ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1095

TITLE JOHN PAUL MORRIS, WARDEN, Petitioner
v.
JOSEPH D. SLAPPY

PLACE Washington, D. C.

DATE December 1, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN PAUL MORRIS, WARDEN, :

Petitioner :

v. : No. 81-1095

JOSEPH D. SLAPPY :

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Washington, D.C.

Wednesday, December 1, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:08 o'clock p.m.

APPEARANCES:

DANE R. GILLETTE, ESQ., Deputy Attorney General of California, San Francisco, California; on behalf of the Petitioner.

MICHAEL B. BASSI, ESQ., San Francisco, California; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Morris against Slappy.

Mr. Gillette, I think you may proceed when you are ready.

ORAL ARGUMENT OF DANE R. GILLETTE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GILLETTE: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court --

QUESTION: To avoid an interruption later on, I could not put my finger on the date of the criminal act that was charged in this case.

MR. GILLETTE: The date of the criminal act was July the 7th, 1976.

This case is before the Court on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. That court reversed Respondent Joseph Slappy's 1976 California state convictions for rape, forcible oral copulation, robbery, burglary, and false imprisonment, because it concluded that his Sixth Amendment right to counsel had been violated.

We submit that the result is an unwarranted expansion of the Sixth Amendment based in part upon a misreading of the state trial record. In addition, we

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submit that the Ninth Circuit has unfairly criticized the state trial judge for failing to conduct an inquiry that was not reasonably required by the record before it.

The facts of the crime can be quickly summarized. Mr. Slappy first accosted the victim early on the morning of July 7th, 1976, in a liquor store in San Francisco. After being ordered to leave the store, Slappy went to the apartment building where the victim lived, and there he waited in the lobby until she returned home. When she entered the building, Slappy grabbed her, forced her into the basement, and there stole her jewelry and committed the sex offenses.

After the victim managed to escape from Slappy, she almost immediately found a police officer and gave him a description of her assailant. Mr. Slappy was arrested two blocks from the apartment building and approximately 15 minutes later. He was wearing a distinctive Afro wig such as the victim had described, and was wearing a distinctive green jacket such as the victim had described.

In his pockets --

QUESTION: Is there any challenge here to the verdict as such?

MR. GILLETTE: None, Your Honor. There has

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never been a challenge either in the California courts or in the federal courts on habeas corpus that the evidence was insufficient to support these convictions. This is not a case where we are talking about the scales of justice being poised between guilt or innocence. Mr. Slappy is clearly guilty, and the only real issue is whether he received a fair trial.

Now, the more critical facts which pertain to the issues before this Court are those which relate to his relationship with the attorney who represented him at trial. At his initial arraignment in municipal court, the San Francisco Public Defender's Office was appointed to represent Mr. Slappy.

QUESTION: And what was the date of that arraignment?

MR. GILLETTE: That arraignment -- I don't know the precise date, Your Honor. It would have been within a day or two of July the 7th.

QUESTION: Well, it seems to me that the papers before us don't have anything about the date of the arraignment, the preliminary hearing, the date of Mr. Goldfine's hospitalization, all of which, it seems to me, are somewhat pertinent.

MR. GILLETTE: Well, the facts relating to the crime and the time and that such were not initially

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before the Court because they had never been presented to the lower federal courts. However, the complete transcripts of both this -- well, of the two trials, because there was a mistrial as to two of the counts, have been submitted to the Court. They were lodged last week per your request.

As to some of those other points, for example, Mr. Goldfine's hospitalization, the reason that is not in the record is a point that I will get to in just a moment, if I may.

Now, after the San Francisco Public Defender was appointed to represent Mr. Slappy, he assigned Harvey Goldfine to represent him, and Mr. Goldfine conducted the preliminary examination, and he also conducted what was later described as a voluminous investigation. Mr. Goldfine was scheduled to try the case, and that was scheduled to begin on September the 23rd, 1976.

On September 17th, six days before trial, the Friday before trial, the case was reassigned from Mr. Goldfine to Bruce Hotchkiss, an equally experienced senior trial deputy with the San Francisco Public Defender. The reason for the reassignment was that Mr. Goldfine had been hospitalized with appendicitis.

Mr. Hotchkiss met briefly that day, on Friday,

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with Mr. Slappy and advised him of the reassignment. He met again with him briefly on Monday morning in court, and then on Tuesday spent in excess of three hours with him discussing the case, met with him again Wednesday morning, again Wednesday afternoon.

On Thursday, September 23rd, in the morning, a jury was selected and empaneled. That afternoon, Mr. Slappy, out of the presence of the jury, complained to the judge that in his opinion Mr. Hotchkiss had not had an adequate opportunity to prepare. He believed --

QUESTION: At that point, had any evidence come in?

MR. GILLETTE: No, Your Honor, it had not, but a jury had been empaneled, and at that point it may have been necessary to delcare a mistrial rather than simply a continuance, because jeopardy had --

QUESTION: Again, the record before us doesn't show that, does it?

MR. GILLETTE: It does now, yes. The record that was in the certiorari petition and that came up from the Ninth Circuit did not, but all of those facts and dates and times are contained in the complete trial transcript which is now before Your Honor. Mr. Stevens advised me this morning that they had been received.

QUESTION: Did you say that no evidence had

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gone in at the time he made this motion?

MR. GILLETTE: That's correct, Your Honor.

QUESTION: The opening statements had been made?

MR. GILLETTE: No, they had not.

QUESTION: Had not?

MR. GILLETTE: No, they had not. The jury was empaneled in the morning, and prior to the beginning of the afternoon session, at which time the prosecutor would have begun his opening statement and begun to present evidence, Mr. Slappy made this complaint, saying --

QUESTION: The Chief Justice referred to it in terms of a motion. Would you describe it as a motion?

MR. GILLETTE: That is how the state trial judge characterized it. He had characterized it as a motion by Slappy for a continuance in order to allow Mr. Hotchkiss to prepare. Mr. Hotchkiss responded that in fact he was fully prepared. He had had six full days. He had had an opportunity to meet with Mr. Slappy. He was fully familiar with the record, including that complete investigation conducted by Mr. Goldfine, and that in his opinion a continuance to allow him to prepare further was not necessary.

That is how the trial judge characterized it,

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and that is how he responded to it, as a motion for continuance until Mr. Hotchkiss could prepare. At no time during this hearing on the afternoon of the first day of trial was Mr. Goldfine mentioned by Mr. Slappy. He did not ask to have Goldfine represent him. He did not identify Goldfine as his attorney. He did not say that he wanted Goldfine to continue to represent him.

The only reference in the record on that day to Mr. Goldfine is by Mr. Hotchkiss who, as he is explaining to the judge the reason for the reassignment of the case, says in passing, I was assigned the case last Friday because Mr. Goldfine is in the hospital with appendicitis.

On the second day of trial, Friday, the 24th of September, Mr. Slappy interrupted Mr. Hotchkiss's cross examination of the victim several times, complaining about the manner in which the cross examination was being conducted. What he was objecting to were leading questions by Mr. Hotchkiss and attempts to limit the witness's testimony. Later, the judge told Mr. Slappy that in fact that was a standard technique of cross examination, and had often been found to be very effective.

QUESTION: I notice, counsel, and it may not be terribly important, but in the appendix here, the

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conversations reflecting what Mr. Slappy said, the Public Defender is simply indicated by "P.D." Now, did he, Slappy, in the courtroom call the Public Defender "my P.D.," or is that the reporter's shorthand?

MR. GILLETTE: This comes on the second day. I am just getting to that.

QUESTION: Yes.

MR. GILLETTE: No, on the first day he only refers to Hotchkiss, and he refers to him as "my attorney," referring to the attorney who is in court with him today, saying, I don't think that this attorney has had an opportunity to prepare. He makes no reference to any other attorney ever having represented him. But now --

QUESTION: Well, did he use the abbreviation "P.D.?"

MR. GILLETTE: Oh, yes, he did, Your Honor. He refers to him as "my P.D."

QUESTION: Is that the way people describe the Public Defender in California?

MR. GILLETTE: Sometimes they describe them --

QUESTION: P.D.?

MR. GILLETTE: -- in even -- well --

(General laughter.)

MR. GILLETTE: There have been instances when,

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unfortunately, they have been described --

QUESTION: What I am trying to get at, is this the vernacular of the street, as it were, or is this a common --

MR. GILLETTE: I think it's a common shorthand reference in the courts --

QUESTION: In the courtrooms.

MR. GILLETTE: -- by the district attorneys --

QUESTION: D.A.

MR. GILLETTE: -- and -- the D.A. Yes, Your Honor. Certainly it's a term which when used by a defendant will identify his attorney and not the police department. Again in response the judge had a -- during a recess in the middle of the morning of that second day of trial, Mr. Slappy repeated the complaints he had made the day before, and said, I don't think that this attorney is prepared, and again, Mr. Hotchkiss fully outlined his preparation, including the fact that he was going to have three full days, not just the weekend, but the additional day of Monday because of prior judicial commitments by the court in which to discuss the case further with Mr. Slappy, prepare him to testify if necessary, to prepare the defense.

Now, at this time, Mr. Slappy did make reference to Goldfine. He does refer to him as "P.D.

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Goldfine" in the course of his conversations, and says, he was my attorney and he still is, but he says that in the context of, and I haven't seen him for five weeks. Again, he did not request a substitution. He did not ask that Goldfine represent him, and he did not identify Goldfine as his attorney. In fact, he said that he had nothing against Mr. Hotchkiss, and specifically said that he did not think Hotchkiss was a bad P.D.

On the third day of trial, which was a Tuesday, September the 27th, Mr. Slappy flatly refused to cooperate any further with Mr. Hotchkiss. He was now declaring that his attorney was Mr. Goldfine, that his only attorney was Mr. Goldfine, and that he would have nothing to do with Hotchkiss. He asked on several occasions to leave the courtroom, but did not. He stayed in court, and occasionally disrupted the proceeding with outbursts and questions and statements, much as he had done the previous Friday.

In this trial, he was convicted of robbery, burglary, and false imprisonment, but the jury deadlocked on the sex offenses, and a retrial was scheduled, which began about two weeks later, on October the 6th, 1976. This was in front of a different San Francisco superior court judge, but Mr. Hotchkiss continued to represent Mr. Slappy.

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During this proceeding, Mr. Slappy was described by the second trial judge as deliberately disruptive. The judge noted that he occasionally slept through the proceedings, and that in his opinion, the trial judge's opinion, Mr. Slappy was simply trying to create a record.

Characteristic of his behavior was an event which occurred as the jury was being taken out by the bailiff to begin their deliberations. Mr. Slappy suddenly stood up and said in front of the jury, "I want to testify." Now, he had been asked prior to that by his attorney to testify, and he had said, "No, I am not going to," and had flatly refused. Now, however, as the jury is getting ready to begin deliberations, he decided he wants to testify, not unlike a tactic or a ploy he had pulled in the first trial. There, the jury had returned to have certain testimony reread. As they were being led out to continue their deliberations, Mr. Slappy suddenly jumped up and said to this jury, "There are two sides to every story, and you haven't heard mine." He had also refused to testify in the first trial.

In the second trial, Mr. Slappy was convicted of rape and forcible oral copulation. All five of these convictions were affirmed by the California court of

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appeal in January, 1978, and the state supreme court denied hearing. In December, 1978, the federal district court judge in the Northern District of California denied Slappy's petition for a writ of habeas corpus, finding that in his opinion the complaints which were made by Slappy with respect to his attorneys, to his attorney, had been properly handled by the state trial judge.

The Ninth Circuit disagreed, and in June of 1981, in an opinion filed by a three-judge panel of that court, concluded that an essential element of the Sixth Amendment right to counsel is the right to a meaningful attorney-client relationship. It concluded that the failure of the state trial judge to inquire into how long Mr. Goldfine might be unavailable violated that right, and it equated this failure to conduct the inquiry with a violation of Slappy's Sixth Amendment right to counsel.

In our view, this extension, this expansion of the Sixth Amendment is unwarranted and unnecessary, and we suggest that it is based, at least in part, upon a misreading of the trial record by the Ninth Circuit.

QUESTION: Mr. Gillette, may I ask one question?

MR. GILLETTE: Yes, Your Honor.

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QUESTION: At the second trial, after the mistrial on the two offenses, the judge there said he thought that the respondent was uncooperative and deliberately misbehaving.

MR. GILLETTE: Deliberately disruptive.

QUESTION: And then also in the Ninth Circuit, after they issued their first opinion, they wrote a second opinion in which they said at the time of the continuance, which I guess was before the first trial, they thought he was acting with sincerity and the state didn't disagree with that.

MR. GILLETTE: Well, that's what they said, but that's not true.

QUESTION: That's what I wanted to ask you. What is your --

MR. GILLETTE: The Ninth Circuit modified in part its opinion in response to our petition for rehearing and hearing en banc, saying in that amendment that Slappy in their view was acting in good faith when he asked to have Goldfine, and was not being disruptive or uncooperative. That isn't true, in part because at the time of the continuance request he wasn't asking for Goldfine. He was asking to be assured that Hotchkiss was prepared.

But moreover, we have always argued that

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Slappy is a manipulative and disruptive defendant and that his behavior from the beginning of the first trial to the end of the second trial illustrates that. Particularly in the first case, he consistently looked for one way or another to try to stop the case or disrupt it.

QUESTION: So your position is, he was uncooperative all the way through.

MR. GILLETTE: Yes.

QUESTION: What about the first trial judge? Did he say anything on that precise point, whether he thought he was sincere or just disruptive?

MR. GILLETTE: No, he did not. He made actually a great many efforts to try to get Mr. Slappy to cooperate with the case, and on several occasions when Slappy said, "I want to leave the courtroom, let me out of here," the judge said, well, I think it is to your advantage, please sit down and please remain, and tried several times to discuss with him.

QUESTION: But your position, as I understand it, just as one other question, is that even assuming he was sincere all the way through, you don't think there is this constitutional right to a meaningful relationship with counsel.

MR. GILLETTE: No. We do not.

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QUESTION: You don't.

QUESTION: Mr. Gillette, isn't it fair to infer at least from some of the trial judge's comments at the very end of the trial that he did think Mr. Slappy was just making a record for an appeal? Look at, if you will, Joint Appendix 52, which I take it is a partial transcript.

MR. GILLETTE: From the second trial, Your Honor.

QUESTION: From the second trial?

MR. GILLETTE: Yes, Your Honor.

QUESTION: Your comment was just addressed only to the first trial?

QUESTION: Correct. Correct. The first judge never made any specific comments on the record that in his opinion Slappy was being disruptive or manipulative, but rather went out of his way to try to get him to --

QUESTION: This pattern appears in both trials.

MR. GILLETTE: Yes, Your Honor, it does.

QUESTION: This pattern of conduct on the part of Slappy.

MR. GILLETTE: Yes, it does.

QUESTION: Including his references to the P.D.

MR. GILLETTE: Yes. Yes.

That brings me to the question of the Sixth --

QUESTION: Mr. Gillette --

MR. GILLETTE: Yes?

QUESTION: -- may I ask before you go on, under your version, I suppose we could conclude that the trial judge was correct in the first instance in treating the comments of the defendant as, at best, a motion for a continuance --

MR. GILLETTE: Precisely.

QUESTION: -- because no reference was made at all to his first assigned attorney.

MR. GILLETTE: Precisely.

QUESTION: And if we did that, we would never reach this Sixth Amendment question, would we?

MR. GILLETTE: No, I think not, and I can address that right now, and I would like to, because it is important to emphasize here that as the Ninth Circuit saw it, the Sixth Amendment violation was not simply that Mr. Hotchkiss rather than Mr. Goldfine represented Slappy, but rather that the judge did not conduct the inquiry, which in its view was required by the record.

Now, I think as far as determining whether the state trial judge was obligated to conduct that inquiry, one framework for analyzing that issue is to look at the conflict of interest counsel cases which this Court has

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decided over the last few years.

The first of those cases was Holloway versus Arkansas in 1978, in which it held that where you had three defendants represented by a single public defender who said that in his view there was a conflict of interest, that the failure by the trial judge in that case to respond to that request by the defense attorney, coupled with the requests by the three individual defendants for separate counsel, constituted a violation of the Sixth Amendment right to counsel, not just because they had a single attorney, but because no response was made to the requests for separate counsel.

Holloway was followed in 1980 by Cyler versus Sullivan. There you had three defendants, each represented by the same two retained attorneys. At no time during the state proceedings was there ever any objection to this joint representation, nor did it appear in the record that there ever was an actual conflict of interest.

In that case, the Court held that unless the trial judge knew or reasonably should have known that there was a conflict of interest, he was under no sui sponte duty to conduct an inquiry into the possibility of a conflict of interest.

Then, finally, in 1981, in Wood v. Georgia,

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the Court found that where you had defendants, several defendants represented by the same attorney who had been hired by the defendants' employer, and who appeared to perhaps have a conflict of interest as between the interests of the defendants and the interests of the employer, that on those facts, the trial judge was reasonably required to conduct an inquiry because he reasonably should have known that there was a possibility of a conflict of interest, and should have determined whether it existed, and if so, whether that conflict was waived by the defendants.

I think that on the facts of this case, we are talking about a situation which is really much closer to Cyler than it is either to Holloway or to Wood v. Georgia. The trial judge was faced with a specific objection by Mr. Slappy, which was that he did not think Hotchkiss was prepared. He was not faced with a request by Mr. Slappy or any statement by Mr. Slappy that he wanted Mr. Goldfine to represent him.

The only way that you can support the Ninth Circuit's conclusion that an inquiry was required on this record is if you agree with what I think is the underlying assumption of the Ninth Circuit, which was that when it became apparent to the judge, or when the judge became aware through the statements of Hotchkiss

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that there had been a substitution of one deputy public defender for another deputy public defender, at that moment, absent any objection from Mr. Slappy, the judge was required to conduct the inquiry.

We submit that he was not, unless he knew or reasonably should have known that Slappy was objecting to that substitution, and there is nothing in this record which suggests that he did. The judge's only obligation, we submit, on these facts, was to ensure that Mr. Hotchkiss was prepared and was capable of providing effective assistance of counsel because he had enough time to read the record, to meet with his client, and to prepare a defense.

I think that the Ninth Circuit opinion on these facts really doesn't hold -- well, what it really holds is that a defendant has a right to continuous representation, because it is going to obligate a trial judge any time he is aware that there has been a substitution of counsel to conduct that inquiry regardless of any objection by the defendant.

Now, that brings me back to what the Sixth Amendment held -- excuse me, what the Ninth Circuit held as an extension of the Sixth Amendment, namely, the right to a meaningful attorney-client relationship. The Sixth Amendment, this Court has held, prohibits a trial

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judge from arbitrarily interfering with the development of the attorney-client relationship, from arbitrarily or unnecessarily interfering with the ability of the defense attorney to represent his client and meet with his client. It does not, however, we submit, guarantee a meaningful attorney-client relationship, for that can occur only through the mutual cooperation of the defendant and the attorney.

If such a relationship fails to develop, that is not a violation of the Sixth Amendment unless it can be shown that there has been judicial interference with the opportunity or ability of the attorney and the defendant to develop that relationship. Where all we have is a failure by a trial judge to conduct an inquiry into the reasons why a public defender substituted one trial deputy for another trial deputy, that is not the type of interference which this Court has condemned and which can be said to have interfered with the ability of the defendant to be represented effectively by counsel at trial.

That, of course, is the key to all Sixth Amendment cases, assuring that the defendant received effective assistance of counsel, and a mere substitution of one trial deputy from a public defender's office for another trial deputy in and of itself is not the kind of

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act which is likely to have an adverse impact upon the effective representation of the defendant or to otherwise prejudice the defendant.

QUESTION: Mr. Gillette, may I ask you a question? You take the position here that the defendant was effectively represented by counsel within the meaning of the Sixth Amendment.

MR. GILLETTE: Yes, we do.

QUESTION: In your view, what is the correct statement of the standard for determining whether there was effective representation of counsel?

MR. GILLETTE: The definition of effective assistance of counsel as California has recently formulated it, which was based in part on language in some federal opinions, is that it must be shown, in order to establish that counsel was not effective, the defendant must show that he failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that that failure resulted in the withdrawal of a potentially meritorious defense.

QUESTION: And you would consider that an acceptable statement of the federal standard?

MR. GILLETTE: Well, the federal courts have used that standard. Yes, Your Honor.

QUESTION: How many have added that last --

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MR. GILLETTE: The withdrawal of a meritorious defense?

QUESTION: Yes.

MR. GILLETTE: That I don't know, Your Honor. That may be --

QUESTION: The court of appeals for the District of Columbia did once. I don't know whether they still adhere to it.

MR. GILLETTE: I think that is --

QUESTION: Does the Ninth Circuit, you think?

MR. GILLETTE: The Ninth Circuit, I believe, does have that standard. I think it is contained in the De Coster cases in the District.

Now, as far as the defendant in this case receiving effective assistance of counsel, I think when you look at the record, it is clear that he was represented by a senior trial deputy from the public defender's office, very experienced, who had six full days within which to review the record. It is clear, as you will see --

QUESTION: Wait a minute. What in the record says that he had six full days?

MR. GILLETTE: Well, he had six days --

QUESTION: Are you telling me that a public defender in California only works on one case at a

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time?

MR. GILLETTE: No, I don't think so, Your Honor.

QUESTION: I hope you don't try to.

MR. GILLETTE: What I --

QUESTION: Because you know and I know that they handle five -- I'm not saying they don't do it properly, but they handle several cases at the same time.

MR. GILLETTE: I am not saying that he necessarily did use all those six days.

QUESTION: Well, you said full-time.

MR. GILLETTE: He had that opportunity, and I think that the state trial judge in this case was required to take Mr. Hotchkiss at his word when he said, I am fully prepared. I have had what I feel to be a reasonable enough opportunity to review the record, to review the preliminary hearing transcript. There has been a complete investigation, and I am familiar with it. And I think that is expressed when you examine his cross examination of the victim. It is very complete.

QUESTION: Did the trial judge at any point in the trial express any appraisal of the performance of the P.D.?

MR. GILLETTE: He did, Your Honor. He did.

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He indicated that in his view the case was being handled in a very effective manner. That would be on the second day of the trial, he had made reference to that, noting, for example, in particular, his long-term contacts and experience with Mr. Hotchkiss.

I think, Your Honors, because it is clear from this record that this defendant was represented by an attorney who was prepared, who was able to provide effective assistance of counsel, and who did provide effective assistance of counsel, that Mr. Slappy did receive a fundamentally fair trial. The Ninth Circuit was incorrect, and we urge that it be reversed.

I would like to reserve my remaining time, if I may, for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Bassi?

ORAL ARGUMENT OF MICHAEL B. BASSI, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BASSI: Thank you, Mr. Chief Justice, and may it please the Court, the issue in this case is not whether or not Mr. Slappy received a fair trial. The issue is an abuse of discretion by the trial court impacting upon the right to counsel.

QUESTION: May I stop you right there?

MR. BASSI: Yes.

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QUESTION: Does a federal district court in a habeas corpus proceeding have the right to set aside a conviction because there was an abuse of discretion by the state trial judge, if there was not an unfair trial?

MR. BASSI: The federal district court does as it impacts upon the right to counsel. The right to counsel is fundamental and essential to a fair trial. There seems to be two strains in the federal cases which indicate that, and I would cite Avery, for example, as one strain, indicating that the courts have recognized that a request for a continuance would necessarily have some impact upon a fair and impartial trial.

There are other cases, and I would cite Burton and Gandy, that recognize that the impact of a request for a continuance affects the right to counsel. Burton and Gandy never reached the issue of whether or not the court would have to reverse on the issue of right to counsel; rather, decided the case on fair trial.

The more recent cases of Laura, which is out of the Third Circuit, and Linton v. Perini, out of the Sixth Circuit, definitely discuss the issue of a continuance and abuse of discretion by the trial court definitely impacting upon the right to counsel rather than on the fair trial side of the train of thought in

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the federal cases.

QUESTION: Are you going to at any time explain why it wasn't effective counsel?

MR. BASSI: The issue is not effective assistance of counsel as we see it, and the Court does not have to reach that issue by a narrow ruling in this case. The trial court, as the record reflects, was concerned with moving its calendar and providing -- moving Slappy towards a trial. The court was aware, though, that Slappy's requests for a continuance were a request for representation by a specific public defender.

When Slappy filed his writ of habeas corpus on the third day of trial, indicating that his attorney was in the hospital, the court specifically stated to him, we have been through this already, Mr. Slappy, on Monday. There is nothing new added. And I would refer this Court to the Joint Appendix, on Page 30.

The California court of appeal, in deciding the appeal by the -- excuse me, the respondent, indicated on -- in its opinion at Page C-3 of the petition for habeas corpus, appellant's real object at trial apparently was that he preferred to be assisted by another deputy public defender who had originally been assigned to the case but had been relieved in order to

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have surgery for appendicitis. Appellant told the court, "I am happy with the public defender, but it is just no way, no possible way that he has had enough time to prepare this case."

That language is reflected in the Joint Appendix at Page 12. The trial court --

QUESTION: Do you agree that an indigent does not have a right to a particular public defender?

MR. BASSI: The --

QUESTION: The reason is, at one time when I was handling the assignment of pro forma cases on the Second Circuit, one of the prisoners insisted that he be represented by Edward Bennet Williams, but he didn't have that right, did he?

MR. BASSI: No, he didn't, Your Honor.

QUESTION: And does your client have a right to any particular public defender?

MR. BASSI: As to the choice of initial appointment, no, the client doesn't have a right.

QUESTION: I didn't say initial. I said the right to a particular public defender at any time.

MR. BASSI: After there is an attorney-client relationship established, we would submit that the defendant has a right to maintain that relationship if --

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QUESTION: Well, suppose he resigns.

QUESTION: Or died.

MR. BASSI: Well, then, this is why the trial court is the final arbiter in the exercise of proper discretion. If the attorney dies, the trial court can naturally substitute another defender. If the defender leaves the office, the trial court can naturally substitute another public defender. But the trial court cannot over the objections of the defendant arbitrarily impose another attorney on the defendant, which it did in this case.

The trial court made no balancing in the exercise of discretion. It should have inquired at least into the nature and extent of Goldfine's interests as to -- it should have inquired as to the nature and extent of the relationship between Goldfine and Slappy, because Slappy vehemently objected throughout the trial as to the imposition of Hotchkiss.

QUESTION: As I read the Joint Appendix, he didn't mention the other lawyer until the second day.

MR. BASSI: He did not specifically state, I want Harvey Goldfine.

QUESTION: I don't want the word "specific." Did he mention it at all?

MR. BASSI: He did not specifically state

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Harvey Goldfine. No, he didn't, Your Honor. That's correct.

QUESTION: Did he say that he had a prior public defender? He didn't say a word about it.

MR. BASSI: He said --

QUESTION: All he said was, this man didn't get in until Tuesday night.

MR. BASSI: Correct.

QUESTION: That is all he said.

MR. BASSI: Correct.

QUESTION: So now the trial is proceeding, and at that stage he comes in and tells the judge, you know, there was another public defender. He is supposed to stop the trial and go into that?

MR. BASSI: No, that's --

QUESTION: Well, what should he do?

MR. BASSI: The trial judge --

QUESTION: When should he have had the hearing?

MR. BASSI: On the issue of who should have been his counsel, the hearing should have been made prior to the trial beginning at the time that Slappy made his objection as to who his counsel was, and that was --

QUESTION: Slappy did not make an objection to Mr. -- He objected to the counsel he had at that time.

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I read this record. He said he didn't have time to prepare the case, that he came in Tuesday, and I didn't see him again until this morning.

MR. BASSI: I submit to Your Honor that the objection --

QUESTION: Well, will you point me where in the record he says that I object to this man representing me?

MR. BASSI: He doesn't say that until the second day of trial. But the record reflects that Slappy felt that Hotchkiss was not prepared. Hotchkiss admits on the second day of trial that he hadn't prepared Slappy for direct or cross examination. Slappy indicates that he hadn't viewed the scene. The trial judge on the third day, when Slappy specifically requests Goldfine, states that this matter has been already reviewed on the first day and nothing new has been added. I think the record fairly reflects Slappy at least thought the only attorney that could represent him at that late date was the attorney who was suddenly replaced by -- removed because of illness.

QUESTION: Mr. Bassi, you are here by our appointment.

MR. BASSI: Yes, Your Honor.

QUESTION: I did not check in the record to

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see, did you argue the case in the court of appeals?

MR. BASSI: Yes, I did.

QUESTION: And you were there by appointment?

MR. BASSI: Yes, I was.

QUESTION: But that was your first contact with the case, was it not?

MR. BASSI: Yes, it was, Your Honor.

QUESTION: Mr. Bassi, it was really the third day, not the second day, that the defendant first mentioned his original attorney, isn't it? Wasn't it the third day of trial before that occurred?

MR. BASSI: He stated on the second day of trial, "my P.D., Mr. Goldfine," or "P.D. Goldfine." He does specifically refer to Mr. Goldfine on the second day of trial. On the third day of trial, he states, "My attorney is in the hospital." But on the second day of trial, he only mentions the attorney by name at that point.

But that issue is not -- does not create a waiver problem for us, because the Ninth Circuit ruled as a matter of law, not as fact, that the right to counsel had been violated. I don't think the Ninth Circuit is bound by comity to the findings of fact of the trial judge when ruling on an issue of law in this case. As the Ninth Circuit properly found, the right to

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counsel, the meaningful attorney-client relationship established between Goldfine and Slappy, was violated.

Therefore, whether or not Slappy's version of the events were correct or Hotchkiss's version in stating that he was actually prepared, the court never had to reach those issues, and they never found whether Slappy was correct or whether or not Slappy had properly raised the issue on the first day of trial or not. They found the court's failure to properly exercise discretion.

Even in the ruling on a continuance, the court made no contrary findings as to the government's need to go to trial, and I submit Slappy had a second trial almost within a month, so the trial calendar couldn't have been that crowded. They made no findings as to -- The court made no balancing at all, and in that event it violated the right to counsel by not weighing his attorney-client relationship with his previous lawyer.

QUESTION: Who represented him in the second trial?

MR. BASSI: The same attorney that represented him in the first trial, Mr. Hotchkiss, and in fact --

QUESTION: Did he say he wasn't properly represented there?

MR. BASSI: It is difficult to tell from the

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record whether or not there was effective representation, partially because Slappy didn't testify. I submit that the fact that the jury was hung on two counts could be taken either way. Had he been represented by Goldfine, who did the voluminous investigation, whom Slappy trusted --

QUESTION: On the second case?

MR. BASSI: On -- Yes, on the second case.

QUESTION: On the second case.

MR. BASSI: I am referring to the first case. He could have been aquitted on the first case.

QUESTION: Well, I am talking about the second case.

MR. BASSI: The second case, it is -- he refused to testify again, and you really can't tell from the record.

QUESTION: Well, that isn't -- When a man refuses to testify, that says that he is not represented by counsel? I am talking about the counsel point.

MR. BASSI: No, I am not submitting --

QUESTION: Well, he raised it -- Is the counsel point in the second case?

MR. BASSI: I am sorry, I --

QUESTION: And if so, why?

MR. BASSI: Is the --

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QUESTION: Is the inadequacy of counsel in the second case?

MR. BASSI: The --

QUESTION: And if so, why?

MR. BASSI: I submit you can't tell from the record, Your Honor, because Slappy refuses to testify, because his right to counsel was violated in the first trial. The court, the Ninth Circuit indicated that it would be irrelevant as to effectiveness. I don't think the court can tell -- I can't tell from the record whether he was effective or not.

QUESTION: But the trial judge didn't have any difficulty in making that evaluation, did he?

MR. BASSI: The trial judge indicated in the first trial that there was an effective representation by Mr. Hotchkiss, but --

QUESTION: He said it several times, didn't he?

MR. BASSI: He did. But I submit, Your Honor, that could be looked upon as self-serving by the trial judge, because he insisted that Mr. Slappy go to trial with Mr. Hotchkiss.

QUESTION: So you think -- you are suggesting the judge perhaps was just protecting himself?

MR. BASSI: I think that could be inferred

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from those statements, Your Honor. I am not suggesting that that is an intentional statement by the trial judge, but there was heated dispute in this trial who was Mr. Slappy's lawyer, the conduct of the trial by Mr. Hotchkiss, and I do submit that Slappy was not acting in bad faith.

The record reflects that generally his comments were reflected -- reflected towards the identity of his counsel.

QUESTION: Mr. Bassi --

MR. BASSI: Yes, Justice?

QUESTION: -- you made a comment a moment ago that Goldfine, the original attorney, I believe, had done voluminous research. I didn't catch that in the record. Is it somewhere in the record?

MR. BASSI: The statements by Mr. Hotchkiss, actually by, I think it's the district attorney, Mr. Dondero, on the first day indicate that there was voluminous investigation done, that the investigators from the public defender's office had been down to the scene three and four times, speaking to witnesses.

QUESTION: Was that personally done -- does the record indicate that was personally done by Mr. Goldfine?

MR. BASSI: Actually, Mr. Hotchkiss does

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indicate that the investigation was -- I'm sorry. The judge indicates that to Mr. Slappy in discussing the request for a continuance, that voluminous investigation had been done. Apparently, there had been a colloquy prior to the motion for a continuance on the record between the public defender, the district attorney, and the trial judge, which is not reflected in the record, but is indicated from the judge's comments, that he was assured by the public defender and by the district attorney that Hotchkiss was ready to try the case.

QUESTION: Is it the custom of the public defender's office in San Francisco, do you know, to have most of the legwork in investigations done by actual lawyers, or just by investigators? Or is there --

MR. BASSI: I think the -- They have an investigative staff in the San Francisco public defender's office. The general -- the staff is understaffed, actually, and I think if the work can be done by an investigator, it is, but I think generally the lawyer goes out and takes a look at the scene, and will try and talk to witnesses if he can. I don't think that is the rule generally, but I think most conscientious public defenders do do that, particularly if the case is going to trial.

In response to Mr. Justice Stevens, does the

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attorney-client -- does the Sixth Amendment contain a meaningful -- a right to a meaningful attorney-client relationship, we submit that it does. The interests of the Sixth Amendment in providing assistance to the defendant to meet the intricacies of the law and in meeting the advocacy of the public prosecutor mandate that there must be some nexus between the effectiveness of counsel and the providing of an attorney.

Powell v. Alabama recognized that there must be more than just an attorney provided at the last minute. There must be investigation --

QUESTION: Well, now, the Powell case involved appointment of the entire bar of the county, and that has never been done since, has it?

MR. BASSI: No, it hasn't, Your Honor. But part of the reasoning behind Powell in my understanding is that the last minute appointment prevented any investigation, communication, or interaction between the defendants and the attorneys appointed to represent them.

QUESTION: Well, do you suggest that here there was a last minute appointment, or that there was a lack of opportunity to investigate and prepare, on this record?

MR. BASSI: I submit that there was a last

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minute appointment resulting in the failure of any attorney-client relationship being established.

QUESTION: Well, you link that just to this meaningful relationship concept.

MR. BASSI: Yes.

QUESTION: Not to the effective assistance.

MR. BASSI: No, we are not arguing effective assistance, because we don't feel that the record is -- first of all, that the Court has to reach this issue.

QUESTION: Well, if a court finds that a client was afforded effective assistance of counsel, could he nonetheless seek habeas relief on the grounds that although his assistance was effective, he didn't have a meaningful relationship with his attorney?

MR. BASSI: If the trial judge were to make an adequate inquiry, and in finding in the exercise of discretion that there would be some prejudice to the relationship between the client and the attorney, but on the other side found a legitimate need to move the case towards trial and did so, then I suggest that prejudice to the defendant does not override an adequate exercise of discretion by the trial judge.

What is essential, though, is that there be an adequate, an adequate exercise of discretion.

QUESTION: Well, supposing you were back in

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the Ninth Circuit arguing this case on appeal, as I understand you did, and you concluded the part of your argument devoted to effective assistance of counsel. Let's assume you made one. And the three judges there say, well, we think this man received effective assistance of counsel. Now, what else have you got to say? And then you go on and say, well, I want to point out that even if you think he got effective assistance of counsel, I want to raise the point that he didn't have a meaningful relationship with his counsel.

Now, do you think that is a separate point that the Ninth Circuit or any other court should consider after finding that he had effective assistance of counsel?

MR. BASSI: Yes. The cases indicate, and I cite Burton, for example, that the courts have considered both the right to counsel and effective assistance of counsel as two separate issues, and that while interrelated, they necessarily are separate in the analysis of whether or not effective assistance has been provided.

In response to your question, would the habeas corpus apply to effective assistance, yes, it would, but under the full and fair trial doctrine, I submit that the right to counsel should be analyzed under the

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theories of Gandy and Burton, and that is whether or not there has been the establishment or provision of the right to counsel.

QUESTION: Is Burton cited in your brief?

MR. BASSI: Burton is cited in our briefs.

QUESTION: Is that a case in this Court?

MR. BASSI: It is a case from the D.C. court.

QUESTION: Mr. Bassi, suppose the judge holds a hearing and finds that there has been a thorough investigation made, and all that is in a voluminous file in the public defender's office, and that no more investigation is needed. Would that be satisfactory?

MR. BASSI: If the judge held -- yes, it would, if the judge completely exercised discretion.

QUESTION: Well, then, let me read to you. "Mr. Goldfine did voluminous investigation in the case. My feeling is that all the investigation that needed to be done and that should be done and quite possibly that could be done had been done." That was testimony before the judge.

MR. BASSI: Correct, Your Honor, but I submit that --

QUESTION: Didn't you say that was enough?

MR. BASSI: It's enough as to whether or not there has been investigation, but as to a complete

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exercise of discretion, the Court has to consider other factors. In this case, the Court considered only whether or not Mr. Hotchkiss was going to represent Mr. Goldfine. It considered -- It didn't consider at all whether or not -- I'm sorry -- Mr. Hotchkiss was going to represent Mr. Slappy. It considered -- It did not consider the nature and extent of Goldfine's illness. It didn't consider whether or not --

QUESTION: What did his illness have to do with it?

MR. BASSI: Well, his illness, I think, is critical in this case, because it is apparent --

QUESTION: It was critical to him.

(General laughter.)

MR. BASSI: Hopefully, it wasn't that critical. He --

QUESTION: Mr. Bassi, may I ask you a question?

MR. BASSI: Yes, Justice.

QUESTION: How would you define a meaningful relationship between a lawyer and his client? I have heard it used in other connections, but I never heard it used before with respect to client --

(General laughter.)

MR. BASSI: I think the American Bar

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Association standards for criminal justice put it well, and that is --

QUESTION: Does it use that term?

MR. BASSI: -- trust and confidence.

QUESTION: Does it use that term?

MR. BASSI: They don't use the words "a meaningful relationship," but they do utilize the words "trust and confidence are essential to the lawyer-client relationship." And --

QUESTION: What if you had the leading defense counsel at the San Francisco bar appointed to represent a defendant, and he had done all of the investigating that any lawyer would have done, but on the first day of trial the defendant said, judge, I just don't trust this fellow, and I don't have a meaningful relation with him?

MR. BASSI: I think that is one aspect in the exercise of discretion that the court must look to.

QUESTION: Do you think even in those circumstances there would be any right to have the second leading lawyer in San Francisco represent him?

MR. BASSI: If the court properly exercised discretion and found no legitimate -- and found there was a legitimate interest in going to trial for the prosecution, then the court is fully within its

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discretion to order the defendant to continue to trial with the first attorney or by himself. The key here is not that the defendant conclusively binds the trial judge, but that the trial judge exercise his discretion by fully looking at the issue. I submit --

QUESTION: Isn't there always a legitimate interest on the part of the prosecution in going to trial if the case has been set, the prosecutor is ready, the witnesses are ready? The burden is always on the person who wants to postpone the trial in that situation, whether it is a defendant or a prosecutor, I would think.

MR. BASSI: There is always a legitimate interest the prosecutor can set forth in going to trial, Justice Rehnquist, and I submit that the trial judge is best positioned to make the final determination who shall prevail.

QUESTION: Well, and he made a determination in denying. He said, I hear your motion for a continuance. I am going to deny it.

MR. BASSI: The trial judge did not make a complete inquiry into the matter, though, and that is the --

QUESTION: So that is your constitutional point, what it finally boils down to? Not a point that

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the California court of appeals could reverse on error, but that a federal court could set aside a state conviction because a state trial judge confronted by a pro se motion for a continuance doesn't go through the precise formulations that the Ninth Circuit would have him go through?

MR. BASSI: When it impacts upon the right to counsel, the federal habeas reviewing court may review a state court's determination as to whether or not counsel has been provided. I think it is a mixed question of fact and law, as set forth in Cyler, and I think Justice Frankfort --

QUESTION: Set forth in what?

MR. BASSI: In Cyler v. Sullivan.

QUESTION: Oh, Cyler, yes. He played center field for the Chicago Cubs in 1933.

QUESTION: Right field.

QUESTION: Right field? Okay.

(General laughter.)

QUESTION: Looking at this record --

MR. BASSI: Yes, Your Honor.

QUESTION: -- this man's conduct during the trial, and the judge's observation about it, would it be irrational for someone looking at the record, not having been there, to conclude that this man, Slappy, was

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deliberately trying to make a record of no meaningful relationship with his counsel? Would it be irrational to reach that conclusion?

MR. BASSI: Well, I submit that it wouldn't be irrational, but I am not conceding the point that that was his purpose. The --

QUESTION: Well, he was interrupting the proceedings constantly, wasn't he, and the judge reprimanded him, what, two or three or four times?

MR. BASSI: That is in the record, Your Honor. That's a fair statement.

QUESTION: Do you think this was rational conduct on his part?

MR. BASSI: I think in light of Wainwright, Rose, and Angle, that that is the type of conduct that is necessary for a defendant to assert his constitutional rights.

QUESTION: In the presence of the jury, or to ask for an opportunity to make these points to the judge in chambers?

MR. BASSI: I think that he did make some of the points in chambers. Possibly he felt --

QUESTION: Only because the court required him to come to chambers after his outburst. Is that not so?

MR. BASSI: The court asked him not to make

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outbursts on the record, but I submit that these were outbursts by an uneducated, indigent man trying to assert his rights in the best way possible. I think the record doesn't reflect --

QUESTION: Did you say innocent or indigent.

MR. BASSI: Indigent. Indigent.

QUESTION: Indigent.

MR. BASSI: I would submit possibly he was innocent if the effectiveness of counsel isn't demonstrated on the record. The right to counsel is so important that I think it is necessary that the defendant make the objection, and make it in the best way he can. He tried on the first day of trial, and succeeded on the second and third.

It is clear that in the -- in the original motion for the continuance and request for specific counsel, that his attorney completely ignored his request, asserting that he was ready to go to trial, and at that point the indigent was effectively pro se and without counsel.

The important point that we would like to stress in this case is that the defendant's objection does not conclusively bind the trial court, that if the trial court properly exercises discretion, even if it is prejudicial to the defendant to remove counsel or to go

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to trial or have the defendant go to trial pro se, the trial court can properly make that determination, but only after it fully exercises discretion.

The case which Mr. Gillette cited, Holloway, we feel is the most similar to this case, not whether the defendant had a fair trial, but whether the trial court's exercise of discretion or failure to do so impacted on his right to counsel. We submit that the issue between effectiveness of counsel and identity of counsel is often difficult to draw, but Slappy's objections in this case go more to the identity of his counsel rather than the sufficiency of counsel's preparation and the effectiveness of Hotchkiss at the trial.

Per se reversal is the appropriate standard when the right to counsel is interfered with. The interests of providing per se reversal, and I think it is demonstrated by the conflicting opinions in the circuits, are that you can have an evenhanded application of the rule for right to counsel. If the case is analyzed in terms of effective assistance of counsel or an abuse of discretion resulting in the denial of a fair trial, you find conflicting opinions, for example, in the Sixth Circuit and in the Ninth Circuit itself.

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QUESTION: Mr. Bassi, if you were to prevail here, then the consequence would be, the case would go back for a third trial? Is that right?

MR. BASSI: Well, all five counts would be retried again. I guess you could call that a third trial.

QUESTION: Now, the crime took place in 1975 or six?

MR. BASSI: Seventy-six.

QUESTION: Seventy-six. And so this woman who was the complaining witness would have to appear again if the case were to be tried. And that would be six, given the month that we are in, it might be seven years after the crime and the first trial.

MR. BASSI: She would, but she doesn't seem to be adverse to appearing, because she has filed a civil suit against the landlords, and that is cited in the Petitioner's brief in chief, which was recently decided by the California court of appeals. So her civil lawsuit is going on in this case at this time.

The position I advocate gives the defendant a strong basis with which to confront the advocacy of the prosecutor. A meaningful attorney-client relationship between client and attorney is essential to providing the right to counsel. Absent a meaningful

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attorney-client relationship, the trust and confidence necessary for the defendant to convey essential facts to his attorney and for his attorney to give him competent advice which the defendant can rely on are absent. The attorney effectively works in a vacuum, and particularly in the criminal justice area, where plea bargaining --

QUESTION: When you read --

MR. BASSI: Yes, sir?

QUESTION: When you read his testimony, couldn't you get the feeling that if Goldfine had tried this case and Hotchkiss had been in the hospital, he would have made the same argument?

MR. BASSI: That, Your Honor, I can't speculate on, and I think that is the type of speculation which this Court refuses to engage in when the fundamental right to counsel is violated.

QUESTION: I try my best.

MR. BASSI: The position allows the trial court to preserve the traditional relationship between attorney and client when warranted, and to exercise discretion in achieving the legitimate interests of society when warranted. We do submit that the failure to adequately exercise discretion violated the right to counsel, and that this Court need not reach the issue of effectiveness of assistance of counsel.

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Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Gillette?

ORAL ARGUMENT OF DANE R. GILLETTE, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. GILLETTE: Yes, I do, Your Honor, and may it please the Court. I have just a couple of points I would like to make.

What we see as one of the critical difficulties with this Ninth Circuit opinion was suggested by the questioning of Mr. Justice Rehnquist and Mr. Justice Powell, and that is that carried to its logical extreme, the Ninth Circuit opinion would permit an indigent defendant or any defendant to seek federal habeas corpus relief solely on the grounds that he did not have what he perceived to be a meaningful attorney-client relationship with the attorney who represented him at trial.

What it does is to transfer the Sixth Amendment determination of whether the Sixth Amendment has been satisfied from whether he had an attorney to whether he had an attorney that he liked. It makes it a subjective test, and that simply is not the obligation under the Sixth Amendment. He must have an attorney. He must have an attorney who was individually

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responsible to his undivided interests, and whose actions are independent of the public defender or the government agency which funds that office.

But the mere fact that he says, I didn't like him, or I couldn't get along with him, standing alone, cannot establish a violation of the Sixth Amendment.

Now, Mr. Bassi has suggested that what Mr. Slappy was trying to do here was simply say in the best way he could what he really wanted, which was to have Goldfine. If what he wanted was to have Mr. Goldfine represent him, it took no sophistication, no great feat of art for him to say, I want Mr. Goldfine. Even when on that first day of trial, when Mr. Hotchkiss told the judge, I was reassigned to the case because Mr. Goldfine is in the hospital, Slappy said nothing.

QUESTION: Well, but you would be arguing roughly the same thing if that is what he had said, and the judge said, you are not entitled to him.

MR. GILLETTE: I am sorry, Your Honor?

QUESTION: You would be arguing almost the same thing if he had said, I want Goldfine, and the judge had said, sorry, you have to be satisfied with this very competent substitute.

MR. GILLETTE: That's correct. Our position is that, first, that the judge had no duty to inquire on

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this record, but that even if there had been a request, or you can infer a request, the judge's only obligation was to ensure that the public defender who was assigned and who was present at trial had the opportunity to prepare, had access to the record, had an opportunity to meet with his client, and was ready to proceed.

Mr. Hotchkiss had an obligation when asked by the trial judge if he was ready to proceed to say, yes, he was, if in fact he was ready. He had an obligation as an officer of the court not to mislead the judge.

The final point I want to make here is that what really happened, what is really happening in this case is that I think the Ninth Circuit has once again, unfortunately, confused its power to have supervisory control over the federal trial courts with its responsibility in cases of habeas corpus not to set aside state convictions unless there has been a constitutional violation.

If the Ninth Circuit wants to say that defendants who are represented by -- who are being tried in federal district court and are being represented by federal public defenders have these kinds of rights, that is fine. They can do that. They have that supervisory power. We see nothing in the Sixth Amendment which compels it as an aspect of the Sixth

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Amendment, and because of that, we submit the Ninth Circuit's decision was incorrect, and again, we ask this Court to reverse it.

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

(Whereupon, at 3:04 o'clock p.m., the case in the above-entitled matter was submitted.)

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