OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: A.L. LOCKHART, DIRECTOR,

ARKANSAS DEPARTMENT OF

CORRECTIONS Petitioners v.

BOBBY RAY FRETWELL

CASE NO: 91-1393

PLACE: Washington, D.C.

DATE: November 3, 1992

PAGES: 1-49

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IN THE SUPREME COURT OF THE UNITED STATES

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A.L. LOCKHART, DIRECTOR, :

ARKANSAS DEPARTMENT OF :

CORRECTIONS :

Petitioner :

v. : No. 91-1393

BOBBY RAY FRETWELL :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, November 3, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

WINSTON BRYANT, ESQ., Attorney General of Arkansas, Little Rock, Arkansas; on behalf of the Petitioner.

AMY L. WAX, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae supporting the Petitioner.

RICKY REED MEDLOCK, ESQ., Arkadelphia, Arkansas; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 91-1393, A.L. Lockhart v. Bobby Ray Fretwell. General Bryant.

ORAL ARGUMENT OF WINSTON BRYANT

ON BEHALF OF THE PETITIONER

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

The petitioner believes the general issue in this case to be whether counsel for Mr. Fretwell was ineffective under the Sixth Amendment when he failed to raise a double-counting issue that may have benefited him at the time of the trial but which has subsequently been shown by a decision of this Court to be without merit.

I would like to recite a few of the facts in this case, because their order is important. In April of 1985, Fretwell lied in wait, entered the home of the victim, stole his money at gunpoint, and shot the victim in the head and killed him. Fretwell and two companions fled in the victim's pickup truck.

Fretwell was tried in August of 1985, and the jury convicted him of capital felony murder. The case was bifurcated into a guilt-innocence phase and a penalty phase. After conviction, the court instructed the jury on

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two aggravating circumstances: 1) murder committed for the purpose of avoiding or preventing an arrest, and 2) murder committed for pecuniary gain.

The jury found only murder for pecuniary gain as an aggravating circumstance, and found no mitigating circumstances.

Fretwell's counsel failed to object to the submission of pecuniary gain to the jury despite the fact that the Eighth Circuit had handed down Collins v. Lockhart in January of the same year, in 1985.

Collins held that the Eighth and Fourteenth Amendments prohibit the use of pecuniary gain as an aggravating circumstance in capital felony murder trials where murder -- where robbery-murder is the capital offense at issue.

Fretwell then appealed his conviction to the Arkansas Supreme Court. The issue of double counting was raised, but the court, the supreme court, decided -- declined to decide the issue because it had not been raised at the trial level.

Then in April of '87 the Arkansas Supreme Court denied Fretwell's application for post-judgment relief.

Then in May of that year, 1987, he filed a habeas petition in Federal district court claiming ineffective assistance of counsel.

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Now, in January of 1988, shortly after he filed his habeas petition, this Court handed down Lowenfield v. Phelps. Lowenfield held that a death sentence does not violate the Eighth Amendment simply because an aggravating circumstance found by the jury duplicated an element of the underlying criminal offense.

To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty.

QUESTION: General Bryant, the question you present in your petition for certiorari seems to me to assume that the Collins case was properly overruled by the Eighth Circuit on the basis of Lowenfield. I don't see that we have here any issue as to whether that overruling was correct or not.

MR. BRYANT: That is correct, Chief Justice Rehnquist. It was overruled by the Perry case -- well, actually, the Lowenfield case prior to the Perry case -- but the issue before this Court in the opinion of the State is whether or not the ineffective assistance of counsel claim under the Sixth Amendment has been met, and the State's position is that when Lowenfield was decided it was based on a decision by this Court in Jurek v. Texas, decided in 1976, and therefore was not new law that applied to the Fretwell situation.

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After Lowenfield was decided, the Eighth Circuit in the Perry case, Perry v. Lockhart, which overruled Collins, specifically considered the death sentencing scheme in Arkansas and said that it was not indistinguishable from that in the Lowenfield decision, which talked about the death penalty sentencing scheme in the State of Louisiana.

But after that, the Federal district court in Little Rock issued a decision and rejected all claims that Fretwell had made in his habeas petition, except to the extent that the court found that the was ineffective assistance of counsel because the pecuniary gain as an aggravating circumstance had not been objected to at the trial court level, and then the district court directed that Mr. Fretwell either be resentenced or his conviction reduced to life without parole.

And then in September of 1991 the Eighth Circuit affirmed the district court's decision with one exception. They directed that Mr. Fretwell's sentence be reduced to life without parole. So --

QUESTION: Well, just to follow up on the question by the Chief Justice, is it open to the respondent to argue that the Eighth Circuit case, Collins, improperly -- was improperly overruled, that it was right all the time?

MR. BRYANT: It's our position that that issue is before this Court and --

QUESTION: That it is before the Court.

MR. BRYANT: The issue is before the Court, the Collins decision, simply because that was the basis for Fretwell's claim.

It's the position of the State that Collins was bad law at the time, and even if you do not accept that theory, under the Lowenfield decision it was overruled and under our concept, the prejudice prong of the Strickland test, the reviewing court must consider whether or not the prejudice occurred at the time of the reviewing -- the reviewing court makes its decision, and not at the time the alleged errors of counsel were made.

QUESTION: Do you think that position is entirely consistent with Teague, that you generally look at the law at the time of trial, the legal rules?

MR. BRYANT: It's our position that if you look at the performance prong of the Strickland test that you look at the alleged errors at the time they were made.

If you look at the prejudice prong of the Strickland test, it's our position that the reviewing court should look at it at the time the review is made.

QUESTION: Would it be the same -- would you give the same view if instead of being an overruling there

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had been a statutory change, say that an objection might have been proper at the time of trial and then by the time it gets to review and habeas corpus the legislature changes some rule and you no longer could make that objection?

Would the ineffective assistance of counsel in failing to make the objection also be judged, in your view, by the time after the legislation?

MR. BRYANT: Quite frankly, I have not considered that question, but I think that there would be -- you could argue more forcefully for the ineffective assistance of counsel claim in that instance, because the legislative act would occur after the fact.

QUESTION: Well, your position is basically that the defendant shouldn't have a windfall, isn't it?

MR. BRYANT: That is correct. That is correct.

QUESTION: A ruling that he would not ultimately have been entitled to.

MR. BRYANT: And if -- that is the reason why that we think the Eighth Circuit should be overruled, because the Eighth Circuit's decision really stops -- when they consider the prejudice prong of the Strickland test, they stop at the time the alleged counsel's errors were made, and we think that is incorrect. We think the prejudice prong should be considered at the time of the

reviewing court decision.

In addition to that, the Eighth Circuit Court used as a basis for its decision the supremacy clause. In this particular case, the Eighth Circuit in the Fretwell decision held that the trial court should have followed Collins because Collins had been decided by the Eighth Circuit in January before the trial occurred in August. Using the supremacy clause as a basis, the Eighth Circuit directed that the Arkansas Court should have followed Collins.

It's our position that the supremacy clause does not apply in this case, and in fact the great weight of authority is that the State courts are not bound to follow decisions of the lower Federal courts. They're co-equal parts of the judicial system, and so the Arkansas court was not bound to follow Collins.

And in fact, had the issue come up and the attorney for Fretwell had made an objection to the use of pecuniary gain as an aggravating circumstance, we think that the better rule for the court to have followed -- the court would have been bound to have followed the Jurek v. Texas decision which was already on the books, and so for that reason we think that the decision by the Eighth Circuit is, quite frankly, incorrect in its applications.

QUESTION: Then it's just as though prior to

Collins the Arkansas Supreme Court had said double counting is all right and refused to change its rule in the light of Collins.

MR. BRYANT: Justice White, the --

QUESTION: You say that Arkansas, until it's overruled by this Court, can have its own view of the Constitution.

MR. BRYANT: As compared to a decision by the Eighth Circuit.

QUESTION: Yes.

MR. BRYANT: But the Jurek v. Texas decision had been decided by this Court in '76, and quite frankly, the Arkansas trial court in our opinion would have been bound to follow Jurek v. Texas --

QUESTION: Mm-hmm.

MR. BRYANT: Because Collins was bad law at the time, and I think that was pointed out by the dissent in the Fretwell case, and of course Perry specifically overruled the Collins decision after the fact.

QUESTION: Well, you know, we aren't interested just in deciding the facts of this -- you know, whether this case should be reversed or affirmed. I think we're interested in getting at the question of whether assuming that Collins was an Eighth Circuit decision that stood for a while and then was later overruled in Perry, you know,

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what should be the effect of that on the Respondent's habeas corpus rights --

MR. BRYANT: We --

QUESTION: Or assistance of counsel rights?

MR. BRYANT: Chief Justice Rehnquist, we feel that the habeas claim is not meritorious and it should be decided against Mr. Fretwell, simply because he is not alleging any constitutional right that has been violated against him.

The aggravating circumstance that was submitted to the jury --

QUESTION: Well, but may I --

MR. BRYANT: -- was bad law at the time.

QUESTION: But -- could I interrupt you? The constitutional violation of these claims is ineffective assistance of counsel, isn't that right?

MR. BRYANT: That is correct.

QUESTION: And I thought it was agreed by everyone that counsel was in fact ineffective, but your claim is that there was no prejudice from the ineffective --

MR. BRYANT: The prejudice prong has not been met.

QUESTION: Right, but you do agree that it was ineffective to fail to make an objection that was

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indicated by a recently decided case.

MR. BRYANT: Yes, and we did not challenge that at the Eighth Circuit, nor have we challenged it --

QUESTION: And then on the prejudice point, if one assumes that even though the trial judge might have had the power to not follow it, but if one assumes as a matter of probabilities that the trial judge would have sustained the objection because there's a recent Eighth Circuit case out there that was directly on point, that that would have meant he would have not gotten the death penalty.

MR. BRYANT: That is correct.

QUESTION: And that's not -- you don't think that's sufficient to show prejudice.

MR. BRYANT: Well, the real issue in this particular case is the definition and the parameters on the prejudice prong in the Strickland case. The Eighth Circuit --

QUESTION: And you don't think the difference between life and death is prejudice.

MR. BRYANT: Well, I think the issue is really whether or not the defendant was prejudiced because he's raising an ineffective assistance of counsel claim, and what the Eighth Circuit has done is focus its inquiry on whether or not there would have been a reasonable

probability that the result would have been different.

And it's our position that the Strickland, Nix, and Kimmelman cases all require a -- in analyzing that aspect of the prejudice prong do not only look at whether or not the result may have been different, but look at whether the counsel's errors were so serious as to impair the adversarial process to where the defendant would not receive a fair trial and a just result, and that is the real focus of this inquiry, and when that is the test, Fretwell does not meet the -- or does not meet constitutional muster on proving his ineffective assistance of counsel claim.

With that, the petitioner will reserve time, Mr. Chief Justice.

QUESTION: Well, could I just ask you, why do you -- I don't quite understand why you concede that it was ineffective assistance of counsel because the Arkansas law wasn't necessarily what the -- the Arkansas view of the Constitution was not necessarily the same as, or controlled by what the Court of Appeals for the Eighth Circuit said.

MR. BRYANT: Maybe I misspoke to a certain extent when I said we completely agreed that counsel was ineffective. We have taken a position of not challenging that, and we did not challenge that before the Eighth

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Circuit, and we haven't challenged --

QUESTION: So as the case comes to us, you're willing to have it judged on the ground that the counsel was ineffective when he failed to object.

MR. BRYANT: Well --

QUESTION: Is that right? It's either one way or another.

MR. BRYANT: Yes, that is correct, but to explain, the issue that we're raising in this case is the prejudice prong and according to the Kimmelman case that can be considered first before the performance prong of the Strickland test.

I would like to reserve the remainder of my time --

QUESTION: Very well, General Bryant.

MR. BRYANT: Mr. Chief Justice.

QUESTION: Ms. Wax.

ORAL ARGUMENT OF AMY L. WAX

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING PETITIONER

MS. WAX: Before I begin, Mr. Chief Justice and may it please the Court, I would like to just address the question of whether it's open to respondent to argue that Lowenfield does not apply to the Arkansas death penalty statute and that Lowenfield didn't overrule Collins.

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We do not believe that it is -- that the Court should consider that issue as a possible ground for affirmance because the premise of the question presented in the petition was that Lowenfield did overrule Collins and respondent did not dispute that in his opposition to the petition.

QUESTION: I just want to be clear on your answer. Suppose we think that Collins was correct.

MS. WAX: Yes.

QUESTION: What should -- is it open to us to say that?

MS. WAX: Well, I think the Court in its discretion could, based on this Court's recent pronouncements on whether it should delve into the merits of a predicate that is not questioned by respondent in its opposition.

For example, in Eastman Kodak v. Technical Imaging just last term, we think that it would not comport with this Court's recent practice to do that. We don't understand the Court as being absolutely barred from doing it. We just think that as a matter of prudential rule that it would not be the proper course in this case.

QUESTION: Ms. Waxman, just refresh my recollection. This is an indigent opponent you have. Did he have counsel in opposition to the cert petition?

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MS. WAX: I think so, Your Honor.

QUESTION: Would that make a difference to you as far as waiving this argument?

MS. WAX: Yes, he did have counsel, Your Honor.

QUESTION: Yes. Yes.

MS. WAX: The Government's view in this case is that respondent's counsel was not ineffective and he is not entitled to habeas relief because his counsel failed to make an objection to his sentencing that this Court's subsequent cases show to be without merit.

There are two reasons for this. First, respondent's counsel was not ineffective because respondent suffered no legally cognizable prejudice from his counsel's conduct of the penalty phase of his trial. That is because the procedures employed at the penalty phase of his trial were perfectly valid under the Eighth Amendment. Thus --

QUESTION: Well, doesn't that -- if you divide the issue into whether counsel was ineffective and whether there was prejudice under Strickland, that -- what you're talking really goes to the prejudice part, doesn't it?

MS. WAX: I think the way to look at it is, was counsel's conduct deficient? Ineffectiveness is the final inquiry --

QUESTION: So --

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MS. WAX: Right.

QUESTION: So you're willing to agree that counsel's performance was deficient, as you put it?

MS. WAX: We did not argue that his counsel --

QUESTION: Okay.

MS. WAX: That his conduct was not deficient because the State did not press that issue below, although we think it's debatable, and we also would disagree with the district court's test that it applied to find counsel's conduct deficient. We don't think the test should be that counsel needs to be aware of every single death penalty case.

However, we're not before this Court to contest deficiency. Our argument rests on a view of legally cognizable prejudice under the Sixth Amendment, and our view is that counsel's conduct did not deprive respondent of his right to effective assistance because it did not deprive him of a fair sentencing or of a constitutional right designed to procure a fair sentencing, which is this Court's test in Strickland v. Washington.

The second reason that respondent's claim must fail --

QUESTION: You don't really have a right to effective assistance of counsel, do you, you have a right not to be convicted -- you have a right not to be

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convicted because of the ineffectiveness of counsel.

MS. WAX: That's right. That's implicit --

QUESTION: And you're saying that it was not the ineffectiveness of counsel that was the cause of the conviction here, but the law.

MS. WAX: You don't have a simple right not to have your counsel make an error, not to have your counsel fall below a professional level of competence. You don't have a right, you know, to that. You have a right to a fair sentencing or trial, or one whose outcome is reliable, and the Sixth Amendment right to counsel is designed to advance, procure, obtain that result, correct.

The second reason that respondent's claim fails is that the habeas corpus statute itself, 28 U.S.C. 2254(a), provides that a person is entitled to habeas relief only if he shows that he is in custody in violation of the Constitution or of the laws of the United States. Respondent could not make that showing, because as of the time that the court granted habeas relief, there was no constitutional defect in the procedures used to sentence him.

Now, with regard to respondent's Sixth Amendment claim, he claims that he should receive relief because his attorney failed to make an objection based on the Eighth Circuit's ruling in Collins v. Lockhart which bars the

submission of a redundant aggravating circumstance at the penalty phase of a trial for a capital offense.

Now, under a straightforward reading of Strickland, respondent could not possibly have an ineffective assistance claim. To so prejudice under Strickland, it is necessary first to demonstrate that there was a reasonable possibility that the outcome of the case might have been different, but that's not enough. You also have to show that counsel's error was so serious that it deprived the person of a fair trial or a reliable outcome.

Now, under Lowenfield v. Phelps, there was nothing wrong with what happened at the penalty phase of respondent's trial and therefore he cannot meet that condition so he is not entitled to habeas relief.

The second argument that --

QUESTION: So we could assume that the attorney, say, could be sued in a professional negligence action because -- if we assume the outcome would have been different, and that he did not know about the Collins case and he should have known about the Collins case, but there's still no constitutional violation because the trial was fair.

MS. WAX: Exactly, and that's because --

QUESTION: It seems a little odd to say you can

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sue for professional negligence even though it's a fair trial, but I understand the difference.

MS. WAX: Well, that's because there's only one Constitution and either Collins was right or it wasn't right, and a basic tenet of our constitutional jurisprudence is that we apply the present view of the law. The present view of the law is presumed to be the correct view of the law, and that is the view that controls whether or not an individual has been deprived of their constitutional rights.

QUESTION: Well, you say that he's not entitled to relief because the trial was fair.

MS. WAX: Yes.

QUESTION: That suggests that perhaps there might have been a constitutional violation, but nonetheless it was fair. It's accurate to say here, isn't it, that your position is he's not entitled to relief because no constitutional violation -- there was no constitutional violation which occurred at his trial.

MS. WAX: Well, his contention is that his trial is unfair because there as a constitutional -- he's saying that there was an Eighth Amendment defect in his trial because Collins addresses the Eighth Amendment viability of the proceeding.

QUESTION: That's why the case is here.

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MS. WAX: Exactly. So we are saying that there was no constitutional defect. His Sixth Amendment claim happens to be predicated on the further claim that there was constitutional prejudice. Not all Sixth Amendment claims are like that, but this one happens to be.

Now, the second independent --

QUESTION: So I'm still not sure what the standard is, whether or not counsel committed a constitutional error --

MS. WAX: No, the standard is broader than that, because it encompasses -- you're saying for a Sixth Amendment violation --

QUESTION: Right.

MS. WAX: What's the standard? The standard is -- for prejudice is really a two-part standard. The first is a purely mechanical inquiry: is there a reasonable possibility the outcome would have been different? That's just the first part.

The second part is, would that error, the different outcome -- is it one that detracts from the fairness of the trial or from the reliability of the outcome, or deprives the individual of a right that goes to the reliability of the outcome or the fairness of the trial?

Now, obviously, if counsel's error resulted in

the Eighth Amendment violation, that would make the result less reliable, because it means that the jury would have imposed the death penalty in a manner that does not comport with the Eighth Amendment, and that's precisely what we're saying didn't happen here.

Everything that happened at the penalty phase comported with the Eighth Amendment as this Court stated the requirements of the Eighth Amendment under Lowenfield v. Phelps.

Now, the district --

QUESTION: Supposing Lowenfield had never been decided, would it have been open to the State to argue on habeas that the Collins case was wrong and therefore there was no prejudice?

MS. WAX: I think that it might have been -- yes, it might have been open to them to do that, because they could have sought in effect the Lowenfield ruling.

QUESTION: And even though the trial judge would have -- well, okay, I understand.

MS. WAX: I mean, the court could have rejected the habeas claim on the basis of the Lowenfield insight, so to speak.

Now, the district court was also wrong to grant the habeas relief for the independent reason that the habeas statute itself does not authorize that relief.

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Section 2254(a) requires a defendant as a threshold matter to show that he is being held in violation of the Constitution or the laws of the United States.

Thank you.

QUESTION: Thank you, Ms. Wax.

Mr. Medlock, we'll hear from you.

ORAL ARGUMENT OF RICKY REED MEDLOCK

ON BEHALF OF THE RESPONDENT

MR. MEDLOCK: Thank you, Mr. Chief Justice, and may it please the Court:

As noted by your initial question to the Attorney General, Mr. Chief Justice, there's been a misstatement of the issue in this case. His formulation, as well as that posited by Ms. Waxman, require the Court to factor into the analysis of Fretwell's claim of ineffective assistance subsequent developments in the law. He suggests the Court must take into account changes in the law which took place some 4 years after Fretwell's trial in determining whether or not he was deprived of his Sixth Amendment right to counsel.

QUESTION: Excuse me --

MR. MEDLOCK: Yes.

QUESTION: Those really weren't changes in the law. I mean, they were just -- the law was always that. It just so happened that the Eighth Circuit had gotten it

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wrong 4 years earlier, and we didn't discover that they were wrong, or it was not publicly announced that they were wrong until 4 years later. That's different from saying the law changed.

MR. MEDLOCK: The law did change, Justice Scalia, in that the rule regarding pecuniary gain was changed, and our point here is that even though we need not reach the question of whether the subsequent law has anything to do with it, this Strickland analysis, it does in a sense that there is before us the possibility of deciding whether or not Lowenfield applies to Arkansas.

Our position is no, Lowenfield does not apply to Arkansas, therefore, the change which occurred was wrong. The law of Collins was always good, and is.

QUESTION: Is it open to us to consider that Collins was wrong for this reason, that it would be possible under the Arkansas statute to commit burglary without doing so for pecuniary gain, and that therefore the -- kind of the basic assumption of Collins was wrong in the first place? Is that analysis open to us?

MR. MEDLOCK: No, sir. If I understand the question, that pecuniary gain within the context of a burglary statute is not the same thing that we are considering in our capital punishment statute.

QUESTION: Well, I thought the argument was that

pecuniary gain was necessarily the motive for burglary and therefore the commission of a crime for pecuniary gain did not narrow the class of burglars.

MR. MEDLOCK: It's not a motive, it's that it is an element of the offense of robbery. Pecuniary gain is a built-in aggravator in every case of capital --

QUESTION: I should have said robbery.

MR. MEDLOCK: Yes, oh, okay.

QUESTION: Is it -- so that you're saying it would not be possible for us to analyze the State law to find that there was a class of robbery in which pecuniary gain was not the motive? What I'm thinking of is -- and this may be a misstatement of State law, but what if someone had committed or had attempted to commit theft, and on learning that he was about to be discovered fled and used force in fleeing? As I understand the way your law is written, the robbery would have occurred at the point at which he used force to escape, and his motive at that point was not pecuniary gain but to escape. Would it be open to us, assuming that's correct, to say that on that view of the law, the pecuniary gain aggravator actually did narrow the class of robbers?

MR. MEDLOCK: That it actually did.

QUESTION: Yeah.

MR. MEDLOCK: Under certain circumstances, it in

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fact can narrow, I think, but in our case --

QUESTION: Well, if under certain circumstances it can narrow, then Collins was wrong, wasn't it?

MR. MEDLOCK: Excuse me.

QUESTION: If under certain circumstances the pecuniary gain aggravator can narrow the class of robbers, then Collins was wrongly decided, wasn't it?

MR. MEDLOCK: No, sir. Under some theoretical possibilities that might happen, but under the realities of the way this law is applied, what you have in a weighing State such as Arkansas, which I'll get to in a moment, is a skewed process of narrowing. You -- with our definition of --

QUESTION: Why is it skewed if it narrows?

MR. MEDLOCK: It is skewed by a built-in aggravator, if in every case there's --

QUESTION: But I -- if I may interrupt you, I thought you told me that there would be some cases in which there would not be, necessarily, an element of pecuniary gain in a robbery -- in a robbery indictment.

MR. MEDLOCK: I'm not sure I'm following.

QUESTION: I misunderstood you, I guess. I misunderstood you.

QUESTION: Mr. Medlock --

MR. MEDLOCK: Yes.

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QUESTION: Was the question raised on direct appeal to the Supreme Court of Arkansas in this case as to whether the Arkansas statute was like the Louisiana Statute?

MR. MEDLOCK: No, sir.

QUESTION: I thought the Attorney General had said it was raised but that the Supreme Court of Arkansas refused to pass on it. Am I wrong in that?

MR. MEDLOCK: It was not raised and there was no pronouncement by the Arkansas Supreme Court --

QUESTION: And --

MR. MEDLOCK: That I'm aware of, no.

QUESTION: As I understand it, the Supreme Court of Arkansas has never opined as to whether it is -- the Arkansas statute is like the Louisiana statute, is that correct?

MR. MEDLOCK: That's right. We don't have a pronouncement of that.

QUESTION: What the petitioner is encouraging us to do in this case is to adopt a new rule. If we limit our analysis, if we focus on the issue that really is before this Court, which is a Strickland analysis of Mr. Fretwell's claim of ineffective assistance, we can answer the question. We need not go further and consider these changes in the law.

Petitioner asks the Court to adopt a new rule, to employ the use of hindsight and look back and analyze Mr. Fretwell's claim in light of these subsequent developments in the law. This is, as I said, a new rule. It's in direct contravention of the opinion in Strickland, where it's stated that every effort should be made to eliminate the distorting effects of hindsight when assessing claims of this type.

QUESTION: Mr. Medlock.

MR. MEDLOCK: Yes, sir.

QUESTION: Supposing that this case had been tried before a trial judge who was known to have a propensity for granting verdicts of acquittal at the close of the State's case and the -- it was also known that they were frequently unjustified, and the State put in a very good case that any reasonable observer would say yes, this is surely sufficient to go to the jury, and the defense lawyer fails to make a motion for judgment of acquittal, and -- can he come back later and say, ineffective assistance of counsel because this particular judge was a real softie for this kind of motion?

It's very likely he would have granted it, although it wouldn't have been justified, and there's no appeal from that.

MR. MEDLOCK: I think he would have a problem

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making that argument once again under Strickland.

QUESTION: Why?

MR. MEDLOCK: Strickland's -- Strickland admonishes us against considering idiosyncracies of the trier. Strickland states that we are to assess these claims and engage in the assumption that the trier of fact is reasonably conscientiously applying the law and not -- not speculate as to these, so I think you would have problems making that argument under those facts.

QUESTION: Of course, the State says it isn't -- there's no new rule, because what the attorney did was consistent with Jurek.

MR. MEDLOCK: Well, Your Honor, it's our position that Jurek simply doesn't apply, and I think something has come up in the questioning that addresses this.

We need to engage in an assessment of probability here. We need to look back and assess things from counsel's perspective at the time and try to figure out what would have happened in the absence of the ineffective assistance.

If the trial court had been -- let's assume counsel for the defendant had made the appropriate objection and had -- had made the court aware of the decision in Collins, and then let's assume, as the State

would suggest, that the prosecutor objected to that and presented the court with a copy of Jurek, Jurek just -- it can readily be seen that Jurek does not apply to Arkansas.

Jurek, first of all, is construing Texas law, and not only is it from Texas, but it's significantly different from Arkansas law. It's intent requirement is much higher than Arkansas'.

We just think that it's preposterous to assume, assessing this matter from a standpoint of what the real probabilities are, that the trial court would have looked at Jurek and said yes, that says that Collins is wrong and that we can ignore the Eighth Circuit and we can here at the trial court level create a new rule in contravention --

QUESTION: And what's the new rule you think is -- is that the petitioner's trying to establish?

MR. MEDLOCK: I think that the new rule that I'm first and mainly referring to here is one under the prejudice prong of Strickland, a rule which permits the use of hindsight, a rule which allows us to assess prejudice in terms of what happened 4 years after the trial or 10 years, or however many years.

QUESTION: Well, of course, if we think Collins is in error as an original proposition, I don't see what's new about it.

MR. MEDLOCK: What --

QUESTION: If we think Collins as articulated by the Eighth Circuit initially is wrong, it was wrong then and it's wrong now, what's new about it?

MR. MEDLOCK: Well, it's our position that it in fact was not, Justice O'Connor. It was not wrong at the time.

QUESTION: Well, what if we disagree with you?

MR. MEDLOCK: Nevertheless, under Strickland -- under the admonitions of Strickland, assessment of these claims are to take place in light of the time of the trial, in light of, or analyzing counsel's conduct at that time, from his perspective.

QUESTION: But doesn't Strickland -- when Strickland says that, isn't Strickland addressing the standard of competence, not the issue of prejudice?

MR. MEDLOCK: Well, I think --

QUESTION: In other words, we've got to judge the reasonable competence of the counsel under the circumstances at the time, but Strickland doesn't hold, does it, that we have to assess prejudice by assuming the articulated standards of the time?

MR. MEDLOCK: Well, I think that when it speaks to that, it speaks of -- out of concepts of fairness, that a fair assessment of this claim, a fair assessment of the

claim in its totality would require that you look at both prongs and that you therefore would consider it in that light, that -- it -- once again, what mainly stands out to me from Strickland is a concept of fairness.

The fundamental fairness, a fair assessment of any Sixth Amendment claim, requires us to look at what happened at the time of the trial, that things changed later, that the law developed over time through the Lowenfield case and then through the Perry case should not be held to relate back and somehow remove the taint of what happened at that time.

He -- Mr. Fretwell did suffer ineffective assistance in the terms of deficient performance. I think that's conceded, and it also obviously affected the outcome of his trial.

If an objection had been overruled -- addressing the assessment of probability once again, if the appropriate objection that we say counsel should have been made pursuant to Collins had been overruled, ultimately Fretwell would have gotten relief anyway, because he would have gone, let's say, to the Arkansas Supreme Court and been denied relief, and under post-conviction relief also denied, but then he would have been in the Federal system and he would have gotten relief prior to Lowenfield, so clearly Mr. Fretwell --

QUESTION: Well, it might have depended a little bit on the pace of his appeal, post-conviction State proceedings, and proceedings in Federal habeas, wouldn't it?

MR. MEDLOCK: Well --

QUESTION: It would all depend whether his case got to the Eighth Circuit before or after Lowenfield was decided.

MR. MEDLOCK: Well, the district court level, Mr. Chief Justice, and he certainly would have gotten there within 4 years time.

QUESTION: Yes, but just remember that he might have gotten relief from the district court. He may not have gotten it up here.

MR. MEDLOCK: That's right. However, he certainly would have gotten it at the Eighth Circuit at that time as well.

QUESTION: Well, maybe, but the Eighth Circuit wasn't the final word.

MR. MEDLOCK: That's right. I'm just addressing the assessment of probability under these facts.

QUESTION: Mr. Medlock, just coming back to Collins again, why isn't the Arkansas scheme sufficiently narrowing even if you assume, as Collins does, that it's improper to count the pecuniary gain element?

I mean, why isn't there a narrowing of all the categories of people who kill, in two respects: the statute limits it to those who kill with extreme indifference to the value of human life, which is, I think, necessary under our case law to influence capital punishment, but then narrows it further. You have to kill with extreme indifference to the value of human life, and in the course of one of these seven felonies. Why isn't that enough narrowing, even without the pecuniary gain sub-part? Why do you need pecuniary gain?

MR. MEDLOCK: Well, you need something in addition.

QUESTION: Well, that's something -- one of seven felonies.

MR. MEDLOCK: You need something in addition to that.

QUESTION: Why? What case of ours says that?

MR. MEDLOCK: There's not sufficient narrowing at that level. If you simply define somebody as having no culpable mental state --

QUESTION: He has a culpable mental -- extreme indifference to the value of human life, and he's committing one of seven felonies. Isn't that a narrowing?

MR. MEDLOCK: No, sir. It is our position that that is not sufficient narrowing.

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QUESTION: Why?

MR. MEDLOCK: Well, we would point out that this Court in Tison established a minimal, minimum culpable mens rea of reckless indifference.

QUESTION: I think that that's essentially the same as extreme indifference to the value of human life.

MR. MEDLOCK: Yes, sir.

QUESTION: You have that.

MR. MEDLOCK: We have that. That's the largest possible group of people --

QUESTION: Right.

MR. MEDLOCK: Who can ever get death.

QUESTION: Right.

MR. MEDLOCK: From that group, there must be narrowed those who are actually deserving of death.

QUESTION: Right, and we have narrowed. We've said, only those who have that mental state and are committing one of these seven felonies.

MR. MEDLOCK: That's -- that is simply insufficient narrowing under existing precedent, Justice Scalia.

QUESTION: Like what? What precedent says it's insufficient? I mean, it's certainly a narrowing. I don't know that we have any precedent --

MR. MEDLOCK: Well, we'd also point out that

what the State of Arkansas says about it, and what the Arkansas legislature and decisions of the Arkansas Supreme Court interpreting that language have held. They don't recognize it as sufficiently narrowing.

QUESTION: Oh, well, they must be right, I guess.

MR. MEDLOCK: Well, using Stringer's admonition, I think we should -- it would be a strange rule of federalism to ignore what the highest court of the State has to say about its own law.

QUESTION: We're not talking about its own law, we're talking about Federal constitutional law, and I think what they have to say about that --

MR. MEDLOCK: No --

QUESTION: Is certainly not -- doesn't --

MR. MEDLOCK: I was speaking to what they have to say about our capital felony murder statute about the definition of a culpable mental state in Arkansas. What our legislature and what our supreme court has said regarding that.

It's our point that Strickland provides all the guidance that's needed for analysis of Fretwell's claim. It's clear if you apply the standards governing the decision at the time of Fretwell's trial that both the performance and prejudice components have been satisfied.

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QUESTION: -- the Eighth Circuit reversed the district court's order for a new sentencing hearing?

MR. MEDLOCK: I argued to them that to resentence him since the law has changed would simply gloss over or ignore the deprivation of rights he had sustained, and they agreed that to send him back and run him through the process now that the law is different, now that the law is the converse of what it was at the time --

QUESTION: Well, so you say the Eighth Circuit was right in applying the law that was -- that it had announced, namely, Powers.

MR. MEDLOCK: I'm not familiar with Powers.

QUESTION: Perry.

QUESTION: I think Perry, sorry.

MR. MEDLOCK: The Perry case. Well, they -- I think at that point in time they're not willing to say that they're wrong in Perry.

QUESTION: No, so they applied their later decision as a basis for not ordering a new sentencing hearing, because there couldn't be any remedy --

MR. MEDLOCK: That's right.

QUESTION: Although they could have ordered a new sentencing hearing without the use of the aggravating circumstance, couldn't they?

MR. MEDLOCK: Yes, sir, and I asked them to do

that in the alternative, but they're --

QUESTION: That's why I ask you, why didn't they -- why did they choose to just say -- to impose a life sentence?

MR. MEDLOCK: I think that they're, as Chief Judge Lay stated at that time, or at the time of the arguments, this situation presented a conundrum, and what happened to Mr. Fretwell at the time of the trial subjected him to prejudice which couldn't be removed any other way.

QUESTION: Because of some later decision.

MR. MEDLOCK: Yes, sir.

QUESTION: So the Constitution was always what they said it was in Perry.

Well, go ahead, counselor.

MR. MEDLOCK: The respondent also urges the Court to reject the petitioner's interpretation of Arkansas' capital punishment statute. I think that issue is before the Court. Certainly, it is our position that it should be, and I think that the petitioner agrees.

Arkansas' statute is simply unlike Louisiana's or Texas. It's a -- does not perform the narrowing function at the guilt phase --

QUESTION: Well, Mr. Medlock, since the Supreme Court of Arkansas has not spoken on the subject, and since

the Eighth Circuit regularly deals with Arkansas capital cases, even if this issue were technically open, wouldn't it make more sense for us to defer to the judgment of the Eighth Circuit as to what impact Lowenfield has on the Arkansas statute?

We don't deal regularly with the Arkansas capital statute, and the Supreme Court of Arkansas has never expressed an opinion on it.

MR. MEDLOCK: I wouldn't suggest that this Court defer to an erroneous opinion, Your Honor.

QUESTION: Well, but, I don't -- you know, we're not going to take either your word or your opponent's word as to whether a particular opinion is erroneous.

I think our practice has been in a situation like that, if it's an interpretation of application of Federal constitutional principles to a State sentencing scheme, to the extent that it involves analysis of State law, we tend to take the word of the court of appeals, the Federal court of appeals that sees a lot more cases than we do.

MR. MEDLOCK: Well, it's our position, as I said, that under the rule of Lowenfield the narrowing function must be performed at the sentencing phase in Arkansas through findings of aggravating circumstances, and those circumstances, in order to provide the genuine,

meaningful narrowing required under the Eighth Amendment, have to tell the jurors in Arkansas something more about the defendant than they already knew at the close of the guilt phase, something which would serve to distinguish him as somebody deserving of the death penalty.

The definition of the offense of capital felony murder in Arkansas is so broad that it brings in defendants who have a variety of mental states, as well as some who manifest no culpable mental state whatsoever.

It's difficult to conceive of a broader class. If any mental state is described in Arkansas, and it can be argued that none is, it's contained in the language which states that the crime was committed under circumstances manifesting extreme indifference to the value of human life.

This language doesn't say anything about what a defendant's mental state may have been. The Louisiana statute, on the other hand, as well as Texas, described culpable mental states of specific intent and knowing and intentional respectively.

It should be noted that in Arkansas the trial court provides no definition of that language. Under the Arkansas model instructions for criminal law, there is no instruction which defines or narrows the statutory language at all.

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The Court should also note that the same statutory language in Arkansas appears in our definition of the offense of first degree murder, which is a noncapital offense.

If, as the petitioner argues, that language is sufficient standing alone to warrant the imposition of the death penalty, then his position is inconsistent with that of the State legislature.

QUESTION: Well, he's not arguing that that's standing alone. I mean, that is a mental state -- extreme indifference to the value of human life. He's arguing that plus the narrowing factor of the commission of one of seven enumerated felonies. Why isn't that a narrowing, a considerable narrowing?

MR. MEDLOCK: Absent something further, it doesn't rise above the Tison threshold is our position, that it's just not sufficiently narrow to warrant the imposition of the death penalty at that stage. Something more must be learned.

QUESTION: -- anything in Tison that says so. What in Tison says that?

MR. MEDLOCK: If Tison specifies reckless indifference and that's the biggest group, regardless of the accompanying --

QUESTION: -- and we have a mental state element

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here.

MR. MEDLOCK: Yes, sir.

Well, it's our position that the felony murder statute with that specified mental state does not rise above the Tison threshold. It's the same thing. It's the broadest group of potentially punishable by death defendants that can be created.

QUESTION: Assume the broadest group that could potentially be created is anyone who kills with extreme indifference to the value of human life. That's the broadest category. Isn't that the totality of the class that can be subjected to the death penalty, all who kill with extreme indifference to the value of human life?

MR. MEDLOCK: Yes, it could be. However, there is not sufficient additional evidence of intent, is our position, of any of those enumerated felonies under our capital felony murder statute to still rise to the level that sufficiently narrows, that constitutionally narrows.

QUESTION: Mr. Medlock, our -- in the papers, does the -- are the seven different felonies anywhere in the briefs? Justice Scalia is referring to seven felonies, and you're talking about seven felonies. How do I -- I suppose I could look it up in the library, but do the papers --

MR. MEDLOCK: The joint appendix.

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QUESTION: The joint appendix --

MR. MEDLOCK: Yes, sir.

QUESTION: Has the whole statute in it.

MR. MEDLOCK: Yes, sir.

QUESTION: So you're arguing as a respondent here that we should affirm on this particular ground.

MR. MEDLOCK: Yes -- which particular ground are you referring to, sir?

QUESTION: That Collins was wrong.

QUESTION: Collins was right.

MR. MEDLOCK: Collins was correct.

QUESTION: Collins was right.

MR. MEDLOCK: Collins has continuing validity.

QUESTION: Yeah -- yeah, and Perry was wrong.

MR. MEDLOCK: We're not going that far. I mean, we don't have to go that far. The continuing validity of Collins is not essential to Mr. Fretwell's claim.

QUESTION: Well, I know, but you have just -- you've been arguing it -- that, though, as another ground.

MR. MEDLOCK: Yes, we do reach that issue. The petitioner has agreed that that's before the Court, and we wish to reach it as well and suggest that the Court should look at this and rule that Arkansas is not a Lowenfield Class 1 State, that it's in the second group in Lowenfield, of those capital punishment statutes which

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must narrow through the finding of aggravating circumstances of the penalty phase.

Any narrowing which occurs in Arkansas occurs in the penalty phase. If you look at the statutory language, that evidences the Arkansas legislature's intent that narrowing occur here and as said earlier there are Supreme Court interpretations of the statute that support the view as well.

The legislature made clear that the penalty phase is all-important in Arkansas, not superfluous as it would be under a Lowenfield Class 1 characterization, by setting forth three separate findings which must be made within the penalty phase.

A person first of all, in order to be convicted, must be found to have committed a crime with aggravating circumstances, at least one or more of the specified aggravating circumstances.

Second, the jury has to weigh these against any evidence in mitigation and thirdly -- must weigh these and find that they outweigh the mitigation, and thirdly the jury has to find beyond a reasonable doubt that death is justified --

QUESTION: Well --

MR. MEDLOCK: In the case.

QUESTION: If you were right that the Arkansas

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capital punishment statute doesn't adequately narrow those people -- to those people eligible for the death penalty, you would say, then, that the whole statute is invalid as a death penalty statute.

MR. MEDLOCK: No, sir. I think it's fine if it's applied correctly. I think that the legislature created a situation as just stated, that if the narrowing function occurs at the guilt phase, as it does regularly, then the statute is okay. As long as the Eighth Amendment standards have been met as far as narrowing the class of death-eligible persons, then the statute's fine, and the statute provides a mechanism for that at the penalty phase.

QUESTION: Well then, what do you say is wrong with the statute?

MR. MEDLOCK: It's not that there's something wrong with it, it's that it does not fit into that first group of statutes under Lowenfield which narrowly define offenders at the -- within the definition of the offense.

It's obvious that the legislature did not deem the sentencing phase superfluous in Arkansas. These findings of aggravating circumstances are all-important, and they went further than that an added in the weighing and justification requirements.

As pointed out by Justice Kennedy in Stringer v.

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Black, the difference between a weighing State and a nonweighing State is not one of semantics but of critical importance. The fact that Arkansas is a weighing State gives emphasis to the requirement that aggravating circumstances be defined with precision, and when one duplicates an element of the underlying offense, it simply is illusory and does not have sufficient precision.

Stringer states that a vague aggravating circumstance fails to channel the sentencer's discretion, and when used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be.

QUESTION: Do you think the Eighth Circuit was right in saying that if the death penalty cannot be imposed it's necessarily life?

MR. MEDLOCK: In this case.

QUESTION: I would think you -- it would be consistent with your argument to say you were entitled to a new sentencing hearing where the -- where life was not the necessary penalty.

MR. MEDLOCK: Well, the argument I made to them, if I'm understanding you, is as stated earlier -- either-or, something to address the fact that he was deprived and was prejudiced by this deprivation of counsel.

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Thank you.

QUESTION: Thank you, Mr. Medlock. General Bryant, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF WINSTON BRYANT

ON BEHALF OF THE PETITIONER

MR. BRYANT: Regarding a point that has been raised, the Arkansas Supreme Court has considered the Lowenfield decision. As I stated, it was raised in the Fretwell case on appeal to the supreme court. The supreme court did not decide the issue because it was not raised at the trial level.

Later, in 1988, in the case of O'Rourke v. State, the appellant, relying on Collins, asserted that he was denied due process and the Arkansas court in responding to that claim basically said that, as was the case with Louisiana's death penalty law which was considered in Lowenfield, the duplicative nature of Arkansas' statutory aggravating circumstances did not render appellant's sentencing infirm and the Constitution requires no more.

So the Arkansas court has considered the Lowenfield issue, the double-counting issue, and in addition to that the Eighth Circuit in Perry also approved the Arkansas capital sentencing scheme. In view of Lowenfield comparing the Arkansas statute with Louisiana

statute as well as the Texas statute under Jurek, Arkansas does narrow those eligible for the death penalty at the guilt phase of the trial.

Reference has been made to Stringer v. Black. That case is not applicable to our situation because Stringer v. Black involved an aggravating circumstance that was too broad and was not specific enough, and this Court said so. We do not have a problem in Fretwell with an aggravating circumstance that is too broad. Quite the contrary. I don't think there's ever been any allegation made that pecuniary gain is too broad. It is specific.

One other point that I would make is that, as Justice Souter pointed out, pecuniary gain in Arkansas is not a necessary element of the criminal offense of robbery.

QUESTION: Has the Arkansas Supreme Court ever so held?

MR. BRYANT: Yes, that has been held by the Arkansas Supreme Court in a number of decisions, which is pointed out in our reply brief, and so because of that, because it's only a motive, it's not necessary that pecuniary gain be proven, so in that regard it is not a duplicate element of the initial offense.

However, in the State's view that is not relevant anyway, because we do sufficiently narrow at the

guilt phase, and that is all that is required under this Court's rulings in the past.

If there are no questions, then --

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

MR. BRYANT: Thank you.

(Whereupon, at 1:58 p.m., the case in the above-entitled matter was submitted.)

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BY Ann-Marie Federico

(REPORTER)