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LOCKHART v. FRETWELL

113 S.Ct. 838 (1993)
United States Supreme Court

FACTS

In August 1985, an Arkansas jury convicted Bobby Ray Fretwell of capital felony murder occurring during a robbery. Fretwell and two accomplices decided to steal a truck parked outside a house. Fretwell knocked on the door of the house and, when the victim answered the door, Fretwell took his money and the key to the truck. Fretwell then shot the victim in the temple, left him to die, and took the truck.

During the penalty phase, the State presented evidence for two aggravating factors: (1) the murder was committed for pecuniary gain, and (2) the murder was committed to facilitate Fretwell's escape. Fretwell testified on his own behalf, along with a psychologist. No other mitigating evidence was presented. The jury found the existence of the first aggravating factor, that the murder was committed for pecuniary gain, but not the second aggravating factor of facilitating escape. After finding no mitigating factors, the jury sentenced Fretwell to death.

On direct appeal, Fretwell argued, *inter alia*, that his death sentence should be overturned in light of *Collins v. Lockhart*.[1] In *Collins*, the Eighth Circuit Court of Appeals had held a death sentence to be unconstitutional if it was based upon an aggravating factor that duplicated an element of the underlying felony. Fretwell argued that because the only aggravating factor found by the jury—that the murder was committed for pecuniary gain—duplicated the underlying felony of murder in the course of a robbery, his death sentence was unconstitutional under *Collins*. The Arkansas Supreme Court declined to consider the argument because no objection was made to use of the aggravating factor during the sentencing phase.[2]

Fretwell filed a state habeas corpus petition, arguing that his counsel had been ineffective for failing to raise a *Collins* objection at trial. The Arkansas Supreme Court again rejected the claim, this time citing the failure of the Arkansas courts to pass on the merits of the *Collins* question at the time of Fretwell's trial.[3]

Fretwell then filed a federal habeas corpus petition alleging, *inter alia*, ineffective assistance of counsel for failure to raise a *Collins* objection. The United States District Court for the Eastern District of Arkansas held that counsel had a duty to be aware of all law relevant to capital cases and that failure to raise the *Collins* objection during the sentencing phase amounted to prejudice under *Strickland v. Washington*.[4] The district court granted Fretwell's petition and conditionally vacated the death sentence.[5]

The Eighth Circuit Court of Appeals affirmed the lower court by a divided vote,[6] even though in 1989 it had overturned its decision in *Collins*.[7] The Eighth Circuit reasoned that if trial counsel had made the *Collins* objection during the sentencing phase, the trial court would have sustained the objection. Therefore, the jury would not have considered the aggravating factor upon which they ultimately based their verdict of death, and Fretwell would have been sentenced to life. In addition, the Eighth Circuit found that Fretwell should be entitled to benefit from the law in effect at the time of the original sentencing proceeding.[8]

HOLDING

The Supreme Court reversed the Eighth Circuit, finding that Fretwell had failed to satisfy the *Strickland* test for ineffective assistance of counsel.[9] The Court ruled that Fretwell had failed to demonstrate any prejudice as a result of his attorney's failure to raise a *Collins* objection during the sentencing phase.[10]

ANALYSIS/APPLICATION IN VIRGINIA

In an opinion delivered by Chief Justice Rehnquist, the Supreme Court focused on the Sixth Amendment's right to counsel as primarily a protection of a defendant's fundamental right to a fair trial. Pointing out that the *Strickland* test reflects this concern for fairness and reliability in the trial process, Rehnquist reasoned that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[11] Because the Eighth Circuit had overturned its *Collins* decision in 1989, Rehnquist found that the result of Fretwell's trial was neither unfair nor unreliable: "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[12]

Under Rehnquist's interpretation, a defendant's rights under a *Strickland* claim of ineffective assistance of counsel will be evaluated under the law existing at the time the claim is heard, not under the law in existence at the time of the alleged errors. In a strongly worded dissent, Justice Stevens, joined by Justice Blackmun, pointed out the inconsistency of the majority's position with the Court's retroactivity ruling in *Teague v. Lane*.[13] Justice Stevens reasoned:

> If, under *Teague*, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, then there is no self-evident reason why a State shou able to take advantage of subsequent changes in the law when they are adverse to his interests.

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1 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

2 *Fretwell v. State*, 708 S.W.2d 630 (Ark. 1986).

3 *Fretwell v. State*, 728 S.W.2d 180, 181 (Ark. 1987).

4 *Fretwell v. Lockhart*, 739 F.Supp. 1334, 1337 (E.D. Ark. 1990). In *Strickland*, 466 U.S. 668 (1984), the Supreme Court established a two prong test to determine ineffective assistance of counsel. First, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

5 *Fretwell*, 739 F.Supp. at 1337.

6 *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991).

7 *See Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989). The Eighth Circuit overruled *Collins* because an ensuing Supreme Court opinion, *Lowenfield v. Phelps*, 484 U.S. 231 (1988), had undermined the reasoning of *Collins*.

8 *Fretwell*, 946 F.2d at 578.

9 *Lockhart v. Fretwell*, 113 S.Ct. 838, 841 (1993).

10 *Id.*

11 *Id.* at 842.

12 *Id.* at 844.

13 489 U.S. 288 (1989). In *Teague*, the Court held that "'new rules' . . . should not be applied retroactively to cases on collateral review." A case is deemed to announce a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301.

A rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially.[14]

Justice Stevens also pointed to an apparent change in the Court's application of the *Strickland* standards for an ineffective assistance of counsel claim: "Strickland makes clear that the merits of an ineffective assistance claim must be 'viewed as of the time of counsel's conduct.'"[15] Stevens argued that this standard should apply to the prejudice prong, as well as to the quality of counsel's performance: "By defining prejudice in terms of the effect of counsel's errors on the outcome of the proceedings, based on the 'totality of the evidence before the judge or jury,' the *Strickland* Court establishes its point of reference firmly at the time of trial or sentencing."[16]

In contrast, the majority opinion maintained that the requirement that counsel's conduct be assessed based at the time of trial did not apply to the prejudice prong because "[prejudice] focuses on the question whether counsel's deficient performance renders the results of the trial unreliable or the proceeding fundamentally unfair."[17] If an open question previously existed as to the timing of the prejudice analysis under *Strickland*, the majority opinion makes it clear that it is the law existing **at the time of review** that is to be considered in determining prejudice.

Now that prejudice under a *Strickland* claim is analyzed in light of changes in the law beneficial only to the State, the need for timely objection at trial is all the more important. After *Fretwell*, even failure to raise a claim that clearly constituted attorney incompetence may not result in relief if the law changes unfavorably. When added to the major hurdle of the *Teague* retroactivity rule, the Court has built an effective roadblock to capital defendants seeking habeas relief.

Summary and Analysis By:
Susan F. Henderson

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14 *Lockhart*, 113 S.Ct. at 852-853 (Stevens, J., dissenting).

15 *Id.* at 849 (quoting *Strickland*, 466 U.S. at 690).

16 *Lockhart*, 113 S.Ct. at 849 (quoting *Strickland*, 466 U.S. at 695 (citation omitted)). Justice Stevens also found that Fretwell's attorney had so fundamentally failed the first prong of the *Strickland* test that Fretwell might be entitled to relief even if he could not show prejudice under the second prong:

> The fact that counsel's performance constituted an abject failure to address the most important legal question at issue in his client's death penalty hearing gives rise, without more, to a powerful presumption of breakdown in the entire adversarial system. . . . In other words, there may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards under *Strickland*'s first prong that it functions as the equivalent of an actual conflict of interest, generating a presumption of prejudice and automatic reversal.

Id. at 851.

17 *Id.* at 844.

GRAHAM v. COLLINS

113 S.Ct. 892 (1993)
United States Supreme Court

FACTS

On May 13, 1981, Gary Graham shot Bobby Grant Lambert to death in the parking lot of a Houston grocery store during the course of a robbery. At trial Graham's mistaken identity defense failed and he was convicted of capital murder. At the sentencing phase, after the state presented evidence that Lambert's murder began a week during which Graham committed a series of violent crimes, Graham attempted to put on evidence in mitigation of his general good character traits, his relative youth, and a positive employment history. Applying the "special questions" scheme of the Texas capital-sentencing statute,[1] the jury sentenced Graham to death. After the Texas Court of Criminal Appeals affirmed the sentence and the state courts rejected Graham's attempts at post-conviction relief, Graham petitioned in federal district court for habeas corpus relief arguing that a jury could not give proper consideration to his mitigating evidence within the confines of the Texas special issues scheme. The district court and the Court of Appeals for the Fifth Circuit denied Graham's petition for

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1 The Texas capital-sentencing statute at the time of Graham's trial required the jury to consider:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased would occur; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Crim. Proc. Code Ann. art. 37.071(b) (Vernon 1981). In order for the death sentence to be imposed the jury was required to unanimously answer all three questions in the affirmative.

The Texas legislature amended the death penalty statute in 1991 in response to *Penry v. Lynaugh*, 492 U.S. 302 (1989). The current law instructs the jury that "it shall consider all evidence . . . including evidence of the defendant's background or character or the circumstances of the offense which militates for or mitigates against the imposition of the death penalty." Tex. Crim. Proc. Code Ann. art. 37.071(d)(1) (Vernon 1993).