ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1554

TITLE CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., Petitioners v. DAVID LEROY WASHINGTOI

PLACE Washington, D. C.

DATE January 10, 1984

PAGES 1 thru 56

ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., :

Petitioners, :

v. : No. 82-1554

DAVID LEROY WASHINGTON :

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Washington, D.C.

Tuesday, January 10, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 o'clock a.m.

APPEARANCES:

CAROLYN M. SNURKOWSKI, ESQ., Assistant Attorney General of Florida, Miami, Florida; on behalf of the Petitioners.

RICHARD E. SHAPIRO, ESQ., Trenton, New Jersey; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Strickland against Washington.

Ms. Snurkowski, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF CAROLYN M. SNURKOWSKI, ESQ.,

ON BEHAIF OF THE PETITIONERS

MS. SNURKOWSKI: Mr. Chief Justice, and may it please the Court, the issue before the Court today is whether the Eleventh Circuit's en banc decision setting forth the standards by which prejudice and the competency level of a defendant in a collateral action, the manner in which that standard should be applied is up for consideration.

The state is very concerned because this particular case concerns three major topics of interest to the state of Florida, and that is that we have a standard that has been imposed by the Eleventh Circuit en banc which upends the standards that the Circuit Courts have addressed. We have a standard that says it is in direct conflict and it acknowledges conflict with a D.C. case, United States versus DeCoster. It is also in conflict with the Florida Supreme Court's assessment of what the state of Florida will do with regard to assessing competency of counsel.

In that particular case, Knight versus State, which is cited in our pleadings, the Florida Supreme Court meticulously set forth the standard for the review of claims of competency of counsel and relied on and looked to with approval the case of DeCoster.

The third part of this case was actually the first and second part, because it has kind of been meshed. We are concerned here also with the scope that habeas corpus will take in federal litigation by state prisoners, because possibly, possibly the outcome of the Eleventh Circuit Court of Appeals has expanded the ability of the defendant to completely forget about cause, demonstrate a degree of prejudice, not affecting the outcome, and open up all claims that may or may not be cognizable pursuant to habeas corpus proceedings.

QUESTION: May I ask you a preliminary question --

MS. SNURKOWSKI: Yes.

QUESTION: -- because it is right on that point. This case, as I understand it, was a mixed petition. There was an unexhausted Gardner claim raised by the petitioner which was not -- never been submitted to a state court. Is that correct?

MS. SNURKOWSKI: It came about at the federal evidentiary hearing. I don't believe it was

specifically initially addressed by the petitioner tc the court. What happened, during the course of the proceedings, there was discrepancies with regard to whether the trial court and defense counsel had seen Dr. Jacobson's psychiatric evaluation of Mr. Washington which occurred approximately October 6th, sc about six days after his arrest --

QUESTION: But that claim was raised for the first time at the federal habeas corpus proceeding. Is that correct?

MS. SNURKOWSKI: Well, but again, the claim wasn't per se raised. It came about and it was resolved through further discussions at that proceeding that in fact there was not a Gardner violation because --

QUESTION: There was not a Gardner violation?

MS. SNURKOWSKI: There was not -- right.

QUESTION: The Court of Appeals said that claim was raised for the first time in the federal habeas corpus proceeding.

MS. SNURKOWSKI: That is correct with regard to --

QUESTION: Now, do you concede that there was jurisdiction in the federal habeas corpus proceeding notwithstanding the fact that the petition contained an unexhausted claim?

MS. SNURKOWSKI: The state would contend that as the posture of the develcpment of this case developed, that in fact it was a ruse. There was in fact no unexhausted claim before the federal court. The fact that there was discussion with regard to the Gardner issue, that it was resolved, that in fact that the court did not utilize that material, and defense counsel's remarks with regard to whether he had seen it was unclear. He could not recall and did not know.

QUESTION: Well, I agree. I just want tc get your position. It is your position that no unexhausted claim was presented.

MS. SNURKOWSKI: That's right, Your Honor. That's right.

QUESTION: And if there had been an unexhausted claim, what would your position be?

MS. SNURKOWSKI: The state, because of the nature of the case and the posture the case was in -- this case happened to be under an outstanding death warrant in Florida -- the state would have waived --

QUESTION: Do you think it is something you can waive?

MS. SNURKOWSKI: Yes, Your Honor, and as a matter of fact, we have -- there is a case cut of the Eleventh Circuit which holds to the contrary. We have

litigated that kind of an issue, but the state is of the mind that you can waive that issue.

QUESTION: The state of Florida's position is that an unexhausted claim does not deprive the federal court of jurisdiction if the state is willing to proceed?

MS. SNURKOWSKI: Yes, Your Honor.

The second point, as I said, has to do with habeas corpus proceedings and the scope that possibly this particular decision will have on continuing litigation in this regard. The third part of our complaint with the opinion is the concern, is the concern the state of Florida has with the integrity of the trial judges and the Florida Supreme Court's review of competency of counsel, the question of whether the ultimate fact determined by -- the ultimate fact determined by the Florida Supreme Court should be given some deference.

Here they used a standard that has not been attacked per se as being unconstitutional. The state is contending that in fact where a state court, the Florida Supreme Court in this particular instance, has reviewed a claim of competency of counsel, that standard is constitutional in the Sixth and Fourteenth Amendment. Federal consideration of competency of counsel in

collateral action in federal court should be limited to, first of all, whether the standard is constitutional. If you get past that point, whether in fact the Florida Supreme Court or the trial court in reviewing this initially has made an assessment, a determination as to the correctness of the sentence based on counsel's representations of the defendant at that time.

Those are the three main concerns we have with this case. The facts of the case reflect that Mr. Washington pled guilty to three murders. It occurred during a crime spree, unexplained crime spree that happened in September of 1976. The facts are very clear in our record with regard to the murders. In fact, Mr. Washington, without counsel's accountenance, pled guilty. First of all he confessed. He pled guilty and he waived the sentencing proceeding, which is part of our bifurcated or trifurcated -- this is the second part of our trial at the sentencing phase in capital cases where we have a separate sentencing jury.

He waived all those things, contrary to counsel's advice. The defendant's case was affirmed by the Florida Supreme Court on claims raised. He then subsequently, many years later, I think in this case four years later, he went to the trial court on a 3.850 motion for collateral relief, seeking relief because he

says now my counsel is incompetent. Although I pled guilty, I have no complaints about his preparation for trial, although I cut him off at the knees with regard to presenting my case to a jury or to a judge, he was ineffective at the sentencing phase because he did not do certain things.

In particular, there were six, but specifically the court has honed in on the fact that he did not contact or call or investigate certain character witnesses, and that he did not obtain information with regard to Mr. Washington's mental condition. He did not obtain psychiatric reports. Those are the two main claims that his complaint is based on. He had more than a dozen issues, but the focus of all the attention in all the courts reviewing this case has been effectiveness of counsel at sentencing with regard to these particular claims.

The trial court in this particular case reviewed the claims said under the Knight standard, which requires that you make a specific allegation as to the competency, you make a determination or you show -- the defendant has the burden of coming forth and demonstrating that there was some prejudice, and in this particular case that would likely affect the outcome, and that you demonstrate that the actions of counsel

fell below that of reasonably effective assistance of counsel. That is the Knight standard.

The trial court found that in applying that standard Mr. Washington had not met any of the standards, that it was summarily reversible because the 14 affidavits tendered to the court and the two affidavits of psychiatrists and a psychologist did not refute -- first of all, they only went to non-statutory mitigating circumstances. He wasn't complaining about the appropriateness of aggravating circumstances. He wasn't complaining about the appropriateness of statutory mitigating circumstances. It only went to non-statutory mitigating circumstances, and the court stated upon review of this whole record, we find that it does not specifically refute that which counsel did. It did not impair Mr. Washington's ability to obtain a sentence of life in this case.

QUESTION: Ms. Snurkowski, was the Florida trial court's determination that the new evidence was insufficient to outweigh the aggravating circumstances as a matter of law a determination of Florida law in your view?

MS. SNURKOWSKI: I believe it was. I believe in assessing -- because there we have the trial court, who has to be regulated by the Florida Supreme Court in

assessing the appropriateness of the death penalty --

QUESTION: Okay, so you think the Florida trial court determined as a matter of Florida law that the new evidence could not have overcome the aggravating circumstances?

MS. SNURKOWSKI: Affected the outcome, modified --

QUESTION: Well, do you think that the Florida death statute could remove discretion from the sentencer and be constitutional?

MS. SNURKOWSKI: Remove? I am sorry, I don't -- Repeat your question.

QUESTION: Remove the discretion from the sentencer?

MS. SNURKOWSKI: As opposed -- you mean --

QUESTION: That would be the effect of the holding as a matter of law then, to remove all discretion from the trial court to be able to sentence to death.

MS. SNURKOWSKI: I don't believe that is -- No, I don't believe that's what we're doing. We are looking at something as a collateral action here. We are talking about the sentencer being the trial judge who says -- who is the sentencer in Florida. It is not the jury in Florida. They make a recommendation but the

trial court judge makes the determination as to whether death should be imposed based on the aggravating and mitigating circumstances.

QUESTION: Well, if as a matter of law the new evidence could not overcome the aggravating, then aren't you saying that the sentencer must give the death sentence?

MS. SNURKOWSKI: No, I don't believe we are saying that. I am saying we are making -- it is a weighing process. Has he come forward, has he come forward and demonstrated other evidence that -- it's like newly discovered -- that, as an example, that the Solicitor General's office has used in their particular pleadings.

I think to bring it more to home, into Florida, it is like quorum novis, leave to file error quorum novis. The defendant says, yes, this is all that happened at trial, but I have new evidence, I have other evidence that would affect the outcome, and it was not presented at this proceeding. Under that requirement, he has the burden of demonstrating that it was through no dilatory actions of his own that he didn't uncover it. Certainly that would not be a consideration in this particular issue, but the second part of that, would it have affected the outcome, that is the test, would it

have affected the outcome.

So in fact you have a sentencer who has made a determination. The question now becomes, has there been anything new introduced into this equation that would require a modification of that? In this particular case the trial court and the Florida Supreme Court in reviewing this particular claim held that beyond a moral certainty this factual recital, this new bit of information would not have changed the outcome, that in fact as a matter of law there were aggravating circumstances that were not challenged, there were no mitigating -- statutory mitigating circumstances, and that the new material did not create non-statutory mitigating circumstances, and therefore death was appropriate under Florida statute.

Under the authorities of Florida cases, where you have one aggravating circumstance and no mitigating circumstance, death is an appropriate sentence.

Again, the facts, as I said, there was a guilty plea to all these cases without regard to what counsel was counseling Mr. Washington in this particular case. Mr. Washington did proceed. He now comes back and complains about that which has been done. The District Court hearing the case on the petition for writ of habeas corpus concluded that he couldn't -- it was a

closed question as far as he was concerned, but he ruled that there was a need for an evidentiary hearing, and in fact an evidentiary hearing was conducted.

During the course of the evidentiary hearing on this matter, Mr. Tunkey, who was Mr. Washington's counsel, was called to testify by the defendant. Others who were called to testify were Judge Fuller and the defendant himself. The main focus, though, I think is important in this particular case is what Mr. Tunkey said, because Mr. Tunkey was now being asked to tell the court, inform the court what was the purpose, why did you do this, why did you do that, did you stop, did you stop your investigation, did you stop your representation of this man once you felt you had this sunken feeling that because he pled guilty he was not taking your advice?

That was the nature of the inquiry of Mr. Tunkey. It was not that the Florida Supreme Court or the trial court had reviewed the facts in light of the affidavits prepared and that in fact it demonstrated that there was no entitlement to relief, but rather Mr. Tunkey, what did you do and why did you do this? And that is -- Past that point, the trial court after the evidentiary hearing assessed that while, while we, after we have asked him all these questions, and because time

has dulled his memory, or because he doesn't want to answer candidly, because he is in fact, he is in fact being pitted against his own client, or maybe because he doesn't know the answer, or maybe because he doesn't remember how he reasoned out why he did something, we have a record that reflects Mr. Tunkey's recollections of what occurred.

The trial, federal district judge found that while his judgment may not have been correct in all instances, he could not find that prejudice pursuant to DeCoster, and that is that would likely affected the outcome, had occurred, and therefore he denied the petition for writ of habeas corpus.

The matter was taken by the Eleventh Circuit on direct appeal, and the en banc court, after a panel decision, concluded the standard to be -- could, with regard to the prejudice aspect could be things that -- could it have been helpful, that was the term, helpful to the defense. That was the standard of prejudice. The defendant only had to come forward and say, I am showing you that these things could have been helpful to my defense.

The en banc panel rejected helpfulness, and in lieu of that substituted that under Fradey there was a likelihood or not likelihood, that substantial and

actual prejudice occurred that would have been a disadvantage to the defense.

The state would contend that one of the more -- perhaps not -- that is a very important issue, but the more important issue in this is also how the court viewed what we must do, and that is what I first started this argument about, how we have turned upsidedown the claim here.

The Eleventh Circuit suggested that because the district judge did not make a finding with regard to ineffectiveness of counsel, because he didn't do that, it had to be sent back. It was not sufficient that he made an assessment that there may have been errors in judgment, but that there was no prejudice. The state would contend that is the very means by which you go about judging collateral issues. You make an assessment based on the allegations raised and the evidence presented. In this particular case, in the federal court, the state, the state produced all of the defendant's affidavits. When he came forth in his petition for writ of habeas corpus, he filed a bare bones petition, and it was the state in their response that included the record, which was their responsibility, but also included the affidavits which the defendant had relied on in the state trial court.

This is kind of the reverse of the weak case, strong case theory of going weak case in state court, strong case in federal court. We had a strong case in the state court and we had a weak case or a minimal case in federal court.

But the point is that getting back to what the court found, the court said, okay, there may have been problems, he may not have used the best judgment, but there was no prejudice demonstrated, and that is the focal point of habeas corpus. We are talking about fundamental fairness, whether there has been miscarriage of justice here, not whether Mr. Tunkey should be crucified, and then after he has been crucified, we say, well, yes, you know, he was a nice guy, but you know, actually, looking at the record and seeing what he did, it really wasn't so bad, was it? As a matter of fact, it probably didn't reduce itself to prejudice to this particular defendant, whether you base it on the standard that the Eleventh Circuit has imposed or you base it on the standard that the state suggests is the proper standard for prejudice, and that is that it has a likely effect on the outcome of the proceedings.

To give full credit to the Eleventh Circuit, I might add that although in suggesting that first we crucify Mr. Tunkey and then we consider whether

prejudice has obtained, they did set out in Footnote 33 of the majority opinion that there may be instances when this kind of procedure could be changed, that in fact you might look to the prejudice aspect first rather than reviewing whether counsel had rendered effective assistance of counsel or counsel's representation fell below a certain standard.

However, in this particular case they said, no, no, we find that in this case you have to make an assesment with regard to what Mr. Tunkey did and then, and then, although the court has already found that we do not disagree with that because possibly there could have been an opportunity or there was a reason for this, there may have been, very well been tactical reasons for the way he proceeded.

In spite of all that, in spite of the fact there was no prejudice, then you come back, and we will see what you've done. But first of all go back and talk about Mr. Tunkey and whether he in fact represented Mr. Washington well.

As Justice O'Connor asked the Solicitor General in the first case, this is a B case, not an A case, based on your question. Certainly the two elements that we need to review is whether in fact prejudice has occurred and to what degree. The circuits

throughout this state or this country have utilized the McMahon rule or the McMahon statement, and in 13 years have developed all sorts of degrees of prejudice, degrees or standards to be applied, and that is what is so important today, is that we have some feeling for what kind of degree.

While the respondents have conceded in their pleadings that in fact the defendant does have a burden to show prejudice, they would take issue certainly with the degree of prejudice the state would contend is necessary in this particular case. They are opting, I might add, for the panel decision, not the en banc decision in this particular case, although there have been no cross pleadings filed that I know of.

The state would contend that the only way, the only way that we can resolve the kinds of problems that exist in habeas corpus, in collateral litigation from state prisoners, and in fact, in fact, federal prisoners under 2255, is to determine that the prejudice that is to -- the burden of prejudice the defendant must reach goes to a likelihood of affecting the outcome.

QUESTION: How do you think the standard should differ on direct review?

MS. SNURKOWSKI: On direct review? Certainly I believe that there should be some demonstration of

prejudice, whether in fact we are going to have a differing scale because of the nature of the proceedings. I might add, fortunately this case is not of that ilk, and the first case was.

QUESTION: I know. I am asking, though, if you think there should be a different standard on direct review.

MS. SNURKOWSKI: Yes, I probably would, only to the extent that collateral litigation -- we have had a hallmark of what collateral litigation is to do as opposed -- you know, we are going to be truth finding. We are looking at the -- we have an otherwise valid judgment and sentence that is now later being attacked.

Now, while it is true that in the direct appeal he is attacking an otherwise valid judgment and sentence, it hasn't been given the imprimatur of an appellate court to say yes, that particular judgment and sentence has been approved, but the standard in a sense should not be that far off. It may be the Agres standard, where there is something just quite -- a little less than showing the likelihood that it would affect the outcome. Perhaps it could be that there was a reasonable doubt raised that wasn't there otherwise.

But again, that is not an issue that we have come forward with, because it is not the normal kind of

issue that we have -- we are faced on a given day to day basis, and we are very concerned again with the collateral type prejudice that should be pronounced with regard to the standard to be pronounced.

The second part of this, of course, is also, and it is important in this case, although it is not as precious to the state, and that is the standard with regard to how we determine competency of counsel. What is the standard? What will counsel do? I think if ycu look through, look through what the circuits have done based on McMahon, we have "reasonable, competent assistant," "customary skill and knowledge," "normal competency," "reasonable effective assistance," "minimal standard of professional representation," "customary skills and diligence," "exercise skill, judgment, and diligence of reasonable competent defense counsel," and "reasonably likely to render and reasonably rendering effective assistance." We have a whole host --

QUESTION: Ycu haven't listed the Second Circuit's approach.

MS. SNURKOWSKI: Well, that, I was told that recently it is a farce mockery. They still adhere to the farce mockery, but apparently a case mid-December came out where a panel, I think the case is Trammel versus United States, where they said that they would nc

longer adhere to the farce mockery, and would in fact accede to a reasonable likely or reasonably likely to render effective --

QUESTION: Can a panel do that?

MS. SNURKOWSKI: I believe in that particular case there was evidence in the record or in the vote that they polled the whole court in that particular case, but I would disagree. Again, a panel might not be able to do that. In that particular case, that's what happened.

The state would contend that while I have no panacea, I can't give you the answer to what is the standard to be applied, it seems to me that there are, there are standards or there are better language or better words to be applied. We are not looking to the name we give something, but what in fact counsel does, and the state would submit that whether counsel's acts or omissions result in egregious error which infected the integrity of the fact-finding system is probably more in line with how we are going to assess counsel's representation. We are going to look for an outcome-oriented test to be applied.

QUESTION: Ms. Snurkowski, I want to make sure I have the procedural posture of the case correct. The district, federal district court granted habeas relief

to the defendant.

MS. SNURKOWSKI: The federal district court, no, denied --

QUESTION: Denied it?

MS. SNURKOWSKI: -- habeas corpus.

QUESTION: And then Judge Vance's opinion for the majority of the Eleventh Circuit sent the case back to the district court --

MS. SNURKOWSKI: Remanded it, yes.

QUESTION: -- in order to be evaluated under the Eleventh Circuit's standard for ineffective assistance of counsel.

MS. SNURKOWSKI: Right.

QUESTION: Now, you here are disagreeing with the Eleventh Circuit's standard for --

MS. SNURKOWSKI: Yes.

QUESTION: Now, if we should agree with your standard, and thereby disagree with the Eleventh Circuit, might there still not be a necessity for a hearing in the district court on the application of whatever standard that we came up with?

MS. SNURKOWSKI: Well, Your Honor, as I am suggesting, the standard to be imposed or the manner by which you view the case or ineffective assistance of counsel is first to look to whether the allegations

presented in fact result in prejudice. If no prejudice has occurred, the second step in making a determination as to what counsel did and why he did it is of no consequence. There is no point in finding out why Bill Tunkey did something if you say the 14 affidavits that now are being presented would not have affected the outcome, would not have changed, had no effect on non-statutory mitigating circumstances.

QUESTION: So you say if a charged dereliction of counsel would have in effect made no difference, you don't get into the question of whether or not it was in fact dereliction.

MS. SNURKOWSKI: To what degree. Right, right.

QUESTION: May I ask one other question? You haven't addressed the question of the trial judge's testimony, which is one of the basis of reversal. I am wondering, is it the state's position that if a habeas corpus petitioner wants to put the judge on the stand, that he has the right to do so?

MS. SNURKOWSKI: The habeas petitioner?

QUESTION: Yes. This time I know the state put the judge on.

MS. SNURKOWSKI: Right, that's true.

QUESTION: Does it work both ways, or is it

your view that only the state --

MS. SNURKOWSKI: It probably does, but I would suspect that there's, you know, there's a problem, certainly there's a problem with that, in that if the --

QUESTION: Well, I can see the problem. I just want to know what your position is.

MS. SNURKOWSKI: Yes, I think there's a viable --

QUESTION: It works both ways?

MS. SNURKOWSKI: Certainly. It's not a one-way street. But I might add in this particular case that the federal district court indicated in his opinion that the statements, while they were admissible, and there wasn't a complaint with regard to them, while he found them admissible, he gave very little credibility to those particular statements, and he said they were not a determinative factor in determining the outcome of this particular result.

QUESTION: You mean the judge didn't believe another judge?

MS. SNURKOWSKI: I don't think it was -- he just didn't want to give it a lot of weight in that particular regard. Thank you.

QUESTION: What if this Court were to determine that admission of that evidence was improper?

Then what do we have to do? Do we have to see to it that it's remanded?

MS. SNURKOWSKI: No, I don't believe that that is required in this particular instance. I think then you can again look to the -- while you say there is admission of evidence of error, is this the kind of admission of evidence that is so egregious that it affected the trial judge's or in this particular case the district court judge's assessment of the case, and I think that is a kind of assessment you can make because you have a record. It doesn't require further evidentiary considerations outside the record itself. I think this Court can make a finding that in fact while it might have been error to have done that, and the state is not willing to concede that, but while it might have been, it does not require remand to the Eleventh Circuit or to the District Court judge.

Thank you.

CHIEF JUSTICE BURGER: Mr. Shapiro.

Mr. Shapiro, before you begin, may I ask a question, more out of curiosity, I guess? Is the New Jersey Department of Public Advocate representing the respondent in this case?

ORAL ARGUMENT OF RICHARD T. SHAPIRO, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SHAPIRO: Your Honor, the public defender of New Jersey is my boss, and I was handling this case when I was in the south representing people in death row cases, and when I came to the office, because of its importance to New Jersey's new capital sentencing law and to standards for effective assistance of counsel nationwide, the New Jersey public defender allowed me to present the case to the Court.

QUESTION: On his behalf?

MR. SHAPIRO: Yes, Your Honor.

QUESTION: Thank you.

MR. SHAPIRO: Mr. Chief Justice, and may it please the Court, before discussing the legal standard for assessing claims of ineffective assistance of counsel, it is essential to point out what the District Court found as the reason for counsel's lack of investigation.

The record shows that any assertion that counsel made a tactical or strategic reason not to investigate is flatly contradicted. At the evidentiary hearing in the District Court, the District Court had an opportunity to hear from counsel, to evaluate his credibility, and to hear his reasons for what he did and did not do. The District Court evaluated this, the credibility of Mr. Tunkey, and made several critical

findings.

These findings reject any assertion of a strategic or tactical choice for lack of investigation. In the appendix to the certiorari petition, at Page 264, the District Court finds that Mr. Tunkey testified to his feeling of hopelessness upon learning of the new murder confessions. At Page 282, the District Court finds as a fact that Mr. Tunkey candidly admitted that once the multiple confessions were given, he had a feeling that nothing could be done to save Washington, and that this feeling was behind his failure to do an independent investigation on petitioner's background and potentially mitigating emotional and mental reasons for the killings.

QUESTION: Mr. Shapiro, in that regard, do you agree that counsel could have been called at the ineffectiveness hearing to testify what his client told him in the course of preparing the defense?

MR. SHAPIRO: Pardon me, Your Honor?

QUESTION: Can the attorney himself be called at the hearing --

MR. SHAPIRO: Yes.

QUESTION: -- on the ineffectiveness claim?

MR. SHAPIRO: Yes.

QUESTION: To testify as to what his client

told him? Is there a waiver of the attorney-client privilege?

MR. SHAPIRO: Yes, there is a waiver of the attorney-client privilege in those circumstances. The record is no doubt --

QUESTION: Was that evidence admitted in this case as to why the attorney did what he did?

MR. SHAPIRO: Yes, Your Honor. Mr. Turnkey testified at the District Court hearing, and the record of that hearing and the findings of the District Court leave no doubt that any argument that there was a strategic or tactical choice for this total lack of investigation is without merit. The state never cross appealed these factual findings. There is no demonstration that they are clearly erroneous.

QUESTION: Does your case turn -- To what extent, I will put it this way, does your case turn on the failure to call the family, the former employers, and friends in the mitigation?

MR. SHAPIRO: No, Your Honor. It turns on two things, Your Honor. It turns on the fact that counsel -- It turns on one essential overarching principle and two supporting factual assumptions. The overarching principle is that counsel's lack of investigation left him utterly unprepared to present essential factual

support for his arguments that David Washington's life should be spared. At the sentencing hearing --

QUESTION: That is the mitigation, what we are talking about.

MR. SHAPIRO: Yes, the mitigation hearing.

QUESTION: Well, now, how should he have demonstrated that?

MR. SHAPIRO: Well, Your Honor, at the sentencing hearing, Mr. Tunkey argued at Page 322 of the joint appendix that David Washington "possesses a spark within him which is good, which is decent," yet he could not point and did not point when his client's life was at stake to a single shred of independent evidence that would have advised the judge of a fuller understanding of who David Washington is. Who is this individual who has a spark of decency within him? He did not point to anything within him, Your Honor, but just made that bald assertion. David --

QUESTION: Well, Mr. Shapiro, I would think that perhaps in a sentencing hearing the colors are a good deal more blurred and the contours less distinct than when you are talking about proving the elements of a crime, that counsel's judgment in a case like that to do something or not do something should much less readily be faulted than it might be where you are

talking about you could have produced this witness that would have definite negative element B of the crime.

MR. SHAPIRO: That might be in a case, Your Honor, where counsel exercises that judgment, and where that is indicated by the record, but in this case, as I have pointed out, the District Court found that the lack of investigation and consequently the inability to present mitigating evidence was due to counsel's sense of hopelessness and a lack of investigation.

QUESTION: Did the District Court also find that this lack of investigation amounted to ineffective assistance of counsel?

MR. SHAPIRO: The District Court did not make that specific finding --

QUESTION: It didn't.

MR. SHAPIRO: -- but we submit that under Pullman --

QUESTION: Well, I just asked you to answer the question.

MR. SHAPIRO: Yes, Your Honor. And under Pullman Standard versus Swint, the record leaves no doubt that this was a basic defect in counsel's performance.

QUESTION: You seem to be arguing that counsel's performance violated some standard, but isn't

the fundamental issue before us what the standard is for performance of counsel?

MR. SHAPIRO: Yes, Your Honor, but I think it is important to consider first of all that Mr. Tunkey advanced certain positions at the sentencing phase and was unable to present the evidence that would support those positions, because the basic difference between the state and our position in this case is that the proper standard of prejudice focuses on impairment to the defense and not just on the effect on outcome. To get -- To demonstrate --

QUESTION: Yes, but what if you are wrong on that? You have to convince us first about that.

MR. SHAPIRO: Well, Your Honor, I think that beyond the record demonstrating that counsel failed to present the evidence that would have supported his sentencing argument, the record also demonstrates that counsel failed to fulfill the basic responsibilities of an advocate, and this substantially undermined his ability to present his case at the sentencing hearing.

QUESTION: Well, that is --

MR. SHAPIRO: Now, the --

QUESTION: Mr. Shapiro, that is what my question was directed to. It is the other side of the coin of what Justice White has presented. He asks you

what is the standard. I put to you, what is the evidence that you think could have been presented in mitigation that could have made the trier of the sentencing issue forget the grisly, horrible slaughtering of three people?

MR. SHAPIRO: Your Honor, under Florida law, non-statutory mitigating circumstances have often made a difference between life and death, evidence of non-statutory mitigating circumstances. Had Mr. Tunkey conducted an investigation, he could have supported two premises in his argument for David Washington's life, which he did try to advance.

One was that David Washington had a spark within him which was good, which was decent. Another was, in his argument, counsel states that no one understands why Mr. Washington might have done what he did or did what he did, and yet there was evidence of -- psychiatric and psychological evidence that could have been available to him upon reasonable investigation, that would have established that the combination of child abuse, deprivation, and neglect as a youth combined with the extraordinary pressures that were placed on Mr. Washington at the time of the crimes led to the severe mental and emcticnal distress which resulted in his breakdown during that period of time.

This is precisely --

QUESTION: How likely do you think a jury would have been to buy that?

MR. SHAPIRO: Well, Your Honor, in this case we can only go by what the Florida Supreme Court has said is the appropriate law in these cases, and by what this Court has said the Florida Supreme Court process is. For one, the Florida Supreme Court has stated in numerous cases which are cited in the brief that non-statutory mitigating circumstances can make a difference between life and death.

QUESTION: I don't --

MR. SHAPIRO: The Florida --

QUESTION: I don't doubt that they can be introduced, but I said how likely do you think a jury would have been to buy this analysis that you are suggesting?

MR. SHAPIRO: I think, Your Honor, if sentencing -- sentencing in capital cases is what this Court has stated, and that is a series of judgmental factors, a myriad of factors that are responsive to the particular individual circumstances of the defendant and of the offense, then we can't know that unless we speculate. We do know that a witness --

QUESTION: Mr. Shapiro, what if you had had a

history of about 20 cases identical to this in Florida. In every one of them the defense lawyer did exactly what you did, and in every one of them the jury had come back saying no recommendation of mercy. Wouldn't you think that the defense lawyer on the 21st time might be spared that job, and you could say juries just aren't buying that kind of thing?

MR. SHAPIRO: Your Honor, I think that if he did do that as a tactical choice, it would be a different situation. In this case, Mr. Tunkey made those precise non-statutory mitigating arguments. What he didn't do was present the factual predicate for arguments that he was asserting the sentencing judge should have bought. He was saying to the judge, these are the reasons why David Washington's life should be spared. He wasn't providing the judge with the facts, though, and the facts are what make the difference.

QUESTION: The defendant had waived the jury here, had he not? The defendant had waived the jury here?

MR. SHAPIRO: Yes, Your Honor.

QUESTION: We are just talking about the judge.

MR. SHAPIRO: He had presented these facts to the judge, and he was telling the judge, these are why

David Washington's life, these are the reasons why his life should be spared, but he presented none of the factual predicate. It is like getting up in front of the judge and saying, not guilty, not guilty, not putting on any evidence, and then coming back and saying, well, there was an alibi. He is asking the sentencer to buy an argument or the jury to buy an argument without presenting the factual predicate. That is the defect.

Now, any standard to consider ineffective assistance of counsel in these kinds of circumstances must take into account the values that this Court has established in Sixth Amendment cases.

First, the standard must preserve the fundamental nature of the right to counsel and our system of justice. Second, the standard, if it is going to work in the myriad of situations that courts are faced with, must provide clear guidelines and criteria for its application in what is essentially case by case adjudication. And third, the standard must accommodate society's interests in the administration of criminal justice and in the finality of judgments.

Under any or all of these factors, we suggest that a test focusing on the impairment of the defense, the adverse effect on the defense, and not on the

outcome, is far superior.

First of all, the outcome determinative test does not preserve the fundamental value of the Sixth Amendment. It simply doesn't. It shifts the focus away from the adequacy of counsel's performance towards an almost exclusive concentration on the trial result. It is a reversal, and has to be faced as a reversal of developments in Sixth Amendment jurisprudence since Gideon.

Rather than adequate legal assistance being essential or critical as a requirement for a fair trial, the outcome determinative test assumes the defendant could have a fair trial with incompetent counsel. This is Betts v. Brady in another guise. And frankly, I don't see the difference, Your Honor, between adopting an outcome determinative test in this situation and if a judge and prosecutor get together before a case and say to the defendant, listen, we have looked at the case, the evidence is against you, you are not going to win this anyway, so we don't even have to bother to appoint counsel. The same principle is equally relevant if you are going to start looking at outcome. If substance of counsel is deprived and removed from the case, then the form of counsel is meaningless.

QUESTION: May I ask just one question? Do

you think a different standard applies to retained counsel and appointed counsel?

MR. SHAPIRO: No, Your Honor. I think Cairo makes that clear, that the same standard should apply.

QUESTION: So that if this had been retained counsel and he had made these judgments, you would make the same argument?

MR. SHAPIRO: If he made the judgments without the essential factual predicates, without conducting the essential -- without performing the basic attributes of counsel, yes, Your Honor.

QUESTION: Do you think the standard should be different on collateral review than direct?

MR. SHAPIRO: No, Your Honor. I think the Constitution says that the defendant is entitled to the assistance of counsel, and this Court has said that that includes the effective assistance, and in fact, our test at all stages of the proceeding would balance society, the fundamental importance of the Sixth Amendment right to counsel and society's interest in finality of judgments. So there would be no need to shift the standards back and forth.

For example, under our test, first of all, or the test proposed in our brief, first of all, the petitioner, the defendant, would have to show a serious

error. Secondly, even if he shows a basic failing of counsel, what is essentially removal of a basic attribute of assistance from his trial, he would have to show that that impaired the presentation of the defense.

Now, by showing the impairment in the presentation of the defense, we are first of all focusing on outcome in this standard. It is the first glimpse of outcome, and the test really says that the integrity of the adversary process must be preserved and can only be preserved by competent counsel, but if in that case there was no effect or adverse effect on the defense, the adversary system functioned. It may have had a few warts, in that counsel didn't do --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Shapiro, you may resume your argument.

ORAL ARGUMENT OF RICHARD T. SHAPIRO, ESQ.,
ON BEHALF OF THE RESPONDENT - RESUMED

MR. SHAPIRO: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court, there are three basic principles in this Court's Sixth Amendment decisions that must be considered in deciding whether to adopt a standard of prejudice that assesses -- that focuses on the effect on outcome or one that focuses on the effect on the defense.

First, the standard must preserve the fundamental nature of counsel in our system of justice. Second, the standard should provide guidelines for the lower courts to apply the Sixth Amendment in a variety of situations. And third, as United States versus Morrison points out, in the Sixth Amendment area, the standard should accommodate society's interest in the administration of criminal justice and finality of judgments.

I have already explained why the outcome determinative test is an utter failure in preserving any sense of the fundamental nature of the right to counsel. In contrast, a standard that looks at the

effect on the defense breathes much needed substance into the formal right of counsel. This is not a question of undermining the adversary system by questioning counsel's adequacy. It is a matter of preserving an adversary system that assumes competent counsel, and that assumes and indeed requires competent counsel.

Secondly, the outcome determinative concentration on result will not provide any guidelines for the lower courts in Sixth Amendment analysis. It is uniquely unsuited to develop a body of precedent that is so necessary to develop standards as to the adequacy of counsel's performance. In fact, the outcome determinative test brings the Court full circle into the subjective morass of the farce and mockery standard, and it would be ironic and it is ironic for petitioners to argue three weeks after the last circuit, the Second Circuit, in Trapnel versus United States, rejected in an en banc form, although it was a panel decision, the farce and mockery standard, for the petitioners to argue that this Court should resurrect what is nothing less than an artifact of that outmoded standard.

QUESTION: Well, do you suggest that those are the only two alternatives, the old Second Circuit case and something else?

MR. SHAPIRO: No, Your Honor. With respect to the standard of competency of counsel, every circuit in the country now has rejected farce and mockery for a standard that focuses on the reasonably competent -- whether counsel was reasonably competent suggests that the experience -- this is an area, as the Court well knows, where the circuits are -- have uniquely dealt with most of the cases, most of the problems, and have really functioned as laboratories for a long period of time in dealing with questions of ineffective assistance of counsel, and every circuit in experimenting with different standards and looking at different tests has ended up now --

QUESTION: Supposing you have the correct test, reasonable competence. Did this lawyer fail or pass that test?

MR. SHAPIRO: Your Honor, we would suggest that in three basic respects Mr. Tunkey did not satisfy that test. First of all, a counsel laboring under a sense of hopelessness, as Mr. Tunkey was, is not the zealous advocate that the Constitution requires and that the sacred professional trust of an attorney requires.

QUESTION: Eliminating perhaps two-thirds of all the criminal cases that come to trial. At least half.

MR. SHAPIRO: Your Honor -- well, a counsel laboring under a sense of hopelessness is, if he fails then as a result of that, he fails to conduct any investigation into critical information that is necessary for that particular case, he is totally incapable at that point of either presenting a case or of adequately advising his client.

Mr. Tunkey had -- Mr. Washington was deprived of all the essential attributes of counsel, and we suggest that under the reasonably competent standard, this is far below what the range of competence demanded --

QUESTION: Well, Mr. Shapiro, the Court of Appeals below didn't apply the standard that you suggest, did it?

MR. SHAPIRO: It applied the reasonable competency standard, Your Honor.

QUESTION: Do you think it did?

MR. SHAPIRO: With respect to assessing the standard of prejudice -- with respect to assessing counsel's performance. With respect to the standard of prejudice, it applied a test that it extrapolated from United States versus Fradey, and as we pointed out in our briefs, the principles in procedural default cases are inapplicable when assessing Sixth Amendment rights.

QUESTION: Well, I know, but are you content with -- are you defending the standard that the Court of Appeals applied here?

MR. SHAPIRO: Your Honor, we are defending the result. The result --

QUESTION: No, I am asking if you are defending the standard.

MR. SHAPIRO: We are defending the Court of Appeals' focus on the adequacy of counsel's performance as the relevant --

QUESTION: Please, Mr. Shapiro. Are you defending the standard the Court of Appeals applied?

MR. SHAPIRO: We would suggest that the legal standard should be modified.

QUESTION: All right. If that is so, we don't apply it here, do we? Don't we send it back and tell them to correct it, if we agree with you, to apply the correct standard?

MR. SHAPIRO: Yes, Your Honor.

QUESTION: So that is what we ought to do then?

MR. SHAPIRO: You --

QUESTION: If we agree with you.

MR. SHAPIRO: Well, if you agree with me, you will remand the case to the Court of Appeals for application of the correct standard. Yes, Your Honor.

The outcome determinative test not only resurrects farce and mockery, but it compounds the farce and mockery problems by forcing courts to engage in speculative recreations and revisions of trial records to determine what the hypothetical result would be of the new procedure.

QUESTION: How is that different -- How is that different, counsel, from a motion for a new trial on the grounds of newly discovered evidence?

MR. SHAPIRO: Well, it is different in two basic respects, Your Honor. One is that the motion for new trial is not a motion that attacks or deals with the Sixth Amendment right to counsel, so that's -- Second is that a motion for new trial assumes that the defendant had a fair trial, competent counsel. Then what it does on the basis of newly discovered evidence, it says that there was something wrong with the judgment, something wrong with the integrity of the verdict, and in that case the focus should be directly on the integrity, whether the new evidence would have changed the verdict.

That is not what we have here. This Court has already said in Gideon you can't have a fair trial without adequate counsel. So a motion for a new trial ignores the major premise of Gideon -- The motion for new trial analogy of the Solicitor General ignores the

majcr premise, the majcr constitutional premise cf Gideon.

QUESTION: Well, let me just be sure I understand you. You would apply in the constitutional presentaticn of omitted evidence because counsel was incompetent, as you contend this counsel was, you would say that that should more readily result in relief than just a motion for new trial based on evidence that could not be obtained, newly discovered evidence?

MR. SHAPIRO: Yes. If the --

QUESTION: You would say even though the evidence would not suffice to support a motion for new trial on the ground of newly discovered evidence, nevertheless, as a constitutional matter, a new trial is compelled because the lawyer failed to assemble that evidence.

MR. SHAPIRO: Yes, Your Honor. I suggest we are dealing with apples and oranges. A motion for new trial assumes the very facts that are in issue.

QUESTION: I understand it assumes competent counsel, but the impact on the fairness of the proceeding is exactly the same in the sense that there is evidence omitted, isn't it?

MR. SHAPIRO: Well, the evidence was omitted, but the --

QUESTION: For a different reason.

MR. SHAPIRO: The evidence was omitted. By the admission of that evidence, the entire basis of this Court's Sixth Amendment decisions has been undermined. There has been a flaw in the adversary system, and there has been a --

QUESTION: Yes, but you are assuming a lawyer who was competent in all other respects except that he failed to assemble this evidence, if I understand you correctly.

MR. SHAPIRO: Well, and we are also assuming that you have to speculate about how the failure to investigate, not the failure to discover, because if counsel conducts a reasonable investigation, there is no claim of ineffective assistance of counsel. It is only when he fails to --

QUESTION: No, but you know what he would have found here.

MR. SHAPIRO: -- conduct --

QUESTION: There is no dispute, is there, about what he would have found here with a reasonable investigation?

MR. SHAPIRO: Yes.

QUESTION: So why should there be a greater chance for success on collateral attack when the man was

represented by an otherwise competent counsel than if he just couldn't find the evidence? I don't understand it.

MR. SHAPIRO: Well, for one, Your Honor, it is because the failures of counsel bring into question the integrity of the entire judgment in the same way, and that is the teaching of Gideon, the teaching of Gideon that you don't have a fair trial without adequate counsel, in the same way that the lack of the newly discovered evidence called into question the integrity of the final judgment. The analogy is a pure analogy. You can't have a fair, fundamentally fair judgment without adequate counsel.

The second respect is that the test that we propose and the test in the Court of Appeals would ensure that even if there was no, if there was absolutely no effect on the outcome, that is, the state could demonstrate that the undiscovered evidence was harmless beyond a reasonable doubt, the defendant would not be entitled to relief. It preserves --

QUESTION: Well, I understand the harmless beyond a reasonable doubt, but you would draw a distinction in this case between two lawyers, one who says what this man said, that I was so discouraged I didn't pursue this lead, and another lawyer who said, I didn't think it would do any good even if I could have

found exactly what I now knew was available. They would produce different results in your constitutional --

MR. SHAPIRO: No, Your Honor. I think that if the attorneys -- if the attorney did not conduct a reasonable investigation, there would be a difference between an attorney who conducted --

QUESTION: Well, he didn't assemble the evidence that's omitted here. That's --

MR. SHAPIRO: Yes, if he conducted a reasonable investigation and did not assemble this evidence, that would be something different than if counsel conducted -- failed to -- if counsel conducted a reasonable investigation and made strategic or tactical decisions, and that is because the counsel in the second situation has fulfilled the essential attribute of an attorney. He has conducted the investigation and made decisions predicated on that investigation.

QUESTION: Couldn't a very experienced counsel confronted with that simply analyze it and say that even if we got the man's minister of his church, his Sunday school teacher, his Boy Scout leader, his mother, and his father, it wouldn't do any good in view of the grossness of the evidence, and make that as a tactical decision?

MR. SHAPIRO: Well, for one, Your Honor --

QUESTION: Would you say that is ineffective?

MR. SHAPIRO: For one, Your Honor, that is not what this Mr. Tunkey did. And secondly --

QUESTION: Well, I am asking a hypothetical question.

MR. SHAPIRO: Secondly, Your Honor, I would say if he did not conduct any investigation, any reasonable investigation into the evidence that is critical to a capital sentencing decision, then I think he is in no position to make the kinds of judgments that are appropriate for what evidence to present and what evidence not to present. It is a basic failing of counsel that is clear in this Court's Sixth Amendment decisions.

QUESTION: Lawyers do this all the time, do they not? When clients say, go do this, go do that, lawyers make tactical decisions based on their own experience and what has been suggested as the value of some undisclosed piece of evidence.

MR. SHAPIRO: Well, if they exercise sound professional judgment in making that decision, then, Your Honor, it is not incompetent assistance.

QUESTION: How do we know that he didn't do that here?

MR. SHAPIRO: Because he said the reason the

District Court found as a reason for his failure to conduct an investigation was a sense of hopelessness.

QUESTION: No, that's --

MR. SHAPIRO: Not --

QUESTION: We are right where we started, at least in my hypothetical. If he concludes that it is hopeless and useless to put in that evidence, then you would say that he must do it on pain of being found guilty of ineffective assistance?

MR. SHAPIRO: Your Honor, that is not what Mr. Tunkey did. He failed to conduct an investigation out of a sense of hopelessness. But in his closing argument he tried to make the very points that his investigation would have allowed him to factually support. Finally --

QUESTION: Mr. Shapiro, at least twice you have said that the Gideon decision says that the defendant must have adequate assistance of counsel. I don't find that language in Gideon. All it says is assistance of counsel.

MR. SHAPIRO: It says, Your Honor, in Gideon, it says that the right to counsel is fundamental to a fair trial. In Cairo versus --

QUESTION: You said that Gideon referred to the term "adequate assistance of counsel."

MR. SHAPIRO: No, Your Honor. If I said that,

I misspoke, but in Cairo versus Sullivan, the Court has made clear that the states are precluded from conducting trials without adequate legal assistance.

QUESTION: Mr. Shapiro, did you cross petition?

MR. SHAPIRO: No, Your Honor.

QUESTION: And yet you are attacking the standard the Court of Appeals proposed?

MR. SHAPIRO: Your Honor, we are saying, stating that the legal standard was incorrect. We agree with the judgment of the Court of Appeals which rejected an outcome determinative standard and adopted the standard that focuses --

QUESTION: But you want -- But the result of your proposal would be a different judgment.

MR. SHAPIRO: Your Honor, well, I am suggesting that the same judgment --

QUESTION: I thought if you wanted a different judgment, you would have to cross petition.

MR. SHAPIRO: No, Your Honor, it wouldn't be a different judgment, because the case would still have to --

QUESTION: I thought we would send it back to the Court of Appeals to reassess it.

MR. SHAPIRO: The case would still have to

be --

QUESTION: The Court of Appeals has now remanded to the District Court.

MR. SHAPIRO: The case would still have to be remanded, Your Honor, under our test because --

QUESTION: Not to the District Court.

MR. SHAPIRO: Yes, it would, Your Honor, because there has been no determination of whether the counsel's error was harmless beyond a reasonable doubt, which is the third feature of our test, and which also is the way in which our test accommodates society's interest in finality in the same way and in a much more compelling way it accommodates the Sixth Amendment right and society's interest in finality by focusing on outcome at the appropriate stage in the analysis, when requiring the prosecution to establish that the result would not have been different beyond a -- that the error was harmless beyond a reasonable doubt.

The state's test does not accommodate at all. What it does is, it establishes that no matter how severely defense counsel impaired the defense, how incompetent counsel was, there is no relief under the Sixth Amendment if the result would not have been different. This is not an accommodation of the Sixth Amendment and the goal of finality. It is an utter

disregard for the fundamental nature of the Sixth Amendment.

In contrast, the test that we have suggested is rigorous, it has functioned well in the circuits, it has been adopted by virtually -- by every circuit except the D.C. circuit as a way of assessing prejudice or focus on counsel's performance, and it has been applied with rigor. There are few cases where counsel's performance has resulted in the reversal of conviction, and there has been no indication in the circuits that they should abandon such a focus on the impairment of the defense because of any problems they are experiencing with the standard. It is a standard that is rigorous, it is workable, it has functioned effectively, and it has accommodated the Sixth Amendment values and the fundamental nature of the right to counsel and finality.

The wealth of experience that has been developed in the circuits and the unanimous consensus in the laboratories that have functioned in this area of assessing claims of ineffective assistance of counsel should be embraced wholeheartedly by the Court and not abandoned.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything

further counsel? You have two minutes remaining.

ORAL ARGUMENT OF CAROLYN M. SNURKOWSKI, ESQ.

ON BEHALF OF THE PETITIONERS - REBUTTAL

MS. SNURKOWSKI: I just have -- oh, thank you. Thank you, Your Honor.

The state would contend that the assessment here that there was a failure to investigate or produce witnesses, that is a limited review of what investigation is supposed to be. If you look at this record, you will find that Mr. Tunkey did on numerous occasions talk with Mr. Washington with regard to the case.

He did discuss, as a matter of fact, at the close of the state's case, at the proceeding, the sentencing proceeding, Mr. Tunkey and Mr. Washington spoke with regard to what evidence should be presented. At that point the court asked, well, are you going to present any evidence? He said, no, Your Honor. And then he proceeded to go through why certain aggravating circumstances were appropriate, why certain mitigating circumstances may or may not be appropriate, through what he had produced in his sentencing brief.

And I might add, we need to look not just at what the allegation is, but what the man did, what Mr. Tunkey did in behalf of Mr. Washington with regard to

sentencing. The record reflects that he produced a sentencing brief which detailed those aggravating and mitigating circumstances and non-statutory mitigating circumstances which Mr. Tunkey felt were appropriate in his case. As a matter of fact, he went so far to suggest that remorse, the fact that Mr. Washington pled guilty, that he cooperated, those were all non-statutory mitigating factors that the court should consider.

He also argued vehemently with regard to what aggravating circumstances should not be applicable, and indeed he, prior to the sentencing proceeding, was able to get a rap sheet of Mr. Washington's excluded. He was also instrumental in getting the trial court to not consider one aggravating circumstance which would have been appropriately applied in this particular case. He convinced them of that.

CHIEF JUSTICE BURGER: Your time has expired.

MS. SNURKOWSKI: That was it. That was quick. Thank you.

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

(Whereupon, at 1:18 o'clock p.m., the case 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:

#82-1554 - CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., Petitioners v. DAVID LEROY WASHINGTON

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

BY Pirie Hammond

(REPORTER)