHALF OF APPELLANT

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

This case presents the question whether large punitive damage awards may constitute excessive fines, in violation of the Eighth Amendment. This issue stems from a Mississippi jury verdict in favor of Appellee Crenshaw in his suit for a $20,000.00 insurance benefit. The jury added $1,600,000.00 in punitive damages against Appellant Bankers Life for its nonpayment of that claim.

The jury verdict was affirmed four years later by a divided Mississippi Supreme Court. That Court then added an automatic 15 percent, $243,000.00 penalty, to the judgment against Appellant, for prosecuting an unsuccessful appeal.

QUESTION: Now, is the validity of that penalty before us, Mr. Olson?

MR. OLSON: Yes. The validity of that penalty was appealed. Because, in fact, Justice Brennan, because the punitive damage issue --

QUESTION: Well, your emphasis is on the punitive

damage.

MR. OLSON: Yes, that is correct.

QUESTION: But you are arguing the penalty, also?

MR. OLSON: Yes, we are.

QUESTION: Thank you.

MR. OLSON: Because the punitive damage issue is a logical antecedent to the question raised by the appeal penalty, because we regard punitive damage as the central issue in this case.

QUESTION: We don't reach the appeal penalty, because if we were to reverse on the other point, you would have won the appeal and you wouldn't pay the penalty, right?

MR. OLSON: Exactly. And for those reasons, and because the other issues, including the appeal penalty, is adequately discussed in the briefs, we would like to concentrate today on the punitive damage question.

QUESTION: Mr. Olson, are you arguing the punitive damages question on the basis of a due process argument as well, or just Eighth Amendment?

MR. OLSON: We are arguing both on the basis of a due process clause objection and on the Eighth Amendment.

QUESTION: Was the Eighth Amendment argument ever raised in the state courts, Mr. Olson?

MR. OLSON: On a petition for rehearing, in the Mississippi Supreme Court, which this Court has held is an

appropriate and not untimely point at which to raise such an issue, the --

QUESTION: Well, it depends. You know, if it is something you could not have anticipated before the Opinion of the Supreme Court of Mississippi, maybe. But certainly, your punitive damages issue could have been raised way back in the trial court.

MR. OLSON: We submit that, and perhaps we are misreading this Court's decision in Hathorn v. Lovorn, but that this Court held that it is not untimely. The rule with respect to Mississippi practice does not regularly and consistently preclude raising issues in a petition for reconsideration. And 11 cases were cited in that Opinion to support the proposition that Mississippi regularly does recognize issues that are raised on rehearing, in the petition.

QUESTION: Does it have to? Our rules say raised and passed upon.

MR. OLSON: In the case which I was cited, the Hathorn case, the issue was not passed upon by the Mississippi Supreme Court. In the Petition for Rehearing in this case, the Appellant raised the issue that the punitive damage award was excessive, constitutes an excessive fine and violates due process, equal protection, and other constitutional provisions.

QUESTION: Mr. Olson, did you abandon your Contract Clause argument?

MR. OLSON: We have not abandoned the Contract Clause argument, Justice Blackmun. We believe that the Contract Clause argument, though, in this case, forms substantially a part of the Due Process Clause argument in the sense that the Supreme Court of Mississippi was in the process of changing subjective standards with respect to the imposition of punitive damages in connection with the enforcement of a contract. So we have not abandoned that issue, but it is clearly subordinate to the Due Process Clause issue, and, we submit, to the punitive damage question under the Eighth Amendment, which we would prefer to discuss.

QUESTION: The Supreme Court of Mississippi denied your Petition for Rehearing without Opinion, did it not?

MR. OLSON: That is correct.

QUESTION: Is your Due Process Clause argument limited to the contention that it violates due process not to give you an opportunity to challenge the excessiveness of the penalty; or does it extend as broadly as one of the Amicus briefs would have it, to wit, that a penalty of indeterminate amount is simply contrary to due process?

MR. OLSON: Let me answer that in this way. In this Court, in 1966, in Giacco v. Pennsylvania, held that a $230.00 penalty imposed upon a litigant after a trial in a criminal case in which the litigant was acquitted, held that a $230.00 penalty imposed upon the individual because of reprehensible

conduct, violated the Due Process Clause of the Constitution, that a penalty of that nature and that amount could not be imposed on the basis of a subjective, elastic standard, such as the word "reprehensible."

In this case, the standard pursuant to which my client was punished is no more clear and no more specific than it was in that case. The only difference is, in this case the penalty was $1,600,000.00. And that is the principal focus of our Due Process Clause objection.

Turning to the punitive damage issue, if I may, I don't need to spend too much time reiterating the principal characteristics of punitive damages to this Court, because they are well-known to this Court and have been discussed in many Opinions of this Court. But I would briefly like to touch upon four principal characteristics of punitive damages which have been mentioned by this Court.

In the first place, punitive damages are not damages in the traditional sense. Damages generally and traditionally are pecuniary reparation. But as repeatedly characterized by this Court, punitive damages are not to compensate victims. They are only windfalls. As counsel for Mr. Crenshaw stated in his opening statement, we are asking you to return a sizable verdict that is not to compensate Lloyd Crenshaw.

QUESTION: Mr. Olson, you say "windfalls," haven't they been referred to as "smart money"?

MR. OLSON: They have been referred to as "smart money." And I am not sure exactly what is meant by the term "smart money."

QUESTION: Well, it connotes to me at least that it is something like a penalty or punishment, doesn't it?

MR. OLSON: Yes, exactly. Something that will "smart" or "sting." That was my next point. The first characteristic being that they are not compensatory.

The second characteristic which this Court has identified is that they are in the nature of a punishment. They are private finds, as articulated by this Court, levied by civil juries.

QUESTION: That comes right out of the word "punitive."

MR. OLSON: That comes, of course, out of the word "punitive," and on jury instructions, and the history of punitive damages, which have been considered over and over again by this Court, make it very clear, as characterized by Chief Justice Rehnquist, punitive damages are quasi-criminal.

The third characteristic that is worthy to focus on, and before I do that, with respect to the characterization of punitive damages as criminal and as for punishment purposes, again, the same theme was reflected in the jury instructions and the arguments to the jury in this case.

The third characteristic which has been mentioned by

this Court is that the standards for the imposition of punitive damages and subjective and elastic. The standards for imposing punitive damages range from reprehensible to wanton, to negligence, to bad faith, and, in Mississippi, even rudeness.

As Justice Brennan put it, in one case, juries award punitive damages in their largely uncontrolled discretion.

The fourth characteristic, beyond the standard, is that the magnitude of punitive damage awards is utterly capricious. In words familiar to this Court, punitive damages are awarded in wholly unpredictable amounts, bearing no necessary relation to the actual harm caused.

Juries have awarded, in this country, up to $3 billion in punitive damages. Appellate Courts in this country have sustained jury awards up to $1 billion in punitive damages.

With those four characteristics of punitive damages in mind, I would like to turn to the Eighth Amendment.

QUESTION: Excuse me. When an Appellate Court reverses or asks for a remittitur of punitive damages, what does it base it on? What does the Appellate Court say? This is too much, or what?

MR. OLSON: That's about it, Justice Scalia. The Appellate Courts of this country are not clear in their articulation as to why awards are upset or why punitive damage awards are sustained.

The words of the Court in this case were to the effect that the punitive damage, it did not matter whether it was high enough to shock the conscience, simply that it was not too high to shock the judicial conscience of the Supreme Court of Mississippi. The dissent pointed out that he couldn't understand the difference between shocking the conscience and shocking the judicial conscience, and I won't go into that. But that is about as subjective and as elusive, and as elastic, as the standards are at the Appellate Court level, as they are at the jury level.

Before turning to the affirmative reasons why we submit that punitive damages are subject to the Excessive Fines Clause of the Eighth Amendment, I think it is my obligation to discuss very briefly the statement of this Court in Ingraham v. Wright that the Eighth Amendment applies only in criminal cases.

We submit that that is not dispositive of the issue that we bring before you today, for several reasons, but I will only mention three here.

In the first place, as this Court is well aware, Ingraham applied only to the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Excessive Fines Clause of the Eighth Amendment has a separate history, independent of the Bail and the Punishment Clauses of the Eighth Amendment.

Secondly, this Court noted in Footnote 37 of

Ingraham v. Wright, that some punishments, though not labeled criminal by the state, may be sufficiently analogous to criminal punishments to justify application of the Eighth Amendment.

We submit, and I think some of the things that I have said already today, support the proposition, that this punishment is sufficiently analogous, though not labeled criminal.

QUESTION: What about the Excessive Fines Clause itself? Does it apply to states?

MR. OLSON: We believe that the Eighth Amendment, the Cruel and Unusual Punishments Clause has been held applicable to the states. This Court has never held that the Excessive Fines Clause applies to the states, but there is no reason to distinguish between the Excessive Punishments provision of the Cruel and Unusual Punishments Clause of the Eighth Amendment from the Excessive Fines Clause.

QUESTION: You just told us there was a reason. You just told us the two were quite different.

MR. OLSON: Because of the separate history.

QUESTION: Right.

MR. OLSON: That is a reason to distinguish the Ingraham case, which was not focusing on the Excessive Fines Clause, and on the history of the Excessive Fines Clause, but not a reason to take that one level of punishment, which may be

a companion in many cases in the same case, and distinguish it from application to the states.

The third reason, and your question leads me to that, is that the historical analysis in Ingraham, as Justice White pu it, in his dissenting Opinion, was vague and inconclusive. We believe that the reason for that was that was, as we have examined the briefs, and the historical analysis of the Eighth Amendment, tracing back to the English Bill of Rights and to Magna Carta, was not thoroughly briefed in Ingraham v. Wright. And that leads me to the affirmative reasons why we believe that the Eighth Amendment does apply, the Excessive Fines Clause of the Eighth Amendment does apply to punitive damages.

There are three principal reasons why we advance affirmatively, that the Eighth Amendment Excessive Fines Clause does apply to punitive damages.

They are, the language in the drafting and legislative history of the Excessive Fines Clause of the Eighth Amendment; the purpose of the Excessive Fines Clause of the Eighth Amendment; and, as I have mentioned, the historical antecedents of the Excessive Fines Clause of the Eighth Amendment.

First of all, the legislative history, the language and drafting. Nothing in the text of the Eighth Amendment itself limits it to criminal cases. There is no suggestion in the Amendment, in the text of the Amendment, that it should be

limited to criminal cases. And that is interesting. Because the Eighth Amendment was debated immediately after the Fifth Amendment during the First Congress of the United States.

During the debate of the Fifth Amendment, in order to ensure that the Self-Incrimination Clause of the Fifth Amendment would not extend beyond the criminal cases, the framers added a clause so that it would read: "... nor shall any person be compelled in any criminal case to be a witness against himself." The word "criminal" also appears in the Sixth Amendment.

Thus, the legislative history of the drafting of the Eighth Amendment suggests that the framers knew how to include the word "criminal" if they had wished to do so.

Similarly, as this Court has noted, the Eighth Amendment traces its history back to the English Declaration and Bill of Rights of 1689. In the Preamble to the Declaration of Rights, the word "criminal" cases modifies the Bail Provision of the Declaration of Rights. But when enacted in a statute in the actual statutory portion of the Bill of Rights, the English Bill of Rights, the word "criminal" cases is not included as a modifier either of the Excessive Fines Clause provision or of the Bail and Cruel and Unusual Punishments provisions of the Declaration of Rights.

Furthermore, this Court has noted that the Eighth Amendment also can be traced to the Virginia Declaration of

Rights of 1776. It is interesting that Section 9 of the Virginia Declaration of Rights prohibits excessive bail, fines, and cruel and unusual punishment, without any reference to criminal cases. Section 8, the immediately preceding section of the Virginia Declaration of Rights, sets out a whole series of rights and protections in capital or criminal prosecutions

So that the language and the legislative history of the Eighth Amendment does not support limiting that Amendment, the Excessive Fines Clause, to criminal cases.

From the standpoint of a purpose of analysis, as suggested by Justice White in the dissent in Ingraham v. Wright, I think that I need no say any more. Punitive damages serve the same function as criminal fines. So therefore, from the standpoint of the analogy suggested in Footnote 37 of Ingraham v. Wright or the purpose of analysis, it is quite clear that the Excessive Fines Clause should apply to punitive damages.

From the standpoint of the historical analysis, the more one examines the history of the Excessive Fines Clause, and its antecedent, the Excessive Amercements Clause of Magna Carta, the more one is stricken by the similarity between punitive damages and amercements as they were understood in the 13th Century and throughout the period of history, leading up to the word "fines" in the Declaration of Rights of 1689.

The history demonstrates that amercements, the

concept of proportionality, in the first place, does not date from Magna Carta. It dates back to ancient Hebrew law, to ancient law, even to municipal law in England, prior to Magna Carta. The concept of proportionality in punishment is based upon the proposition that disproportionate, unduly severe, arbitrary or capricious punishment is unwise and unjust, and it does not support a proper system of justice.

Saxon law did not distinguish between crimes and torts, and English law combined the concept of private and public wrongs, and remedies for private and public wrongs. Amercements, and later, fines, were imposed for virtually every form of conduct, including civil misconduct, and upon civil litigants.

By 1689, the date of the Declaration of Rights in England, the terms "amercements" and "fines" were relatively interchangeable. And in the Colonial charters, the concept of moderation in punishment, both in the area of fines and in amercements, were embodied, those concepts were embodied in those charters as well.

Book III of Blackstone discusses private wrongs, and it is interesting to examine that history, because Blackstone discusses, in chapter after chapter, that many of the things which he describes as private wrongs contain both a private component and a public component. Certain of what we recognize today as torts, those which were regarded as breaching the

peace and those such as libel, which were regarded as sufficiently serious, were regarded as wrongs to an individual, but also wrongs to the society.

The wrong to the individual was recompensed by damages payable to the individual. The wrong to society was dealt with in the form of a fine. And it is interesting, if we look at that history, and compare it to what precisely we are talking about in this case, the concept of a private and a public wrong, and a private remedy and a public remedy in the same general context, the Consumers Union Amicus brief which supports the Appellee in this case, talks about that there were two separate awards. And there are two separate awards in these cases -- civil damages to private litigants and amercements to the Crown in the form of public damage, in English history.

Mr. Crenshaw's opening statement, his counsel's opening statement in this case said, we really have two lawsuits to present to you today. The first is Mr. Crenshaw's lawsuit for the policy benefits. The second is to penalize Bankers Life.

The same is true in the closing statement. The recognition in this case, the recognition in history, the recognition in the law of punitive damages, that there is a public and a private component. The private component is dealt with in the form of damages, the public component in the form

of either wites, which was the pre-Magna Carta term; amercements, the Magna Carta term; fines, the English Bill of Rights term;, or today, punitive damages.

QUESTION: Mr. Olson, I guess we don't have any reported decisions that have found and Eighth Amendment violation for a punitive damages award, do we?

MR. OLSON: No, you do not. This, as far as we are able to determine, is the first occasion, other than the case two years ago in which the issue was not reached, in which this issue has been presented to this Court. There are lower court decisions. Two of them were cited in my opponent's brief. We feel that those lower court decisions don't stand for anything. They were not well-briefed, and in both of these cases the court did not really focus on the issue.

All of this seems to us to support overwhelmingly the proposition that the Excessive Fines provision should apply to punitive damages. It seems to me that the next question, logically, therefore, is what is meant by "excessive."

This Court has had some strenuous debates and some, I think it is fair to say, difficult times, with the proportionality issue in the Cruel and Unusual Punishments component of the Eighth Amendment, particularly as it deals with criminal punishments. But there is no question, because of the word "excessive," that to the extent that the Excessive Fines Clause is applicable, the question of proportionality is

a key consideration.

The question then becomes what should be the standard that this Court adopts, if it agrees with us that the Eighth Amendment does indeed apply to punitive damages? We have articulated this in our Brief, and let me just restate it briefly, that the objective standards to which this Court should turn in determining whether a fine is excessive is to those objective indicia which have been recognized in this Court's other Eighth Amendment cases, the legislative enactments from the states -- in this case, the State of Mississippi. As we have pointed out, the concept of proportionality in punishment takes into consideration what the society -- in this case, the society of the State of Mississippi -- considers as a whole, in terms of the scheme of things, what is most severe based upon the judgments of the lawmakers of Mississippi.

QUESTION: Well, if you were to apply the Eighth Amendment in this case, what do you think the result would be, and how much of a punitive award would be allowable?

MR. OLSON: The most severe punishment for business fraud, the closest analog that we can find in the State of Mississippi, is a fine of $1,000.00. And we think that the legislative determinations of the State of Mississippi with respect to what is an appropriate level of punishment, is an appropriate, objective indicia of what this Court should turn

to in terms of evaluating what the standards are in Mississippi in terms of the severity of this act, and the nature of the punishment with respect to it.

QUESTION: Mr. Olson, if we proceed in this case under the Excessive Fines Clause, what it means is two things. In each case, we are going to have to evaluate the particular fine and find out if that fine was too excessive or not. And secondly, we are going to have to pick another number, that would have been okay under the circumstances of this particular case.

If we were to find in your favor, on the other hand, on the basis of the Due Process Clause, and on the ground that the vice here is not the excessiveness of the fine or at least we don't have to reach that, but simply the fact that a fine may be imposed by a jury with no standards whatever, then we wouldn't have to examine each case, would we?

MR. OLSON: That is correct.

QUESTION: It would mean the Legislature would have to come up with some kind of a standard and we could evaluate the standard instead of the individual judgment of each jury.

MR. OLSON: That is correct, Justice Scalia.

QUESTION: So why do you want us to do it on the Excessive Fines ground, then?

MR. OLSON: We would be very happy with a decision by this Court that this punitive damage award is barred by the Due

Process Clause.

QUESTION: You haven't given much time to it at all.

MR. OLSON: I think that we have covered it in extensive detail in the Brief, and in fact, the Due Process Clause, the implications of the Due Process Clause are all over the Eighth Amendment. We talked about the elasticity of the standards, and the capriciousness of the penalty. Those are Due Process concepts as well.

We submit that the resolution, which we are advocating in this Court, is not going to require this Court to examine every punitive damage case. What this Court will do is develop a set of standards which it can articulate, requiring the state courts to evaluate what the Legislature has determined is the appropriate scale of punishment, and then instruct its trial courts to instruct juries that if it is appropriate to grant a punitive sanction, and it does pass the Due Process Clause test --

QUESTION: Mr. Olson, are you urging us to say that $1,000.00 would be the limit?

MR. OLSON: In this case, we are suggesting that the objective suggestions, the objective criteria established by the Legislature of Mississippi as an appropriate penalty, would be an appropriate punitive, would be the limit of a punitive damage award in this case.

QUESTION: $1,000.00. Would that apply to General

Motors, too?

MR. OLSON: Well, only in the sense that the State of Mississippi has determined that a $1,000.00 fine for business fraud is the appropriate criminal penalty for General Motors or anyone else in the State of Mississippi.

QUESTION: For anybody else?

MR. OLSON: Exactly, Justice Marshall, because that is the legislative judgment of the State of Mississippi, placing on the scale of things the severity of crimes punishable in the State of Mississippi.

QUESTION: Mr. Olson, in our other Cruel and Unusual Punishment proportionality cases, you say we have had such bad luck with and such uncertainty over, and I think you say that quite rightly, we have looked to other states and what they proscribe. Why wouldn't we look to other punitive damage awards here?

MR. OLSON: In this case, I submit that it would not be necessary, that the State of Mississippi has developed a range of penalties which are appropriate.

On the high end of things, you have looked to other states to determine whether perhaps an excessive penalty might be outside the scale of things, based upon the judgment of other legislatures. If, for example, if the State of Mississippi were to legislate a penalty which would involve cutting off a hand or something of that nature, then it might

be necessary to go to the next step and to look at other legislative determinations. We submit, in this case, it is not necessary to do that.

And if I may, I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Olson. We will hear now from you, Mr. Ennis.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR., ESQUIRE

ON BEHALF OF APPELLEE

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

Although I will certainly address the punitive damages issues, I would like to begin by addressing the rationality of the appeal penalty statute, because in our view, that is the only issue that is properly before the Court.

The penalty statute serves several legitimate state interests, including the indisputably legitimate interest of conserving judicial resources, protecting the integrity of judgments, and providing some measure of compensation for the real but difficult to measure intangible costs of defending appeals.

The statute applies equally to all parties who appeal from money judgments. If Lloyd Crenshaw had unsuccessfully appealed from the same judgment at issue here, he would have incurred precisely the same 15 percent penalty that Bankers

Life incurred.

The statute conserves judicial resources by discouraging marginal appeals without preventing them. Discouraging appeals in marginal cases is perhaps a more important interest in Mississippi than in any other state. Mississippi is one of the few states that does not have an intermediate Court of Appeals.

QUESTION: Well, there were many states that did not have them until very recently, and states larger than Mississippi got along pretty well.

MR. ENNIS: Justice Blackmun, that is entirely correct, and I am not suggesting Mississippi cannot get along. It is getting along. But in addition to not having an intermediate Court of Appeals, Mississippi has chosen to allow all litigants an automatic right of appeal directly from Mississippi's 40 trial courts to the Mississippi Supreme Court.

QUESTION: But that again is routine, really.

MR. ENNIS: Well, Your Honor, it may be routine, but I do not think it is routine in most states for there to be the backlog of appeals there is in Mississippi. In Mississippi, the average time in cases receiving plenary review between appeal and disposition is about four years, as it was in this case.

Mississippi wanted to address that chronic backlog problem, and discourage appeals, but not prevent them. Now,

the Equal Protection Clause does not require a perfect fit between means and objectives, but given the Legislature's objectives in this case, there is actually a very close fit between this statute and the desire to preserve judicial resources.

The Legislature wanted a statute that would be as self-executing and administratively simple as possible, so that already overworked judges would not have to spend additional time holding individualized hearings to determine whether there should be a penalty, and if so, how much. And the Legislature wanted to provide an appropriate level of deterrence by providing a penalty that would be proportional to the judgment at issue and which could be known in advance, so the prospective Appellant would be able mathematically to calculate the penalty and weigh the penalty when deciding whether the strength of his or her appeal justified the penalty that would be imposed if unsuccessful.

Given those objectives, it was certainly rational to limit the appeal penalty to cases involving money judgments. That, for example, explains why the penalty does not apply to plaintiffs who seek money judgments but recover nothing. Applying a penalty in that circumstance would require the Mississippi Supreme Court to hold an individualized hearing and make an ultimately subjective judgment.

QUESTION: Mr. Ennis, I know Alabama has a provision

like this. Are there other states, too, do you know?

MR. ENNIS: Yes, Justice Brennan, there are other states. Virginia and Kentucky. In fact, in a case not cited in our Brief, Louisville and National Railroad v. Stewart, 241 U.S. 261, Justice Holmes upheld the Kentucky 10 percent appeal penalty statute, precisely on the ground that it protected the integrity of judgments.

QUESTION: May I have that again?

MR. ENNIS: Yes. It's 241 U.S. 261, Justice Holmes upheld Kentucky's automatic, mandatory 10 percent penalty for unsuccessful appeals.

QUESTION: Some of those states you mentioned, at least presently, I don't know what may have been the case when they enacted this statute, presently they have intermediate appellate courts.

MR. ENNIS: Yes, that is correct, Justice Brennan. In fact, it is even correct that Alabama has now repealed its appeal penalty statute, so there are now only three states that have them.

The second interest which the Louisville and Nashville case addresses is protecting the integrity of judgments. If there is a money judgment, defendants can often force a needy plaintiff to compromise and accept less than the jury has awarded, rather than to incur additional expenses on appeal, and the delay, which is Mississippi will be about four

years before a Plaintiff can use that money.

QUESTION: There is a post-judgment interest statute, is there not?

MR. ENNIS: There is, Justice O'Connor?

QUESTION: In Mississippi?

MR. ENNIS: There is simple 8 percent interest, and we are not claiming that this statute is needed to further that desire to get interest on the judgment. But what happens in these cases is, particularly if it's a large judgment, is, needy plaintiffs, who often need the money desperately, simply to survive, are forced to compromise the judgment and accept less than the jury awarded, rather than wait four years to get the judgment plus the statutory interest. This statute furthers that interest.

It also furthers the legitimate interest in providing compensation for the intangible costs of appeal. For example, for the prolonged uncertainty.

QUESTION: Isn't the second really the same as the first?

MR. ENNIS: They are certainly similar, Justice White.

QUESTION: Well, it is just supposed to make the Appellant take a second look.

MR. ENNIS: All of these are designed to make the Appellant take a second look. That is correct.

QUESTION: And see what his hole card is.

MR. ENNIS: That's correct. That is absolutely correct.

Now, having identified these interests, let me say that there is no serious dispute between the parties that these are legitimate state interests and that this statute rationally furthers that. Bankers Life's contention here is that the statute is unconstitutional because it is under-inclusive. That is, that it only furthers these legitimate state interests in cases involving appeals from money judgments.

We have shown, however, why it is that the statute is limited to appeals from money judgments, and those statutory classifications are not arbitrary and they are certainly not designed to harm any suspect group or politically powerless minority.

Furthermore, under the Equal Protection Clause, statutes can be very under-inclusive and still be constitutional, because states are permitted so long as their statutes do rationally further a legitimate interest, to proceed one step at a time, addressing broad social problems, step by step.

In fact, in the very case that Bankers Life relies upon, Lindsey v. Normet , this case upheld a statute that was very under-inclusive. It upheld special litigation burdens on only one class of defendants who happened to be tenants in

eviction proceedings.

In the McRae case, which we did not cite, 291 U.S. 566, this Court actually even upheld statutes that singled out insurance company defendants in suits brought by policyholders for special litigation burdens that were not faced by any other litigants, including imposition of attorneys' fees at trial and appeal, and a 12 percent penalty if they lost the suit by the policyholder, even if their defense was in good faith.

The Court did not find that that was an under-inclusive or irrational classification.

And in the Ortwein case, which we cited, the Court even upheld appellate filing fees that absolutely barred appeal by indigent plaintiffs, even though other classes of litigants were permitted to appeal in forma pauperis, as the appellants in Ortwein were not. That statute was not considered under-inclusive.

It is true that in the Lindsey case, this Court did strike down the double bond provision of the Oregon statute. But that double bond statute was not struck down because it was under-inclusive. It was struck down because it did not rationally further the two very different state interests the state relied upon in that case.

In that case, the state interests were to guarantee recovery of rent if appeal by an tenant was unsuccessful. Rent, of course, is easily measurable and calculable, unlike

the intangible costs on appeal we are talking about here. And the purpose of that statute was not just to discourage all marginal appeals as in Mississippi, but to quote "...prevent frivolous appeals." That statute obviously did not prevent frivolous appeals, because tenants who had frivolous appeals, if they could post the bond, could appeal.

There are other important distinctions between Lindsey and this case. The double bond statute there had to be paid before appeal, so it actually did prevent appeals by indigent parties.

In Mississippi, this penalty does not prevent appeal by anyone. It only comes into play after the appeal is unsuccessful.

I will turn now, if I may, to a discussion of Bankers Life's challenges to the punitive damage awards. I want to stress as categorically and clearly as I can that not one of the Federal challenges to the punitive damage award that Bankers Life has argued here was presented to the Mississippi Supreme Court, even in the Petition for Rehearing after the affirmance of the underlying case.

Accordingly, based on a long line of cases, which we cited in Footnote 36 of our Brief, this Court this not have jurisdiction to hear those questions.

Furthermore, those are not appeal questions, they are cert. questions, and therefore, even if the Court had the power

to hear those questions, in the exercise of its discretion, it should decline to do so. They are, of course, extraordinarily important questions, which, if Bankers Life's position is accepted, would fundamentally change the nature of Federal-state relations and would require states very substantially to modify both their tort law systems and their criminal law systems.

The Court should not, in my opinion, reach out to decide those questions until a case properly raising them is before it.

QUESTION: Do you take the position that no due process claim was raised below?

MR. ENNIS: No, I do not, Justice O'Connor. I take the position that the due process claims that are being argued here were not raised below. They did raise different due process claims below. They raised below the due process claim that Justice Scalia referred to. That is, they alleged they were denied due process because they did not have an opportunity to contest, not the punitive damage award, but the penalty imposed on that award, because it was imposed automatically. They have not pressed that due process argument here.

QUESTION: Suppose Mississippi had a rule that was just as expressed as it could be, that it shall be no barrier to our consideration of the claim if you wait until petition

for rehearing to raise it. So if you've got anything left over after we've written an opinion, bring it up on the rehearing. And most of the time, the Court entertains them in the sense they let them be filed, and then they just deny them without Opinion.

Now, I suppose that is just passing on it. They are raised and passed on.

Do you think our rules would bar our jurisdiction?

MR. ENNIS: No, I do not, Justice White. Let me be clear about this.

QUESTION: Well, how about, what do you make out of Hathorn?

MR. ENNIS: I understand Hathorn. Hathorn is not relevant to the situation now before Court and we are not, it is not at all dispositive. Here is the distinction I would like to make.

There are two reasons why this Court will not accept an issue. One is that it was not presented in the trial courts of the state, and under state law, if an issue is not presented in the trial courts, the state supreme court won't hear it.

This issue was not raised in the trial courts. But we are not relying on that. Our point is that even in the Petition for Rehearing, the issue was not presented, ever.

For example, let us take the Excessive Fines Clause issue, which is the most important one they are pressing. They

have radically changed their position on the presentation of that question.

In their jurisdictional statement, they admitted that the Excessive Fines Clause question was not presented even in the Petition for Rehearing. So they claimed that although it was not presented, it was a mere enlargement of the questions that were presented.

QUESTION: Of the due process claim?

MR. ENNIS: That is correct, Your Honor.

QUESTION: Because after all, it takes the Due Process Clause to apply the Eighth Amendment anyway.

MR. ENNIS: Your Honor, as I will show in a moment, they did not even apply, they did not even make a due process challenge to the size of this judgment in the Mississippi Supreme Court.

QUESTION: My transcript of the last sentence of their brief is this, in the Supreme Court of Mississippi, about the punitive damages. "It is excessive, constitutes an excessive fine and violates Due Process, Equal Protection, and other constitutional standards."

Is that your understanding of what the last sentence of their Brief said, too?

MR. ENNIS: Justice Rehnquist, it is. Let me make two points about that.

First, the jurisprudence of this Court is clear and

settled -- we have cited the cases in our Brief -- that you cannot rely solely upon arguments made in briefs to support the jurisdiction of this case.

QUESTION: Well, if something can be raised on rehearing, that is all you have to rely on, because you don't have oral argument on most petitions for rehearing.

MR. ENNIS: You can look to the Petition for Rehearing itself, which is on Page 138(a) of the Appendix to the Jurisdictional Statement. Excuse me. It's Page 139(a). There, the sole reference to excessive fine is contained in the last sentence of the paragraph just before .4, which says: "The punitive damage verdict was clearly excessive, no reasonably related to any legitimate purpose, constitutes excessive fine and violates constitutional principles."

Now, Your Honor, that reference to excessive fine is not, unless we are going to overrule Webb v. Webb and a long line of cases in this Court, sufficient, because it does not refer to the Excessive Fines Clause of the Federal Constitution. There is no reference in the Petition for Rehearing or in the Brief to the Excessive Fines Clause of the Eighth Amendment, no reference to the Eighth Amendment at all, not any reference to the United States Constitution at all, not even the use of the word "Federal" in the Petition for Rehearing.

In Webb v. Webb, which I think absolutely demolishes

their position on this case, this Court ruled eight to one that in a case where a plaintiff repeatedly, at every stage of the litigation, used the phrase "full faith and credit" but did not say "the Full Faith and Credit Clause of the Federal Constitution," that was insufficient presentation in the state courts.

Now, the Court in that case, the Georgia court, did no even have a full faith and credit clause. So in this Court, in the Webb case, the plaintiff said, I must have been referring, and it could only have been thought that I was referring to the Full Faith and Credit Clause of the Federal Constitution, because the Georgia Constitution doesn't even have such a clause.

Even there, this Court said that was not adequate presentation.

Let me just say that Mississippi does have an Excessive Fines Clause.

QUESTION: Let me direct your attention to Page 135(a) of the jurisdiction statement. This is Part (F), not of the Brief on the Petition for Rehearing, but of the original Brief. And it says, among other things, this goes to the due process challenge, not the excessive fines challenge, it says: The threat of unrestricted punitive damages awards, such as $1,600,000.00, existing whenever an insurer litigates a contested claim, has a substantial chilling effect on the

exercise of this fundamental right. The right referred to is the concept of ordered liberty guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments.

Why isn't that the clearest possible raising of the due process claim?

MR. ENNIS: Your Honor, it is the clearest possible raising of a due process challenge, and that is a challenge not to the size of this award, but to any punitive damage award, because the defendant cannot know in advance how large it will be.

QUESTION: Any unrestricted one, without a limitation on it?

MR. ENNIS: Any unrestricted one. That is correct. But that due process challenge, although it was raised below has not been pressed or argued here.

QUESTION: I asked counsel whether he was making that and his response was yes.

MR. ENNIS: They may be making it, Your Honor, but as you noted in response to that question, they don't seem to have spent much time on it in their briefs. In fact, I don't see any reference to it in either the Brief or the Reply Brief. In my opinion, they have not pressed that particular due process argument here.

Let me continue by saying that although they have, I think, revealed the weakness of their position on the

presentation of the Excessive Fines Clause issue, by changing their position from saying first it was a mere enlargement and now saying it was presented, though inartfully, it was never presented in the way this Court's prior decisions require. And that is, showing the Court below they were relying, not on the Excessive Fines Clause of the Mississippi Constitution, Article III, Section 28, but on the Excessive Fines Clause of the Federal Constitution.

QUESTION: Mr. Ennis, to get to the substance of some of these questions, on the due process issue, would you think that it would be a valid criminal statute to say that anyone who commits a particular offense shall be subject to a fine in whatever amount shall be determined by the jury that tries him? Do you think that would violate due process of law?

MR. ENNIS: Well, I think, Your Honor, that there would be very serious problems under the Due Process Clause for a truly criminal case, for that kind of an award. I would like to make two responses.

First, punitive damage awards are not criminal sanctions. And second, they are not unlimited.

QUESTION: What are they limited by?

MR. ENNIS: The common law restrictions that did apply to amercements were applied. They are applied as part of the common law test for reviewing punitive damage awards and were applied by the Mississippi Supreme Court. Let me turn to

that.

The Appellant relies almost exclusively on the Amercements Clause of Magna Carta and says it is very similar to punitive damage awards. It is in fact very dissimilar.

Amercements were monetary payments which were paid to Crown, to the Government, not to private parties. They were not paid just for reprehensible or outrageous or intentional conduct. They were paid in almost every case.

QUESTION: I'm not interested in that for the moment. You're getting off on excessive fines. I'm far away from amercements. I just want to know why it wouldn't violate due process to allow a fine of indeterminate amount. You were going to tell me that this was not an indeterminate amount. Then we got lost somehow.

MR. ENNIS: It's not an indeterminate amount, because there are limitations on punitive damage awards, that they not shock the conscience of the Court.

QUESTION: That is a limitation, that it not shock the conscience of the Court? All right. Change my criminal statute. You will be subjected to a fine in whatever amount shall not shock the conscience of the Court. That would be due process?

MR. ENNIS: Justice Scalia, this test, the "shock the conscience test," has been fleshed out more than that. For example, under the common law test for punitive damage awards,

the punitive damage award must bear some proportion to the nature of the offense, not to the financial injury to the plaintiff, but to the nature of the underlying offense. It must not be disproportionate to the nature of the conduct.

QUESTION: What does that mean, if $1,600,000.00 is not disproportionate, as you say it isn't, and as your Court said it wasn't, to a failure to pay a much lesser claim, insurance claim?

MR. ENNIS: Because it is not whether it's disproportionate to the financial injury to the plaintiff, it is whether it is disproportionate to the nature of the offense. The nature of the offense in this case was a practice and policy by Bankers Life to withhold claims monies.

QUESTION: I don't understand what you are saying. Is that a standard, whether it's disproportionate to the nature of the offense? Would $5 million be? Would ten? Would a hundred? It doesn't seem to me to be a standard.

MR. ENNIS: It would depend upon the nature of the offense, Your Honor.

QUESTION: Well, suppose it was what Bankers Life was worth?

MR. ENNIS: That would be excessive under the common law.

QUESTION: Suppose it was one dollar less.

MR. ENNIS: It would still be excessive.

QUESTION: What would not be excessive?

MR. ENNIS: Well, let me try and answer that, Justice Marshall.

Under the common law, under the Amercements Clause, even, a fine, an amercement could not be so large as to deprive the offender of his means of livelihood.

QUESTION: And that's it?

MR. ENNIS: Well, that was the limitation at common law.

QUESTION: And that's it? No other limitations?

MR. ENNIS: There are two. That is must be proportionate to the nature of the offense and that it not deprive the offender of the means of livelihood.

In this case, the punitive damage award was one half of one percent of Bankers Life's net worth.

QUESTION: Bankers Life is a corporation, it's not an individual.

MR. ENNIS: That is correct.

QUESTION: So Bankers Life doesn't have any livelihood. Does Bankers Life have a livelihood?

MR. ENNIS: If the punitive damage award had been so large as to in effect force Bankers Life out of business, that would have violated the common law standards reviewing courts apply in reviewing punitive damage awards.

QUESTION: Even if it only had $50.00 left in the

till and the jury hits it with a $50.00 punitive damage, which tilts it over into bankruptcy, $50.00 would be too much?

MR. ENNIS: Any amount would be too much if it deprived them of their means of livelihood. That would be the common law test, Your Honor. And it is partly for that reason that it is common for reviewing courts in cases involving punitive damage awards, to reduce those awards very considerably. Some awards have, when issued by the jury, been so large as to deprive the offender of a means of livelihood. They have all been cut back.

QUESTION: So the tests are, not shock the judicial conscience, not deprive of means of livelihood and thirdly, not be excessive in relation to the offense, whatever that means.

MR. ENNIS: Those are the principal tests used by the common law. Which brings us to the test that Appellant would use, which is not those tests at all, it is not the tests used at common law, but rather, proportionality to legislatively-enacted criminal fines.

QUESTION: Criminal statute that had those three tests. If you commit such and such an offense, you shall be liable to a fine which may be in any amount determined by the jury, provided that it shall not shock the judicial conscience, shall not deprive you of a livelihood, and shall not be disproportionate to the offense. Do you think that would be constitutional?

MR. ENNIS: Your Honor, that would be a much more difficult question than the question before this Court. I would personally have some doubts about the constitutionality of such a statute.

QUESTION: I would, too, and I don't see very much difference if you call it civil or criminal.

MR. ENNIS: Well, this Court has perceived a very important difference between calling things civil and calling them criminal, in a long line of cases, including several very recent cases.

QUESTION: Of course, this case is a very convenient one for a Mississippi jury. Here is a Chicago insurance company that really is the originator of the McArthur Foundation, and with lots of money. It is a great place for a Missouri jury to run wild, isn't it, and still meet your criteria?

MR. ENNIS: Your Honor, the jury did not run wild in this case. The fact of the wealth of the Defendant was presented to the jury without objection by Bankers Life. Its annual statement was put in evidence without objection. The jury instructions under which the jury decided the amount of the punitive damage award were either proposed by or accepted by Bankers Life, and never challenged on appeal.

The jury found that Bankers Life made a business decision to withhold $20,000.00 it knew it should have paid,

because it mistakenly believed that Mississippi was a penalty state in which, if it were sued for bad faith refusal to pay an insurance claim, the most it would have to pay would be a penalty of approximately $3,000.00. It was because of that mistake in judgment that Bankers Life, as the Mississippi Supreme Court put it, played the odds and skirted a bad faith cause of action.

Bankers Life's internal claims forms required all claim adjusters to indicate whether the claim came from a punitive damage state or a penalty state, obviously because in a punitive damage state where there would be a much greater possible penalty, Bankers Life would be more inclined to pay the claim it knew it should pay than it would in a penalty state.

The jury was entitled to conclude that this was a corporate policy of Bankers Life in penalty states, to withhold monies it knew it should pay, and that it had engaged in that practice for a long time, because it had never changed its policies in Mississippi even though 15 years ago, the policy provision on which it was relying was declared illegal by the Mississippi Supreme Court.

QUESTION: Would you agree that punitive damages are quasi-criminal, at least?

MR. ENNIS: Your Honor, I would not personally characterize them as quasi-criminal, but even if they were

quasi-criminal, that does not mean they are criminal. In a lot of cases, going back to 1851, Day v. Woodworth, this Court has squarely ruled that even though punitive damage awards are in part designed to punish and deter, they are not criminal, they are civil sanctions.

The rationale that Bankers Life proposes would have to apply, not just in punitive damage awards, but in the broad range of civil fines and sanctions.

For example, treble damages in rico actions or in anti-trust actions often exceed the maximum criminal fines authorized for that conduct.

QUESTION: Yes, but in a due process challenge, at least those have been determined by legislative branches to be appropriate and they would perhaps survive a due process challenge, wouldn't you think?

MR. ENNIS: Let me respond to that, Justice O'Connor. If we really want to pay deference to legislative judgment, in this case, we would win, because the Mississippi Legislature has squarely rejected a bill that would have capped punitive damage awards, even though the cap that they rejected would have been 150 times higher than the maximum criminal fine.

QUESTION: One legislative judgment, Mr. Ennis, one legislative judgment that the Due Process Clause does not defer to is the legislative judgment not to make a legislative judgment. And that is what you are talking about.

No, Your Honor. My position is simply this. Bankers Life is arguing that the sole benchmark for determining the excessiveness of an award ought to be the legislative judgment of what is appropriate in the criminal context. Of course, that ignores the fact that the fine in the criminal sanction is only a very small component of the total criminal sanction. It admits, for example, incarceration and loss of business license and other penalties like that.

I think that the fair way to look at this is that legislatures know about what is going on out there in tort awards and punitive damage awards. Some legislatures have adopted caps. Others have chosen not to. The Mississippi legislature has squarely chosen not to.

QUESTION: Is there a statute that says they have chosen not to? Can a legislature choose something by not enacting a statute?

MR. ENNIS: There was a bill pushed by the insurance industry in the 1986 legislative session, which got out of committee, went to the floor of the Mississippi Legislature. It would have capped punitive damage awards. That bill was defeated by vote of the Mississippi Legislature. I think that reflects a legislative judgment not to cap punitive damage awards in Mississippi, for the very good reason that a punitive damage -- I'm sorry. I see my time is up. If you want me to finish answering that question, I will be happy to do so, if

there are no further questions from the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ennis.

MR. ENNIS: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Olson, you have four minutes remaining.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQUIRE

ON BEHALF OF APPELLANT - REBUTTAL

MR. OLSON: I will be brief. With respect first of all to the appeal penalty, this Court squarely held in Lindsey v. Normet that access to the appellate courts cannot be denied or barriers imposed that are over-inclusive, or over-broad or under-inclusive. This statute is all of those things. It does not merely punish frivolous appeals. This was not a frivolous appeal. This was a case that took the Mississippi Supreme Court four years to handle and decided on a five to four basis. It could not be construed as a frivolous appeal. Yet, the punishment was to apply here.

QUESTION: Are you suggesting that it was deliberating all of those four years?

MR. OLSON: I have no way of knowing. It had four years within which to deliberate it, to deliberate the issue, and from the Opinions written, it does suggest that considerable time and debate was spent on the issue. It was a close question. It certainly wasn't a frivolous appeal.

The Mississippi statute seems to me to suggest a

statute which I read about in preparing for this argument that existed under Edward I in England, which is described by Pollock and Maitland. In that statute, under Edward I, if an appeal was rejected, the appellant was to be imprisoned for year and had to pay a penalty in the form of damages. According to Pollock and Maitland, this statute is a typical piece of medieval legislation. It desires to punish malicious appeals. It actually punishes every appeal which ends in affirmance. That is exactly like the Mississippi appeal penalty statute, and, as Pollock and Maitland said, a very good example of medieval legislation.

With respect to whether the issues were raised in a timely fashion and brought to this Court in such a fashion that this Court has jurisdiction, we have not hesitated to address the fact that the issues were not raised in an elegant or sophisticated or detailed fashion in the Mississippi Court. But they were raised in a way which is consistent with the decisions of this Court, particularly the Webb's Fabulous Pharmacy v. Beckwith case. As has been pointed out in the oral argument, the Excessive Fines Clause was expressly referred to, this penalty was referred to as an Excessive Fine. The Court should not deny jurisdiction because the phrase "Excessive Fines Clause" was not used when the words "excessive fines" were used.

With respect to the due process objection, my

opponent has made the point that this is not criminal penalty and it is a civil penalty. I refer back to the Giacco v. Pennsylvania case which I referred to during the earlier part of my argument. That issue was specifically raised in that case in a $230.00 for so-called reprehensible conduct. It was after the individual was acquitted and the state made the argument, this isn't a criminal penalty, it's just like costs in a civil case. This Court held, and I think it was unanimous, I'm not sure, that you cannot fine someone $230.00 because they have been found by a jury to have acted reprehensibly. That decision is dispositive, it seems to me, with respect to the issues in this case.

Seventeen years ago, this Court struck down as unconstitutional a practice which dated back to medieval England, was practiced by virtually every state and the Federal Government, had been repeatedly implicitly approved by this Court. As the Court then said in Williams v. Illinois, striking down incarceration for non-payment of fines, neither the antiquity of a practice nor the legislative and judicial endorsement of it provides insulation from constitutional scrutiny.

The punitive damage awards should be recognized for what they are -- governmentally-imposed penalties. When they are excessive, they are unconstitutional.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson. The

case is submitted.

(Whereupon, at 2:47 O'clock p.m., the case in the above-entitled matter was submitted.)

C E R T I F I C A T E

Heritage Reporting Corporation hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Bankers Life and Casualty Company,

Appellant,

v. No. 85-1765

Lloyd M. Crenshaw

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