SUPREME COURT OF THE UNITED STATES

No. 91–1393

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, PETITIONER *v.* BOBBY RAY FRETWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 25, 1993]

JUSTICE O'CONNOR, concurring.

I join the Court's opinion and concur in its judgment. I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland* v. *Washington*, 466 U. S. 668 (1984). The determinative question—whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694—remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry. As we explained in *Strickland*, certain factors, real though they may be, simply cannot be taken into account:

> "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, `nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially

> applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Id.*, at 695.

Since *Strickland*, we have recognized that neither the likely effect of perjured testimony nor the impact of a meritless Fourth Amendment objection is an appropriate consideration in the prejudice inquiry. *Nix* v. *Whiteside*, 475 U. S. 157 (1986) (failure to put on perjured testimony); *Kimmelman* v. *Morrison*, 477 U. S. 365, 382 (1986) (where the defendant claims that the deficient performance was failure to make a suppression motion, "a *meritorious* Fourth Amendment issue is necessary to the success of a Sixth Amendment claim" (emphasis added)).

Today the Court identifies another factor that ought not inform the prejudice inquiry. Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission. That narrow holding, of course, precisely disposes of this case as it appeared before the Eighth Circuit. The omitted objection of which respondent complained very well may have been sustained had it been raised at trial. But by the time the Eighth Circuit reviewed respondent's ineffective assistance claim, on-point Circuit authority bound that court to hold the objection meritless; the Arkansas Supreme Court had rejected the objection as well. *Perry* v. *Lockhart*, 871 F. 2d 1384, 1392–1394 (CA8), cert. denied, 493 U. S. 959 (1989); *O'Rourke* v. *State*, 295 Ark. 57, 63–64, 746 S. W. 2d 52, 55–56 (1988). Consequently, respondent's claim of prejudice was based not on the allegation that he was denied an advantage the law might permit him. It was predicated instead on the suggestion that he might have

been denied "a right the law simply does not recognize," *Nix, supra,* at 186–187 (BLACKMUN, J., concurring in judgment), namely the right to "have the state court make an error in his favor," *ante*, at 6 (opinion of the Court) (internal quotation marks omitted). It seems to me that the impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration when assessing "the likelihood of a result more favorable to the defendant." *Strickland*, *supra*, at 695. I therefore join the Court in holding that, in these somewhat unusual circumstances, the Court of Appeals should have concluded that respondent suffered no legally cognizable prejudice.