ORIGINAL

In the

Supreme Court of the United States

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W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,	)	
PETITIONER,	)	
V.	)	No. 79-1127
ERNEST BENJAMIN SMITH,	)	
RESPONDENT.	)	

Washington, D.C.
October 8, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Petitioner,	
v.	No. 79-1127
ERNEST BENJAMIN SMITH, Respondent.	

Washington, D. C.

Wednesday, October 8, 1980

The above-entitled matter came on for oral argument at 10:02 o'clock a.m.

BEFORE:

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

APPEARANCES:

MS. ANITA ASHTON, ESQ., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of the Petitioner.

JOEL BERGER, ESQ., Suite 2030, 10 Columbus Circle, New York, New York 10019; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Estelle v. Ernest Benjamin Smith.

Ms. Ashton, you may proceed whenever you are ready.

ORAL ARGUMENT OF MS. ANITA ASHTON

ON BEHALF OF THE PETITIONER

MS. ASHTON: Mr. Chief Justice, and may it please the Court:

The State is here today to contend that the use of psychiatric testimony in the punishment phase of a capital murder trial is proper and is necessary to allow the jury to have all relevant information concerning the character of a defendant, especially when the jury is making this important determination as to life or death.

This testimony is used only after a finding of guilt in a capital murder trial. It is not used for the purpose of incriminating the defendant or as to any issue of guilt for the offense. It is merely as to determining his mental status at the time that he committed the crime and his mental status so that the jury may take that factor into consideration in making the determination of future dangerousness, which is one of the questions which the jury must answer under the Texas capital punishment statute.

Testimony of this type has been used in the State of Texas historically in murder prosecutions from the beginning of

this century pursuant to Section 1906 of the Texas Penal Code. In a murder prosecution both the State and the defendant may introduce all relevant evidence as to the defendant's mental status so that the jury may have this evidence before them in determining the appropriate punishment for a crime.

QUESTION: Has Texas had a bifurcated proceeding since the beginning of this century?

MS. ASHTON: No, Your Honor, they have not but the statute has been carried over from the beginning. Under the old "murder with malice" is when it was originated, when there was one proceeding, not a bifurcated proceeding. But when the bifurcated proceedings --

QUESTION: So until the present statute this kind of evidence went in to this jury that determined guilt?

MS. ASHTON: No, Your Honor. There was a bifurcated proceeding prior to this statute, beginning in 1965, the 1965 Code. This particular statute of capital murder was enacted in 1973. So during the period of time between 1965 and 1973 in all murder with malice trials this evidence wasn't.

QUESTION: But from the beginning of the century until 1965?

MS. ASHTON: There was a single, a unitary trial, not a bifurcated trial.

QUESTION: Therefore this sort of evidence that you said has traditionally been --

MS. ASHTON: Evidence as to mental status could be used as to guilt.

QUESTION: As to guilt?

MS. ASHTON: But it was admitted for the purposes of punishment under the statutory provisions.

QUESTION: Were there any instructions?

MS. ASHTON: Yes, Your Honor, there were generally instructions.

QUESTION: Limited to the determination of punishment?

MS. ASHTON: Yes. The mental status -- depending on the way the issue was introduced for the defense, if they'd introduced it as --

QUESTION: No, no. This is the prosecution introducing it.

MS. ASHTON: If the prosecution introduced the evidence, it would be limited as to punishment, not as to guilt. The same statute provides for the use of introducing evidence as to the deceased's character in prior altercations between the deceased and the defendant, whether or not the defendant or the deceased were acting in passion or were cruel or were agitated at the same time. It's that type of a statute.

QUESTION: Is there any practice in Texas as distinguished from the rule in the Texas courts as to furnishing notice of witnesses to the adverse party before the case opens?

MS. ASHTON: If the counsel requests a list of witness and it is so ordered by the court

witness and it is so ordered by the court, it is provided, but it is depending upon the type of order. In this particular case the witness list provided that the witnesses be listed if known at that time. The witness list was filed on the 11th, trial began on the 25th, the only evidence in the record as to what time, the first time that Dr. Grigson was contacted as a witness was on the 21st, ten days after the witness list had been filed.

In a trial in capital murder cases, generally the prosecution introduces evidence of prior crimes if known, if they are available; sometimes they're not available. The prosecution now under some Texas decisions can under Texas law clearly introduce evidence of extraneous offenses, of crimes. If they are proven up, they have to be proven up during the punishment stage. It's not merely reading from an arrest sheet. They must prove up the crimes with competent evidence.

And they often use psychiatric testimony. Psychiatric testimony can be used by both the State or by the defendant. In fact, reversible error results in the Texas system if the defendant is prohibited from introducing psychiatric testimony as to his ability to be rehabilitated.

There was a Texas case of Robinson v. State specifically on that point. Both the State and prosecution have this right to present this type of evidence as to the mental status of the defendant.

QUESTION: Does that psychiatric testimony, General Ashton, go beyond that, however?

MS. ASHTON: Your Honor, generally in the context it's used, the State uses it if a psychiatrist or psychologist has determined that the defendant has a sociopathic personality or an antisocial personality and will continue to commit crimes. Now, in the particular case, in the manner in which the testimony was presented, the psychiatrist testified that he was a sociopathic personality. One of the features of the sociopathic personality was a lack of remorse -- that he found a lack of remorse in this particular defendant, Ernest Benjamin Smith. It was on cross-examination by Smith's counsel where he asked him, what statements did the defendant make to you to bring you to this conclusion that the defendant had an antisocial personality? And then statements that had been made to the psychiatrist by the defendant were brought into evidence as a result of that questioning by defense counsel.

QUESTION: Then I take it that the State doesn't agree with the observations in the amicus brief of the American Psychiatric Association that this kind of testimony as to predictive behavior is unreliable?

MS. ASHTON: No, Your Honor, we do not agree with that. We think that it is a factor that is brought to the attention of the jury. It is a type of evidence like any other expert witness that is subject to cross-examination and subject

to impeachment and is one factor for the jury to consider.

QUESTION: It seems a little strange, doesn't it, for the APA to be taking an opposing position?

MS. ASHTON: Your Honor, the brief that was filed by the American Psychiatric Association reflects the viewpoint of some psychiatrists with that association. The State of Texas believes that it is not necessarily reflective of all psychiatrists in America, no more so than a brief filed by the American Bar Association would be reflective of all the attorneys in America. It is a brief submitting the viewpoint of a segment of their profession as to predicting future dangerousness, or future behavior. But as is pointed out in many writings in the area, future behavior is something that psychiatrists, and in fact, all medical doctors are trained to predict from the very beginning of their profession. If they see someone that has a fever they are going to predict that they are going to be sick. If they give them a certain type of medication, they are going to predict that they are going to become well.

QUESTION: Yes, but how can you predict future behavior by way of recidivism? Do you know?

MS. ASHTON: Your Honor, I'm not trained in the area of psychiatry. If you are trained in that area, certainly there are some personality types which apparently can be diagnosed, although --

QUESTION: But at least Dr. Grigson thought he could?

MS. ASHTON: No, Your Honor, not just Dr. Grigson. Dr. Grigson is not the only psychiatrist that testifies like this in Texas. There are over 20 psychiatrists that I am familiar with that have testified as to this type of future dangerous behavior for the State. There are also psychiatrists that testify as to the lack of future dangerous behavior on behalf of defense counsel and testimony of this nature is presented throughout the country in capital murder trials in the context of negating the mitigating circumstance of rehabilitation, oftentimes.

QUESTION: Dr. Grigson is one of the favorites, isn't he?

MS. ASHTON: Well, Your Honor, he has had more experience in doing criminal examinations than probably any other psychiatrist in the State of Texas.

QUESTION: And testifying.

MS. ASHTON: And has testified numerous times.

QUESTION: Doesn't he testify in virtually every capital case in Texas?

MS. ASHTON: No, Your Honor.

QUESTION: Well, most, doesn't he?

MS. ASHTON: He testifies in most of the capital cases in Dallas and in that surrounding northeastern part of Texas. In Houston he rarely testifies nor -- he has testified on about two occasions in San Antonio. It depends upon the location of

the trial whether or not they use Dr. Grigson or another psychiatrist.

QUESTION: There are some psychiatrists who consistently and regularly testify for the defense, are there not?

MS. ASHTON: Yes, Your Honor.

QUESTION: Not only in Dallas but --

MS. ASHTON: -- throughout the State.

QUESTION: All over the country?

MS. ASHTON: And the country.

QUESTION: Was not the genesis of this caution about prediction based on -- if you know -- many situations where psychiatrists testified that there was no future danger and then very quickly it was found that that was erroneous and then psychiatrists began to retreat from predictions; at least some of them did?

MS. ASHTON: Yes, Your Honor. Some of the articles that I have read have indicated that particular thinking within some members of the profession, especially when, after a period of time where they did not predict future dangerousness, and a very violent crime resulted as a result of a person not being incarcerated for future dangerous behavior.

QUESTION: Ms. Ashton, you said that there were psychiatrists who testified for the defense as to the absence of the probability of recidivism or future danger. Do they testify that it is simply beyond the ken of psychiatry, or that it

is within the ken of psychiatry but that with respect to this particular defendant, he is not going to be a danger?

MS. ASHTON: Generally they testify as to the latter. They can predict future dangerousness and that this defendant will not be dangerous in the future. There are also some psychiatrists and psychologist that testify that you simply cannot predict future behavior. That type of testimony is generally used when they can't find a psychiatrist to come in and testify that this particular defendant will not be dangerous in the future, as rebuttal testimony.

QUESTION: Ms. Ashton, does this case present any issue with respect to the admissibility of this kind of testimony?

MS. ASHTON: Of the defendant's testimony, Your Honor?

QUESTION: No; the psychiatrist's testimony.

MS. ASHTON: Yes, Your Honor, it does present an issue, I believe, as to --

QUESTION: I thought it only was inadmissible -- the Court of Appeals was unhappy about the way the testimony was obtained and the fact there was no notice given to counsel.

MS. ASHTON: Your Honor, the Court of Appeals opinion went on in the second portion of the opinion, though, to state that in the event of the retrial that the testimony could not be used.

QUESTION: Of Dr. Grigson because of the way it was

obtained.

MS. ASHTON: Well, the way it was --

QUESTION: But there's nothing in the opinion, is there, that would foreclose the use of another psychiatrist who would follow the procedures that they held were appropriate? Or is there? Maybe I'm missing it.

MS. ASHTON: Well, Your Honor, the interpretation that I had of the second portion of the opinion said they were indicating that anytime a psychiatrist was court-appointed and went in to talk to a defendant and his testimony might conceivably be used during the punishment stage of a trial, that that psychiatrist must warn the defendant that he has a right to remain silent, a right to --

QUESTION: Yes, but if he does give those warnings, his testimony is admissible, isn't it?

MS. ASHTON: Yes, Your Honor, but previous to that time there's not been that standard of warning for a psychiatrist to give to the defendant.

QUESTION: I understand that, but the issue that you've been talking about up to now is whether the testimony is ever admissible. And I think everybody assumes it's admissible if you follow the procedures that they require.

QUESTION: Well, accept the American Psychiatric Association.

QUESTION: Well, but they don't define the questions

presented by the petition for certiorari.

MS. ASHTON: No; their brief goes to the ultimate issue of presenting this type of testimony.

QUESTION: It didn't seem to me that was among the questions presented to us for decision; that's all.

QUESTION: Is it true that in every case that Dr. Grigson examined, he gave verbatim the same testimony?--

MS. ASHTON: No, Your Honor.

QUESTION: -- that "I have an opinion that he will commit other acts"? Didn't he do that every time he testified?

MS. ASHTON: No, Your Honor.

QUESTION: No, let me put that: isn't that all the testimony that we have on every case in this Court in which he testified? And if not, give me one that he didn't testify that way.

MS. ASHTON: Give you one capital murder case in which he did not --

QUESTION: Which is in this Court.

MS.ASHTON: Court -- presently?

QUESTION: Yes, that Dr. Grigson was there and where he didn't say that "I believe he would go ahead and may commit other similar or other criminal acts if given the opportunity to do so."

MS. ASHTON: Your Honor, the cases that have been in this Court and are currently pending in this Court in which

Dr. Grigson has testified, the testimony is all as to a sociopathic personality. He has testified in the same manner. It has not been the only testimony --

QUESTION: Did he use the same words?

MS. ASHTON: He uses approximately the same words for his diagnosis --

QUESTION: Same words; that's right.

MS. ASHTON: -- if it's a similar diagnosis. It is not necessarily the only evidence that has been used in the punishment stage of all the trials, though.

The findings of Dr. Grigson have been used both to help a defendant as well as to help the prosecution. In the cases where Dr. Grigson has examined defendants and other psychiatrists have examined defendants, and they have found that there is not a sociopathic personality trait. Generally the district attorney's office refuses to seek an indictment for a capital offense because in Texas one of the very first steps is a denial of bond in a capital offense. In order to deny bond the proof must be evidence, in the words of the Court of Criminal Appeals, that not only will a conviction result for capital murder but that affirmative answers will result to all three special issues.

QUESTION: This argument, I take it, goes to the suggestion that Dr. Grigson isn't a "hanging psychiatrist" necessarily. Is that it?

MS. ASHTON: That's correct.

QUESTION: Now, are these statistics -- of record? How do we know what you are saying? It is part of this record?

MS. ASHTON: No, Your Honor, it is not part of this record. The cases in which the State does not seek an indictment do not become a part of an official court record.

QUESTION: Right; right. But you might have had testimony with respect to this in this case.

MS. ASHTON: Your Honor, we have not had evidentiary hearings in any court on this.

QUESTION: Well, that's what I was leading up to, to asking you whether some of these claims were ever presented to the state courts?

MS. ASHTON: No, Your Honor.

QUESTION: The Fifth and Sixth Amendment claims?

MS. ASHTON: They were presented by purpose of a -- in this particular case, in a shotgun petition for writ of habeas corpus which --

QUESTION: Where -- in what -- where?

MS. ASHTON: In the state courts, in the Texas Court of Criminal Appeals and to the trial court approximately I believe it was four or five days before an execution was scheduled to take place for this defendant. The relief was denied summarily in both the trial court and the Court of Criminal Appeals.

QUESTION: Well, would these claims have been open in the state courts on a state collateral proceeding? I know the state collateral relief was denied just summarily, without an opinion. Do you know whether the Fifth and Sixth Amendment claims were properly presented, could have been properly presented in a state collateral proceeding?

MS. ASHTON: Your Honor, they have been presented by indirect appeal in some other cases.

QUESTION: I'm asking about this case.

MS. ASHTON: Well, the court has found, the Texas Court of Criminal Appeals has found that there is no Fifth and Sixth Amendment right as to psychiatric testimony.

QUESTION: I know, but I'm asking whether these claims were properly presented in the state collateral proceeding. Were those claims open in the state collateral proceeding if they hadn't been raised on direct appeal?

MS. ASHTON: Yes, Your Honor, they would have been open.

QUESTION: So they denied them on the state collateral?

MS. ASHTON: They denied them.

QUESTION: So state remedies have been exhausted?

MS.ASHTON: Technically the state remedies have been exhausted. The State is of the opinion in this particular case that the District Court opinion went further than the pleadings

that were filed in the case as to setting forth the issues involved. Therefore the state courts were not given an opportunity to fully analyze and have an opportunity to hear the issues as were decided by the federal District Court.

QUESTION: Well, then your claim, is it, must be, then, that state remedies haven't been exhausted?

MS. ASHTON: Well, yes, Your Honor, they have not been, except for the fact that the technical allegation was that it was copied verbatim from one petition to the other.

QUESTION: I don't understand your position on exhaustion then. Do you claim that they should go back to the state courts first or not?

MS. ASHTON: Your Honor, because of the decision subsequent to decision by the Court of Criminal Appeals holding that there is not a Fifth and Sixth Amendment right to psychiatric testimony as a matter of state law, I feel that it would be futile to bring the claims as presented to the federal District Court in this claim. Therefore, exhaustion is not a ground that I feel is strongly stressed in this particular case under the facts in which it arose.

QUESTION: Well, as the case comes here, I had understood that the two issues were whether it was a violation of due process to fail to give notice of Dr. Grigson's testimony, that he would testify; and second, that the Constitution required that before any interview material could be used, that the

defendant had to be informed that the information might be used against him. I thought those were the only two issues presented here.

MS. ASHTON: That is correct, Your Honor.

QUESTION: You've addressed one of them.

MS. ASHTON: As to the --

QUESTION: But the latter is based on the Fifth and Sixth Amendments.

MS. ASHTON: Yes, Your Honor. The latter is based on the Fifth and Sixth Amendments. The former, of the denial of due process, the State strongly contends and still contends that there is a need for an evidentiary hearing as to that issue to fully develop the record. We believe that the record has never been fully developed as to a finding that the State deliberately omitted the psychiatrist's name from the list and deliberately acted so as to deny due process to the defendant in the manner in which the testimony was presented.

All right. Now, I'd like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Berger.

ORAL ARGUMENT OF JOEL BERGER

ON BEHALF OF THE RESPONDENT

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

As the Chief Justice just pointed out, we have before

the Court today basically two sets of issues, either one of whch standing alone is sufficient to invalidate the death sentence imposed upon Mr. Smith.

QUESTION: Well, is there a death sentence outstanding now?

MR. BERGER: I believe there technically is because the 5th Circuit decision has been stayed and Mr. Smith is presently on death row in Texas.

Now these two issues can be loosely described as --

QUESTION: Who stayed the decision? I wasn't aware of that.

MR. BERGER: The 5th Circuit.

QUESTION: Oh, it stayed its own --

MR. BERGER: I might add, we did not oppose that. The choice for Mr. Smith was either the Dallas County Jail or Ellis Unit at Huntsville, and given the amounts of time that would pass we felt that he would still be better off down there at Huntsville.

One issue is the surprise witness issue, which is grounded in both Eighth and Fourteenth Amendments dealing with the manner in which the State presented Dr. Grigson's testimony at the penalty phase.

The other issue with both Fifth and Sixth Amendment components deals with the manner in which the State obtained the very basis for this testimony in the first place.

QUESTION: The Court of Appeals didn't proceed on the basis of anything that was deliberate by the State. It just said it was surprise. Is that right?

MR. BERGER: No, Mr. Justice White, the Court of Appeals affirmed the finding below.

QUESTION: Well, they affirmed the judgment but did they say it was deliberate?

MR. BERGER: Yes, they expressly affirmed the District Court's finding of facts that the prosecutors had intentionally failed to place Dr. Grigson's name on the witness list in a deliberate effort to surprise defense counsel.

QUESTION: Would it make any difference constitutionally whether it was inadvertent or deliberate?

MR. BERGER: I think it would make the State's case a little easier --

QUESTION: On the due process.

MR. BERGER: Yes. Although the Court of Appeals did point out that even if it was inadvertent, the prejudice in this case was so substantial that the result might very well be the same.

QUESTION: This case I'm talking about. In this case it would have made no difference whether it was inadvertent or calculated.

MR. BERGER: I do think that it makes the case stronger because there is no doubt from the record, no doubt at

all, that the prosecutors knew several days in advance that they were going to call Dr. Grigson and in fact deliberately tricked defense counsel here. If you'll look at pages 15 and 16 of the Appendix, the voir dire examination of Dr. Grigson prior to his actual testimony, this examination took place on Tuesday, March 26, 1974, just before he actually testified. And he says there, page 15, that he had been asked to testify in this case the previous Thursday, Thursday, March 21, 1974, five days earlier.

He specifically had been told that he would be called, that he would be needed the following week. Over on the next page he is again asked whether he was requested to testify in advance, he again answered in the affirmative. I think in context there he is quite probably talking about even an earlier date.

I must correct one thing Ms. Ashton said, if I heard her correctly. She said that the prosecution had not contacted Dr. Grigson prior to March 21. That is not true and pages 14 and 15 illustrate that. Dr. Grigson, in fact, discussed his findings at a much earlier date with the prosecutor, gave the prosecutor a copy of his report, and was, I think it is fair from page 16, asked sometime prior to March 21 to testify.

As Ms. Ashton pointed out, Dr. Grigson does most of his work in the courts in Dallas. He regularly transacts business with the Dallas District Attorney's Office. They knew

about his involvement in this case way before the 21st and it is clear that at the very minimum, no later than March 21, they knew he would testify.

QUESTION: You were not trial counsel, were you?

MR. BERGER: Excuse me?

QUESTION: You were not trial counsel, were you?

MR. BERGER: No, I was not.

QUESTION: Do you know whether defense counsel -- apparently this Grigson has testified in so many cases around Dallas, in capital cases, would he not have anticipated that Grigson probably was going to be called?

MR. BERGER: Mr. Justice Brennan, this was one of the earliest cases under the new Texas statute, one of the very first. It may have even been the first or second.

QUESTION: I see.

MR. BERGER: I don't know that for sure. As the Court knows, it was the only case that had been affirmed by the Texas Court of Criminal Appeals other than Jurek at the time that Jurek was decided.

QUESTION: It was Smith.

MR. BERGER: That's correct.

QUESTION: And in Smith, according to the Jurek opinion or an opinion in Jurek, there was offered in evidence the conclusion of a psychiatrist that Smith had a sociopathic personality and that his patterns of conduct would be the same

in the future as they had been in the past. Do you happen to know if that was the same psychiatrist as the one involved here?

MR. BERGER: Well, yes, that is this case, Mr. Justice Stewart.

QUESTION: That's this case?

MR. BERGER: Correct. That is Dr. Grigson who is being referred to there. Neither Mr. Simmons, the defense attorney, or I think this Court at the time of Jurek really knew very much about Dr. Grigson. In Dallas Dr. Grigson had begun to make something of a reputation for himself as a prosecution-oriented psychiatrist. There are some cases cited in the opinions below that were decided prior to the trial in this case, non-death cases, or one that's a death case under the old statute, but cases --

QUESTION: Mr. Berger, when you say "prosecution-oriented psychiatrist," aren't all expert witnesses oriented toward the side that calls them, in effect? You don't call an expert witness who's going to damage your case.

MR. BERGER: That is certainly correct. It's relevant here, though, particularly on the Fifth and Sixth Amendment claim, because it points out a problem that we have in Texas with psychiatrists who regularly work with the prosecution, going in to see defendant at the jail after he has been indicted and after counsel has been appointed. We're concerned with that practice as done by psychiatrists who are antecedently

favorable to the State. That's where it comes in. Of course --

QUESTION: Well, what if Dr. Grigson were asked to examine 100, or say 50 defendants, and he examined them and 50 of them, or 25 of them, he said, nothing wrong with these two people, and the others, he said they were sociopaths. And the prosecution asked for the death penalty for 25, and not for 25 others. And then they called Grigson and the 25, they -- would you call him prosecution-oriented?

MR. BERGER: In view of the use to which -- I would say that his approach might be more balanced if that were the case, which it is not. But I would still be --

QUESTION: Well, how do you know it isn't? How do you know it isn't?

MR. BERGER: I would still -- we can look at the cases in which he has testified that are reported, cases that have been through the courts.

QUESTION: That still doesn't show that Mr. Justice White's hypothetical isn't correct, as the cases in which he's testified are, would be the 25 hypothetical cases in which he found that the defendant was a sociopath.

MR. BERGER: Well, I think that the State has had ample opportunity in this case to give us some information on him.

QUESTION: Well, that's a different answer. You asserted a fact, and I asked you how you knew it.

MR. BERGER: Well, I can state, having followed Texas death cases for the last three years, four years, that I have never --

QUESTION: Well, have you followed the cases where the prosecution hasn't asked for the death penalty and Grigson has examined the defendant, or hasn't that ever happened?

MR. BERGER: I do not know whether it has happened or not. I do know I have never --

QUESTION: Well, who knows?

MR. BERGER: I have never been told of it happening. I realize all this is outside the record. Ms. Ashton was asked about it first, and so I'm responding in like fashion. It's not only --

QUESTION: But you're still asserting the fact that he's a prosecution-oriented psychiatrist, and I'm not sure you know that except based on all the cases in which he testified, in which he said defendant was a sociopath.

MR. BERGER: I do not know of a single death case in which he testified for the defense. That's what I'm saying.

QUESTION: And that is the basis for your --

MR. BERGER: That is correct.

QUESTION: The sole basis for your statement?

MR. BERGER: Also the fact that balanced against my lack of knowledge of one case in which he has appeared for the defense, is a long list of cases in which he has appeared for

the prosecution, a very long list.

QUESTION: Even if we were to conclude that he is defense-oriented, would not your legal arguments be precisely the same?

MR. BERGER: Yes, they would, Mr. Justice Stevens, of course. Even if he testified for the prosecution in 25 cases and for the defense in the other 25, we would still maintain that the way he approaches these capital defendants --

QUESTION: I agree with you. Well, yes, but I would -- regardless of the way he approaches them, your legal argument would be the same, I suppose.

MR. BERGER: Yes, and I'll go a step farther: if the case did not involve Dr. Grigson but involved some other psychiatrist.

QUESTION: Have you ever heard of a defense counsel calling a psychiatrist who was not known to testify favorably for the defendant?

MR. BERGER: Defense counsel often does do that, of course. Of course.

QUESTION: Often? Often? Do they ever do it otherwise? I have sat on hundreds of appeals and tried, as a trial judge, cases and I never knew of a case where defense counsel called a hostile witness any more than the prosecution, so that your point, really, is an unnecessary point and not grounded on

any facts, and it isn't relevant to your constitutional arguments.

MR. BERGER: Well, I think it is relevant only in one sense. At least there's one particular sense in which I think it is most relevant and then I will turn away from it, which is only that in, I think we have to take cognizance of the practice that goes on down in Texas that the 5th Circuit was aware of at the time it decided this case. The 5th Circuit recognized certain Fifth and Sixth Amendment safeguards, and I think it's important to realize that they were not acting on a blank slate, they were not dealing with one case in which this particular procedure happened to occur once. They were dealing with a specific problem involving many psychiatrists, primarily this psychiatrist. And I think when federal courts impose the types of safeguards that were imposed here, it's of some relevance that they are responding to a particular need rather than to isolated needs.

QUESTION: There's no dispute, I gather, as to the circumstances under which Dr. Grigson examined the respondent.

MR. BERGER: Absolutely none; he gave no --

QUESTION: That is, he was requested by the trial judge in advance of the trial to do so on the judge's own motion?

MR. BERGER: That is correct.

QUESTION: And now is it your claim that there was something improper about that?

MR. BERGER: I don't think that standing alone would create due process violation.

QUESTION: I think there are indications in some of this Court's opinions that it's the duty of the trial judge to do that.

MR. BERGER: No, that standing alone would not create a due process violation.

QUESTION: And that was done without notice to the defense counsel?

MR. BERGER: The main ground of our surprise claim is the way the State ultimately presented this doctor, by leaving his name off the witness list and then calling him as a last minute surprise witness. They knew --

QUESTION: They didn't call him as a witness in the case in chief, did they?

MR. BERGER: That is not correct, Mr. Justice Rehnquist. On page 23 of their brief in the court below, the Court of Appeals, the State says the following: "Since the State witness, Dr. Grigson, was temporarily unavailable to testify, the defense agreed to proceed with its witnesses before the presentation of Dr. Grigson's testimony." The State has never claimed that he was a rebuttal witness; never.

QUESTION: What did the Texas court say?

MR. BERGER: the Texas court, looking at the record, decided for themselves that he had been a rebuttal witness and

I think the State's comment there in the 5th Circuit two years later is quite relevant, because they are admitting that the Texas Court of Criminal Appeals made a mistake. Now --

QUESTION: Mr. Berger, you had subpoenaed the records of Dr. Grigson's visit to Smith, had you not?

MR. BERGER: The trial attorney did; yes.

QUESTION: The defense side did, then?

MR. BERGER: Yes.

QUESTION: What does that do to the claim of surprise?

MR. BERGER: Well, I'm not sure, because the State did not point to that subpoena in the District Court and as a result we had no opportunity to respond to say anything about what it might have meant. Them -- sort of looking at that subpoena like some sort of a smoking gun, two courts later, and for the first time waving it front of us and saying, ah, this obviously means that he knew.

Now, defense counsel was about to go on trial that day. He issued, I think, 10 or 12 subpoenas that day for all kinds of information. When you're preparing to go to trial on a case you want to learn everything you can conceivably know about the case, you follow all kinds of blind leads, and several of those subpoenas, other subpoenas that day, I don't even understand what they were about, they don't seem to tie into anything in the case.

That subpoena, as I understand it, was for jail

visitation records. For all we know he may have wanted to to check that no one else had signed in with Dr. Grigson, if there was some other person present at the interview who might show up as a rebuttal witness after Smith took the stand. I don't know. The record is blank because the State did not point to that subpoena.

QUESTION: How much time did counsel ask for when Grigson was called? Or did he ask for any?

MR. BERGER: After the motion to bar Dr. Grigson's testimony was denied, the trial judge on his own recognizing that counsel was surprised offered counsel one hour. And under the circumstances Mr. Simmons accepted one hour.

QUESTION: Did he ask for any more? Did he ask for a day or two days; continuance?

MR. BERGER: No, he did not. I think that, in context, the reason that that happened was simply his belief that that was just out of the question, given the realities of the situation. We were late into the trial, the jury had been sequestered already, they were sequestered after the testimony on guilt/innocence. That's on page 20 of the state trial transcript. And the judge offered him an hour; he saw that was all he was going to get; and so that's how he proceeded.

QUESTION: Was his motion to exclude the testimony based on anything other than surprise?

MR. BERGER: No, it was not. It was not.

QUESTION: And was the Fifth and Sixth Amendment claim ever presented in the direct appeal, on the direct appeal?

MR. BERGER: Not on the direct appeal. It was presented for the first time in the state habeas corpus petition and it was denied.

QUESTION: And is the rule in Texas that those claims were open, or that they're not?

MR. BERGER: Yes, they -- I believe that that is the rule, I believe that's what I understood Ms. Ashton to say, and certainly there was no exhaustion problem.

QUESTION: Well, in any event those claims were considered on their merits by this state court in collateral --

MR. BERGER: Oh, yes; definitely, definitely.

QUESTION: So whatever the rule might be, that was what was done in this case.

QUESTION: Well, there wasn't any opinion; it was denied without opinion.

MR. BERGER: Yes. There was no opinion on the Fifth Amendment issue. Pardon me -- on the surprise issue, the Court of Criminal Appeals specifically spoke. There was no opinion on the Fifth Amendment issue.

QUESTION: So the rejection could have been based upon the fact that they were not properly there, those claims.

MR. BERGER: Well, they did not say that. I'm not aware --

QUESTION: They didn't say, one way or the other.

MR. BERGER: I'm not aware of such a rule of law in Texas, no.

QUESTION: No.

MR. BERGER: Also, I might add that the State did not defend on that grounds either.

QUESTION: Was there any reference in the opinion to the fact that defense counsel did not ask for a continuance?

MR. BERGER: In the Court of Criminal Appeals opinion? No. No, the Court of Criminal Appeals treated it fairly as a surprise question and they did not say, you should have moved for a continuance. They went on to the merits.

Now, I would like to point out one salient fact about the surprise issue that I don't think has come out thus far. The State says they didn't know that Dr. Grigson would testify, as of March 11 when they submitted the witness list. And we say they clearly knew as of March 21. They say, as I understand it, we were under no obligation to add names to the list after we filed it.

On March 25, a Monday, the opening day of the trial, the day before Dr. Grigson's testimony, defense counsel made a motion in limine asking the trial court to bar the testimony of any individual not on that list. And that motion was granted. Now, you'd think since it was clear from the record that no later than the previous Thursday they knew they were going to

call Dr. Grigson. This would have been the appropriate moment, if not sooner, for the District Attorney to stand up and say, Your Honor, one moment, please. If you are going to sign that order in limine, we would like to make one exception, we would like to add the name of Dr. James T. Grigson. We realize he was not on the list up to now. We apologize for that, but we want to give defense counsel notice at this time. Please make him an exception to that order in limine.

That wouldn't have been particularly difficult to do. Yet the State did not do that. They said nothing. They remained silent. And that's why we're before the Court on a firm findings of fact that there was a deliberate, intentional effort to surprise defense counsel.

Now, of course, the testimony of Dr. Grigson was highly impeachable. We know that from the American Psychiatric Association brief. We're not saying here that it's inadmissible; we're not saying here that it cannot form a reliable basis for the death sentence. We did plead those points in the habeas corpus petition. Please don't misunderstand me; we pleaded them. They were not reached by the District Court, they were not reached by the Court of Appeals. In fact to the extent that the District Court commented on it at all, the District Court said that in its view it thought such testimony ought to be admissible.

QUESTION: If the defense had called a rebuttal wit-

witness on the subject, a psychiatrist who said that having examined this gentleman he would be perfectly safe and would be a good citizen and would not repeat his prior conduct, the American Psychiatric Association position would apply exactly the same with reference to that prediction, would it not?

MR. BERGER: Yes. The American Psychiatric Association does not believe that such predictions can be reliably made. That is their position; it applies to both sides. That's correct.

I would like to, in the remaining time, turn if I may to the Fifth and Sixth Amendments issues because I don't think they have been aired sufficiently thus far. Here there was absolutely no dispute of fact at all. The State has never claimed that Dr. Grigson gave Mr. Smith warnings of any sort and we know that he did not.

On February 18, 1974, Dr. Grigson went to the jail. At this time Mr. Smith had been under indictment for nearly two months. The indictment was December 28, 1973. Defense counsel had been appointed nearly four months earlier, October 25, 1973, and only 18 days earlier the State had announced that it intended to seek the death penalty.

Dr. Grigson went to the jail and he simply proceeded to speak with Mr. Smith for about 90 minutes. He said that Mr. Smith cooperated fully, he was pleasant, he was courteous, he was extremely polite. And during those 90 minutes this man

facing trial for his life unknowingly, unknowingly provided prosecution with the basis for the only testimony presented against him at the penalty phase. No one ever told Mr. Smith that his encounter with Dr. Grigson could have any adversarial purpose whatsoever. Certainly no one told him that his comments to the doctor could and would literally be used to try to kill him or that in view of that awesome consequence of this encounter he had a right not to say anything and to discuss the matter with the attorney who'd been representing him for the past four months. Now --

QUESTION: When did the defense counsel first know of the examination?

MR. BERGER: Long after it had actually occurred. It was sometime during the jury selection process which began, I believe, March 11 and ran through March 25. A curious thing about the State's position, as I read it, is that they are saying that all of these capital defendants who have been examined by Dr. Grigson and others -- and altogether there are 30 cases that I'm aware of; Dr. Grigson has testified in 20; altogether the Court of Criminal Appeals has affirmed 62, to date, so we have psychiatric testimony in about half of them, Dr. Grigson in about one-third of them.

The State is of the view that all of these defendants, these capital defendants, have absolutely no Fifth Amendment privilege when faced with a psychiatrist under these circumsta

circumstances. Taken literally, this means that in their view a capital defendant could be compelled to provide the very evidence through which the State will seek his execution.

QUESTION: Well, he could be called to testify by the State at the penalty trial.

MR. BERGER: That would logically follow also; yes. They're saying he has no Fifth Amendment privilege, that upon conviction -- I must point out that this interview took place before conviction. But leaving that aside for a moment, we can treat that in a lengthy footnote in our brief. They're saying that the State can reuire a capital defendant to submit to examination by a psychiatrist knowing full well that that psychiatrist will then recommend whether or not he's fit to live.

QUESTION: Well, what's their answer to the Sixth Amendment claim? Even if that were so, it wouldn't dispose of the Sixth Amendment.

MR. BERGER: Yes, I don't think they have really addressed that very much in their brief at all if -- we have a highly critical stage of the proceeding here; I can't think of a more critical moment in the history of this case.

QUESTION: Well, Mr. Berger, what if the trial judge at the time of the arraignment orders a competency hearing for the accused and the accused simply says, I decline to speak with any psychiatrist, does that prevent any further proceedings in the case?

MR. BERGER: I think that what would probably happen in a situation like that, defense counsel felt there was a real need, a strong need for a competency exam to be conducted.

QUESTION: Well, what if the defense counsel said, no, I'm not going to let my client speak with any psychiatrist?

MR. BERGER: I think that would be the end of it. I think that if there is a real need for a competency exam defense counsel would do well to urge the court to bar the testimony of the psychiatrist who does the competency exam, bar that psychiatrist from testifying at --

QUESTION: Your position, then, ultimately, leaves the fact that someone charged with capital murder can effectively frustrate that charge by simply refusing to submit to a competency hearing before there is ever a trial on the guilt or innocence --

MR. BERGER: Oh, no. No, I'm not saying that.

QUESTION: If he refuses, when it's the end of it, you'd just say, they'd just try him.

MR. BERGER: Oh, no, I don't mean it's the -- I just meant it was the end of the question of -- oh, I'm sorry, I misunderstood your question.

QUESTION: You would just try him.

MR. BERGER: Oh, no, of course I'm not saying they can't try him. What they can do, the obvious solution, is to simply say that the doctor who performs the competency exam

examination, if there is a very strong need for a competency exam, that doctor cannot then testify --

QUESTION: Yes, but what if the defendant refuses to say a word, to even talk to them? The State is free to try him then, I take it.

MR. BERGER: I believe that they are, yes, and unless there is some overwhelming evidence of which one does need a psychiatrist's testimony that might show that he's incompetent anyhow if he's doing all kinds of strange things, I suppose.

QUESTION: Does that refusal to submit to an examination and answer questions constitute a waiver of any future claim of lack of competency, in your view?

MR. BERGER: I don't know whether that would be the case. I think it would depend on his reasons for failing to speak to the doctor, but in any event I do know that he certainly by requesting -- if you -- let's look at it the other way around. If he were to request a competency exam, which is his right under the Due Process Clause, I can certainly -- that would not mean that he waives his Fifth Amendment privilege with respect to the penalty phase. And that's a very important point because it comes up in some other Texas cases.

Here there was no request. To get back to the facts of this case, here there was no request for a competency exam, there was no request for a sanity exam. Defense counsel had never at any time raised the question of alleged incompetence

or insanity of this defendant.

QUESTION: But some of our cases have held the trial judge on his own motion has to order an exam, haven't they?

MR. BERGER: Yes, and if it's only going to be used for competency, then the law is clear that it is a purely benign, neutral, nonadversarial proceeding. The problem is where that examination is then turned around and used to get the defendant executed. That's the problem we're concerned with here.

Now, I must point out that under Texas law the State has the burden at the penalty phase. The State has the burden of proving certain statutorily specified facts as a precondition to imposition of the death sentence and of particular relevance to this case, the State has to prove on its own beyond a reasonable doubt to the satisfaction of a unanimous jury that there is a probability that this defendant would engage in future criminal acts of violence that would be a danger to society. That was their burden, and the State is saying that they can require the defendant to help the State meet that burden out of his own mouth? Surely the Fifth Amendment protects against that.

QUESTION: Do you think it would violate his constitutional rights if the psychiatrist simply went to the institution where he was incarcerated and then observed him for two or three days, even without having any responses coming from

the defendant?

MR. BERGER: That's a much more difficult question. The Court of Appeals addressed that in its opinion and said they really weren't sure. You know, perhaps it would depend on the facts of the case. But we know that here, in fact, he examined Mr. Smith, Mr. Smith made statements, the statements were used.

Incidentally, I should point out, although our case is not based purely on the use of the statements themselves or rather the inferences the doctor drew from them that it is not true that on every occasion that Dr. Grigson testified to specific statements that the door was opened by defense counsel. You'll find at least one inference on page 33 of the Appendix, towards the end of the examination, where Dr. Grigson on his own volunteered some statements that Mr. Smith had allegedly made.

But, apart from that, the doctor drew all of his diagnosis from Smith's comments, from what Smith said to him, and apparently from what Smith supposedly did not say to him. That certainly does present a very serious Fifth Amendment problem and also, as Mr. Justice White pointed out, because of the time in which it occurred, raises questions under a host of Sixth Amendment cases, Massiah, Brewer v. Williams, just last term United States v. Henry, the need for the assistance of counsel in this circumstance. After all, I'll admit that without

the Sixth Amendment aspects of this decision, the defendant might be somewhat confused by the warnings he was given.

QUESTION: But didn't the Court of Appeals hold that there couldn't be a waiver of counsel at this stage without the help of counsel?

MR. BERGER: I do not read their opinion as going that far and of course this Court's opinion in Brewer v. Williams does not go that far. You'll notice that the Court of Appeals --

QUESTION: You're not claiming that and you're not going that far? Is that right or not?

MR. BERGER: I'm not going that far because this Court as I read Brewer v. Williams has not gone that far, and that's one reason why there's a need for warnings.

QUESTION: But at least you say there was no waiver here?

MR. BERGER: There isn't.

QUESTION: Was there ever an opportunity to waive counsel?

MR. BERGER: Oh, obviously, obviously not. I think also that certainly there would be the heaviest of all conceivable burdens upon the State to show a genuine waiver. I'm just saying that under Brewer as I read it at this moment this Court has left that matter open.

You'll notice, incidentally, that the Court of Appeals

used the very words from the Constitution, "assistance" of counsel; did not go any farther than that. So I do not believe that in using the word "assistance" that they meant to impose some new rule that can't be waived without notice to counsel, a rule not yet adopted by this Court.

I might only conclude by pointing out that 25 years ago Dean Griswold wrote in "The Fifth Amendment Today," "We do not require people to sign their own death warrants or to dig their own graves." And I think he said that at the height of the McCarthy period in 1954 for a very special reason. He wanted to emphasize the importance of the Fifth Amendment, and that, he felt, was the perfect illustration, and so it is.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Berger.

MR. BERGER: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Ms. Ashton?

MS. ASHTON: Yes, Your Honor.

ORAL ARGUMENT OF MS. ANITA ASHTON

ON BEHALF OF THE PETITIONER -- REBUTTAL

MS. ASHTON: First of all, in regard to the surprise issues and a continuance, under Texas law historically and it is well established that a counsel if he is in fact surprised must move for a continuance from the trial judge. Contrary to Mr. Berger's statements, the trial judge -- there is no indica-

indication at all that the trial judge knew that the defense attorney was surprised. The defense attorney had taken Dr. Grigson on voir dire outside of the presence of the jury to establish the fact that his name was not on the witness list. He never said, I'm surprised, I want a continuance, I haven't had a --

QUESTION: Well, did the judge give him an hour?

MS. ASHTON: The judge gave an hour recess and said, is that agreeable?

QUESTION: Why? Why?

MS. ASHTON: Your Honor, trial judges frequently give recess during the presentation of testimony for one reason or another. There is nothing in the record --

QUESTION: May he not have done so here because he thought defense counsel was surprised?

MS. ASHTON: He may have, Your Honor, but there is no indication that that was the reason that he did so.

QUESTION: Well, he claimed surprise, did he not?

MS. ASHTON: He claimed that the name was not on a witness list. He did not --

QUESTION: Well, wasn't that equivalent to claiming surprise?

MS. ASHTON: Your Honor, there are facts in the record -- first of all, the subpoena that was issued indicates that he knew Dr. Grigson had examined his client and obviously

gave some consideration to the fact or he would not have requested the subpoena for the visitation records.

Secondly, this counsel, this was not the first capital case tried in Dallas nor was it the first capital case in which this counsel had defended. He had defended William David Hovila a month before in Dallas County and Dr. Grigson had testified during Hovila's trial as to sociopathic personality features, although there had been an issue of sanity raised in that trial. Still, Dr. Grigson had given testimony extremely similar to the testimony given in the Smith case and was cross-examined by this same trial counsel one month previously.

Further, he said the defendant himself knew he had been examined by Dr. Grigson, and surely told his counsel that the psychiatrist had talked to him, but there is no showing in the record that the defendant had given that information to counsel; I'm making an assumption from the record.

These are some of the reasons the State feels that a full evidentiary hearing should have been conducted as to the issue of due process and surprise in order to have all of the facts in the record, to give the State an opportunity to cross-examine the defense attorney as to his statements in his affidavit, for many statements could not be disproven any other way than on cross-examination from him from the witness stand.

An affidavit was submitted by the trial court. The trial court stated that to the best of his knowledge he had informed defense

counsel, there had been no written notification -- at that time statutory practice did not require written notification. The report from Dr. Grigson had been placed in the court's file, was available to either side for review. The prosecution talked to Dr. Grigson; there was nothing to prohibit the defense counsel from talking to Dr. Grigson; he was appointed as a disinterested expert by the court. The defense could have gone to him and talked to him if they had gone through the court file or had given preparation in that regard.

QUESTION: When you say that the report was placed in the court file, is it common practice in Texas for attorneys to run through the file rather than rely on a witness list or documents served on them?

MS. ASHTON: Yes, Your Honor, it is common practice for attorneys to look at a court's file fairly frequently, especially when they're trying a capital-type case, that the court's file is something that is open to either side and is going to have information in it as to subpoenas, as to other materials, communications with the court. It's a fairly common practice in trial practice to look through the court's file on a relatively frequent basis, especially in preparing for a case of this nature.

QUESTION: Ms. Ashton, if a state passed a statute that said in a capital case in the second part of a bifurcated trial as to whether or not the man gets death is determined by

a psychiatrist. Would that be allowed by due process?

MS. ASHTON: If that -- the ultimate issue would have to be determined by a psychiatrist?

QUESTION: I gave you what the statute said. Don't put in anything or add, just leave it as it is. Would that be due process?

MS. ASHTON: Well, Your Honor, I don't believe that under the context of having an expert witness make an ultimate factual determination without giving the jury consideration as to all the facts of the trial, I believe that probably would be a denial of due process. But that is not the statute, it is not the way it is written. The State does not have to present any testimony. The State can rely only on the testimony that they presented at the guilt phase of the trial; all of the facts are before the jury for consideration.

In calling Dr. Grigson to the stand as a psychiatrist he was called as a rebuttal witness in the order that the witnesses were presented, though we contend that he was not available to testify initially. The State was under no obligation to call him as a rebuttal witness. It could have relied strictly on the evidence that had been introduced in the guilt phase of the trial where the defendant had testified, where his oral confession had come in and where there had been testimony from the police officer who had witnessed the oral confession that the defendant showed no remorse upon questioning by defense

counsel of whether or not the defendant seemed emotional or seemed to regret the crime.

Additionally, the defendant in this case could have taken the stand in the punishment stage of the trial and testified that he was sorry about the murder, that he regretted the fact that William Moon was no longer alive, that if he could have he would have stopped it. But he did not take it. His counsel did ask him about regrets during the guilt phase --

QUESTION: At this point, Ms. Ashton, could the State have called Smith, at the penalty phase of the trial?

MS. ASHTON: No, Your Honor, I don't think they probably could have called Smith to force him to testify; no.

QUESTION: Well, then you're abandoning part of your --

QUESTION: In the face of that answer, how does that square with your argument that Fifth Amendment does not apply at the penalty phase?

MS. ASHTON: Your Honor, although you could not force a person to give testimony from his mouth, the Fifth Amendment should not apply to prohibit use of testimony which has, serves as a basis for an opinion which has been rendered; that the Fifth Amendment should not go as to those statements made by the defendant after he's been found guilty as to statements of guilt, especially in circumstances where he has given the same testimony in the court as to the facts of the offense.

QUESTION: If while incarcerated he had boasted to the

jailor about the crime and said if he had the opportunity he would do it over again, would that be admissible under Texas law in the second phase of the proceeding?

MS. ASHTON: Yes, Your Honor.

QUESTION: So that you're putting the statements to Dr. Grigson in the same category as voluntary statements made to a third person?

MS. ASHTON: Not necessarily because they are voluntary, but they are made to a court-appointed expert, but he is not serving as an official of law enforcement. His purpose was not to gather incriminating evidence for the purpose of conviction. His purpose was to evaluate mental status. He as a result of the examination gained some knowledge of the crime, but his knowledge of the crime was not used for the purpose of conviction.

QUESTION: May I ask another question about the penalty phase of the trial in the Texas procedure? Suppose -- I think I understood you to say that the State need not present any evidence at this. It could rely on what came in in the guilt phase.

MS. ASHTON: Yes, Your Honor.

QUESTION: Suppose the State did not present any evidence and then the defense, as I think in this case, presented no evidence, could the State then call Dr. Grigson?

MS. ASHTON: No, Your Honor. The State rested, and

the defense rested without presenting any evidence whatsoever. The State could not -- they already -- they'd had their one chance to present evidence. If the defense chose not to present any, they could not present any further evidence.

QUESTION: So there are some rules that apply in the penalty phase of the trial --

MS. ASHTON: Yes, Your Honor.

QUESTION: -- even though you say the Fifth Amendment is not a --

MS. ASHTON: Yes, Your Honor.

QUESTION: I just wanted to follow up on the same thought that Justice Blackmun was raising. You have now acknowledged, as I understand you, that the State could not have compelled the defendant to testify at the penalty phase?

MS. ASHTON: That's correct, Your Honor.

QUESTION: Could the State have used Dr. Grigson's testimony during the guilt phase?

MS. ASHTON: The state could not have used Dr. Grigson's testimony because under the statute, under 4602, which provides for psychiatric, court-appointed psychiatric examinations in a criminal trial, it specifically states that no evidence may be used as to the issue of guilt.

QUESTION: Thank you.

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

(Whereupon, at 11:03 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1127

Estelle v Smith

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: James K. McCarthy