ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: A.L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, Petitioner, v. JOHNNY LEE NELSO

CASE NO: 87-1277

PLACE: WASHINGTON, D.C.

DATE: October 3, 1988

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IN THE UNITED STATES SUPREME COURT

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A.L. LOCKHART, DIRECTOR, :

ARKANSAS DEPARTMENT OF CORRECTION, :

Petitioner, :

V. : No. 87-1277

JOHNNY LEE NELSON, :

- x

Washington, D.C.

Monday, October 3, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

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APPEARANCES:

J. STEVEN CLARK, ESQ., Attorney General of Arkansas
on behalf of the Petitioner.

JOHN WESLEY HALL, JR., ESQ., Little Rock, Arkansas,
on behalf of the Respondent.

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(1:58 p.m.)

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll go now to the argument of No. 87-1277, Lockhart against Nelson.

General Clark, you may proceed whenever you're ready.

ORAL ARGUMENT OF

ATTORNEY GENERAL J. STEVEN CLARK

ON BEHALF OF PETITIONER

MR. CLARK: Mr. Chief Justice, and may it please the Court, the State of Arkansas believes the facts in this case are somewhat simple in that simply what occurred here in our trial courts in Union County was trial error rather than a failure to submit sufficient evidence.

In 1980 the defendant, Johnny Lee Nelson, was charged with burglary, breaking and entering, and misdemeanor theft. In 1982 he pled guilty to that same charge and agreed to be sentenced by a jury.

Because of the defendant's previous prior convictions my state chose to sentence him as an habitual offender. The state introduced four prior convictions, one of which included a conviction of assault with intent to rape.

The jury, after hearing the evidence, sentenced

the defendant to 20 years as an habitual offender, the minimum sentence under our statute. The sentence was subsequently upheld by the Arkansas Court of Appeals and by the Supreme Court of the State of Arkansas.

In 1985 Mr. Nelson filed a habeas petition alleging that one of the four convictions upon which the state relied had been pardoned. The United States District Court asked my office to in fact investigate that fact and we did, and learned that there had been a pardon on the conviction of assault with intent to rape.

The District Court then issued an opinion which held that the Double Jeopardy Clause of the Fifth and the Fourteenth Amendment applied to the State of Arkansas and would bar us from resentencing Mr. Nelson as an habitual offender. The Eighth Circuit Court of Appeals affirmed that decision. In that order from the District Court and from the Eighth Circuit the State of Arkansas was advised that in fact we either had to retry Mr. Nelson as a burglar, sentencing him to three to twenty years, or to let him go within 60 days.

The state concedes that the Double Jeopardy Clause applies to the sentencing phase of our trial procedure in the instance that that procedure is one in which the state has a burden of proof beyond a reasonable doubt, one in which the state may offer

witnesses and the defendant has an opportunity to confront those and cross-examine and offer other testimony. And so in that instance Bullington standard, as articulated by this Court, we submit and concede applies to that procedure.

QUESTION: This is because of the multiple offender aspect?

MR. CLARK: Yes, your Honor. Under our state statute if you are sentenced as an habitual offender, you must give the defendant notice of that but not notice of the prior conviction upon which the state will rely. So, Mr. Nelson knew that we were going to sentence him, or attempt to sentence him, as an habitual offender.

Yet, I further submit and contend that the District Court in its decision found this case to be like that of a Burks decision of this Court when in fact this case can be distinguished from a Burks decision. This is not a decision like Burks in which there is an insufficiency of the evidence. This is a case in which we had trial error that occurred.

That distinction is really based on this analogy, I would offer to this Court. The burden pushed upon the State of Arkansas was to fill a basket, a basket full of apples. That was four prior convictions

to trigger the Habitual Offender Act in order to let the jury consider the evidence and determine if in fact the state had made its burden beyond a reasonable doubt.

We attempted to do just that and believed that we had. We did that in the instance offering four prior felony convictions from the court records. These were certified copies of commitment orders from the Union County Circuit Court. When we offered those --

QUESTION: Attorney General Clark, couldn't one argue -- I don't know if it would be a correct argument -- that one of your four apples really wasn't an apple?

MR. CLARK: Yes, your Honor, one can argue that, clearly.

QUESTION: And that therefore it's really a Burks case?

MR. CLARK: Yes, your Honor, one could argue that clearly. I think the distinction to be drawn in this case is this. It is that at the time that we offered those four prior convictions, as you will recall from the record, there was no objection, you recall there was some discussion. The defendant himself made some reference to the fact that he believed he had been pardoned. Yet, he also made some comment to the fact that he believed his sentence had been commuted to a term of years.

I submit to this Court that the better reason rule of law is two here in this instance and distinguishes this from Burks. One, that the state, I believe, should have the right to rely upon the trial judge. The trial judge, after hearing the statements of the defendant and looking at the evidence as offered as being competent to represent the facts for which it was offered, let it be admitted.

Secondly, in our process which is a bifurcated process, the jury had the opportunity to consider that evidence as it was introduced, as to its competency. The jury had --

QUESTION: Well, in fact here, I think that decision was to be made by the judge, but under a mistake he referred it to the jury.

MR. CLARK: Yes, your Honor, that is correct. The Arkansas Legislature had amended our law in 1981. This trial proceeding occurred in 1982. The trial judge did make error. He gave the four convictions to the jury for the purpose of them determining their validity as competent evidence.

But the jury, as I suggested, made a decision which distinguished this case from Burks in the instance that they heard the evidence; the statement of the defendant, the comments of prosecutor, the comments of

the trial judge, and the statement of the defendant that in fact his sentence had been commuted to a term of years, and comments by his defense counsel. Weighing all of that, the jury determined these were four competent convictions upon which they could believe or accept -- and in this instance did believe and accept -- and weighed them to believe that the state had met its burden of proof.

QUESTION: Well, General Clark, I know you're arguing the Burks question. I'm just wondering, are you convinced that Bullington necessarily applies --

MR. CLARK: Yes, your Honor.

QUESTION: -- outside the capital context?

MR. CLARK: Yes, your Honor. We're willing to concede that in this case it does because we think the very nature of our trial process for habitual offenders is much like that -- or is identical, as a matter of fact, to a capital case where we bifurcate. And we really present that sentencing phase very much like a trial phase. So, we have --

QUESTION: I just wonder why you were so willing to concede that. It strikes me as very curious.

MR. CLARK: Your Honor, I'm only willing to concede that because I simply believe that that is the way that process occurs and would not want to

misrepresent or mislead this court in any fashion.

QUESTION: Mr. Attorney General, you did mislead the trial court, didn't you?

MR. CLARK: No, your Honor, we did not.

QUESTION: But you did give them what was a conviction that had actually been pardoned?

MR. CLARK: We did offer --

QUESTION: You did present that to the court deliberately?

MR. CLARK: Yes, your Honor, we did present the conviction. We did not deliberately present it knowing it had been pardoned.

QUESTION: Well, weren't you obliged to find out whether it was a valid conviction or not?

MR. CLARK: Your Honor, at the time that we offered --

QUESTION: Did you present it as a valid conviction?

MR. CLARK: Yes, your Honor, we did.

QUESTION: It wasn't.

MR. CLARK: No, your Honor, it was not.

QUESTION: And you should have known it.

MR. CLARK: No, your Honor. I submit --

QUESTION: Well, why don't you admit that?

MR. CLARK: Your Honor, in the interest of the

time that we offered this conviction, which was a 1960 conviction which followed the 1964 pardon, the time that the notice came to the state, other than the comments of the defendant -- and the comments of the defendant were weighted both by the trial court and by the jury --

QUESTION: -- and the lawyer when he presented evidence to the court supported it.

MR. CLARK: Did the prosecutor support the evidence? Yes, your Honor.

QUESTION: Well, you didn't support it, did you? Or, did you?

MR. CLARK: We did, your Honor. We --

QUESTION: Well, that was wrong, wasn't it?

MR. CLARK: It was erroneous at the time. Yes, your Honor.

QUESTION: Wasn't it wrong?

MR. CLARK: We thought --

QUESTION: W-r-o-n-g?

MR. CLARK: Your Honor, we believed that the conviction was a valid conviction at the time that it was offered. On the face of the court records it said it was.

QUESTION: How could it be valid then?

MR. CLARK: Your Honor, the conviction continues to exist today regardless of what maybe was

said in respondent's brief in terms of --

QUESTION: But your court said it was not?

MR. CLARK: Our court said it was, your Honor, after a --

QUESTION: Well, should I listen to your court or you?

MR. CLARK: You should listen to our court in the sense, your Honor, when the collateral attack came and the habeas petition and the facts were discovered by the trial court of the state, which we admitted, and the defense, that in fact we had offered an erroneous conviction not known to any of the persons at that trial proceeding in 1982, then we at that point said --

QUESTION: Didn't --

MR. CLARK: -- said error occurred.

QUESTION: Didn't you know about it?

MR. CLARK: We did not know, your Honor, at the time offered.

QUESTION: Well, when it was pardoned wasn't your office notified?

MR. CLARK: No, your Honor, my office was not. My office is not routinely --

QUESTION: You mean the government pardons somebody and didn't tell you?

MR. CLARK: Your Honor, that's correct. That

is correct procedure today and that would have been a correct procedure in 1964.

QUESTION: Well, where is that in this record?

MR. CLARK: It's not in that record, your Honor.

QUESTION: Well, where -- I'm sorry, I have to take your word for it.

MR. CLARK: Yes, your Honor. In the instance that the procedure in Arkansas is such that the Governor's Office does not give me regular notice of the fact that a pardon has been issued. In this instance, in the facts, as you recall, the pardon was issued in 1964 by Governor Faubus. It was some 22 years later that Mr. Nelson was placed on trial and tried as an habitual offender and it was some six years after that -- or five years after that that in fact the collateral attack occurred.

What I submit to this court occurred in this instance was that the trial court had a responsibility to make a decision.

QUESTION: There was no objection?

MR. CLARK: Absolutely none, your Honor.

QUESTION: And there was an agreement that it wasn't a pardon?

MR. CLARK: Yes, your Honor, there was.

QUESTION: Actually, there was a colloquy. Was

Mr. Keaton the defense attorney or --

MR. CLARK: Yes, your Honor.

QUESTION: Where the court says, "'I think he cleared it up himself when he said it was commuted to time served,' is that what you said?" And the defendant says, "Yes, sir." Then the court says, "Does that answer your question? It was commuted to time served. It's not a pardon. Do you agree, Mr. Keaton?" And Mr. Keaton, the defense attorney, says, "Well, that's the way it sounds to me."

MR. CLARK: Yes, sir. That is exactly the colloquy that occurred in that courtroom.

QUESTION: Well, it wasn't true.

MR. CLARK: It was not true. Yes, sir, that's correct. At the time, however, the jury had the opportunity to hear all that colloquy that occurred and to weigh that evidence and to make a determination once it was ruled to be admissible had Arkansas met its burden of proof beyond a reasonable doubt for the purpose of enhancing as an habitual offender. And they concluded just that. When we came back --

QUESTION: Counsel, what's the standard here? We're assuming that to determine sufficiency of the evidence that the improperly admitted evidence was considered. Isn't that the test?

MR. CLARK: Yes, your Honor.

QUESTION: And we then look at that evidence and see whether or not it could support a conviction?

MR. CLARK: Yes, your Honor.

QUESTION: But it can't support a conviction if it's not a pardon. Suppose these had been pardons of someone else with a similar name? Sufficiency of the evidence?

MR. CLARK: I think, your Honor, that the rule that the State of Arkansas is articulating we believe this court should adopt is this. That on appellate review you look at the record within the four corners of the record, the appellant reviewing body then ask the question of sufficiency within light of all evidence admitted, whether objected to or not.

If you found that we filled that barrel of apples, we rose to the level of sufficiency of evidence, which I submit we did, we submitted four prior convictions --

QUESTION: Even if they were the convictions of someone else?

MR. CLARK: Even if -- then if you find there was trial error that occurred, the convictions of someone else, another Johnny Lee Nelson, the wrong Mr. Nelson, but it was believed it was the correct Mr.

Nelson, the trial judge it accepted as admissible, the jury weighted it and considered it as admissible even though there was some colloquy or objection or any other evidence in the record, that at that point the proper decision then is to consider this as trial error because we met our sufficiency standard first. And then we get a chance to come back and try this case again.

Otherwise, to remove that evidence, saying, as Justice Stevens said, we had an orange instead of an apple, and the appellant court says, "Excuse me, you had there four apples; you've got three and an orange, you're insufficient evidence," is that you put a burden on my state in this instance of a situation where we literally are arguably overtrying our cases, but in terms of every objection, we don't know at some point when we're going to be barred from coming back from a Fifth Amendment double jeopardy argument from trying a case where mere trial error had occurred. And we don't have perfect trials in Arkansas.

QUESTION: Let me ask you this. Supposing the defense lawyer -- you put in your four apples --

MR. CLARK: Yes, sir.

QUESTION: -- and on the face of the record you're got a sufficient case. The defendant's lawyer comes in and puts in the pardon in the record. The

Judge submits the thing to the jury, the issue to the jury, and the jury says there are four convictions and hence punishment. But on appeal, the appellant court would say, well, that fourth of the pardon really meant that that was not a fourth apple. What do you do in that case?

MR. CLARK: I think, your Honor, that you have articulated the one instance where I think the sufficiency would not have been by the state. I think this court has said repeatedly that in terms of the appellate court's proper authority they can review the sufficiency of the evidence and if they could conclude that a reasonable jury could not have reached the decision that we had four apples because one of them had pardon right across the front with whistles and bells and bows and buttons, and whatever, then in fact this court could reverse and say the state failed to meet its sufficiency standard.

But that didn't occur in my case. Mine is a different case. We had four convictions that on their face, showing legitimate court orders, said convicted of these crimes. All we had was the colloquy among the parties present as to what really in fact occurred, and the defendant himself said it was commuted to a term of years.

The jury, hearing all of this, weighed it, knowing that the burden, as instructed to them by the trial judge, was on us to prove beyond a reasonable doubt. We did that.

Add a collateral attack subsequently later, we learned, my office learned, that in fact there had been a pardon. At that point we believed that the proper rule of law is to let the Eighth Circuit Court of Appeals weigh that basket and see if it's full, and if it is --

QUESTION: Was this case appealed to the Supreme Court of Arkansas; or it was appealed to the Arkansas Court of Appeals?

MR. CLARK: Yes, your Honor. To the Court of Appeals and then under extraordinary relief which we call Rule 37 Petitions to the Supreme Court of Arkansas. This issue of the pardon was raised in both of those. But in each instance the Court of Appeals and the Supreme Court denied the appeal, affirmed the lower court decision.

QUESTION: General Clark, maybe this is an unfair question, but I wonder why when the defendant made the objection he did, why somebody didn't find out what the facts were instead of just relying on his recollection of some 20 years.

MR. CLARK: Your Honor, I think --

QUESTION: Isn't it pretty easy to call up and find out if there had been a pardon?

MR. CLARK: Your Honor, I would submit to you that the answer is yes, that it's not an unworkable burden to stop at that process and perhaps ask this question and find out at that point. So, I wouldn't -- I don't want to make the burden appear to be more than it in fact is.

But the facts are these in the trial situation setting. The defendant was represented by counsel. Counsel there present heard the statements of his defendant, I believe had some affirmative duty also to investigate. But the defense counsel, the prosecutor and the Judge having this colloquy in the presence of the jury concluded with the defendant's statement saying, "No, it was commuted to a term of years."

And on its face this record appeared to be what it was, an official record of the sentencing court, Union County Circuit Court for South Arkansas, about 25 miles from the Louisiana border, as exactly what it was.

And the jury looked at it. It was handed to them. They reviewed it. They had an opportunity to weigh it and consider it.

I submit that in fact it was trial error. And

if we set the standard that each time the defendant says, "I was pardoned," or "You have the wrong defendant," as Justice Kennedy has said, I'm the wrong Johnny Lee Nelson for that offense.

QUESTION: You're not saying it was trial error. You're actually saying it was new evidence.

MR. CLARK: In a sense, your Honor, that's a very --

QUESTION: As I understand.

MR. CLARK: -- good analogy. A very good analogy. It's like new evidence.

QUESTION: Mr. Attorney General --

MR. CLARK: Yes, your Honor.

QUESTION: -- if we rule against you, and the next case comes up like that, they'll find out, won't they?

MR. CLARK: Your Honor, I suspect the answer to that is yes. However, if you rule against me, your Honor, in the next case in which there is an objection to evidence offered, and any objection offered, then the state, if it is not absolutely correct, and there is some error, I submit that that defendant will come back and argue to this Court or to other courts in Arkansas that a double jeopardy application should apply.

QUESTION: I suggest, as Justice Stevens says,

you could have telephoned, which would take about six minutes.

MR. CLARK: Well, your Honor --

QUESTION: In the next case, you'll call up. It won't interrupt the trial. It'll just take about two or three minutes.

MR. CLARK: Your Honor, in the instance we could have telephoned. I admitted that to Justice Stevens and I do to you too, Justice Marshall, in the sense that that could have occurred.

What in fact did occur, however, is the situation in the process of the administration of criminal justice in Arkansas, as in any other state, is that if we are going to stop the process every time a defendant says you've got the wrong defendant or "I was pardoned" for a six minute phone call or for a half-hour phone call --

QUESTION: Let me bring about any time -- this is where a document has been challenged.

MR. CLARK: Your Honor, the document was only challenged by a statement by the defendant who later recanted, I submit to you, by saying he had had his sentence commutted to a term of years.

QUESTION: Well, suppose it had come up 16 years later, what would you have said?

MR. CLARK: I would have said just what I --

QUESTION: That it was a valid conviction?

MR. CLARK: Your Honor, if --

QUESTION: Would you have said it's a valid conviction?

MR. CLARK: If I learned 16 years later --

QUESTION: Yeah.

MR. CLARK: -- that it's been pardoned? I would say, as I'm saying today, your Honor, it was trial error. It's like newly-discovered evidence, the analogy that Justice Scalia made. We didn't know at the time. We relied upon the conviction upon its face. We relied in good faith and the jury considered it as such.

QUESTION: Well, when you say a document is challenged -- there was nothing wrong, I take it, with the certificate of conviction. The conviction actually had taken place.

MR. CLARK: Yes, your Honor.

QUESTION: It was the existence of another document, the pardon, if those are documents that render the first document not usable for the purpose you wanted to use it for.

MR. CLARK: You're absolutely correct, your Honor. You're absolutely correct.

QUESTION: Is the document not usable or

invalid? What is the law in Arkansas?

MR. CLARK: The law in Arkansas, for purposes of the Habitual Offender Act, your Honor, is --

QUESTION: What is the law on a pardon?

MR. CLARK: The pardon is only inapplicable -- inapplicable for use as a -- to count as a prior conviction for habitual offenses. The pardon itself will not in fact erase the conviction and will not prevent the conviction from being used to deny one the right to hold public office, deny one the right to own a firearm, deny one the right to be a law enforcement officer or other sorts of privileges granted by the state. It has a limited in --

QUESTION: Now, what is the limited position?

MR. CLARK: The limited position is that you can't count it as a prior conviction for purposes of habitual offenders. And that's it.

QUESTION: Isn't that this case?

MR. CLARK: That is this case, your Honor.

QUESTION: Well, that's all I'm talking about. I'm not talking about --

MR. CLARK: I understand, your Honor. In the instance of the document, though, as Mr. Chief Justice allowed, the document submitted to the court on its face was represented to be competent for what it was offered.

We submit to this court that that is the better reason rule of law in the instance of the burden to place upon the state in trying its cases.

QUESTION: I take it -- just to pursue this point one question further -- that if under your analogy a blood sample in a drunk driving case is introduced and it's from the wrong person, that's sufficient evidence? There is error, we find out --

MR. CLARK: No, your Honor, I wouldn't say --

QUESTION: It's not authenticated properly, the judge admits it erroneously, we find out that it's the wrong blood sample -- in your view, that's sufficient evidence --

MR. CLARK: Your Honor --

QUESTION: -- to justify retrial?

MR. CLARK: I'd like to amplify that just a little bit. It is sufficient evidence -- the appellate court on review must look to see if a reasonable jury could have concluded that it was sufficient evidence for the purpose of conviction. If they did, if they concluded that, it is trial error and we get a chance to try again.

If it was the blood sample of some O-positive versus A-negative, one a very common source of blood, one a very rare source of blood, and it was identified

as such, then an appellant body could say on review it is not reasonable that a jury could have mistaken O-positive for A-negative. It's just not reasonable. Therefore, it was insufficient evidence. The state is bound by its own error. That, I think, is the rule of law.

But in the instance where -- in my case in particular, Justice Kennedy, the four convictions on their face appear to be exactly what they were. Exactly what they were. The trial court believed them to be what they were. We all believed them to be what they were.

We discovered literally five and a half years later that one was not. It was an orange, Justice Stevens, not an apple. And at that point we said what happened was the state has to rely upon someone. That someone is the trial judge as to the issue of admissibility. Secondly, in terms of whether it was reasonable to rely, we relied upon that jury. And that jury heard all the evidence in that colloquy in that testimony, in that courtroom, and weighed it, and beyond a reasonable doubt concluded that in fact we had met our burden.

QUESTION: Isn't it a little confusing, General Clark, to talk about this as an admissibility problem?

I suppose all evidence that is effectively rebutted can be said to have been inadmissible because it's not probative.

MR. CLARK: Yes, your Honor, I would concur.

QUESTION: I mean, it seems to me we're getting led off the track by talking about it as an admissibility case. This stuff was clearly admissible. I don't think there was any trial error in admitting it. Why was there any trial error?

MR. CLARK: The suggestion, your Honor -- I would say that there was trial error or --

QUESTION: No. Other evidence should have been brought forward. That's all. But just because I let in one person's testimony and I don't let in the testimony -- and the other side doesn't bring forward someone who could have totally refuted that rendering it irrelevant and, therefore, inadmissible, I haven't been guilty of making a trial error by admitting it in the first place, have I?

MR. CLARK: Well, the court in this instance made error because it admitted something that didn't have any probative value. As Justice Marshall has indicated and I've stated, that under Arkansas law a pardon conviction cannot be offered as --

QUESTION: It has no probative value only after

it was refuted by the pardon. But when it was presented, it had probative value.

MR. CLARK: Yes, your Honor.

QUESTION: Just as when you present a witness --

MR. CLARK: Yes, your Honor.

QUESTION: -- who later may be utterly destroyed by another witness, that witness is properly admissible --

MR. CLARK: Yes, sir.

QUESTION: -- to begin with.

MR. CLARK: Yes, your Honor, I agree with that. And I agree -- but I would like to take it one step further, Justice Scalia, to say that in the instance of what I am trying to persuade this Court, is that in fact it was admissible and it was admissible to meet the standard required by law in Arkansas to pass the case to the jury for the purpose of them weighing that evidence to impose the sentence that was provided by law. And that's exactly what occurred.

It was only after that that we discovered that in fact it was not admissible for the purpose for which we offered it.

QUESTION: But I think even there perhaps that's not entirely accurate. Supposing that in an action I offer a promissory note all duly executed and

so on, and no one objects. The notes comes in. Well, it turns out later that the payee has released the note. And if that release is offered, it will show the promissory note carries no obligation, although without the release it obviously does.

Well, that doesn't mean that the promissory note was inadmissible. It just means, like in your case, that there was another document which when introduced would show that the promissory note was no longer enforceable.

MR. CLARK: Yes, your Honor, that's correct.

QUESTION: But you don't say that's inadmissible.

MR. CLARK: No, your Honor, I would not say it was inadmissible. You're correct, your Honor.

QUESTION: What did your court say?

MR. CLARK: Our court didn't actually -- there was no objection, Justice Marshall. But our court admitted it.

QUESTION: I'm talking about the appellate court.

MR. CLARK: The appellate court, courts of appeals, and the Supreme Court in Arkansas said that there was no grounds to overturn the conviction. The District Judge, Judge Eisele, said that in fact because

it was discovered later that it was erroneously relied upon, we had incorrectly received information and because of that we had not met our sufficiency standard and ordered us to retry or to release Mr. Nelson.

QUESTION: Judge Elsele ordered --

MR. CLARK: Yes, your Honor, I submit that he did, but I submit that his decision is in error in terms of what is the better reason rule of law that should be applied by this court to appellate bodies.

QUESTION: General Clark, do you think the case of Poland against Arizona from this Court has any bearing on this question?

MR. CLARK: I'm not certain, your Honor, that it does. I would further argue to this Court that in terms of the standard that Arkansas request that you articulate is one that presents for my state a clear answer to a problem that we are now facing in the sense that I have been asked from time to time why we didn't just go back and resentence this person and then if it be challenged in terms of double jeopardy, produce this case to this Court in a different fashion than presently offered.

I submit to you that's not where we are. Judge Elsele said to us we have 60 days to either release this person or retry him not as an habitual offender. We

have other convictions that we would offer to retry this person, if permitted to do such.

I submit to you that the better reason rule of law lets us have that opportunity because what occurred here was we met our sufficiency standard, we filled up that barrel with apples. We learned after, and much like a motion for newly-discovered evidence in terms of setting aside the procedure that one of those apples was an orange. And because of that, we should have an opportunity to retry this matter.

I'd like to, Mr. Chief Justice, if there are no further questions, reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clark. Mr. Hall, we'll hear now from you.

ORAL ARGUMENT OF

JOHN WESLEY HALL, JR.

ON BEHALF OF RESPONDENT

MR. HALL: Mr. Chief Justice, may it please the Court, what the state is asking for here is an opportunity to get a chance to resentence this man to fill a void in its proof six and a half -- if the trial is later, seven years, seven and a half years -- after the fact.

What the court is asking them to do, asking you

to do, is to call its orange an apple in effect, pretend it's an apple to let them get over the sufficiency hurdle.

QUESTION: Why do you say it's a void in their proof? In fact, if you viewed this when that trial was over, you would say they proved their case? It's your side that had the void, you had a void in your defense. But as far as what was before the court, after the trial you'd look at it and you'd say, "Sure enough there's four convictions."

MR. HALL: That's true. But at the time that it was offered, the state was on notice that it was pardoned and the state made no effort to inquire. The colloquy that occurred happened on the record with Mr. Nelson as a witness. He was being examined, apparently, by his own lawyer. The prosecutor asked him questions, the court asked him questions. Then he responded to a leading question and said, "Yes, I guess it's been reduced to time served." And that's how the court let it go to the jury.

He said very clearly, "I've been pardoned. I have papers on that at home."

QUESTION: Surely the defense was on notice too.

MR. HALL: Yes, the defense was on notice. But keep in mind that this defense counsel didn't do a very

good job of trial and didn't even follow the appeal he was required to do so. Mr. Nelson had to have a belated appeal granted by the Arkansas Supreme Court.

Let me give you the chronology in this case because the chronology is important to how it occurred. He was charged first in early 1979. His case number is CR-79-22. He was convicted before a jury on the first trial and got 40 years. This was in 1980.

That conviction was reversed because the prosecuting attorney withheld discoverable material and the case was sent back for retrial. It was reversed in 1981.

When it came back in 1982, Mr. Nelson pled guilty and asked to have the sentence in question submitted to the jury. And that's where the pardon prior conviction first came up.

Now, there were three convictions from 1960. The state only chose to use one of them. Another conviction, Number 90-90 that's in our footnote 1, may be invalid. It was a pre-Gideon conviction that does not apparently show counsel. That's probably why the state didn't offer it in the first place.

The one that was used here, Number 9078, did in fact show counsel. The other conviction, Number 9065, the earlier conviction -- I don't recall now whether

that one shows counsel or not. I think it was from a guilty plea; it probably does not. And one of the other convictions the state did in fact used that's never been challenged before and is waiting for when this case comes back, CR74-137, also used -- it's just a printed form that says he appeared with his attorney with no name mentioned. That conviction itself may be invalid under state law.

Anyway, the case was submitted to the jury. The jury came out and found him guilty -- of course, because he pled guilty -- and sentenced him to 20 years at a minimum.

Now, one of the -- there is a problem in my brief, an inconsistent statement of fact. I want to clarify it. At page 12 I talk about their being lessers submitted to the jury. In fact, no lessers were submitted to the jury. It was submitted as four priors or not guilty. And that's kind of incongruous because he did in fact plead guilty. So, the jury had to find four priors or let him go.

Anyway, after the conviction no appeal was lodged by his lawyer. He wrote a pro se petition to the Arkansas Supreme Court. They granted a belated appeal in 1983.

The case goes to the Arkansas Court of Appeals

in 1984 and in that court Mr. Nelson's counsel, another appointed counsel, says, "He was pardoned in this case." And the state's response was, "He just said he was pardoned. That's not good enough. He said a trial. I thought it was pardoned. But they didn't put in a document. That's not good enough. He conceded at trial that it was reduced time served. Therefore, that's not good enough." So, the Arkansas Supreme Court affirmed -- or, Court of Appeals affirms.

This time pro se he seeks post-conviction relief and he writes a handwritten petition to the Arkansas Supreme Court raising the same issue. That he was pardoned on that prior conviction. The State of Arkansas says, he just alleged it, that's not good enough.

Now, all this time nobody bothered to call the Secretary of State because this conviction was a matter of judicial notice. It could have gone in with the pardon. It could have gone in by judicial notice under Arkansas law. But nobody made an effort to find out. His own counsel didn't.

QUESTION: Mr. Hall, may I ask you a question? Supposing right after this error occurred, and so forth, within say 60 days the lawyer had followed through on it, found out there was a pardon, went in immediately to

the trial judge and said, "Your Honor, I found out there was a pardon here. I move to set aside the conviction on the ground there are only three apples." The judge said, "Relief granted."

The prosecutor then said, "Okay. I'd like to retry the man and put in the fourth conviction." At that time, would double jeopardy have prevented that?

MR. HALL: At that time they could have resubmitted only the three prior convictions.

QUESTION: The three? Could they have said, "Well, in view of this development, we'd like to reopen the record and put in what we believe to be other valid convictions." And you'd dispute them. Could they have done it then?

MR. HALL: In that particular case you'd have the question of he moved to set aside the conviction. Having set aside the conviction on his own motion, he now is subject to being retried, and whatever evidence could be produced -- it would be like a mistrial mid-trial maybe. Or, a mistrial --

QUESTION: Why would that situation be any -- why should the rule be any different in that situation than the one you've got today. Here we've had a collateral attack on the conviction. It's been set aside.

MR. HALL: Well, the question is double jeopardy finality.

QUESTION: Right.

MR. HALL: In this particular case here we are talking about it seven and a half years later. And this is the extreme of finality.

QUESTION: But why should your defendant get the benefit of the fact that he's seven years late in succeeding with what he should have brought to the attention of the court right away, if he knew the facts and if his lawyer checked it out?

I mean, who is responsible for this delay? Is it the —

MR. HALL: Well, everybody is responsible for the delay. The defendant probably for not bringing the conviction to court. He should have, I suppose, told his lawyer. And then if he told his lawyer, the lawyer might have said, well, they won't use a pardoned conviction, and they did.

Nobody was prepared at the trial. Nobody was prepared at the appeal. This case just got short-shift all the way through the system.

But the problem is Mr. Nelson ended up doing five and a half extra years as a result of this problem. This happened in March of 1982. But here we

are now in 1988 still questioning what happened.

I don't know if you can talk about equities in a habeas case, but --

QUESTION: But if the double jeopardy isn't kind of an equitable doctrine -- it's kind of a firm rule of law -- it would seem to me that if the state is barred now, it would also have been barred if they'd raised it just a few -- you know, 30 or 60 days later -- brought out the fact that there in fact, there were only three apples and you need four.

MR. HALL: On that particular type of situation other considerations might come in, like whether the defendant was sandbagging the state, for instance, and letting this go to the jury for the purpose of causing that kind of error. And there is no evidence that that happened here. Mr. Nelson raised that question before it went to the jury. On the stand --

QUESTION: But what if exactly those same facts -- where there is no evidence of sandbagging -- on Justice Stevens' hypothesis -- so that it's all the same except it all comes out 60 days after the -- or 30 days after the judgment of conviction?

MR. HALL: Then it would still be barred by double jeopardy assuming the defendant didn't participate such that he could be charged with some

participation in the occurrence. Like in this case, you know, Mr. Nelson didn't know the difference. He was relying on a court-appointed counsel. The court-appointed counsel let him down. The prosecutor let him down. The trial court let him down.

QUESTION: What about a murder trial in which there is some dispute as to whether the alleged decedent was even killed and they produced testimony about a certain corpse and it is later found out that it was not the right corpse?

MR. HALL: Another person was killed?

QUESTION: Right. Another person was killed.

MR. HALL: Well, that's not --

QUESTION: Therefore, that testimony at the first trial should not have been admitted, because the fellow was testifying about a different corpse.

MR. HALL: Well, you wouldn't even have a double jeopardy problem because you're talking about another victim. We can set aside the conviction for --

QUESTION: No, I'm not talking about another victim. There's still only one person who was charged. He was only charged with killing one individual. I don't see why that's any different from your case. It turns out that evidence admitted before, in the light of subsequently discovered evidence, was not relevant.

MR. HALL: But you're talking about a person who was convicted of killing person "A" when in fact he killed person "B"?

QUESTION: No. I'm saying it's still not sure that person A was even killed because the testimony introduced in trial one by a coroner, the coroner later discovers that, oh, he was totally mistaken, it wasn't corpse A, it was somebody else. Would you say that you couldn't retry the person because there was not evidence to convict? At the time of the trial there was enough evidence to convict. You had a coroner who said A was killed, "I saw his body."

MR. HALL: The question of trial error has to be looked at in terms of he and the prosecutor cure the error given an opportunity to put more proof. In this situation they can't cure the error because no amount of proof is going to set aside that pardon. In that particular situation you could say that's it's a question of admissibility of evidence, foundation of evidence. They had improper foundation, the court read in the wrong evidence, the witness was recanting, or whatever, and that would probably go down as a trial error, not sufficiency of the evidence.

QUESTION: Mr. Hall --

MR. HALL: It wasn't insufficiency at all.

QUESTION: -- while you're out on these hypothetical cases, what if there was perjured testimony, would anybody have any problems with it?

MR. HALL: Well, the --

QUESTION: -- testimony, wouldn't it? It would just be automatically reversed, wouldn't it?

MR. HALL: Perjured testimony doesn't guarantee you're going to be able to set aside a conviction either. The interesting finality requires such a high burden to set it aside under Arkansas law --

QUESTION: Would a court have any trouble in setting aside a conviction based on perjured testimony?

MR. HALL: They shouldn't, but they would have some difficulty in Arkansas, yes.

QUESTION: They would in Arkansas? I thought Arkansas said you couldn't do it.

MR. HALL: Well, I've been trying to set aside convictions there for a long time in a lot of cases and it's hard to do.

QUESTION: Well, I'm talking about in this case.

MR. HALL: With newly-discovered evidence even.

QUESTION: What's that?

MR. HALL: Even with newly-discovered evidence that shows a person is not guilty it's hard to get a new trial in Arkansas.

QUESTION: Perjured testimony is different from newly-discovered evidence.

MR. HALL: Well, even a person recanting isn't always necessarily taken to be positive evidence. We have a method of doing that. Once a conviction has gone through an appeal in Arkansas, it's over. The only remedy you have is to go through a pardon. The Arkansas Supreme Courts have been very clear on that. No matter what happens, newly-discovered evidence, perjured testimony, recanted witnesses, whatever.

QUESTION: (Inaudible)

MR. HALL: Maybe you can, but you have to do it by a pardon and not through the courts.

QUESTION: I wouldn't say that. You've had several Arkansas cases that have been done right in the court. I know of several of them myself.

MR. HALL: The state in this case denies that it had its one fair opportunity to put on proof. I'm taking that language, "the one fair opportunity", from Burks. But in this case, it had its fair opportunity, and that was the jury trial with jury sentencing.

It offered the evidence, the defendant objected to it personally, the state was on notice at the time. It could have called a circuit clerk about other convictions. It could have called the Secretary of

State. It could have called the Department of Correction, which is what it did after the pardon was -- the district court requested the pardon to be determined. And it could have provided additional evidence if it had any. And it chose not to.

If that's not really one fair opportunity to put on its proof, I don't know what is under Burks. It had its opportunity. Now, the parties in the briefs talk about overtrying the case. Will they be required to overtry the case whenever an objection is made? Everybody is well familiar with what the standards are to get over a corrected verdict, what the standards are for sufficiency of the evidence on appeal.

If there is almost any probative evidence in the record at all, that's going to be enough. If in this particular case there was another -- a fifth conviction, for instance, and it was only alluded to and a certified copy wasn't in, someone may say that was sufficient to overcome it because whether or not looking at all the evidence in a light most favorable to the state, a jury could reasonably conclude the proposition that the state put forward.

If the particular piece of evidence is critical to the case and it's objected to, then logically you're going to want to put more on. If it's a piece of rank

hearsay, for instance, you're going to want to back it up because there's always the possibility the jury may disbelieve hearsay because juries sometimes do that.

And also, there's always the possibility that the prosecutor at least wants to get enough evidence in the record to maintain getting past a directed verdict.

QUESTION: Do you have any problem here because you're proceeding on habeas corpus? The state appellate court has never set aside this conviction. Your client has been in jeopardy the entire course of the proceedings until habeas comes. And haven't we limited Burks in the habeas situation?

MR. HALL: I'm not sure to what degree you're talking about, Justice Kennedy, but under Arkansas law he has no state remedy. He has one post-conviction petition which he filed, and he did it himself so it wasn't very artfully drafted. It wasn't backed up with the pardon like it should have been. It's out-of-state court. His only remedy is to go to federal court.

And in federal court finally he started the process himself. He filed the handwritten petition. The state produced the pardon on request, and that's the first time he had counsel appointed, was after the pardon was produced. And that's the first time the double jeopardy issue arose.

The background of the question making the record, the state's authorities that they cite, page 5 of the Reply Brief, talk about proffered evidence and that's exactly what we talk about in our brief. But if the evidence is there, it's alluded to. It's proffered to the court. Then on appeal, the court can refer to it even though it's not in the record because proffered evidence forms the basis of many appeals under Rule 103 of the Rules of Evidence.

And, of course, the Arkansas State Rule is the Uniform Rules, which is almost identical to the Federal Rule. And, if there was no evidence referred to in the record, then of course you can't rely on it and you can't speculate as to whatever other evidence there was.

Several of the appellate courts, the Federal Appeals Court say we can't speculate as to what there is. Well, they shouldn't speculate as to what there is. If there's been no reference to it, then it can't be relied on.

It is also possible, and I thought about this in preparation to the argument that the Court may concern itself with DeFrancesco because that dealt with a post-conviction sentencing proceeding where the defendant claimed double jeopardy prevented a resentencing. DeFrancesco dealt with a federal statute

that dealt with a feceral right to appeal the sentence when the federal government decides it didn't like the life of a sentence.

Here, in Arkansas, there is no right to appeal a jury sentence. Neither side can appeal it. It's possible that you could do it on post-conviction relief through proportionality review, but then you'd have to put on proof and establish the proportionality review, but then you'd have to put on proof and establish the proportionality question.

Proof of enhancement factors in DeFrancesco was by a preponderance of the evidence tried separately to the judge. In this particular case, it's proof beyond a reasonable doubt tried to the jury.

QUESTION: Well, it should have been tried to the judge, I guess.

MR. HALL: Well, that's not necessarily a clear question either, if it goes whether this is procedural or substantive. The crime was in 1979. The statute was changed in '81. The first trial was in 1980. And if the judge were operating under what benefits accrued the defendant under the pretrial or the prior trial, then he would give him the benefit of the 1980 version of the statute.

So, while Judge Lay and the court of appeals

referred to the fact that the trial court might have acted erroneously, it's not really clear that the trial court did act erroneously in how it was submitted. And, of course, that may raise another question too. Whether or not submitting it to the judge separately denies six men a right to try a fact to a jury.

QUESTION: Well, it isn't all that clear to me, frankly, that the Bullington line of cases should even apply outside the capital context.

MR. HALL: Well, two courts discussed it at great length and if, for instance, the jury had the conviction submitted to them and they decided in this case, we buy Mr. Nelson's statement, we find beyond -- find the state failed to prove four priors beyond a reasonable doubt, the only option they would have had was to have acquitted him. The state would have had no right to appeal. That would have been final, no matter how erroneous, even though he pled guilty. And that's the reference to all these cases the courts had. That we grant finality no matter how erroneous.

QUESTION: I guess there is another statute in Arkansas that lets you sentence as an habitual offender someone with just one prior conviction. Isn't that right?

MR. HALL: There are two levels.

QUESTION: Two levels.

MR. HALL: No priors and one prior has no enhancement. Two and three priors is first level of enhancement, and it's the same minimum, but fifty percent of the maximum.

QUESTION: You think the state can't even go after him again under the lesser enhancement statute?

MR. HALL: I think that they could have if they had submitted the question of lessers to the jury in the first instance. Under Arkansas law, it's statutory how it's done. If there is any evidence to support a lesser, it's submitted to the jury. If the defendant so requests. And the defendant can elect not to.

In this particular case the jury had four more or not guilty. If they had said, we can find four more, two or three, or less than two, then that would be the posture we're in. But that's not before the court because nobody asked for lesser included offenses.

Now, there are cases from some of the appellate courts that would allow a remand. For instance, suppose there are four elements of proof in a particular case. One of those elements is required for first degree murder and it's not proved. The remaining evidence shows the defendant guilty of second degree murder but it was submitted to the jury only on first degree and

the court reverses it. Under Arkansas law, I submit, you'd have to send it back and find the man not guilty.

If a lesser included offense were submitted, the court could say we find him not guilty of first degree murder because of failure of proof but direct the lower court to enter a judgment of second degree. But that's not the case here.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hall. Mr. Clark, do you have anything more, General Clark?

ORAL ARGUMENT OF

ATTORNEY GENERAL J. STEVEN CLARK

ON BEHALF OF PETITIONER - REBUTTAL

MR. CLARK: Mr. Chief Justice, just two points I'd like to make.

In this case we're talking about sentencing not lesser included offenses. Had we failed to meet the four prior convictions standard or didn't have four prior convictions, Mr. Nelson would have to be sentenced as a burglar and the range is three to twenty years -- because we would have only had three.

The second point is we asked for the opportunity to --

QUESTION: What's the matter with the other habitual offender provision?

MR. CLARK: It is a separate process, Justice O'Connor, in which we must meet that burden of proof. If we didn't have it, we just can't apply it. We submit to you that we have it, but that's a different issue.

The second point that I would like to make to this court is that we believe that the better reason rule of law gives us the opportunity to make that decision. I submit to this court that there are two prior convictions upon which we can rely. I've researched the record and know that for a fact.

But it's not a matter of whether he could make an habitual offender statute apply to this defendant, but it's whether we have the right to make the decision if we want to. And I submit to you that the better reason rule of law gives us that opportunity.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, General Clark. The case is submitted.

(Whereupon, at 2:44 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#87-1277-A. L. LOCKHART, DIRECTOR, ARKANSAS, DEPARTMENT OF CORRECTION, Petitioner V. JOHNNY LEE NELSON

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)