Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

R. K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, Petitioners,	**Docket No.** 44
vs.	
VERON ATCHLEY, Respondent	

Place Washington, D. C.

Date November 18, 1970

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C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

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R. K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, Petitioners,	:	
vs.	:	No. 44
VERON ATCHLEY, Respondent.	:	

Washington, D. C.,

Wednesday, November 18, 1970.

The above-entitled matter came on for argument at 10:48 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

ROBERT R. GRANUCCI, ESQ.,
Deputy Attorney General of
the State of California

CHARLES A. LEGGE, ESQ.,
San Francisco, California
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 44, Procunier vs. Atchley.

Mr. Granucci, you may proceed whenever you are ready.

ARGUMENT OF ROBERT R. GRANUCCI, ESQ.,

ON BEHALF OF THE STATE OF CALIFORNIA

MR. GRANUCCI: Mr. Chief Justice, and may it please the Court. This is another chapter and the final chapter in the story of a criminal prosecution that commenced in 1958. This case comes here after the United States District Court, in a decision affirmed by the Court of Appeals for the Ninth Circuit, ordered the State of California to hold a new hearing in the state courts on the question of whether Atchley's confession was voluntarily given, which confession was introduced at his trial over objection, and a lengthy hearing at the trial, and the question was reviewed and affirmed by unanimous opinion of the Supreme Court of California, and the decisions of the state courts which were adverse to Atchley, brought to this Court.

I think the issue that is really presented today is whether a State Supreme Court decision on the merits of a federal claim in a criminal case can be given a presumption of correctness in federal habeas corpus proceedings.

Now, if the answer to that question is in the

negative, then the state appellate review of federal constitutional claims in criminal cases is an utter waste of time for everyone concerned, and state appellate courts would be well advised to relegate criminal defendants to the federal courts for the immediate litigation of their constitutional arguments.

Now, by way of procedural background: Atchley was convicted of murder in January 1959 after a jury trial in the Superior Court for Butte County, California. Because he was sentenced to death, and incidentally that sentence was subsequently commuted to life imprisonment and then commuted again to allow him the possibility of parole for which he is presently eligible, his appeal to the California State Supreme Court was automatic.

That court affirmed the conviction in a unanimous opinion authored by then Associate Justice Trainor, to which we will refer in some detail later. Suffice it to say at this point, the principal issue raised by Atchley on his state appeal was whether his confession was voluntarily made. The California Supreme Court concluded that it was.

Atchley then came to this court on a petition for a writ of certiorari, which was granted. Briefs were filed. The record was filed, and the case was argued. But after hearing argument and examining the record of the state proceedings, this Court dismissed the writ as improvidently granted.

Shortly thereafter, Atchley filed a petition for a writ of habeas corpus in the District Court for the Northern District of California. This was denied summarily, and the denial was affirmed by the Court of Appeals for the Ninth Circuit.

In 1967, Atchley filed a second petition for a writ of habeas corpus in the Federal Court for the Northern District of California. That petition challenged the admission into evidence of a tape recorded confession which he had given to his friend and insurance agent, one Ray Travers, the same issued that had been presented to the California Supreme Court.

The District Court granted the writ. It did not say that Atchley's confession was involuntary. Indeed, the court admitted that it could not say that Atchley's confession was involuntary. The District Court avoided the necessity of passing on that issue by holding that the procedure followed in the state trial court was not fully adequate to achieve a reliable determination that Atchley's confession was voluntary.

By the order of the District Court, we are relegated to the State courts for further hearing on this issue, with the possibility of further appeals in the state and federal courts Atchley loses again.

We say that the District Court erred in refusing to apply the presumption of correctness contained in title 28, United States Code, section 2254(d) which was enacted in 1956.

The District Court refused to apply the presumption for two reasons.

One, the District Court concluded that a clear-cut determination of voluntariness did not appear on the state court record. Secondly, the District Court stated that the trial court had applied an erroneous legal standard. We respectfully submit that the District Court was wrong for three distinct reasons.

First, there was a definite ruling on the merits of Atchley's constitutional claims in both the trial court and the California Supreme Court. The District Court totally ignored the independent review of the California Supreme Court, focused its attention on the trial court. It was wrong in both instances.

First of all, with regard to the trial court, I point out that California is a jurisdiction that adheres to the Massachusetts or "humane rule" in determining the admissibility of confessions. That is to say the question of voluntariness is one that is to be determined first of all by the trial judge. And if the trial judge finds the confession voluntarily made, the confession is again submitted to the jury for a second albeit redundant determination of the voluntariness question.

This Court, in Jackson vs. Denno, in the concurring opinion of Mr. Justice Black, has indeed recognized that

California does follow the Massachusetts or "humane rule."

Now, Atchley had a ruling on the voluntariness of his confession when the trial court, over objection, allowed the confession to go to the jury on the issue of guilt. While the trial court did not give detailed and specific instructions on the question of voluntariness to the jury, this is unnecessary for purposes of federal review, because all Jackson vs. Denno requires is that the trial judge make a determination. When that is done, the question of whether to submit the matter to the jury for a second determination is truly one of state law.

So there was compliance with Jackson vs. Denno in the trial court, and there was also a definite ruling on the merits by the California Supreme Court. That court exercised the power of independent review and found the confession voluntary.

Now, the District Court, we submit, erred in holding that the material facts were not fully developed. Each of the alleged inadequacies relied on by the District Court in the development of the facts can be answered by an examination of the state trial record and the opinion of the California Supreme Court.

First of all, the fact that Atchley was trying to contact a particular attorney in San Jose, and this is a point that the District Court said wasn't sufficiently

explored. Well, this was brought out in the trial record. It was considered by the California Supreme Court. In this case, the record also showed that Atchley was not an indigent. He was a man who ran a used car business, speculated in small parcels of property. He has access to a telephone while he was under arrest and he had retained local attorneys to carry on some civil litigation in connection with his business activities.

In any event, Atchley spontaneously confessed to a third party, and that is why, even if there was a clear-cut showing of denial of counsel, it would have little if any weight under these circumstances. The California Supreme Court also considered the point, and moreover Escobedo, which was a first decision by this court to specifically make a request for counsel, the denial thereof, determined it in a confession case. Escobedo is not retroactively applied.

The second point that the District Court said wasn't adequately developed was Travers' concealment from Atchley of his motives for having a second conversation. Now, I would point out, although it is spelled out in great detail in the briefs, I would point out for the illumination of the Court at this point that there were two conversations.

About two days after he was arrested, Mr. Atchley called his insurance agent, one Ray Travers, called him down to the jail to talk about the circumstances of his insurance,

the changes that resulted from his condition of arrest. Now, at that time spontaneously, without any involvement of law enforcement, Atchley admitted to Travers that he had fired the shots that killed his wife. Travers reported this to the police. The police asked Travers if he would go back and get a second statement from Atchley that they would tape record. He agreed to do so because -- and this appears in the record -- he had told Atchley that he was coming back to get further information in any event.

Now, it is the second of these statements, this second statement that was tape recorded that was at issue here. In any event, the Supreme Court reviewed this matter of deception and held that this would not make a statement involuntary because it was not the sort of deception that would be likely to produce an untrustworthy statement.

Third, the District Court said that the fact that Atchley did not know that the conversation would be recorded, that this wasn't adequately developed, but it was in the record, it was considered by the California Supreme Court, and Atchley's lack of knowledge of this point would hardly put any pressure on him to confess.

Finally, the -- no, fourth, what the officers said to Travers -- again, this was relied on by the District Court, but this wasn't material to Atchley's state of mind. There is no question that Travers was acting on behalf of law

enforcement at the time the second confession was given. We don't deny that at all.

Firth, evidence of his mental condition, says the District Court, was not adequately developed. But Atchley did not offer evidence of his state of mind at the time he made the confession. His offer of proof as to state of mind at his trial went only to the time of the shooting. The District Court also said that Atchley should have been allowed to develop proof of his education, his limited background.

Well, the Trial Court, when the prosecution objected to proof of this nature, overruled the prosecution's objection and allowed defense counsel to proceed. However, the reason this point wasn't developed is that defense counsel went on to another line of inquiry, and that appears at page 147.

Q Did Travers testify to the conversation which he had on his first visit to the cell block?

A He did, Your Honor.

Q Did he testify to the second also?

A He testified to the second, and the tape recording of the second conversation was played to the jury.

Since the commencement of this proceeding in the Federal Court, Atchley has never specifically suggested any additional evidence that was not already contained in the trial court record. Indeed, he has abundantly documented his

argument that his statement was involuntary as a matter of law, with citations to testimony in the record of the state trial proceedings.

Now, we most respectfully submit that this is the very type of case that Congress had in mind when it enacted title 28, United States Code, section 2254(d).

Q When was that section enacted?

A November 2, 1966, Your Honor.

Q What prompted it? Did you look into that?

A Your Honor, I am convinced that it was dissatisfaction with this Court's decisions in Fay vs. Noia and Townsend vs. Sain, and the great expansion of the use of habeas corpus in the federal district courts to non-collateral attack on state criminal convictions.

Q Have you looked at the legislative history of that?

A Yes, Your Honor.

Q Did it come through the Judicial Conference of the United States?

A I believe it did, Your Honor.

Q With approval?

A I believe it did. I think there was some modification though. I think that at one point in the Judicial Conference it was suggested that federal habeas corpus cases be tried by three-judge federal courts, and this proposal was

specifically deleted in the legislation as it was passed by Congress for the reason that it was felt that the three-judge court requirement would pose an undue burden on the federal judiciary.

Your Honor, the legislative history is cited in our brief. It is relatively short. The committee reports are relatively short and we respectfully commend them to Your Honor's attention.

Q I don't understand your observation that you thought the amendment of 2254(d) reflected some congressional dissatisfaction with Townsend vs. Sain. How can you say that, when 2254(d) enacts all of the standards for review laid down in Townsend vs. Sain?

A Mr. Justice Brennan --

Q Is that not a congressional acceptance of them?

A Mr. Justice Brennan, it has been suggested that 2254(d) is a codification of Townsend vs. Sain --

Q Well, it uses the identical language, doesn't it?

A No, it doesn't, Your Honor.

Q It doesn't?

A In fact, the only thing that those two sections have in common is that criteria are present. First of all --

Q Are there criteria any different from those laid down in Townsend vs. Sain?

A Yes, Your Honor. For one thing, the sixth criteria in Townsend vs. Sain, namely that the federal court -- whenever he feels he ought to be granted a hearing, that was specifically deleted. Also specifically deleted was a provision in Townsend vs. Sain which allowed the federal habeas court to grant a hearing on substantial allegations of newly discovered evidence.

Now this thing was deleted, and it is interesting to note --

Q I thought it was omitted?

A Omitted, Your Honor, that would be the better term -- it is interesting to note, though, that contemporaneously Congress amended 2244 which involved subsequent hearings on federal --

Q 2255.

A Excuse me, 2244, relating to subsequent hearings in federal courts after a hearing in a federal court on the merits, or after a hearing in this Court after the grant of a writ of certiorari on determination on the merits, and those provisions contain mention of newly discovered evidence as a ground for grant of a further hearing. It is not contained in 2254(d), and I think that is significant.

The second big difference between Townsend vs. Sain and 2254(d) is this: That under Townsend vs. Sain, where the criteria were satisfied, the Federal District Court was

permitted -- authorized, if you will -- to accept state court findings of fact. Under the statute, the Federal District Court is required to accept the findings of fact. In other words, the section, if you will, turns the authorization of Townsend vs. Sain into an actual requirement. Also the petitioner is given the burden of showing that the criteria for the adequatey of state court hearings are not present.

A second further distinction is that 2254(d) changed the burden of proof in habeas corpus cases. Now, traditionally, as in all civil cases, the burden of proof in a habeas corpus case was on the petitioner, but it was proof by a preponderance of the evidence only. 2254(d) says that where the criteria are satisfied, proof must be made by clear and convincing evidence. Obviously, a higher standard of proof.

We think the District Court erred for the further reason that it totally ignored in its order the effect of the independent review afforded actually by the California Supreme Court. Just as this Court does in confession cases, the appellate courts of the State of California afford independent review in confession cases, therefore the decision of the California Supreme Court should have been afforded a presumption of correctness separate and apart from that given the trial court.

Now, we think it is quite reasonable, given the policy behind section 2254(d), to apply it to the opinions of

state appellate courts when they consider claims on the merits. Obviously, 2254(d) refers to "a determination after the hearing on the merits of a factual issue." And while this section obviously contemplates a determination by a trial judge after a hearing, it ought not to be confined to that meaning.

There are two additional interpretations to which the section is reasonably susceptible. First, a determination may refer to the decision of an appellate court.

Q Could I interrupt you there and ask you this question? I gather under 2244 if when this case was here on direct review, we sustained the Supreme Court of California, then 2244 was amended, would have precluded what happened here on a federal basis, would it not?

A Yes, Your Honor.

Q Well, I don't find it in your brief. You have argued that our disposition back in 356 was tantamount to sustaining the Supreme Court of California. What we said there was, after hearing the argument and fully examining the record, we conclude that the totality of circumstances as the right manifest did not warrant bringing the case here, accordingly the writ is dismissed. Now, for some reason you haven't argued that that was in substance sustaining the Supreme Court of California?

A Your Honor, I wish I could have argued that in the District Court, and the reason I couldn't is because --

Q Well, why can't you argue it here?

A -- a denial of certiorari, Your Honor --

Q No, it's not.

A -- is not a ruling on the merits.

Q We dismissed the writ. We didn't deny it. We dismissed the writ. We granted the writ. We didn't deny the writ.

A I have always understood, Your Honor, that a dismissal of cert after hearing argument is the same as a denial of hearing.

Q We didn't dismiss as improvidently granted. We didn't say that, did we?

A I think that is fairly apparent from Your Honor's language.

Q Well, in any event, if we construe this as having passed on the merits and reverse on that ground, are you going to be offended?

A Your Honor, I could never be offended by winning a case in the United States Supreme Court.

Q I am just surprised you haven't argued it. You don't say a word about it in your brief.

A Your Honor --

Q I think this is a little bit more than a simple denial. I think I read this in your brief yesterday.

A Yes, Your Honor, it is a little more than a

simple denial, but in light of Fay vs. Noia, in light of 2244, which talks about a determination on the merits, I didn't feel I could conscientiously argue that it was, particularly when the point that I am seeking to present to this Court has much more important implications for federal-state relations.

Q You don't really want to win this case, then. You want us to review Fay vs. Noia and Townsend vs. Sain, that is what you're after?

A I would like both, Your Honor.

Q I see.

A I would like both. And if I can't get both, I will take one.

Q And you may not get either.

(Laughter.)

A That is always a risk.

In any event, we think that the determination mentioned in 2254(d) can refer to determinations by state appellate courts which pass upon the merits of federal questions.

Now, in the years just passed, this Court has taken many steps to extend state appellate review to state prisoners. Beginning in Griffin vs. Illinois, in which it provided transcripts, then proceeding through Douglas vs. California, in which it made the appointment of counsel mandatory, and culminating in Anders vs. California, in which it stated that counsel in a state appeal must present every non-frivolous claim --

this Court has proceeded to compel the states to set up meaningful appellate procedure for the review of the merits of federal claims.

How can this Court now, by refusing to apply the presumption of correctness to the state appellate decision, say that state appellate decisions are meaningless, when this Court itself has said that the state must provide meaningful appellate review?

There are compelling reasons, we think, for extending presumption of correctness to state appellate decisions. First of all, we think most respectfully that Fay vs. Noia underestimated the great importance of finality in the criminal law. We think that state court decisions where full procedural fairness has been afforded up and down the line ought to be given finality.

Perhaps a most important reason is to strengthen public confidence in the administration of justice. Nothing erodes that confidence as much as the constant litigation and relitigation and relitigation again of claims in the federal courts by state prisoners.

Extending the presumption to state appellate decisions, we encourage state appellate courts to review federal claims on the merits. I think that every commendator who has considered the matter has concluded that federal claims should be considered on the merits as soon as possible after the

trial has been completed.

Q Well, and during the trial, too?

A And during the trial, too.

Q At the first opportunity that they are raised, that is --

A At the first opportunity that they are fairly raised. Also I think also that what the District Court did here that was wrong was reviewing this state trial record in the microscopic examination, illuminated by the glare of hindsight. If we --

Q I gather the District Court and the Court of Appeals did nothing that we hadn't already done, is that right?

A Well --

Q They acted only on the same record that was before us?

A That's correct.

Q By which we heard oral argument and of which we fully examined.

A That is correct, Mr. Justice Brennan.

Q And I still get back to my question, I don't understand why -- well, yes, I guess I do understand.

A We didn't think it was a ruling -- we didn't think the decision in this Court was a ruling on the merits.

Q And if you prefer to look at it that way.

A Now, with the permission of the Court, I would

like to reserve the remainder of my time to reply to learned counsel.

MR. CHIEF JUSTICE BURGER: Mr. Legge?

ARGUMENT OF CHARLES A. LEGGE, ESQ.,

ON BEHALF OF RESPONDENT

MR. LEGGE: May it please the Court, Mr. Chief Justice. The apparent major thrust of the state's argument is really that the courts of appeal of the state should substitute their appellate processes for the federal habeas corpus review of the facts which have been required by this Court and also required by Congress.

The question of whether a federal court should exceed to the decisions of the state in the same way as it would its own fact finding process, I think the answer to whether it should is a resounding no, it should not. Federal appellate review -- correction, state appellate review cannot constitute a substitute for review of the facts by the federal courts.

Q Well, I put to you, didn't we review the facts in this case?

A I do not believe you did, Your Honor.

Q Did we say we did? We said we did.

A The ruling of the Court, I believe --

Q Not the ruling -- didn't we say we did?

A You said the --

Q After hearing oral argument and fully examining the record, we conclude that the totality of circumstances of the record makes it manifest that it doesn't warrant bringing the case here. Didn't we say that we had fully examined the record?

A Yes, the words are there, Your Honor, but I must say that the relief granted by this Court to wit the dismissal of the certiorari petition as improvidently granted has in many --

Q Did -- we didn't say improvidently granted.

A Well, I believe that was the construction of the Court.

Q That was the construction of the District Court?

A Yes. But it seems to me that you have wrestled with this question in the Rogers case, and have gone into the question of when and where this Court must pass upon the merits of a decision and when and where it may rule that certiorari is improvidently granted, and it seems to me that the only rule we can gather, that the bar can gather from those cases is that if you have got four, you have got certiorari, and you can dismiss the certiorari as being improvidently granted, but that does not constitute a ruling upon the merits of the case.

Now, I would also note, Your Honor, that of course

since that case was first before this Court, we have had decisions of Jackson vs. Denno, we have had decisions of Escobedo, we have had decisions of Miranda.

Q Yes, but I am right, am I not, that the decisions here in habeas were only on the state court record?

A That's quite right.

Q The same record that we had before us before?

A That's quite correct, because you granted the remedy that the District Court granted, was let's have a hearing, let's determine the facts. Now, I --

Q Well, they didn't have a hearing, at least they had no evidenciary hearing?

A No. No, this is what the District Court granted.

Q What happened in the District Court that hasn't already happened here in the way of argument?

A In the way of argument, Your Honor?

Q Anything different?

A I can't say that. We did not represent them before this Court. We were appointed in 1967, so I can't say what was done.

But I do simply wish to conclude my response to your question with the mere statement that we do not believe that the decision of this Court in a prior review of this matter constituted a ruling upon the merits.

Now, if I may return to the state's main argument --

Q On the merits of voluntariness, are you narrowing it to that?

A I am not, merits of any of it. This Court decided that as a matter of policy or matter of a total review that the granting of certiorari had been improvident and it reversed that grant of certiorari.

Q Were there questions -- I know the record was the same when it was here before -- were there questions pressed by the petitioner when it was here before the same as the --

A I cannot answer the question, Mr. Justice White, because we did not represent them in that prior hearing.

Q You haven't looked at the --

A I have attempted to do so.

Q -- petition for certiorari?

A Yes, and we do find that there are questions presented of voluntariness.

Q Were any questions raised in this proceeding about his habeas corpus petition that were not raised?

A Certainly.

Q What?

A The denial of counsel, the Jackson vs. Denno case, and the application of Miranda and Escobedo retroactively back to the time of his confession. Now, those are, of course,

matters that were brought before the District Court that were not before this Court the first time.

Q New legal issues were raised --

A Yes, Your Honor.

Q -- in this petition for habeas corpus --

A Yes, Your Honor.

Q -- on the same factual record?

A On the same factual record.

Q Yes, but I gather the standard of voluntariness under the Johnson decision was the pre-Escobedo standard, wasn't it?

A This Court has said that in evaluating the voluntariness of a confession that Escobedo and Miranda are retroactive.

Q No, you mean relevant, that there was no counsel sought. But wasn't that always the case on voluntariness cases before Miranda?

A I'm sorry, wasn't what?

Q Weren't those relevant considerations, counsel, entitled to counsel and so forth?

A There might have been.

Q Even before we decided Miranda?

A There may have been, but certainly sharpened by Miranda and sharpened by Escobedo.

Your Honor, if I may return to what I believe is

the state's main thrust here, and that is that they want state appellate review to have the dignity of fact finding as required by this Court and required by Congress in the chapter dealing with habeas corpus.

I do not believe that state appellate review can ever perform the function of the fact finding that is required by this Court and required by Congress. The first point is this: In state appellate review you have a principle of substantial evidence.

Now, the state says it is an initial review, but it is still an initial review based with a substantial evidence rule. And I cite for that a 1970 case by the California Supreme Court that defines the scope of its appellate review of confession cases.

This is People vs. Randal, cited in 1 Cal 3d 948, and I wish to quote from page 954 of that opinion just very briefly:

"On this appeal we accept the version of the events which is most favorable to the people to the extent it is supported by the record and confine our review beyond such testimony to facts which are uncontradicted by the people."

Now, I submit, Your Honors, that by any proper definition that is a substantial evidence rule, and that substantial evidence rule has impact on this case, because if Your Honors review the language of the state court opinion,

you will find that the facts are essentially the facts that were stated in the recorded confession.

Now, appellate review --

Q You suggest they were different from the facts which Travers testified to independently?

A There were material differences that are referred to in the brief, Your Honor. However, I state the point in comparing state appellate review versus a fact finding process which is what we believe is required on habeas corpus, that this is an example of how it works. The state picks up in its opinion those facts which are most favorable to the people, assuming of course that there has been a conviction.

Now, you combine that substantial evidence rule with a harmless error rule on appeal, and this is exactly what happened to Mr. Atchley in this case. The California Supreme Court said he didn't have a lawyer, that was error for the judge to stop that testimony, that it was harmless error. So you have a substantial evidence rule, you have a harmless error rule, and of course you have the fact also that the appellate courts have no facility for taking evidence.

Q Let me see if I get -- I am not sure I understand the substance of your argument. Let me project this into an assumption that this case went back to review in that a new trial would be the remedy.

A Yes.

Q Would you suggest that Travers could not testify at that new trial?

A No, I wouldn't suggest that at all, Your Honor. I am responding to the state's contention that the state of California's appellate review on direct appeal from the conviction forecloses us from waiving these fact finding determinations in the district court. That is what I am replying to. And what I am stating are the reasons why state appellate review can be no substitute for a fact finding process.

Now, I believe this Court has said the same thing in Jackson vs. Denno. It said when facts are important, appellate review is an inadequate substitute for a trial court hearing. So what I think we have is this, Your Honor: If there is going to be examination into the constitutionality of convictions, there has to be the fact finding process so that matters that are extraneous to the record can be brought in so they can be evaluated, so that constitutional significance can be weighed. And I don't believe that a state court appellate opinion could ever satisfy that function.

Q What kind of extraneous facts do you have in mind?

A You mean in our case or hypothetically?

Q In this case?

A In this case, Your Honor, the facts that we would bring in would be the facts which were omitted from

evidence by the state court. For example, the fact of no lawyer. For example, testimony between Mr. Travers to obtain the recording with the state police officer. Facts pertaining to Mr. Atchley's mental and physical condition. Facts which were not brought forth in the record and which should have been brought forth in the record, and on a new evidenciary hearing will be brought forth in the record.

To broaden it beyond this case, to respond to Your Honor's question in that manner, take the classic search and seizure case where a defendant objects to certain evidence used at his trial was improperly obtained in violation of the Fourth Amendment. Of course, that kind of thing would very rarely ever be in the transcript of the state court hearing. You could only develop that kind of thing in a vast majority of cases by having the hearing into factual determinations made by a federal court.

Now, Your Honors, we have here in this case the coming together of really three very fundamental rights which the Court has long protected. These are the problems surrounding confession, the right of an accused to an attorney, and the right of an accused to a fair hearing on whatever merits, on whatever issues he raises in connection with his trial on the merits.

Now, this Court has devoted a great deal of time and attention in past decisions to its confession cases. It

has expressed itself time and again the importance of confession cases to the administration of justice. And it has also gone to the point of making its confession cases retroactive, which is significant.

With respect to the right to an attorney, some references were made by the state's attorney to whether Mr. Atchley had access to one or not. We believe that the record is patently clear and in fact undenied that he requested a lawyer and did not receive one. I am reading from page 189 to 190 of the record:

"Question: How many times did you ask for a lawyer, wouldyou say?

"Answer: I would say I asked for a lawyer ten times.

"Question: And you asked how many people?

"Answer: Well, everyone that I talked to I still asked them for a lawyer."

Referring to page 206 of the transcript, where Mr. Atchley is under examination by the State's Attorney, Mr. Atchley says this:

"As I said, I asked for counsel about eight or ten times when I got down here where I could tell the truth and nothing but the truth, and yourns wouldn't give me one."

Now, there is no --

Q Did he ever claim indigency?

A Pardon me, Your Honor?

Q Did he ever claim indigency?

A He was represented in the trial of this case by a court appointed attorney.

Q Did he claim indigency at the time that he asked -- he asked for an appointed lawyer?

A He asked for -- yes, he asked the police to provide him with a lawyer.

Q And did he give any reason for it?

A For what, Your Honor?

Q Well, suppose he is a millionnaire?

A Well, the record doesn't say, Your Honor.

Q It doesn't show?

A It doesn't say, no. But certainly I think you can state this, that when he asks repeatedly, when there is testimony in the record that he didn't get it, and when he is represented at the trial of his case by court appointed counsel, I think it is undeniably true --

Q It is what?

A -- it is undeniably clear that the man was asking for a lawyer to be appointed for him.

Q Well, it is not undeniably clear that he needed, that he didn't have money.

A Well, the record --

Q I understood the Deputy Attorney General to

say that this man had property.

A Well, the record, I don't believe, Your Honor, contains any language to the effect of whether he did or did not. I would say this, that it is this evidence that was blocked by the trial court, the trial court did not permit any testimony to be introduced on the subject of an attorney, because the trial court says --

Q The state says that is harmless error?

A Yes, and the trial court says you can't even hear it.

Q What is your answer to that?

A My answer is that it is not harmless error.

Q Why?

A Because of Escobedo and Miranda, these are very valid, very important constitutional rights which have been applied retroactively in confession situations. You have here the coming together of two rights, protection from involuntary confession and the right to a lawyer. In fact, we think that coming together is so clear that this Court should rule that the confession is involuntary as a matter of law, that at the very lease we should be entitled to that evidenciary hearing where the evidence blocked at a trial court as to the circumstances surrounding the need for a lawyer, questions which Mr. Justice Marshall --

Q We should do it as a matter of law, on the

basis of that I get back to Justice Brennan's point, the court had the opportunity to do that but passed it up.

A Well, it may have done so, it may have passed up the opportunity, we don't think we are foreclosed from asking this Court to do it.

Q I didn't understand that either Miranda or Escobedo had been applied retroactively.

A Well, they have been applied retroactively, Your Honor, to the subject of confessions. We cite these cases on page 14 of our brief. They are Darwin vs. Connecticut, Johnson vs. New Jersey, and Davis vs. North Carolina. The courts --

Q You mean Johnson vs. New Jersey held that Miranda was to be applied retroactively?

A Retroactively to the relevance and to the substance of whether a confession is or is not voluntary.

Q Well, that was always the rule.

A Well, it may have always been the rule, the case certainly states the rule. I needn't argue whether it had been that rule or not before.

Q The circumstances surrounding this man's -- what you call his confession, it actually wasn't quite that -- in this case was the error of Crooker vs. California.

A I'm sorry, I --

Q Doesn't it?

A I can't respond to this specific case, Your Honor.

Q Involving situations like very much Escobedo in which this Court affirmed the conviction.

A Well, I can't respond to the cases, Your Honor, because neither the state nor I have considered them in our briefs here.

Q Does your case depend upon whether you have to make out ultimately that the statements made to Travers before they were recorded constituted a confession legally?

A No, I do not believe so, Your Honor, because what Mr. Travers did not directly testify in this record as to what Mr. Atchley told him. I assume that what Your Honor is saying is suppose the recorded confession were just lifted from the transcript and placed aside and all you had left was Travers' oraltestimony, would that be a confession. And it would not, Your Honor. I am satisfied that all they used Travers for was to lay the foundation, the evidenciary foundation for the introduction of the confession.

Q What about the defendant's testimony, added to the defendant's testimony?

A Well, with the defendant's testimony, following after the confession, that is after the confession is played to the jury, you have a circumstance, Your Honor, where what can he do, what can he say. Now, the decisions of

this Court, many, many of them say that regardless of evidence, regardless of how many other confessions there may be, regardless of independent evidence of guilt, but if there is an involuntary confession, the conviction is improper.

Now, I would certainly say, Your Honor, that there is nothing in the defendant's testimony here in trial to constitute a confession.

Q The ultimate relief you want is a new trial?

A The best ultimate relief we can get, Your Honor, is a new trial.

Q Now, the criminal act here takes place when, in 1958?

A 1958 or 1959.

Q It was tried in '59 originally?

A I believe so, '58 or '59.

Q So you would be trying this case, if it were retried, some twelve years or thirteen years --

A That's quite true, Your Honor. That's quite true. But I don't think that the mere passage of time should have the effect of eliminating constitutional violations. We have -- this Court has certain control over that also in connection with the decisions which it decides to make retroactive and those which it does not make retroactive. And it has declared that its Jackson vs. Denno decisions are going to be retroactive in their application. So I think once the

Court has said that, that just passage of years, the number of years that have passed is not enough to eliminate the existence of the right.

Your Honor, I would reply to one further argument made by the state, and that is in connection with the Jackson vs. Denno consequence. The state makes the argument that the trial judge's mere admission of his confession into evidence constituted enough of a ruling upon the subject of voluntariness to satisfy the requirements of Jackson vs. Denno.

We first point out, Your Honors, that the introduction of the confession in evidence was not enough in the Sims case, Sims vs. Georgia, was not enough in Boles vs. Stevenson, and was not enough in Parker vs. Ziegler to constitute rulings by the trial judge. It is sort of a certiorari to the Boles vs. Stevenson decision, because that decision, the procedure followed in that was the so-called orthodox procedure where the jury has no function in finding voluntariness at all.

I would also cite to the Court in that regard that Sims required unmistakable clarity of a ruling by the trial judge. Now, here, however, the decision and ruling made by the trial judge was all tied in with the evidenciary -- there were twenty pages of evidenciary material, and we submit could only be confusing at the utmost when admitted into evidence before the jury.

Now, Your Honors, there is another element to the case which we think is significant and is important, and that is the inducement underlying this confession. There is the fact that the reason why Mr. Travers was talking to Mr. Atchley was that he needed facts for purposes of insurance coverage, set out on page 100, and this is a portion of the transcribed conversation between Travers and Atchley.

Mr. Travers says, "Boy, oh, boy, you got your cigarettes, I got to write this up to the company. We got to think of the children. I want this information," and then he proceeds with his interrogation of Mr. Atchley.

Again, on page 102 of the record, Travers says, "I see, 100 percent as far as the policy. I am almost positive." So this Court has said many times that a confession cannot be the product of any inducement at all, and I think here, Your Honor, that the inducement is very specific -- insurance money.

Now, what consequences should flow from all of this --

Q You say that is page 102, material is from the recording?

A Yes, page 102 and page 100, what I just quoted, are from the recording of the conversation, that is the so-called confession that is in dispute here.

The consequences, Your Honor, that we think should

flow from all of this are two: We first of all respectfully submit that because of the denial of counsel in this case, that this confession should be determined to be involuntary as a matter of law, and that Mr. Atchley should be accorded a new trial. We believe that the Court has come close to this if not actually doing it in its decisions in the Greenwald and Darwin cases, and we believe it has in fact done it in the Massiah decision. The Spano decision, of course, is quite relevant to it, too.

We feel that when these two interests of protecting against involuntary confessions with the right to counsel come together, that that in and of itself should be enough for a confession should be involuntary as a matter of law. In addition, of course, to the absence of an attorney, as we point out in our brief, there are numerous other factors involved in this confession. He is not being advised of his rights, the inducement of the insurance money, his personal intelligence or actually lack of intelligence, and capacity to resist, and the other factors mentioned.

Now, at the very least, Your Honor, because of the procedural inequities in the state court hearing on a confession, we believe that the District Court should be affirmed and that Atchley should be given the evidenciary hearing, which the District Court said he should have.

So we believe, Your Honors, that the confession is

either involuntary as a matter of law and should result in a new trial, or at the very least Mr. Atchley should be given the evidenciary hearing in the state courts that was awarded to him by the District Court.

Q Is the state judge who originally tried this case still sitting?

A I understand that he is deceased, Your Honor.

Q So even on your second alternative, you would have to have a reappraisal of this whole thing before the judge who did not try the case?

A Yes, but I think, Your Honor, that that is what the habeas corpus statute requires anyway, and I think that is what this Court's decision in Fay vs. Noia and Townsend vs. Sain require.

Q Maybe so, but that doesn't necessarily dispose of the question. Have you looked into this case enough that if you prevailed on your first theory, namely that you got a new trial, could this case be retried?

A Could this case be retried?

Q Are witnesses available on both sides?

A Well --

Q Perhaps that is an unfair question to ask you. You haven't been concerned with it that long.

A Well, I can say this, and the State's Attorney will have an opportunity to reply to what I say in the event

that what I say about their advice to me is inaccurate. Of course, as the case proceeds, Your Honors, we all discuss, counsel discuss how can we move the case, is there some other alternative beside proceeding along with litigation. One of the suggested alternatives, well, what is going to happen with the case if we have the evidenciary hearing, are the witnesses available. If we have the retrial, are the witnesses available.

I have been advised by one of the State's Attorneys that Mr. Travers is still available. Mr. Travers would, of course, probably be the key witness other than the defendant in this case. I believe he is available. As to the availability of the other witnesses, I simply can't answer for it at the moment.

Q Thank you.

A Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Granucci, you have about three minutes left to complete this.

ARGUMENT OF ROBERT R. GRANUCCI, ESQ.,
ON BEHALF OF THE STATE OF CALIFORNIA -- REBUTTAL

MR. GRANUCCI: Thank you, Your Honor. I will use them briefly to reply to counsel's argument. He lays heavy stress on alleged inducements. This was, I think, dispositively answered by the California Supreme Court in its opinion on the original appeal.

Moreover, the recorded conversation demonstrates --

Q Where are you reading from?

A I am reading from page 32 of our petition for a writ of certiorari. The California Supreme Court opinion, I believe, is also reproduced in the appendix, but I can't find it now.

Q That is good enough.

A Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility.

Now, as far as the counsel's point, of course, if Johnson vs. New Jersey means anything, it means that Escobedo and Miranda are not retroactive. Moreover, the counsel point was considered as the circumstance by the California Supreme Court in assessing the voluntariness of the confession.

Now, counsel argues that state appellate review is not comparable to the federal habeas corpus because of the substantial evidence rule. I would answer this, that in the state appellate practice the substantial evidence rule does not come into play at all until there has been an original determination of procedural fairness. In other words, where the procedural fairness of the hearing itself is challenged, counsel confrontation and that sort of thing, where those

things are challenged, substantial evidence can't be determined until the procedural questions are answered, and this is roughly analogous to what Congress provided in 2254(d).

In other words, state hearings are to be given finality where state -- where the state courts have afforded substantial procedural fairness. It was a step in the direction of what Professor Bator proposed in his Law Review article, which we cite and refer to in our brief. We think it ought to be adopted by this Court.

I would respectfully submit that in the ultimate, the ultimate determination is this: We live in a federal system. This case gives the court an opportunity to show that federalism is a two-way street. State courts are required to apply federal law. State judges are sworn to uphold the Constitution. The obligation of the states to apply the constitution ought to call forth from this Court a corresponding grant of confidence in the state courts to apply it correctly.

I think, from an examination of the California Supreme Court opinion here, it is obvious that the Constitution was correctly applied in this case, and we respectfully submit the matter.

MR. CHIEF JUSTICE BURGER: Thank you. Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:45 o'clock a.m., argument in the above-entitled matter was concluded.)