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IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET BRADSHAW, WARDEN, :

Petitioner :

v. : No. 04-637

JOHN DAVID STUMPF. :

- - - - -X

Washington, D.C.

Tuesday, April 19, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

DOUGLAS R. COLE, ESQ., State Solicitor, Columbus, Ohio; on behalf of the Petitioner.

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

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(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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