OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1554

TITLE EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, Petitioner V. CLIFFORD W. CARRIER

PLACE Washington, D. C.

DATE January 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD W. MURRAY, ACTING :
DIRECTOR, VIRGINIA DEPART- :
MENT OF CORRECTIONS, :
Petitioner, :
V. : No. 84-1554
CLIFFORD W. CARRIER :

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Washington, D.C.

Tuesday, January 21, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:49 o'clock a.m.

APPEARANCES:

JERRY P. SLONAKER, ESQ., Senior Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the petitioner.

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of the petitioner.

SHERMAN L. COHN, ESQ., Washington, D.C.; on behalf of the respondent, appointed by this Court.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Murray against Carrier.

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

ORAL ARGUMENT OF JERRY P. SLONAKER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SLONAKER: Mr. Chief Justice, and may it please the Court, this case presents two questions the resolution of which will have a profound effect on habeas corpus litigation. The first question is whether attorney error resulting or flowing from inadvertence or ignorance but not rising to the level of ineffective assistance of counsel constitutes cause under Sykes to excuse a procedural default.

The second question is whether habeas corpus relief can be obtained from the federal courts by asserting attorney error was caused when that very same form of cause is recognized in the form of ineffective assistance of counsel by a state court, and the petitioner has never presented any suggestion of ineffectiveness to the state court to determine whether that court may excuse the default and address the merits.

I realize the Court is familiar with the facts, but there are a few facts I want to mention and

emphasize. Prior to Carrier's trial, 1977, for the offense of rape and abduction, and again during the trial, his defense attorney moved for discovery of the victim's statement made to the police. The prosecutor took the position that the statement is not favorable to you, so you are not entitled to receive it, but I am entirely willing to have the state trial judge consider it in camera.

Judge Lamb was then assigned to hear the case, and he considere it in camera. At the request of the defense attorney he compared that statement with the preliminary hearing testimony of the victim, looking specifically for inconsistencies. But there was a second trial judge who considered the statement. Judge Lamb was replaced by Judge Owen.

When the discovery request was renewed at trial, Judge Owen reviewed it in camera, and before he ruled on the discovery request, he listened to the direct examination testimony of the victim. After hearing that, he denied the request, finding the evidence was not favorable or exculpatory to the defendant.

The next factual point I want to mention, he defaulted on appeal in the sense that he did not raise a discovery claim on direct appeal although he had assigned it among many other errors in his notice of appeal filed

in trial court, but he did not pursue that on appeal.

About one year after the direct appeal review was completed -- when I say one year later, I am including the denial of certiorari by this Court -- Carrier filed a pro se habeas corpus petition in the state court, but he waited almost one full year. He alleged his discovery claim. The commonwealth moved to dismiss that petition, saying that habeas corpus is not a substitute for direct appeal. You could have asserted your claim on direct appeal and did not, but we didn't leave it there. We said you are foreclosed from having it considered on habeas corpus under Virginia law in the absence of additional allegations explaining the default.

Carrier proffered none. After the state habeas proceedings were completed, including the appellate review of the dismissal of his petition for the reasons stated in the commonwealth's motion to dismiss --

QUESTION: Excuse me.

MR. SLONAKER: Yes.

QUESTION: Did you tell us that he had asserted it among a number of other grounds of appeal initially, but he did not press it by brief. Is that it?

MR. SLONAKER: That is correct.

QUESTION: Is that under Virginia law? What is the consequence of that under Virginia law?

MR. SLONAKER: At that time it was required that your issues be assigned in the notice of appeal. Now, that is no longer Virginia law, but it is significant --

QUESTION: He did that?

MR. SLONAKER: He did that.

QUESTION: Yes.

MR. SLONAKER: And that is the first step toward having appellate review, but that is only the initial step. Typically what defense attorneys do -- I am sure this is true in other jurisdictions --

QUESTION: Well, may I ask, what is the Virginia law? Was he required to brief it after he listed it in his notice of appeal?

MR. SLONAKER: No, sir, not at all.

QUESTION: And the failure to brief is what? What is the consequence?

MR. SLONAKER: The failure to brief that issue means that the issue is lost, because only claims that are pursued --

QUESTION: When you say lost, do you mean waived?

MR. SLONAKER: Waived or defaulted, so it cannot be considered.

The first issue, as attorney error is caused,

the commonwealth is not suggesting that if an egregious trial error is omitted by defense counsel such that a miscarriage of justice might result or would result, or that a fair trial would be denied, that relief should not be granted. Of course it should be granted and it would be granted by showing ineffective assistance of counsel for not pursuing that claim.

If you can't show your attorney was ineffective for admitting the claim, surely the claim is not sufficient to establish a denial of a fair trial. That is the purpose of the federal habeas review anyway, is to determine whether the petitioner receives a fair trial.

There is no magic in the fact that there is to be federal review. That is the essence of the review. This Court has already set the proper standard in the Strickland case to determine the effectiveness of counsel, reasonably effective assistance.

It is a workable standard. It is a flexible standard. And it is a time-tested standard, but unlike --

QUESTION: May I just ask one point about that? I suppose for purposes of Strickland, we look at the effectiveness of counsel for the trial as a whole. We are not just focusing on a single omission or error at one point in the trial. We look at the whole picture, right?

MR. SLONAKER: I realize, Justice O'Connor --

QUESTION: And for the cause and prejudice inquiry and the argument you are making, would you have us focus on the performance of counsel at the trial as a whole, or would you concede that you have to focus on this specific complaint, this one alleged error, and ask if it was ineffectiveness in that narrower focus only, some kind of clear failure to meet a reasonably competent standard as to a single error? I am confused.

MR. SLONAKER: I believe you would look in both cases at the whole performance, but the focus in each instance would be on the specific default or defect or deficiency of the attorney. I think a good example of this might be the Stokes case, which we cite in our opening brief, where the Supreme Court of Virginia found that an attorney was ineffective for not raising a Sandstrom defective instruction.

Now, that doesn't mean you don't look at his performance overall. In this context, on appeal, surely the Court would look to what issues he did raise, the relevant merit, so it really wouldn't be in isolation. You don't ignore what else was done, but the focus would be on the particular deficiency as it would be in any allegation of ineffective assistance of counsel.

But the standard -- I mentioned the Stokes

case, and why I think this is so significant. The Stokes case, where the Virginia Supreme Court found the attorney was ineffective, would have been wholly bypassed, that is, the state courts would have been wholly bypassed in that situation under the Carrier rule of the Fourth Circuit if prisoner Stokes had elected to go directly to federal court.

All he would have had to do was go to the District Court, allege his defective instruction, and assert as cause that he had attorney error. Under the Fourth Circuit's rule, there would be no requirement to exhaust state remedies because it is only a cause question. The state court would have been bypassed, would have had no opportunity to address that problem.

This goes to the heart of the difficulty with the Fourth Circuit's analysis.

QUESTION: May I interrupt again to get one thing straight in my mind before lunch comes? Under Virginia practice, as I understand it, he asserted this error in his notice of appeal but not in the petition for appeal. So there are two separate documents.

MR. SLONAKER: Yes, Justice Stevens. That is correct.

QUESTION: And the Virginia Supreme Court doesn't write an opinion, they just say -- it is a little

one-paragraph disposition finding no reversible error in the judgments complained of. They refused the petition for appeal. Is it their practice to look at both documents or just to look at one? Do we know?

MR. SLONAKER: No, sir, I think it is their practice to look at the issues asserted in the petition for appeal, because the Virginia rule says that if you don't assert them or pursue them in the petition for appeal, then they are not considered, so I don't think the Court would look at errors assigned in the notice. I think they would look to the errors set forth in the petition for appeal.

QUESTION: Is this a typical disposition of a criminal case where they don't write an opinion even identifying the errors they considered? I mean, it is sort of a discretionary review, sort of like our cert grant.

MR. SLONAKER: Actually, it is not a discretionary review. It is discretionary in the sense the defendant is not entitled to have a writ of error, but in the case of Saunders versus Reynolds, which is found in Volume 204 of the Southeastern Second Reports, the Virginia Supreme Court said there is a single criterion for denying or granting a writ of error, and that is the merits of the case, so it is a merits

determination, unlike certiorari with this Court, where you have any number of considerations. So it is in my judgment an appeal of right within the meaning of Evitts versus Lucey. It would be not discretionary in that sense.

The rule of the Fourth Circuit, I submit, is going to send the wrong signals to defense attorneys. What it is going to tell them is, you don't have to be careful. The pressure is off. Ignorance is bliss. Because if you overlook something, if it is inadvertent, the question can always be reviewed in federal habeas corpus. It is just the wrong signals.

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

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

AFTERNOON SESSION

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

ORAL ARGUMENT OF JERRY P. SLONAKER, ESQ.,

ON BEHALF OF THE PETITIONER - RESUMED

MR. SLONAKER: Mr. Chief Justice, and may it please the Court, as I was saying at the luncheon break, even if this Court accepts our position on the exhaustive question, and we fervently hope the Court will, acceptance of the Fourth Circuit's rule will put enormous pressure on the state courts to lower their standards, to accept mere attorney error and inadvertence as an excuse for serious procedural defaults or face the alternative of simply deferring the federal court without providing the federal court the benefit of either state factual findings or the benefit of the state court's reasoning.

Surely this Court would not accept on a routine basis attorney error or inadvertence as an excuse for such defaults. And I submit the state court should not be required to do that either.

The role of the Fourth Circuit's rule in practical application is going to cause less significant issues to occupy the attention of the federal courts. And it will undercut the very healthy role of the state default rules of motivating counsel to emphasize the

important issues.

There are a number of serious problems with the Fourth Circuit's rule, among them the very unfair distinctions that it draws. First, if you object -- I mean, if the object is fairness, if that is the purpose, the Fourth Circuit rule just doesn't make any sense. Why have a special test that if the attorney doesn't object to something, he omits the objections, then we will excuse that on the basis of attorney error, but if he doesn't call an alibi witness, which can be even more prejudicial to the defendant, he has to show ineffective assistance of counsel. The Strickland standard would apply. That is just an arbitrary and irrational distinction.

QUESTION: May I ask, do you interpret the Court of Appeals -- the Fourth Circuit opinion as applying to trial error as well as error on appeal?

MR. SLONAKER: I don't see anything in the opinion, Justice Stevens, that would limit their reasoning to the appellate default.

QUESTION: Do you think we might possibly limit the holding in this Court and then avoid some of the problems that you are discussing?

MR. SLONAKER: I don't think it would avoid the problems that I am discussing, because I think --

QUESTION: The examples you gave were trial -- errors at the trial level.

MR. SLONAKER: Yes, as far as the type of default, yes, on overlooking an issue. That is true. But I think that it wouldn't provide guidance then for the many issues that would arise in the trial context, but yes, I would agree that this Court could limit it, and that would be somewhat helpful if it at least went that far.

QUESTION: What harm would the rule cause if we did so limit it?

MR. SLONAKER: I am not sure that I am following. I am saying that if you are accepting the Fourth Circuit's rule --

QUESTION: As applying only to error on appeal.

MR. SLONAKER: I think that would be devastating, because it would have the same problem of allowing -- taking the pressure off counsel not to focus on the most important questions, not to carefully analyze the possible issues on appeal.

QUESTION: What do you do with the problem then? Assume you have a lawyer who is not totally incompetent, but just through negligence completely misses the point, and an innocent man is therefore denied

review? You just say that is too bad?

MR. SLONAKER: Justice Stevens, I submit that if the attorney makes an admission that would result in a defendant who is innocent going free, he would have no difficulty establishing ineffective assistance of counsel, if indeed the default flowed from attorney error. That is our position.

QUESTION: Is there a claim here the carrier was innocent?

MR. SLONAKER: There is no claim the carrier was innocent. In fact, the evidence was overwhelming in this case, just absolutely overwhelming. The other difficulties with the Fourth Circuit's task is the fact that this Court has recognized in numerous decisions without any question that a defendant is bound by the tactical decisions of his lawyer, yet the defendant under the Fourth Circuit's approach who has the attentive lawyer is bound, whereas the defendant who has the inattentive lawyer would not be bound. This places a premium on ignorance.

As far as the evidence, I would like to go back to that point. As I said, the evidence was overwhelming. The defendant was positively identified by the victim, positively identified by an independent witness, a Mr. Barko, who observed the two together

shortly before the offense. The victim was -- there is a positive identification by this third witness of both the victim and the perpetrator when he saw them together. There was physical evidence found at the defendant's house that tied him into the offense. The victim identified the truck and unique details. There was a shoe print of the defendant found at the rape scene. So I won't go into all of the evidence. There was evidence of blood typing that matched the defendant and put him in a 20 to 30 percent population grouping, so the evidence was truly overwhelming in this case.

The Fourth Circuit's approach trivializes the Sixth Amendment right to effective assistance of counsel. Most federal circuits, I think, recognize that because they have rejected that approach, and not a single federal circuit has accepted the Fourth Circuit's rule since Engel versus Isaac was decided, and that is really for good reason, because the Strickland test is not going to result in any denial of due process, but acceptance of the Fourth Circuit's rule is going to afford the defendant undue process. We submit that is not appropriate.

I would like to save the remainder of my time for rebuttal.

QUESTION: If you win on your exhaustion point,

what has to be exhausted?

MR. SLONAKER: It is our position that he should return to the state court to present his allegation of cause that he suffered attorney deficiency. Virginia recognizes ineffective assistance of counsel as cause for that deficiency.

QUESTION: I know, but the Court of Appeals here said it didn't have to be ineffective assistance of counsel, right?

MR. SLONAKER: That is true, but this is the problem with not requiring exhaustion. In other words, he could always bypass the state court, because if he can't show mere attorney error, he certainly can't show ineffective assistance of counsel. So unless we are going to have a bypass of the state system, surely if the type of cause is specifically recognized under state law, so that there wouldn't even be a default, there wouldn't even be a Sykes problem, it is fair to require him to return.

The American Civil Liberties Union in their amicus brief have acknowledged that if there is a state remedy, they see no reason --

QUESTION: Wouldn't you be just as happy if we said that momentary lapse of counsel is not cause?

MR. SLONAKER: No, we wouldn't be as happy

because we think the state court should have the opportunity to make that assessment of whether -- in other words, if you are going to say that under all circumstances --

QUESTION: Well, suppose you go back to state court and the state court says, well, this was not ineffective assistance of counsel, denied. Then he files another habeas petition and says, well, it may not have been ineffective assistance of counsel, but it was cause, just like you said, Mr. Court of Appeals, or the District Court said. He says to the District Court, the Court of Appeals held this lapse was cause, so give me the writ.

MR. SLONAKER: Well, that is why I think it is essential that this Court find that it has got to rise to the level of ineffective assistance.

QUESTION: All right, so we have to decide that as well?

MR. SLONAKER: I think you do. Yes, Your Honor, I think you do.

I would like to reserve -- excuse me, Your Honor.

QUESTION: On that same point, as I understand your position, if counsel makes a choice not to raise a point in either the lower court or the federal court, that is just too bad, because it is charged to the

defendant.

MR. SLONAKER: No, sir. I am saying that if he makes that decision, and that decision is within the range of competence demanded of attorneys under Strickland, he would be bound.

QUESTION: He would be bound.

MR. SLONAKER: But if he does not pass that test he would not be bound.

QUESTION: If the prosecutor violates his principles, then that is harmless error. You don't charge that to the state.

MR. SLONAKER: No, sir, that would be --

QUESTION: But they are both lawyers. The defense counsel and the prosecutor are both lawyers.

MR. SLONAKER: The prosecutor would be equally bound. In fact, he would be more bound by his mistakes.

QUESTION: Can you give me a case where they didn't find harmless error?

MR. SLONAKER: Yes, there is a case in Virginia, Rice versus Commonwealth, where the Commonwealth attempted to challenge a state statute for the first time on appeal, and the Supreme Court of Virginia held that they would not entertain the question. That is in 212 Virginia. Would not entertain the question because the commonwealth had not raised the

objection in the trial court.

QUESTION: Did they say -- was the harmless error point raised?

MR. SLONAKER: There was no consideration given to the harmless error doctrine.

QUESTION: That was the kind of case I was talking about.

MR. SLONAKER: I am not certain I understand your question, Justice Marshall.

QUESTION: Is there a case in Virginia where a prosecutor violated a rule and it wasn't declared to be harmless error?

MR. SLONAKER: Yes, sir, many situations --

QUESTION: Many?

MR. SLONAKER: -- where a prosecutor has been guilty of misconduct and it has not been found to be a harmless error?

QUESTION: Yes.

MR. SLONAKER: See, a commonwealth has no right to appeal in Virginia, so we are not in the posture -- we have no right to appeal except in revenue cases. I don't know if a revenue case has ever arisen in the last 10, 20, or 30 years. There just -- there is no context for that to arise.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court, I would like to begin by describing what our position is with respect to attorney oversights.

Our position is not that attorney oversight can under some circumstances be cause. Our position is that if the defendant is alleging attorney error as a basis for relief, he must satisfy the Strickland ineffective assistance of counsel. The cause and prejudice test, we believe, applies to something external to the defense, something, an outside circumstance that has justified the defendant's failure to raise or preserve his claim.

Now, this does not mean, contrary to the suggestion that I think the ACLU and respondent have made that nothing can be cause under the cause and prejudice test. Quite the contrary. First of all, there are situations where the court may refuse to allow a motion or objection to be made. The state may have a rule which unreasonably conditions or interferes with the ability to make or preserve a claim, or in the more common situation there will be an inability to discover through reasonable diligence the factual or legal basis for the claim at the

time when the rules call for it to be made.

Now, an example of that is the United States against Henry, a Messiah case this Court decided a few years ago in which the Messiah claim was raised for the first time in collateral attack. We did not argue there that there was a procedural default in failing to raise at a trial, because the fact that the cellmate was a government informant was unknown prior to trial.

Now, so our position is that in order to get relief on the basis of a claim which was procedurally defaulted at trial or on appeal on the basis of attorney error the defendant must satisfy the Strickland ineffective assistance of counsel standard.

Now, what are the alternatives to this position? One alternative was the view expressed in Fay against Noia and in Justice Brennan's dissent in Wainwright against Sykes. And that is that a procedural default should bar a claim only if the defendant is somehow personally responsible for it, and this view is based on the notion that it is not fair to hold the client responsible for the errors of his attorney.

Now, under this view, procedural defaults would rarely be enforced, but I think there is little question that this view was rejected by the Court in Wainwright and again rejected in Engel.

Now, what has happened in this case is a search for an intermediate position by the Court of Appeals, and under this position as I understand it the client's personal waiver is not required, but he is still not to be bound by his lawyer's action unless in effect the lawyer deliberately waived the right by choosing not to raise an issue of which the lawyer was aware.

Now, it seems to me there are several reasons for rejecting this effort. First of all, I think it is quite clear that this can't be squared with Engel. There is language in Engel versus Isaacs that unequivocally talks about the lawyer overlooking a claim, the lawyer's unawareness of the claim, and makes it quite clear that that is not cause to excuse a procedural default.

Now, there is another problem. I am not sure that I totally understand what the Fourth Circuit's test is. It seems to me clear in this case that what happened is that the lawyer in his assignment of error listed everything he could think of, and then when he got around to preparing the petition for appeal, selected from among those things the issues that were thought most likely to gain the attention of the Virginia Supreme Court, discarding others.

Nevertheless, the Court of Appeals here reversed, and in fact it suggested that almost surely

this was the kind of attorney error that would constitute cause, but it did send it back for a hearing. Now, what is the situation in the case where the attorney considers he is aware of the potential existence of a claim but decides that it is not sufficiently meritorious to be pressed? Is that under the Fourth Circuit's test going to be a waiver of the claim, or is it not going to be a waiver of the claim?

Now, if that is going to be an excusable default in that case where a legal error causes the lawyer to choose not to press a claim, then we will be back essentially to Fay against Noia, and the cause and prejudice standard of Wainwright will be pretty much wiped out in any case where the lawyer has failed to preserve the claim.

I don't think the Fourth Circuit meant to go that far. I think what the Fourth Circuit meant to say was, well, if the lawyer doesn't realize the claim exists, that is cause. If the lawyer realizes the claim exists but chooses through a legal mistake not to press it, that is not cause.

Now, in our mind this creates a totally irrational system for deciding what constitutes cause and what doesn't constitute cause, and in thinking about it I have come up with a little parable to try to illustrate

this.

Long ago there was a kingdom in which the king liked to hold cooking contests, and every week he would have a contest, and in this particular week he decided to have an apple pie baking contest. And all the nobility participated, and there were two noblemen who sent their cooks out to make apple pies and submitted a pie to the contest, and they were denied any award in the contest because there were no apples in the pie.

The king said, sorry, no apples in the pie, you can't get any prize. Well, this was a litigious country, and they filed suit, claiming that they were entitled to this prize, and they each brought in their cooks, and one cook said, I didn't realize there weren't any apple trees in the garden. It is true, there was one there, but I just didn't realize it. And the other cook said, I knew there was an apple tree, and I went out there, but I didn't think my ladder was tall enough to reach the apples.

Now, under the Fourth Circuit's result, one of those noblemen is entitled to the prize and one of them is not, because in one case the cook was unaware there was an apple tree. In the other case, the cook wrongly thought he couldn't reach the apple tree with his ladder.

Now, to come back to our defendants here, what

difference does it make to the defendant, what difference does it make to an equitable resolution of this problem whether the lawyer failed to recognize that there was a claim or recognizing that there was a claim erroneously failed to recognize that the claim had legal merit?

It seems to me this is a completely unworkable standard. Now, it is not only unworkable, but I think it totally undermines what the Court accomplished in Strickland. Strickland is really -- can fairly be viewed also as a procedural default case.

The claim in Strickland was, my lawyer failed to put on evidence. I would like another hearing at which evidence that tends to be exculpatory or minimize my culpability and justifies a lighter sentence can be put on.

The state's answer to that essentially is, no, you have failed through the exercise of due diligence to put on evidence that was available to you. You have defaulted. You don't have the right to come back and have another hearing.

Now, it seems to me that essentially the claim in Strickland is not different in character from the claim in this case. In both instances, there is a failing by the lawyer, a default or a claim of a default by the lawyer.

Again, in Strickland, the Court labored, pondered the question, and decided that the way to deal with these feelings -- Yes?

QUESTION: Let me try one.

MR. FREY: All right.

QUESTION: Tried in the federal criminal court, and claim of ineffective assistance of counsel, and the only claim is that the counsel did not ask for Jenks Act material. And his response is, who is Jenks?

MR. FREY: Well, I don't think that the --

QUESTION: Would that be ineffective?

MR. FREY: Well, I can't answer your question on the basis of the facts that you have supplied me applying the Strickland standard. First of all, I don't think the Strickland standard looks to the subjective state of mind of the defendant, and I would point out that one of the problems with the Fourth Circuit standard is that it requires you to bring the lawyer in and ask him, well, did you hear about Jenks, have you heard about Brady, what do you think it means, why did you or didn't you make your claim?

In your case, you would have to look at whether a reasonable competent attorney under the circumstances would clearly have asked for it, and then you would also have to look at how important the -- material is.

QUESTION: Well, after you look at all of that, would you find him anything?

MR. FREY: I -- I might. But I would have to know more about the rest of the case. I would have to know how important the undisclosed Jenks material was to the overall case.

QUESTION: Mr. Frey, doesn't Justice Marshall's example, just like this case, say that you really -- how can you answer without knowing what the Jenks Act material is, or how can you answer this question without seeing the file?

MR. FREY: That is to do away with the procedural default doctrine altogether, because the premise of all of these situations is that the defendant had a meritorious claim which he has lost. Otherwise there is no point in worrying about whether there is a cause or not.

QUESTION: In your view, does the strength of the claim have any effect on the analysis, or do we treat all the claims alike?

MR. FREY: Well, I know that your view was that the strength of the claim would, and I think the strength of the claim would have relevance under the Strickland standard. It would be part of the determination, but I think under the cause and prejudice analysis, if you were

going to go that route, I don't think it would. That is --

QUESTION: So the rule would apply, because -- Justice Rehnquist raised it earlier. Even if this undisclosed material would in fact show the man to be innocent, it would still be the same rule.

MR. FREY: Well, I would have to say in answer to your question again that the premise always is that he would prevail. If he hadn't defaulted, he would have prevailed either in state court or in federal habeas proceeding. So I suppose that is true. There is, of course, the remedy of executive clemency where it is demonstrated, and that is an available remedy.

QUESTION: How many judges passed on this in camera?

MR. FREY: Excuse me?

QUESTION: Did two judges pass on this?

MR. FREY: My understanding is, the two trial judges did examine this, yes.

Thank you.

CHIEF JUSTICE BURGER: Mr. Cohn.

ORAL ARGUMENT OF SHERMAN L. COHN, ESQ.,

ON BEHALF OF THE RESPONDENT,

APPOINTED BY THIS COURT

MR. COHN: Mr. Chief Justice, may it please the

Court, the issue before this Court is really quite a narrow one, the meaning of the word "cause" under the Wainwright versus Sykes doctrine, and it is really narrower than that.

Justice O'Connor referred to the key issue in this case in her question in the first few moments of the argument. The Fourth Circuit's decision is really much narrower than either the Commonwealth or the Solicitor General would make it out to be.

The issue that was stated by the Fourth Circuit, and this is on Page 8 of the appendix, the precise issue to be resolved in this case is whether Carrier's assertion of ineffective assistance of counsel can make out Wainwright cause.

What we have here is not a question of mere error, mere negligence. What we have here is the Fourth Circuit, read in context of the issue, read in context of its discussion of this issue, holding that the performance part of Strickland, holding that the incompetency argument that was made by Carrier would have to be used as the standard to see whether this one default, this single glitch met the performance standard that Strickland lays down.

This can be seen in the Fourth Circuit's opinion in the appendix at the bottom of Page 11. After

reviewing a series of cases, the Fourth Circuit said, from these authorities we conclude that attorney error short of wholesale ineffectiveness of counsel can constitute Wainwright cause.

Now, I would like to posit and emphasize that word "wholesale," that under the Sixth Amendment, we are looking, as Justice O'Connor pointed out, to the overall performance in the case. Here, the Fourth Circuit said we are looking at the one default to see whether it met the performance test of Strickland.

The Court goes on. A procedural default is excused not when counsel reasonably but incorrectly exercised his judgment, but when through ignorance or oversight he fails to exercise it at all in dereliction of the duty to represent her client.

This is what we mean by attorney error. I suggest that the Fourth Circuit in trying to find the midground to which Mr. Frey referred found a very narrow one that preserves the concept of cause under Wainwright versus Sykes as applied to attorney conduct or misconduct.

QUESTION: Mr. Cohn, now, does the standard the Fourth Circuit applied require holding a hearing in every case that a habeas petitioner alleges some colorable constitutional claim when the record doesn't show why the

attorney acted as the attorney did?

MR. COHN: In this case --

QUESTION: And isn't that kind of an unfortunate standard to have in these cases?

MR. COHN: In this case, Your Honor, we have more than that. We have, first of all, that the default is clear. Secondly, we have the assertion that it was through the ineffective assistance of counsel, and that there was no consultation.

Putting those three points together, I suggest that the lower court could reasonably determine that it wanted to note more. I am not saying that every judge, every trial judge would come out with that same conclusion, or every Court of Appeals panel would come out with the same conclusion.

QUESTION: Well, the Fourth Circuit test does seem to suggest that that would be the result, and I just wonder if that is in keeping with what justified the court's holdings in Wainwright against Sykes and in the Engel case.

MR. COHN: Your Honor, in Wainwright versus Sykes there is the cause prejudice exception to the procedural bar. I would assume that the Court contemplated that it has some meaning, and that there will be occasions when the petitioner is going to allege

enough to go on to the next stage, which is the possibility of a factual hearing.

That factual hearing can be very attenuated. Here all that somebody had to do, I would suggest, as a first step is ask counsel, what happened, why.

QUESTION: But if it is that simple, then what the Fourth Circuit has really done, isn't it, is to say that it is a deliberate bypass test, but you apply it to the lawyer and not to the client.

MR. COHN: Your Honor, in this narrow situation, that may be so, but it is deliberate bypass in the same sense that the Chief Justice pointed out in Jones versus Barnes. You are looking for counsel exercise of the minimum skill being counsel, and as the Fourth Circuit says, we aren't here to second guess judgments made. We are here to look whether judgment was made.

QUESTION: But it puts a premium in a sense on knowledge rather than judgment, it seems to me, because if you say the lawyer knew about this issue but decided to waive it, then he can't make anything of it, whereas it might have been just terribly bad judgment to waive it even though he knew about it.

MR. COHN: As Jones versus Barnes points out, any appellate counsel having a series of potential issues

before him has to winnow out those issues that he considers to be the strongest. That is an exercise of judgment.

I may consider that a particular counsel is wrong in the exercise that was made, and here, if counsel did exercise that judgment, the counsel has met the minimum competence performance test of the first prong of Strickland. On the other hand, if there is any other explanation, I don't know what it would be, because I don't know. Nor did the Court of Appeals, nor, with all due respect, does Mr. Frey know what happened and why it happened.

QUESTION: Well, counsel, you keep saying the first prong of Strickland would be met. Are you defending the Court of Appeals judgment that cause is supplied by a counsel, a lapse of counsel short of ineffectiveness? Are you defending that or not? It doesn't sound like it.

MR. COHN: Well, it all depends on your meaning of ineffectiveness, Justice Blackmun.

QUESTION: Well, all I --

MR. COHN: I mean, if --

QUESTION: The Court of Appeals said it didn't need to amount to ineffectiveness of counsel.

MR. COHN: If you mean by ineffectiveness the

wholesale --

QUESTION: What did the Court of Appeals mean? I will just ask you again.

MR. COHN: Okay

QUESTION: Are you defending the Court of Appeals opinion, and if so, tell me what it means?

MR. COHN: I am defending the Court of Appeals opinion as I believe it is meant in a narrow holding. There is language within the opinion that one could take out of context and read differently, and the commonwealth and the Solicitor General has done so.

QUESTION: So you concede that reading is just wrong. Is that it?

MR. COHN: I concede that --

QUESTION: Or you just don't defend that language.

MR. COHN: It is unnecessary to here to begin with, and also, once we get to the question of mere error, whatever that may mean, I have difficulty articulating a test.

QUESTION: If it is really -- if the issue really was ineffectiveness of counsel, why shouldn't you have to exhaust it?

MR. COHN: Because we are here talking about not ineffectiveness as an independent Sixth Amendment

claim, which would get the petitioner complete relief in its own mind. Instead, we are looking at one here, one incident, and we want to under the cause prong of the Sykes case, we want to get to the constitutional issue that is really the merits of the petition.

In order to do that, we are looking at the competence of what was done, and I am talking about Strickland competence, of what was done in this one incident.

QUESTION: But you don't have to meet the second prong of Strickland in showing its effect on the outcome of the trial under the Fourth Circuit's view, in your view, I take it.

MR. COHN: Justice Rehnquist, the cause prong of Sykes as construed in this type of situation only gets you over an initial hurdle. There is still the entire problem of prejudice.

QUESTION: Well, the Court of Appeals remanded it to find to deal with prejudice if you got that far.

MR. COHN: That is correct, Your Honor.

QUESTION: Now, what do you conceive to be the prejudice inquiry if you got that far in the District Court.

MR. COHN: I think, Your Honor, that somebody would have to take a look at those notes.

QUESTION: And then you would ask, would they probably have made a difference in the outcome of the trial?

MR. COHN: That's correct.

QUESTION: Which is the other end of the ineffectiveness claim, too, isn't it?

MR. COHN: We have sort of jostled a bit between counsel as to whether the prejudice test under Sykes and the prejudice test under Strickland are any different, and we have each tried to pick out the language. I don't think that that is clear as to --

QUESTION: You don't think there is clearly any difference between them. Is that it?

MR. COHN: If there is one, I have a strong difficulty in articulating it. So it may very well end up that there is no difference in the prejudice prong, but we aren't there.

QUESTION: If there is no difference in the prejudice prong, does it really make any sense to generate this middle ground and have a new body of doctrine grow up about it if really it isn't going to make a whole lot of difference as to what happens to the habeas petitioner in the end?

MR. COHN: It makes a difference in this sense, Justice Rehnquist, that under Sykes, one is able to get

into court, show cause, and get to the constitutional or the claimed constitutional violation, and if that is prejudicial.

QUESTION: You are already dealing with the merits of that claimed constitutional violation in this case when you deal with the prejudice angle, I would think.

MR. COHN: I don't know how --

QUESTION: Because the claimed violation is a failure to turn over these statements, isn't it?

MR. COHN: But in order to determine whether that is prejudicial, one has to examine the documents that were not turned over.

QUESTION: I agree with you. I agree with you.

MR. COHN: And I don't see how else to do it.

QUESTION: And if you have to get to this kind of a question, I would think you would want the state courts to deal with it in the first instance, to exhaust it. Would it have made -- wouldn't it have made some difference in the outcome of the trial? Isn't that something that state courts ought to look at?

MR. COHN: Well, Your Honor, that is what this Court spoke about in Sykes and in Engel. Footnotes 27 and 28 in Engel speak exactly to this point, that there

is a difference between a Sykes waiver and the problem of exhaustion. Sykes waiver gets you into federal court. The cause and prejudice end of it is the entry ticket, if you will, to get to the constitutional claim, and that is an entry ticket into the federal court.

Sykes does not say, Engel clearly rejects that you have to go to the state court first. Moreover, the commonwealth does not make that argument. The commonwealth has disavowed in its reply brief that one has to go to the state court to prove Sykes cause at the bottom of Page 14, top of Page 15.

QUESTION: I am talking about prejudice.

MR. COHN: I am sorry, Your Honor?

QUESTION: We were talking about prejudice, not cause.

MR. COHN: Well, it seems to me to be quite bifurcated to say that under Sykes --

QUESTION: Well, how would you solve it, taking them both to state court or neither?

MR. COHN: I would take a Sixth Amendment independent violation claim to state court. I would take the Sykes -- the Wainwright versus Sykes cause prejudice solely to federal court, and that, as I understand it, is the position of the state as pointed out in their reply brief at the bottom of Page 14 and the top of 15, where

the state says, at no time has the commonwealth ever advocated that Carrier must return to state court so that the state courts be given the opportunity to determine whether he can demonstrate Sykes' cause.

So, it is a position that the commonwealth does not urge on us. Instead, they urge very carefully that there may be some kind of a cause exception under Virginia law to the Virginia procedural bar. They urge that despite the clear language of the rule that there is none. They cite no case that so holds. The one case that they do cite at most is the dictum in an unreported order. And I am not even clear it rises to that dignity.

And besides that, we have a situation here where the man came to the state court with his claim, and he said, I don't know how to put this in proper form. Give me counsel so that I can put my habeas claim into the proper form. He asked for it. It was denied.

We are struggling here with the intricacies of state cause if it is exists, of Sykes cause, whatever that might mean in this context, of prejudice in this context. I suggest to the unlettered pro se, the petitioner to put this burden on him without help is quite unrealistic.

There was a state habeas review here. There

was an attempt on his part to meet whatever procedural hurdles there were. Give me counsel, he asked for. The state turned him down.

QUESTION: Mr. Cohn, may I interrupt there?

MR. COHN: Yes, Your Honor.

QUESTION: I am having a little trouble following the significance of the failure to provide counsel. Supposing you had been appointed counsel for him at that stage. Could you have drafted a better state habeas corpus petition that he drafted himself?

MR. COHN: I think what counsel would have done, Your Honor, is to inquire into the facts, at least those facts that weren't under seal, and --

QUESTION: How would he have gotten them? The prosecutor says, I don't have to turn them over to you.

MR. COHN: He would have asked the appellate counsel on direct review what happened, why didn't you raise that issue. He would have had more facts at his command than this petitioner had, and supposedly counsel would be better able to --

QUESTION: Supposing counsel had said, well, I only had -- figure my experience in the Virginia Supreme Court is, they don't ever grant review if you plead too many points. I took my three best. I knew this error was there but I thought the trial judge was probably

right when he looked at it and he found no exculpatory material. I just thought these were the three stronger points. That would just be the end of the ball game?

MR. COHN: I would assume so. Yes, Your Honor. But it would have been the end of the ball game upon some intelligent knowing of facts, and that is what this case is about.

But we are -- I would assume that counsel would not only do that, but would have a better idea of the answers to these arcane questions that we are struggling with here today than a pro se litigant would have.

Are there any other questions? If there are none, I submit.

CHIEF JUSTICE BURGER: Do you have anything further?

MR. SLONAKER: Nothing further, Your Honor.

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

(Whereupon, at 1:39 o'clock p.m., the case 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:

84-1554 - EDWARD W. NURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioner V. CLIFFORD W. CARRIER

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

BY Paul A. Richardson

(REPORTER)