

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARGARET BRADSHAW, WARDEN, :

4 Petitioner :

5 v. : No. 04-637

6 JOHN DAVID STUMPF. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, April 19, 2005

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:06 a.m.

13 APPEARANCES:

14 DOUGLAS R. COLE, ESQ., State Solicitor, Columbus, Ohio; on

15 behalf of the Petitioner.

16 ALAN M. FREEDMAN, ESQ., Evanston, Illinois; on behalf of

17 the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Margaret Bradshaw v. John David Stumpf.

Mr. Cole.

ORAL ARGUMENT OF DOUGLAS R. COLE

ON BEHALF OF THE PETITIONER

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

John Stumpf pleaded guilty to the aggravated
murder of Mary Jane Stout. The evidence shows he is, in
fact, guilty of that crime. The court below, nonetheless,
vacated his conviction on habeas review citing two
grounds. Its reasoning on each directly conflicts with
this Court's opinions and significantly undermines the
finality of the hundreds of thousands of State court
criminal convictions based on pleas.

JUSTICE O'CONNOR: Counsel, I -- I think he was
given the death sentence. Is that right?

MR. COLE: That is correct, Your Honor.

JUSTICE O'CONNOR: At the end of the day.

And there was a separate sentencing hearing?

MR. COLE: There was a separate mitigation
hearing under Ohio law, yes, Your Honor.

JUSTICE O'CONNOR: And was it argued at that

1 hearing by the State that Stumpf was the triggerman?

2 MR. COLE: Your Honor, the State said that they
3 -- they thought there was evidence to support that. They
4 said, I don't believe it's necessary for this court to
5 conclude he was the actual shooter, and that's in the
6 joint appendix at 186. So the death penalty is
7 appropriate --

8 JUSTICE O'CONNOR: But it was argued.

9 MR. COLE: The court -- or I'm sorry. The
10 prosecutor argued that there was sufficient evidence to
11 show it.

12 JUSTICE O'CONNOR: And was there evidence at the
13 recent habeas hearing that at least one of the sentencers
14 relied on the fact that the judge thought Stumpf was the
15 triggerman and the murderer?

16 MR. COLE: Your Honor, after -- at the time of
17 the original sentencing hearing there was no other
18 evidence, this new evidence of which he complaining --

19 JUSTICE O'CONNOR: Right.

20 MR. COLE: -- didn't exist.

21 JUSTICE O'CONNOR: Right.

22 MR. COLE: When it came into being, he then
23 moved to vacate his sentence at the State --

24 JUSTICE O'CONNOR: Right.

25 MR. COLE: -- court. And the judge there from

1 the original panel --

2 JUSTICE O'CONNOR: Yes.

3 MR. COLE: -- one of the judges said, it may
4 have made a difference. Of course, they had before them a
5 motion to vacate the -- the sentence at that time, and
6 they denied that motion. So apparently it didn't make a
7 difference to that judge.

8 Two other Ohio courts have independently
9 reweighed all of the evidence and found that the death
10 sentence was appropriate.

11 JUSTICE O'CONNOR: Well, I guess my concern
12 actually is more with the sentencing proceeding here, in
13 light of what's happened, than with the guilty plea. And
14 I suppose it's possible that that stands, but conceivably
15 he's entitled to a hearing on the sentencing aspect.

16 MR. COLE: I -- I guess that would be
17 conceivable, Your Honor, although I note that there's only
18 one due process claim he's making. He's making one form
19 of constitutional error claim predicated on the Due
20 Process Clause, and if there was no due process violation
21 with respect to his conviction, which is the claim that he
22 was pressing before the Sixth Circuit, there's similarly
23 no due process violation with respect to his sentence.

24 JUSTICE SOUTER: Why --

25 JUSTICE O'CONNOR: Do you think he has waived

1 any due process claim insofar as it applies to the
2 sentencing? Do you think that's waived? Is that clear?

3 MR. COLE: No, Your Honor, I wouldn't say that.
4 In his Sixth Circuit briefs, he does -- in a section
5 that's entitled I hereby challenge my conviction, he does
6 also note in that section that he's got some concerns
7 about his sentencing hearing. So I don't know that he's
8 waived that. But I don't believe that there's a valid due
9 process claim that he has with regard to either his
10 conviction or his sentence.

11 JUSTICE SOUTER: Why do you argue that if there
12 is no due process violation with respect to the actual
13 plea, there is, therefore, no due process violation with
14 respect to the sentence?

15 MR. COLE: Well, because his theory, Justice
16 Souter, is the same with regard to both. He says this --
17 the use of this --

18 JUSTICE SOUTER: Yes, but we -- we may say the
19 theory really is -- is not sufficiently relevant with
20 respect to the plea but that it is with respect to the
21 sentence.

22 MR. COLE: That's conceivable, Your Honor. We
23 understand that the -- we understood the Sixth Circuit
24 opinion to be directed toward his conviction. So the --

25 JUSTICE SOUTER: I -- I -- no question about

1 that.

2 MR. COLE: -- the thrust of our arguments before
3 this Court were directed towards the conviction. The
4 other side then raised, oh, the State has waived their
5 claim about the sentencing, and -- and we were just
6 making --

7 JUSTICE SOUTER: No.

8 MR. COLE: -- clear that, A, we haven't, but B,
9 in any event, the due process theory sounds the same in
10 both. And so if there's not a due process problem, with
11 respect to these arguably inconsistent theories, then
12 there's not a due process problem with respect to his
13 sentence either. He hasn't brought any other set of
14 facts --

15 JUSTICE SOUTER: No. I -- I understand that.

16 May I go back just to one factual issue before
17 we go on and forget it? You -- you stated, in response to
18 Justice O'Connor, that the State argued in -- in the
19 Stumpf case that there was sufficient evidence to find
20 that he was the triggerman. Did the State stop there and
21 say, in effect, we don't care whether you find him the
22 triggerman or not? We're just telling you there's enough
23 evidence. I -- I assumed the State went on to say there
24 is enough and you ought to find that he is the triggerman.

25 MR. COLE: Well, Your Honor, referring to page

1 187 and 188 of the joint appendix, he says, given those
2 circumstances, although we believe the evidence does prove
3 he was the shooter of Mary Jane Stout, legally,
4 technically, I don't believe it makes any difference when
5 you have two people acting in concert for the joint and
6 unlawful purpose of committing an aggravated robbery and
7 -- and murder results.

8 JUSTICE SOUTER: Did -- did the prosecutor ever
9 say he was the triggerman? The evidence supports it and
10 -- and that's the conclusion that ought to be drawn: he
11 was the triggerman.

12 MR. COLE: He said there's ample evidence from
13 which the court could conclude --

14 JUSTICE SOUTER: But did he take the second step
15 and say there's ample evidence and he was, in fact, the
16 triggerman and you should so find, or in so many words?

17 MR. COLE: In so many words, Your Honor, in
18 connection with the mitigation phase, in -- in connection
19 with the factual basis hearing even, he put on the
20 evidence saying, you know, Mr. Stumpf says he wasn't the
21 shooter and gives a lot of reasons to discount that
22 evidence. So he's arguing that in fact Mr. Stumpf was the
23 shooter. I think it's a fair implication if he doesn't
24 say the express words, but it's a fair implication.

25 Of course, at that time, there was absolutely no

1 evidence to the contrary. Mr. Wesley had not yet been
2 extradited from Texas. He hadn't even made this alleged
3 statement to Mr. Eastman.

4 JUSTICE GINSBURG: Well, the -- the evidence was
5 Stumpf -- Stumpf himself who said Wesley was the
6 triggerman with respect to Mrs. Stout.

7 But I wanted to ask you a question about -- that
8 -- it relates to the sentencing part and it follows up
9 Justice O'Connor's question. The -- the -- you -- as --
10 if I understood you right, you said, well, there was a
11 motion that came before two of the three judges that were
12 part of the guilty plea and the sentencing. This was a
13 plea, so no jury trial. It was three judges. One of them
14 had died. The -- the two who remained -- one of them
15 said, but if we had not been satisfied that Stumpf was, in
16 fact, the triggerman, and we were satisfied that he was,
17 in fact, an aider or abetter, that may very well have had
18 an effect on the court's determination whether the death
19 penalty should follow. I'm not saying it would, but it's
20 possible. And then you said, but then he went ahead and
21 voted to deny the motion.

22 MR. COLE: To vacate the sentence, yes, Your
23 Honor.

24 JUSTICE GINSBURG: Yes. But there's no
25 explanation at all. The only expression that we have from

1 that judge is -- he said, well, it's conceivable, although
2 it wouldn't affect guilt, we would have come out with a
3 different sentence, and then going from that statement to
4 nothing, just a denial without explanation. You -- you
5 want us to infer from that silent denial that the judge
6 must have resolved his own difficulty and decided it
7 wouldn't make any difference on the sentence.

8 MR. COLE: Well, A, I think that's an inference
9 that's supported by the fact that he voted to deny the
10 motion, but B, in any event, there's been an independent
11 reweighing of all of the evidence in the Ohio intermediate
12 appellate court and that court said that -- very
13 specifically said, even if we didn't believe he was the
14 principal -- or principal offender, the actual shooter --
15 we do believe that. But even if we didn't, the death
16 sentence here would be appropriate. And this Court noted
17 in Clemons that an independent reweighing by an appellate
18 court of the evidentiary record can be sufficient to
19 secure -- or to --

20 JUSTICE GINSBURG: But it would be appropriate
21 because the statute permits it. But the decision-maker
22 has three choices. And if the evidence had come in that
23 Wesley was the triggerman, maybe the -- this panel of
24 judges would have done what the jury did in Wesley's case,
25 that is, it's the same crime, but not give the death

1 penalty for it.

2 MR. COLE: Well, Justice -- Justice Ginsburg,
3 the -- the evidence wasn't available at the time of the
4 original sentence. So the failure to have that part of
5 the record at the time of the original sentencing hearing,
6 of course, can't violate due process.

7 And then the question would be, did something
8 that happened later violate due process? But I just don't
9 think it can be the case that anytime new evidence comes
10 up that might cause a judge to say, boy, if we'd have had
11 that evidence before when we -- when we reached the
12 sentencing decision, we might have reached a different
13 result --

14 JUSTICE KENNEDY: Well, what -- what is the rule
15 if there are two successive -- there are successive trials
16 with different defendants and there can only be one
17 shooter and in each trial it's found that the defendant is
18 the shooter? What should be the rule, or does the -- does
19 the second person get the advantage? Does the State have
20 to begin all over again with both? Or -- or does the
21 State have no obligation to correct either?

22 MR. COLE: Well, Justice Kennedy, I -- I think
23 it depends, at least in part, on what role that finding
24 played. If those two verdicts each had as an essential
25 component this fact, this person is the shooter and this

1 person is the shooter, so that the verdicts are
2 necessarily inconsistent so that we know the State has
3 actually got someone in jail they're punishing that's
4 innocent, we would concede there may be a substantive due
5 process right of the -- against the State because the
6 State at that point --

7 JUSTICE SCALIA: By whom? By whom? By which
8 one of the two?

9 MR. COLE: Your Honor, I -- I think that's a
10 great question.

11 JUSTICE SCALIA: Do we flip a coin?

12 MR. COLE: Well, I -- I think the point is
13 probably both would have some kind of claim in that I
14 don't think the State can pursue and convict two people on
15 necessarily inconsistent theories because at that --

16 JUSTICE SCALIA: Why -- why is that? I mean, it
17 seems to me due process requires that there be enough
18 evidence to -- for a jury to find beyond a reasonable
19 doubt that -- that the person was the shooter. And if in
20 -- if there is, indeed, in both cases enough such
21 evidence, it seems to me there is no denial of due
22 process, and that the usual manner of accommodating for
23 that apparent injustice is -- is for the Governor to grant
24 clemency to one of the two, have him figure out which one
25 of the two wasn't the shooter, or to apply for -- for

1 reopening of the -- of the -- of one of cases. But I
2 don't know that there is automatically a due process
3 violation which allows one or the other of the cases --
4 proper convictions. Each one is fully proper. I don't
5 know that there's a due process violation that allows one
6 of them to be set aside.

7 MR. COLE: And I don't know that there is
8 either, Your Honor. We'd be willing to concede that for
9 purposes of this argument because even if there is, it
10 doesn't apply here --

11 JUSTICE SCALIA: Due -- due process doesn't mean
12 perfection. It doesn't mean that each jury has to always
13 reach the right result.

14 MR. COLE: I -- I agree with that, Your Honor,
15 and I hate to argue against my position, so I -- I do this
16 gently. But at the same time, the court has noted and --
17 and one of the old saws of American law is -- is it's
18 better one guilty person should go free than that one
19 innocent person should be punished. And if the State
20 knows, as a matter of fact, that it secured two
21 convictions for a crime that only one committed, the State
22 knows at that point that it's punishing at least one
23 innocent person and that might violate --

24 CHIEF JUSTICE REHNQUIST: When -- when did this
25 new evidence come to light?

1 MR. COLE: The new evidence came to light some 6
2 months after his plea was entered and after the sentence
3 was announced.

4 CHIEF JUSTICE REHNQUIST: Did the other guy
5 confess to a -- kind of a jailhouse snitch?

6 MR. COLE: To -- to a jailhouse informant, yes,
7 Your Honor. And the prosecutor put that evidence on at
8 trial, at Wesley's trial, but it's interesting to note
9 what he did with that evidence at Wesley's trial. He put
10 it on but then in closing very expressly noted that while
11 there's been this evidence, even if you don't believe he's
12 the principal offender, you can still find him guilty of
13 aggravated murder.

14 JUSTICE SOUTER: But it is the case that he
15 argued that -- that you should find him guilty because he
16 was the triggerman. I mean, that was an alternative
17 argument. So the -- I mean, I think what's the -- the
18 concern following Justice Kennedy's question, the concern
19 that I have is not with the -- the guilt or innocence as
20 such here. It's with the sentencing. And as -- it seems
21 to me fair to say that as the record stands now, the State
22 has made two arguments: one that Stumpf was the
23 triggerman, one that Wesley was the triggerman. It has to
24 be the case that one of those arguments, if accepted,
25 would lead to a false result.

1 And the question -- I think the due process
2 question is whether the State can pursue those
3 inconsistent arguments, even if it starts out innocently
4 doing it, but can it pursue two inconsistent arguments
5 knowing that in one case the argument must be for a false
6 result, without there being any kind of -- of process to
7 correct the State's inconsistent positions? What -- I
8 mean, what's your response to that?

9 MR. COLE: Well, Your Honor, first, I -- I don't
10 think they're -- he was without process. Mr. Stumpf had
11 abundant process within the State system. He got all the
12 evidence --

13 JUSTICE SOUTER: Oh, he could -- he could get
14 into court, but as I understand it, there was no
15 recognition here that there is -- that there is in fact
16 something wrong with the two inconsistent -- or the two
17 arguments of the State, each of which, if accepted, will
18 necessarily result in one false conclusion.

19 MR. COLE: Well, Your Honor, the -- again, the
20 intermediate appellate court independently reweighed this
21 evidence and concluded that even if we conclude that Mr.
22 Stumpf is not the shooter, even if that's our -- our
23 conclusion -- it isn't, but even were we to conclude that,
24 the death penalty would still be appropriate here. So
25 there's been an independent reweighing of the evidence

1 minus the mitigating evidence or minus the --

2 JUSTICE SOUTER: Maybe -- maybe that's enough.

3 Let me, with respect to that, just ask you one final
4 question. And I'm assuming the -- the answer, but I want
5 to be sure.

6 I assume that at the point of this intermediate
7 court's reweighing, the intermediate court was aware of
8 the -- the evidence of -- of -- the hearsay evidence of
9 Wesley's confession and was aware that the State argued in
10 the second case that Wesley was the triggerman. Am I
11 correct?

12 MR. COLE: Yes, Your Honor. He -- the
13 prosecutor, in fact, stipulated to the admissibility of
14 the Eastman and the Wesley evidence from Wesley's trial
15 back into the Stumpf proceeding in the original trial
16 court before the two judges -- the two of the three judges
17 that were remaining at that point, and then --

18 JUSTICE SOUTER: And -- and I take it also --

19 MR. COLE: That was part of the record on
20 appeal.

21 JUSTICE SOUTER: -- stipulated or represented or
22 admitted, whatever, that in fact the State had argued in
23 the second case that Wesley was the triggerman.

24 MR. COLE: I believe so, Your Honor. The
25 indictment in Wesley's case included a specification that

1 he was the principal offender, so at the very least, the
2 indictment would --

3 JUSTICE SOUTER: Because of being -- because of
4 being the triggerman.

5 MR. COLE: The only way to be the principal
6 offender under that specification is to be the triggerman.
7 So that -- that's clear from the face of the indictment in
8 -- in Wesley's case that the State had argued that.

9 Now, the jury, importantly in Wesley's case,
10 found that he should be acquitted on that aggravating
11 circumstance. It's not an element of the crime, but it's
12 one of the aggravating circumstances that the State could
13 rely on in seeking the death penalty in Wesley's case, and
14 the jury specifically rejected that aggravating
15 circumstance and -- and found that the State had not
16 proved it beyond a reasonable doubt.

17 Throughout the -- throughout the appellate
18 process, with regard to the sentence, the State's attorney
19 argued that, yes, there's evidence in the record from
20 which you could conclude that he's the actual shooter, but
21 in any event, it doesn't matter. And the -- the State's
22 attorney was correct in that, as a matter of Ohio law,
23 aiders and abettors can both be found guilty of aggravated
24 murder under Ohio law and are subject to the death
25 penalty.

1 The two -- the two aggravating circumstances --
2 I'm sorry. The one aggravating circumstance that remained
3 after the plea deal turned merely on the reason why Mrs.
4 Stout had been put to death. It did not turn at all on
5 who was the person who put her to death. So as an
6 accomplice, aider, and abetter, with liability for the
7 aggravated murder, he was also subject to the death
8 penalty under that --

9 JUSTICE STEVENS: But, General Cole, isn't there
10 a distinction between eligibility for the death penalty
11 and actually making the decision to impose the death
12 penalty? And it's perfectly clear -- you're dead right,
13 of course. He's eligible under either theory. But is it
14 not likely that the sentencer would be more likely to
15 sentence the defendant to death if the sentencer thought
16 he had been the actual shooter?

17 MR. COLE: I -- I think it's definitely a fact
18 that the court weighs, although here we have evidence that
19 at least one Ohio court took that possibility into account
20 and said even in light of that fact --

21 JUSTICE STEVENS: Right.

22 MR. COLE: -- we still conclude that the death
23 sentence is appropriate. So I don't know that we can say
24 that in this case it in any way would change the outcome.
25 In fact, the record --

1 JUSTICE STEVENS: Well, and the original
2 sentencer might -- might not have done the same thing. We
3 don't really know that.

4 MR. COLE: Well, this did go back in front of
5 the two -- two of the three original sentencers and they
6 declined to allow him to vacate his sentence. The
7 intermediate appellate court then independently reweighed
8 and expressly said, whether he's the shooter or not, he's
9 eligible for the death sentence. So there have been a
10 number of Ohio judges that have --

11 JUSTICE SCALIA: As I understand the facts, even
12 if he hadn't shot the wife to death, which was what the
13 prosecution was for, he had tried to kill the husband,
14 shooting him twice in the head?

15 MR. COLE: Twice at the head from essentially
16 point-blank range, Your Honor.

17 JUSTICE SCALIA: From point-blank range.

18 MR. COLE: Right.

19 JUSTICE SCALIA: And then there was some
20 discussion that the -- that the lying, seriously wounded
21 husband heard between the two perpetrators, and then there
22 was shooting of the wife. Whether he pulled the trigger
23 or not, could that possibly make a difference? He did
24 pull the trigger trying to kill the husband. Is it
25 difficult to -- to think that -- that he willingly allowed

1 his -- his cohort to do the same to the wife? I -- I
2 can't imagine it would make any difference.

3 MR. COLE: Your Honor, we agree and that
4 certainly falls well within the -- the range of
5 culpability that this Court set out in Tyson as --

6 JUSTICE BREYER: There's no doubt that they
7 could have -- the trier of fact could have reached the
8 same conclusion. But I guess the problem is that when you
9 go back to reopen the evidence the second time and the
10 judges are sitting there, someone might have thought,
11 well, the husband didn't die, and we don't know if he
12 actually pulled the trigger on the wife. And we're trying
13 to guess what those judges would have done if they thought
14 that. I don't know. It could be that people don't want
15 to impose capital punishment without thinking I know that
16 this person has killed somebody, and if that's so, they
17 wouldn't have reached the same conclusion.

18 Now, I guess that's the problem because at that
19 time on reopening, the State told that panel of judges
20 pretty clearly by implication that the State thought that
21 the evidence did support Stumpf having pulled the trigger,
22 even though at that point the State knew and indeed
23 referred to the statement to -- you know, the confession
24 and all the things in the second trial.

25 Now, what do you think about that problem?

1 MR. COLE: Well, first, Your Honor, I don't
2 think we have to guess what the judges would do because
3 the judges did what they did. They denied the motion to
4 vacate and then --

5 JUSTICE BREYER: They denied it, but as I read
6 what the Ohio court said after the denial, I thought it
7 did probably rest upon their determination that Stumpf had
8 pulled the trigger.

9 MR. COLE: And certainly the intermediate --

10 JUSTICE BREYER: Did you think that?

11 MR. COLE: Well, the intermediate appellate
12 court expressly said that its determination did not turn
13 on who had pulled the trigger, that they would have
14 reached the same conclusion independent of who pulled the
15 trigger.

16 JUSTICE GINSBURG: But the panel -- the panel
17 that didn't reopen -- there was no reopening because they
18 denied the motion. But they didn't say one way or
19 another.

20 JUSTICE BREYER: It's the Supreme Court of Ohio
21 that then I think I got my impression from, and of course,
22 they don't know either.

23 MR. COLE: Well --

24 JUSTICE BREYER: The fact is we don't know what
25 that original panel thought.

1 MR. COLE: That's --

2 JUSTICE KENNEDY: Well, it isn't that -- isn't
3 one of the answers to Justice Breyer's questions that you
4 -- you never know exactly what a fact finder would do.
5 What you have to deal with are reasonable likelihoods and
6 reasonable possibilities.

7 MR. COLE: That's --

8 JUSTICE KENNEDY: And when -- and when you have
9 someone who shoots the first person and is obviously
10 attempting to kill him, and then there's an apparent
11 discussion -- not -- not 100 percent clear that those were
12 the two voices. It's pretty clear because there were only
13 two other people there. So we talk about reasonable
14 likelihoods, don't we?

15 MR. COLE: I would think that's --

16 JUSTICE BREYER: Absolutely right. Of course,
17 that's right. But we can't be sure what they would have
18 done, and because we can't be sure what they would have
19 done, I guess it might well have made a difference that
20 the State told that panel we think Stumpf pulled the trigger.

21 MR. COLE: But --

22 JUSTICE BREYER: And that's what gives rise to
23 the problem in the case.

24 MR. COLE: But, Justice Breyer, I think it --
25 it's always going to be the case that after a sentence is

1 announced, there's the possibility that new evidence might
2 come up that would cause us to say we can't know for sure
3 what this panel would have done with that new evidence.
4 And so there needs to be --

5 JUSTICE BREYER: -- the State say when it comes
6 to the panel, the reopening panel, we'll tell you
7 something. We think, indeed, that's what we argued, that
8 the State -- in the last case we argued that Stumpf didn't
9 pull the trigger, that the balance of evidence is against
10 that, but nonetheless, he should be sentenced to death.
11 That would make your position absolutely consistent with
12 what you argued in that second trial with Mr. --

13 MR. COLE: Mr. Wesley.

14 JUSTICE BREYER: Mr. Wesley.

15 MR. COLE: But, Your Honor, I'm not sure that
16 that would have been the State's position. I don't
17 believe after the Wesley trial, that the balance of the
18 evidence necessarily showed that Wesley was the shooter
19 versus Stumpf. That was one person's testimony.

20 JUSTICE KENNEDY: Yes. Now, the -- the jury in
21 the Wesley trial rejected that position.

22 MR. COLE: They did, Your Honor, and Mr. Wesley
23 -- it isn't as though all the new evidence is in Mr.
24 Stumpf's favor. Mr. Wesley, the only other eyewitness
25 who's testified, came and sat on the witness stand and

1 said, yes, Mr. Stumpf pulled the trigger. At the end of
2 the day, the only two people who know exactly who pulled
3 the trigger are Mr. Wesley and Mr. Stumpf, and they have
4 every reason to point their finger at the other person.
5 So if that's --

6 JUSTICE SOUTER: Okay, but wait. Who did the --
7 who was the last person the State pointed its finger at?
8 You -- you told me in -- in response to earlier questions
9 that when the case back before the two remaining members
10 of the panel, that in fact the State brought the -- called
11 to their attention the fact that Wesley had confessed and
12 -- and it was -- it was clear one way or another that --
13 that they had argued in Wesley's trial that he was the
14 triggerman.

15 When they -- at that point when they are back
16 before the two remaining members of the panel in Stumpf's
17 case, did the State say we now go back to our original
18 position that Stumpf was the triggerman and Wesley wasn't,
19 or did they say we think -- we think Wesley is the
20 triggerman and Stumpf wasn't? Or did the State simply
21 stand there agnostic?

22 MR. COLE: The State -- and I would encourage
23 the Court to look at the State's response to that motion,
24 which is in joint appendix at 126. But what the State
25 says on 126 is -- essentially there's a lot of agnosticism

1 in the response. It says, look, there's this new
2 evidence. We don't know. It seems like from this record
3 you could conclude that Stumpf was the shooter, but then
4 the State says even deleting that finding, even if you
5 don't agree with us, or even if you don't agree that's the
6 case, because the State isn't really saying this is our
7 position anymore, even if you delete that finding, there's
8 still sufficient evidence here to support a death penalty
9 against Mr. Stumpf.

10 JUSTICE SCALIA: Could -- could I get one fact?
11 Wesley didn't confess or we don't know that he confessed.
12 He -- he said he wasn't the shooter at trial, didn't he?

13 MR. COLE: That's correct, Your Honor.

14 JUSTICE SCALIA: But what was introduced was --
15 was the testimony of one of his jailhouse companions who
16 said that Wesley had told him that he was the shooter. So
17 who was the shooter was -- was as much an issue in
18 Wesley's trial as it was in Stumpf's trial, wasn't it?

19 MR. COLE: As the court expressly -- or as -- as
20 the State expressly noted in its closing in that case --

21 JUSTICE STEVENS: Yes, but the State's position
22 was that the jailhouse informant had told the truth,
23 wasn't it?

24 MR. COLE: In closing --

25 JUSTICE STEVENS: At the trial.

1 MR. COLE: In -- in closing at that trial, Your
2 Honor, the -- the prosecutor was relatively agnostic,
3 frankly. He said, look, you could conclude --

4 JUSTICE STEVENS: He at least put in the
5 evidence.

6 MR. COLE: He -- he put in the evidence, and
7 then he said, look, from this evidence you could conclude
8 that Wesley was the shooter. You could also --

9 JUSTICE STEVENS: Normally you don't put in
10 evidence unless you think it will support a proposition
11 that you -- that you're in favor of.

12 MR. COLE: Well, and Your Honor, I -- I think if
13 he could show Wesley was the shooter, that would, of
14 course, support a conviction against Wesley, but he
15 recognized that the jury didn't necessarily need to
16 believe that, and in fact, he wasn't relying on that in
17 order to secure the conviction.

18 JUSTICE SOUTER: May I ask you one final
19 question? As a matter of due process, why shouldn't the
20 State -- after learning of the supposed admission in
21 Wesley, after taking Wesley's position, why shouldn't the
22 State, when it gets back to the Stumpf case before the
23 remaining two members of the panel, have to fish or cut
24 bait on a position and say we think he's the triggerman
25 and we want you to affirm on that basis, or we don't think

1 he was the triggerman because we've taken this other
2 position? Why can the State, as a matter of due process,
3 stand there agnostic?

4 MR. COLE: Because, Your Honor, the State is not
5 the fact finder. The judge is the fact finder. The State
6 needs to put the evidence in and allow counsel for the
7 defendant, counsel for the State to argue positions, and
8 let the fact finder make the ultimate determination.

9 With the Court's permission, I'd like to reserve
10 the rest of my time.

11 CHIEF JUSTICE REHNQUIST: Very well, Mr. Cole.
12 Mr. Freedman, we'll hear from you.

13 ORAL ARGUMENT OF ALAN M. FREEDMAN

14 ON BEHALF OF THE RESPONDENT

15 MR. FREEDMAN: In light of the questioning, I'd
16 like to indicate what exactly was argued below and what
17 was the rulings. In -- in the first Stumpf trial, they --
18 they argued that there was, quote/unquote, ample evidence
19 to point --

20 CHIEF JUSTICE REHNQUIST: Who is they?

21 MR. FREEDMAN: The prosecutors. I'm sorry. Mr.
22 Chief Justice, and may it please the Court:

23 The prosecutors argued that there was ample
24 evidence, quote/unquote, pointed --

25 JUSTICE GINSBURG: Mr. Freedman, it wasn't a

1 trial. It was a -- it was a plea hearing.

2 MR. FREEDMAN: That's correct, but there was --
3 but -- but in Ohio there's a requirement to have an actual
4 prove-up of the aggravating factor itself. And they
5 argued that there was ample evidence, quote/unquote,
6 pointed to Stumpf as the killer, and that's in joint
7 appendix 186 to 187. Ultimately they -- and they urged
8 that he was the shooter.

9 Then when the Wesley trial took place, at the
10 trial they did the same thing. They used the same terms,
11 quote/unquote, ample evidence that Wesley was the shooter.
12 They urged a finding that Wesley was -- was the shooter.

13 JUSTICE GINSBURG: I -- I thought the prosecutor
14 in closing in the Wesley trial said, it could have been
15 Stumpf, but it doesn't make any difference.

16 MR. FREEDMAN: They --

17 JUSTICE GINSBURG: I thought they argued both?

18 MR. FREEDMAN: That -- they really didn't argue
19 both. They -- they -- effect -- that was the throwaway
20 argument. They came in there -- what -- what I think is
21 critical in both trials and later on in the proceedings is
22 what they were urging, what they were recommending the --
23 to the jury.

24 JUSTICE KENNEDY: Well, but it's at the bottom
25 of page 187. We're on this same point. Given these

1 circumstances --

2 JUSTICE SCALIA: What -- what page is that?

3 JUSTICE KENNEDY: 187 like the -- of the joint
4 appendix. Given these circumstances, although we believe
5 the evidence does prove he was the shooter, I don't
6 believe it makes any difference when you have two people
7 acting in concert for the joint and unlawful purpose of
8 committing an aggravating robbery. That's at the top of
9 188.

10 MR. FREEDMAN: But the -- but they urged. They
11 recommended. They didn't come in and say -- and
12 throughout this proceeding -- we don't know who the
13 shooter is. We don't care who the shooter is. They both
14 deserve the death penalty. They -- they were -- the
15 prosecutors were aware that the -- the death penalty is
16 what stirs the pot here, and so they were urging somebody
17 to be the shooter to get the death penalty. If this
18 wasn't a death penalty case, I don't think they -- it
19 would have mattered who killed who. And so they were
20 urging --

21 JUSTICE KENNEDY: Well, I think there's quite a
22 difference in -- in case A where you say our position is
23 that Stumpf was the shooter, pure and simple. That's it.
24 In case B, they say we think Stumpf was the shooter.
25 We're not 100 percent sure, but he should get the death

1 penalty. The alternative is before the sentencer and the
2 sentencer can make that determination.

3 MR. FREEDMAN: But -- but they took the position
4 of actually urging, making a recommendation. I -- I don't
5 think there would be a due process violation if they said,
6 we don't know. They didn't take that. They -- they urged
7 a position, and I think that's the key factor when the --
8 in this case.

9 JUSTICE SCALIA: What -- what was the due
10 process violation here? You're talking about due process
11 in the second trial, in --

12 MR. FREEDMAN: The due process violation, Your
13 Honor, would be --

14 JUSTICE SCALIA: Was in the first trial?

15 MR. FREEDMAN: No, of course, it wasn't in
16 the first trial.

17 JUSTICE SCALIA: But that's the trial that
18 you're trying to get set aside here.

19 MR. FREEDMAN: We submit that the due process
20 error is at the motion to vacate. At that time, again,
21 after taking the position that Wesley was the shooter,
22 they came back and urged that -- that Stumpf was the
23 shooter, that the record was ample enough to support
24 Stumpf being the shooter --

25 JUSTICE SCALIA: Well, it was. They're --

1 they're just -- they're just arguing that the evidence we
2 introduced supported the jury verdict. What -- what is
3 wrong with arguing that? There's --

4 MR. FREEDMAN: Because they've taken
5 inconsistent positions. The -- the violation here is in
6 the positions itself, not in necessarily the results.

7 JUSTICE SCALIA: Not -- not if they said in the
8 second trial it doesn't matter whether he's the shooter.

9 MR. FREEDMAN: I think they did more than it
10 didn't -- it just didn't matter. I think they urged the
11 position. It would -- I mean, a lot of the cases in the
12 lower courts have made that distinction when the -- when
13 the State comes in and says, we don't know what happens.
14 We can't tell you who the shooter is or not, and we don't
15 care who the shooter is.

16 JUSTICE KENNEDY: Suppose the State had said on
17 motion for resentencing in Stumpf's trial, Your Honor, we
18 took the position that Wesley was the shooter in Wesley's
19 trial. The jury disbelieved that. We accept the jury's
20 verdict. Our position now is that -- that Stumpf was the
21 shooter. We've learned from the jury verdict in the
22 Wesley trial. We've had 12 people. They heard the
23 evidence. We'll accept that. Any difference in that case
24 and what we have here?

25 MR. FREEDMAN: It's different, but that's not

1 what happened. It's different if they've taken -- if
2 they've taken the position --

3 JUSTICE KENNEDY: It -- it would -- in the case
4 I put, would your argument be the same, and if so, why?

5 MR. FREEDMAN: I -- I put it that it's not the
6 same because they -- first of all, in reality, that's not
7 what they did. But let's talk in terms of the
8 hypothetical that -- that you've asked me. It is that you
9 have to also look at what actually happened in the Wesley
10 trial to determine due process for Stumpf because Wesley
11 -- what happened in this case through the whole circular
12 reasoning, Wesley didn't get the death penalty here
13 because they were informed that Stumpf pled guilty, was
14 found to be the principal offender, and was sentenced to
15 death. Now --

16 JUSTICE GINSBURG: That was introduced by
17 Wesley, not by the prosecution.

18 MR. FREEDMAN: That's correct. The prosecution
19 in the Wesley trial originally did not want the -- the
20 jury to hear at all what happened in Stumpf's trial. They
21 wanted to argue the complete -- that -- that Stumpf's
22 verdict was not even -- should be informed. The sentence
23 of death shouldn't be informed or the sentence of death.
24 And in fact, that's when they started to throw in a little
25 bit of the alternative theory after that evidence did

1 subsequently get in. The record shows that they
2 originally did not get it in and they allowed the defense
3 counsel -- prevented defense from getting -- in the Wesley
4 trial from getting in the evidence of the Stumpf trial.

5 JUSTICE GINSBURG: Mr. Freedman, you're trying
6 to read back now into what apparently you recognize is --
7 is not a flawed initial sentencing hearing.

8 MR. FREEDMAN: That's correct.

9 JUSTICE GINSBURG: And it might be more
10 persuasive if the trier were a jury when the motion to
11 vacate is made, but these are judges whose business it is
12 to preside over these kinds of cases. They presided over
13 that first hearing and now the same prosecutor -- was the
14 same prosecutor in both?

15 MR. FREEDMAN: That's correct, Your Honor.

16 JUSTICE GINSBURG: Comes back to them and says,
17 judges, don't vacate the sentence that you yourself
18 entered. It's -- given that we're dealing with
19 sophisticated judges, the same panel in both episodes,
20 it's a little hard to -- to see where the due process
21 violation is.

22 MR. FREEDMAN: The due process violation is that
23 at the minimum, assuming that -- that a weighing is even
24 appropriate here, they never weighed it, and clearly any
25 indication that there was a waiver -- a -- a weighing of

1 whether Mr. Stumpf would be put to death as an aider and
2 abetter. They never took Eastman's testimony as true and
3 -- and the prosecution's position as true, and then
4 ultimately said it would make no difference.

5 JUSTICE SOUTER: Well, they didn't have to take
6 it as true. As I understand it, when they went back
7 before the -- the two original judges on the motion to
8 vacate, they didn't have to take the -- the testimony
9 about the jailhouse admission as true, and they didn't
10 have to take the State's position at the Wesley trial as
11 true. It was evidence. It was before them. They were in
12 -- they were required to consider it.

13 But as I understand it, the State at that point
14 essentially was -- was agnostic. The State said, you
15 know, this is what happened, this is what we said, this is
16 what the jury did in the second trial, but regardless of
17 how you determine -- of -- of any determination about
18 triggerman, this man Stumpf still deserves death, so don't
19 vacate the sentence.

20 And -- and there was nothing I guess -- number
21 one, there doesn't seem to be at that point a -- a problem
22 with the State taking inconsistent positions, i.e., with
23 its position in -- in the -- in the Wesley case, and there
24 doesn't seem to be any -- any lack of candor. There may
25 be a -- a lack of initiative on the State's part to fish

1 or cut bait, but there's no lack of candor. So where does
2 the due process violation come at that point?

3 MR. FREEDMAN: We submit the due process
4 violation comes at the time of the motion to vacate. We
5 urge -- we're urging that they've not take an agnostic
6 position as prosecutors. They're -- they're urging again
7 saying the -- the evidence is ample to support that --
8 that Stumpf was -- was the shooter.

9 JUSTICE SOUTER: But it -- I mean, that -- that
10 statement is true, I take it.

11 MR. FREEDMAN: But -- but they're also urging a
12 position. The State at some point should take a position
13 on what the evidence is. At that position -- at that
14 point, after urging that Mr. Wesley is the shooter, they
15 -- were they untrue? Were they -- I mean, the prosecutors
16 at that point maybe then -- if they were believing that --
17 that Eastman was testifying truthfully, why wouldn't they
18 now believe that he was testifying truthfully now in the
19 motion to vacate?

20 JUSTICE SCALIA: Well, because it seems to me
21 they -- they would have two arguments. One is even if he
22 wasn't the shooter, you -- you should -- you would have
23 imposed the death penalty anyway, but argument number two
24 is, wait a minute. You know, yes, we -- we don't know who
25 the shooter is but there's a -- there was no violation of

1 due process here. There was plenty of evidence for you to
2 find that he was the shooter. That evidence is still
3 there. Do you expect them to throw away that argument? I
4 mean, it's -- it's very true and it goes to whether this
5 conviction and sentence deserve to be set aside.

6 MR. FREEDMAN: We -- we proffer to the Court
7 that they shouldn't be taking inconsistent positions as to
8 -- in a death penalty case in the sentencing --

9 JUSTICE GINSBURG: What should -- what -- was
10 Wesley then denied due process? Because at the time of
11 Stumpf's initial plea hearing, Eastman hadn't appeared and
12 there was only Stumpf's testimony that he was not the
13 triggerman and the prosecutor's evidence that he was.

14 Then we get to Wesley, and Eastman shows up.
15 The prosecutors have already taken the position that
16 Stumpf was the triggerman. Is Wesley denied due process
17 because they're taking inconsistent positions at his
18 trial?

19 MR. FREEDMAN: I -- I don't believe that Wesley
20 was denied due process. They discovered the evidence
21 afterwards and ultimately at that trial they had -- the
22 Wesley jury had the opportunity to hear what happened in
23 the Stumpf trial, and they were able to weigh that case
24 along with the evidence of the Stumpf finding and sentence
25 of death and the finding that he was the principal

1 offender. That's something we submit has not happened in
2 this death penalty case.

3 JUSTICE O'CONNOR: Well, do you concede that the
4 evidence presented in the Stumpf proceeding was sufficient
5 to support a finding of guilt as an aider and abetter?
6 Was there enough evidence that the fact finder could so
7 find?

8 MR. FREEDMAN: Without the Wesley evidence, I --
9 I -- at the initial trial, I certainly would concede that.

10 JUSTICE O'CONNOR: Right, right.

11 MR. FREEDMAN: As -- as to -- as to whether the
12 evidence that you learn from the Wesley trial -- that's a
13 much closer question because the -- the aggravating factor
14 in this case --

15 JUSTICE SCALIA: She asked as aider or abetter,
16 not as shooter.

17 MR. FREEDMAN: Okay, all right. I'm just --
18 that's correct.

19 JUSTICE O'CONNOR: And as to that, it seems to
20 me the guilty plea can stand and the only question that,
21 it seems to me, I would have would be with the sentencing,
22 and I'm not sure that has to be overturned.

23 MR. FREEDMAN: Well --

24 JUSTICE O'CONNOR: So it would help to focus on
25 that.

1 MR. FREEDMAN: I --

2 JUSTICE O'CONNOR: Did you address, on behalf of
3 Stumpf, some allegation that he has to be resentenced?

4 MR. FREEDMAN: That's correct, and that's what
5 the Sixth Circuit --

6 JUSTICE O'CONNOR: Is that still before us?

7 MR. FREEDMAN: That -- that is correct.

8 JUSTICE O'CONNOR: Or has that been subsumed
9 somehow?

10 MR. FREEDMAN: No. That's before you. In fact,
11 there's a -- there's a question of whether they even
12 challenge that. But clearly, that the sentence by the
13 Sixth -- the sentence was challenged by the Sixth Circuit
14 and found to be defective and a violation of due -- of due
15 process, and that's in the cert --

16 JUSTICE SCALIA: I thought a State appellate
17 court had effectively reweighed and effectively
18 resentenced, saying that this additional evidence would,
19 in our view, have made no difference. And we -- we allow
20 that to happen all the time. We speculate as to what the
21 -- what the sentencer would have done had an invalid
22 factor not been there. I mean, when -- when a -- an
23 aggravating factor is -- is invalidated, the State supreme
24 court can determine, you know, whether the same sentence
25 of death would have been imposed even without that

1 aggravating factor. Why is this any different?

2 MR. FREEDMAN: Well -- well, I'd like to ask --
3 answer that in two ways. First, the -- we would submit
4 that a reweighing isn't necessary. This is not like
5 vacating an aggravating factor. This is determining a
6 constitutional error of due process.

7 But let's assume for the moment that reweighing
8 is -- is adequate. There was no reweighing, proper
9 reweighing, in either the appellate court or the Ohio
10 Supreme Court.

11 The -- the appellate court, which is the
12 intermediate court in Ohio, came out and said both Wesley
13 and Stumpf were principal slayers as if they were both
14 shooters. And the whole opinion is hinged on the
15 assumption that Mr. Stumpf pled guilty to being the
16 shooter. If you -- I mean, that's -- we submit that's
17 just a fair reading of the opinion.

18 And also, if you go to their main opinion, which
19 is the final opinion, which this Court reviews, the Ohio
20 Supreme Court -- they did the same circular reasoning.
21 Ultimately they said he pled guilty. He was the shooter,
22 and therefore, Eastman's testimony will have little weight
23 as hearsay to -- to vacate the death sentence. They never
24 independently weighed the case saying, let's take Eastman
25 as true, let's look at this case as an aider and

1 abetter --

2 CHIEF JUSTICE REHNQUIST: What is your best
3 case, Mr. Freedman, for the idea that an inconsistency,
4 such as you say was present here, is a violation of due
5 process?

6 MR. FREEDMAN: The best case we cite in our
7 brief is Green v. Georgia.

8 JUSTICE SCALIA: Which one?

9 MR. FREEDMAN: Green v. Georgia where they came
10 in with inconsistent positions.

11 JUSTICE SOUTER: Mr. Freedman, you've -- you've
12 argued just a second ago that both of the appellate courts
13 decided the case or went through so-called reweighing on a
14 false premise that he had pleaded guilty to being the
15 shooter. Let me go back to the -- to the two remaining
16 members of the original trial panel. I take it they did
17 not make that -- in your judgment that error.

18 MR. FREEDMAN: In all candor, I don't know.
19 There's no finding. They simply said denied.

20 JUSTICE SOUTER: Yes.

21 Let me -- let me ask you what your position
22 would be if a hypothetical Justice Kennedy suggested
23 earlier in the argument were true. What if the State had
24 gone back at the -- at the hearing before the original two
25 in response to the motion to vacate and had said, we did

1 argue in the Wesley case that he was the triggerman? The
2 jury rejected that argument. They found that -- that he
3 was not. We've -- we've learned from -- from our own
4 experience and -- and we now no longer think that -- that
5 the evidence from the jailhouse informant should be
6 accepted. We're back to the position that we took in the
7 -- at the Stumpf sentencing hearing originally, that --
8 that he was the triggerman. If the State had taken that
9 position, would you have a due process claim?

10 MR. FREEDMAN: On -- on this -- on this record,
11 we would have a due process claim for twofold. We submit
12 that the -- that the error is in the attempt not
13 necessarily the success, and particularly in the --

14 JUSTICE SOUTER: I'm -- I'm not getting it.
15 What do you mean?

16 MR. FREEDMAN: I mean -- I mean, it's -- it's
17 that they honestly believed that Wesley -- that in the
18 Wesley trial, that Eastman testified truthfully. They
19 believed that.

20 JUSTICE SOUTER: Well, can't they -- can't they
21 profit from the jury's verdict?

22 MR. FREEDMAN: Perhaps, but not in this
23 particular case because what the jury weighed in Wesley
24 was not only Eastman's testimony, they weighed the fact
25 that Stumpf pled guilty, was found to be the principal

1 offender, and was sentenced to death. That's a -- I mean,
2 that's going to lead to -- I -- I -- maybe I'm off base
3 here, but that's going to lead a jury to come out in a
4 conclusion to find Wesley the aider and abetter and not --

5 JUSTICE STEVENS: The jury simply decided they
6 didn't want to sentence two people to death for the same
7 offense.

8 MR. FREEDMAN: Right. I mean, they already had
9 the principal offender. They already had somebody
10 sentenced to death for it.

11 JUSTICE BREYER: Can I ask you a procedural
12 question here? When I read the -- the Ohio Supreme Court
13 opinion, my impression of their due process part of it is
14 that they found a violation because of the inconsistency
15 between the Wesley trial and the Stumpf sentencing
16 proceeding. When you started to talk to Justice Scalia,
17 you agreed that couldn't be right. Rather, you said there
18 is an inconsistency between what the prosecutor said at
19 the Wesley trial and what the prosecutor said when Stumpf
20 made his motion to vacate.

21 Now, if that's so, I'm not sure that the Ohio
22 Supreme Court or the lower courts have addressed that
23 question to determine whether they really were
24 inconsistent, and if so, what or why or what difference it
25 made. But I haven't read the record thoroughly, and my

1 impression might be wrong. So I'd appreciate your telling
2 me what are the facts there.

3 MR. FREEDMAN: They -- they argued generally in
4 -- in the record, and it was -- it was somewhat cryptic.
5 They argued that it was unfair --

6 JUSTICE BREYER: All right. Who is they?

7 MR. FREEDMAN: I'm sorry. I apologize. The --
8 the defense counsel.

9 JUSTICE BREYER: I'm not interested in what
10 defense counsel did or did not say. I'm interested in
11 what the Ohio courts did or did not say.

12 MR. FREEDMAN: Thank you.

13 JUSTICE BREYER: And my point there is my -- do
14 I repeat it or do you have it?

15 MR. FREEDMAN: I have it now, yes.

16 The -- the Ohio -- the Ohio Supreme Court simply
17 -- simply used -- simply used some sort of circular
18 reasoning. They -- they hung to the position that Stumpf
19 was the shooter, and then after that --

20 JUSTICE BREYER: All right. Let's go to the
21 circuit court of appeals. When I read the decision of the
22 circuit court of appeals in the due -- what -- what am I
23 reading, which is -- this is in the Sixth Circuit Court of
24 Appeals.

25 MR. FREEDMAN: Okay.

1 JUSTICE BREYER: They went on both grounds,
2 first the confession -- sorry -- the guilty plea, and
3 second, the inconsistency. Now, there I thought that the
4 Sixth Circuit Court of Appeals was -- now, I think I
5 misspoke because I think that's where I see the problem.

6 MR. FREEDMAN: Okay.

7 JUSTICE BREYER: You understand what the problem
8 is or shall I --

9 MR. FREEDMAN: Yes, I see it. You want to know
10 somewhere in the Sixth Circuit opinion?

11 JUSTICE BREYER: The Sixth Circuit seemed to be
12 addressing the inconsistency between the sentencing
13 proceeding of Stumpf and the Wesley trial. Well, you say
14 the inconsistency we should focus upon is between the
15 Wesley trial and the motion to vacate. And I think you're
16 right about that because I can't imagine the other being a
17 problem.

18 MR. FREEDMAN: I -- I -- maybe I should clarify.
19 I -- I think that you have to compare the Wesley trial
20 with the Stumpf trial.

21 JUSTICE BREYER: It's relevant in terms of
22 evidence, but I think you're asking us to say that there
23 is a due process violation because of the inconsistency
24 between what the prosecutor said at the Wesley trial and
25 what the prosecutor said when Stumpf made his motion to

1 vacate. Am I right?

2 MR. FREEDMAN: That's correct.

3 JUSTICE BREYER: All right. I'm asking you if
4 the Sixth Circuit or the Ohio courts has addressed that
5 question.

6 MR. FREEDMAN: I'm uncertain. I -- I think they
7 did it in a generic fashion.

8 JUSTICE BREYER: So I read this. You can't
9 point to anything in which they have addressed that
10 question. My quick reading of it -- I couldn't find
11 anything in which they addressed that question. And if
12 that's so, what should we do?

13 MR. FREEDMAN: Well, as an -- as an alternative,
14 the Court could remand back to have the Sixth Circuit --

15 CHIEF JUSTICE REHNQUIST: Did you raise that
16 argument before the Sixth Circuit, the one that you're
17 making now?

18 MR. FREEDMAN: With absolute certainty, Mr.
19 Chief Justice, yes, because they asked the same questions.
20 They asked where did the error occur, and that the line of
21 the questionings were almost -- on that point was
22 identical. They asked questions where did the error come,
23 and of course, it wasn't in the first trial. The error
24 occurred at the motion to vacate.

25 JUSTICE SCALIA: What if -- what if Wesley comes

1 in with a -- with a motion to vacate now and -- and he
2 points to the inconsistency with the -- with the Stumpf
3 trial? Would he also be entitled to get his sentence
4 vacated because of the same inconsistency that you're
5 pointing out?

6 MR. FREEDMAN: Well, he certainly wouldn't have
7 the death sentence. That was -- is solely as to the guilt
8 part of the case, Justice Scalia?

9 JUSTICE SCALIA: Yes.

10 MR. FREEDMAN: He might. He might because the
11 -- the -- I mean --

12 JUSTICE SCALIA: So a jury, having found both of
13 them guilty beyond a reasonable doubt and possibly on a
14 basis that -- or not a jury but the judges and possibly on
15 a basis that has nothing to do with whether they were the
16 shooter, you think both of them are entitled to have the
17 death sentence vacated. I think that's extraordinary.

18 MR. FREEDMAN: Well, in all due respect, only
19 one has the sentence --

20 JUSTICE SCALIA: Which one? I mean, doesn't
21 Wesley have just as much of a complaint as your client
22 does?

23 MR. FREEDMAN: Not -- not as to the death -- not
24 as to -- not as to the death sentence, no.

25 JUSTICE SCALIA: Why?

1 MR. FREEDMAN: Why? One, he didn't -- let's
2 assume arguendo that he received the death sentence. He
3 had an opportunity --

4 JUSTICE O'CONNOR: I thought Wesley didn't
5 receive a death sentence.

6 MR. FREEDMAN: No, he did not. That's what --
7 but you --

8 JUSTICE SCALIA: No. That's -- that's my
9 mistake.

10 JUSTICE SOUTER: Okay. He didn't receive the --
11 the death penalty. What would his argument be with
12 respect to guilt or innocence? It seems to me that the
13 issue only goes to penalty.

14 MR. FREEDMAN: There's still an issue out there
15 because this is killing a witness. As -- he would have a
16 tougher role. I don't think Wesley would -- would have
17 much of a chance. The -- the version of Mr. Stumpf's
18 facts, whether it's a difficult row to hoe is that he --
19 he drops the gun. That was one of the -- and -- and
20 shortly leaves the scene after that. So that he --
21 there's no intent, notwithstanding Justice Scalia's
22 position that you -- attempt to shoot Mr. Stout, that he's
23 automatically -- the specific intent is inferred. But
24 it's not absolutely clear, leaving the scene, that the
25 intent could be inferred to kill another witness.

1 JUSTICE SOUTER: But that's Stumpf's case.

2 MR. FREEDMAN: Yes, that's correct.

3 JUSTICE SOUTER: Yes. So I mean --

4 MR. FREEDMAN: So I'm saying that he would

5 not --

6 JUSTICE SOUTER: I don't see where Wesley --

7 MR. FREEDMAN: No, Wesley would not have --

8 Wesley would not have that scenario under --

9 JUSTICE SOUTER: So -- so Wesley would have

10 neither a -- a due process claim with respect to sentence

11 nor with respect to guilt.

12 MR. FREEDMAN: That's correct. That's correct.

13 JUSTICE GINSBURG: But now your -- your part

14 about the guilt, the Sixth Circuit agreed with you because

15 it vacated not only the sentence, but the conviction. And

16 what is your argument that the conviction is infirm?

17 MR. FREEDMAN: And -- and what they -- they

18 deduced from that is that the -- the evidence of the

19 Wesley trial -- their position is that -- and the position

20 that -- that the prosecutor took and the evidence that

21 Eastman took, that there would be no specific intent as to

22 the killing of -- of Mary Jane Stout inferred from the

23 shooting of Norman Stout because he dropped the gun. I

24 mean, you don't -- but there's no -- in -- in Ohio a plan

25 is required. There's no foreseeability or reckless

1 disregard for the death -- for the eligibility for the
2 death penalty. It's one of the few States.

3 JUSTICE SOUTER: I -- I thought the -- the
4 specific intent element would be satisfied if -- if they,
5 by plan, went to the scene with -- with deadly weapons.

6 MR. FREEDMAN: I believe under Ohio law that
7 that's not correct. I mean, it's one of the few States.
8 And I believe even the cases that are cited by the State
9 would infer that.

10 JUSTICE GINSBURG: I thought the State argued
11 that knowledge -- that there's this plan, and they had a
12 common design to rob. Is that right? And then the State
13 said that common design plus knowledge that an inherently
14 dangerous instrument would be employed to perpetuate the
15 felony or that the felony and its manner of accomplishment
16 would be reasonably likely to produce death. That's what
17 the State argued was the law of Ohio.

18 MR. FREEDMAN: But I -- I believe that they
19 needed a plan for -- for the killing of a witness. They
20 needed that plan at the time for killing the witness.
21 It's not enough just to plan the robbery for the specific
22 intent.

23 And -- and they -- in the Wesley trial, I want
24 to refer you to page --

25 JUSTICE GINSBURG: Did -- did any judge say

1 that, any judge on the Sixth Circuit say that that was the
2 Ohio law?

3 MR. FREEDMAN: I believe so. That's my reading
4 of the Sixth Circuit opinion. They said that there was an
5 element of -- of intent that was -- I believe that's the
6 -- the way I interpret the holding.

7 I would like to refer you just to page 295 of
8 the joint appendix, even the last sentence or so in the
9 first paragraph. They imply that in the Wesley trial,
10 talking about the same scenario, that there's not
11 necessarily a plan coming in to kill the witnesses. There
12 would have to be a plan while they're in the house. And
13 -- and the scenario of Mr. Stumpf dropping the gun I
14 believe is arguably that there's no specific intent.

15 I -- I would just like to sum up and indicate
16 that -- that the State argued in both cases urging the
17 death of two individuals based on killing the same person,
18 and ultimately there was not adequate review in Mr.
19 Stumpf's case indicating that he would have gotten the
20 death penalty notwithstanding Eastman's testimony,
21 notwithstanding their position that he would have gotten
22 the death penalty as an aider and abetter, which is a
23 rather rare circumstance not only in Ohio but also in this
24 country.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Freedman.

2 Mr. Cole, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF DOUGLAS R. COLE

4 ON BEHALF OF THE PETITIONER

5 MR. COLE: Justice Ginsburg, to respond to your
6 question, under Ohio law you do not need to -- to plan to
7 kill the witness in order to have specific intent for
8 aggravated murder. I would refer the Court to the In re
9 Washington and State v. Scott cases that we cite in our
10 brief that say that participation in an aggravated robbery
11 where that's going to be done through force or violence or
12 in a manner reasonably likely to result in death is
13 sufficient to support a -- an intent -- a -- an inference
14 of specific intent. So there's -- there's no need to find
15 that they planned to kill the witnesses.

16 If -- if I heard Mr. Freedman correctly, he
17 admitted that Wesley would not have a due process argument
18 here because he said the fact finders were apprised of Mr.
19 Stumpf's proceedings. Well, exactly the same is true in
20 Mr. Stumpf's case. As soon as that testimony became
21 available, as soon as Mr. -- as the prosecutor had
22 knowledge of Mr. Eastman's testimony, that testimony was
23 then placed back in the record for further proceedings in
24 the Stumpf matter. The prosecutor made arguments, but I
25 don't think that the Due Process Clause requires --

1 JUSTICE SOUTER: You -- you mean at the hearing
2 on the motion to vacate.

3 MR. COLE: Hearing on the motion to vacate and
4 further appellate review.

5 I don't think the Due Process Clause requires
6 the State to admit the ultimate truth of everything that
7 Mr. Eastman testified to at that other trial. The
8 question was did they have a good faith basis for putting
9 him on, and they did. And did they have a good faith
10 basis then for arguing that notwithstanding what he said,
11 that the conviction and the sentence in Mr. Stumpf's case
12 were appropriate? And I believe the record supports that
13 they did have a good faith basis for making that argument.

14 If we look at the arguments they made, they were
15 arguments in the nature of, look, there's this evidence in
16 the record. You may believe it, you may not. Either way,
17 Mr. Stumpf is correctly eligible for the death sentence
18 under Ohio law and that sentence is appropriate. And the
19 courts found, based on that argument, that Mr. Stumpf had
20 appropriately been sentenced to death.

21 This Court has noted that the principal function
22 of habeas is to assure that no man has been incarcerated
23 under a procedure which creates an impermissibly large
24 risk that an innocent person will be convicted. Well, we
25 don't have that risk here. Stumpf has knowingly and

1 voluntarily pled guilty, removing any risk about that.
2 And if we look to this sentencing hearing, there's no risk
3 that he received an impermissibly large sentence because
4 the prosecutor made the evidence available, and Stumpf's
5 counsel used that evidence and argued it, and the court
6 simply rejected it.

7 If the Court has no further questions, I'll
8 stop. Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole.
10 The case is submitted.

11 (Whereupon, at 11:04 a.m., the case in the
12 above-entitled matter was submitted.)
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