OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-5424

TITLE GLEN BURTON AKE, Petitioner v. OKLAHOMA

PLACE Washington, D. C.

DATE November 7, 1984

PAGES 1 thru 56

ALDERSON REPORTING

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

BLEN BURTON AKE, :

Petitioner, :

v. : No. 83-5424

OKLAHOMA :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Wednesday, November 7, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:32 o'clock a.m.

APPEARANCES:

ARTHUR B. SPITZERM, ESQ., Washington, D.C.; on behalf of the petitioner.

MICHAEL C. TURPEN, Esq., Attorney General of Oklahoma, of Oklahoma City, Oklahoma; on behalf of the respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Trott, I think you may proceed whenever you are ready.

ORAL ARGUMENT BY ARTHUR B. SPITZER

ON BEHALF OF PETITIONER

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

In this case, the State of Oklahoma convicted an indigent defendant of murder having refused his request for expert psychiatric or psychological assistance that was necessary for him to make any real defense to the charges against him.

Additionally, the State requested and obtained the death penalty based in part on an expert prediction of the defendant's future dangerousness, which the defendant was unable to rebut because he could not afford the same expert assistance.

The State tried this defendant in the face of obvious and recognized indications that he may not have been competent to stand trial.

We submit that the constitution, as a matter of due process, equal protection, and the right to effective assistance of cousel, requires the States to provide indigent defendants with such necessary assistance.

QUESTION: Would you apply this rule you have just asserted to every case, or capital cases, or to just the sentencing part of the capital case? Do you break it down at all?

MR. SPITZER: Well, Your Honor, what is before the Court, of course, is a capital case and the Court need not decide more than is before it. But to the extent, which I think is a large extent, that these questions go to the accuracy of the truth finding process at the trial, I think the logic would apply then to other cases as well as capital cases.

With respect to the sentencing proceeding, of course, a capital sentencing proceeding is a considerably different procedure than a sentencing proceeding in a normal case, and there different considerations might well apply.

QUESTION: In other words, you might say that even if it is not applicable to the criminal charges generally, but it must be in the capital case.

MR. SPITZER: I would certainly say that, Your Honor.

As I will explain in more detail later, to the extent that this Court applies a due process balancing test as it did in Little against Streater, then it is legitimate to consider the State's countervailing

interest and fiscal economy balanced against the interest of the defendant. Then, of course, the interest of the defendant is greater in a capital case than it is in other kinds of cases. So those considerations may legitimately be considered.

In October, 1979 --

QUESTION: Mr. Spitzer, do you plan to address the jurisdictional problem during the argument today?

MR. SPITZER: Your Honor, I'll address it right now. The State argues that Mr. Ake waived his right to bring these issues to this Court by not including them in a motion for a trial in the trial court.

There are two answers to that. The first is, the State Court of Criminal Appeals dealt with these issues on the merits, and under this Court's jurisprudence that is all that is required to preserve the issues.

QUESTION: It didn't really deal with a due process argument, did it, on the merits?

MR. SPITZER: Your Honor, I think both arguments were made to it that the court's treatment of these arguments --

QUESTION: I didn't find anything in the opinion that indicated that it dealt with the due

process argument.

MR. SPITZER: Certainly the court's treatment in its opinion was brief, but in the briefs that were presented to the Court of Criminal Appeals those arguments were made, and I think the court dealt with the issue. I think it is the constitutional issue that is important.

The second argument, or the second response, Your Honor, is that it would have been absolutely futile to raise this in a motion for a new trial. The point of a motion for a new trial is to give the trial judge a chance to correct his errors at that point, holding a new trial right away without going through an appellate process, if he recognizes the error of what has happened.

But in this case, the trial court committed no error under the law of Oklahoma. The trial court was correctly following the law of Oklahoma in denying these experts and bringing it to his attention was pointless because he couldn't have given --

QUESTION: That is not an exception under Oklahoma law, I assume, for failing to bring the motion for a new trial on that ground?

MR. SPITZER: I don't know whethe it is under Oklahoma law, Your Honor.

QUESTION: You have researched the cases, though, in Oklahoma?

MR. SPITZER: As to whether futility an exception on that point.

QUESTION: Yes.

MR. SPITZER: I don't know the answer under Oklahoma law.

QUESTION: Have you found any cases suggesting that it would be?

MR. SPITZER: No, Your Honor, but I think that it is a consideration that this court can legitimately apply. There is really no point in requiring counsel to exercise a pointless procedure if he had raised that question to the trial court's attention.

QUESTION: There is an adequate and independent State ground, then, existing here?

MR. SPITZER: I believe not, Your Honor, and I believe that because the Oklahoma Court of Criminal Appeals did address the merits of this issue, it's properly in this court.

QUESTION: Mr. Spitzer, you don't cite, in support of the argument that is made, Douglas v. Alabama in 380 U.S. Are you familiar with it?

MR. SPITZER: Your Honor, I am afraid I'm not familiar with it.

QUESTION: I thought in that case we held on something like futility grounds that there to the extent that the Alabama rule -- that was Alabama -- requires objection at each and every question in the suit, it is totally inadequate to bar a review of the Federal question presented as to whether or not it was inadequate State ground, and to bar a review was a question for us to decide.

MR. SPITZER: Thank you, sir.

QUESTION: I would have supposed you would rely on it. I thought that decision seems to foreclose any argument that there was an inadequate State ground.

QUESTION: That is a different argument than you present. You say that your submission is just because the Court of Criminal Appeals discussed the merits that there is jurisdiction here.

Suppose the Court of Criminal Appeals says: We think that there should have been an objection at trial, or there should have been a motion for a new trial on this ground and there was not, so it is barred, we cannot reach it.

But in the event that the Supreme Court of the United States thinks that this is not an adequate State ground, we are going to address the merits," and they go ahead and address the merits. You wouldn't think that

they are addressing the merits, and then give us jurisdiction, do you?

MR. SPITZER: Well, Your Honor, I don't think that's what happened.

QUESTION: I could see that there would be a question that would survive, the one that Justice Brennan refers to, as to whether that really an adequate or an independent State ground, but that is not your submission.

MR. SPITZER: That question would certainly survive, and I will be glad to adopt Justice Brennan's position on that question.

QUESTION: I would think you would.

MR. SPITZER: But that's not what happened here. The court first addressed the issue on the merits and then said: By the way, it was not raised in the motion for a new trial.

QUESTION: But it is still alternate grounds. It is still completely alternate grounds.

If a State court decides a question before it where there is a claim of constitutional violation on both State and Federal constitutional grounds, making clear that they are both separate ones, we say that is an adequate ground, even the Federal constitutional issue is discussed at length.

MR. SPITZER: Your Honor, I think I have cited a couple of cases in my briefs where the court has ruled that when the State did treat the Federal question on the merits that was all that was necessary.

QUESTION: But not if they give also a statement that we are also deciding this case on the State constitutional grounds.

MR. SPITZER: Your Honor, I guess I just don't think the State's decision was that clear in giving an alternate State ground. I do think this issue was plainly presented to the trial court, and the trial court could not have done other than it did under the Oklahoma law, and I believe that the issue is adequately preserved.

QUESTION: Mr. Spitzer, do you think that Michigan against Long has any bearing on this issue?

MR. SPITZER: Your Honor, I must confess that I am not familiar with what that case held on this point either.

QUESTION: I guess you wouldn't be able to enlighten me on it.

MR. SPITZER: I'm afraid not.

Your Honor, assuming that this court has jurisdiction, if I may pass to the merits of the case, Mr. Ake was arrested some six weeks after the killings,

and he confessed at that time that he had committed the acts.

While he was in jail and at his arraingment, about 11 weeks later, his conduct was so bizarre that the trial judge, on his own motion, had him examined by a psychiatrist and sent to the State Mental Hospital for observation, but only on the issue of competency to stand trial.

The hospital concluded after a month that he was not competent, and at a hearing the psychiatrist testified that he was paranoid schizophrenic, that he had extreme dillusions, that he lived in a different dimension, that he did not accept the ordinary concepts of right and wrong.

QUESTION: What was the lapse of time between the alleged murder and the competency examination?

MR. SPITZER: The murder was in October, Your Honor, and the competency examination, the first one, was in February.

The defense counsel had raised the issue, at least to a certain extent, at the preliminary hearing in January, that is the first hearing at which we have a transcript, and he asked questions of various deputies as to whether they had observed him having fits and seizures at the jail.

He asked questions of witnesses about Ake's mental state at the time of the crime. But there was no formal proceeding directed to compentency at the pretrial until arraingment in February.

After this finding of no competence, Ake was recommitted to the hospital, but again for care and treatment, not for any observations with respect to sanity at the time of the crime. Six weeks later, the hospital reported that on medication he had improved to the point where he was competent, and he was sent back for trial. No hearing was held to determine whether he was competent at that time.

At this point, his counsel moved for funds to retain a psychiatrist to examine him with respect to his mental condition at the time of the crime, and to assist in preparing and presenting the defense of insanity.

QUESTION: In that request did he also tender the proposition that the court could designate the psychiatrist?

MR. SPITZER: Your Honor, that is correct, as an alternative. He requested first funds to retain a psychiatrist, but as an alternative, as a fall-back, he suggested that the defense would be contend if the court would appoint a neutral court psychiatrist. Both requests were denied, and both on the same ground.

It wasn't denied because the trial judge had any doubt that insanity was an issue and that such assistance would be very helpful to the defendant, it was denied simply on the ground that under Oklahoma law no such assistance of either kind could be provided in any case. As a result of that decision, there was no expert testimony at Ake's trial with respect to his mental condition at the time of the crime, no direct testimony.

In an attempt to present an insanity defense, defense counsel, who were court appointed, called the three doctors who had examined Ake with respect to his competence. They all testified that he was mentally ill, diagnosed as a paranoid schizophrenic.

Two of them specifically mentioned that they were relying on the criteria in the American Psychiatrist Association's diagnostic manual and those criteria require at least a six-month duration of symptoms for such a diagnosis. Both psychiatrists testified that the illness might have been affecting his conduct -- "might have been apparent," were the words that one used -- on the day of the crime.

Dr. Garcia, specifically in answer to a hypothetical question, testified that someone with Ake's condition, who had consumed drugs and alcohol, as he had

on the day of the crime, might not have been able to know right from wrong under that circumstance.

On cross-examination, each doctor was pressed and each doctor admitted that he could form no professional opinion, could give no expert testimony about Ake's mental condition at the time of the crime because he had not performed an examination with that in view.

The jury was then charged, in accordance with Oklahoma law, that the defendant had the burden of proof of raising a reasonable doubt as to sanity, and because the State appears to dispute that, I would like to read briefly from that charge to the jury. It is in the Joint Appendix, at 57 and 58, and I am omitting unnecessary words.

"The law presumes every person to be sane and able to distinguish right from wrong as applied to any particular act, until a reasonable doubt of his sanity is raised by competent evidence. When the plea of insanity is interposed, the burden of proof is on the defendant to introduce sufficient evidence to raise in the minds of the jury a reasonable doubt of the defendant's sanity at the time of the commission of the acts in question. When this is done, the burden of proof is on the State to prove the sanity of the

defendant by competent evidence, beyond a reasonable doubt."

In closing argument, the prosecutor argued that the defendant had not met his burden of raising a reasonable doubt and the reason he gave was that no psychiastrist had so testified. The prosecutor didn't argue that --

QUESTION: Have you raised this point in your petition for certiorari?

MR. SPITZER: Yes, Your Honor, I believe we did. The prosecutor argued that because there was no expert testimony, no doubt had been raised. Of course, the reason why there was no expert testimony was because the defendant had been denied the psychiatrist examination requested.

QUESTION: Maybe I didn't make my question clear. Did you present the question of the court's instruction?

MR. SPITZER: No, Your Honor, and there is nothing wrong with the court's instruction under Oklahoma law, and I do not contend that Oklahoma cannot require the defendant to shoulder the initial burden of raising a reasonable doubt about his sanity at the time of the crime, not at all. That was a proper instruction.

What was improper was -- what was a violation of due process was the catch-22, if I may use that phrase, of requiring the defendant to shoulder that burden, then depriving him of what was effectively the only means of doing so, of shouldering that burden.

The jury found the defendant guilty, and the Court of Criminal Appeals, in affirming, relied on the same reasoning. They affirmed not on the ground that the State had proved its burden of showing sanity beyond a reasonable doubt, but on the ground that the defendant had never raised a reasonable doubt about sanity. Again, the only evidence they point to was the lack of psychiatric opinion testimony, the testimony the defendant was unable to obtain because of his poverty.

QUESTION: I note that you don't cite Davis, at least in your main brief, Davis against the United States, an 1897 case which held that as soon as there is any indication of any mental factor in a case, the burden of proof shifts.

MR. SPITZER: Your Honor, as I understand it, that was a rule for Federal courts, and not necessarily a rule for the State courts. But Oklahoma, I think, follows that rule, or at least Oklahoma's position is that if the defendant raises a reasonable doubt by sufficient evidence, the burden shifts.

But the holding of the Oklahoma court here was that the burden had never shifted. It was that it was the defendant who hadn't satisfied his burden and, therefore, the defendant is the party in this case who had burden throughout the case. It never shifted.

We believe that under those circumstances that the burden on the defendant, with as a practical matter that burden carriable only with expert testimony, the defendant had the right to that expert assistance.

The State concedes in this court that there are circumstances where such expert testimony is necessary to a fair trial and would, therefore, be required by the Constitution. We submit that this is such a case.

Insanity is not a subject where the observations of lay witnesses or the common sense reasoning of lay jurors is sufficient. Only a trained clinician can recognize the often puzzling symptoms of mental disease, and explain to a jury the etiology of the disease and how it may affect someone's conduct.

QUESTION: Mr. Spitzer, may I ask you a question here.

Would it have been at least theoretically possible that you might have called lay witnesses, friends, relatives, and the like, who knew your client

in the period when the crime was committed, who could have testified to whatever behavior they knew about. Then, you might have asked one of these three psychiatrist hypothetical questions, based on the following assumptions which would be supported by the lay testimony?

What your opinion be? Couldn't you possibly have crossed the threshold in that manner?

MR. SPITZER: Your Honor, that is a thecretical possibility, but I think it is not more than thecretical certainly in a case like this. The ability of the lay witness to recognize and to report symptoms of mental illness may be present in some cases, where the symptoms are florid, where the illness is obvicus, but that is certainly not always the case and it may well not have been the case here.

Oregon -- I cited in my brief several cases, and there is a long line of cases in Oklahcma where lay testimcny such as that is held not even to raise a reasonable doubt. In Garrett against State, for example, the defendant was an 80-year old woman whc shot a fcster child of hers.

She had raised a dczen foster children, and shot one one day and twc other people. One of the victims testified that she looked crazy, she lcoked

bizarre when she was doing it. The defendant testified on the stand that she couldn't remember anything about what happened. The Oklahoma held that she never raised a reasonable doubt.

In High against State, two deputy sheriffs, who were the jailers, testified that the defendant did not appear to them to be a normal person. He had no memory, that he was unintelligeable, that he was grossly lacking in personal hygiene. No reasonable doubt of sanity was ever raised.

QUESTION: In Oklahoma, is there some overt time when the burden shifts? Is there some announcement, or a holding?

MR. SPITZER: Your Honor, I understand that under current Oklahoma practice, which has changed since this trial, the judge does not instruct the jury on insanity until the judge determines that it is an issue in the case.

At that point, the judge instructs only that the State has the burden of proving beyond a reasonable doubt. But at this time, this was not the practice, and the judge simply instructed the jury on both, and allowed the jury to determine that.

QUESTION: Just so I get the extent of your position clear, suppose under the present Oklahoma

practice, the judge says a reasonable doubt about sanity has been raised, so the State has the burden, and the State then puts on some testimony.

Is it part of your submission here that you, even in those circumstances, would have the right to have your own psychiatrist appointed?

MR. SPITZER: I think the answer is, yes, but the reasoning is different. In those circumstances, it may be that the defendant needs psychiatrist assistance in order to rebut or cross-examine the State psychiatrist, just as the State has been held in most circuits to have a right.

QUESTION: You want a psychiatrist who may testify quite contrary to the other psychiatrist.

MR. SPITZER: Exactly so. I think in this case, the answer is the same but for different reasons. In this case, the defendant apparently needed that assistance not to rebut the State's case but to shoulder his burden. I think the result in either of those cases is the same.

QUESTION: Mr. Spitzer, is your position that the psychiatrist must be selected by counsel for the defendant?

MR. SPITZER: Not necessarily, Your Honor. I think that the State could have the same flexibility as

it does in providing lawyers for indigent defendants. There could be a panel from which a person could be appoited.

QUESTION: Could the court simply appoint?

MR. SPITZER: The court, I think, could appcint cne. I think the key thing is that once appcinted, the psychiatrist must be there to assist and consult with defense ccunsel, as well as to examine the defendant. It is not, in other wcrds, the State's doctor, it is the defense's doctor.

QUESTION: Nct a mutual psychiatrist, but cne who, in effect, would participate in assisting defense counsel in conducting the trial.

MR. SPITZER: That is our primary submission, Justice Powell, but let me say that even if the ccurt were to conclude that all that the Constitution requires is some psychiatric examination where a defendant's mental condition in an issue, as occurred, for example, in United States Ex Rel. Smith against Baldi, even was not done here, and even that would require a reversal in this case.

QUESTION: Why would it require it? It wasn't requested here, was it?

MR. SPITZER: Your Honor, I think the defense request at the pretrial conference can be interpreted to

include that. What the defense was asking was for some psychiatric examination.

QUESTION: Certainly the point raised, at least in the opinion of the Oklahoma Court of Criminal Appeals, simply says that he is entitled to be furnished a psychiatrist. That is the way the Oklahoma -- I don't think you have really preserved, unless the idea is that the greater includes the lesser, which I don't think there are on.

MR. SPITZER: I think in a case like this, the greater certainly includes the lesser. At the prehearing trial where the request was made, defense counsel phrased the request in a variety of different ways, but I think it was clear to the trial judge that what they were asking at a minimum was that there be some psychiatric examination of this defendant with respect to his sanity at the time of the crime.

QUESTION: Do you think that it was made equally clear to the Oklahoma Court of Appeal?

MR. SPITZER: Your Honor, I would have to look at the brief that was filed there, but certainly United States Ex Rel. Smith against Baldi was repeatedly cited by the trial courts, had been relied upon by the Oklahoma Court in the case which it cited in this case. So I think that question was one that the court would

have understood to be before it, even if it was not explicitly before it in so many words.

I have little time, and let me briefly touch on the other two issues that we have raised in this case.

The first is, at the sentencing hearing, Ake was again disadvantaged severely by the lack of his sane expert assistance. Psychiatrists predicted his future dangerousness, and I should mention that they were called as defense witnesses at the merit phase of the trial, but the prosecution had previously announced its intention to call those as its own witnesses. So I think the fact that the testimony came out earlier is not of great significance.

QUESTION: You are not submitting that the defendant, if convicted, has the right to a psychiatrist in every single capital sentencing?

MR. SPITZER: No, Your Honor, that's not our position.

QUESTION: It is inly when there is this element of future dangerousness that the jury has to find.

MR. SPITZER: Those are the facts in this case, Your Honor, and that is what our argument is directed to here.

QUESTION: How much broader do you think it is than that?

MR. SPITZER: I really don't know that, Your Honor. I think, though, that here the need is clearer by a wide margin because there is no effective rebuttal to expert opinion testimony, except expert opinion testimony and perhaps the ability to cross-examine with the assistance of an expert to help you cross-examine.

QUESTION: Was cross-examination of the State's witnesses on the question of future dangerousness conducted at this sentencing proceeding?

MR. SPITZER: No, Your Honor. These witnesses were not called at the sentencing proceeding. They testified --

QUESTION: I guess that could have been done by the defendant himself on the question of future dangerousness.

MR. SPITZER: Your Honor, certainly the defendant could have tried to cross-examine on this question, but we don't require lawyers to be educated about the internal disputes among the psychiatric profession, about their ability to make this kind of prediction, without any expert either to testify on his behalf or to assist him in that cross-examination. I think that it was more than we could reasonably expect

for defense counsel.

QUESTION: You say that you really can't expect a lawyer to be able to cross-examine an expert witness without an expert witness of his own to suggest questions?

MR. SPITZER: That's certainly not always true, Your Honor. It depends, I think, on the nature of the expertise and the nature of the case.

QUESTION: Certainly, if one were to read Justice Blackmon's dissent in our Barefoot Decision, there is a good deal of psychological literature, and psychiatric literature available on the issue.

MR. SPITZER: That's true, Your Honor, and I am not saying that that is not a theoretical possibility. But we have a situation here where Oklahoma pays defense counsel a very modest sum to defend a first degree murder case and provides them with none of the same assistance that it provides the State. In these same kinds of cases, Oklahoma makes funds available and makes experts available to the State.

I think the real answer to the question is, the defendant was entitled to expert assistance to rebut by expert opinion testimony these opinions, if that was possible. But such an expert could also be of great assistance in helping defense counsel to know how to

cross-examine.

Our final point had to do with the defendant's competency to stand trial. He was receiving a large amount of Thorazine during his trial, and acting in a way that certainly raised questions about his competence. I can't say I know he was incompetent, but I don't think the courts of Oklahoma are in a position to say that they know he was competent.

Under this court's precedence in Pate against Robinson, Grove against Missouri, we submit it was the court's duty, when the court was aware and acknowledge those questions, to inquire into the subject.

If I may, I would like to reserve what remains of my time for rebuttal.

CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock, Mr. Attorney General.

(Whereupon, at 11:59 o'clock a.m., the court recessed, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

12:59 p.m.

CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT BY MICHAEL C. TURPEN

ON BEHALF OF RESPONDENT

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

On October 15, 1979, the petitioner in this case, Glen Burton Ake, committed the murder of the Reverend Richard Douglass, and his wife Marilyn. It wasn't until some eight months later, at trial, that the issue we are here on today was ever even raised. When it was finally raised, a right to a psychiatric examination, be it constitutional or otherwise -- I expect that is the issue we are here to decide -- was raised just a few days before trial in an oral motion.

The attorney at that point in time saw fit to bring no one forwad, nobody that had seen the defendant, if you will on the date of the crime, not his father, not his grandfather, who had helped him move furniture the morning of the date of the crime. He brought no one forward to supplement his motion.

QUESTION: Mr. Attorney General, I thought that before the trial commenced, he had been committed for observation.

MR. TURPEN: It is correct.

QUESTION: to make sure that he was competent to stand trial. Is that right?

MR. TURPEN: That is exactly correct. I was about to draw the distinction between the issue of sanity at the time of the crime, and competency at the time of trial.

QUESTION: You must be saying at least that just because there was an issue about competency to stand trial that that didn't necessarily mean that there was ever an issue about competency at the time of the crime, or insanity at the time of the crime.

MR. TURPEN: Exactly. We get a little bit confused in Oklahoma with the interchangeability of those two terms. At the time of this trial, it was sanity at the time of the crime, as well as sanity at the time of the trial. Now in Oklahoma the law has changed, and we talk about competency to stand trial, as this Court, of course, has in past cases, and sanity at the time of the crime.

There is a whole body of case law, of course, that says to plead not guilty by reason of insanity doesn't automatically put competency at the time of the trial into issue. Of course, we believe that the reverse is true.

Some several months, four or five months after the crime, you do have the issue of competency raised, but we don't believe that it automatically calls into issue sanity at the time of the crime. Those are two different tests, two different times, and frankly, two different people.

QUESTION: Attorney General Turpin, what if the competency inquiry for trial purposes develops testimony by the State psychiatrist that the defendant suffers from a chronic mental condition, that at least could have existed at the time of the commission of the offense, does that in and of itself raise additional concern that would make it appropriate or necessary for the court to consider appointment of psychiatric expert for the defense?

MR. TURPIN: I think we have to look at a test, if you will, and I am not sure one exists, except by looking at Greve versus Missouri where they do say that you have to look at three different factors. I say, "they say," and I mean, you say, this Court said that you look at, number one, prior medical opinion; number two, the history of irrational behavior; and, number three, the demeanor at trial. That is for competency at trial, of course.

I think that same test could be applied to

sanity at the time of the crime for determining the nature or quantum of type of evidence we look at to decide this very test.

In our case, there was no prior medical opinion. He had never been adjudicated or committed before. In our case, there was no history of irrational behavior. In fact, the only history was his mother testified that he had a normal childhood.

There is something that you brought up where Dr. William Allen said that we do have a history of him talking with Jesus at the age of seven after his daddy beat him for cigarettes -- for smoking cigarettes. I'll suggest to you that that is a subjective symptom, if you will. That was what the petitioner told this doctor, otherwise there was nothing in the record except for the fact that the mother said personally that he had a very normal childhood, and that is in the record. So you have an objective observation there versus a subjective symptom.

QUESTION: I don't believe that you have answered my question.

MR. TURPEN: I am trying to. I think I'd suggest that I don't think it does automatically. To answer your question most directly, I don't think it does automatically trigger the right to further

psychiatric examination in and of itself just based on that competency issue, I think that at the time of trial, a few days before trial, when he raised the issue.

QUESTION: I think the fact that I added was, if the testimony of the examining physician reveals what can be characterized as a chronic or ongoing mental condition that could amount to evidence of insanity, legal insanity.

MR. TURPEN: I think perhaps the crux of this case, as far as the facts are concerned, depends on the if you just suggested. I do believe that there might be a constitutional right to a psychiatric examination in the appropriate case, that is, if they show the trial court judge that there is a real, substantial and legitimate doubt as to the man's sanity at the time of the crime. If they show, as you say, as this Court says in Pate versus Robinson, if you show that there is a bona fide doubt. Once again, this was as to competency, but I think you can extrapolate the same test as to sanity at the time of the crime.

QUESTION: Did the Oklahoma Court look at -- Excuse me, go ahead.

QUESTION: Why did you have the competency hearing? You say that there must be a showing, and

there has never been any showing as to this man's sanity. Why did you have the competency hearing?

MR. TURPEN: Some four months after the crime, the crime being October 15, 1979, and we are now Valentine's Day, February 14, 1980, at District Court arraingment. At that point in time there was some action on the part of the petitioner in this case that gave rise in the trial court's mind to go ahead and have a psychiatrist that he appointed locally to come and look at this man.

He did look at him and said that there is symptoms of paranoia or schizophrenia here, or that he is malingering, one or the other. Those were his two conclusions. Then they sent him to Eastern State Hospital for further observation.

QUESTION: Don't you want to revise your statement that prior to the trial there was no instance of insanity?

MR. TURPEN: Your point is well taken. When I talk about prior medical opinion, once again I am looking at the case of Drope and Pate versus Robinson where I think in both cases you had prior medical opinion, and I expect prior to the date of the crime.

But your point is well-taken, there is no prior medical history in this case prior to the date of

the crime, but certainly the action that the trial court judge took on February 14 and February 20, when he actually had the observation, did predate the exact time of the trial. But never in this case, until several days before trial, did the defense counsel ever bring up the issue of a psychiatric examination for the purpose of sanity at the time of the crime, and then it wasn't supplemented by any witnesses.

QUESTION: Sanity at the time of the crime, you mean?

MR. TURPEN: That's correct.

QUESTION: You said at trial, or I misunderstood you.

What you are focusing on now is that only just before the trial did the question of is mental state at the time of the crime arise; is that right?

MR. TURPEN: That's exactly right. That's exactly right.

QUESTION: But it did arise.

MR. TURPEN: Well, we believe that if you look at the test of prior medical opinion, at least prior to the date of the crime, and if you look at the test of the history of irrational behavior, and the best you have in the record is that he had a normal childhood, and you do have some testimony as to Dr. William Allen,

the one psychiatrist, saying that clear back to age seven, he could have had some problems because his father beat him back then. This is all what exactly the petitioner told the psychiatrist, there is no other documentation.

QUESTION: General Turpen, I think that I understand that two psychiatrists, the State psychiatrists, testified at least before the trial that the petitioner was not sane and that he could not then distinguish right from wrong, and he suffered from chronic paranoia and schizophrenia, and that was the reason he was confined for treatment before he was ever determined to be competent to stand trial. Is that right?

MR. TURPEN: The determinations to right and wrong, under the McNaughton test, this is the very issue that we are about here today.

QUESTION: But there was that testimony by the State's own psychiatrist.

MR. TURPEN: I think there was testimony by psychiatrists that that possibility did exist, and it did get into right and wrong to a certain extent.

QUESTION: Then the petitioner did request appointment of an expert at the pretrial conference. Is that correct?

MR. TURPEN: He did, court appointed or money to go and hire his own. He never did suggest that they send him back to the hospital again for a hospital provided examination.

QUESTION: Do you read the Oklahoma Court of Appeals' opinion as holding that the State would have no duty under any circumstance to appoint a psychiatrist for a defendant, an indigent defendant?

MR. TURPEN: In fact, in this case, we had three different psychiatrists, or at least three different doctors and two different psychiatrists that were appointed and did testify, as we know. The State never called a psychiatrist.

QUESTION: Do you read the opinion of the Oklahoma Court of Appeals as holding that the State flatly does not have a duty to provide a psychiatrist to an indigent defendant under any circumstances?

MR. TURPEN: Yes, I believe they believe that there is no responsibility on the State's behalf to provide a psychiatrist, or a psychiatric examination for sanity at the time of the crime. They do, of course --

QUESTION: It is your position that under some circumstances, there would be that duty?

MR. TURPEN: It is our position exactly. I don't think there is any doubt that the circumstance may

exist.

QUESTION: So you don't buy your Court of Criminal Appeals' opinion in its entirety?

MR. TURPEN: The Court of Criminal Appeals goes into the fact in several opinions that there may be the possibility, in fact, where you need a psychiatrist, particularly in the second stage --

QUESTION: I thought you answered just the opposite way to Justice O'Connor's question.

MR. TURPEN: Once again, I'm talking the difference between sanity at the time of the crime and competency at the time of trial. They do provide -- The law provides and the Court of Criminal Appeals provides unequivocally that you are guaranteed a psychiatrist in the State of Oklahoma to help you establish competency at the time of trial.

It is true that they deny that this Constitution in this country that we are here to define today, does not require they to make a psychiatric examination available for sanity at the time of the crime. That is true.

QUESTION: What if the evidence before the trial court when the trial opens, or when they are trying to pick a jury, before jeopardy has attached, the conduct of the man is such that coupled with the

examination for competency that Justice O'Connor has just referred t, shcwed that he was probably a psychopath, or at least very seriously mentally disturbed. Do you say then that there no constitutional right or obligation on the State to provide an independent medical examination to inform the Court, I am speaking now as to his condition at the time cf the crime, not the competency tc stand trial?

MR. TURPEN: I understand your question. I do believe that there obviously is the possibility where a constitutional right wculd exist or an appropriate case as to a psychiatric examination to help prepare or to determine sanity at the time of the crime.

I don't necessary mean, in fact, I dc nct mean, I'll be unequivocal about this, that it should ever gc to the point that we provide somebody with the money to go hire a psychiatrist of his own choosing. The right of counsel doesn't even go that far.

QUESTION: What about providing an examination by the psychiatrist selected by the court?

MR. TURPEN: I think that in an appropriate case that may well be what fundamental fairness and due process requires, or an examination by a doctor in a State hospital.

QUESTION: Then this case narrows down tc

whether, on the record of this particular case, that standard was invoked. You say that it was not, that there wasn't any evidence that called for the designation of a neutral psychiatrist.

MR. TURPEN: I think that we understand each perfectly at this point. What I would like to share with the Court is that you had an incredible situation On October 15, 1979, an incredibly distinctive case, if you will, where you have a petitioner, who at the very time of the crime, and I don't mean to recount the facts and detail, but just one statement, he said to the family, as they laid there on the floor, all four tied up, "I'm sorry. I'm in a bad position here, but dead men don't talk."

We submit, Mr. Chief Justice, that there are incredible facts in this case. If you look at the McNaughton rule, which we can argue about in and of itself, but that is the law in the State of Oklahoma, did he know right from wrong? Did he have the capacity to distinguish between right from wrong?

We think we have a compelling record in this case that at the very moment of the crime, you have a contemporaneous statement that is compelling to the fact that he did know right from wrong, as well as an incredible record where he had a reason to pick out that

house. He had a reason, through the use of deception, to enter the house. He said, "I need to use the telephone." He had a reason to cut all the telephone wires. He had a reason to tie up this family. He had a reason to ransack the home, and he had a reason to shoot them. It is a crime of reason, as opposed to other paranoiac/schizophrenic situations.

QUESTION: Don't you usually have experts for that testimony, isn't that the usual way?

MR. TURPEN: I would submit that lay witnesses can share with the jury and the court objective observations.

QUESTION: Didn't you use expert testimony to find out whether he was competent to stand trial? Didn't you?

MR. TURPEN: Yes.

QUESTION: Weren't they still available?

MR. TURPEN: Yes.

QUESTION: Why couldn't you have used them? It wouldn't even cost you anything.

MR. TURPEN: In fact, they were called to testify.

QUESTION: Not on this point.

QUESTION: In fact, they testified on this point to a certain extent. It is interesting that the

law in the State of Oklahoma is that they must raise the defense with sufficient evidence. They must show "sufficient evidence" that there was a doubt as to sanity, and then it is up to the State. We have a Federal rule where the burden is on us to prove that he was, in fact, sane.

I submit that the petitioner wants you to believe that the testimony, as we talked about a while ago, Justice O'Connor, that the testimony from the psychiatrists on competency is strong enough to trigger the right that we are talking about here today, the constitutional right to a psychiatrist, but not strong enough to actually bring the defense of insanity to the jury.

I don't think that they can have it both ways. It is either strong enough to trigger the right and, therefore, strong enough to raise that sufficient evidence with the jury.

QUESTION: Are you saying that it wasn't strong enough to trigger the right? The testimony that the man at one time was not competent to stand trial is not enough to trigger?

MR. TURPEN: From my personal perspective, based on reading Greve and Pate --

QUESTION: I am not asking your opinion. I am

asking any reasonable person's opinion.

MR. TURPEN: I don't think that it is strong enough to a reasonable person looking at this whole record, Justice Marshall. I don't think it is strong enough to trigger either right. I don't think it's strong enough to raise it to the jury, I am not arguing that, but I also don't think it's strong enough to trigger a right to further psychiatric examination.

They are two different tests addressed to two different times to two different people. One person at the time of the crime, and another one, five months later, who has been in prison or in jail for five months. We can look at experts in the field, and Dr. Carl Menenger comes to mind, where he talks to the crime of punishment. What happened to a man in just five months in prison, standing around and thinking about shooting four people, four fellow human beings, in the back. You are talking about two different tests at two different times and two different people in this incredibly --

QUESTION: May I raise a question. Am I correct in understanding that the transcript of the arraingment on February 14, 1980, has never been filed?

MR. TURPEN: We have the minutes.

QUESTION: What I'm curious about is there is

an entry in the Joint Appendix that says, "Defense counsel specifically do not desire the particular plea of not guilty by reason of temporary insanity to be entered." This is the occasion, as I recall, when the defendant acted in the strange way that prompted the inquiry into his competence to stand trial. That's correct, is it not?

MR. TURPEN: That's correct.

QUESTION: At that time was known that he intended to plead not guilty by reason of insanity?

MR. TURPEN: No.

QUESTION: How do they get to discussing -- I am surprised that if the question of the plea that was to be entered was raised at that time, why you wouldn't have had the psychiatric examination encompass both inquiries.

MR. TURPEN: Arguably it did, to a certain extent, because they did go into right and wrong as we talked about in some of the testimony a while ago. At that point in time, I submit to you, you had a trial court judge that was on top of the thing enough that sua sponte he asked for this examination to be conducted on his own. But at that point in time, he didn't go ahead and ask for the other test to be done also.

QUESTION: But there was discussion of the

possibility, at least, of the man being not guilty by reason of temporary insanity. There was a decision not to enter such a plea, which is very puzzling to me. If the question came up at that time, it would seem to me that the normal thing to do would be for the judge to give us a full report on the whole situation, find out what you can about it. Wouldn't that be the normal way to handle it?

MR. TURPEN: I think this court has held many times that you rely on trial counsel to help you focus the issues, and I guess that's what we are trying to do here today. The court also relies on counsel to help them focus the issue. I submit to you that in this case, he had very little help as far as focusing on this one particular specific issue. There was aggressive motion practice. They filed a motion to disqualify the judge, and that sort of thing.

On this particular issue, they don't make it an issue until seven or eight days before trial, when they finally said, "By the way, we'd also like an examination as to sanity at the time of the crime." We think that it is a real bad standard to use, when you have a lawyer at that late date -- obviously they never bring it up again, as we know. They never brought up in their motion for a new trial. It was brought that one

time by that lawyer, and never again.

Case law, facts, witnesses, they weren't brought to that judge's attention at this time, a few days before trial. I don't suggest that he thought it was delitory practice, I don't suggest at all, but he did, you know, based on the record, have no help from trial counsel to focus on the case law across this land, that I have learned about, case law from this court that I have read about, or any evidence or witnesses, or even affidavit from him, how he felt about this man, which some case law suggests that you can do.

That motion, he never even filed a written motion. He said that he was going to, and never did. It was all kind of an oral exchange, very casually, a few days before trial. That's the first time that this issue became an issue in this case as far as sanity at the time of the crime. We think that it is perhaps a bad standard to set, and in a lot of respects this could be a retroactive rule if we go that far. That's one of the things that we are suggesting.

QUESTION: General Turpen, may I ask you a point or two about the possible adequate and independent State ground. Is it your understanding of Oklahoma law that regardless of whether or not the Federal Constitution would require the appointment of an expert

psychiatrist under these circumstances, that if the matter were not preserved in the motion for new trial that under Oklahoma law it could not be considered?

MR. TURPEN: It's our understanding of the law of our own State that it simply was not brought up in the motion for new trial.

QUESTION: There is no exception for "fundamental error"?

MR. TURPEN: There is an exception but, of course, they found in this case that there was no fundamental error, that's what they held. They held, therefore, the right is waived because it simply was not brought up in the motion for new trial. As I pointed out, it was only brought up once in the whole case, and that was a few days before trial. It was never brought up before that, and it was never brought up again after that as far as this specific examination.

QUESTION: May I ask you that, Mr. Attorney General, I have the impression that the trial court held two things on the application for some kind of psychiatric assistance. The first, he couldn't have it because it wasn't provided for by the Oklahoma statute, and the second, that not in any circumstances was there any Federal constitional obligation to provide one. Is that what happened? That's, as I read the transcript,

what the trial court said.

MR. TURPEN: I think it's fair to say, in relation to whether he was going to give him money to go find his own psychiatrist, to find one of his own, and it is also fair to say that he wasn't going to appoint a psychiatrist for him at that point in time.

QUESTION: Did he say he wasn't because the Oklahoma statute made no provision for any, number one.

MR. TURPEN: That's right.

QUESTION: Number two, as to the Federal constitutional claim, there was no merit in the Federal constitutional claim.

MR. TURPEN: That's exactly right.

QUESTION: Now, as you just said to Justice O'Connor, that when the motion for new trial was made, it did not repeat the desire or the motion to have a psychiatrist. That's true, is it?

MR. TURPEN: Yes, sir.

QUESTION: Would it have done them any good to make the application after what the trial judge had already ruled?

MR. TURPEN: I think it will always do good to bring to the judge's attention -- This judge is now deceased, but I can't help but think that it would have been very helpful for him to have an attorney that would

have brought the wealth of case law to him that you now have before you on this very issue. But, of course, that didn't happen. There wasn't even written motion. It was all I can say, an oral casual situation.

No, I can't help but think this judge knew the 14th Amendment applied to the State Oklahoma. I believe that he did. I believe that judges in our State do believe that.

QUESTION: But he did hold, apparently, on the application that, no, there is no Federal constitutional right whatever to the appointment --

MR. TURPEN: That he knew of.

QUESTION: -- of that kind of a psychiatrist.

MR. TURPEN: That he knew of, and nobody tried to enlighten him, which I think is part of the lawyer's job in any case, and not a psychiatrist to help him.

QUESTION: I gather the question of the adequacy of the State ground, if it was one.

MR. TURPEN: Okay.

QUESTION: The failure to repeat the motion on a motion for new trial, the adequacy of that for purposes of independent and adequate State ground is something we decide, isn't it? It doesn't depend on Oklahoma law.

MR. TURPEN: I understand that.

QUESTION: Are you familiar with Douglas and Alabama, your adversary wasn't.

MR. TURPEN: Well, let's be totally candid and say that I looked it up over the lunch hour.

(General laughter)

QUESTION: Didn't we hold in that case that there was nothing to be gained by renewing it?

MR. TURPEN: That was my reading of the case.

QUESTION: That was my reading and writing.

(General laughter)

MR. TURPEN: We noticed who wrote it, and we commented on that.

QUESTION: Would the Oklahoma judge have violated any Oklahoma law or statute if he had said at that time, in view of what has developed, I'm going to send him to the State Hospital for further examination, psychiatric examination, to see if they can determine his probable condition at the time of the crime? Would he have violated any law if he had done that?

MR. TURPEN: No, I don't think so. In fact, we believe it has been done. I have talked to the superintendent of the hospitals, they have done it and they do do it.

QUESTION: Can you suggest any reason why they didn't do it in this case, other than the failure to

make a formal motion? In other words, wasn't there enough to have alerted the trial judge that something was wrong here?

MR. TURPEN: Mr. Chief Justice, you have got an incredible situation, once again, where you've got the crime in October, and on December 11, side by side, co-defendants, Glen Burton Ake and Steven Keith Hatch. Steven Keith Hatch's attorney stands up and says, here we are now, a month after the crime -- two months after the crime, "I want my man committed for observation." Glen Burton Ake, the petitioner in this case, sits quietly by, nothing said. They even asked him on the record, "Do you mind if we waive your preliminary hearing -- or continue it," a very big difference. He said, "No, I don't object."

Then we go on to January 21st, when you have the preliminary hearing, and there is no objection, no motion, anything about Glen Burton Ake's sanity at the time of the crime raised in this case until his co-defendant gets back from the hospital himself, and they get into the District Court arraingment and we see what happens.

I will say to you, at that point in time, the trial court judge may really wonder about the difference, about competency now versus sanity at the

time of the crime. We are saying, based on this record, they didn't go very far, if at all, the attorneys, in trying to put sanity at the time of the crime in issue, which is a distinctly different test, or a retroactive inquiry, if you will, versus a present determination, a very distinctive different test, distinctively different. We say that he believed that it never was really an issue. He waits a few days before trial, and you have got to wonder how much good faith that particular attorney used on that specific issue at that point in time.

QUESTION: That's true, but it is also true, is it not, that the professional medical judgment was that he really was incompetent for a period, that that was not a contrived situation. Isn't that correct?

MR. TURPEN: That's correct. That's correct. Well, but you have the day, no several days before trial, and I'd like to share this with you, you've got petitioner in this case, just several days before trial, telling his own cellmate, Charles Yancey -- not his cellmate, but across from him, I'm going to go to trial and "mess with their mind." I'm going to act like some kind of angel.

He said, "I liked the people I met down at the crazy-house, and that's when I want to go down, when in

fact, I go down." He said, "I liked the food there. I liked the ladies, and I met a guy named The Wizard who is playing crazy just like I am." That's the testimony, and he gave that a week before the trial.

QUESTION: You think it's absolutely impossible that someone who is really crazy could have said that?

MR. TURPEN: All I can do is clear that with the McNaughton test, irresistible impulse, diminished capacity, the Durham test, perhaps he'd have a problem in any event, or the State would, I should say. I say, under the McNaughton test, whether we agree with that rule or not, in the State of Oklahoma, this record is compelling. This record is compelling that every action of that man throughout this whole record in fact complies with the McNaughton test, as I said again, whether we agree with that test or not.

QUESTION: May I ask you one other question. On the independent and adequate State ground point, and specifically the exception in the Hawkins case in Oklahoma for fundamental error.

MR. TURPEN: Yes, sir.

QUESTION: What do you understand fundamental error, is that constitutional error? In other words, if we disagreed with the merits of their ruling, would that

have come within the excpetion, do you think?

MR. TURPEN: To me, fundamental error means constitutional error.

QUESTION: So if it is constitutional error, then it would not be an adequate independent State ground.

MR. TURPEN: Yes. As I said before, we believe in the appropriate case, there is a new constitutional rule to talk about. The constitutional right, I expect we are going that far today, but I will suggest to you that Thomas Huxley once said in closing, "Many a beautiful theory is thwarted by an ugly." I think we have before us today a developing, perhaps beautiful from your perspective, an independent constitutional theory. We submit, in this case, thwarted by the ugly facts of, in fact, a total record that shows this particular petitioner, Glen Burton Ake, did in fact -- I'm not talking diminished capacity, Durham test, irristible impulse -- did in fact know right from wrong.

QUESTION: General Turpen, I guess the Oklahoma Court of Appeals really never looked at that, did it. It just there is no such right to appointment of a psychiatrist in Oklahoma, so it didn't look at the facts in this case. Is that right?

MR. TURPEN: I think it's fair to say on this specific issue. That's fair to say.

QUESTION: So the weighing that you're asking to be done is something that was not done in your court.

MR. TURPEN: The Court of Criminal Appeals?

QUESTION: Right.

MR. TURPEN: That's right. That's fair to say, I will say.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, you have three minutes remaining.

MR. SPITZER: Yes, Mr. Chief Justice, if I might.

REBUTTAL ORAL ARGUMENT BY ARTHUR B. SPITZER

ON BEHALF OF PETITIONER

MR. SPITZER: To answer Justice Stevens' question about that February hearing, I was curious about it, too, why the court minute reflects that they didn't want a plea of not guilty by reason of insanity. We have no transcript. Apparently, the court reporter moved to Texas, and no one can find her.

I spoke to the defense counsel, and that's out of the record, but they said to me that they did that because they couldn't talk with their defendant, and

they couldn't get from him what plea he wanted entered. So they refused to enter any plea, and you will see from the court minute that the court enters a plea of not guilty. That's what they told me happened at that hearing.

Earlier than that, at the January hearing, the defense counsel -- At the preliminary hearing, the defense counsel had raised some questions, and asked some jailers, had they seen Ake having fits and seizures at the jail. Those particular jailers said they didn't see that.

But there was some indication that things were wrong, and certainly in April, at the mental competency hearing, psychiatrists testified that he was a chronic paranoid schizophrenic, and that was several months before he went to trial.

QUESTION: At anywhere along the line has the issue been raised as to the effective assistance of counsel at the trial court level?

MR. SPITZER: Your Honor, we raised that as one of the bases for our argument, but no.

QUESTION: When was it raised first?

MR. SPITZER: This is a direct appeal, of course, and so --

QUESTION: Was it raised in the Louisiana

Court?

MR. SPITZER: In the Oklahoma Court?

QUESTION: The Oklahoma Court, I mean.

MR. SPITZER: The Oklahoma Court of Appeals, no, Your Honor. Ake was represented by the same counsel in the Oklahoma Court of Appeals as he was at trial.

The law of Oklahoma on this question is quite clear, and I commend to you the Amicus filed by the Oklahoma County Public Defenders, noting, for example, the case of State against Davis, where the judge sent the defendant to the State hospital for an examination, and the State hospital refused on the ground that the State statute didn't authorize such an examination.

Similarly, in State versus Paris Johnson, cited there, the court, feeling the 14th Amendment applied to him, ordered a chemist be made available to the defendant to test some blood samples that were crucial evidence in the case, and the Court Fund Board, which dispenses these funds, refused. Defense counsel took a petition for mandamus to the Oklahoma Supreme Court which denied mandamus, so the defendant never got his expert. So the Oklahoma Court's position is really quite unambiguous.

Finally, let me say a word about the testimony of the cellmate about faking it in court. It's

specifically contradicted by the testimony of the State's own chief forensic psychiatrist that his observations, his careful testing, negate that possibility. They were very suspicious about that when he went to the hospital, and the observed with particular respect to that, and concluded that it was not true.

So whatever he may have said to the person in the opposite cell shortly before trial, you have to assume that he was a person who was mentally ill, restored to competence under Thorazine, and then in that condition determine to play act that he was mentally ill. I think that it is hard assumption to make, but it illustrates the difficulty with relying on lay testimony in a case like this. Lay people simply aren't qualified to delve into the intricacies of mental illness and determine what's really going on. That never happened in this case.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Gentlemen, the case is submitted.

(Whereupon, at 1:32 p.m., the case was submitted.)

CERTIFICATION

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

#83-5424 - GLEN BURTON AKE, Petitioner v. OKLAHOMA

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

BY Paul A. Richardson

(REPORTER)