ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-420

TITLE R.C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, Petitioner, v. ROBERT LONBERGER

PLACE Washington, D. C.

DATE October 5, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

R.C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY,

Petitioner

v. No. 81-420

ROBERT LONBERGER

Washington, D.C.

Tuesday, October 5, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 p.m.

APPEARANCES:

RICHARD DAVID DRAKE, ESQ., Assistant Attorney General of Ohio, Columbus, Ohio; on behalf of the Petitioner.

JOHN CZARNECKI, ESQ., Toledo, Ohio; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Now we are on Marshall against Lonberger, and Mr. Drake, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD DAVID DRAKE, ESQ.,

ON BEHALF OF THE PETITIONER

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

The instant case presents two substantial questions concerning our nation's system of federalism. The initial inquiry focuses upon the deference which the federal judiciary sitting in a habeas corpus action brought by a state inmate must afford the factual determinations made by the state court. A resolution of this threshold issue centers upon this Court's prior decisions in Sumner v. Mata and Henderson v. Morgan.

The secondary question before this Court concerns the continuing viability of this Court's decision in Spencer v. Texas. It is respectfully submitted that the court below erred with respect to both issues.

The facts of this case are essentially uncontroverted. The respondent was indicted in the Ohio Court of Common Pleas for aggravated murder. Under then prevailing law aggravated murder was essentially a

felony murder. Here, the respondent was indicted for rape during commission of a murder. The grand jury as a separate and distinct matter also returned a death penalty specification, alleging that the respondent had previously been convicted of attempted murder in Cook County, Illinois.

Prior to trial the respondent filed a motion to dismiss the death penalty specification, alleging that his 1972 Illinois guilty plea was not intelligently entered. Pursuant to this pretrial motion the Ohio trial court conducted a full evidentiary hearing. During the course of the hearing several pertinent facts were developed.

It was developed that the respondent had been incarcerated on at least two prior occasions in the Illnois penal system; that he had been charged with and involved with the Illinois courts unrelated to those prior incarcerations with both rape and murder; that in addition to those crimes he had appeared before the Illinois judiciary on several different occasions by his own admission.

It was further developed that respondent was incarcerated continuously in the Cook County jail for a period of 13 months prior to the entry of this guilty plea.

Respondent was arrested and given an arraignment. He was thereafter afforded a preliminary hearing. By his own testimony the victim in the -- of the Illinois incident appeared and testified, offered evidence. Subsequent to the preliminary hearing the Illinois trial judge bound the case over to the grand jury. They returned the indictment, charging the respondent with one count of attempt under Illinois law and three counts of aggravated battery.

Respondent was once again arraigned in the Illinois -- before another Illinois court on these charges. It was further developed and the Ohio trial court made a finding of fact that the respondent was both intelligent and literate. The respondent also conceded that he was represented throughout his 13-month pretrial incarceration by two attorneys.

During the course of the hearing the respondent contended that he was never informed of the attempt charge, neither by service of the indictment, at the preliminary hearing, at either of his two arraignments, by either of his two attorneys, or in any other manner.

At the conclusion of the Ohio evidentiary hearing the Ohio trial court expressly found that the Illinois guilty plea had been tendered and was tendered

in an intelligent and voluntary manner and that the plea was therefore valid. It is therefore obvious that the Ohio trial court rejected as self serving testimony of the respondent. And might I also add reference to the record indicates that the Ohio trial court found his testimony wholly incredible.

QUESTION: Counsel, is it possible that the Ohio court believed that the respondent didn't receive an explanation of the charges but that his lawyer understood them and simply enforced the lawyer's understanding?

MR. DRAKE: No, Your Honor, there's never been any allegation that the Ohio trial court applied the wrong constitutional standard or review.

QUESTION: Well, it's not crystal clear, is it, what the Ohio court was deciding?

MR. DRAKE: The issue before the Ohio court in the evidentiary hearing was in fact crystal clear. The respondent's testimony was uniform; it never deviated. He said I never knew I was charged with attempt -- in this particular instance, attempted murder. No one ever told me. It was the sole, single, solitary issue before the court. He never alleged he didn't understand, for instance, the elements of attempt, but that he never even knew that he was charged with it and had no idea

that he had pled guilty to it.

This in the face of a record wherein the trial judge mentions the crime attempt, indicates the separate penalties for attempt, and where his lawyer at the conclusion stipulated that the indict -- the charges, plural, in the indictment were sufficient both in law and fact.

I don't believe it's ever been argued that the Ohio trial court so horrendously misunderstood the issue before him, and it's never been alleged that he applied the wrong standard, Your Honor.

QUESTION: But it is true that the Ohio court did not say in so many words that the defendant knew he was charged with attempt, did it?

MR. DRAKE: Your Honor, I would -- in response to your question I would refer the Court to this Court's decision in LaVallee v. Delle Rose wherein this Court indicated that given a straightforward factual consideration --

QUESTION: Well, it seems to me you can answer my question without referring to another case.

MR. DRAKE: I'm sorry, Your Honor.

QUESTION: The trial court did not in so many words find that he had been aware of the fact that he was charged with attempt.

MR. DRAKE: Not expressly, Your Honor. That is entirely implicit by his finding.

QUESTION: You infer that from the finding that he intelligently and voluntarily entered his plea.

MR. DRAKE: I believe it would be logically inconsistent not to infer that, Your Honor.

QUESTION: Is the indictment in the papers before us?

MR. DRAKE: Yes, Your Honor. The indictment is in the Joint Appendix at page 2.

QUESTION: Two?

MR. DRAKE: The Illinois indictment is at page 2, Your Honor.

QUESTION: Well, I was thinking about -- yes, Illinois indictment, that's right.

MR. DRAKE: Yes. Page 2, Your Honor.

QUESTION: And counsel stipulated, as you've just said, that that was sufficient in law and fact and sustained a finding of guilty.

MR. DRAKE: On the charges, plural, yes, Your Honor.

QUESTION: Yes. And was the defendant in the courtroom at the time?

MR. DRAKE: He conceded that he was at the Ohio evidentiary hearing. He never contended that he

wasn't. His testimony again was wholly incredible. He indicated that Mr. Xenos, the lawyer who represented him at the Illinois guilty plea proceeding, essentially told him to go in there and lie. That was the crux of his testimony. He's never indicated he was not in the courtroom, no.

Respondent thereupon proceeded to trial. In order to prove the substantive charge of aggravated murder the prosecutor presented in part, and most important, the testimony of the two sons of the victim. The testimony was fairly straightforward. The two young sons indicated that the respondent was at their home that evening, the only gentleman present. The one son indicated he had heard his mother scream. The other son thereafter went down to the kitchen and spoke with respondent briefly. The lights were out, and the respondent ordered him not to turn the lights on and also ordered the child back to bed.

The body of the victim was subsequently found in a state of undress in a freezer in the kitchen. Also found was a bent and bloodstained 12-inch knife. The cause of death was the victim's throat was slashed. A pack of cigarettes of the respondent's brand were found in the apartment, and also there was blood on the respondent's clothing.

That was the evidence that the state adduced in order to substantiate the substantive offense -- here rape/murder.

QUESTION: General Drake, may I ask you a question about Ohio nomenclature? Is a specification something that just pertains if a death penalty is being sought?

MR. DRAKE: Yes, Your Honor. Under then -- obviously because of the Bell and Lockett decisions Ohio has -- now has a different death penalty. But at the time it was incumbent upon the prosecutor to allege aggravated murder, in most instances felony murder, and then allege and prove as an independent and discrete fact that a specific aggravating circumstances, in Ohio called a death penalty specification, that had to be alleged and proved beyond a reasonable doubt.

QUESTION: Well, and the Ohio Court of Appeals reversed or set aside the death sentence, did it not?

MR. DRAKE: Yes, Your Honor, on a ground wholly unrelated to this case.

QUESTION: Well, why doesn't the whole question of specifications wash out at that point? I couldn't understand why the Court of Appeals for the Sixth Circuit focused on these specifications and what it deemed a problem with them when I thought that had

pretty well washed out after the Court of Appeals set aside the death sentence.

MR. DRAKE: Your Honor, that was our argument. We vigorously argued that point. The Court of Appeals relied on this Court's decision in Burgett v. Texas, extended not only the rationale but the conclusion therein that the substantive offense had to also be vacated. That was the summary rationale that the court used. They did not dwell on it in any length whatsoever or give any analytical reasoning for the ultimate conclusion.

In order to prove the separate and distinct factual question regarding whether or not the death penalty specification was proven beyond a reasonable doubt, the Ohio prosecutor introduced a certified copy of the Illinois judgment entry which was proper mode under Ohio law at that time.

The respondent appealed his conviction to the Ohio Court of Appeals. The Court of Appeals reversed the aggravated murder conviction pursuant to a state law question. Under Ohio -- the Ohio law is considerably different than the federal law. In Hollin v. United States this Court expressly rejected a theory that the prosecution when presenting only circumstantial evidence must disprove all theories consistent with innocence.

Ohio has the more stringent doctrine whereby the Ohio prosecutor must rule out beyond a reasonable doubt all theories consistent with innocence.

Here the Court of Appeals' rationale was that since the victim knew the respondent, they might have had consensual intercourse prior to the homicide; therefore, it wouldn't be a forcible rape.

The Court of Appeals reduced the aggravated murder conviction to what is called simple murder in Ohio. Respondent from that point on and to this day stands convicted of having purposely caused the death of another. The death penalty specification has nothing to do with his incarceration. He was thereafter resentenced to a term of from 15 years to life imprisonment. He has not faced the specter of the death penalty.

Respondent thereafter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254 in the United States District Court. The district court reviewed the record and made the following finding of fact: "From review of the record this court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner" -- respondent -- "was pleading guilty."

The respondent appealed to the Court of

Appeals for the Sixth Circuit. That court looked at the Illinois guilty plea, the actual transcript, and found the Illinois guilty plea facially invalid. The court did not and, despite our urgings, refused to look at the totality of the circumstances regarding and surrounding the entry of the Illinois guilty plea.

This Court thereafter summarily vacated and remanded in light of Sumner v. Mata. Upon remand, the Court of Appeals sua sponte reinstated its prior judgment.

QUESTION: Mr. Drake, did the court look at anything other than the bare transcript from Illinois that we have in the record?

MR. DRAKE: The only tangential allusion by the Court of Appeals to any other facet of the Illinois guilty plea is that the Ohio trial court did not make an express finding regarding the credibility of the respondent.

As noted in the reply brief --

QUESTION: Was there a record from Illinois before the court with all of the documents in it and any written plea agreement or anything of that --

MR. DRAKE: The three documents before the court were the Illinois indictment, the Illinois judgment entry, and the --

QUESTION: And the transcript?

MR. DRAKE: -- Transcript. And, of course, the testimony and cross examination of the respondent in the Ohio trial court.

QUESTION: Of course, it isn't entirely accurate to say that the Court of Appeals for the Sixth Circuit didn't pay attention to anything except the transcript of the guilty plea in Illinois. It did mention both the trial -- Ohio trial court's findings on that question and the Ohio Court of Appeals' findings on that question.

MR. DRAKE: Your Honor, it mentioned insofar as it stated them in some manner. In Sumner v. Mata this Court indicated that if the federal judiciary wishes to set aside factual findings pursuant to 28 U.S.C. 2254(d)(8), it is incumbent upon the habeas corpus applicant to allege and demonstrate by convincing evidence that the Ohio trial court findings are not supported by looking at the record and the statute says in its entirety here there is absolute -- and the Court went on to say that the federal court is of course free to make a contrary determination, but it must articulate its reasons for doing so.

The opinion of the court below articulates no reasons whatsoever. Upon remand the court sua sponte

entered the same judgment it did. Paramount in its misinterpretation was the misunderstanding of this Court's decision in Henderson v. Morgan. The court had earlier cited a prophylactic rule whereby a guilty plea must be more facially valid than they found this one in their subjective opinion. They did not look to the fact that he had competent counsel, the fact that he was arraigned twice, the length of his pretrial incarceration, the fact that he was more than conversant both with the Illinois penal system and most assuredly with the Illinois judiciary, beginning as a young -- well, as a juvenile and essentially working up from there on. The Illinois trial judge indicated he'd been in prison approximately every two years.

These are the factors which surrounded the entry of the guilty plea, that coupled with his own personal characteristics which would be, of course, his familiarity with the system, and his innate intelligence, and his literacy level.

QUESTION: Mr. Drake, one thing worries me. What do you want more than the record of the Illinois case? What do you want more than the record? You said he saw the whole record, right, of the Illinois conviction, the Illinois plea guilty. He saw the whole record. What else should he have listened to?

MR. DRAKE: You're referring to the Ohio trial judge, Your Honor?

QUESTION: Yes, sir.

MR. DRAKE: He did, in fact, listen to the respondent's testimony. The respondent offered --

QUESTION: Well, what are you complaining about on that point about him relying on the Illinois record?

MR. DRAKE: Your Honor, we're not complaining. We believe the Ohio trial court did in fact examine the totality of circumstances surrounding the plea.

QUESTION: And you make no complaint about that.

MR. DRAKE: No. We believe that the Ohio trial court finding is fully supported by the record, and that most assuredly the respondent has not indicated that it's -- certainly not by convincing evidence that that factual finding is not supported by the evidence before the Ohio trial judge.

QUESTION: I'm at a loss as to why you keep mentioning it. I guess I just missed something, that's all.

MR. DRAKE: The reason I mention it, Your Honor, is because the court below refused to consider

the very factors upon which the Ohio trial court predicated its determination that that Illinois guilty plea was intelligently entered. The only reference is to the transcript of the Illinois proceeding itself.

The court points out -- and again, it's, I believe, only a one-line statement -- that the Ohio trial court failed to make express factual findings regarding the credibility of the respondent. That, of course, has already been considered by this Court in a different case, LaVallee v. Delle Rose.

The Ohio trial court, had he credited respondent's testimony, he would have had no choice but to dismiss the death penalty specification; that's apparent from the record. And the disagreement or the statement by the court below that the Ohio trial court did not make credibility findings is beyond me in light of what the record was.

QUESTION: Mr. Drake, twice you've referred to the Sixth Circuit as doing this sua sponte. I detect a criticism there. A criticism of what -- not having a hearing or something? What is your concern about the sua sponte?

MR. DRAKE: Well, Your Honor, I, as an attorney, would have liked to briefed and argued the case in light of this Court's decision in Sumner v.

Mata. It was perhaps the Bellweather decision interpreting the 28 U.S.C. 2254(D). I believe that with further briefing and argument that perhaps the court would not have erred to the degree I believe it did.

QUESTION: I suspect on many remands from here for reconsideration in light of another case the courts of appeal would do precisely this.

MR. DRAKE: I did not mean to be overly critical of the court below, Your Honor.

In Henderson v. Morgan this Court set forth a totality of the circumstances test wherein one judges whether the accused was given adequate notice of the true nature of the charges against them so as to comply with due process.

I have elaborated upon what I believe are the circumstances which fully substantiate the findings of the Ohio trial court. I would only reiterate in Sumner v. Mata there is a requirement that the federal judiciary -- that first of all the habeas corpus applicant demonstrate by convincing evidence that state court findings are not fully substantiated by reference to the record. Here I believe there has not only been a showing of convincing evidence, but that would be impossible.

The court below essentially allowed the

respondent a presumption by looking only at the record, finding it in their opinion facially defective, and refusing to examine those other factors which surrounded the entry of this plea.

QUESTION: Mr. Drake, incidentally, is there any indication in the Ohio record why the judge and the prosecutor refused to accept Lonberger's offer to stipulate to the prior conviction?

MR. DRAKE: No, Your Honor. I did not try the case. There is no --

QUESTION: Is there any state interest involved in that refusal that you can identify?

MR. DRAKE: No, Your Honor. Any constitutional ramifications would have been dissipated by this Court's decision in Spencer v. Texas. As set forth in the brief, what I believe to be a very, very fine limiting instruction was given to the jury. Not only that, but in the voir dire of this case the jury assured both the Ohio trial judge and counsel that they would abide by any limiting instruction. They would resolve the guilt or innocence as to the substantive offense independent of any evidence presented regarding Mr. Lonberger's prior escapades with law enforcement agencies or officials in Illinois.

The second question presented by this case

presents an equally compelling issue of federal-state comity insofar as the decision of the court below wholly disrupts state evidentiary proceedings maintained pursuant to this Court's decision in Spencer v. Texas.

Even assuming the correctness -- and petitioner in no manner does -- of the circuit court finding with respect to the facial validity of respondent's previously entered guilty plea, and again, even the court below indicates they're dealing only with the facial validity and fully acknowledge that this plea may well be very validly a constitutionally entered plea, in their opinion.

QUESTION: Well, I gather in Spencer the prior convictions were concededly all valid, weren't they?

MR. DRAKE: Yes, Your Honor.

QUESTION: Whereas here at least we have a holding that the guilty plea in Illinois was invalid.

MR. DRAKE: In --

QUESTION: We do.

MR. DRAKE: Yes.

QUESTION: And in Burgett, I gather, we had all invalid prior convictions, didn't we?

MR. DRAKE: Of a very specific nature, Your Honor.

QUESTION: Yes.

MR. DRAKE: It is my opinion in my reading of --

QUESTION: But you don't think there's a distinction between --

MR. DRAKE: No.

QUESTION: -- Valid and invalid prior convictions for the purposes of this case?

MR. DRAKE: I believe there's clearly a distinction between this case and that in Burgett. For instance -- assuming, for instance, that this guilty plea was invalid, most assuredly Mr. Lonberger could not be sentenced to death, but it should not affect the validity of a murder conviction wherein the evidence is overwhelming that he did in fact murder the victim in this case.

QUESTION: In other words, you're saying that that -- if it had any bearing, the status of the Illinois conviction would bear only on the death penalty aspect of the case and not on anything that occurred after the death penalty was set aside.

MR. DRAKE: Yes. The remedial action by the court should be limited or commensurate with the violation perceived. Burgett was a different case insofar -- this Court had recently decided at that time Gideon v. Wainwright. The Court considered that states

were using uncounseled guilty pleas in express violation of Gideon and the Sixth Amendment right to counsel.

Burgett was necessary to ensure the continuing viability of Gideon. States were not going to be allowed to use uncounseled guilty pleas, which this Court deemed to be inherently unreliable and presumptively prejudicial.

The uncounseled guilty pleas considered in Burgett this Court found to be presumptively invalid, i.e., facially invalid. The prosecutor either knew or should have known that he was not to be using these. The Burgett decision can only be reconciled with Spencer -- the underpinning of Spencer is that juries both in civil and here in the criminal context can and will follow limiting instructions. Juries are called on to do this all the time, either in multiple co-defendants --

QUESTION: Mr. Drake, wouldn't that have required Burdette, or Burgett, rather, to be decided the other way, because wasn't there a limiting instruction there and wasn't it offered just for enhancement purposes?

MR. DRAKE: But Burgett, Loper v. Betto, all the decisions stemming from Burgett have been limited to Gideon v. Wainwright type contexts. This Court has never held that the mere fact --

QUESTION: Well, I understand it's a different constitutional thing, but if you -- insofar as your harmless error argument is made, wouldn't that also have been valid in the Burgett situation?

MR. DRAKE: This Court apparently found that the use of uncounseled convictions was so inherently prejudicial that the actual -- in point of fact in Burgett the uncounseled convictions were never even presented to the jury. The judge withdrew that from the jury's consideration at the last moment.

But only in the Gideon v. Wainwright context to ensure the continuing validity in the face of apparently animosity by various states to that decision was such a Draconian measure deemed necessary. The Court has never used that remedy, i.e., the vacation of the substantive offense despite overwhelming evidence of guilt on that offense when limiting instructions have been given outside the Gideon v. Wainwright context, Your Honor.

QUESTION: Are you suggesting that the Burgett opinion said anything to the effect that only uncounseled convictions were invalid for the purposes of the Burgett rule?

MR. DRAKE: Your Honor, I'm reading Burgett narrowly, yes.

QUESTION: You certainly are.

MR. DRAKE: Yes.

QUESTION: No other invalid convictions would have the benefit of the Burgett rule, is that it?

MR. DRAKE: This Court has never so held, Your Honor. If the Court were to so hold, the states would most assuredly have to change their procedures. The states would almost have to go to bifurcated or even trifurcated trials in any enhanced penalty setting.

QUESTION: Yes, but can you show me anything in the Burgett opinion which suggests what you're arguing?

MR. DRAKE: No, Your Honor. I can only inferentially because the Court has ever extended Burgett outside that context.

QUESTION: Counsel, what difficulties would the state face in bifurcating the evidence for purposes of sentencing as opposed to putting it on initially at the guilt or innocence phase?

MR. DRAKE: In this particular context -- and I'm dealing with Ohio laws that existed -- there's the unfortunate specter that jeopardy might have attached when the jury returned a verdict of guilty into aggravated murder, because the death penalty specification, we're talking about a unitary

proceeding. To have bifurcated it would have opened the door to Mr. Lonberger arguing the jeopardy attachment, and you could not then present that to the jury. That relates to this case --

QUESTION: Even if the charges were filed initially in a way to indicate that that would be the procedure?

MR. DRAKE: That is a very limited answer to your question as far as the entire ramifications across the nation. The Court in Spencer indicated the state has a viable and substantial interest in trying all charges together. Spencer stands for the proposition that juries can and will follow limiting instructions to --

QUESTION: Well, in the face of the stipulation that was offered, I still -- it's still unclear to me what interest the state would have in introducing the evidence of prior convictions in the guilt/innocent phase.

MR. DRAKE: You're talking about this particular case?

QUESTION: Yes.

MR. DRAKE: Again, I did not try the case. I don't know the nature of the offer of the stipulation. It's very briefly related in the -- I believe counsel

relates it to the judge in a midtrial or pretrial context, and it's not really set forth whether it's a stipulation subject to subsequent objection or what the nature of the stipulation was, Your Honor.

I'd like to reserve the rest of my time.

QUESTION: Can I just ask one other question? Is it not clear -- I mean I know you didn't try the case -- but is it not clear that had the stipulation been accepted, the argument of prejudice would have been totally put to one side, would have been avoided. Because they claim prejudice by getting this prior conviction before the jury during the guilt and innocence phase, and had you accepted -- had your trial lawyer, rather, accepted the stipulation, that prejudice at least would not have been in this record.

MR. DRAKE: As Burgett is being read by the court below, it wouldn't alter our presence before this Court. I assume they were going to reserve their right to appeal the pretrial ruling regarding the validity of the Illinois guilty plea.

QUESTION: Except that it wouldn't have affected any of the -- it only could have affected the death penalty then. But the problem is now it may taint the verdict on guilt or innocence.

MR. DRAKE: Your Honor, I honestly fail to see

the difference. The jury would have known that he was convicted previously of attempted murder. That apparently is the prejudice that the court below looked to.

Thank you.

CHIEF JUSTICE BURGER: Mr. Czarnecki.

ORAL ARGUMENT BY JOHN CZARNECKI, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I'd like to begin, I guess, by extending Mr. Drake's argument.

Justice Stevens, you're correct. The stipulation offered by Mr. Lonberger in this case was unqualified. It was designed only to withdraw that issue from the issue, and in fact, it was one of four opportunities we afforded the state at trial to withdraw this particular claim or this particular charge from the jury.

We filed initially -- upon the filing of the Ohio indictment we filed a motion to dismiss, making the claims we make here today. That motion was overruled by the trial court after a hearing. We then moved the court for a bifurcated procedure, and that in fact -- Justice O'Connor asked the question -- would have had

the effect of keeping this particular issue out of the guilt-innocence phase. It would have put this issue squarely before the jury only after they had reached a decision on guilt or innocence.

And it was our position then and it remains our position now that the state would suffer no detriment by accepting that proposal, because as a matter of fact had the jury returned a verdict of not guilty, the specification under Ohio law would have become irrelevant.

QUESTION: Well, does that really bear on the case here? The state didn't accept a stipulation, and it's got to bear the consequences of whatever resulted from introducing the evidence; but there's no federal rule that requires a state to stipulate it.

MR. CZARNECKI: No. That's correct. And, in fact, Spencer v. Texas addresses that question precisely. I was simply addressing Justice Stevens' question on the stipulation.

The state in its argument seems to cast great doubt on the Sixth Circuit's opinion herein. The Sixth Circuit reviewed the entire record. It began, as the state court did, with a facially invalid conviction from Illinois. One ordinarily presents a conviction statement to prove a prior conviction. This conviction

statement said, among other things, Robert Lonberger has been convicted of the offense of aggravated battery, et cetera. Robert Lonberger has been given one sentence, two to four.

That conviction statement was concededly ineffective to prove that anyone had been convicted of the offense of attempted murder. The invalidity or the insufficiency of that statement can be shown by the fact that the state was forced to go outside the record, outside the normal channel of proof --

QUESTION: Constitutionally invalid?

MR. CZARNECKI: It was certainly invalid to show a conviction for attempted murder.

QUESTION: Yes, but do you say it was constitutionally invalid?

MR. CZARNECKI: The conviction statement itself, Your Honor, was facially invalid.

QUESTION: Was this procedural invalidity? What kind of invalidity was it?

MR. CZARNECKI: Well, simply stated, it did not say that Robert Lonberger had been convicted of attempted murder, period. I mean it said, the conviction statement simply said he'd been convicted of aggravated battery, et cetera, in quotations, that phrase literally. So that certainly the state could not

have introduced that to a jury and expected them to find as a matter of fact --

QUESTION: I'm still asking is this a constitutional invalidity to admit it then? It was admitted.

MR. CZARNECKI: I would think that it doesn't rise to the level of constitutional invalidity, no, Your Honor.

QUESTION: So in that sense it's not like the prior convictions in Burgett, is it?

MR. CZARNECKI: Well, I'm sorry. I misunderstood the Court's question. If in fact the conviction itself was invalid, yes, that invalidity arises from a constitutional deprivation. I'm sorry. I was referring to the conviction statement, the document that ordinarily proves a conviction. In this case it was insufficient.

The state then went outside the record with the testimony that was taken at the change of plea and sentencing hearing. And notwithstanding what the state's position is, the trial judge in Illinois simply said you are pleading guilty that you did commit the offense of aggravated battery, and you did attempt on the victim.

Mr. Lonberger's position has been unwavering.

His position was that he understood he was entering a plea to aggravated battery and that the phrase relating to an attempt provided the factual backdrop for that plea. There is no other factual information in the record to support a plea of aggravated battery. His position is credible on its face.

The Sixth Circuit simply found, simply stated, that the Ohio trial court without more could not hold that the state of Ohio had borne its burden to sustain the validity of a conviction that it sought to use on the face of the record presented.

QUESTION: Well, counsel, why do you think the Sixth Circuit said in its opinion that no explicit findings were made concerning Lonberger's credibility as a witness? Doesn't that suggest that if the Ohio court had made findings, the Sixth Circuit would have thought somewhat differently of the case?

MR. CZARNECKI: I'm not sure that I'd like to read that into the Sixth Circuit's opinion.

QUESTION: Why do you think they said it?

MR. CZARNECKI: As an observation that the facts that they were finding need not be given the deference that 2254(D) normally requires.

QUESTION: Well, but doesn't that suggest to you that they were giving some credibility to

Lonberger's testimony, the Sixth Circuit?

MR. CZARNECKI: The Sixth Circuit? I would suspect so, Your Honor.

QUESTION: If so, how can you reconcile that with LaVallee v. Delle Rose in 410 U.S.?

MR. CZARNECKI: Well, I would distinguish that case, Your Honor, in that that was a case remanded with specific instructions; that was a case remanded with a specific legal standard to be applied; and that the question to be answered by the state court was fairly clear on the issue of voluntariness.

Justice O'Connor asked the question during argument, and I had intended to get to it later in my argument, but I will now. We have no way of knowing, Your Honor, on the strength of the state court finding either what standard he found or he applied or what facts he found. In fact, it's entirely possible that the state court found, having made specific findings that this defendant was intelligent -- and that's questionable -- that he was well represented at every stage of the proceeding by competent and capable counsel, that he was well experienced in the criminal process, and that every effort was taken to protect his constitutional rights, may well have found that those four facts justified a finding, a conclusion of law that

the plea was intelligent and voluntary, notwithstanding the fact that the court may have -- and we are forced to speculate in the face of a silent record -- the court may have found he neither had notice -- and that's conceded, I believe -- nor actual knowledge from Henderson. We simply have no way of knowing.

The Sixth Circuit reviewed the record and found, I think properly, that the record presented did not support the trial court's finding that this plea was voluntary.

In the event, Your Honor, on the question of 2254(d) in Sumner versus Mata, this Court held last term in the second remand of Sumner that Sumner in 2254(d) did not apply to mixed findings of fact and law, and I think it's beyond argument that the validity of confessions, the validity of pleas are mixed questions of fact and law, that the federal courts are certainly free to apply federal constitutional standards to historic facts found. They are free to give certain credence and certain weight to facts found.

QUESTION: Would you think that a federal habeas court -- if an Ohio court in this case had said we do not believe Lonberger when he testified, do you think a federal habeas court would entitled to say well, we think he should have been believed?

MR. CZARNECKI: I would find that very difficult to support, Your Honor. Yes. Because the trial court certainly had an opportunity to view the defendant's demeanor.

The question, however, transcends that simple question. Mr. Longberger was subjected to cross examination for the better part of a day. He was absolutely firm in his representations that he did not know. There is not a scintilla of objective evidence presented by the state to show that this plea was, in

fact, a knowledgeable, voluntary please. The state --

QUESTION: How do you reconcile that with the statement on page 5, after they've gone through -- page 5, the Appendix to your Cert Petition. After they'd gone through the usual inquiry by the court to him about what he had done, in fact, then the court summarized at the end, "Understand that by pleading guilty, I could sentence you from one to ten,..." -- and I assume he means years, one to ten years --"...on the aggravated battery, and attempt one to 20. So I could sentence you to the penintentiary for a maximum of one to 40 years."

MR. CZARNECKI: Your Honor, Mr. Lonberger's explanation is not the explanation of 11 lawyers. It's an exclamation that I didn't know, I simply didn't understand that he --

QUESTION: When he answered -- the judge then repeated, "Do you understand that?" And he answered, "Yes, sir." So would you ignore that exchange, even after it followed the more detailed inquiries about what he had, in fact, done, what the criminal acts were?

MR. CZARNECKI: At the risk of appearing to be engaging levity, Your Honor, we have to also ignore the fact that the trial judge could not have taken this plea. I think it's clear the state in this case, in the Ohio case and the case before the bar today, does not

contest the fact that this plea was probably legally invalid in any event.

It is no more unlikely that Robert Lonberger didn't understand that the judge thought he was taking a plea to attempted murder than it is that the judge didn't understand that he could not have taken pleas for attempted murder and aggravated battery arising out of the same operative facts. The law is absolutely clear in Illinois that the offense of aggravated battery is subsumed into the greater offense of attempted murder.

If one looks at the sentence I think that supports my client's position. The sentence is for a single charge. My criminal practice is a regular one, and I have never seen, or stood before a court and entered a plea or had a client convicted for more than one offense when the court did not acknowledge that fact at the time of sentencing and make sentences consecutive, make sentences concurrent, dismissed, suspend.

But this case supports this client's -- on the facts -- supports this client's position that he simply didn't know. And I'm not sure that anyone knew what this plea connoted. I'm not sure that anybody had read this Court's opinion in Boykin and spread upon the record a clear understanding from the court to this

defendant.

If this Court today accepts the state's position it is approving this sort of sloppy plea-taking, this sort of sloppy procedure before the state courts. This finding in Illinois and this finding in Ohio, neither one of should be accorded the sort of deference that a careful factfinding, a careful legal process, would require.

The second argument that the petitioners make goes to the question of good faith admission and harmless error and the limiting instruction from Spencer. In the first place, -- and I don't want to spend a great deal of time on it -- this case was not one of overwhelming evidence of guilt. Mr. Drake --

QUESTION: Does that really have anything at all to do with our review here?

MR. CZARNECKI: I think it does, Your Honor. I think the significance of the --

QUESTION: Because of the harmless error?

MR. CZARNECKI: Yes, of the harmless error made by the state is important. I think that the state utilized his prior conviction to secure a conviction in a case that was otherwise one of insubstantial circumstantial evidence.

The Spencer court, -- and I think it's

significant that the Spencer court, when it discussed limiting instructions and the importance of limiting instructions, also predicated that finding on a ruling that found in Spencer that prior convictions are ordinarily not inflammatory, ordinarily introduced pure documentary evidence.

QUESTION: Mr. Czarnecki, do you think that Spencer and Burgett are completely reconcilable?

MR. CZARNECKI: Yes, sir, I absolutely do.

QUESTION: They were both -- one was six-three and the other was five to four, and they certainly point in two completely opposite directions.

MR. CZARNECKI: I don't believe so, Your Honor. I believe that they are perfectly reconcilable.

QUESTION: Even as to the limiting instructions?

MR. CZARNECKI: Yes.

QUESTION: How would you reconcile Spencer's treatment of limiting instructions with Burgett's?

MR. CZARNECKI: Spencer, as I began to say, first noted that limiting instructions -- I think one has to back up a moment and analyze Spencer in its entirety. Spencer began with the premise that this court and the federal system generally is not in the business of structuring criminal procedures for the

states; a position that I certainly agree wholeheartedly with.

It then went on to suggest that states, quite uniformly, have enacted recidivism statutes to address a reoccurring problem.

Having made those two holdings, then the court acknowledged prejudice. I think that a fair reading of Spencer must of necessity lead one to the conclusion that the court acknowledged prejudice flowing to a defendant from the admission of prior crimes evidence. But said that because that admission is normally not inflammatory, is normally cured by a limiting instruction, that in a balance we're going to allow that procedure.

Burgett, Your Honors, is much different. Burgett is entirely different than Spencer because Burgett is -- the prior conviction in Burgett was predicated upon an invalid prior conviction, and the state's representation --

QUESTION: That was an element of the offense, in Burgett, wasn't it?

MR. CZARNECKI: In both cases, Your Honor.

QUESTION: In both cases. But not in this case. Not in your case.

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

QUESTION: The specification washed out of the case when the Ohio Court of Appeals reversed the death sentence, I would have thought.

MR. CZARNECKI: The Ohio courts have held prior convictions to be elements.

QUESTION: To be what?

MR. CZARNECKI: Prior convictions in recidivism cases, Ohio has a number of statutes which, for instance, the --

QUESTION: I am talking about this particular case.

MR. CZARNECKI: The trial court had held that it was an element.

QUESTION: Yes, but did it play -- was it one of the elements upon which the conviction which was actually sustained against him was based?

MR. CZARNECKI: No, it was not.

QUESTION: So really, it's different from Burgett in that sense.

MR. CZARNECKI: No, it isn't.

QUESTION: Well, I think that in Burgett the invalid conviction was an element of the substantive offense, and here it's simply -- was a question of some evidence coming before the jury that proved to be quite irrelevant in the light of the Ohio Court of Appeals

ruling.

MR. CZARNECKI: Your Honor, in Burgett, just as in this case, the validity of the prior conviction was raised apparently mid-trial. There was some discussion in the opinion about exactly what happened. But in any event, the trial judge found the prior conviction to be invalid and withdrew it, as the state has already told us, from the jury's consideration so that it played no part in the enhanced penalty. It is a distinction without a difference to suggest that Mr. Longberger's conviction was reversed on appeal, and therefore, his prior conviction played no part.

Burgett also was not sentenced as a recidivist, Your Honor, was not convicted as a recidivist. I think that Burgett is indistinguishable. I think that this Court has to directly overrule Burgett unless it is --

QUESTION: Well, it would have to do no more than take some of our later cases such as Parker against Randolph which said that juries are usually presumed to follow the instructions that courts give them to say that Burgett may have been too categorical on that point.

QUESTION: Unless Burgett adopted a prophylactic rule with respect to the absence of counsel.

MR. CZARNECKI: Your Honor, I don't think that

the opinion supports the state's position on that issue. It -- the case of Boykin said that invalid pleas are to be considered in much the same way that 6th Amendment deprivations are to be considered; that the state cannot rely upon a valid waiver of constitutional rights in the fact of a silent record.

I fail to be able to distinguish an invalid plea, which goes to the heart of the factfinding process, from a 6th Amendment violation which, if anything, maybe a less important right. The 6th Amendment right to counsel is a facilitating right. It is a right guaranteed by our Constitution to insure that other 6th Amendment rights, the rights to notice of the charge among other things, are guaranteed.

I cannot denigrate an invalid, unknowledgeable plea to some subsidiary status, to that of --

QUESTION: Could I ask you another point. What did you say earlier about what the -- how free was the federal habeas court or the court of appeals to disagree with the Ohio court's finding with respect to intelligent and voluntary -- ? Did it need to give any deference at all to the Ohio court's findings?

MR. CZARNECKI: I'm not sure that it did, Your Honor. I think --

QUESTION: And why is that? You say it wasn't

-- ?

MR. CZARNECKI: Because it was a mixed finding, certainly a mixed finding of fact and law.

QUESTION: And what if it was? So what if it was?

MR. CZARNECKI: It exempted from the application of 2254 --

QUESTION: Under what case?

MR. CZARNECKI: Under the second decision of this Court in Sumner versus Matta last term, the memo opinion remanding the case to the Ninth Circuit. The Court agreed with the Ninth Circuit that mixed questions of fact and law are not covered by the presumption of validity contained in 2254(d).

QUESTION: And the court is free to independently look at the same record and come out with a different conclusion?

MR. CZARNECKI: The federal courts have regularly, Your Honor, assigned constitutional significance to given facts. That has been the function --

QUESTION: So what's the answer to my question? Your position is that the federal court need give no deference to the state court's conclusion about an intelligent and voluntary plea? That it can look at

the same record that the state court did and come up with a different conclusion?

MR. CZARNECKI: I think that argument could be made, Your Honor. It need not be made in this case because --

QUESTION: Why not?

MR. CZARNECKI: Because the Sixth Circuit expressly said that it disagrees with the factual finding of the Ohio court. It found that the Ohio court could not, on the record, find either notice or knowledge of the plea.

I would like to be able to make the argument that as a mixed question of fact and law, the Sixth Circuit need not give deference, but I think it's irrelevant here. I think the court fulfilled --

QUESTION: So you say the court of appeals said that the Ohio court really didn't do its job in making the kind of findings that it should have.

MR. CZARNECKI: I think that's correct, Your Honor, and I think that that is the heart of 2254 --

QUESTION: That's only on the basis of the -- why do you say you can't tell that the Ohio court made the necessary findings?

MR. CZARNECKI: Because, Your Honor, it would have been -- I'm bemused by the fact that the court made

certain factual findings which are, in my view, irrelevant to the central question. If, as the state points out, the issue was as clear as they represent, then it would have seemed that the trial court could have simply said the defendant had, on the strength of the record, actual knowledge of the charge made against him. But the court did not.

It made, however, four other findings that in our view are irrelevant to the central question. It did not address the central question.

QUESTION: Do you make these observations concerning the Sixth Circuit's view of the credibility aspect of Longberger's credibility?

MR. CZARNECKI: I'm not sure, Your Honor, that the state -- even assuming arguendo that the trial judge did not believe Robert Longberger -- I am not willing to suggest that a state court could, without any other evidence, on an issue as crucial as this, hold that the state has borne a heavy burden, a burden that some of the circuits have characterized as requiring clear and convincing evidence, --

QUESTION: Well, what would a factfinder sitting as a juror believe about the credibility of Longberger against the background that's in the record here of his criminal activities all his life? Wouldn't

they discredit his credibility?

MR. CZARNECKI: I don't think so, Your Honor.

QUESTION: You don't think so?

MR. CZARNECKI: No, I do not. I didn't. If the court -- and I don't know if that's anymore significant. I think the court should review the record. Review the record that the state court found intelligence on. And I won't comment upon this defendant's intelligence beyond to suggest, as I have in my reply brief, that post-conviction, psychological testing showed that he was on the borderline of mental retardation.

QUESTION: May I ask one question about his testimony? Who called him as a witness? I can't remember.

MR. CZARNECKI: We did, Your Honor.

QUESTION: So your position is that if you just disregard his testimony, your opponent had the burden of proof and still hadn't met it, because the record of the Illinois trial shows a facially defective -- does not show a plea of guilty to attempted murder.

MR. CZARNECKI: That's precisely right.

QUESTION: So they had the burden of going outside the record and proving attempted murder, and they didn't -- you could take his testimony outside the

record, and you would still argue that they didn't sustain their burden.

MR. CZARNECKI: That's absolutely correct, Your Honor.

QUESTION: So we don't really have to care much about credibility.

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

In the state's representations before this Court that Robert Longberger had two arraignments are an extension of his own testimony. Robert Longberger doesn't know whether he had two arraignments. Robert Longberger recounted to the court that he thought he was in court a couple times, and we assume, his lawyers, that he had two arraignments.

Robert Longberger talks about a hearing at which the victim testified. We assume that is a preliminary hearing. Robert Longberger doesn't know if it was a preliminary hearing. We have no idea. And all the state need do, in my view, to bear this burden is to bring some evidence that would substantiate the position that they are now espousing; that this --

QUESTION: But what's the burden on the state?

MR. CZARNECKI: In our position, Your Honor, this Court has repeatedly held that the burden is always on the state to show a waiver of important

constitutional rights. And that sounds like I am reading back your language to you, and I am not. I'm suggesting that our system of jurisprudence seldom, if ever, casts upon a litigant the duty to prove a negative.

QUESTION: What about an official record of a plea taken in a court of competent jurisdiction that on its face shows no constitutional defect?

MR. CZARNECKI: Your Honor, this Court made a decision in a case precisely like that in Blackledge versus Allison, and it suggested that even in a record that is absolutely proper and regular on its face, the defendant, by coming forward with some evidence to cast doubt upon the validity of that conviction should be entitled to a hearing to rebut those charges.

We have a much different situation here.

QUESTION: What evidence did this defendant come forward with?

MR. CZARNECKI: I think the Court must understand that this defendant started from a different place. He is not attacking a facially valid conviction. He is raising the facial invalidity of a conviction. He is raising a conviction that is, on its face, insufficient to prove what it is the state wishes to prove.

QUESTION: Why do you allege, then -- why do

you say it was insufficient on its face?

MR. CZARNECKI: Your Honor, in the criminal practice in my experience, the fact of a prior conviction is proved by the state's introduction of a judgment entry or what is often called, and was called in this case, a conviction statement.

QUESTION: Yes, a conviction statement reflected the aggravated battery and the attempted murder, didn't it?

MR. CZARNECKI: No, it did not, Your Honor. That's the point of my argument. The conviction statement simply said aggravated battery, et cetera. It did not --

QUESTION: And the state then introduced the transcript to supplement what the "et cetera" was.

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

QUESTION: And the transcript reflected the attempted murder as well as the aggravated battery.

MR. CZARNECKI: I do not believe that it did, Your Honor. The transcript, as the Sixth Circuit I think aptly pointed out, never contained --

QUESTION: Well, whether the defendant understood it is another question, but the transcript reflected that the judge understood it, anyway, right?

MR. CZARNECKI: The judge understood that he

was taking a plea for attempt, which, incidentally, is something of an unusual charge in that it generally encompasses some other offense. Attempt could mean, without more, an attempted larceny, or an attempted murder.

QUESTION: Is it correct that the transcript doesn't ever include the words "attempted murder"?

MR. CZARNECKI: That's correct, Your Honor, absolutely.

QUESTION: It says attempt with a knife.

MR. CZARNECKI: That's correct, Your Honor. Which, by the way, would form the factual basis for an aggravated battery. It's entirely consistent with this defendant's testimony.

QUESTION: But not an attempted battery.

MR. CZARNECKI: No, an aggravated battery, Your Honor.

QUESTION: But what other than murder would you attempt with a knife?

MR. CZARNECKI: Your Honor, if one, as my client puts it, attempted on a victim, attempted to cut a victim with a knife, under my reading -- and I think I would be free to suggest that the state would agree -- of Illinois law, that act without more would constitute an aggravated battery; an attempt to injure with a

deadly weapon.

Attempt with a knife could, under anyone's reading, reflect the factual basis for a plea of aggravated battery. That's all my client's claim has been from the outset. The Sixth Circuit found that the state had failed to bear a burden beginning with an insufficient record.

And incidentally, the circuit courts have been uniform in finding that when the record is silent, from Boykin, from Henderson, the state bears a heavy burden; a burden to show by clear and convincing evidence that a plea, that total relinquishment of all this defendant, all Robert Longberger's constitutional rights, casting them before the court, must at least be based in the knowledge of the charge to which he is entering a plea.

QUESTION: Well, let's suppose two or three situations. Suppose that in the Ohio proceeding, after an evidentiary hearing the Ohio court found that this guilty plea was intelligent and voluntary and that he had had notice and knew of the plea. You would think there would have to be some deference to that in the habeas proceeding.

MR. CZARNECKI: Yes, Your Honor.

QUESTION: Now, suppose the judge says I find it to be a voluntary and intelligent plea and valid.

Would there have to be any deference to that?

MR. CZARNECKI: I think that's too much of a legal conclusion given the fact that --

QUESTION: Well, we have cases and plenty of them that would say that even if all the judge said was I find the plea to be valid. We have cases that say unless there's some indication to the contrary, that you assume that a knowledgeable judge or a state judge has applied the right legal standard.

MR. CZARNECKI: Yes, Your Honor. That's correct, Your Honor, except in this particular case, as I pointed out to you before, the Sixth Circuit has found that even if that finding is to be given deference, even if one reads that phrase broadly enough to mean I find this defendant had actual knowledge of the charge, the record is totally devoid of objective evidence to support that finding.

QUESTION: Well, the record maybe, but that was the finding of the state court.

MR. CZARNECKI: That's correct, Your Honor, but that finding must be supported in the record.

QUESTION: I'm going back to your statement just before Justice White's question to you. You said he couldn't have thought there were two crimes involved here. Let me repeat to you again the question: after

the judge had gone through all these specific questions, in which admittedly, the word "murder" was left out, but "attempt with a knife", then he said, "Do you understand by pleading guilty I could sentence you from one to ten on aggravated battery." Clearly, nothing ambiguous about that, is there?

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

QUESTION: And attempt, one to 20. Now, didn't that convey a message that the second crime that the judge was talking about was the much more severe crime of the two?

MR. CZARNECKI: The Court's question would force me into the defendant's mind some 11 years in the past. All I can represent to the Court --

QUESTION: What would you understand about it? Let's put it that way.

MR. CZARNECKI: The standard is not what I would understand --

QUESTION: That there were two crimes, and one was much more serious than the other. Is that not what almost anyone would understand?

MR. CZARNECKI: But I don't believe the standard, Your Honor, is what an ordinary person would understand as the state presents, or what any other person would understand. But rather, what this

defendant understood or had notice of in 1972.

QUESTION: I see. Thank you. Do you have anything further, Mr. Drake?

MR. DRAKE: Yes, Your Honor.

ORAL ARGUMENT OF RICHARD DAVID DRAKE, Esq.

ON BEHALF OF THE PETITIONER -- Rebuttal

MR. DRAKE: Two points. The difficulty here is that the respondent endeavors to assume that no evidence had been presented whatsoever, which I believe is Justice Stevens' question -- on other words, had not Mr. Lonberger testified at the Ohio hearing -- that some burden would have been foisted upon the state of Ohio to validate this plea.

I would note that in Henderson versus Morgan, it was precisely this contention by the state that you're inviting countless collateral attacks to guilty pleas than the court indicated. Moreover, even without an express representation, it may be appropriate to presume that in most cases, defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

The burden here was by convincing evidence --

QUESTION: Let me ask you about that. We're talking now about the hearing in advance of trial in the

Ohio court in support of the state's motion to use the prior plea to aggravate the sentence. Who went forward with evidence at that hearing? Who put on the first witness?

MR. CZARNECKI: The respondent.

QUESTION: The respondent, but --

MR. CZARNECKI: It was respondent's motion. The trial court gave it --

QUESTION: Was it a motion to prevent the state from using it, rather than a motion for permission?

MR. CZARNECKI: It was essentially a motion in limiting -- it was a motion to dismiss the death penalty specification, but it was essentially a collateral attack on that Illinois guilty plea. Were it no good, the death penalty specification was, of course, inadmissible.

QUESTION: Well, would you be content to take the position that we can simply look at the Illinois guilty plea proceeding, and that's all the evidence you need? On the basis of the presumption that you read from the Henderson opinion.

MR. CZARNECKI: That is the presumption, but evidence --

QUESTION: We don't have to get involved in credibility at all.

MR. CZARNECKI: You don't have to, but --

QUESTION: It was an indictment that charged attempted murder, and even though the judge was a little imprecise in saying -- just mentioning the aggravated battery and the word "attempt" without ever using the word "murder", the fact that the indictment mentioned attempted murder and the fact that we can presume counsel normally tell their clients what the charge is, that's enough for your position?

MR. CZARNECKI: Absent some evidence, credible evidence, by the accused, yes.

QUESTION: No. Say there was no evidence except what I described. Would you be willing to rest on that?

MR. CZARNECKI: In this particular record, yes. There could be guilty pleas. But you must remember, bear in mind, that this was a plea bargain.

QUESTION: Then our task is limited to two questions, as I see it. Just look at the indictment and find out if the man was represented by counsel. Maybe that should be the test.

MR. CZARNECKI: And, of course, whether or not he was arraigned and otherwise notified. Here there are additional factors that are before the Court by Mr. Lonberger's own admission, Your Honor.

But in answer to your question, that is correct, it would be our position that he bore the burden and it's quite obvious that the Ohio trial court did not credit his testimony.

QUESTION: But in Henderson, didn't they read the indictment to him?

MR. CZARNECKI: No, Your Honor. That was the --

QUESTION: That didn't appear in the record?

MR. CZARNECKI: That was the very pivotal in -- there were two issues. One is that he had never been read the indictment or otherwise notified of the charge, because he was indicted for first degree murder in New York and pled guilty to second degree murder.

QUESTION: That's right.

MR. CZARNECKI: Therefore, he was never arraigned on it.

And also, at the hearing, the federal district court found, as a matter of fact, that his attorney had not told him, in this particular case, that the purpose was an element of the crime of second degree murder.

QUESTION: That's in Henderson.

MR. CZARNECKI: That coupled with his intellectual deficiency made it quasi-credible.

QUESTION: Is it clear that the indictment was

read to the defendant in this case?

MR. CZARNECKI: He said he was arraigned, despite Mr. Czarnecki's contrary --

QUESTION: He pled guilty to the indictment.

MR. CZARNECKI: He pled guilty to the original charge --

QUESTION: Not guilty to the indictment.

MR. CZARNECKI: He pled guilty while represented by competent counsel to the original charges on which he said he was indicted -- I'm sorry -- arraigned twice.

QUESTION: Was he present when he pled not guilty?

MR. CZARNECKI: He said, they took me before a court and arraigned me. It's --

QUESTION: What I'm trying to find out is does the record show whether or not the defendant was present when the indictment was read?

MR. CZARNECKI: Yes, Mr. Lonberger indicated that he was present; that he was arraigned. He didn't go into any specifies or didn't delineate, did not present any corroborative evidence one way or the other.

QUESTION: I thought he said he went three or four times. He wasn't clear about any of them, was he? Did he say he went to court three or more times?

MR. CZARNECKI: He indicated he was arraigned twice and that he had a hearing with the --

QUESTION: Then my answer is which one of these was the indictment read to him? You don't know.

MR. CZARNECKI: He did not indicate that it was ever read to him, is the answer.

QUESTION: In fact, isn't it a little stronger than that? We do have a transcript with at least some of the Illinois proceedings, and that transcript does not include a reading of the indictment to the defendant. Is that not correct?

MR. CZARNECKI: The transcript you have is only of the guilty plea, Your Honor.

QUESTION: Yes, whatever we have from Illinois; we do have some transcript from Illinois. That transcript does not include a reading of the indictment to the defendant.

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

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

(Whereupon, at 2:08 p.m., the oral argument in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

R.C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY

v. ROBERT LONBERGER NO. 81-420

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

BY _____

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