OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-6607

TITLE BOBBY CALDWELL, Petitioner V. MISSISSIPPI

PLACE Washington, D. C.

DATE February 25, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BOBBY CALDWELL, :

Petitioner, :

V. : No. 83-6607

MISSISSIPPI :

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Washington, D.C.

Monday, February 25, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock p.m.

APPEARANCES:

E. THOMAS BOYLE, ESQ., Smithtown, New York; on behalf of the petitioner.

WILLIAM S. BOYD, III, ESQ., Special Assistant Attorney General of Mississippi, Jackson, Mississippi; on behalf of the respondent.

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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 first this morning in Caldwell against Mississippi.

Mr. Boyle, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF E. THOMAS BOYLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BOYLE: Mr. Chief Justice, members of the Court, this case is here on certiorari to the Mississippi Supreme Court. There are three issues that I would like to address in this appeal.

The first is whether or not the remarks by the prosecutor that the verdict, jury verdict is non-final and subject to appellate review constitutes constitutional error. The second issue is whether or not there was a denial of Sixth and Fourteenth Amendment rights in denying experts and a criminal investigator.

And thirdly, whether certain remarks by the prosecutor at the sentencing phase of the trial, wherein he alluded and compared this case with all the other capital cases that he had tried, whether or not that constitutes plain error which this Court should notice under the due process clause.

The facts with regard to the first issue are as follows. Under Mississippi practice, the prosecutor

has the right to open and close during summation. During the rebuttal portion of his summation to the jury, he argued, your decision is not the final decision. Your decision is reviewable.

Defense counsel immediately objected. The court ruled on that objection and overruled it, stating that under the Mississippi death statute there was in fact mandatory review of decisions by the jury in a capital case, and instructed the prosecutor to make full expression of his argument.

The prosecutor proceeded to state to the jury that defense counsel had wrongfully insinuated that their decision was not final, and again repeated that it was subject to review.

QUESTION: He did a little more than that, didn't he?

MR. BOYLE: Yes.

QUESTION: He said, in effect, if you render a verdict of guilty here and return that sentence, you will be the killers.

MR. BOYLE: Yes, he did. Your Honor, on appeal to the Mississippi Supreme Court with regard to this issue, assigned appellate counsel failed to set this forth in the claim of error statement which is required to be filed under Rule 6B of the rules of the

Mississippi Supreme Court.

The Mississippi Supreme Court split four to four, with one judge disqualifying himself. The court ruled -- based its decision primarily on three grounds, first, that under this Court's decision in California aginst Ramos, that the states were free to determine what the jury would hear in this area, and felt that this was appropriate argument.

Secondly, they maintained that this was invited error by suggesting that imprisonment was for the rest of the petitioner's natural life, and thirdly, the court held that the issue was foreclosed by virtue of the failure of counsel to comply with Rule 6B.

Petitioner maintains that the remarks violated the due process clause and the Eighth Amendment first on the ground that those remarks were false and misleading to the jury. The statute involved here, and it is set forth in the petitioner's brief at 6A of our appendix to that brief, on its face and as construed by that court, is a final determination.

It is the sole and exclusive function of the jury in the state of Mississippi to ascertain and determine the appropriate sentence in a capital case. The argument here that they were not the final determiners of that sentence is simply false.

Moreover, it was false also in suggesting to the jury that someone else shared the responsibility which under that state statute is solely and exclusively theirs.

QUESTION: Mr. Boyle, in your view, would it be error or a violation of due process for a court to instruct a jury correctly and accurately concerning the existence and scope of appellate review?

MR. BOYLE: It would not, Your Honor. However, I respectfully submit to the Court that it would be a much different case for this Court to consider were it not for the fact that counsel here argued in addition to the review element the fact that it was a non-final judgment.

Secondly, we maintain that the argument by the prosecutor unconstitutionally diminshed the jury's responsibility for imposition of the death sentence. The remarks here were intended to overcome the jurors' natural reluctance to return a death sentence by diluting their responsibility for the consequence of those actions.

The dissent below pointed out that a juror in deliberation is going to be -- feeling that death is an inappropriate sentence, is simply going to be much less likely to hold out in the event that he or she knew that

any error could be corrected in connection with an appeal.

This Court in the Witherspoon case admittedly in a totally different context indicated that it is a fundamental guarantee of due process that the decision as to whether a person lives or dies must be made on scales that are not deliberately tipped toward death.

We respectfully submit to this Court that the prosecutor's argument here encouraged the jurors to err on the side of death with the false assurance that if death is not appropriate, the Supreme Court will correct that error.

The verdict based on such remarks is one in which the jurors' moral responsibility is diminished to unconstitutional proportions.

I would like to briefly discuss the California against Ramos case, which we submit is simply not controlling in this case, and we make that argument for the following reasons. First, in California againt Ramos, this Court made it very, very clear that they were paying due deference to the state statute, the enactment by the legislature of the state of California.

Here, on the other hand, we are dealing with the remarks of a prosecutor, and although there is legislation in this area to the effect that there is

mandatory review, that legislation, unlike the Briggs instructions, does not embody also the instruction that the jury be told about it.

And so we respectfully submit that that is a very, very significant distinction.

QUESTION: But isn't that a state law distinction in essence? I mean, would you say the distinction vanishes if the Mississippi legislature had said that juries ought to be told about this, and if your answer to that is yes, why isn't the Mississippi Supreme Court a prefectly good spokesman for state policy, just as the legislature would be?

MR. BOYLE: If we are talking just about that element, that would be a matter for the state to determine and so advise the judges of the trial courts that this is a matter for particular instruction for the jury.

We have the element in this case, Justice Rehnquist, of a misleading statement in addition to the comment and interrelated to the comment on judicial review.

QUESTION: But I thought your point that you were just making had nothing to do with the misleading character, but had something to do about articulated state policy.

MR. BOYLE: There is another reason with regard to the state policy why it would not be admissible, and that is, this Court made it clear that under California law in the Ramos case evidence was permitted on the factor which this Court equated with future dangerousness as being a question of fact, and evidence was admissible with regard to that element, and counsel could comment on it.

You don't have that situation here. Here you have the unmitigated, I submit to the Court, danger of speculation solely on what these nine Justices of the Mississippi Supreme Court will do, and I submit that the arbitrary and capricious nature of that speculation is no more visible in this case where you have this four to four split which affirmed and one judge disqualifying, and then, as we pointed out in our brief, at a later time the judge who disqualified himself actually joined the dissenting opinion here to make it the majority.

QUESTION: Then you are saying, I guess, that a state supreme court is not to be given the same deference as a state legislature in speaking out on a matter of state policy.

MR. BOYLE: I don't think we are saying that at all. It is just that there are factors here that were not present in the Ramos case that make Ramos not

controlling in this particular situation.

If Your Honor is positing the question whether or not in the event that the Mississippi Supreme Court in their infinite wisdom decided to permit comment on non-review, I would first of all take the position that it shouldn't be done by the prosecutor, and if it is going to be done, as it was done in the Ramos case, it is an instruction by the Court.

But that really is a hypothetical which has been decided by the Mississippi Supreme Court which has said, we don't want this statute to go to the jury. So that is the state of the law today in Mississippi by virtue of cases which came after the Caldwell case.

Lastly, we would argue that under the Woodson against North Carolina standard, the speculation here and the remark by defense counsel simply diverted the jury from considering the nature of the offense and the individual characteristics of the offender, which really are the true focus and the constitutional obligation of a jury to consider.

We maintain that there was no invited error. This Court decided the Young case. Just last week it was handed up. And I respectfully submit to the Court that it made it clear that the invited reply theory as far as prosecutorial argument is a response in kind, and

here there is simply no response in kind.

QUESTION: Mr. Boyle, do you read Young as being a constitutional decision?

MR. BOYLE: I read it as -- we were dealing with -- the Court was dealing with a federal prosecutor in that case. I believe they were dealing with the due process clause.

QUESTION: Does the opinion cite the due process clause.

MR. BOYLE: I haven't got it with me, Your Honor, but it dealt with --

QUESTION: I didn't think it did.

MR. BOYLE: I stand corrected. One of the arguments we are making here, and it comes in the third part, is dealing with plain error, which perhaps is more appropriate with regard to that aspect of the opinion, but the point that I am trying to make here is that there must be a response in kind, and I submit that there is no response in kind here.

What the court seized on, the majority seized on in this case was that they had argued imprisonment for the rest of his life. Comments by the prosecutor actually -- he used the exact same term, and it is the only statutory alternative that an attorney has to argue to a jury, and I submit that that simply is not invited

error, and there is simply no response whatsoever.

Lastly, with regard to this issue, this Court decided Ebbits against Lucy last month, and we call that to the Court's attention with regard to the respondent's argument that there is an adequate independent state ground here for the decision.

I believe that under Lucy the failure by the assigned appellate counsel in this case to claim this as error would prevent the court, the Mississippi Supreme Court, from reaching the merits with regard to that issue, and accordingly we submit that it is not an adequate state ground, and that this Court should consider the merits of the issue.

I would lastly point out on this issue that the Mississippi Supreme Court in effect waived Rule 68 because they invited counsel prior to the argument to address that issue in oral argument. They accepted briefs on it, and in fact they did deliberate and reach a decision on that issue.

And so I think under Lucy and under just the general law the adequacy of an independent state ground, being itself a federal question, that should not be a bar here.

QUESTION: Do you think there was any indication in Ebbits against Lucy, first of all, that it

extends to other experts other than the psychiatric help, and secondly, do you think that there is any indication in it that a state can't have a rule that says the defense has to specify the cost in any event and make the other showing that the state thinks would be necessary?

MR. BOYLE: I don't see the applicability of Ebbits at all. Now, Justice O'Connor, we are getting into the second phase of our argument. I only see Ebbits against Lucy as bearing on the issue dealing with whether or not there is an adequate state ground by virtue of counsel's failure to comply with Rule 6B.

If I may go into the facts with regard to the second issue under the Sixth Amendment, there was a pretrial motion for a psychiatrist, a ballistics expert, a fingerprint expert, and a criminal investigator. The request for a fingerprint expert in the Mississippi Supreme Court below was treated as a request for an expert with regard to the foot cast evidence, and I would urge this Court to do so, and the respondent urged the Mississippi Supreme Court to do so, I believe, in their brief, and that has been the way the case has proceeded.

The order notes that the claim for all these experts, including psychiatrists, was made in order to

establish an adequate defense, and they appointed, the Court appointed its own expert in the area of psychiatry and then denied the application with regard to the other experts, and they did so, and I quote, "based on recent Mississippi cases," and that is a question as to what they were referring to.

At the trial, these experts, there was a ballistics expert called by the prosecution, and he testified in assisting the government to make out their prima facie case. The same way with regard to the foot cast expert. They tied the bullets taken from the deceased with the gun taken from the defendant at the time, and likewise the boots that the defendant was wearing when he was arrested were connected with footprints near the scene of the accident.

There was cross examination which only really further bolstered the claim with regard to the strength of the ballistics testimony. On summation, the prosecutor highlighted the ballistics testimony and then he even went so far as to note to the jury that it stood unimpeached.

QUESTION: Wasn't this a case where there was an eye witness?

MR. BOYLE: There was an eye witness. We don't suggest, Justice Rehnquist, that there was not

other evidence in connection with the prima facie case. There was an eye witness, and there was a glove that was also found near the scene of the crime which had been caught on a barbed wire fence. There was also -- and the matching glove was found in the defendant's possession. There was also a confession in the case.

However, we maintain that this is one of the pieces that the prosecutor used to establish his prima facie case. The Mississippi Supreme Court with regard to this issue sustained a request -- the denial on two grounds, first, that under the United States Constitution, defense was not entitled to these services, and secondly, on the ground that they had failed -- that defense counsel had failed to itemize the specific costs and the purpose and the value of these.

We respectfully submit to the Court that the second ground deals with the state's reimbursement statute, which we maintain is inadequate on its face. The respondent takes the position in this Court that he doesn't seek to sustain the Court's decision at all on the constitutional issue. They concede that, and they concede that there is a due process right to experts in this area.

I submit to the Court that that concession is made in an effort to attack the petitioner's case in an

area where they consider it to be weak and vulnerable, namely, the failure to sufficiently specify costs. However, we respectfully submit that because of the statutory scheme and the unconstitutional -- the inadequacies of that statutory scheme, that the application cannot be fairly judged under that, and that the case should be vacated and remanded.

QUESTION: Mr. Boyle, is there anything in the cases from this Court that you find that say a state cannot require as prerequisite the appointment of any expert --

MR. BOYLE: No, there is not.

QUESTION: -- witnesses that there be a threshold showing of need and cost and so forth?

MR. BOYLE: There is not. Justice O'Connor, the law in Mississippi, however, has never recognized a due process constitutional right to these services.

QUESTION: Why does it need to? Maybe it wants to offer them whether or not the Constitution requires it, and if so, why can't they have a reasonable rule requiring a threshold showing?

MR. BOYLE: The problem here is that they are construing -- let's say that there's a statutory right, and that is what the respondent says here. In an appropriate case, there is a statutory right under our

reimbursement statute.

First of all, that statute is being construed from the point of view that there is no constitutional right in this area. Secondly, it is inadequate and defective on its face for the following reasons. First, it doesn't provide for an ex parte application, and there are certain constitutional problems that arise from that.

In other words, defense counsel, in order to make this application, has to go to the judge on notice, and this was done in this case, on notice to his adversary, and say, I would like to call an expert in this area. They have to tip off their defense.

And there is no similar requirement for a non-indigent to do it, and so we maintain that there is an equal protection problem with that, because it is creating a classification between indigents and non-indigents.

In addition, under Wardius against Oregon, which is the reciprocal alibi statute which the Court considered, the Court said that under due process you can't have discovery on one hand and not reciprocal on the other, and we submit that the government or the state isn't obliged to make any --

QUESTION: Aren't requests by indigent for

counsel to represent them matters that are made with notice to the other side?

MR. BOYLE: I don't know if I understand your question.

QUESTION: You said that the problem is that there can't be an ex parte proceeding, and requests by an indigent for counsel aren't done in an ex parte setting.

MR. BOYLE: That doesn't have to do with secrets of the defense, or strategy of the defense is probably a better terminology. The mere fact that an attorney is appointed for someone which under the law is his constitutional right in no way indicates to the government or to the state in this case what the strategy of defense counsel may be at the trial.

However, when you come into court and you make a request for an expert, and you want a foot cast expert, and maybe he wants a criminal investigator, or maybe he wants something that the state isn't even going to call, and he has got a good reason for it. We respectfully submit that that is imposing a burden on an indigent defendant in a state trial to disclose items of his defense strategy, and there is no reciprocal obligation on the part of the state.

QUESTION: Even if your contention were to be

upheld, wouldn't you still have an equal protection claim? A wealthy criminal defendant can get all the experts he wants without petitioning the court.

MR. BOYLE: That is exactly what my point was. There are two constitutional problems with it. One is the Wardius against Oregon due process question of non-reciprocal, and the other is the classification that this creates, because any non-indigent can get any expert that he wants.

QUESTION: But your solution suggests that perhaps to me your definition of the constitutional right is overly broad, because if the defendant is going to have a claim that I have to petition the court to get experts, and the wealthy defendant doesn't have to fool around with a court at all, then the only answer is simply for the legislature to appropriate each year about $5 or $10 million for whatever services criminal defendants may want, and I dare say there aren't many courts that would sustain that sort of a claim.

MR. BOYLE: Well, I call to the Court's attention, Justice Rehnquist, the federal legislation in this area, not that it is constitutionally mandated by virtue of the fact that it comes from Congress, obviously, but this has been interpreted, and I believe that there are serious problems which arise if you are

going to make defense counsel in an indigent case tip his hand and put his adversary on notice, this is the very heart of our criminal justice system.

This Court went to great expense in the Cronic case to say that this adversary system is essential to rooting out the facts, and if you are going to require defense counsel representing an indigent to make this kind of disclosure and not make a reciprocal obligation, I think you run into due process problems --

QUESTION: Mr. Boyle --

MR. BOYLE: -- and I think that is exactly why Congress enacted 18 USC 3006 AE, which is the applicable statute, and expressly provided for ex parte application, and that is the rule in the federal courts.

QUESTION: Mr. Boyle --

MR. BOYLE: Justice Marshall.

QUESTION: -- I don't understand this tipping your hand. You have to tip your hand when you ask for a lawyer, don't you?

Number Two, you don't think there is any requirement other than for the defendant to ask for a particular expert. That is all required.

MR. BOYLE: No, I think there is more --

QUESTION: What else would you require?

MR. BOYLE: I think there is more to it, but I think in this case, Justice Marshall, that the statutory requirement is intertwined, inseparably intertwined with the constitutional issue, and I believe that the state --

QUESTION: What more would be required?

MR. BOYLE: I believe that the state interprets that reimbursement statute without recognizing rights in this area. It is a matter of grace.

QUESTION: Did I understand you to say that the Court really said, you aren't entitled to it, but anyhow the state keeps you from getting it? That is stretching it a little, isn't it?

MR. BOYLE: It is solely a matter of statutory grace or discretion.

QUESTION: Well, would you have to get an expert on fingerprints, too?

MR. BOYLE: In the event that --

QUESTION: Yes, in case his fingerprints are used, would defense counsel automatically get an expert on fingerprints?

MR. BOYLE: I don't think that it would be automatic. I believe that the states --

QUESTION: Well, what other than automatic? How much more than automatic?

MR. BOYLE: I believe in this case that it was self-evident from the fact that the prosecution was using a fingerprint expert. I think it was self-evident that there was a reciprocal need here by the defense.

QUESTION: Have you ever seen a case involving fingerprints where the government didn't put an expert on?

MR. BOYLE: Well --

QUESTION: Ever?

MR. BOYLE: They certainly did here.

QUESTION: The first thing the defendant would be up yelping that you can't put them on without an expert, wouldn't he?

MR. BOYLE: I think certainly in a case where they have relied on an expert, that it is a reasonable request, not only to call an expert on one's own behalf, but also to effectively cross examine.

QUESTION: One final question. You want the same rule as in a regular case where you have a wealthy defendant. Suppose a wealthy defendant brings an expert from London. Would you in the next case be entitled to that expert from London?

MR. BOYLE: Obviously, the answer to that i no, Justice --

QUESTION: Well, where is your -- I am trying

to find out what --

MR. BOYLE: Justice Marshall, we are talking about very, very fundamental concepts of justice here.

QUESTION: I assume that all constitutional claims are fundamental.

MR. BOYLE: In the event that this Court were to acknowledge in this case that there is a constitutional right in this area, perhaps questions like that would arise, and undoubtedly they would, but we are dealing with a situation --

QUESTION: Would we need some help from defense counsel?

MR. BOYLE: As far as --

QUESTION: That is what I am asking.

MR. BOYLE: I certainly think you do.

QUESTION: Why don't you give it to me?

MR. BOYLE: We are dealing here with an application which I submit to the Court it was obvious on its face that the prosecution was relying on experts, and for that reason the Court should have been aware of the value of experts in this area.

I acknowledge, as I have to, that perhaps in retrospect if this application were redrafted, it could be somewhat more specific, but I submit that that is not a defect in this case, and if I could just make one

other point with regard to the reimbursement statute, it imposes the obligation on its face on defense counsel to reach into his pocket and put the money out.

And that creates all kinds of problems, because maybe defense counsel isn't willing to risk the fact that the trial judge when the case is all over may disallow that expense, and I simply don't think that this is a burden that properly should be placed on the individual counsel.

There is a case that my adversary cites, the Ruffin case, where --

QUESTION: In this case, did the judge ask counsel to put the money up?

MR. BOYLE: No, he did not.

QUESTION: Well, how is it here?

MR. BOYLE: But the Mississippi --

QUESTION: How is that point here?

MR. BOYLE: The Mississippi Supreme Court in Ruffin, in denying the authorization on appeal, indicated that if this was so important, then why didn't counsel go out and fundraise for $500 to bring in the expert, and they accused the defense counsel of sandbagging the court to try to get reversible error.

This is the -- I simply point it out because this is the way that statute is being interpreted.

QUESTION: If we take that out of the opinion, will you be satisfied?

MR. BOYLE: No, the statute on its face --

QUESTION: You can't do it. You don't appeal opinions. You appeal from judgments.

MR. BOYLE: I am just pointing out, Justice Marshall, my point is, the bottom line, that the statute for implementing any statutory right is defective on its face and defective as applied here.

Thank you.

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

Mr. Boyd.

ORAL ARGUMENT BY WILLIAM S. BOYD, III, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BOYD: Mr. Chief Justice, and may it please the Court, initially I would like to briefly summarize the state's position on the three issues that have been raised in this matter. The initial question, of course, concerns the propriety of advising the jury of a condemned prisoner's right of mandatory appellate review.

State court resolution of this issue rested upon two grounds. The first was procedural, the second substantive. While we feel that the ultimate resolution

of the issue was based on independent and adequate state grounds, that is, state procedural grounds, we shall concentrate our comments this morning upon the substantive aspect of the issue.

Within this regard, while the Mississippi Supreme Court divided four to four over the state's argument, it unanimously concluded that this Court's decision in California versus Ramos was the benchmark from which they must work, and that the ultimate resolution of the issue was a question of state law.

The second, the denial of expert and investigative services, it is the state's position that a defendant does not have a constitutional right to expert or investigative assistance simply upon demand. He must demonstrate to the trial judge that the services requested are both necessary and reasonable.

And as for the third question, the confrontation issue, we note that there was no objection to a portion of counsel's argument identified in the briefs, and that the issue was not raised on direct appeal in the Mississippi Supreme Court. The issue is clearly barred under state law, and we suggest that this Court's recent case in United States versus Young is more or less dispositive of the issue.

Within this regard, we suggest that certiorari

has been improvidently granted on that particular issue. Now, directing our comments to the closing argument question, we note that in particular there was nothing really per se objectionable to defense counsel's comments during closing summation.

However, both the trial judge and the assistant district attorney were both of the opinion that the argument left the jury with the impression that once a sentence of death was returned, nothing could be done to correct it. I believe the way that the assistant district attorney termed it, that they were going to take the defendant out the front door and string him up at that point in time.

The Mississippi Supreme Court or this Court has basically -- has consistently held that based upon principles of comity and federalism, in particular the case of Donnelly v. DeChristoforo, review is limited to determine whether the arguments of counsel in state court cases render the trial so fundamentally unfair as to deny the defendant due process.

Within this regard, we note three major points that this Court has in the past identified in questions concerning state court closing argument. This was also recently stressed in the recent case of United States versus Young. And that is, arguments must be viewed or

reviewed within the totality of the circumstances of the case.

QUESTION: Mr. Boyd, may I ask you one question that just occurred to me? The administration of the death -- capital punishment is often criticized because of the great delay that elapses between the imposition of the sentence and the carrying out of the sentence.

Do you think it would have been prejudicial to the prosecutor if the jury had the impression that the sentence would be carried out in a very short period of time?

MR. BOYD: I am not sure that I understand your question, Your Honor.

QUESTION: Apparently the response was needed, as I understand kind of the preliminary comment you made, because it might have been harmful to the prosecutor's case if the jury thought they were going to take him right out immediately and implement the sentence.

Is that your view, that the jury would have a distorted view of the case and it would harm the prosecutor to think that that sentence would be carried out promptly?

MR. BOYD: Your Honor, I am not so sure that

it would have harmed the state's case. I think what, in my impression of reading the closing argument in this case, was that the state was simply trying to inform the jury or advise the jury that death would not be administered in an arbitrary and capricious fashion.

There was a good bit of discussion by state's counsel in this matter concerning the state of the law prior to this Court's decision in Furman v. Georgia, that in essence what we had was an automatic imposition of death with basically a mercy clause, that then the state's counsel went in and discussed this Court's decision in Furman, noting that the Court had found those statutes that existed at that time were arbitrary, that death was administered in a capricious fashion and what not, then.

The Court came down -- the state's attorney noted that the legislature had undertaken to enact new statutes dealing with this question in order to funnel or to guide the jury's discretion to take the arbitrary aspects or the capricious aspects out of imposition of death.

He then went into this Court's discussion or this Court's decision in Gregg v. Georgia and Proffiff v. Florida, and one thing that I think is a key point to his argument was that he stressed, and there are a

number of instances in his closing argument where he stressed that it was the jury's determination that this Court had made its decision in Gregg and Proffitt to the effect that it was the jury who was to decide what the particular or what the appropriate punishment would be under the circumstances of the case within a channel of guided discretion, as the Court has discussed.

QUESTION: But all of that just suggests to me that there was really no need to respond to what the defense counsel said, that basically it was a jury decision.

MR. BOYD: From my reading of defense counsel's closing argument, I got the distinct impression, especially when they started talking about the poem that was written by the prisoner in Georgia prior to being executed, that in essence what defense counsel was saying, he was trying to put the blood of this man on the jury's hands, was in essence what they were doing.

The argument that was given by defense counsel in essence said, if you return this verdict, you are going to kill the man. They are going to take him out the front doors of the courthouse and they are going to string him up in front of the courthouse. And of course no juror wants this particular burden upon his

conscience.

QUESTION: Suppose he argued that if you find him innocent nobody can kill him?

MR. BOYD: Well, we had already passed the guilt-innocence phase at that particular time and were in sentencing.

QUESTION: But that would be all right, wouldn't it?

MR. BOYD: Yes, of course, that is true, that if a life sentence was returned, then of course no one could execute him, but what -- our position in this matter is this, that there are a line of cases, particularly emanating from the state of Lousiana, cases such as State v. Berry, State v. Matheson, State v. Monroe, and this Court's decision is Maggio versus Williams, wherein it was discussed a dichotomy more or less or a dual system that they have developed in Lousiana, and that is where the closing argument is addressed to dispelling in the jury's minds the question of arbitrary imposition of death, then such an argument is appropriate under the circumstances.

QUESTION: Well, do you concede that the state in any event has no right to make an argument that is misleading on the law?

MR. BOYD: Oh, I think that's clearly what the

law is, that the state cannot make a misleading argument.

QUESTION: All right. So isn't the real question whether it was misleading or not? Isn't that what we really have to focus on?

MR. BOYD: Yes, ma'am, I think so, that --

QUESTION: And the question there is whether the prosecutor's remarks indicate that the jury's verdict if they impose death will be automatically reviewed in all its aspects?

MR. BOYD: Well, I think there is a greater question that we have to answer first, and that is whether this is a matter of state law or whether or not this is a matter of constitutional law.

I would invite the Court's attention to the fact, as Mr. Boyle commented on, that there had been two subsequent decisions to Caldwell dealing with this particular issue by the Mississippi Supreme Court, that of the case of Wiley v. State and the case of Williams v. State.

In both of those cases as well as all eight Justices in this particular case have noted that this is a question of state law, that in Wiley and in Williams they have exercised their supervisory powers, and now prohibited arguments of this nature.

QUESTION: It is your position that it does not violate the federal Constitution for a prosecutor to make a misleading argument to the jury? Is that your position?

MR. BOYD: No, ma'am, that is not my position. My position is that under Donnelly v. DeChristofor, that this Court made it rather clear to the effect that unless there is a violation of a specific constitutional right, or that the state's arguments are spurious or false, that those are the bases upon which reversal will be predicated.

I would assume that a misleading argument would in that nature be false or spurious. However, we do preface it with this, that this argument was not, was not misleading. It did accurtely state what the law in the state of Mississippi was. The Assistant District Attorney told the jury that it was their responsibility to return a verdict of death, that they were the only ones under state law who could do that.

However, he did add to that that it would be reviewed by the Mississippi Supreme Court, and of course under state law the Mississippi Supreme Court does have the right.

QUESTION: Reviewed for what, I guess is the question.

MR. BOYD: For what. There are a number of items. They were outlined in the case of Williams v. State. Basically they are this. There are three of them. The court must in performing what we refer to in state law as proportionality review or mandatory appellate review, one, whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors, two, that the evidence supports the aggravating circumstances, and three, that the sentence is not excessive or disproporationate.

Within this regard, the Court is authorized to remand to the trial court for modification of sentence to life imprisonment. They have done so in at least two cases -- three cases. Pardon me. Now --

QUESTION: Mr. Boyd, may I ask, what do you interpret the significance of the dissenting Justices' comment that even a novice attorney knows that appellate courts do not impose the death penalty, they merely review the jury sentence and that it reviews with a presumption of correctness?

I read that to indicate that his view was that the prosecutor's argument did not make a full and accurate statement of the function of the reviewing court.

MR. BOYD: Your Honor, I think --

QUESTION: And I don't think the majority disagreed with them.

MR. BOYD: That is a difficult thing to explain, in that that particular court in the case of Edwards v. State did exactly that, that we had a jury determination that Hezekiah Edwards should be sentenced to death.

In that particular case, the evidence was clearly that the man was not suffering from psychosis. However, the Mississippi Supreme Court, in reviewing that matter, determined that they did not agree with the jury verdict, vacated the sentence of death, and sentenced Mr. Edwards to life.

Now, there are comments in this particular matter that I don't particularly understand. Some of the comments made by the dissent I don't particularly understand, but mine is not to know exactly what they are talking about in the matter, just to argue the cases before them.

Within this regard, the question as to diminished responsibilty, we suggest that this Court's recent decision in Wainwright versus Witt and the decision in Donnelly v. DeChristoforo mandates that deference be given to the trial judge's determination as to what was said.

The trial judge in this particular case felt that defense counsel's closing arguments were misleading to the jury, and instructed the assistant district attorney basically to straighten the matter out, and this is what he attempted to do, to address the question as to whether or not the defendant would be taken out the front of the courthouse and there summarily executed.

A corollary to this is a case which is currently pending before this Court on certiorari, the case of Booker v. State, wherein defense counsel is the one that got up at the initiation of the proceedings and started talking about let's go ahead and sentence this man to life, because we have all of these multiple appeals1 that we are going to go through in this matter.

Likewise, in this particular case, defense counsel discussed at great length this Court's decision in Furman v. Georgia, and noted that the Assistant District Attorney would probably address comments in that direction.

So I think that we do have something here that both the Mississippi Supreme Court in its supervisory capacity and the lower trial court found not to be particularly objectionable under the circumstances.

Addressing the second point in this matter, the expert witness question, there are several things that we need to, I suppose, straighten out in this. There have been three recent decisions by the Mississippi Supreme Court on this particular point. Ruffin v. State, which is cited at length in our brief, DuFor v. State, and Billiot v. State.

Billiot v. State gives a rather protracted recounting of the history of this particular point in the jurisprudence of the state of Mississippi. Likewise, DuFor v. State recognizes the particular special aspects that psychological or mental health professionals play within the context of the criminal proceeding.

Historically speaking, Mississippi has recognized the right of an indigent offender to expert and investigative services. And it consistently held that the determination of whether to provide such services must be made on a case by case basis.

Here, we would note in particular one thing that I don't know has been made abundantly clear, and that is that Mr. Caldwell did have the assistance of a psychiatrist in this matter appointed at state expense to the tune of $70 per hour. That was Dr. Allen Battle of Memphis, Tennessee.

Not only did he have that, but prior to trial he was sent to the Mississippi State Hospital at Whitfield, where he was examined there by the staff at the state hospital. Apparently counsel chose not to use these professionals that were given to him for these particular purposes within this case.

Substantively speaking, and this is something that the petitioner has attacked rather particularly here, and that is Section 9915.17, the authorization for retention of these services, Billiot v. State speaks to the particular question as to whether or not this statute is applicable, and found that it has been so.

However, the court by judicial definition has impressed upon the statutory authority the requirements that the defendant on a motion to the court, one, outline the specific cause that will be involved -- in this case it was $70 an hour by Dr. Battle -- two, the purpose of the services, why do you need these services, and three, the value of the proposed testimony of the defendant.

Now, in this particular case we must remember several things. One was that defense counsel never told the court who he wanted retained as a footprint expert or who he wanted retained as a ballistics expert. So there the court was confronted with a situation where

there was no indication as to what witness expert the defendant wanted in this regard.

I think that within the overall constitutional context, and while I often times do not agree with this organization, I find myself agreeing with it in this particular case, and that is the American Civil Liberties Union, in their brief to this Court in the case of Eit v. Oklahoma.

And Footnote 22 of their brief in that particular matter I think adequately summarized what the law was. Our submission is not that state paid experts should be made available to indigent defendants on demand, or that the Constitution requires the state to provide indigents with the same quantum of assistance that a millionarie might choose to mobilize for his defense.

We suggest that the Criminal Justice Act's constitutionally grounded standard of assistance necessary to an adequate defense and the workable criteria developed by the federal courts and by many state courts operating under similar statutes to implement that standard may be appropriately applied to implement the constitutional guarantee of due process.

In the recent cases of Ruffin and Billiot, the Mississippi Supreme Court has recognized that a due

process standard does exist. However, it has still maintained that the principles that were announced in Bullock v. State and the earlier cases were still applicable in that you had to outline the costs, state the purpose of the services, and the value of the proposed testimony to the defense.

Now, in this particular case, as to the ballistics expert and the fingerprint expert or footprint expert, the necessity of these services has not been shown. The man confessed, the petitioner in this case confessed to shooting the victim twice in the head. He confessed that he walked to the store across the pasture, and he confessed that he walked away from the store across the pasture.

Consequently, to be frank with the Court, the expert services that were used by the state in this matter were frankly immaterial. Where you have a confession that the man did it, and the confession is not questioned before this Court, I see no necessity for these particular services.

QUESTION: But can't the defendant say that if a state has sufficient doubt about the other evidence that it is going to call a ballistics expert that the defendant is entitled to call one, too?

MR. BOYD: No, sir. I don't think that that

is a proper standard. The Eleventh Circuit in particular has developed a particular line of cases which say that where the state has expert witnesses available for the defense to talk to, to examine prior to trial, and things of this nature, and where there is no showing that those particular experts are biased toward the defendant or are particularly not -- will not consult with them and things like that, that that may be of some significance, and may necessitate the appointment of additional experts.

But unless we are dealing with a crucial point of evidence, that is, where it is the pivotal point of evidence within the case, I do not think that the Constitution mandates that such an expert be appointed for defense counsel purposes.

Likewise on the investigative assistance question, we note that under the Criminal Justice Act, there is a $150 maximum ceiling placed on investigative services. Within this regard, the advisory committee on the Criminal Justice Act has recommended to this Court that such services be sparingly used, and that they be viewed with great -- graded severely.

In this particular case, there were 35 witnesses, and the motion noted that the state had 35 witnesses that they would call. However, we would note

from the record that both counsel were appointed for the petitioner in this case on March the 23rd, 1981. The names and addresses of these particular witnesses were provided to counsel eight days later. The matter was called for trial some seven months later, in October.

Consequently, there was a tremendous amount of time between the actual appointment and the time of trial.

Likewise, we would note that prior to trial, the trial judge directed the state to provide defense counsel with copies of the initial investigative interviews in these cases, and counsel had that in order to cross examine the particular witnesses.

We would more or less rely on our brief on the third question in this matter, and if the Court has no further questions, I will --

CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen. The case is submitted.

Your time has expired, counsel.

MR. BOYLE: Thank you.

CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 10:55 o'clock a.m., the hearing in the above-entitled matter 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:

#83-6607 - BOBBY CALDWELL, Petitioner v. MISSISSIPPI

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

BY Paul A. Richardson

(REPORTER)