OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CARY MICHAEL LAMBRIX, Petitioner v. HARRY K. SINGLETARY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CASE NO: 96-5658

PLACE: Washington, D.C.

DATE: Wednesday, January 15, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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CARY MICHAEL LAMBRIX, :

Petitioner :

v. : No. 96-5658

HARRY K. SINGLETARY, JR., :

SECRETARY, FLORIDA DEPARTMENT :

OF CORRECTIONS :

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Washington, D.C.

Wednesday, January 15, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MATTHEW C. LAWRY, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioner.

CAROL M. DITTMAR, ESQ., Assistant Attorney General of Florida, Tampa, Florida; on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-5658, Cary Michael Lambrix v. Harry K. Singletary.

Mr. Lawry.

ORAL ARGUMENT OF MATTHEW C. LAWRY

ON BEHALF OF THE PETITIONER

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

Everybody agrees that the proceedings by which petitioner was sentenced to death violated the Eighth Amendment of the Constitution. Espinosa v. Florida so holds.

The issue before the Court is whether the settled principles of Eighth Amendment law applied to the Florida system in 1992 in Espinosa were themselves compelled by existing precedent in 1986. That the --

QUESTION: Another way of appraising it is the way we phrased it in the Butler case, isn't it, Mr. Lawry, that could a reasonable jurist have decided otherwise?

MR. LAWRY: Yes, Mr. Chief Justice, that is another way of phrasing it.

That the Espinosa result was compelled in 1986 can be explained very briefly, in 30 seconds or less. As

Stringer explains, as of 1985 an unadorned jury instruction on heinous, atrocious or cruel aggravating factor was unconstitutional. An uncorrected jury weighing of such a factor required resentencing.

Moreover, jury weighing of such a factor could be corrected or cured only by harmless error analysis or by independent reweighing by a court that was untainted by the original error. Espinosa simply applied those settled principles to the Florida sentencing scheme.

To elaborate somewhat on these points, I would like to describe in a bit more detail why the result in Espinosa was compelled by this Court's decisions in Proffitt, Godfrey, and Stringer.

QUESTION: You -- I don't want to interrupt the sequence that you want to follow, but are you going to address also Baldwin in Alabama, because Baldwin held in '85, I think --

QUESTION: Five, yes.

QUESTION: -- that there was a question about just how intense the reweighing had to be if that were to supersede a jury error, and I would have supposed that that would be factored into the question of just how clearly anticipatable Espinosa was.

MR. LAWRY: Yes, sir. Yes, sir, I think it does factor in, if I can explain the way that I think it

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factors in. We have to start with Proffitt v. Florida in 1976, and in fact respondent has quoted one of the key passages from Proffitt in their brief at page 13.

The Court was discussing whether the Florida sentencing scheme was basically constitutional, and it said that it was basically constitutional as long as adequate guidance was provided, and I'm quoting here, to those charged with the duty of recommending -- that is, the jury -- or imposing death sentences.

So in Proffitt this Court recognized that the jury has sentencing authority and must be adequately guided, and I would see Baldwin as more or less a reminder that the Florida sentencing scheme does work in that way. It's different from Alabama, which at the time gave no real consideration to what the jury did.

QUESTION: Well, that may -- you know, that might be the better view, but isn't it also the case that one could reasonably read Baldwin as saying that it's not clear whether the subsequent act of the sentencing judge in the Florida scheme constituted an adequate reweighing even on the assumption -- which, of course, we never really know under the Florida scheme -- even on the assumption that that factor was found by the jury and was one of the bases for the jury's recommendation.

Couldn't it reasonably have been argued that

Baldwin had left that question open?

MR. LAWRY: Well, yes, I don't think that Baldwin -- Baldwin itself decided that decision. I think that's --

QUESTION: But didn't Baldwin signal that there was a real issue to this effect, and that issue, at least so far as the particular Florida scheme was concerned, did not get resolved until -- or at least resolved in part until Espinosa came along?

MR. LAWRY: No, I -- well, I think that Baldwin itself does not decide the issue. I think that's correct. I think that the way to decide -- because Baldwin was not looking at the Florida scheme.

QUESTION: Right.

MR. LAWRY: The way to decide the issue is to look at how the Florida sentencing scheme actually works, applying this Court's settled principles, and if you look at the way that the Florida sentencing scheme works, you have to start with the Florida supreme court's 1975 decision in Tedder, and respondent virtually ignores Tedder in their brief because that's the only way that you can really seriously argue that the Florida jury does not have any sentencing authority.

Proffitt says that the jury does have sentencing authority, that it has to be guided, and that's exactly

what this Court picked up on in Espinosa.

QUESTION: But the question, it seems to me, that you've got to wrestle with here under Teague is whether, assuming we were correct, and I happen to think we were insofar as evaluating the significance of the jury's function, you still have to wrestle with the question whether the subsequent act of the judge, who is presumed to know the Proffitt standard, in effect adequately supersedes what the jury had done, and I would have thought that that was the difficult question.

And one reason why that was a question upon which people could reasonably disagree was that Baldwin had said we're not telling you yet just what kind of subsequent act or how intense or de novo a subsequent reweighing will be required, and I would have thought that was the sticking point under Teague.

MR. LAWRY: Well, I think that Stringer answers the question about what significance the trial court's actions have. Stringer says that as of 1985, in order to cure weighing error before a jury, it's necessary to either have harmless error review or independent reweighing.

QUESTION: But in Mississippi it was the jury that sentenced, wasn't it?

MR. LAWRY: It was the jury that sentenced, yes,

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and because the Florida jury has sentencing authority, the same result applies in Florida.

QUESTION: Yes, but the sentencing authority is divided in Florida, is it not, between the jury and the judge.

MR. LAWRY: Yes, it is.

QUESTION: In Mississippi it wasn't.

MR. LAWRY: That's true, yes.

QUESTION: I'm not sure how you read -- you read Proffitt to say that the jury is the sentencer as well? Is that my interpretation of your argument thus far?

MR. LAWRY: Yes, I do read it in that fashion. In fact, it refers to sentencing authorities in the plural, and two or three times it talks about adequate guidance, adequate direction --

QUESTION: Well, but three or four times it says the trial judge is the sentencing authority, and so forth. I guess we can quarrel over the reading of it. I certainly don't think it's clearly to the effect that you state.

MR. LAWRY: I think that it's clear from Proffitt that the sentencing authority is divided. Certainly the judge ultimately imposes the sentence.

QUESTION: It says the basic difference between the Florida system and the Georgia system is that in

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Florida the sentence is determined by the trial judge rather than by the jury, and there are like phrases -- there are like phrases throughout the opinion.

MR. LAWRY: That's correct, but --

QUESTION: Counsel, Espinosa was a per curiam decision?

MR. LAWRY: That's correct, yes.

QUESTION: Which lends, I suppose, a little support to your theory that this Court didn't think there was some wide division on the issue, or it might not have handled it as a per curiam.

MR. LAWRY: I think that's correct, and certainly nothing had changed in the law in the intervening period, and I think it was obvious to this Court in Espinosa that the Florida sentencing scheme in fact gives sentencing authority to the jury.

QUESTION: Well, we had heard that point in Soklar.

MR. LAWRY: That's correct, yes.

QUESTION: And I suppose one explanation for the per curiam is that the Court had heard the arguments on it in Soklar.

MR. LAWRY: Yes.

QUESTION: Does Florida law require the sentencing judge to place great weight on the

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recommendation of the jury?

MR. LAWRY: Exactly. That's what Florida law requires, and that's whether the jury's recommendation is life or death.

QUESTION: But Mr. Lawry, you also said that harmless error plays a part in this, and this trial judge did say that the facts speak for themselves. Doesn't that indicate that he reweighed without reference to the jury verdict? Isn't that a signal that what we're talking about is really academic?

MR. LAWRY: Well, no, Your Honor, I don't think so. I -- first it's very difficult to determine exactly what the trial judge found when he said the facts speak for themselves, but even if it's assumed that the trial judge was finding that the facts fit within the Dixon limiting construction in Florida, which I don't think can be assumed, but even if we were to assume that, merely a finding by the judge that the facts -- that he believes the facts fit within the aggravating circumstance doesn't mean that the jury necessarily would have.

It's certainly not a finding of harmless error, because he doesn't recognize that there was any error, and it's also not any kind of independent reweighing, which is what Stringer would require, because the judge in his weighing process must give great weight to what the jury

did, and what the jury did was tainted by the invalid instruction, so it's not possible for the trial court in Florida to cure the error because the trial court has to weigh the error. You can't cure the error by weighing it.

QUESTION: But if he said -- this trial judge had said, now, I know what heinous, atrocious conduct is, and I find that that standard is met here, these facts speak for themselves, would that be -- is that -- would that be adequate then to amount to harmless error?

MR. LAWRY: No, Your Honor, not without determining the effect of the error upon the jury, because the jury may not view the facts in the same light. They may not believe that the facts are unnecessarily tortuous.

Unless you go to that step and say that the facts are -- that the jury necessarily would have, or by some standard would have found that -- the case unnecessarily tortuous, then you're not applying harmless error analysis, and --

QUESTION: Would it be harmless only if the judge disassociated himself from what the jury did and said, I'm looking at this de novo and here's how I come out?

MR. LAWRY: Yes, that's right, and furthermore, in the Florida system the Florida supreme court's review, both what the trial court does is virtually controlled by

the jury's recommendation. So is the Florida supreme court's review, because if a death sentence is imposed after a jury recommendation of death, the Florida supreme court does a normal form of deferential appellate review to see if the trial court's findings are supported by the evidence.

If a death sentence is imposed after a jury recommendation of life, the Florida supreme court will affirm only if virtually no reasonable person could differ as to the appropriateness of the sentence.

So that many, many times the Florida supreme court reverses the trial court's imposition of a death sentence after a jury recommendation of life when the trial court did not make any error. The trial court did not err in any of its findings, but the Florida supreme court nevertheless reverses and imposes life because of the jury's life recommendation.

QUESTION: Mr. Lawry, there's also an issue of procedural bar in this case. Are you going to address that at all?

I mean, as I understand it the Florida supreme court held in this litigation specifically that Lambrix did not raise the issue of the trial court's failure to include his special instruction on his direct appeal, and consequently Lambrix's Espinosa claim is procedurally

barred. That's the last word of the Florida supreme court on that subject. Why is that not dispositive?

MR. LAWRY: Well, it's not dispositive for several reasons. First, in the initial round of post conviction proceedings there was what the district court found was a merits ruling on this claim, and so this was a second review after remand from the Eleventh Circuit.

Now, whether that was -- whether what the Florida supreme court did on its second look, whether that was an adequate and independent State bar, is a very complicated issue that's tied up with Florida rules and practice, and it's not been ruled on by any court, and so it's --

QUESTION: I thought it was ruled on by the Florida supreme court.

MR. LAWRY: No -- yes, Your Honor. I mean, it hasn't -- whether that was an adequate and independent State bar has not been ruled on by any Federal court is what I should have said.

QUESTION: Well, I find it hard to get around the statement by the supreme court of the State that the objection wasn't raised on appeal, and there is a procedural bar. That's what it said, and you say there's a later lower court opinion in the State which contradicts the supreme court statement that there was a procedural

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bar?

MR. LAWRY: No. There was -- the claim was previously raised in the 3850 proceedings, and in those proceedings there was what the district court found amounted to a merits ruling, but --

QUESTION: By a lower Florida court.

QUESTION: The supreme court of Florida's ruling came after that, did it not?

MR. LAWRY: It came -- yes. It came after the case had gone to Federal habeas proceedings, proceeded to the Eleventh Circuit. The Eleventh Circuit then remanded because it wanted the State's views on the merits of the Espinosa claim.

QUESTION: Was the merits ruling in the State system in the -- I forget the number that you -- 38 something, the collateral proceeding.

MR. LAWRY: 3850, yes.

QUESTION: Was that by an intermediate appellate court?

MR. LAWRY: That was by -- it was by the trial court, and it was not -- it was not disturbed by what the Florida supreme court did on appeal, and --

QUESTION: So the argument is that that's an implied affirmance, or validation of the trial court's merits ruling even though it hasn't been raised on appeal

to the Florida supreme court?

MR. LAWRY: Well, it was raised on the 3850 appeal. The point --

QUESTION: But I thought Florida required that it be raised on direct review and that that's the problem.

MR. LAWRY: Ordinarily it does, but there were several cases during this time period where claims were raised in 3850 proceedings. It happened in Glock, for example, also.

The point that I'm trying to make is that --

QUESTION: But even in that proceeding the Florida supreme court didn't pass on it.

MR. LAWRY: That's correct, but if the lower court has ruled on the merits and the appellate court does not disturb that, then under Ylst this Court will look back to the original ruling and say that's a merits --

QUESTION: Even where the appellate court has previously said before the lower court went back to the merits, even where the appellate court has previously said this claim is procedurally barred? I mean, that's a different situation, it seems to me.

MR. LAWRY: No, Your Honor. The court -- the appellate court has to say that it's barred in the proceedings in the case that we're talking about, not a -- a general rule that will apply a procedural bar doesn't

have any effect unless it's actually applied in the case.

QUESTION: Well, but the procedural bar arises from the original trial. If that is procedurally barred as a result of what was done at the original trial, the mere fact that you have different later proceedings certainly wouldn't alter the judgment of whether there's a procedural bar or not.

MR. LAWRY: No. The procedural bar goes away, though, if the State courts rule on the merits.

What I'm trying to get at is that it's a very complex issue, the procedural bar here. It hasn't been ruled on -- the adequacy hasn't been ruled on by any Federal court. It's really not included in the question presented, but even -- and even if the Court thinks that the ruling was an adequate --

QUESTION: You don't think the other issue is complex?

MR. LAWRY: Pardon me?

QUESTION: You don't think the other issue you were talking about is complex?

MR. LAWRY: The Teague issue? The Teague issue is --

QUESTION: Yes. The merits issue.

MR. LAWRY: Yes. I don't --

QUESTION: I'd really like to hear your

explanation in sort of an uninterrupted fashion if I could, because it's a rather difficult issue.

Would you start over on why you don't think the procedural bar requires us to dismiss the -- to rule against you?

MR. LAWRY: Yes. The claim was raised in the 3850 State --

QUESTION: Right.

MR. LAWRY: -- post conviction proceeding.

QUESTION: What claim?

MR. LAWRY: The claim that the jury instructions were unduly vague and unconstitutional.

It was denied on the merits by the State trial court. It was appealed to the Florida supreme court. The Florida supreme court did not pass on it. We went to Federal habeas. The Federal district court --

QUESTION: Did they also not rule on the procedural bar issue at that time?

MR. LAWRY: That's correct.

QUESTION: Okay.

MR. LAWRY: The Federal district court said that all of the claims were ruled -- were denied on the merits in State court, and therefore it reached the merits. The Eleventh Circuit --

QUESTION: And did it also -- and therefore

there is no procedural bar?

MR. LAWRY: Yes --

QUESTION: Okay.

MR. LAWRY: -- no procedural bar, and if any procedural bar had been applied it wouldn't have been adequate and independent.

The Eleventh Circuit then remanded the case back to State court, where the State supreme court said that there was a bar. The case returned to the Eleventh Circuit. The Eleventh Circuit ruled only on Teague.

So our argument is that there was no regularly applied bar, that the bar -- or that the bar went away when the State courts ruled on the merits in the first instance. You can't go back after the fact. The State's bar may be nothing more than applying a rule that we're not going to consider the merits in a successive proceeding.

And furthermore, even if there is -- even if the Court thinks that there's an adequate and independent bar, there's also a cause in prejudice argument, because if we win on Teague, then it's clear that this law was dictated as of the time of the direct appeal, and so competent counsel should have raised it.

The Eleventh Circuit hasn't ruled on any of this. The Eleventh Circuit is closer to State law and

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State practice than this Court is, and the appropriate disposition would be to remand to the Eleventh Circuit to let it figure out the procedural bar issues as well as any other issues remaining after this Court's disposition.

QUESTION: If I may ask you this: the first even that you recounted was that the vagueness was raised in the trial court, I take it post trial, or pre-trial?

MR. LAWRY: Post trial.

QUESTION: Post trial, all right, and then you said, it was appealed to the Georgia supreme court. When you -- was the case appealed with that issue in it, when you say it was appealed?

QUESTION: The Florida supreme court.

QUESTION: Excuse me, the Florida supreme court.

MR. LAWRY: Yes. It was --

QUESTION: It being the vagueness issue?

MR. LAWRY: Right. Yes, Your Honor. It was raised -- these proceedings were under death warrant. It was raised -- in a recognized and sanctioned practice in Florida it was raised by filing a motion for stay of execution in the State supreme court and attaching all of the claims that were raised in the trial court and saying, these are the claims, please give us a stay.

QUESTION: Specifically including this one?

MR. LAWRY: Yes.

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QUESTION: May I ask one other question, just to be sure -- did the State in its opposition to your petition for certiorari argue procedural bar?

MR. LAWRY: Yes, Your Honor.

QUESTION: It did. Okay.

QUESTION: Counsel, how many other cases are there like this petitioner's case, Lambrix, in Florida that would have to be overturned if you are correct on the merits?

MR. LAWRY: Your Honor, I have no idea the answer to that question.

QUESTION: Are there many? Aren't you involved in public defender's work, generally? No? Yes?

MR. LAWRY: Yes. Yes, although no longer in Florida, but yes, there are probably quite a few cases in which one of the unduly vague instructions on heinous, atrocious, or cruel was given. There -- whether they would all have to be overturned would depend on a number of things.

QUESTION: On whether there's a procedural bar, perhaps?

MR. LAWRY: Yes.

If there are no further --

QUESTION: Would you like to say anything about the amicus brief's arguments? I thought they were pretty

good -- a pretty good brief.

MR. LAWRY: Is there a particular point in there that concerns --

QUESTION: No. I thought that their basic point was that as you go back to that period of time, the late eighties and so forth, it wasn't really clear the extent to which the Constitution required States to follow what one would have thought of as ordinary legal harmless error rules, and that perhaps all that was happening was that the judge was being told, you go look at this case where there's a HAC error, and you make up your own mind.

We have to have a judge saying that this case is the kind of case that isn't cruel and unusual, heinous, aggravated or cruel on the ground that all murders are like that. There has to be something special about it. But as long as the judge has gone and looked at the facts and said there's something special about it, that's good enough.

MR. LAWRY: Well, Your Honor, that contention is completely antithetical to Stringer v. Black. Stringer was a case that the Mississippi supreme court said would meet -- was -- would fall within the definition of heinous, atrocious, or cruel, it was an aggravated case, and this Court in Stringer said that as of 1985, it was compelled that the failure to do harmless error analysis

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or reweighing meant that the error had not been --

QUESTION: Was Stringer decided after your case was tried or not? What's the timing there?

MR. LAWRY: Stringer was decided in 1992, but it says --

QUESTION: So then they'd say well, Stringer wasn't obvious, either.

MR. LAWRY: But --

QUESTION: How many members of the Court, by the way -- in answering Justice Breyer's question, how many members of the Court concurred in the Stringer holding?

MR. LAWRY: I believe it was six, Your Honor.

QUESTION: Yes.

QUESTION: I just knew Justice Souter didn't.

(Laughter.)

QUESTION: I think he thought it wasn't obvious. I think he thought Clemons wasn't obvious. That's -- and I'm just trying to get what I take perhaps wrongly to be the thrust of the amicus brief to see what --

MR. LAWRY: Well, I think that -- yes, I think that the thrust of the amicus brief is that Stringer is wrongly decided, because Stringer says that the result was compelled as of 1985.

So if there's no further questions, I'd like to save my remaining time for rebuttal.

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QUESTION: Very well, Mr. Lawry.

Ms. Dittmar, we'll hear from you.

ORAL ARGUMENT OF CAROL M. DITTMAR

ON BEHALF OF THE RESPONDENT

MS. DITTMAR: Mr. Chief Justice, and may it please the Court:

There are two fundamental reasons why this Court should affirm the opinion of the Eleventh Circuit in this case. The first issue is the Eleventh Circuit's conclusion that Teague v. Lane bars Espinosa review in a Federal habeas proceeding, and that conclusion is correct.

The second reason is the procedural bar that exists, and I'd like to start by addressing the procedural bar.

First --

QUESTION: Which the Eleventh Circuit didn't address, is that right?

MS. DITTMAR: That's correct. The Eleventh Circuit obeyed the command of treating retroactivity as a threshold issue and decided the case solely on Teague, so they did not address the State's procedural bar argument.

QUESTION: You raised it there, though?

MS. DITTMAR: Yes, sir. It was raised there numerous times, including, even on a motion for rehearing.

QUESTION: Was it also raised in the district

court?

MS. DITTMAR: Yes, it was.

QUESTION: And it was ruled on there?

MS. DITTMAR: Yes, it was. The district court -- as to the Godfrey claim that had been raised back in the district court, the State argued at that time that there was a procedural bar based on several different reasons. One of the reasons, and this is in the joint appendix on pages 46 to 49 in the State's response, the primary reason was this was a direct appeal issue in the State of Florida, and it had not been raised in Mr. Lambrix's direct appeal.

The next -- the other argument put forth by the State at that time was that although it had been raised in the motion for post conviction relief, the trial judge in that motion did not decide the merits of that issue, and furthermore, when it went to the Florida supreme court, the Florida supreme court did not have that particular issue before it, because the Florida supreme court opinion from the appeal of the post conviction motion clearly says there are two issues before this Court. Both of them relate to the defendant's state of intoxication at the time of the crime. So that specific issue was not addressed in the post conviction appeal as well.

QUESTION: How does that square with --

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MS. DITTMAR: What the district court found?

QUESTION: -- what the petitioner's counsel has told us that it was specifically included in the grounds that were presented in the collateral -- in the appeal from the denial of collateral relief?

MS. DITTMAR: Based on Florida procedure is how the district court reached that conclusion.

What happened is, the Godfrey claim that was raised in post conviction -- and this was a claim that the Florida supreme court had inconsistently interpreted this aggravating factor, and therefore the factor was invalid. That claim was raised in the post conviction motion for the first time, and the State responded at that time that it was a direct appeal issue.

The circuit court judge, the trial judge in Florida, did not specifically address that issue. In his order he merely concluded that Mr. Lambrix was not entitled to relief. He does not say, based on the merits, or based on the procedural law in Florida. He just says his conclusion is Mr. Lambrix is not entitled to relief. That is what the Federal district judge in the habeas proceeding found to be a ruling on the merits, his conclusion.

When that was appealed to the Florida supreme court, there is a particular statute -- I'm sorry, a rule

of procedure in Florida that when a post conviction motion is determined summarily by a trial judge without an evidentiary hearing, that what is -- goes to the Florida supreme court or whatever the appellate court is, is simply the record that was before the lower court, and that there is no briefing or argument in that appeal. It's basically a review of what the trial judge had before him.

If there is an evidentiary hearing held on the post conviction motion, it is treated as an ordinary appeal where the parties file briefs and orally argue the case, and then the court decides it.

Because there had been no evidentiary hearing on the post conviction motion, the petitioner has argued to the Federal district court successfully that under the Florida rule that says everything goes up to the Florida supreme court, even though in this particular case there were briefs filed and there was oral argument held, that under the rule, you have to look at the entire record and not just what was argued in the briefs and argued to the court, and that's what the district court found when he found that there was a ruling on the merits by the trial judge, and that that ruling on the merits was undisturbed by the Florida supreme court.

Therefore, he found that it was reviewed, and

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central to his holding -- of course, this is prior to the time that the Espinosa claim went back and was found to be procedurally barred by the Florida supreme court. Central to the district court was the idea that no State court had ever specifically said this is procedurally barred. He was looking for that language in one of the State court opinions and he did not find it. Based on the lack of that statement, he said that there was a ruling on the merits.

So the State has maintained consistently that this was a direct appeal issue that should have been raised in the direct appeal and it wasn't.

This same issue in the Sochar case, this Court declined to address it, because it was procedurally barred in that case, and that was a direct review case, so you really can't come back on a collateral case on habeas review and address the procedurally barred issue that's the same issue that you didn't address earlier.

QUESTION: But we would have to decide this issue of Florida law here to conclude there is a procedural bar, is that right?

MS. DITTMAR: Well, I think it's a very straightforward issue, though. I don't think it's as complicated as --

QUESTION: Even though the Eleventh Circuit

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hasn't addressed it?

MS. DITTMAR: Right, but the -- we have the clear statement from the Florida supreme court applying the bar, and we don't have any State court decision ever even addressing the Federal question or addressing the merits of it, or even recognizing or acknowledging that this issue has ever been raised.

QUESTION: But is it not correct that it could be a procedural bar but still -- I mean, at least theoretically not be an independent and adequate State ground?

MS. DITTMAR: Theoretically that argument could be made.

QUESTION: It's unlikely, I understand, but at least it's theoretically possible --

MS. DITTMAR: Correct.

QUESTION: -- on the grounds it's not consistently applied, or they waived it by addressing the merits later, or something like that. It's at least theoretically possible.

MS. DITTMAR: Theoretically, but --

QUESTION: It should be an opportunity to show, though, that, if there's an allegation that the Florida court has not consistently applied, although they could have, this as a procedural bar.

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MS. DITTMAR: That's true, but I don't think Mr. Lambrix can cite to you any cases where the Florida supreme court has not consistently applied the procedural bar that they applied in this case. I don't think they can find any cases where the Florida supreme court has not applied a procedural bar when the argument was not presented in the appeal, because that is --

QUESTION: Why do you suppose the Eleventh Circuit didn't rule on it, if it's this clear?

MS. DITTMAR: I suppose --

QUESTION: Because they know more about Florida law than we do. That much is clear.

MS. DITTMAR: Well, I think they were just satisfied with the Teague ruling, and they just didn't address the State's procedural bar argument at all, and I think that there are cases that say the threshold issue is retroactivity, and I think they felt like once that was resolved and they could thoroughly analyze that issue --

QUESTION: Of course, if we agreed with you on the Teague issue you'd probably be happier with that disposition.

MS. DITTMAR: Well, either way I'd be happy, but the --

(Laughter.)

MS. DITTMAR: I think the Teague issue is

standing out there. It's something that needs to be decided.

QUESTION: Do you know how many Florida convictions or sentences would have to be set aside if we were to agree with the petitioner on the merits?

MS. DITTMAR: Yes, ma'am. I would say less than a dozen cases, not necessarily set aside but at least considered in the habeas proceeding.

Most of the cases in Florida where this has come up have either been decided since the time of Espinosa, and obviously at that point the Florida supreme court was well aware of the issue and they had consistently applied Espinosa to the cases that have come before them.

It really only affects the cases prior to Espinosa that had already gone into Federal court, and there would have to be the preservation of error and, in fact, the Florida supreme court, if it was raised in the trial court, an issue, and argued on appeal, the Florida supreme court is granting collateral relief in those cases.

So if it has not been procedurally barred, even though the conviction may be final in Florida, they can still get relief from the Florida supreme court without having to turn to the Federal court. There are --

QUESTION: Relief under Espinosa?

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MS. DITTMAR: Yes, sir.

QUESTION: For cases that were tried before Espinosa was decided?

MS. DITTMAR: Right. If they argued to the trial judge that the instruction was incorrect, and also argued that on appeal to the Florida supreme court, and those arguments were rejected at that time because Espinosa had not been decided, then the Florida supreme court is granting relief in those cases.

QUESTION: Well, that indicates maybe the procedural bar might be the best thing for this Court to consider first --

MS. DITTMAR: In this case.

QUESTION: -- as a preliminary matter.

MS. DITTMAR: I think the procedural bar is an important threshold issue in this case. The --

QUESTION: When the lower --

QUESTION: How many people on Florida's death row now were tried before Espinosa? Do you have any statistics to that effect?

MS. DITTMAR: I don't have any statistics to that effect. I -- of the Federal habeas proceedings that I'm aware of that are now going on in the State of Florida, I would say there are less than a dozen cases where this is potentially an issue.

QUESTION: But I dare say there are more than a dozen case in Florida of people on death row who were tried before 1992, are there not?

MS. DITTMAR: Certainly. Certainly there are more than a dozen.

QUESTION: I think you want to get to the Teague issue and should, but one more question on the procedural bar -- one more question from me.

When the circuit court says that Teague is a threshold issue, do they do this -- do thy say this in the context where a procedural bar argument is presented? Do they say it's threshold even to a procedural bar?

MS. DITTMAR: Well, actually, this Court has said it's a threshold issue.

QUESTION: Even to a procedural bar?

MS. DITTMAR: I don't believe that specific circumstance has been addressed.

QUESTION: I thought it was threshold to the merits. That's --

QUESTION: I would think so.

QUESTION: -- what I understood it to mean.

MS. DITTMAR: I think that that is how it is, but the cases -- I think the cases where this Court has said that have not been cases where there was a procedural bar to consider or to decide whether a procedural bar

takes priority over a Teague issue. I think that fundamentally the procedural bar is an issue that needs to be addressed as a threshold issue by any Federal court.

QUESTION: But it would be extraordinary for this Court to take it up in the first instance, when it hasn't been taken up in the lower Federal courts.

MS. DITTMAR: Well, I don't think it would be that extraordinary. In Gray v. Netherland this Court found a procedural bar on the Brady claim, despite the fact that the circuit court in Gray had never reached the procedural argument on that claim.

The district court in Gray had found a procedural bar on the Brady claim. The circuit court did not address it at all, and when Gray came up to this Court, this Court addressed the procedural bar that applied on that claim, so I don't think it's so unique that it can't be done, and I certainly don't think it's something that's beyond this Court's ability to do.

QUESTION: What's the advantage to you as a prosecutor from that? It's -- I mean, suppose we said you're right on the procedural bar. There are other cases in front of us, I think, that raise this same Espinosa retroactivity issue, and if that were so we'd have to take one of those, if there are, and then decide the same issue in that other case, and all we would have done with the

two cases is simply decided on a matter unique to this case that the Eleventh Circuit's perfectly capable of deciding anyway.

I mean, so how do you benefit from that, except you might have two arguments instead of one or something.

MS. DITTMAR: Well, I think this Court can address both issues in this case. I don't think you're limited to only addressing one issue. The Eleventh Circuit applied the Teague bar, and I think that gives the Court reason to look at the Teague issue and to decide the Teague issue.

I think that you can say that there are two reasons to affirm the Eleventh Circuit, and one of them is a procedural bar, and one of them is the Teague issue.

QUESTION: On the Teague issue, it -- if -- is the reading of Proffitt dispositive of the case? If we disagree with petitioner's counsel and say Proffitt was very, very clear that the judge is the sentencer, is that the end of the case?

MS. DITTMAR: I think that is -- a great deal of the case is Proffitt, but also the other sentencing opinions out of Florida that has come from this Court, including Spaziano, where you were looking at the constitutionality of the judge imposing a death sentence when the judge had recommended a life sentence.

And in Spaziano you talk about how that jury recommendation is only advisory, and again you refer to Florida as a judge-sentencing State, and even up through the time of the Walton decision in Arizona, which was decided the same year that Espinosa was decided, this Court continuously refers to Florida as a judge-sentencing State.

QUESTION: But Ms. Dittmar, may I just ask this question? Sometimes you put things in neat categories, either a judge State --

MS. DITTMAR: Right.

QUESTION: -- or a jury State and so forth, and we use those labels, but is it not correct that as a matter of Florida law the verdict of the jury is a significant part of the procedure?

MS. DITTMAR: It is an important part of the procedure.

QUESTION: And it will have an impact presumptively on what the judge does?

MS. DITTMAR: I think necessarily a life recommendation will have a graver impact on what the judge does than a death recommendation.

The Florida supreme court in Tedder has said, you have to look at a life recommendation and find whether or not it was a reasonable -- there was a reasonable basis

to that recommendation. In --

QUESTION: Therefore we should assume that if the jury had come in with a life recommendation here, if it -- presumably a properly instructed jury might have done so, that would have an impact on the judge, some impact?

MS. DITTMAR: I think it would have had some impact on the judge.

QUESTION: Right.

MS. DITTMAR: The --

QUESTION: And in fact the judge, as a matter of Florida law, would have had a duty to pay attention to what the jury had said.

MS. DITTMAR: Right. Well, as a matter of Florida law the judge still has to make his own independent determination.

QUESTION: Right, I understand, but he doesn't do it as though there were no jury recommendation out there.

MS. DITTMAR: That's correct. He has to take into account the jury recommendation, and I think particularly when the jury is recommending something that differs from his independent analysis of the situation, he has to consider it.

QUESTION: So it's not really independent. I

mean, these words don't make any sense. He makes his own independent determination, but he has to take into account the jury's determination --

MS. DITTMAR: Well, I think he can --

QUESTION: -- if it disagrees with his independent determination.

MS. DITTMAR: I think he can make an independent determination first.

QUESTION: Okay, but that won't suffice. He -- his own independent determination may be overcome by the fact that the jury's determination to the contrary was a reasonable one. Is that right?

MS. DITTMAR: In the situation where the jury has recommended life.

QUESTION: Right.

QUESTION: Well, it all -- it says -- great weight is the quote they use, that he's -- in page 23 of your opponent's brief it says that, quoting Espinosa quoting Tedder, it says that the Florida law is that the judge has to give great weight to the jury's recommendation, whether of life or death, which are counsel's words. Now, is that right?

MS. DITTMAR: Well, there are cases in Florida in dicta where there's been a death recommendation where the Florida supreme court has said a death recommendation

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is also entitled to the same deference. However, you don't have the same situation. If the judge -- if the jury in Florida recommends a death sentence and the judge imposes a life sentence, then a life sentence is it, and that case is not reviewed by the Florida supreme court.

QUESTION: Can you respond to -- I have another question which I -- I grant you, going through the -- this is very -- there's the Godfrey, and the --

MS. DITTMAR: Right.

QUESTION: Thirty-eight different case names, and it's sort of like you have to figure out the professor writes ten million equations on the board and then he answers, well, it was obvious. I mean, the question is, how obvious is this?

So in thinking about that, well, basically there is something working out here which is obvious from, like, Justinian or something, that if you have a jury and the jury decides whether a person's negligent or any other thing, and the jury's misinstructed, you get a new trial, unless the judge says that it was harmless, and it seems as if all these cases represent a working out of that principle and nothing else.

And the only thing was, it wasn't clear for a while whether that basic hornbook principle is applicable through the Eighth Amendment to the States in death

penalty cases, and by the late eighties it was clear that it was, and even if it wasn't clear that it was, Stringer says it was clear that it was, and that's the end of the matter, and therefore it's clear.

MS. DITTMAR: But what was clear --

QUESTION: Now, what I want is your response to that.

MS. DITTMAR: I don't think it's clear.

(Laughter.)

QUESTION: What is your response to my oversimplified effort to make it clear?

MS. DITTMAR: What is clear is that there is Eighth Amendment error if the jury waives an invalid factor, and under the cases prior to Espinosa, the validity of the factor turned on its application to the facts of a particular case and the way the factor had been interpreted by the State appellate court to give a narrowing definition of the factor.

In Espinosa, the validity of the factor all of a sudden turned on the sufficiency of the jury recommendation, or the jury instruction, rather than how the factor was applied and whether it had been narrowed through appellate court decisions. That was a fundamental change new to Espinosa. That did not come from Godfrey, or Maynard or Stringer, or any of those other cases.

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QUESTION: Then this Court should not have disposed of it summarily in a three-page per curiam opinion, because isn't it this Court's ordinary practice not to dispose of a case in that kind of summary way if it's doing something new? Isn't it the general practice here that we have full briefing and argument if we're doing something that's genuinely new?

MS. DITTMAR: Well, I think, as the point was made earlier, there had been briefing on the issue in Sochar that the Court examined, but I don't think it's a fair conclusion to draw merely from a summary -- the fact that it was a summary opinion in Espinosa to say we would never have made a new rule. I'm not sure that the Court fully --

QUESTION: I didn't say never, but a slight -- there's a tilt in that direction at least that if the Court thinks this is clear enough that it doesn't have to set the case down for argument, doesn't need briefing beyond the cert petition and brief in opposition.

MS. DITTMAR: Well, you may have more of an opportunity to create a new rule in a summary disposition because you may not fully understand the implications of the decision.

QUESTION: Then that's a good reason not to dispose of it summarily if we don't fully understand the

implications.

MS. DITTMAR: That's true.

QUESTION: And then of course we might have --

QUESTION: At least it's our stated practice, I assume you would acknowledge from prior decisions and the rules and the text writers on this subject, that at least the Court attempts not to break a lot of new ground on a per curiam.

MS. DITTMAR: I'm not personally familiar with where that's stated, but I would certainly defer to that being stated somewhere.

QUESTION: May I ask another question about the merits? Part of your submission, as I understand it, is that as a matter of State law the scope of the HAC factor was fairly -- had already been narrowed --

MS. DITTMAR: Right.

QUESTION: -- at the time of this trial.

MS. DITTMAR: Right.

QUESTION: But the one question I'm not clear on on that, why, then, did the judge give this instruction? Why didn't he give the instruction that you say he clearly should have given as a matter of State law?

MS. DITTMAR: Well, he -- I believe the judge did apply the narrow construction from the Florida supreme court. The facts of this case clearly support the narrow

construction, and it was found by the trial judge --

QUESTION: In other words, you say his instruction was adequate.

MS. DITTMAR: His construction, I'm sorry.

QUESTION: No, I mean the instruction to the jury. Do you agree or disagree with your opponent that that was a valid instruction?

MS. DITTMAR: Well, I believe that it was invalid under Espinosa.

QUESTION: Right. Well, was it also invalid under Godfrey?

MS. DITTMAR: I don't think so, if the facts of the case supported the narrow construction.

What Godfrey said was, the Georgia supreme court -- in finding the factor to apply in that case, the Georgia supreme court was applying an inconsistent application of the statute because the facts did not meet the narrow construction that the Georgia supreme court --

QUESTION: You're saying in other words that if the facts of the case would have been heinous, atrocious, and cruel, it doesn't really matter what the jury -- how the jury was instructed.

MS. DITTMAR: Right.

QUESTION: I see.

MS. DITTMAR: And I think under this Court's

decision in Cabana v. Bullock, when you said a case which you had to determine at what point there had to be a finding of Enmund under a felony murder situation for the death penalty to be imposed, you said that finding could be made by the appellate court.

QUESTION: No, but your -- it seems to me that your argument and your response to Justice Stevens is to say that if there is sufficiency of the evidence to support the proper construction, the error was harmless, but we've rejected that. We have said very clearly that harmless error is not sufficiency of evidence. Isn't that correct?

MS. DITTMAR: Well, that's true, but I think you have to look at, and especially in a habeas case, the extent to which the error could have injuriously affected the defendant.

QUESTION: Well, that may be, but it's still not a sufficiency of evidence standard. One still looks to -- in effect to the extent of the damage, whether one looks at it under the Brecht standard or a more -- the more demanding standard.

MS. DITTMAR: That's true, but I think before you get to the harmlessness you have to get to the fundamental question of where the error occurred.

QUESTION: All right --

QUESTION: But you don't stop there, right?

MS. DITTMAR: You don't stop there.

QUESTION: I want to go back for a second to my question, because looking at it as I was doing you'd say, look, all that Godfrey is, is it tells you what the basic error is. It's like making a misinstruction about negligence.

And all Clemons is, it tells you, treat it like a negligence case. It gives you some rules, which are obvious rules, that if the jury makes a mistake because it was misinstructed on the Godfrey issue, like negligence or anything, then of course you have to have a new trial, unless the judge can say for one of three reasons that it made no difference.

And all that Espinosa does is say, Florida, which is a little bit special, is really like a State where the jury decides it.

And in case you had any doubt, Stringer makes clear this very basic rule, the rule from Justinian, is the rule. It was obvious, says Stringer.

Now, that's a way. I know it's not the perfect way, and I know it's overlooking a lot of things, but if I were to look at the case that way, then I would say, yeah, Espinosa's pretty obvious, and this whole thing's obvious enough.

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So I want to get a direct response to that.

MS. DITTMAR: The biggest leap in that analysis is when you say, Florida is like a jury sentencing situation.

QUESTION: Ah, that's the biggest leap. Okay. It's at that point that then you look to Espinosa's quote of Tedder.

MS. DITTMAR: Right.

QUESTION: Then the question is, do you really have to give great weight to the jury, and if we read Tedder and went back and read the earlier Florida cases and thought, gee, it looks as if the judge really is giving weight to the jury and has to, then we would think this is pretty much like a negligence case, and everybody in Florida should have thought that it was.

MS. DITTMAR: Except that --

QUESTION: And then what would we look at to see the contrary?

MS. DITTMAR: Except that when you read Tedder, I don't think you're limited to Tedder itself. I think you need to read the Florida supreme court decisions that interpret Tedder and that say what they meant by Tedder, and the Florida supreme court has expressly come out and said in Tedder we did not elevate the jury to be a cosentencer in Florida. That was never our intent.

The judge has a statutory duty to do an independent, de novo review of the aggravating and the mitigating factors, and the jury recommendation is just that, an advisory recommendation, and the Florida supreme court said that quite strongly in cases where the Eleventh Circuit had found a Caldwell error, a violation that the jury's role was minimized to the jury based on Florida's standard jury instructions.

For those reasons, we would ask you to affirm the Eleventh Circuit's opinion.

Thank you.

QUESTION: Thank you, Ms. Dittmar.

Mr. Lawry, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF MATTHEW C. LAWRY

ON BEHALF OF THE PETITIONER

MR. LAWRY: I'd like to briefly address the procedural bar issue. There's two important points about what happened in the trial court in the 3850 proceedings. The claim that was raised there was a Maynard claim that challenged the vagueness of the jury instructions as well as the Florida supreme court's review.

Furthermore, the trial court denied the State's motion to dismiss, which was based on procedural grounds, so the clear implication of what the trial court did is that it was ruling on the merits of the claim.

If there's no further questions, I have nothing additional.

QUESTION: Well, but the procedural bar is not just failure to raise it at the trial level, is it? It's failure to bring it to the attention of the supreme court, which brings us back to our earlier discussion.

MR. LAWRY: Right, but when a State court rules on the merits -- the 3850 proceedings are after the trial. When a State court rules on the merits in any proceeding, that does away with the procedural bar. They -- even though the court perhaps could have applied a procedural bar.

QUESTION: But that's a question of Florida law, I take it, requires interpretation of what the Florida law is in that regard.

MR. LAWRY: Yes, that's right.

QUESTION: And the Eleventh Circuit is more familiar with that than we.

MR. LAWRY: That's correct, and that's why we think the appropriate disposition is to remand after ruling in our favor on the Teague issue.

QUESTION: The part about Espinosa which opposing counsel said was the least obvious was the part about what Florida State law is really like. That is, is the role of judge-jury there really like a judge-jury in a

negligence case or some other, or does the judge really make a pretty independent decision?

Now, what do you think we ought to read on that, just Tedder?

MR. LAWRY: Well, I would read Sochar and the cases cited in Sochar, because there are numerous kinds of jury error that the Florida supreme court has reviewed in death penalty cases -- jury instruction error, improper evidence, improper argument.

In none of those cases has the court said, oh, well, the jury has -- there was error in front of the jury, but the judge did it, okay, so we don't have to concern ourselves with the jury. They've always said, look to see whether the error affected the jury, and that's exactly what should be done in this case, and that shows that it's not just a pure judge case --

QUESTION: Mr. Lawry, can I come back to your response to Justice O'Connor? You say it's -- the question of whether there's a procedural bar is a question of State law. If it was a question of State law we have the last word of the supreme court of Florida, which says that this claim is procedurally barred.

Now, it seems to me that there is an issue whether that assertion by the Florida supreme court is sufficient to establish a procedural bar for Federal

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purposes, given that a lower Florida court had reached the merits in this other fashion and so forth, but it's clear, is it not, that the Florida supreme court believes this claim to be procedurally barred, as a matter of Florida law?

Now, you know, they may be wrong as to whether they are -- that is good enough to create a Federal bar, but don't we have the word of the Florida supreme court?

MR. LAWRY: Yes, and a second opportunity, and then the question is whether that's adequate, independent, and whether there's cause and prejudice for any default.

My time is up. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lawry. The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter was submitted.)

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CASE NO. 96-5658

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BY Ann Marie Fedrick

(REPORTER)