SUPREME COURT
OF THE UNITED STATES

In the Matter of:	)	
	)	
SAMUEL RICE JOHNSON,	)	
	)	No. 87-5468
Petitioner,	)	
v.	)	
	)	
MISSISSIPPI.	)	

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IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL RICE JOHNSON,

Petitioner,

v. : No. 87-5468

MISSISSIPPI

Washington, D.C.

Monday, April 25, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:38 a.m.

APPEARANCES:

FLOYD ABRAMS, ESQ, New York, New York
on behalf of the Petitioner.

MARVIN L. WHITE, JR., ESQ. Jackson, Mississippi
on behalf of Respondent.

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P R O C E E D I N G S

(11:38 a.m.)

CHIEF JUSTICE REHNQUIST: Mr. Abrams, you may proceed whenever you wish to.

ORAL ARGUMENT BY FLOYD ABRAMS, ESQ.

ON BEHALF OF PETITIONER

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

This appeal arises out of the reliance by the State of Mississippi in the sentencing phase in a capital murder case of the trial of Samuel Johnson, of a 1963 New York conviction for assault in the second degree that has since been reversed by the New York Court of Appeals, and is thus under New York law, a nullity.

The 1963 New York conviction was referred to 22 times by the prosecutor during the sentencing phase of the trial, and was emphasized by the prosecution as a prime basis for the imposition of the death penalty.

QUESTION: What was the basis of the reversal of the conviction, Mr. Abrams, by the New York Court of Appeals?

MR. ABRAMS: The New York Court of Appeals reversed the conviction specifically on the ground that there had been no right to appeal provided to Sam Johnson in New York.

QUESTION: No right to appeal?

MR. ABRAMS: Well, it was a few things which came

together. Specifically and indisputably in terms of the State of New York, he had never been advised that he had a right to appeal in New York. He sought to appeal in New York on three separate occasions, the Court of Appeals observed, after his time had expired, after he learned and tried pro se to appeal. He was not provided with counsel, appellate counsel that represented him competently in New York, the New York Court of Appeals commented on that. And he had what the New York Court of appeals described as claims of possible merit on the merits of what would have been his appeal in New York.

All this time having passed, however, and having passed because of the fault of New York, not Sam Johnson who had tried to appeal thrice during this period, the New York Court of Appeals reversed the conviction that had been entered against Mr. Johnson.

QUESTION: The just didn't give him a late appeal then.

MR. ABRAMS: No, what they said in effect is that there is not enough left to talk about here. What happened, Mr. Chief Justice, was this.

The lower court in this case had resentenced Mr. Johnson so that he could appeal. That was what the New York state authorities had urged; simply a resentencing. We had urged in the lower courts in New York vacation of the judgment. We lost on that at the State Supreme Court level. We lost on

that at the appellate division level.

The New York Court of Appeals said, in substance, it isn't enough in this case, there is nothing to hear on this appeal. There are no records left to examine on this appeal. There is no point in having a Huntley hearing, for example.

QUESTION: Isn't the burden normally on an appellant in New York to show error?

MR. ABRAMS: Not in a situation, Your Honor, where he was denied a Jackson hearing. On the voluntaryness of a confession, for example, the burden is on the state to show that it was voluntary.

Now in this case we came forward with affidavits from trial counsel, from Mr. Johnson himself, from the state legal defender's office that was supposed to but did not represent him when they were assigned to represent him on the appeal, all of which taken together persuaded the New York Court of Appeals that not only had Johnson been denied a right to appeal, but that he had serious claims which he could have made.

QUESTION: Do they ordinarily -- but they would pass on those claims, I would think.

MR. ABRAMS: Ordinarily what the New York Court of Appeals has done in the past in the Rivera case, the Montgomery case where a lot of time has passed and it has passed because of the action of the state, only if it has passed because of state misconduct so to speak as opposed to defendant

misconduct, what they have routinely done in New York in those cases is to dismiss and to reverse the state conviction.

QUESTION: Even though they do not make any judgment on the merits as to whether the conviction was infected with error.

MR. ABRAMS: In the earlier Rivera case, they made no decision on the merits as to the correctness of the conviction.

In this case, the court, having read the affidavits, said that there were claims, serious claims of possible merit which Mr. Johnson had. Those claims were the ones that I adverted to earlier.

QUESTION: That was as far as they went on the merits?

MR. ABRAMS: Yes. On the merits as far as they went was to say that there were serious claims of possible merit. Those claims were claims relating to the use of a coerced confession and the like against him in his 1963 trial and related matters.

QUESTION: But the conviction is another thing.

MR. ABRAMS: The conviction is a nullity under New York law.

QUESTION: In New York.

MR. ABRAMS: Yes, sir.

QUESTION: Mr. Abrams, that means that another state cannot take it into account for any purpose?

MR. ABRAMS: I believe so, Justice Scalia.

QUESTION: By reason of the Full Faith and Credit Clause.

MR. ABRAMS: Yes, sir.

QUESTION: What if the governor had pardoned --

MR. ABRAMS: There I think it's a somewhat harder issue because what the pardon means --

QUESTION: Not if you are relying on Full Faith and Credit.

MR. ABRAMS: No, I think it depends on what a pardon means in the state. There are a lot of states in which a pardon does not wipe out the conviction but --

QUESTION: Let's assume it does. Let's assume New York is a state in which a pardon wipes out the conviction.

Do you think Mississippi cannot constitutionally rely on the conviction anymore as an indication of the character and the blame worthiness of this individual simply because the governor of New York has decided to give a pardon?

MR. ABRAMS: Again, I would distinguish between a pardon issued by the executive of the state and a judicial determination.

The answer might be the same under Full Faith and Credit if the effect in the state where the pardon was issued is that he has no record at all and it is as if he had done nothing at all. If that's so --

QUESTION: It wouldn't have to be the same. If you are relying on Full Faith and Credit, wouldn't the pardon be fully as effective, assuming the pardon wipes out the conviction for purposes of state law?

MR. ABRAMS: So long as you ask me to assume I'm in a state --

QUESTION: That's right.

MR. ABRAMS: -- in which a pardon wipes it out completely.

QUESTION: Right.

MR. ABRAMS: If a pardon wipes it out completely, then I would be urging upon you that a pardon under Full Faith and Credit ought to be given the same effect as if it was a judicial decree.

Now as to whether that argument would persuade as to whether a pardon is close enough, exact enough fit to a decision of the highest court of the state, I think it probably should be if you are in a state in which the pardon completely eliminates the prior conviction.

I can't tell you that that would --

QUESTION: It seems to me there is one thing -- there is a difference between giving a decision of another state full faith and credit in the sense that it has an operative legal effect. And it seems to me quite another to say that the jurors of Mississippi cannot be allowed in evaluating the

character of this individual to take into account that he has been convicted by a New York jury of having committed a serious crime regardless of whether the governor later chose to pardon him.

That's not giving it any legal effect. It's just using it as a means of determining what the man's character is.

MR. ABRAMS: This was given legal effect in Mississippi. This was the only basis for the aggravating circumstance, the only one for the aggravating circumstance most relied upon by the prosecutor.

Under Mississippi law one potential aggravating circumstance in a capital offence which can lead to execution is if you have a prior criminal record of a felony.

So we're not talking here about the question of whether --

QUESTION: It doesn't say record. It says conviction, a prior conviction.

MR. ABRAMS: Yes, it does.

So we're not talking here about whether there is some possible way that a jury could have learned about it in some context. It might be, for example, that on cross-examination of Mr. Johnson, if he had testified, that the rules might be somewhat different. But this was used as the evidence of an aggravating factor, and it is evidence which could not be admitted in New York, could not be taken account of by a New

York court because it is a nullity.

Now if I'm wrong about it being a nullity, that would be one thing. But I don't think there is any dispute on that.

QUESTION: It's your position that the Full Faith and Credit Clause has a negative operation; that a second state cannot give a judgment any more faith and credit than it has given in the state that it originated.

MR. ABRAMS: That's correct.

QUESTION: And what case from this Court --

MR. ABRAMS: This Court has not held that, Mr. Chief Justice.

QUESTION: Then what's the basis of your argument then?

MR. ABRAMS: The basis of the argument is this.

Mississippi adhered, took advantage of, so to speak, the Full Faith and Credit Clause. They gave full faith and credit to a New York conviction. They were entitled to do that as a matter of fact by federal statute.

QUESTION: I think we have cases in our jurisprudence that say even though the state was not required by the Full Faith and Credit Clause to give effect to a particular judgment, it could do so unless there is a due process context relation.

MR. ABRAMS: It is not my argument, Mr. Chief Justice, that Mississippi is obliged to give full faith and

credit to criminal convictions from out of state. They could if they choose certainly constitutionally have a system where they have no aggravating circumstance, for example, for convictions out of state. Having taken account of, having given full faith and credit to the New York conviction, it is our position that they must give full faith and credit to the New York reversal.

QUESTION: What case in this Court comes closest to supporting your proposition?

MR. ABRAMS: Well, this Court has talked in terms of states not being able to pick and choose between giving full faith and credit sometimes and sometimes not giving full faith and credit.

QUESTION: Do you have a case in mind that supports you?

MR. ABRAMS: I will give you that name right after lunch, Mr. Chief Justice.

But I want to make clear, I am not urging on this Court that there is a body in this Court's law of Full Faith and Credit law which is exactly on point in terms of this case. What this Court has done and done with some frequency in three separate cases is to deal with the question of what happens in a situation in which a jury that is engaged in the sentencing process or a judge in fact receives materially false information, or receives information in the U.S. v. Tucker case

which is false about the validity of a prior sentence. That's not full faith and credit. I'm not urging upon you that it is.

But I do want to start out by saying that this Court has had those cases in the past, that all 12 Court of Appeals in this country have had cases and have routinely, all of them, held that resentencing should be required in situations in which juries receive information about sentences which subsequently have been reversed.

Now all those are not cases involving states doing one thing and then changing their policies. Those aren't Full Faith and Credit cases. But I start with the proposition that what we are urging upon you here in terms of resentencing has been the most ordinary, usual, repeated action of state courts around the country. To our knowledge, we don't know of any case in which a state court has not resentenced in a situation after a conviction that was relied upon has been reversed. And every federal Court of Appeals in one way or another has done that.

Now, our first argument is --

QUESTION: In dealing with the federal Court of Appeals, we're dealing with federal convictions?

MR. ABRAMS: Yes, sir, yes.

I'm sorry, in a few cases state, but mainly the federal convictions, often uncounseled convictions or otherwise inappropriate invalid, the courts have said, for one reason or

another.

Our first argument to you is a full faith and credit argument, and it's based upon the proposition that when a state in the first instance affords full faith and credit to the judgment of another state, it is obliged not to stop. It is obliged not simply to take account of the conviction and not the reversal.

QUESTION: Mr. Abrams.

MR. ABRAMS: Yes.

QUESTION: Was that full faith and credit argument made to the Mississippi court below?

MR. ABRAMS: Yes, it was.

QUESTION: May I ask, Mr. Abrams, are you asking that we give more than the required full faith and credit to the earlier conviction?

I'm sorry. Are you saying you cannot give more than the required full faith and credit to the earlier conviction? Or rather, are you saying you must give the required full faith and credit to the second action of the New York courts; namely, the setting aside of that conviction.

I'm saying at least in the circumstance in which you have given full faith and credit to the first, you must give it to the second. Mississippi --

QUESTION: So it's really the second action, it's the second action that you focus on.

MR. ABRAMS: Yes, yes, the reversal.

If Mississippi had not in the first instance admitted into evidence the conviction, then there would be a question, I suppose, as to whether they had to take, on grounds of relevance, the reversal of the conviction. But having taken the conviction, we think they have to take the reversal.

QUESTION: But if it's relevant, then they would have to take the reversal whether or not they have considered the earlier conviction, I would think is your argument.

MR. ABRAMS: Yes. If it is relevant, we would think they would have to. And under the federal statute, in fact, I think -- I mean I have no doubt that under the federal statute that they could not argue that it was not sufficiently proved for purposes of admissibility.

As to whether it's relevant, I suppose there could be a case in which a prior reversal of an unadmitted conviction was not relevant from the point of view of even a sentencing if the first conviction had not gone to the jury.

I think it's worth starting with what time I have left at this point in my argument with why New York became involved in this case. I mean, it is a little bit unusual to have a situation in which you have a New York Court of Appeals decision in a Mississippi murder case, a brief from the Attorney General of the State of New York in a death case that comes from Mississippi.

It all came about because of Mississippi case law. The Phillips case in Mississippi, Phillips v. State holds, and I think holds clearly that there is only one option for a defendant in Mississippi against whom the state wishes to use in one fashion or another an out-of-state conviction. He has to go back to that state. That is not a majority rule in this country. It's perfectly constitutional. It's entirely consistent with principles of federalism for Mississippi to say, as they have, we don't want to have separate hearings here, separate trials here on already tried cases. Go back to where your conviction occurred.

QUESTION: And that was done here.

MR. ABRAMS: That was done here, Mr. Justice Blackmun. But so far as we know, Mr. Johnson is the only one ever to be able to do this since Mississippi made clear that that was the law. And so we went to New York, which is where in effect Mississippi law sent us.

And in an adversary proceeding in New York, in which we were opposed at every step of the way by the New York Attorney General's office, except on the issue, the fact issue of whether Mr. Johnson had been advised of his right to appeal in 1963 as to which the Attorney General's Office, doing its job and adhering to ethical principles of the bar, checked it out and found out that he had not, and so advised the court. They opposed any other relief that we sought save resentencing

of Mr. Johnson.

Now there is a suggestion in the opinion of the Supreme Court of Mississippi in this case that the Phillips case does not apply in a capital murder case because it arose in the context of habitual offender sentencing. That is surely not apparent on the face of the Phillips case. And if it ever was even arguable, it is now no longer arguable because in the recent Nixon case we cite in our brief, a November 1987 case in the Mississippi Supreme Court, they make very clear that they do apply it in capital cases.

It is not applied in Sam Johnson's case, but it is applied in the case of Mr. Nixon, who was another person on death row in Mississippi.

Now we urge upon you that that is simply not a permissible way for a state to behave.

The Phillips case was a case we were entitled to rely upon. It told us what to do, and we went and did it, and we went to New York, and we got the very reversal that as it were the Phillips case told us, demanded that we get in New York, and we went back to Mississippi and we urged, as a part of post-conviction relief that we were seeking in Mississippi, that based on full faith and credit principles, that the New York decision should be given effect, and that resentencing should occur.

And the Mississippi Supreme Court responded by

saying, among other things, that they would not give effect to it because of the "extremely likelihood" that if they were so dependent on out-of-state highest courts to make decisions impacting on their sentencing procedures, that they could have sureness in the sentencing policy. With all respect, they cannot have it both ways. They cannot send us to New York, and then when we obtain the holy grail in New York and bring it back and present it to the Mississippi Supreme Court tell us that that's not enough. In fact, it is as if they were insulted by the fact that the New York Court of Appeals had done that.

QUESTION: For the Mississippi court, you had your other spirited division of opinion, didn't you?

MR. ABRAMS: Indeed, indeed. And as the dissenters pointed out, if this had been raised earlier in Mississippi, we presumably would have been told, pursuant to Phillips, we don't have it. And then if we ever got what we went to New York to obtain, that it was res judicata because it had been argued before.

QUESTION: Mr. Abrams, you said that the New York State's Attorney vigorously contested the relitigation of this and refused to accept anything but the resentencing.

Now after the resentencing, was there opposition to the setting aside of the sentence?

MR. ABRAMS: The New York Attorney General's office

opposed setting aside of the sentence.

QUESTION: So this was a genuinely litigated matter in New York from beginning to end.

MR. ABRAMS: Yes, it was genuinely litigated.

Now I want to say again --

QUESTION: Adversely litigated.

MR. ABRAMS: -- so as not to mislead the Court, that the New York Attorney General's office, in my view, in the highest tradition of the bar, advised every court that it appeared before in New York that they had investigated and that Sam Johnson had not in fact been advised of his right to appeal, and that therefore resentencing was appropriate under the circumstances, and then that an appeal should follow.

But beyond that, they did not agree with our position as to what should occur as a result.

Now the New York Court of Appeals, having ruled as it did, as this Court is aware, the State of New York has now filed a brief with this Court urging that as a matter of Full Faith and Credit Law, and in part citing a New York State Court of Appeals opinion which is far more on point than anything that this Court has said in so many words, that the same full faith and credit should be given in New York as New York gives to other states' rulings.

QUESTION: Mr. Abrams, there was no holding in New York that failure to give him an appeal denied him a

constitutional right.

MR. ABRAMS: The New York State court cited New York cases, yes. The New York cases are bottomed themselves on some cases of this Court, well known to this Court.

QUESTION: Do you think in effect it was a holding that his conviction was unconstitutional, or that the constitution required the setting aside of his conviction?

MR. ABRAMS: In response to the first part of your question, Mr. Justice White, they did not say that this conviction was unconstitutional under federal law. It was unconstitutional under New York law at least.

Under federal law, though, at the least if he didn't get a Huntly hearing in New York, Huntly is our effort to comply with Jackson v. Denno, and he didn't get that sort of hearing. He is constitutionally entitled under the law of this Court as well as the law of New York to that sort of hearing.

So the ruling in New York then is bottomed on New York cases which in part are bottomed on federal cases. For example, he had no effect of representation in his appeal. The New York Court of Appeals dealt with that. No effective representation because although --

CHIEF JUSTICE REHNQUIST: We will resume there at 1:00, Mr. Abrams.

MR. ABRAMS: Thank you.

(Whereupon, at 12:00 Noon, the Court recessed, to

reconvene at 1:00 o'clock p.m., this same day.

AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll resume where we were before lunch, Mr. Abrams.

ORAL ARGUMENT BY FLOYD ABRAMS, ESQ.

ON BEHALF OF PETITIONER - RESUMED

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

There were two reasons relied upon primarily by the Mississippi Supreme Court in its opinion denying post-conviction relief; one procedural, one substantive. I will advert briefly to each.

Procedurally, the thrust of the Mississippi opinion was that the issues considered here and argued by me today were not raised before the Mississippi Supreme Court on direct appeal in the action, but only on post-conviction -- only at the post-conviction stage.

There are answers in our brief. I would rest at this point in this oral argument on the Phillips case itself. We had nothing to say on direct appeal. We had been told by the Phillips case that what we were to do was to go to New York, if a New York conviction it was. That was what we did, and it was proper to do so. We abided by the procedural rules in effect at the time in Mississippi in all respects.

Substantively, I have been thinking about my not too

persuasive answer to you, Mr. Chief Justice, in terms of citing cases from this Court involving Full Faith and Credit which are wholly applicable to the situation here.

Most of the cases that we rely upon in our brief which are close are state cases. The reason for that is that states have, in our view, abided by their obligations under Full Faith and Credit, and have therefore written the basic opinions dealing with the scope of the clause in this area.

We cited the New York case, the Fairland Dairies case, a California case, Oklahoma case. We think those cases are correct in their interpretation of federal law.

The closest cases from this Court are close only because they set down general principles about Full Faith and Credit: Millikan v. Meyer, Wisconsin v. Pelican, old cases, Pelican in particular, in terms of the theory of Full Faith and Credit.

There is nothing contrary to those state cases that we cite in terms of its articulation of Full Faith and Credit law.

QUESTION: Well, is there some other constitutional reason based on -- reason based on the federal constitution why this conviction could not be used in this sentencing proceeding?

MR. ABRAMS: Yes, the other reason is a due process reason that this Court has in the Burgett case, in the Tucker

case, in the Townsend case, come down hard on lower courts, state and federal, in which you have used --

QUESTION: Would you think you have a better chance of winning on Full Faith and Credit than the due process?

MR. ABRAMS: I thought so coming in, but --

QUESTION: Well, at least you've got some cases in this Court.

MR. ABRAMS: I do have cases in this Court on that. It seemed to me that those three cases are -- those three cases of this Court are right on point insofar as misleading or prejudicial evidence, particularly evidence with respect to reversed convictions.

QUESTION: But you have no cases on Full Faith and Credit.

MR. ABRAMS: On Full Faith and Credit, in terms of reversed criminal convictions, no. It did seem to us that Full Faith and Credit, and it still seems to us, a more serious argument. But those three cases are due process cases which I cite to you.

QUESTION: But weren't they all involving enhancement statutes?

MR. ABRAMS: They were enhancement cases, yes, yes, and they were cases in which information which came before state and federal courts was later stricken because it turned out to be wrong just as hear.

Finally, this is not a case in which it could be said that was is involved here is harmless error. Whatever the scope of that doctrine in the sentencing field, the Mississippi Supreme Court itself explicitly assumed any finding of harmless error in this case. We think this is not a case, in any event, in which harmless error could play a role given the degree of emphasis placed by the prosecutor on this single prior felony conviction. But this is not a harmless error case in the sort that this Court has sometimes considered.

I would reserve the rest of my time, Mr. Chief Justice, if I may.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Abrams.

We will hear now form you, Mr. White.

ORAL ARGUMENT BY MARVIN L. WHITE, JR., ESQ.

ON BEHALF OF THE RESPONDENT

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

I think the case that we are presented for resolution here today is similar to that found in Smith v. Murray that was decided in 1986. We have to be considered here questions of procedural bar and the questions of what must occur, if anything, when one of several aggravating circumstances is found used in support of a death penalty is later held invalid, and then we have this twist of the Full Faith and Credit argument also added to that particular part of it.

In Smith, of course, the procedural bar was relied on there, and the Court expressly declined to address the question of what the invalidation of one aggravating circumstance of several would affect -- how that would affect the outcome of a sentencing decision there.

We think, though, that the Smith rationale is applicable here, both on the issue of procedural bar as well as the ultimate outcome of the case.

And just to step to the Full Faith and Credit question a minute in this particular case, what we have is a situation where the Mississippi Supreme Court looked at what New York did and said that it did not, in effect, affect the judgment of the sentence of death in this particular case.

The Petitioner amici here would have the Court adopt a rule that it would require an automatic reversal or vacation of a death sentence where an aggravating circumstance is later found invalid. This has not occurred in the past from this Court. The lower courts have held in various cases that this does not result in an automatic reversal; that the court can consider this.

And even without a harmless error analysis on this type thing, the Fifth Circuit in Williams v. Maggio, and Knighton v. Maggio, they only review -- in Louisiana, only review one of several if there are several found; they only review one. They don't review the others.

QUESTION: Has Mississippi in the past, when they find one of several aggravating circumstances invalid, normally remand it for a new trial?

MR. WHITE: No, it has not.

QUESTION: So the appellate court does the reweighing itself?

MR. WHITE: Yes, it does.

QUESTION: And if it finds that the valid aggravating circumstances outweigh the mitigating circumstances, they affirm?

MR. WHITE: They affirm, right.

In this particular case, it is our contention that they did do a proportionality review here, and say that the death penalty was totally appropriate in this case without considering the prior conviction in that particular part of the opinion. They did in the opinion say that it was supported by the record at that time.

QUESTION: But they say, "Even if we conceded that the jury had no authority to consider this conviction, the remaining to aggravating circumstances were sufficient to support the jury's verdict."

Is that what you rely on?

MR. WHITE: That's what I am relying on, yes, sir.

QUESTION: You don't think they took that back a couple of pages later? It's hard to tell.

MR. WHITE: Well, they talk a lot about what the effect of the New York vacation in that particular instance were, but I think that we get to that point, and they say it would not affect that, and we are relying on that that they were correct in that the sentence of death would not be disturbed because of the vacation of that New York sentence.

QUESTION: All this means that if you should lose now, he still may receive the death penalty.

MR. WHITE: Yes, sir. He could be resentenced, a new sentencing proceeding could be contrary to the amicus brief of the City Bar of New York who said that it would have to be sentence to life. He could be given a new sentencing hearing before a new jury and a new sentence of death could be imposed if the jury saw fit to do so at that time.

QUESTION: Mr. White, what's the language you rely upon to say that the Mississippi court actually did a reweighing?

It seems to me proportionality review is not the same as reweighing. It just means, you know, this jury verdict is in accord with the run of the mind jury verdict.

MR. WHITE: Right.

QUESTION: Nor is the other statement you rely on actually a redoing of the weighing by the Supreme Court. It's just saying even without this, there would be enough to support the jury verdict. That's not the same as saying, you know, if

we had to call ourselves, we'd call it that way.

What language in the opinion leads you to believe that they did the reweighing here?

MR. WHITE: Well, those are the thing we rely on. And I would certainly agree that the statute, the way the statute is written the court makes a finding of whether or not the aggravating circumstances are supported by the record. And then they make a proportionality review of that case with other cases, like cases.

And in this type thing, they sometimes do this reweighing. I think they are saying here that these aggravating circumstances here do -- in fact, would not change the outcome of this thing. I don't think they --

QUESTION: Wouldn't they say it would support an unchanged outcome? They say it would support an unchanged outcome. That is, the jury could reasonably not have changed the outcome.

MR. WHITE: That's right.

QUESTION: But that's a bit different from reweighing it themselves and saying, well, you know, the jury goofed up through no fault of their own because there was inadmissible evidence. We'll have to reweigh it ourselves, and our call is thus and such. They didn't really say that.

MR. WHITE: Well, in Wainwright v. Goode, the way I read it, the court there did not go into an extensive

reweighing. It was more or less that they found that it was supported there.

QUESTION: -- before this one where it's clear that the Mississippi Supreme Court does reweigh, where they have expressly said, we do not -- when one of several aggravating circumstances is invalidated, we do not necessarily send it back for a new sentencing hearing, we will reweigh?

MR. WHITE: Yes. I mean they have said in Stringer v. State, and Irving v. State.

QUESTION: Stringer v. State, and Irving.

MR. WHITE: They are cited in my brief, I think Stringer and Irving both.

QUESTION: All right.

MR. WHITE: And in the Nixon opinion that is --

QUESTION: So it is Stringer, and the other one was what, Irving?

MR. WHITE: Irving. Stringer v State, 500 --

QUESTION: Yes, I've got it.

MR. WHITE: And Irving, 498.

And these also go back to Tokman. They have held for quite awhile that the invalidity of one aggravating circumstance doesn't vitiate the death sentence that they will --

QUESTION: And doesn't necessarily vitiate it, but will -- but do they say, we will not send back for a new

sentencing hearing?

MR. WHITE: They say --

QUESTION: We will reweigh, and we find the --

MR. WHITE: Well, they have never said they will not. In fact, in Nixon they said that in the similar context. You know, if you want to bring this before us, you can bring it before us, but it's not going to guarantee you a new sentencing hearing, or even that we are going to vacate the death penalty.

QUESTION: Yes?

MR. WHITE: It is something we will consider at that point to think, in our opinion whether a new sentencing hearing is required.

QUESTION: Well, what did Irving hold?

MR. WHITE: Irving held the same thing. It said that they would consider it to determine whether or not a new hearing -- but basically Irving's holding is that one -- the invalidation of one aggravating circumstance does not vacate a death sentence if it is supported by other valid circumstances much the way that the --

QUESTION: Well, that's very good, but I mean that's just what we are arguing about here.

MR. WHITE: Right.

QUESTION: The issue is it's clear that it doesn't invalidate it if the court is reweighing in light of that invalidation itself. But it seems to me circular to simply

argue since the court said it doesn't automatically set it aside, the court must be reweighing it itself. The court might have just been taking the erroneous view, or at least what Mr. Abrams would say is erroneous, that it doesn't have to reweigh; that proportionality review is enough.

Would you assert the proportionality view is enough without reweighing assuming that --

MR. WHITE: I think from the reading of Zant and Barclay and Goode, the court places great emphasis on the proportionality review separate from. They talk about the invalidity, the court talks about the invalidity of an aggravating circumstance, and then they talk about, but we are further, you know, feel safe about this, because the courts have demonstrated they will set aside one if it is disproportionate. And the Mississippi Supreme Court has set aside cases finding the sentence disproportionate to the crime and to the circumstances in several cases, holding that the crime, the punishment does not merit -- I mean the punishment of death is not warranted in that case under the circumstances.

QUESTION: Is that really fair to the defendant though? The jury was entitled, if it wanted to give him a disproportionately lenient sentence, wasn't it? And he's been deprived of that opportunity.

It's one thing to say we'll have the Supreme Court reweigh it, but the jury might have decided to give him a

disproportionately light sentence for one reason or another had it not been considering this improper factor.

And you're saying, well, that's too bad. So long as it is proportionate on appeal, we'll uphold it, and we won't even have the Supreme Court redo the weighing. That's quite a different approach.

QUESTION: The Mississippi Supreme Court is interpreting its statute not to require reweighing.

MR. WHITE: I think maybe it is in some circumstances here. I know the Fourth Circuit, in Smith v. Picunia, which is the lower court case in Smith v. Murray, they did not apply a harmless error test or a reweighing type situation there in that.

And as I said, the Fifth Circuit regularly, out of the cases out of Louisiana, they only review one aggravating circumstance and don't even reach the others, whether they are invalid or not, to determine whether or not relief could be granted on one of these others. They only review one.

QUESTION: General White, isn't there involved in this case still another problem though?

Suppose this conviction in New York had been set aside before the sentencing hearing. Would you not agree that it would have been improper to put the trial court conviction before the sentencing jury?

MR. WHITE: I agree.

QUESTION: It would be improper.

MR. WHITE: I agree.

QUESTION: So here if you say that we didn't know at the time, the jury did consider evidence that we now know it should not have considered.

MR. WHITE: Well, they did, yes.

QUESTION: So these other cases where you invalidate an aggravating circumstance usually the evidence supporting the circumstance is properly before the jury, and the question really is whether it was entitled to have the label aggravating circumstance attached to it.

MR. WHITE: Yes. Well --

QUESTION: But this is a little different, I think.

MR. WHITE: Well, it's like the situation in Smith v. Picunia, or Smith v. Murray, and your dissent in that case where there was a Fifth Amendment violation.

QUESTION: Of course, that was a procedural bar case rather than --

MR. WHITE: A procedural bar case, but your dissent, of course, said the procedural bar should not be applied, and that the Fifth Amendment violation relating to one of the aggravating circumstances should vitiated the whole -- the death penalty and a new sentencing hearing was conducted. I am well aware of that precedent, or that dissent.

And going back somewhat to Justice Scalia's question

earlier about the -- I think was dealing with the pardon situation here. What is in effect here has been a judicial pardon. There has been no finding that -- by New York that he was actually innocent of this 1963 crime, but that because of the passage of time that it's impossible to retry him or give him an out-of-time appeal. And in the words of the New York Court of Appeals that this is the case and he had appealable issues with possible merit.

QUESTION: Well, Mr. White, what does Mississippi rely on in these aggravating circumstances? Or at least what did it rely on here? Did it rely on the prior conviction in New York without going into the facts and so forth?

MR. WHITE: Well, under the facts of the case, you introduce the certified copies from the State of New York.

QUESTION: And that's it, just the conviction.

MR. WHITE: Right. That can be --

QUESTION: And that has now been set aside.

MR. WHITE: That has been. But you can challenge that as the time even though, you know, the validity of that at the time and show that it in fact is not there.

QUESTION: What do you assert that the Petitioner should have done in this case to raise his constitutional challenge in light of your Phillips case and Nixon case in Mississippi?

MR. WHITE: Well, in the Phillips case, of course,

dealt with a habitual offender statute type situation where we had -- and as the court distinguished it here, our Supreme Court distinguished the use of Phillips in this type case and --

QUESTION: Well, my question to you is, what do you say this Petitioner should have done here to put his claim before the courts?

MR. WHITE: Well, relying on the bar that the Mississippi Supreme Court applied in this case, that one found in Evans v. State, he should have raised it as the soonest possible moment he could have after the conviction or beforehand.

But from the time he was convicted and until the time he presented this to a court was four years.

QUESTION: Well, I don't think I understand. You say that on direct appeal he should have raised this claim?

MR. WHITE: He could have. I mean it would not have been --

QUESTION: I'm asking what he should have done in order to enable the Mississippi courts to address the problem that has arise.

MR. WHITE: In Phillips, and as it is now interpreted in Nixon, he did what the Supreme Court now has said he should have done. He raised it post-trial.

QUESTION: Well, then how could he be procedurally

barred?

MR. WHITE: For the failure to do it speedily after that time.

Now I agree with you the procedural bar question here is problematic. And the Phillips case, and as I have said in my brief, I did not argue procedural bar before the court below. But procedural bar is one of the court's sua sponte imposition. I think I have to argue it here, because the court found that procedural bar. But they did also go on and address it alternatively. And so the procedural bar question is one that is important, but I don't think in this particular case it is necessarily the most important procedural bar we have in this context.

I think our argument, our strongest argument is that the context of aggravating circumstances in Mississippi is different than it is in Georgia or Louisiana where you have the aggravating circumstances not being constitutionally required. The Mississippi statute is just like -- for all practical purposes -- like the statute in Louisiana in which this Court earlier in Lowenfield v. Phelps held that the aggravating circumstances are not constitutionally required in the narrowing process to whether not the person is going to receive the death sentence.

So I think that looking at it in that context the aggravating circumstances serve a state law purpose here, and

not a constitutional purpose, because under Lowenfield the finding of guilty of a murder of a policeman in this case was adequate to impose the death penalty without the consideration of aggravating circumstances in Mississippi as it was in Louisiana, and this was not part of the constitutional required narrowing process.

QUESTION: But Lowenfield did not involve a situation in which the defendant's claim is the jury -- he could not possibly have said the jury wouldn't have reached the result it did, and that's the situation here. There is a plausible claim that this jury wouldn't have given this man the death sentence had that evidence been excluded.

MR. WHITE: Certainly.

QUESTION: Now that situation didn't exist in Lowenfield.

MR. WHITE: That's right.

QUESTION: All the stuff that went before the jury was directly before them, and they made the decision on the basis of all of that. So, you know, I don't find Lowenfield terribly persuasive on the precise point here.

MR. WHITE: Well, it says, though, that it's not required. The aggravating circumstances are a matter of state law there, and I think we have to make that argument that the state law ground of that, and our court interpreted that that not to require reversal in this case.

QUESTION: Are you saying they are not constitutionally required by the federal constitution?

MR. WHITE: That's right.

QUESTION: Well, let's take the normal criminal trial. Let's say a certain crime is defined to require, I don't know, putting three bullets in the individual, and that's certainly not required that you define the crime to have that element. But nonetheless, if that element is not proven, we wouldn't uphold a conviction and simply saying, well, it wasn't federally required that you have that element.

MR. WHITE: I agree, I agree with that.

QUESTION: Here the state didn't have to require the jury to find all this, but it did.

MR. WHITE: It did.

QUESTION: And we don't know that the jury actually found it, or properly found it.

MR. WHITE: But we would basically rely, though, on the proportionality review there in the readings of Zant and Barclay and Goode in that when this proportionality review is made, even in light of an invalidated aggravated circumstances or invalid circumstance, that this review that the invalidation of this aggravating circumstance here does not make the penalty arbitrary, or freakish, or capricious, nor is it excessive or disproportionate in this case.

And the narrowing done by the jury there I think was

sufficient, and the other two aggravating circumstances relied on, and as found by the Supreme Court, would certainly outweigh this later invalidated --

QUESTION: Would you clear up one thing for me? I kind of got myself mixed up in this argument.

If this instead of being a capital case had been a habitual offender case, and you had the same sequence of events that you had here, would the sentence -- the enhanced sentence be reduced in Mississippi?

MR. WHITE: It could be. If let us say in an enhanced sentencing situation under the habitual offender statute all you have to prove is the existence of the prior.

QUESTION: Right.

MR. WHITE: You have to prove two, or sometimes the prosecutor will go and prove three, and this is before the judge only. Upon the proof of two, he is eligible to be sentenced to life without parole, or the maximum sentence without parole, depending upon which statute you are under.

There you don't have this process as the court below pointed out, this process of the jury then looking at all of the factors here. Just on the proof of that prior conviction he is entitled -- the judge is entitled to impose the maximum sentence, whether it be the maximum number of years or life. So you have a greater involvement in that case of the, or play of the use of a prior conviction.

QUESTION: But if it were set aside in the same time sequence that we had here, normally the trial judge would take a second look at the sentence then.

MR. WHITE: Well, it wouldn't go back to the trial judge.

QUESTION: Or would it automatically --

MR. WHITE: The procedure in Mississippi, of course, is that once something is appealed to the Mississippi Supreme Court, it goes back to that court for an application to proceed in the lower court. And so the Supreme Court, just as in this particular case here, this did not go back to a trial court for a hearing. This was considered en banc by the Mississippi Supreme Court, and without sending it back for a hearing before the lower court.

QUESTION: I'm still not clear on -- had this not been a capital case and been an enhance sentencing case, and you had the same sequence of events, say one of the two prior convictions was set side as this one was after the sentencing, would there be a new sentencing either by the Mississippi Supreme Court or by the trial court?

MR. WHITE: In that case he would be -- the sentence would be reduced.

QUESTION: It would be reduced.

MR. WHITE: It would be reduced. There would not be a chance under that situation because they have applied. Our

court -- the weight of the evidence, the sufficiency of the evidence --

QUESTION: There would be no Mississippi procedural bar to a reduction of the sentence in this same time sequence. That's what I am trying to get to.

MR. WHITE: I don't know that. I mean we haven't had that presented in this case. Both in Phillips and in Nixon, the issue of the invalidity of the sentence was raised on direct appeal. And both Phillips and Nixon are direct appeal cases. They are not post-conviction cases where the court said, we're not going to consider it here on this direct appeal. You have raised the validity on direct appeal, but we're not going to -- you know, you go and tell us.

And in fact, in Phillips on the direct appeal, he had already filed in petition in Kentucky and had the sentence set aside during the pendency of the appeal. The Kentucky Court of Appeals reinstated the convictions, and so the court said, we're not going to fool with this on direct appeal. Get it all straightened out, and then bring it back to us.

And this is basically what they have said in Nixon, but with the admonition that just because it's vacated doesn't mean that we're going to vacate the death sentence that was based in part on that.

Even in the situation here, the dissent below says that they would invalidate this under state law grounds and not

under federal law grounds. So we feel that the analysis here can be made without having to make a harmless error analysis, and that the court below was correct in its judgment.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. White.

Mr. Abrams, you have four minutes remaining.

ORAL ARGUMENT BY FLOYD ABRAMS, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. ABRAMS: It is not our position in this case that there should be an automatic reversal when an aggravating circumstance is held invalid. This Court has dealt with that question.

Our position here is that when bad evidence comes before a jury, misleading evidence, prejudicial evidence, evidence which counsel, General White now concedes could not have come before the jury had the reversal occurred earlier, that that is the circumstance in which the death penalty cannot be upheld because it cannot be said that it would have occurred but for the bad evidence.

QUESTION: -- competent constitutionally to reweigh the aggravating circumstances against the mitigating and affirm?

MR. ABRAMS: I would say, first of all, that is not what the court did in this case as a constitutional matter.

QUESTION: Well, that's your reading of this opinion.

MR. ABRAMS: Yes, sir, it is my reading of this opinion on two separate basis. First of all --

QUESTION: Well, how about my question now?

MR. ABRAMS: Right. Yes, it would be, my answer to your question directly, that that sort of reweighing in this circumstance, in a situation in which a jury had free rein to determine how much to weigh mitigating circumstances against aggravating circumstances, and the jury is instructed, as in this case, that it could weigh in effect the mitigating circumstances as much as they wanted the aggravating. That in that sort of situation where the jury did that, that it would raise very serious constitutional issues for the state Supreme Court to engage in the reweighing.

QUESTION: What constitutional provision would be violated?

MR. ABRAMS: I believe the Eighth Amendment would be violated. Now this Court has not addressed that issue yet, because it hasn't had to address that issue yet.

But in a situation -- I mean we have a situation here where the scope of review of the Mississippi Supreme Court is not one which asks anything more than whether a jury could have done that. I mean the court is not substituting its views for that, or affirming the views of the jury in Mississippi. It is addressing a much narrower issue.

In Mississippi v. Caldwell, the sort of language used

in Justice O'Connor's opinion, for example, was was it so arbitrary that it was against the overwhelming weight of the evidence. I mean that's the role of the jury in Mississippi. For the state Supreme Court then to engage in the first instance in a weighing process where it has not heard any of the evidence and cannot assess the in-court evidence, I would argue to you, if that was before you, is barred by the Eighth Amendment.

But I would urge upon you that that question is not before you. There was no reweighing here. The proportionality review, for example, was at the time of the direct appeal.

QUESTION: I'm not taking about proportionality.

MR. ABRAMS: Yes, sir. Right. And I would just urge upon you that it is my reading, at least, that they did not engage in that and could not.

So in the end then, we would urge upon you that this situation is the question reserved by the court in Zant. It is not Zant, or Barclay, or Lowenfield. If this were Lowenfield and this sort of information had come before the jury, we might well make the same argument. I mean if this were the Lowenfield case itself and the jury in that case had heard evidence pressed by counsel of a reversed conviction, we would be urging upon you that in that type of situation you should reverse, and that's what we urge upon you today.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Abrams.

The case is submitted.

(Whereupon, at 1:31 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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CASE TITLE: Samuel Rice Johnson v. Mississippi

HEARING DATE: Arpil 25, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Superior Court of the United States.

Date: 4-29-88

Margaret Daly

Official Reporter

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