ORIGINAL

Daniel Wilbur Gardner,

Petitioner,

v.

State Of Florida.

No. 74-6593

Washington, D. C.
November 30, 1976

Pages 1 thru 59

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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL WILBUR GARDNER, Petitioner,	:	
v.	:	No. 74-6593
STATE OF FLORIDA, Respondent.	:	

Washington, D. C.,

Tuesday, November 30, 1976.

The above-entitled matter came on for argument at 11:12 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHARLES H. LIVINGSTON, ESQ., 46 North Washington Boulevard, Sarasota, Florida 33577; on behalf of the Petitioner.

WALLACE E. ALLBRITTON, ESQ., Assistant Attorney General of Florida, The Capitol, Tallahassee, Florida 32304; on behalf of the Respondent.

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C O N T E N T S

[Afternoon session - pg. 44]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-6593, Gardner against Florida.

Mr. Livingston, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES H. LIVINGSTON, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is on certiorari from the affirmance of the death sentence of Daniel Wilbur Gardner. Petitioner was convicted of first-degree murder in Florida of his wife following a hard day and night of drinking and arguments about the location of their children.

As to sentence, it was conducted pursuant to Florida's bifurcated sentencing procedure. The State introduced into evidence two photographs of the victim and waived argument. The petitioner testified in his own behalf, his counsel made argument, the jury returning a sentencing verdict of life, which, in Florida, is an advisory verdict.

The trial judge then ordered and considered a pre-sentence investigation, disclosing portions of that presentence investigation to both the State and to petitioner's counsel. He rejected the jury's sentencing verdict of life, and sentenced petitioner to death, on the basis in his fact-finding

that the aggravated circumstance, the nature of the crime being especially heinous, atrocious and cruel.

The State Supreme Court affirmed per curiam. Two of the seven Justices of that Court entered dissent saying that it was fundamental error for the trial judge to have considered and failed to disclose portions of the presentence investigation.

QUESTION: What was the basis of the trial judge's determination? Was it not the nature of the crime, which --

MR. LIVINGSTON: One problem with --

QUESTION: Where would the district judge find out the facts, become fully aware of the facts that would motivate his decision there?

MR. LIVINGSTON: Your Honor, that's really the crucial problem with the case, that the petitioner is not in any position to know, really.

QUESTION: Well, where do you normally find out what are the facts of a case? In the courtroom, do you not?

MR. LIVINGSTON: Well, as to the facts in the -- as to the facts of the incident, as opposed to the individualized considerations of the defendant, it would be from the trial. He sat there just as well as the jury did, obviously.

What we do not know is what sort of force the information contained in the confidential portion of the presentence investigation had in his determination of the

sentence. What sort of force --

QUESTION: And you have no idea what was not disclosed?

MR. LIVINGSTON: Your Honor, the State has recently, about three weeks ago, as an appendix to its brief, reproduced what purports to be a facsimile of the confidential portion of the presentence investigation, which is something that we have not seen until now. No one has seen until now. We do not admit its authenticity.

QUESTION: Mr. Livingston, I wonder if you would lift that microphone up a little bit, or -- it's hard for me to hear you over here. Thank you.

MR. LIVINGSTON: Thank you, Mr. Justice.

QUESTION: Where do you say that is, in the --?

MR. LIVINGSTON: It's Appendix "A" to the appellee's brief, Mr. Justice Brennan.

And this is after this Court granted certiorari.

QUESTION: Well, are you going to address any of this as information that you might have contested had you had it at the time of the sentencing?

MR. LIVINGSTON: Yes, sir. With your permission, I will go into that right now.

First, we claim this case can't be decided on the basis of that, anyway, because it's not in the record. It's never been authenticated. We don't admit its authenticity.

Secondly, that introducing it at this late date, almost three years after the time it was used, flouts the procedural regularity required under the capital sentencing procedures, post-Furman and post-July 2, 1976.

Third, there's no fair or proper way that petitioner either now, or particularly at the time of the sentencing, when it was not disclosed, can deal with this. That the reasons we say mandate disclosure of information used and considered by the trial judge --

QUESTION: My question was, though, are there contents -- is there content here, had you had it at the -- been given to you at the time of the sentencing, --

MR. LIVINGSTON: Yes, sir, there are --

QUESTION: -- that you might have introduced evidence to contest; that's my question.

MR. LIVINGSTON: Yes, sir.

QUESTION: I see. Are you going to tell us what that is?

MR. LIVINGSTON: Yes, sir.

QUESTION: Fine.

MR. LIVINGSTON: Obviously, Mr. Justice Brennan, this is done arguendo, because we're not assuming that it is properly before the Court; we're not admitting it.

QUESTION: Right.

MR. LIVINGSTON: But there are at least three factors

that are significant here, and a fourth larger area.

One, in the information that was disclosed to petitioner and his counsel, there is information he had had a series of assault charges, all of which were dismissed, or nol prossed; there was a statement from police officers he had a long line of charges involving his wives. That was disclosed.

We get into the confidential portion. For the first time, the probation officer does something that the police, the prosecutors, and no jury has ever done. He convicts petitioner. He says "Petitioner has beaten his wife X times". That is not established in the view of the petitioner. We think it would be significant in the trial judge's mind.

Secondly, he ends up with a note --

QUESTION: You've lost me there.

MR. LIVINGSTON: Yes, sir.

QUESTION: You're addressing your comment to the presentence report, are you?

MR. LIVINGSTON: Yes, sir.

QUESTION: Well, would the officer making that presentence report not be familiar with the evidence in the case?

MR. LIVINGSTON: Well, Your Honor, it would not be the evidence in the case so much as background of the individual. And --

QUESTION: But you're addressing yourself to his

lack of capacity to make some of these observations. But, by this time, the case has been tried and the jury has returned its verdict, and it's public knowledge as to what went on.

MR. LIVINGSTON: I'm sorry, Mr. Chief Justice, if I led you astray, but we're not contesting the actual incident for which petitioner was convicted, but rather the probation officer was referring to other incidents, going back to 1960 or something, which we do not admit occurred. And it has never been tested in any sort of adversarial process.

These were all the charges that were denied -- dismissed or nol prossed.

QUESTION: Well now, for example, I'm looking at page 57. I'd like to get clear what you're suggesting to us.

Here there is a reference to an incident involving a first wife at Ft. Myers. Was there any evidence at the trial for this offense, involving an incident at Ft. Myers, involving the first wife?

MR. LIVINGSTON: No, sir.

QUESTION: And what you're saying here is that here at length this confidential report discusses an incident at Ft. Myers and winds up that "he broke into the trailer, noticed a colored man sitting in the front parlor with no clothes on and his wife in the back room with a white man

apparently fighting or arguing. He stated that he took out his knife and told the colored man to get out of there," and so forth.

Now, that's an incident at Ft. Myers. Had you had this information, would you have offered anything to contradict what is stated there?

MR. LIVINGSTON: I didn't represent petitioner at trial. I think he was entitled to be -- to have that disclosed to him.

QUESTION: I'm speaking of the sentencing hearing.

MR. LIVINGSTON: Pardon?

QUESTION: At the sentencing hearing, if you --

MR. LIVINGSTON: Well, at the sentencing hearing --

QUESTION: -- had had this at that time, would there have been an effort to refute this by other evidence?

MR. LIVINGSTON: I think he was entitled to notice that this was something that was going to go before the judge, and then have, with the consultation of his counsel, make that decision.

We're really referring, in particularity, not so much to the Ft. Myers incident, but to the statement on page 61, in the same Appendix.

QUESTION: What is that?

MR. LIVINGSTON: And that would be the end of the first paragraph. "It should be noted that the subject in these

charges has had at least three times when he has beat on his wife."

And that is the first time that this comes up in any way, other than these arrests, which were all tossed out.

QUESTION: Now, this is on the victim, the wife, --

MR. LIVINGSTON: Correct, that is the victim.

QUESTION: -- but not the first wife.

MR. LIVINGSTON: Correct, that's the second wife.

QUESTION: And, in other words, that he had a record of at least three times beating on this same woman for whose killing he was convicted, is that right?

MR. LIVINGSTON: Yes, sir, but this never arose before. This is the first time we have seen this in a confidential portion of the PSI.

QUESTION: And that was not in evidence at the trial?

MR. LIVINGSTON: No, sir.

QUESTION: Nor before the jury that was determining sentencing?

MR. LIVINGSTON: No, sir.

QUESTION: Of course, that was -- if it had been in evidence, it would hardly have been helpful to your client.

MR. LIVINGSTON: No, sir, it would not.

If I had represented petitioner at trial, in front of the jury, we would certainly try to exclude that evidence, and be sadly remiss if you did not.

QUESTION: But would that have been admissible under the new Florida capital punishment law at the sentencing proceedings before the jury, after the conviction?

MR. LIVINGSTON: I believe it would have been admissible under the Florida Statute 921.141. I can't, at this moment, pull out of my head the exact aggravating circumstance it would fit under. But I think you would have a difficult time keeping it out.

QUESTION: Yes.

QUESTION: But to get it in, would the State have had to introduce witnesses at the sentencing proceeding?

MR. LIVINGSTON: The Florida Statute does provide that the State can use hearsay testimony in the sentencing proceeding.

QUESTION: No, my question is, could they have used this report? Would that be enough, or would there have to be some testimony about it?

MR. LIVINGSTON: Well, what they would have had to have done is precisely what was not done here, Mr. Justice Brennan. Even if they had used this --

QUESTION: Well, that's what I'm trying to get at.

MR. LIVINGSTON: Yes, sir.

QUESTION: What would they have had to do?

MR. LIVINGSTON: Okay. If they had used this information, or attempted to use it, regardless of the form,

whether it was police reports, hearsay, police officers, whatever, --

QUESTION: Yes.

MR. LIVINGSTON: -- they would have then put petitioner on notice what they were trying to do, they would have given him the opportunity, ex necessity, to correct it, explain it, rebut it if necessary.

Instead of, you know, being a shot from the dark, something that only the judge saw.

QUESTION: Do you suggest that there is anything in this report,which was not disclosed at the time of the sentencing hearing, which would have tended to exculpate and to persuade someone that the death sentence should not be imposed?

MR. LIVINGSTON: Well, Your Honor, I think, if I may turn that just a little bit, and that goes to what appears to be the State's position, that it's all harmless error, anyway, regardless; and I don't think that we can point so much --

QUESTION: Well, it wouldn't be harmless if there was exculpatory evidence here, which you may have exploited.

MR. LIVINGSTON: No, sir, but I think what we are forced into doing, by the posture of the case, is to speculate what was going on in the trial judge's mind.

Our position is that you're entitled to have the information, entitled to make your case before he makes up his

mind.

But, directly to your point, I think it would be pertinent as to how he might have discounted mitigating evidence. The jury had everything the judge had, except these two PSI reports.

QUESTION: It's your view that there is no way of determining what the judge had in his mind, --

MR. LIVINGSTON: Yes, sir.

QUESTION: -- when he imposed the death sentence?

MR. LIVINGSTON: I think that we are forced to speculate, and that takes it out of the harmless error rule under Chapman.

But if I may return to what I was saying, that the jury, after all, voted for life. They had everything that --

QUESTION: Well, if the jury had voted for death, without having any of this, and then the trial judge did what he did, without disclosing this, would you be here?

MR. LIVINGSTON: Yes, sir. I don't think the case would be as strong, however. I think the principle would still pertain, but I think the strength of the case would not be as strong.

QUESTION: Well then, putting that the other way, I gather you think it's significant the jury voted only for life, and it's the judge who voted for death after having seen this and not disclosing it.

MR. LIVINGSTON: Yes, sir. I think it's significant, but not controlling.

QUESTION: I shouldn't say "voted", he imposed the death sentence.

MR. LIVINGSTON: He rejected the jury's --

QUESTION: At what point in the Florida courts did you raise this point?

MR. LIVINGSTON: Mr. Justice Rehnquist, it was first raised before the State Supreme Court.

QUESTION: On your appeal from what, the District Court of Appeals?

MR. LIVINGSTON: No, sir. In capital cases in Florida, the appeal is taken directly under the Florida Constitution from the trial court or the circuit court and then the State Supreme Court.

QUESTION: So you made it in your opening brief in the Supreme Court of Florida?

MR. LIVINGSTON: It was mentioned, but not with the exactness it should have been; it was mentioned again in the reply brief. It was mentioned in oral argument. The two dissenting Justices both picked up on it.

QUESTION: But the per curiam opinion of the Supreme Court of Florida doesn't even deal with it.

MR. LIVINGSTON: Mr. Justice Rehnquist, the per curiam opinion in the State of Florida does not deal with any

issue advanced by appellant in that court. It states the jurisdiction, it states what the indictment says, it repeats the fact-finding of the judge, and says "affirmed" in --

QUESTION: But it's your contention, at any rate, that you adequately raised it in the Supreme Court of Florida, so that under Florida procedure they would have to consider it? Do they have to consider something that you didn't raise before the trial court?

MR. LIVINGSTON: Mr. Justice Rehnquist, their practice is, in capital cases, to consider errors, even if not contemporaneously objected to at the trial level. Florida Rules, Appellate Rules 6.16 and 3.7 both permit them to recognize plain error; 6.16 goes further and says in capital cases they are under a duty to review the record.

QUESTION: So that any error that you adequately raise in your brief, they must consider under Florida practice?

MR. LIVINGSTON: Yes, sir.

And we'd say that, as T-appointed, certainly they are not raised with the precision one would like, in retrospect, it's certainly raised better than the issue was in Boykin.

QUESTION: When did you first know that the court had relied on this?

MR. LIVINGSTON: Your Honor, the court's statement

at time of sentencing was: "I have furnished to counsel" -- or "Has counsel for the State received -- and counsel for the defense -- received the portions of the PSI report to which they are entitled?"

Sounding like the decision is already made as to what he was going to give them. The prosecutor said, "The State has, Your Honor"; defense counsel said, "The defense has, Your Honor."

So, presumably, they could figure out from that, if they were only receiving a portion of it, that there was a portion that wasn't being given to them.

QUESTION: When did you know -- when did you first know that there was some --

MR. LIVINGSTON: We did not know for sure -- excuse me, we still do not know for sure, Mr. Justice White, if there is in fact a written confidential portion of presentence investigation.

QUESTION: Well, how did you know -- you're claiming that he did rely on something, though?

MR. LIVINGSTON: We are claiming that he stated in his findings of fact he considered it.

QUESTION: But did you have any opportunity after that to present your questions to the trial court, or was the only place you could take your point to the Supreme Court?

MR. LIVINGSTON: The State Supreme Court.

QUESTION: You couldn't have made a motion to a new trial?

MR. LIVINGSTON: Your Honor, defense counsel could have. It was not done.

If I may --

QUESTION: Well, suppose you prevail, what happens with this case?

MR. LIVINGSTON: Well, if we prevail, it seems to us that at least three possible things could happen on remand. One would be simply to send it back to the State Supreme Court and say "consider it now".

QUESTION: For resentencing?

MR. LIVINGSTON: Yes, sir. But, to me, that would be inadequate because the State Supreme Court, like this Court, has no way of certifying -- authenticating that it is in fact what the judge used and considered.

Secondly, the State Supreme Court would not have the benefit of petitioner's trial counsel's reaction to this information; his attempt to rebut it or explain it or argue it, or what, whatever.

The second alternative would be to send it to the trial court, simply some sort of pro forma admission of the record,of the matter into the record, and then to re-institute his sentence, resubmit. That would be inadequate simply because it would be pro forma, and it would take --

QUESTION: Do you say reinstitute or redetermine?

MR. LIVINGSTON: To reinstitute.

A third, --

QUESTION: Well, you're assuming his conclusion in advance, when you say reinstitute the sentence. If it's remanded, so that it ultimately reaches the sentencing judge, with directions to open up the record, and hear any arguments you have, are you assuming in advance that he will impose the same sentence?

MR. LIVINGSTON: Your Honor, I hesitate to do so, and I know this Court hesitates to do so, but I think, given the gravity of the decision, he has already made, it is beyond any human being to say, "Oops, I made a mistake in sentencing someone to death, let me try to do it again."

And that's why I think the third alternative, the third choice on remand is the proper choice. And that would be to remand the case for a new sentencing proceeding, de novo. Obviously this doesn't touch the conviction at all.

QUESTION: A new sentencing -- just the sentencing procedure before the sentencing jury?

MR. LIVINGSTON: Correct, Your Honor, and then --

QUESTION: In which this total information would go to that jury, would it?

MR. LIVINGSTON: If the judge intends to use and consider it, yes, sir.

QUESTION: But you don't claim there is any defect of the sentencing proceeding before the jury, do you?

MR. LIVINGSTON: No, sir.

QUESTION: Then why should it be in the sentencing proceeding?

MR. LIVINGSTON: Because we think that --

QUESTION: The only thing --

MR. LIVINGSTON: -- the Florida procedure seems to be something of a hybrid. Most States either have the judge firmly determine the capital sentence or the jury firmly determines it. In Florida they have the advisory sentence of the jury is important, it is supposed to have an effect upon the judge.

Now, if we were on remand, if the State were willing to stipulate that the jury would again recommend life, I think that would be a decision to be made at that point by petitioner and his counsel at that point.

QUESTION: Let me -- do you agree that the least you can get out of this is life?

MR. LIVINGSTON: Yes, sir.

QUESTION: Well, why --

MR. LIVINGSTON: In the case in its present posture.

QUESTION: -- why do you want to upset the life verdict that the jury gave you? Why do you want to upset that?

MR. LIVINGSTON: I don't.

QUESTION: Well, what's the purpose of giving it to the jury, so they can give death?

MR. LIVINGSTON: Well, no, sir, I think on remand the proper solution would be to have another judge, and have him do what he would need to do from the beginning.

Now, if it could be done fairly by studying the --

QUESTION: But you take the position that the jury was okay, because the jury didn't have this information. The trouble came when the judge looked at this without letting you look at it, so it should go back to the judge, and not the jury.

MR. LIVINGSTON: Yes, sir, I see the --

QUESTION: I thought that's what you were saying when you started out, but now you've changed.

MR. LIVINGSTON: I think my difficulty is that on remand, we would submit, petitioner submits, that the proper solution would be to give it to a different judge and he would have to have the benefit of that information. Now, perhaps it could be done by stipulation, by a case stated --

QUESTION: Has this Court ever, in a State proceeding, said that a case would have to go back for retrial or resentencing before a different judge? I realize that on occasion Courts of Appeals in the federal system have said that, in the case of a district judge; but has a federal court ever said that in the case of where we're reviewing a

State proceeding?

MR. LIVINGSTON: Not to my knowledge, Mr. Justice Rehnquist, yet we would point out this is a capital case, it's under the post-Furman, post-Woodson, post-Proffitt procedures where --

QUESTION: So what?

MR. LIVINGSTON: Well, because this point is an extremely significant decision, it's to be made with the utmost regard for procedural regularity.

If I may return to one thing you raised, Mr. Chief Justice, and that is, you asked, "How do you think this might have been used by the trial judge?"

And that would be that we know the jury recommended life. The most likely mitigating factor in the jury's mind was the drinking, the children, the marital setting of the situation. What we don't know --

QUESTION: The matters disclosed by this report?

MR. LIVINGSTON: No, sir, but what we are getting to is that what -- how this report might have actually used them, and again we're forced to speculation.

QUESTION: Could you not have demonstrated to the sentencing jury all the information which is in this report? That is, about his lifelong drinking habit, his tendency to violence.

MR. LIVINGSTON: Well, the problem with the drinking

and the violence is that these things can cut both ways. Something that the trial counsel should be aware of at the time, so that he can --

QUESTION: Well, it cuts not both ways if you want to go back to that sentencing jury; it cuts only one way. The best you can get out of them is reaffirmation of the life sentence, life recommendation, and if they have all this information before them, they might impose the death sentence, might they not?

MR. LIVINGSTON: Well, Your Honor, --

QUESTION: It's a possibility.

MR. LIVINGSTON: -- when I was talking about the use of the information in the confidential portion of the PSI, I was attempting to address the issue of how the judge might have used it, since we're forced into speculating. And it seems that the use of it and the danger in it is that they say, "Well, he has beaten his wife; he had a worse military record than, you know, was apparently disclosed." He was characterized by the probation officer as "the usual drinker and fighter", "assaultive nature", et cetera, et cetera.

Now, what -- how that might have been used by the judge is to knock out what the trial jury apparently found to be mitigating circumstances.

QUESTION: Let me understand how this Florida procedure works. After the verdict of guilt, then the jury is

assembled again for a sentencing proceeding; is that right?

MR. LIVINGSTON: Correct.

QUESTION: And that's an adversary hearing, of course, isn't it?

MR. LIVINGSTON: Correct.

QUESTION: Now, then, after -- then the jury goes out and it returns its recommendation.

MR. LIVINGSTON: Correct.

QUESTION: And then what's the proceeding before the judge after the jury's recommendation of life?

MR. LIVINGSTON: All right. In this case, what occurred, Mr. Justice Brennan, is the jury returned its verdict on January 10, I believe, he at that time ordered the presentence investigation; this was turned in to him on January 28; he sentenced the petitioner on January 30th.

QUESTION: Was there any hearing of any kind before --

MR. LIVINGSTON: No, sir. He came in, stated, "I have furnished this to counsel, the portion to which they are entitled. Does the States have anything to say?" "No, sir." "Does the defendant have anything to say?" Defense counsel at that point pointed out that -- the jury advisory verdict and begged for mercy. He had already made his determination before he asked them to say anything.

QUESTION: Well, suppose when he asked counsel, "Do you have anything to say", counsel said, "Well, what you have

given us, we'd like to offer some evidence, opposed to as much as you've given us"; would he have done that?

MR. LIVINGSTON: Well, I think we're being forced to speculate, and the difficulty really, Mr. Justice Brennan, is that he was not given --

QUESTION: No, but does the Florida procedure call for that before the judge actually imposes sentence, an opportunity for the defense to meet anything that is turned over after the jury's recommendation for sentence?

MR. LIVINGSTON: The Florida procedure allows locution immediately prior to the imposition of sentence.

QUESTION: No, but how about --

MR. LIVINGSTON: There is no clear step in the statute that says there will be a separate opportunity for argument at the time of sentencing.

QUESTION: So there's no -- at least there's no adversary hearing before the judge mandated by the Florida statute?

The Florida statute does not require or even give an adversary hearing before the judge.

MR. LIVINGSTON: Subject to the return of the jury's advisory verdict, correct, sir.

QUESTION: So that in so far as the judge's function is concerned, it's just -- it's like in the more traditional States where a judge does the sentencing?

Except that he does have a jury recommendation.

MR. LIVINGSTON: He does have a jury recommendation, in a line of cases decided subsequent to the sentencing --

QUESTION: And he has a record, he has a written record.

MR. LIVINGSTON: A written record, and a line of cases decided by the State Supreme Court subsequent to the petitioner's case, they have imposed an extremely heavy importance to a jury advisory verdict for life.

QUESTION: Well, that's the point, isn't it? In the case of Tetter v. State, that the -- at least the opinion of three members of the Court relied on in upholding this procedure in Proffitt v. Florida, that opinion relied upon the Florida decision of Tetter v. State, which said that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ, unquote -- and I'm quoting the opinion of the Supreme Court of Florida. And it was upon that proposition, among others, that three members of the Court here relied in upholding the Florida, and also upon the related proposition that this would all be reviewed by the Supreme Court of Florida.

And that there would be an opportunity for -- to answer on the defendant's part and argue to the sentencing

authority the effect of those facts. And that was entirely denied here, wasn't it?

MR. LIVINGSTON: Yes, sir, it was. I think it should be pointed out that --

QUESTION: Did the Supreme Court of Florida have the confidential -- even the Supreme Court of Florida have the confidential part of this presentence investigation?

MR. LIVINGSTON: No, sir, the --

QUESTION: The dissenting opinion suggests that it didn't.

MR. LIVINGSTON: It did not.

QUESTION: How could it possibly review the sentence, then?

MR. LIVINGSTON: Correct. And as to Tetter and Halowell, and some of the other cases to which you're referring and to which you all referred -- you and --

QUESTION: Yes.

MR. LIVINGSTON: -- the judgment of the Court, Mr. Justices Stewart, Stevens and Powell, Tetter was after this case. And, just as a simple statistical matter, there are now 77 people on Death Row in Florida; 27 of them had jury verdicts recommending life, which were overridden; and the vast disproportionate number of those were early capital cases in Florida.

QUESTION: Wasn't it implicit in the Florida law that

-- three of us, at least, thought that we were understood in upholding it -- that all of this would be open and above board, both in the trial court and the appellate court?

MR. LIVINGSTON: Yes, sir, I think that that is covered in the opinion announcing judgment of the Court; in Proffitt, I think it is also -- can be inferred from the decision in Woodson.

QUESTION: Yet when you came to the point that the jury had returned this recommendation and you were before the judge for the final stage, was there any evidence tendered on behalf of the sentenced, convicted man, or proffered in any way to enlarge the showing to the judge as to why he should accept the jury's recommendation?

MR. LIVINGSTON: No, Mr. Chief Justice. Furthermore, --

QUESTION: Wasn't that the occasion for it?

MR. LIVINGSTON: If petitioner and his counsel had known what was in the confidential portion of the PSI, it very well might have been. But in the disclosed portion of the PSI, they could easily have concluded there was nothing worth rebutting, that they could have relied on the jury verdict, they could have relied upon what had gone before.

QUESTION: Well, Mr. Livingston, a little while ago, when you said that the jury must have found some mitigating circumstances, can you enlighten me as to what those possibly

were?

MR. LIVINGSTON: Yes, sir. They were instructed pursuant to Florida Statute 921.41 to the mitigating circumstances provided by that statute, which are that the defendant acted under extreme mental or emotional disturbance, or, two, --

QUESTION: Under extreme what?

MR. LIVINGSTON: Mental or emotional disturbance; or that his capacity to recognize criminality, and conform his conduct to it, was substantially impaired. Both --

QUESTION: Did you argue this to the jury?

MR. LIVINGSTON: I believe it was argued in effect, based on the drinking. I was not trial counsel, but the drinking, the petitioner saying, "I was not in my right mind", and so forth; which, presumably, together with the distress about the location of the children, presumably is what the jury hung their hat on in the advisory verdict.

QUESTION: And those arguments, of course, were available to the court?

MR. LIVINGSTON: Certainly.

QUESTION: Mr. Livingston, before you conclude, I would like you to complete your answer to a question that was asked very early in the argument.

You were asked to identify the portions of the confidential presentence report which were adverse to your client and which included matter not in the record before the

jury. You did identify, on page 61, the reference to actual beatings as opposed to arrests. Is there anything else?

MR. LIVINGSTON: Yes, sir. There is also a claim that petitioner spent time in the brig when he was in the military, which is not in the disclosed portion.

QUESTION: And what was that again, counsel?

MR. LIVINGSTON: There is also a claim in the confidential portion that he spent time in the brig while in the Air Force, and yet that is not in the disclosed portion of the presentence investigation. There is a series of characterizations about "he has an assaultive nature", "he's the usual drinker and fighter", et cetera, et cetera.

QUESTION: There is also that he assaulted his first wife two more times, in 1970 and '72, on page 58.

MR. LIVINGSTON: Yes, sir, although I think that perhaps that was included in the conclusions back on page 61. But there is a series of things --

QUESTION: Well, wouldn't you like to know whether those were additional or not?

MR. LIVINGSTON: Yes, sir. Not only would I like to know, I think petitioner has a sound constitutional right under both the due process and Sixth Amendment provisions of the Federal Constitution to know; he did not know, his counsel did not know, and the sentencing is defective for that reason.

If I may reserve --

QUESTION: And you want to know that in order to persuade the judge that it isn't true. That would be one approach, would it not?

MR. LIVINGSTON: That would be one approach, Mr. Chief Justice, or to fashion an argument, as in Herring v. New York, you needed --

QUESTION: Or to say that it is true and that this shows this is a lifelong pattern of conduct which is, in your view, a reason why the death sentence should not be. I suppose you could play that either way.

MR. LIVINGSTON: Correct, Mr. Chief Justice, and we claim that we need to know before the decision is made. It doesn't do us any good at this point.

QUESTION: Well, then, at most, your remedy would be a remand to the district judge to do what you now say he should have done at the time, or his --your client's then counsel should have done, had he known these things, and go through the process again. Is that right?

MR. LIVINGSTON: We think the constitutional underpinning of our argument would require it to at least go back to the point of the jury's verdict and then forward -- the jury's sentencing verdict, even though I misspoke myself somewhat earlier.

Thank you. If I may reserve the minute or two I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Allbritton.

ORAL ARGUMENT OF WALLACE E. ALLBRITTON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

By preface to my remarks, I'd like to advise the Court that I have somewhat of a speech impediment, so if any time I mumble or the Court does not understand any remark I have made, please let me know and I will attempt to repeat it.

If the Court please, in Woodson v. North Carolina, this Court struck down a State law, and one of the grounds it gave was because this law failed to provide for the particularized consideration of relevant aspects of the character and record of the defendant convicted under it.

The Court went on to remark, and I quote very briefly: Justice requires consideration of the character and propensities of the offender, unquote.

And then the Court remarked, and I quote again very briefly, that this is a constitutionally indispensable part of the process of inflicting the penalty of death.

Now then, today, this Court has been asked for recede from Woodson, from that constitutional principle, by emasculating a provision specifically tailored to furnish a trial judge with the kind of information that this Court said was constitutionally required before the imposition of the

death penalty.

I'd like to digress a moment about as to how this case got here. It has been urged that counsel didn't have the confidential part of the PSI report; that the Supreme Court of Florida didn't have it.

I'll tell you why they didn't have it, is because trial counsel in the trial court didn't ask for it. There were two motions for new trial filed in the trial court. In none of those is any mention made that the trial judge erred in refusing to disclose the confidential part of the PSI. Because, you see, if it had been, then, under the Florida rule, the PSI could have been made part of the record on appeal and it would have been before the Supreme Court of our State.

And they could have reviewed it. But this was not done, not done.

QUESTION: Mr. Allbritton, isn't it correct that as a matter of Florida law only a portion of the presentence report is disclosable? Or do I misunderstand? I'm not --

MR. ALLBRITTON: You misunderstand. The rule provides that a trial judge may disclose all of it, --

QUESTION: I see.

MR. ALLBRITTON: -- if he so deems fit. And it also provides that when the presentence report becomes an issue, that it can be included and it can be reviewed by an

appellate court. But this was not done, and that's why the Supreme Court didn't have it before it.

QUESTION: Now, doesn't the Florida practice require the Supreme Court to search the record for all possible material error?

MR. ALLBRITTON: They searched everything they had down there.

QUESTION: And is the procedure they followed in this case consistent with their later description of the procedure in the Tetter case?

MR. ALLBRITTON: Yes, sir. I think so.

QUESTION: Can it be consistent if they did not look at the same material that the trial judge relied on, on their own initiative? How can it be --

MR. ALLBRITTON: I think it can look, because it was not made an issue. There was no mention --

QUESTION: But I thought you just said that they have a duty, independently, to investigate every potential issue that's material. I thought you said that was the practice in the Supreme Court.

MR. ALLBRITTON: They do, in the ---

QUESTION: Then why is the absence of a request of any materiality at all here?

MR. ALLBRITTON: Well, it is, because they just didn't have it in front of them, Justice. They can't review

what's not in the record on appeal.

QUESTION: But if they knew, as they did, that the trial judge relied on something not before them, didn't the Tetter opinion indicate that they would have independently made an effort to find out what was the basis for his decision of death rather than life?

MR. ALLBRITTON: No, I think that --

QUESTION: Isn't that what Tetter, in substance, says?

MR. ALLBRITTON: Yes, it is, but I think it's argumentative to say that they knew what the trial judge had.

QUESTION: Well, if they read the dissenting opinion, they knew the trial judge relied on something that they did not have before them.

MR. ALLBRITTON: And that was the first time it was brought up.

QUESTION: But does that matter under Tetter?

MR. ALLBRITTON: No, sir, I don't believe it does.

However, at no time, even until this present time, has counsel, any counsel, made any demand whatsoever for a copy of the confidential portion of the PSI. So I took the liberty of attaching it as the Appendix to my brief, so that this Court can read it.

Counsel says he doesn't believe that's authentic. Well, if he doesn't, I have an authenticated copy here, and if he wants to read that, he can.

QUESTION: Well, why shouldn't the Supreme Court of Florida look at it?

MR. ALLBRITTON: They can, Justice, if it's made a part of the record on appeal; they can.

QUESTION: Well, you wouldn't -- you don't suggest that the point wasn't made in the Florida Supreme Court, that the trial judge had relied on material that had not been disclosed; and it was clear that the appellant there was urging that that was error, constitutional error?

MR. ALLBRITTON: No, I deny that emphatically. It was not raised in the Supreme Court of Florida.

QUESTION: You say it was not raised, it was not raised by the parties but it was raised by the dissenting Justices, was it not?

MR. ALLBRITTON: It was commented on by Justice Ervin in his dissenting opinion, --

QUESTION: Well, is this wrong -- I'm reading from page 26 of the petitioner's brief, it says "his Assignment of Error No. 13 contended that 'the court erred in considering the presentence investigation of defendant', and" -- in No. 12 "Error No. 12 contended that 'the trial court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and sentencing proceedings".

MR. ALLBRITTON: That, Your Honor, has to do not with

the failure of the trial judge to disclose the confidential aspect of the PSI, he's arguing there that the trial judge erred in reviewing the PSI at all. That's what he is arguing. That is a general assignment, and it does not deal with the precise issue that is now before this Court.

QUESTION: Well, his brief goes on and gets much more detailed about it.

MR. ALLBRITTON: Yes, I know it does. And in the brief that he filed in the Supreme Court of Florida he mentions it, but not in the context that it was error for the trial judge not to disclose it, and particularly so when it had not been requested by the defense counsel.

QUESTION: It must have been error if -- how did the dissenting judges find out about it?

MR. ALLBRITTON: Beg pardon, sir?

QUESTION: How did the dissenting justices find out that this was a point in the case? Somebody must have told them.

MR. ALLBRITTON: Because it was mentioned in the brief of appellant filed in the Florida Supreme Court. But, again, not in the context that the trial judge erred in failing to disclose or refusing to disclose the confidential aspect of the PSI.

QUESTION: Well, I know, Mr. Allbritton, but doesn't this get us back to my brother Stevens' question to you? At

least, in light of Tetter, was not the mention sufficient to trigger a discussion and consideration and decision based on it by the majority view of the Supreme Court?

MR. ALLBRITTON: I believe, sir, that all they can review is what's before them.

QUESTION: Well, I'm asking you, in light of what Tetter held, --

MR. ALLBRITTON: Yes, sir.

QUESTION: -- as the responsibility of the Supreme Court under the new Florida Statute.

MR. ALLBRITTON: That's a hard one to answer, because it's hard to say that they have a duty to go into matter that is not before them, that no point has been raised as to this at all.

QUESTION: No, but the point was raised, wasn't raised sufficiently at least.

MR. ALLBRITTON: No, sir, I deny that.

QUESTION: The dissenting justices certainly thought it was.

MR. ALLBRITTON: The dissenting -- he pointed it out, but even he did not say that it was error, because the trial judge failed or refused to disclose the confidential aspect of it. He just mentioned it, as part of his dissenting opinion.

QUESTION: Well, is it not possible that since this

is an evolving area of the law, both at the level of this Court and in the States, by virtue of these recent holdings, that the Tetter opinion decided after the Court passed on this case, the Florida Court, indicates some enlarging of their view of the matter of what they should consider?

MR. ALLBRITTON: That could well be. That could well be. I can't argue with that --

QUESTION: But if the case were to go back, in your view should it go back to the Supreme Court -- and I emphasize the "if" -- should it go back to the Supreme Court of Florida for their reconsideration, taking into account the material now in the record, or do you think it should go back to the sentencing judge?

MR. ALLBRITTON: Well, if that terrible event occurs, then I think it should go back to the Supreme Court of Florida with directions to review the confidential portion of the PSI in order to determine whether or not there was matters and things in there that should have been disclosed to the defendant and his attorney, so that the same could be rebutted.

And whether or not the trial judge abused his discretionary power in failing to disclose it in the absence of a request so to do.

QUESTION: Well, this Court upheld the Florida Statute on the representations of Florida, through its Attorney

General, and through its Supreme Court, and through its Legislature, that this would be an open and above-board proceeding; and now we get to this case and there wasn't one. I don't think it's a matter of discretion, unless those three Justices who upheld the Florida Statute are going to change their minds.

MR. ALLBRITTON: Well, it is discretionary, begging your pardon, sir, under the rules.

QUESTION: Under your Florida rules, yes.

MR. ALLBRITTON: What's wrong with that?

QUESTION: Well, --

MR. ALLBRITTON: You have a federal rule that's comparable to it.

QUESTION: -- you might find out.

MR. ALLBRITTON: Federal Rule 32(c) provides the same thing for a federal district judge. He has discretionary power. So does the Florida rule. It says that the State trial judge may disclose. And the federal rule is comparable to it.

QUESTION: That rule, however, at the federal level, has not been considered or litigated in connection with the imposition of the death sentence under any -- under the new federal statutes, however.

MR. ALLBRITTON: No, that's true, it hasn't; but it has -- there are many cases on the point, but not in the context of a capital case, that's true.

QUESTION: That's right.

QUESTION: The dissenter certainly raised this. It could hardly have been clearer, when he said, "We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn appellant's death sentence on the basis of this fundamental error alone." And Mr. Justice Boyd joined that, and certainly I would suppose if the other Justices of your Court read the dissenting opinions that are filed, they must have seen that that was raised, didn't they?

MR. ALLBRITTON: They saw it and evidently didn't agree with it at all.

QUESTION: Well, they didn't say a word about it, did they?

MR. ALLBRITTON: They didn't say a word about it. Absolutely not. They evidently felt that the trial attorney was happy with the way things was in the trial court, or else he could have --

QUESTION: Well, he couldn't have been when his client was sentenced to death, could he?

MR. ALLBRITTON: Well, he may not have been happy about that, but he was -- thought that he had a fair trial, or else he would have initiated the procedure to have the PSI sent up to the Florida Supreme Court, which he didn't do.

It seems as though my time has gone -- I'll just go

to --

MR. CHIEF JUSTICE BURGER: No, you have --

QUESTION: A lot of time.

MR. CHIEF JUSTICE BURGER: -- lots of time yet. At least in relation to your thirty minutes.

MR. ALLBRITTON: All right, sir.

I think the gravamen of petitioner's complaint is with the discretionary power that is given to State court trial judges to withhold certain parts of the presentence report here.

Well now, if he's arguing about this, to me he's arguing against the entire criminal process, because I frankly tell this Court I know of no way in which the exercise of a reasoned judgment can be cut out of the criminal process. It's in it from beginning to the end.

And in considering the responsibility of a trial judge, that is a heavy one. I think all of us will agree on that. And practicularly is this true in a capital case. So then, in the exercise of this awesome responsibility, I say to this Court that trial judges need help. They need all the help they can get. And that is the purpose of the presentence report, is to give trial judges the kind of help that this Court said in Woodson was constitutionally required. That is, to learn about the character and the propensities of the defendant.

QUESTION: Can you think of any reason, counsel, why, if a motion had been made before the sentencing judge on behalf of the defendant to produce the entire presentence report, that it should not have been made available to him?

MR. ALLBRITTON: Absolutely not. There's not a thing in there that, in my opinion, would keep the trial judge from disclosing the entire PSI. Nothing.

QUESTION: Is there anything in the record to indicate why he did not do that on his own motion?

MR. ALLBRITTON: I don't know why he didn't do it. Absolutely not.

But going to that, too, the trial judge didn't say that he relied on the confidential part of the PSI, that there were things in there that inflamed him and therefore, consequently, he imposed the death penalty.

That is just wrong, that's all.

QUESTION: Did the trial judge --

MR. ALLBRITTON: He ddin't do it.

QUESTION: Did the trial judge indicate publicly that he had relied on the presentence investigation at all?

MR. ALLBRITTON: Yes, he did; the whole thing.

QUESTION: He did?

MR. ALLBRITTON: And the major part of it defense counsel had. The things that could have been controverted, he had those. It was only things that you need the protection

of confidentiality to help a judge --

QUESTION: General Allbritton, how about the statement that the subject had spent time in the brig in the military? Now, that's not in the public portion of the PSI, and how did he know that the judge had that before him?

It's a quote of what the defendant is alleged to have said to the probation officer, whoever made the investigation.

MR. ALLBRITTON: Well, if he said it to the probation officer, it must be accurate, then.

QUESTION: But how do we know he said it? He didn't have a chance to say, "That's what I said" or "That's different". I mean there's nothing in the public part that put him or his lawyer on notice that the judge was told he had been -- he had said that.

MR. ALLBRITTON: No, sir. There are things in the confidential part that are not in the public part; that's true. But I say to you there isn't anything in there that required the trial judge to disclose it to him at all. There isn't anything in there that it's inflammatory, that it would prejudice the trial judge.

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock, counsel.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Allbritton, do you have anything further?

ORAL ARGUMENT OF WALLACE E. ALLBRITTON, ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

MR. ALLBRITTON: Yes, I do, Mr. Chief Justice.

May it please the Court:

I'd like to restate the fact that under both the State rule and the federal rule, it is discretionary on the part of the trial judge as to whether or not he will disclose the confidential aspect of the presentence report.

Now then, the question would come up: What would be the harm in mandatory disclosure of this confidential part of the PSI? What harm would it do?

I say much in every way. Because, first and foremost, it would dry up the sources of information which comprises -- from which the confidential part of the PSI is made up. That report then would become nothing more than a mere abstract of public records. And then no longer would the trial judge have the benefit of the kind of information that this Court said was constitutionally required in order to help him discharge his responsibility in the sentencing procedure.

QUESTION: Where did this Court say that?

MR. ALLBRITTON: Woodson v. North Carolina.

QUESTION: Did that involve a presentence investigation or discretion in the sentencing judge?

MR. ALLBRITTON: It involved a statute; it involved a statute.

QUESTION: That involved a jury, didn't it?

MR. ALLBRITTON: It involved a statute, too, I know.

QUESTION: But didn't it involve sentencing by the jury --

MR. ALLBRITTON: And a jury, yes.

QUESTION: -- and you don't give a confidential presentence investigation to a jury.

MR. ALLBRITTON: No.

QUESTION: That's evidence in open court, isn't it?

MR. ALLBRITTON: Yes, that's true.

QUESTION: That was the system, statutory system at issue in the Woodson case, wasn't it?

MR. ALLBRITTON: Well, whatever kind it was, still the judge has to have it.

QUESTION: Well, but -- excuse me.

QUESTION: I suppose that's what the Court said through Mr. Justice Black in Williams v. New York.

MR. ALLBRITTON: Yes, it is, --

QUESTION: I thought you were quoting from Williams v. New York.

MR. ALLBRITTON: Yes, sir.

Let's think about this for a minute. In securing information upon which to prosecute a crime, a prosecuting attorney relies on immunity in order to get people to testify in front of a grand jury. Thus, immunity is a tool that he uses to get the information that he needs, just so, then, I say that confidentiality is the tool that the judge can use in getting the needed information to insure that a just punishment is meted out to a wrongdoer.

But even then, in the exercise of the discretion, if the trial judge feels that the confidential aspect of the PSI is of such gravity, he can, in the exercise of his discretion, disclose it to the defense attorney, so that he may rebut it if he can.

But petitioner here says "not so". When a trial judge exercise his discretion against disclosure, it is contended before this Court that this, ipso facto, constitutes a denial of due process.

It seems to me that the premises that must undergird such an argument as that is that trial judges are simply incapable of separating the wheat from the chaff when reading the PSI, and thus, whenever the discretion is exercised against disclosure, automatically this results in a due process -- a denial of due process.

Now, I deny this. I can't subscribe to that. I do

not impute that degree of unfairness or lack of impartiality or lack of humanity to the trial judges.

Now, getting to Williams v. New York, Mr. Justice Black said it better than I can, when writing for a majority of this Court, and he said -- I quote his words --

"The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." Unquote.

But now it may be you're saying, "Well, look, this is a capital case; we throw all that aside in a capital case." Well, this Court rejected that argument in Williams v. New York. And again, very briefly, I'd like to read, and I quote, "It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention", the words of this Court. And on down, I quote again, "We cannot say that the due process clause renders a sentence void merely because out-of-court information" -- excuse me -- "void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death penalty -- or sentence", unquote.

QUESTION: Is it not correct that in the Williams case, the out-of-court information which the judge received was disclosed to the defendant and his counsel in open court?

MR. ALLBRITTON: No, sir, I don't agree with that.

QUESTION: The only issue in that case, as I read it, was the question of confrontation of the out-of-court sources of evidence.

MR. ALLBRITTON: Well, Justice Stevens, I didn't read it the same way you did, then, because the way I read the case, it was not disclosed to the defendant or his attorney, and they claimed before this Court that that constituted a denial of due process. And this Court said, absolutely not.

And I say that the decision of this Court in Woodson is an implicit reaffirmance of the principle of Williams v. New York.

I agree with this Court when it said in Proffitt, and I quote again very shortly, "It is no longer true that there is no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases where it is not."

Now, the simple truth is, if truth can ever be simple, that the presentence report is one of the key instruments used in providing such a meaningful basis that this Court referred to in Proffitt.

I cannot subscribe that in each and every instance, no matter what the case, when a trial judge exercises his discretion not to disclose the confidential aspects of the PSI, that this, ipso facto, constitutes a denial of due

process. This Court repudiated that in Williams, and the only way I know of to get around it is for the Court to recede from that.

QUESTION: Well, suppose the trial judge, in arriving at his sentence, looked at a presentence report and then said in his findings, "I find the following aggravating circumstance", and proceeds to find an aggravating circumstance and then says, "based upon the presentence report"?

MR. ALLBRITTON: Well, in the case that we're thinking about now, the judge read all of the presentence report, and his findings --

QUESTION: He reads the presentence report, he does not reveal anything in the presentence report, but he finds an aggravating circumstance based upon what he read in the presentence report.

MR. ALLBRITTON: I beg your pardon, sir, I think that was based on what he heard at the sentencing phase of the trial.

QUESTION: I know, but let's suppose a case, let's suppose -- I said to suppose a case.

MR. ALLBRITTON: Well, if we're going to suppose that, then, trial counsel, if he knows his way in and out the court, is going to request that the confidential part be disclosed and if he refuses to do that, he can have it put in the transcript in the record on appeal, and it can be reviewed.

QUESTION: But isn't your -- isn't perhaps your strongest point here that the judge, guided by the statute, found an aggravating circumstance based upon the evidence before the jury, namely, that the crime was especially heinous, and found that there were no mitigating circumstances. That's all he found, isn't it?

MR. ALLBRITTON: That's right. That's exactly -- and he found that from the things that were produced at trial and at the sentencing phase. He did not say that he relied on the PSI at all.

As I read his findings of fact. And I think my strongest point here is that ever since the beginning of the PSI, trial judges all over the country and this Court have found it very proper to withhold the disclosure of sometimes all and at least part of the confidential aspects of the PSI.

QUESTION: That's not uniform, there are some that do not follow that rule.

MR. ALLBRITTON: Well, there are some people, yes, sir.

QUESTION: There are some federal courts where the presentence report is filed in the Clerk's office.

MR. ALLBRITTON: That's true.

But I think I speak for the majority, that they regard the decision to disclose or not as discretionary with the trial judge, and when he doesn't disclose it, it does not

constitute a denial of due process.

Let me sum up by saying --

QUESTION: Mr. Allbritton, before you do, one of the reasons for nondisclosure is to protect informants from possible retaliation by the defendant, things of that nature. Does that reason, or does any reason apply when the defendant is to be killed?

MR. ALLBRITTON: Oh, yes, when he is to be executed by judicial due process, sir.

I think it does --

QUESTION: But how can he retaliate after this all takes place?

MR. ALLBRITTON: Oh, yes. Yes. Yes. If someone wanted to kill me, I have a 20-year-old son at home that would be pretty angry about that, particularly if he found out that someone put out a bad word on me. Oh, yes. The fear of retaliation is there. The fear of the stigma in the community of being a stool-pigeon. Of course it's there.

People will talk when they know that what they say is going to be held in confidentiality. That's the reason for it. But people are not going to talk to a probation officer when they know that they are liable to have to come into court and repeat it, and what they say then will become public.

Now, that's common sense.

I think all of us will admit that -- I hope --

QUESTION: Did you indicate earlier, General Allbritton, that you didn't understand that the sentencing judge relied on the presentence report?

MR. ALLBRITTON: Not expressly, no. He relied on that among other things, Justice Stewart.

QUESTION: It seems to me very express -- I'm looking at page 138 of the Appendix. You're familiar with that, I guess?

MR. ALLBRITTON: Yes, sir.

QUESTION: In which he says two different times, he says first of all that he has received a presentence investigative report on said defendant by the -- and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled; and then he says, "and after carefully considering and weighing ... and reviewing the factual information contained in said presentence investigation, the undersigned concludes and determines that aggravating circumstances exist, to wit:" and then he itemizes them, and then he sentences the defendant to death.

That's pretty clear that he did rely on it, isn't it?

MR. ALLBRITTON: Not in toto, no, sir. That, among other things. I can't say he relied on the confidential part of it, and it doesn't say so in what you just read.

QUESTION: Nobody suggested that it was in toto, I

think, Mr. Allbritton; just whether or not he took it into consideration in imposing the sentence.

MR. ALLBRITTON: Yes, he did take it; that's the purpose of it, sir. That's the purpose of it.

QUESTION: And he made it very expressly clear that he did so.

MR. ALLBRITTON: Yes.

MR. CHIEF JUSTICE BURGER: Your time is up, Mr. Allbritton.

MR. ALLBRITTON: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Livingston?

MR. LIVINGSTON: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: You have a minute left.

REBUTTAL ARGUMENT OF CHARLES H. LIVINGSTON, ESQ.,
ON BEHALF OF THE PETITIONER

MR. LIVINGSTON: Thank you. How many, sir?

MR. CHIEF JUSTICE BURGER: One minute.

MR. LIVINGSTON: Okay. As to Williams, Mr. Justice Stevens is exactly correct. That was a confrontation case, it was not a disclosure case. 337 U.S. 244 describes how that information was disclosed in open court.

In addition, Williams was a pre-Furman case, also decided, obviously, before the July 1976 capital cases.

As to the confidential problem, that can be controlled.

Federal Rule 32 controls. We're not here claiming we have a constitutional right to be free from all out-of-court information, but we are here saying that we're entitled to know what the judge is using, if there is a need to protect somebody, if there is a need not to disclose, he can disclose that, and say --

QUESTION: Could I ask you, how could the presentence report have influenced or affected the judge's finding that there was the aggravating circumstance of an especially atrocious crime?

MR. LIVINGSTON: It could have affected it by knocking out the mitigating circumstances which the jury --

QUESTION: No, I didn't -- I'm going to get to that. How about the atrocious, the aggravating circumstance?

MR. LIVINGSTON: That circumstance was in open court, before both the judge and jury.

QUESTION: So that you put that aside, but now -- but you think the presentence report might be relevant to establishing a mitigating circumstance?

MR. LIVINGSTON: Or to the disregarding of mitigating circumstance, which necessarily must have been --

QUESTION: Well, I know, but he found there were no mitigating circumstances.

MR. LIVINGSTON: Correct. And he found it by reading the same information differently than the jury did, about the

drinking and whatever, and the only difference --

QUESTION: I know, but suppose he had had no presentence investigation at all, and he had just disagreed with the jury, you wouldn't have any complaint then? You'd have a complaint, but not this one.

MR. LIVINGSTON: Our complaint would not be founded upon a confidential report, the undisclosed, unjustified, unexplained nondisclosure of the confidential portion; no, sir, it would not be.

QUESTION: Well, you think there might be something in the presentence report that affected his judgment about there being a mitigating circumstance present or not?

MR. LIVINGSTON: Sir, I believe that we are being pushed into speculating as to what affected his decision-making process at this crucial stage. And by being forced to speculate, it takes it out of harmless error rule in any event.

But, yes, we are having to guess, and I think that's the most likely operation there, that it caused him to disregard what the jury found to be mitigating.

QUESTION: Are you familiar with the Florida Supreme Court decisions in Songer v. State and Swann v. State?

MR. LIVINGSTON: Yes, sir.

QUESTION: Both of which were cited and implicitly approved in one of the opinions in Proffitt, and each of which

approved the use of a presentence investigation report by the sentencing judge under the Florida system, didn't they?

MR. LIVINGSTON: That's correct, Mr. Justice Stewart, neither of which addressed the confidential problem, however.

QUESTION: Was it clear in each of those cases that there had been a disclosure to the defendant or his counsel of the contents of the presentence investigation?

MR. LIVINGSTON: In Songer, I am certain there is a disclosure of the nonconfidential portion, but not the confidential portion. In Swann, I don't have any present recollection as to that point.

QUESTION: Both of those decisions were implicitly approved, weren't they, in a footnote, footnote No. 9? In one of the opinions in Proffitt.

MR. LIVINGSTON: Correct.

QUESTION: Well, Songer expressly states that he received a copy of the PSI and it doesn't differentiate between the nonconfidential and the confidential part.

MR. LIVINGSTON: That's correct.

QUESTION: Yes.

QUESTION: Then you were mistaken?

MR. LIVINGSTON: On what point, sir?

QUESTION: In saying that there was not a disclosure of the confidential portion of it, in Songer.

MR. LIVINGSTON: No, sir, in Songer -- it's outside

the record -- in Songer there was a confidential portion and there was a disclosed portion. The defendant did not get the confidential portion. The Florida Supreme Court decision addresses the area of the PSI in general, but does not address itself to confidential versus disclosed.

QUESTION: Of course, in Songer or Swann or one of the cases, at least, the Florida Supreme Court set aside the death sentence.

MR. LIVINGSTON: That would be Swann.

QUESTION: Swann.

MR. LIVINGSTON: Songer is still under sentence of death.

QUESTION: I think you said in your opening argument that were this case back before the jury, you would object to the submission of the presentence report to the jury. Did I understand you correctly?

MR. LIVINGSTON: Well, my understanding at the time of that point in the argument, Mr. Chief Justice, was that the information as to the guilt deciding phase of the trial as being collateral incidents relevant to the crime. That's -- I'm saying if I were his trial counsel, I think an astute trial counsel would object to this collateral information coming on the guilty/not guilty phase of a bifurcated trial.

QUESTION: Well, at that point the guilt has been determined by the jury, why would that be excludable?

MR. LIVINGSTON: No, sir, what I was talking about was if there was an effort to introduce it at the guilt determination, the first half of the trial --

QUESTION: No, no, we were talking, in your opening argument, about the possibility of the case being before the sentencing jury, after the determination of guilt. I understood you to say that if the case, by some chance, should get into that posture by virtue of any remand, that you would object to the introduction of the report at that stage in the sentencing process.

MR. LIVINGSTON: Well, my answer may not have been responsive. My understanding at the time of making that answer was that it related to the first half of the trial, which isn't involved here.

QUESTION : Oh.

MR. LIVINGSTON: But as to the sentencing jury, our position is that if the State is going to use it, if the judge is going to use it, consider it, review it, that the defense should at least be entitled to notice of the general nature of it, so if they can't -- you know, they may not be able to keep it out, but they can rebut it, clarify it, or explain it.

QUESTION: Well, if it went to the sentencing jury, you surely would have a copy of it.

MR. LIVINGSTON: Yes, sir.

QUESTION: It couldn't go to the jury without going

through you, through counsel.

MR. LIVINGSTON: Yes, sir. Well, one would think tha the due process clause and Sixth Amendment would keep it from going to the judge without going through us, either, under the circumstances of this case.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:21 o'clock, p.m., the case in the above-entitled matter was submitted.]

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