OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1661

TITLE IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL., Petitioners V. NEIL MORRISON

PLACE Washington, D. C.

DATE March 5, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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IRWIN I. KIMMELMAN, ATTORNEY :

GENERAL OF NEW JERSEY, ET AL., :

Petitioners, :

V. : No. 84-1661

NEIL MORRISON :

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Washington, D.C.

Wednesday, March 5, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:53 o'clock a.m.

APPEARANCES:

ALLAN J. NODES, ESQ., Deputy Attorney General of New Jersey, Trenton, New Jersey; on behalf of the petitioner.

WILLIAM E. STAEHLE, ESQ., Mountain Lakes, New Jersey; 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 Kimmelman against Morrison.

Mr. Nodes, I think you may begin whenever you are ready.

ORAL ARGUMENT OF ALLAN J. NODES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. NODES: Thank you. Mr. Chief Justice, and may it please the Court, defendant in this case is in custody due to his condition for the rape of a 15-year-old girl. He seeks habeas corpus relief, claiming that he was denied the effective assistance of counsel at trial. This contention is based on a Fourth Amendment claim which was not litigated in state courts due to a procedural default.

During trial, a bed sheet which has been obtained from defendant's room following the crime was introduced into evidence. This bed sheet contained a semen stain which matched defendant's blood type, several hairs which were found to be morphologically similar to defendant's hair type, and a single head hair which was found to be morphologically similar to the victim's hair.

When the prosecution entered the bed sheet into evidence, the defense counsel for the first time at

trial objected, claiming that it was obtained in violation of his Fourth Amendment rights. Since this motion was well beyond the time limits allowed by New Jersey court rules, and in fact was one year beyond that time limit, and since defendant was unable to demonstrate good cause for this procedural default, the trial judge did not entertain the motion.

New Jersey's appellate courts affirmed this ruling, and in addition ruled that defendant had been effectively represented by counsel at trial.

MR. CONSTANTINE: Mr. Nodes, was there ever any evidentiary hearing in the trial court as to the circumstances surrounding the seizure and that sort of thing?

MR. NODES: No, Your Honor, there was not.

On habeas corpus, the district judge ruled that counsel's actions in not making a suppression motion in this case were below the normal standards of competency. In addition, he ruled that had a suppression motion been made in this case, the evidence would have been excluded. He also found, contrary to the findings of the trial judge who sat as a finder of fact in this case, that this error, if any, was not harmless.

We believe that these rulings were erroneous

and improper. We believe that the district judge erred both in reaching the merits of the Fourth Amendment claim and in reaching that the Fourth Amendment had been violated in this case.

QUESTION: How was this case tried in state court?

MR. NODES: This was a bench trial. It was a bench trial at defendant's specific request. So the trial judge sat as the finder of fact in this case.

QUESTION: Did the trial judge in effect make a finding, or at least expressed in some way the harmless error --

MR. NODES: Yes, we believe he did, in two different ways. Firstly, at trial, at the conclusion of the trial, prior to giving his verdict, he expressed his observations of the case and gave his reasons for reaching his verdict. At that time he spoke only of the credibility of the defense witnesses and the prosecution witnesses, and obviously found the main witness, the victim, to be the most credible.

More importantly, at a bail hearing following the trial at which the trial judge was required to determine whether or not there was any good cause for appeal or any issue on which defendant could prevail, he was confronted with the issue concerning the bed sheet,

and he ruled that this bed sheet evidence was only one small part of the whole case.

Clearly, if he did not believe that this error was harmless, knowing that a supression issue, a Sixth Amendment and a suppression issue were to be litigated before the appellate courts, he would have to have ruled that there was a possibility of success on appeal. He said that there wasn't because the --

QUESTION: Would you say that he characterized that evidence as cumulative?

MR. NODES: Oh, I believe that this evidence was either cumulative or in some parts not --

QUESTION: Did the trial judge characterize it in essentially that way?

MR. NODES: He compared. I don't know that he used the term cumulative. He did compare the evidence such as the semen stain found on the bed sheet with the semen stain that was found on the victim's underwear.

QUESTION: Didn't somewhere, at some point, he express the view that without that evidence he would have reached the same conclusion?

MR. NODES: Yes, he did state, I think, fairly clearly at the bail hearing after stating that the bed sheet evidence was only one small part of the whole case, he did state that the main evidence in the case

was the credibility evidence, and the bedsheet had little importance. I believe that it is clear from his ruling that the bed sheet evidence was cumulative evidence, and that that was his feeling, and I believe that that is demonstrated also by his findings at the end of trial, and of course we realize he was not required to make those findings, but he did at some length explain the reasons for his decision, and the reasons for his decision were based almost totally on the credibility of the witnesses. He simply found defendant's witnesses to be uncredible and the victim in this case credible.

So, introduction of this evidence, we suggest, was harmless beyond a reasonable doubt. We do believe that the judge erred in reaching the Fourth Amendment claim because by reaching the merits of this claim, he violated this Court's mandate in Stone versus Powell. Stone, of course, precludes federal habeas corpus litigation in situations in which defendant has had full and fair opportunity to litigate a Fourth Amendment issue before the state courts.

The New Jersey court rules provide such an opportunity to every criminal defendant. In fact, the District Court on habeas corpus in this matter found that petitioners' petition for habeas corpus did not

even allege that he was denied a full and fair opportunity to litigate his Fourth Amendment claim, and the District Court at habeas corpus in his opinion stated that if such a contention had been made, it would have been totally without basis in fact.

To allow defendants to avoid the reasoning behind Stone v. Powell by phrasing their claim in Sixth Amendment terms rather than Fourth Amendment terms does violence to the reasoning behind that opinion, and will eliminate the benefits of finality and comity which that opinion was intended to enhance.

Stone v. Powell is based on the premise that deterrence is the reason for the exclusionary rule, and that if states provide an opportunity to litigate Fourth Amendment claims in the state courts, the deterrent potential of the exclusionary rule will be fully realized. The exclusionary rule, of course, is not intended to provide a personal benefit to criminal defendants, but to discourage police misconduct.

Therefore, defendants whose suppression motions are denied cannot claim that they have been denied a personal right, but only that society has not received whatever deterrent effect suppression in their case might have cost.

This Court found in Stone versus Powell that

the incremental benefits of applying Fourth Amendment law and exclusionary rule law on habeas corpus would be small. Thus a defendant who claims that he was denied suppression due to the ineffective assistance of counsel can really only claim that society has been denied certain minor benefits which they might have received had the counsel acted differently.

He still stands convicted on the basis of highly reliable evidence, and as in this case, rarely is evidence which is found to have been obtained in violation of the Fourth Amendment found to be unreliable, and there will be very little chance of an unjust conviction.

Claims of this type are really Fourth Amendment claims even though raised under the Sixth Amendment, and should be treated as such. Defendant should no more be allowed to raise Fourth Amendment claims under the Sixth Amendment than they are under the Fourth Amendment.

We suggest that this is particularly true in cases such as this in which the attorney error, if any, amounts to a procedural default of a reasonable state rule. In other situations, attorney error or miscalculation concerning the law or the facts does not constitute cause under the first crime of Wainwright v.

Sykes.

In a number of cases, including Reed v. Ross, this Court has noted that the criminal trial process is extremely complex, and if the system is to run efficiently so that just results can be reached in criminal trials, it is necessary that the states enact and enforce a series of rules and procedures.

Of course, if these rules are violated, it will nearly always be an attorney who is responsible for the violation. He is the one who makes the objections. He is the one who makes motions in cases. He will almost always be responsible.

If a criminal defendant is allowed to excuse the violation of a procedure or a rule simply by claiming that the attorney has made the error, or attorney responsibility, there will be no way to enforce the rules since on habeas corpus a defendant who makes that type of claim in state court and does not prevail because the state court holds its own rules, will be able to claim a due process violation, and in doing so, if successful, will be able to effectively enforce noncompliance with the court rules.

If this were allowed, we believe that the court rules would become meaningless because there would really be no way to enforce them in a meaningful way.

QUESTION: Mr. Nodes, there was an admitted violation here, wasn't there?

MR. NODES: A violation of the Fourth Amendment?

QUESTION: Yes.

MR. NODES: We believe that on the facts of this case, that determination can't be made. The state, of course -- there was no hearing held. What was admitted and what we would still agree is that the record in this case does not demonstrate a reasonable grounds for the search and seizure, but there was no suppression hearing in this case, so the state never had to meet its burden.

QUESTION: Is there any reason why a warrant wasn't obtained?

MR. NODES: I don't know the reasons why a warrant wasn't obtained, and I wouldn't want to make any statement concerning that, because we simply don't have that in the record in this case at all. I might note that this case now is eight years old. At the time the habeas corpus proceeding was held the case was six years old. I would suggest that it would be quite a bit more difficult to put on a suppression motion and find out that the motivations of the officer at the time of the crime, six years after the fact, then it would be six

months or a year after the fact, and that is one of the main reasons why suppression motions are normally held before trial and why in New Jersey the requirement is that a suppression motion be made within 30 days of the time the plea is entered. We simply need to do it, especially in a warrantless situation, at a time when memories are fresh. But I can't make an offer of proof that there was any particular reason for the search in this case.

QUESTION: May I ask you a question about your original suggestion that it is harmless error because the trial judge at the hearing before the appeal indicated that? Is the record of the proceeding when the request for a bail-setting appeal was made in the printed materials before us? I don't seem to be able to --

MR. NODES: Yes, I believe it is. I believe that was in the materials that were submitted to the Third Circuit and to this Court. I will check on that and ensure that you have that.

QUESTION: You don't know whether it is in the joint appendix or the appendix to the petition for certiorari?

MR. NODES: I don't believe that we placed it in the joint appendix or in the petition for

certiorari. Most of the record we submitted -- the Third Circuit submitted copies to this Court. We could submit additional copies immediately if the Court would like.

QUESTION: It is not in the regular material?

MR. NODES: No, I don't believe it is there.

We do not believe that this Court's rulings require the effect that state courts be unable to enforce their procedural rules, and we believe that this is one of the primary reasons behind decisions such as Wainwright v. Sykes and such as Engle v. Isaac.

In Engle v. Isaac, for instance, it was clear that the attorney had failed to make an objection, and he failed to make an objection on the basis of a rule which many, if not most attorneys would have known about at the time when the objection was required.

Still, his failure not to make that objection did not constitute good cause under Wainwright v. Sykes. In effect, the Wainwright v. Sykes line of cases assumes attorney error, but still requires that a showing of cause be made in order to justify procedural defaults.

Attorney error in these cases, the rule, not the exception, that is the way the case gets to the

level where a Wainwright v. Sykes determination is made in the first place. If it were not the rule that additional cause had to be shown in this type of a situation, we suggest that the cause rule in Wainwright v. Sykes would simply be swallowed up by the exception.

QUESTION: Let me also ask you another question, because I may not have the case properly in mind. Is this a case in which the attorney error, he just made a mistake on this particular claim, or is it assumed that he was ineffective in his total responsibility to his client?

MR. NODES: There is absolutely no inference whatsoever that he was ineffective in any respect except in failing to make the exclusionary motion.

QUESTION: Is it not correct that the lower courts treated it as though the ineffectiveness in this regard was so serious that it violated the Sixth Amendment. It wasn't just -- or am I wrong?

MR. NODES: They treated this one error as if it were a Sixth Amendment violation.

QUESTION: And your position is that even if it were a Sixth Amendment violation, and I suppose even if his total representation was ineffective, that still he can't raise this point. Is that right?

MR. NODES: No. We don't say that if his

entire representation was ineffective that he couldn't raise this point. If his entire representation throughout the trial were ineffective, this might be one of many points that would be raised or freely considered.

QUESTION: Supposing there were two things he did wrong instead of one, and he said, putting those two together, it violates the Sixth Amendment. One of the things was the Fourth Amendment omission. Could he do it that way?

MR. NODES: I think that the Court could consider the effect of the other violation, the Wainwright type violation in considering whether his representation throughout the trial was effective, but that would be only one part of the inquiry, and standing alone it would not normally --

QUESTION: What you are saying is, if the only evidence of ineffectiveness, no matter how serious and gross it may have been, if it all relates to the Fourth Amendment claim, it is barred by Stone against Powell.

MR. NODES: Yes.

QUESTION: I see.

MR. NODES: Even if that is the only evidence against the defendant.

QUESTION: Under the Stone v. Powell inquiry,

yes, I would say that that is correct. Under Stone v. Powell --

QUESTION: Do you think that is the only evidence and the attorney fails to move for its exclusion when grounds exist to exclude it that that would never amount to ineffective assistance of counsel under the performance standard of Strickland?

MR. NODES: I think that if the courts were willing to make the inquiry, the performance standard of Strickland might be found to meet it. What I would suggest is that in the Fourth Amendment area this inquiry should not be made, or that Stone v. Powell would lose most of its effect if such an inquiry is made.

Stone v. Powell assumes, as most cases do, that most Fourth Amendment evidence is highly reliable and that there will not be an unjust result because of the admission of this reliable evidence, and Stone v. Powell relies on the state courts to make determinations concerning Fourth Amendment motions.

We believe that in almost any Fourth Amendment situation where a defendant could claim that the trial judge erred in failing to exclude evidence, he could also claim that his attorney erred in failing to properly present witnesses, and failing to properly

cross examine, and failing to properly bring case law before the trial judge or argue the case before the trial judge, in addition to the fact that he could err in just not bringing the motion itself. We believe the inquiries into the attorney performance concerned a discretionary motion such as an exclusionary rule motion should not be made for the same reason as we don't delve into the reasons for excluding evidence in a normal exclusionary rule context. We believe that the state courts can take care of the Fourth Amendment rules as well as the District Courts can on habeas corpus, and that that is sufficient for exclusionary rule purposes.

We also don't believe that we have a situation here where we normally will have ineffective assistance of counsel simply because of the elimination of this type of evidence.

QUESTION: Did either the District Court or the Court of Appeals say, analyzing the performance here in terms of the Strickland versus Wainwright or Washington, whatever that case name is, that there was ineffective assistance of counsel across the board?

MR. NODES: The District Court did not rule on the basis of Strickland versus Washington. The District Court ruled under the Third Circuit standard, which was somewhat easier for defendants to meet than Strickland

is. In that situation the trial judge ruled that the error was not harmless beyond a reasonable doubt.

However, the District Court also said that regardless of whether the Third Circuit standard was used or New Jersey's farce and mockery standard were used in this case, that the single error would have been ineffective assistance of counsel. The Third Circuit seemed to imply that the conduct was professionally unreasonable, but remanded for a decision on the Strickland issue to the District Courts, and Strickland hadn't been decided at the time the District Court ruled.

QUESTION: Was there an evidentiary hearing in the District Court on this Fourth Amendment question?

MR. NODES: No, there was no evidentiary hearing on the Fourth Amendment contention. The District Court reached its ruling based on the trial record in this case.

QUESTION: Even though the state court had not held any evidentiary hearing on the Fourth Amendment.

MR. NODES: That's correct.

QUESTION: The ineffectiveness claim has been exhausted, hasn't it? It was raised in the appellate courts of New Jersey?

MR. NODES: Yes.

QUESTION: I don't see that -- but it only went to the intermediate court, didn't it?

MR. NODES: I believe that that was raised before the Supreme Court, but I will check that. I believe that it was raised on the petition also.

QUESTION: Was there an opinion written by the Supreme Court?

MR. NODES: No, the Supreme Court simply denied certification.

QUESTION: So the only opinion we have is of the intermediate court.

MR. NODES: Yes, New Jersey appellate

QUESTION: That court didn't seem to apply a farce or mockery standard.

MR. NODES: That court used language which is similar to the language used by this Court in Strickland, for instance, or by many circuit courts prior to Strickland, talking about confidence. The District Court found that it had in fact used the farce and mockery standard because the Appellate Division of the decision refers to State v. Edge, a New Jersey Supreme Court case in which the farce and mockery standard was announced.

QUESTION: Yes, but that isn't what the intermediate court said.

MR. NODES: No, that isn't precisely what they said. We did argue for the farce and mockery standard. That is not what the Appellate Division said.

On the Wainwright v. Sykes issue, we would suggest that the caused crime has not been met in this case because it is very clear that the attorney in this case was an experienced New Jersey trial lawyer who was well aware of New Jersey's court rules, and his only possible error in this case was in the miscalculation of the possible excludability of a single item of evidence.

We don't believe that this can meet the caused crime of Wainwright v. Sykes, a single error of this type, and at the very least we feel that a review of the entire trial would be necessary in a situation such as this prior to overcoming the procedural bar.

We also don't believe that defendant has met the prejudice crime of Wainwright v. Sykes in this case. Really, he can only claim that he was convicted on the basis of highly reliable and highly probative evidence which he hoped to keep from the fact finder due to a rule which was intended to deter police generally, not to provide him with a personal right.

QUESTION: May I ask you, I am not quite sure I understand the thrust of the Wainwright v. Sykes argument. It is clear the Fourth Amendment claim is

procedural default as to that, but why is there procedural default as to the Sixth Amendment?

MR. NODES: I believe that underlying this -- I believe that the Sixth Amendment claim, the entire Sixth Amendment claim in this case is based on the contention that the attorney made an error in not making the motion for exclusion at the proper time under New Jersey's court rules.

QUESTION: Is it your position that the attorney at the trial had to in effect challenge his own failure to make that motion?

MR. NODES: No, I believe the attorney at trial gave what reasons he had for failing to make the motion and blaming it on a prosecution incorrectly.

QUESTION: I don't see how you can say it is procedural default when the intermediate court accepted the issue and decided it.

MR. NODES: Well, the procedural court decided the -- I don't believe that the procedural default in this case is the same inquiry as the Sixth Amendment inquiry. What I am saying is that when there is a procedural default in a case and that is clear -- in this case there is no doubt that there is a procedural default --

QUESTION: Yes, but you don't need that,

because you have got Stone against Powell on the Fourth Amendment anyway.

MR. NODES: Well, I believe that those are separate inquiries, and if we have Stone versus Powell, that would take care of the first part of it. We suggest it would take care of the Sixth Amendment inquiry also, but we believe that on the procedural default line of cases, there was definitely a procedural default in this case such as would normally --

QUESTION: And what was it that they failed to do that they should have done?

MR. NODES: The defense counsel made his motion for suppresion a year outside the time which was allowed by the New York and New Jersey courts.

QUESTION: The default was the failure to move to suppress the evidence.

MR. NODES: That's correct.

QUESTION: And that bars both the Fourth Amendment claim and the Sixth Amendment claim, even though the man who failed to make the motion is the one who is claimed to be incompetent.

MR. NODES: Yes, we believe so, and we believe so because in almost all the Wainwright v. Sykes cases, the person who failed to take the action is always going to be the defense attorney. In Wainwright itself --

QUESTION: Yes, but in those claims you are not claiming -- the constitutional claim is not ineffectiveness of coiunsel.

MR. NODES: Well, what we would argue is that the final result in each of the Wainwright cases would not turn out to be the opposite merely by also saying, and the Sixth Amendment was also violated. We don't think that that entire line of cases can be overruled simply by writing in the words "Sixth Amendment" next to the claim. That is what has been attempted in this case.

There is an admitted procedural default, and what they are saying is, the attorney did it. What we say is, of course the attorney did it. In the procedural default cases the attorney always does it, and that doesn't end the inquiry. Now, we don't say that there can never be a procedural default that raises to the level of ineffective assistance of counsel. We agree that that is what happened. What we would suggest is that a higher standard should be used, and the defendant should have to show that his counsel was grossly incompetent in order to meet the caused crime of Wainwright v. Sykes.

If that isn't required, the Wainwright v. Sykes line of cases basically will not be effective any

more, and the court rules --

QUESTION: Are you suggesting then that there may be some kinds of default that would enable you to raise what is an effective Fourth Amendment claim in the federal courts?

MR. NODES: No.

QUESTION: It seems to me the logic of your argument is that Stone against Powell said that because of the peculiarities of the Fourth Amendment exclusionary rule that it bars trustworthy evidence, that this Court has said those kinds of claims are going to have to be litigated in the state courts and reviewed here. They are not properly federal habeas, and it seems to me the logic of that is that there can never be a defaulted Fourth Amendment claim in the state courts which would give rise to anything cognizable in federal habeas.

MR. NODES: We believe that that is correct. We believe also that this Court should announce that Stone v. Powell also applies to Sixth Amendment claims which are brought concerning solely Fourth Amendment issues. And that and the Wainwright v. Sykes contention are the main bases of our arguments.

I would save the remainder of my time for rebuttal. Thank you.

CHIEF JUSTICE BURGER: Mr. Staehle.

ORAL ARGUMENT OF WILLIAM E. STAEHLE, ESQ.,

ON BEHALF OF THE RESPONDENT,

APPOINTED BY THIS COURT

MR. STAEHLE: Mr. Chief Justice, and may it please the Court, Neil Morrison was not convicted fairly, and in a fair trial it is unlikely that he could be convicted. We recognize at the outset that the best we can do in federal court is to win a new trial, as it were, a writ of habeas corpus as issued by the District Court conditioned upon the state's right to retry him.

QUESTION: What do you have to say about the trial judge's statement that he would have decided the case the same way without the evidence?

MR. STAEHLE: I say, Your Honor, that that statement was never made by the trial judge.

QUESTION: Was it made in substance, or what did he say about it? You tell me what he said about it.

MR. STAEHLE: No, it was not even made in substance. There was no such finding. He said the following. At the conclusion of the case, he said that this case is not cut and dry, and he went on to give --

QUESTION: Tell us precisely, if you are going to tell us, give it verbatim.

MR. STAEHLE: Yes. "Cut and dry." "Not cut and dry" are his verbatim words.

QUESTION: What else?

MR. STAEHLE: And then he went on to give, and this is a verbatim word, "some" of his observations, and he began to discuss the credibility of the witnesses, stopped and rendered his judgment. On the motion for bail pending appeal, he indicated that the bed sheet and the consequent tests were, and these are his words, "obviously important," and then he went on to say, "but it is one small part of the whole case."

And in denying the motion for bail pending appeal, he was not determining a Sixth Amendment question, which was in fact being raised on appeal. He was not determining whether or not defense counsel was effective. The trial judge was simply determining whether he was in his rights in denying defense counsel's belated request to suppress the evidence, and clearly under New Jersey's procedural rules he was within his rights, and he was so bound to be within his rights by the appellate court.

Later, Mr. Chief Justice, on a motion for post-conviction relief, wherein it was determined that there were no issues to decide because the Sixth Amendment and Fourth Amendment claims have been in

effect decided by the intermediate appellate court. A statement was made in the presence of the trial judge that the bed sheet evidence, as I refer to it, was a major point.

And I submit that the trial judge's failure to make any comment at that point is further evidence, although not the greatest evidence, further evidence of his failing to find that it was cumulative, and cumulative is the key word. We would expect the trial judge to use the word cumulative if in fact that was his feeling, and at no time was that word ever used.

So, I urge the Court at the outset to put aside the notion implicit in the state's argument that this is somehow a guilty man looking to get off on a technicality. He is innocent by definition, and probably innocent in fact.

QUESTION: You say innocent in fact. Are you saying there was something wrong with the bed sheet evidence introduced against him other than the fact that it was wrongfully seized?

MR. STAEHLE: Yes. In a sense I am, Justice Rehnquist. I am saying that the effect of the bed sheet evidence served to undermine his credibility, and that is going to take some analysis on my part, if I may.

First, when we speak of the bed sheet

evidence, let me just take a moment and clarify what we mean. We mean, of course, the bed sheet, one semen stain found on the bed sheet correlating with his blood type, his head hairs, one head hair from the victim, and no hair samples which matched -- no hairs which matched or correlated with her pubic hair samples.

So the absence of that evidence, I think, is significant. The bed sheet evidence undermined his credibility because it forced him to account for her presence on his bed or, more specifically, more precisely, her presence on his bed sheet, and his explanation was that they were in the apartment for a legitimate purpose, and that is where she sat down.

Now, in order to believe that that is where she chose to sit, we have to make two assumptions.

QUESTION: It is pretty clear that the trial judge, the trier did not believe him, is it not?

MR. STAEHLE: Yes. Yes. I believe that this case turned simply on the credibility of the victim and the credibility -- or the alleged victim and the credibility of the defendant, and it was the bed sheet evidence, I submit, that served to undermine his credibility because if we -- in order to believe his explanation, we have to believe that, A, she chose to sit on a stained bed sheet, and B, we have to assume

that -- well, we don't know what her alternatives were. We have to assume also that his bed was simply covered with this stained bed sheet, and sometimes an explanation, however truthful, is inherently unbelievable, and I think that is where his credibility began to go down the drain. I submit that there is further prejudice --

QUESTION: Didn't the District Court in this case issue the writ?

MR. STAEHLE: The District Court issued the writ, yes.

QUESTION: And certainly the District Court didn't think the error was harmless.

MR. STAEHLE: The District Court certainly did not think that the error was harmless.

QUESTION: Neither did the Court of Appeals.

MR. STAEHLE: The Court of Appeals did not determine that, but remanded for a prejudice inquiry under Strickland --

QUESTION: Under Strickland.

MR. STAEHLE: -- which was decided between the decision by the District Judge and the determination by the Court of Appeals. I submit that the testimony, the defendant's account of the complainant's sitting on his bed sheet caused him further prejudice, something that

he would not have had to account for and probably would not have been asked to account for in the absense of the introduction of that evidence.

It caused him further prejudice because if the trier of fact assumes, as an ordinary person, that one usually changes his bed sheet from time to time, then the existence of a semen stain, which stain correlated with Mr. Morrison's blood type, suggests that Mr. Morrison engaged in sexual activity on that sheet recently enough for the stain to have been a product of his raping the complainant.

If one excludes the bed sheet evidence, Mr. Morrison's testimony is plausible and internally consistent.

QUESTION: Why are you making this argument?

MR. STAEHLE: I am making this argument with respect to the significance of the bed sheet. Now, I am making it directly --

QUESTION: It sounds like you are asking us to decide whether there was prejudice under the Strickland test. This sounds like an argument you ought to make to the District Court if you are permitted to do that.

MR. STAEHLE: I hope to be permitted to do that, but I also hope that this Court will in fact consider the prejudice inquiry, and we have urged the

Court --

QUESTION: I know, but the issue in the case is whether the inquiry should be made at all. The issue here is whether you have any standing in federal habeas to argue this ineffectiveness issue.

MR. STAEHLE: I will move on to that issue, Justice White, but I want to make it clear --

QUESTION: Isn't that the only issue?

MR. STAEHLE: No, the writ of certiorari was not limited, and the issue of prejudice was briefed by both sides, and so it is for that reason that we are urging this Court to find that under the Strickland prejudice inquiry, that this man suffered sufficient prejudice rather than to simply remand it tc the District Court for that determination because if it goes back to the District Court it is not because we are not confident of establishing sufficient prejudice before the District Court, but by the time the lower federal courts rule on it, this man will have been released on parole, and it is for that reason that we seek an early determination. We believe this Court has the information with which to make that determination. We urge the Court to do so if it gets to that point.

With respect to the initial issue, in the courts of the state of New Jersey Mr. Morrison received

neither full and fair consideration of his Fourth Amendment claim nor full and fair consideration of his Sixth Amendment claim. In fact, he had no real opportunity for such consideration.

With respect to the Fourth Amendment claim, the state technically provided and provides that opportunity. His attorney, however, failed to take advantage of that opportunity, and Mr. Morrison was therefore powerless to avail himself of the state-provided opportunity. One who is powerless -- an opportunity provided to one who is powerless to take advantage of it is no opportunity at all.

And it is that which we read the Stone versus Powell doctrine to turn on. The opportunity for full and fair consideration and ineffective, constitutionally ineffective assistance of counsel cuts off that opportunity. With respect to his Sixth Amendment claim which was raised by assigned counsel on appeal, his having been represented by retained counsel at trial, the state court failed to apply the proper test.

It is for the first time today that I hear the slightest suggestion that the standard applied by the Appellate Division of the State of New Jersey somehow was in accord with the then prevailing federal standard, which in the Third Circuit was the same standard as that

announced in Strickland, namely, the normal competency standard.

And I think it is clear, and it has been until the suggestion today, that the appellate court applied the more stringent farce or mockery standard, citing the New Jersey Supreme Court case which delineates that standard, and I think at the very least the Appellate Division of the state of New Jersey should be presumed to have applied the law in effect in New Jersey as announced by the New Jersey Supreme Court at the time of its decision, and that was simply the wrong federal standard.

So there was no full and fair consideration of either claim, and that is why we believe it is appropriate for the federal courts to determine his rights.

In essence the state's argument is that defense counsel's ineffectiveness does not violate the Sixth Amendment, and indeed can never violate the Sixth Amendment so long as the ineffectiveness was limited to Fourth Amendment claims. The state is really arguing for an exception to the Sixth Amendment, and that is a giant step which we urge this Court not to take.

QUESTION: Well, one can just as surely say that you are arguing for an exception to this Court's

Stone against Powell rule covering the Fourth Amendment. I mean, the two are kind of parallel. It is a question of which one prevails in this case.

MR. STAEHLE: We do not argue for an exception to Stone versus Powell because we read Stone versus Powell, Justice Rehnquist, as requiring an opportunity for full and fair consideration.

QUESTION: Are you saying that New Jersey did not afford an opportunity for full and fair consideration of its Fourth Amendment claim?

MR. STAEHLE: We are saying that Mr. Morrison had no opportunity for full and fair consideration.

QUESTION: Well, would you answer my question?

MR. STAEHLE: Yes.

QUESTION: You are saying that New Jersey did not afford a fair opportunity for hearing this Fourth Amendment claim.

MR. STAEHLE: New Jersey, to answer your question directly, technically provided that opportunity, but Mr. Morrison was powerless to take advantage of that opportunity because of his attorney's ineffectiveness, constitutional ineffectiveness.

QUESTION: Couldn't you get around Stone against Powell in almost any case that way? Presumably

there has been -- you have lost on the Fourth Amendment claim in the state court systems, sometimes through procedural default, sometimes on the merits. Can't you always come back and say, if I had just had a better attorney this thing wouldn't have happened to me? Therefore you convert a Fourth Amendment claim into a Sixth Amendment claim.

MR. STAEHLE: The short answer is, that can always be alleged. But the concern of Stone versus Powell to prevent federal courts from relitigating or redeciding a Fourth Amendment issue as a practical matter is not going to occur where there has been an evidentiary hearing in the state courts, where somehow the opportunity has been seized.

I don't see therefore a subsequent claim of ineffective assistance of counsel causing the Federal District Court to relitigate the Fourth Amendment issue. It is only where there has been a complete default as it were through ineffective assistance of counsel that the federal court would then be in a position of either determining the Fourth Amendment issue or somehow sending it back to the state for a determination at the state court level, and we would urge that it would be proper in that case for the federal court to decide the issue.

QUESTION: Then wouldn't that result pretty much in a system where the state court trial judges were really not capable of enforcing their own state's procedural rules, because they would know if they did inevitably the claim that they refused to decide under the Fourth Amendment because of state rules would be decided by the same litigant in a federal court.

MR. STAEHLE: It may be decided in a federal court. Certainly a federal court might first choose to apply the prejudice inquiry and determine that in any event there was not sufficient prejudice, and might never reach the Fourth Amendment issue. On the other hand, certainly that could be the case. A federal court might, but not in every case, and in few cases, we submit, would then be called upon to actually decide the Fourth Amendment question.

And the state courts, yes, it is something the state courts would have to deal with at the time of trial. Let's take this case, for instance. What might have been done in this case to have prevented the respondent from ever getting into federal court? First of all, it being a bench trial, the judge could have held a hearing without inconvenience to anyone. Secondly --

QUESTION: You mean contrary to the provisions

of the New Jersey rules.

MR. STAEHLE: The New Jersey rules permit discretion on the part of the trial judge for good cause shown, as it were, to hold such a hearing. And I submit, Your Honor, that --

QUESTION: What would be the good cause shown here?

MR. STAEHLE: Good cause shown in this sense may very well have been that there is a breakdown here in the adversarial process, and if we don't decide it, then it is likely to be an issue on a petition for habeas corpus, and we may be in fact handing the ball to the federal courts. That might have been in a sense --

QUESTION: So you swallow up the state --

MR. STAEHLE: I submit secondly I think there is a responsibility on the part of everyone, the trial judge and the prosecutor included, to see to it that there is not a breakdown in the adversarial process, to see to it that there is a fair trial afforded to a defendant, and I think that is one way in which the trial judge could have ensured that.

QUESTION: Do you think the New Jersey rule that requires the making of a suppression motion within 30 days after the plea is such that it does not afford a defendant a fair trial?

MR. STAEHLE: Not as such. No. No. In fact, the lack of a fair trial, as it were, could never be attributed directly to the existence of such a rule, or at least certainly we are not contending that in this case. The lack of a fair trial occurred when the attorney was constitutionally ineffective in taking advantage of the --

QUESTION: Is there any claim that the trial counsel's performance was incompetent apart from the failure to make a timely motion to suppress?

MR. STAEHLE: No, Justice O'Connor. There is no suggestion in the record that --

QUESTION: Do you think that the Strickland standard normally contemplates a focus on the entire performance at trial rather than one single incident?

MR. STAEHLE: I do not read the Strickland performance inquiry to focus on the entire representation as it were as opposed to one critical element of the trial.

QUESTION: I am surprised to hear you say that.

MR. STAEHLE: I suppose --

QUESTION: But I wanted to know your position.

MR. STAEHLE: Well, I was going to go on to

answer that slightly differently. A defense counsel who is incompetent with respect to a critical element of the trial, which then passes muster under the prejudice inquiry, I believe, in a very real sense has completely let down his client, and can be viewed as having been completely incompetent.

I don't know where we draw the line between fatally incompetent on one point and yet somehow overall competent. That is why I answered it as I did. And there is no question here that he -- in the application of the performance inquiry, that his conduct fell below the standard of normal competency.

QUESTION: Did the District Court view his performance as a whole in making its determination of competence?

MR. STAEHLE: I can't say, Your Honor, that the district judge expressly did. I can't say that the judge expressly did. I can say, however --

QUESTION: The District Court acted, of course, before Strickland had been handed down.

MR. STAEHLE: Yes. But the performance inquiry was the same as that later enunciated in Strickland and --

QUESTION: Well, maybe not, if the appropriate focus is through the larger lens of the entire

performance.

MR. STAEHLE: The Court of Appeals also viewed its standard as applied by the District Court as conforming to the Strickland performance inquiry, and the district judge found not only was defense counsel incompetent, as it were, under the normal competency standard, but also under the farce or mockery standard, and it is that second finding which leads me to believe, Justice O'Connor, that the district judge may very well have been thinking along the lines that the entire representation was flawed, but I can't go so far as to represent that the district judge specifically made that finding, and the Court of Appeals had no problem in finding that defense counsel was grossly negligent, and said so directly.

QUESTION: One difficulty, of course, and the tension that is in this case, in part, comes from the fact that Stone versus Powell, I guess, rests on the assumption that a defendant is not deprived of a fair trial simply because reliable evidence could have been kept out had a timely motion been made. I guess that is the premise of Stone against Powell.

So, it is a little hard to then say, well, there isn't a fair trial here because the Court relied upon this reliable evidence.

MR. STAEHLE: I simply believe that where that is compounded by a blatant Sixth Amendment violation, that it goes past the point at which this Court can simply defer to the state courts.

With respect to the federal stipulations, I do not read Strickland as having dwelled on that fact in its consideration of the Sixth Amendment or the alleged Sixth Amendment violation as opposed to the Stone v. Powell doctrine in the consideration of the Fourth Amendment claim, and I don't see the word "comity" appearing in the opinion, and I believe that the court made essentially two assumptions.

Number One, that personal constitutional rights such as the Sixth Amendment right to effective representation by counsel, that the federal courts are going to be the ultimate arbiter of that kind of constitutional right, and the second assumption is that the state courts understand that role.

And I believe those two assumptions, whether or not they in fact were assumptions in Strickland, are correct. So again I don't see -- I see the Stone versus Powell doctrine as being inapposite to the issues presented in this case.

QUESTION: Counsel, may I go back to what I regard as a concesssion that you made earlier. You said

the only ineffectiveness of counsel on this record was the failure to make the motion to suppress. But as I read the district judge's findings, he said that the ineffectiveness was the failure to conduct any meaningful pretrial discovery. Because he didn't conduct any discovery, he was not aware of the bed sheet as potential evidence, and that is why he didn't make the motion to suppress.

It seems to me that is a broader statement of ineffectiveness than the one that you seem to acknowledge.

MR. STAEHLE: Yes, I believe it may be. And I may have been focusing on simply the consequence of his ineffectiveness as opposed to his overall ineffectiveness itself. That specifically was the point of ineffectiveness, his failure to conduct any discovery.

QUESTION: He said he did no preparation because he assumed that the victim wasn't going forward with the case, which is quite a different thing from just making one misstep.

MR. STAEHLE: I think that may have been the reason for his failure to do discovery or conduct any discovery, and also, I believe a second reason for his failing to undertake any formal discovery was because he

received some discovery from the prosecutor.

QUESTION: Well, the Court of Appeals on Page 3A of the petition for writ of certiorari in Judge Lord's opinion says because defense counsel failed to conduct any discovery, he was unaware that the state was in possession of the sheet. Now, it sounds to me -- the Court of Appeals, perhaps not the District, but the Court of Appeals thought that the failure to conduct discovery was simply the reason why the person did not make the suppression motion, not a separate reason for ineffective assistance of counsel.

MR. STAEHLE: My response, in an effort to harmonize the views, is that in the first instance the ineffectiveness was the failure to conduct any formal discovery. And in the second instance, the failure to make a timely motion to suppress.

QUESTION: Are there any other harmful consequences that resulted from the failure to conduct discovery other than the failure to make a motion to suppress? And if so, what are they?

MR. STAEHLE: To answer your question directly, no. None -- no identifiable consequences other than what we sought to demonstrate. I think an argument can be made that any time counsel fails to make discovery, he is going to be inadequately prepared. But

we cannot point to another aspect of the trial where we can say with the certainty that we can say with respect to the suppression motion that here is a consequence of his failure to conduct discovery. He would have asked these questions or would not have gone into this area, and that is the kind of thing that I don't think can ever really be -- representation being an art, as it were.

And that is just another reason, because of the hidden consequences of ineffective counsel that we urge this Court to reach these issues, and to find that they are properly before the federal courts, whereas in Stone versus Powell, the Fourth Amendment claims which have been heard in the state courts are not.

Hearing no further questions, I have concluded my argument.

CHIEF JUSTICE BURGER: Mr. Nodes, do you have anything further?

ORAL ARGUMENT BY ALLAN J. NODES, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. NODES: Yes, Your Honor.

Firstly, I would like to reply to the question asked by Justice Stevens concerning the impact of no discovery in this case on a proceeding. The District Court used the term "no discovery." That is not quite

accurate, and it doesn't comport with the factfindings again made by the state trial judge, and in the bail transcript of August 3rd, 1979, the same issue was raised before the trial judge who conducted the trial in this case.

What he found was that the defense counsel was not surprised by learning that the bed sheet was in existence and had been taken by the police, and the reasons for this are twofold. Firstly, at least a month prior to trial --

QUESTION: Is that transcript in the printed materials?

MR. NODES: I believe that is in the material the Third Circuit submitted to this Court.

QUESTION: May I just suggest, it is awfully difficult when you are going to argue facts, and this happens very often, I just don't say it to you, to have counsel always referring to transcripts and things that they don't provide us. This is just another example.

MR. NODES: The trial judge ruled that there was no surprise due to two things. One of these factors was that a month prior to trial defense counsel was provided a copy of the lab report from lab tests done on the semen stain taken from the bed sheet and the hairs which are taken from the bed sheet.

Defense was aware of this prior to that time even because we had to make a motion in order to be able to take defendant's hairs to test them, and at that time he was aware that we were testing them against other evidence which had already been tested, such as the semen stains on the bed sheet, so at least a month prior to trial he knew about this. He could have made a motion at least at that time, and it wasn't a surprise.

QUESTION: He could have, but do you dispute the federal trial judge's statemen? He says, in 30A and 31A of your appendix to your cert petition, "We come quickly to the conclusion that petitioner's trial counsel was ineffective under the standard announced in Moore." Of course, that is a different case. "Put simply, counsel failed to conduct any meaningful pretrial discovery, and thus was totally unaware that certain damaging evidence might have been the appropriate subject for a suppression motion." Do you disagree with that statement?

MR. NODES: We suggest that the district judge is right, that he did not request discovery. We say he got it without requesting it. He could have gotten something more, but he got enough to know that we had defendant's bed sheet.

QUESTION: But he seems to have based the

conclusion of ineffectiveness -- now, maybe he is wrong. I don't know.

MR. NODES: I believe that --

QUESTION: But on the ground that he did not conduct any meaningful discovery.

MR. NODES: I believe it is the finding --

QUESTION: Which is quite different from just failing to make one motion.

MR. NODES: Yes, and I believe that that conflicts, however, with the finding of the state trial judge, and I would also note that the --

QUESTION: Did you make a Sumner against Matta argument in this case? Do we have that question to deal with, too?

MR. NODES: Yes, we did raise Sumner v. Matta, mainly on the fact of whether or not there was harmless error in this case, but I think it ties in, the whole thing ties in.

I think the discovery point also, we have to remember that defense doesn't say that the entire trial was affected by this. They said, though, that he did a poor job through the entire trial. He said that one motion was affected by it, and one item of evidence which was reliable would have been excluded because of this, and that has to be the basis of the argument.

Now, defense counsel also would say that if ineffective assistance of counsel is shown at a critical stage of the proceedings, that we can dispense with the Wainwright analysis. If this is accepted, I believe that the Wainwright analysis will be overruled, because I believe in Wainwright it could be argued that that was a critical stage in the proceeding since it claimed a Fifth Amendment violation.

In Engle, for instance, it concerned the jury's charge concerning reasonable doubt and burdens of proof. I believe any of these cases can be termed to be critical stages of the proceedings. That has not been the analysis that has been accepted by this Court. We don't think that one attorney error is normally enough to overcome Wainwright v. Sykes. We would agree that at some point ineffective assistance of counsel could overcome the first prong of Wainwright. However, we believe that a gross incompetency standard should be used in this case, since if anything less than that is used it will amount to undoing the entire line, the entire Wainwright line.

Thank you very much.

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

(Whereupon, at 11:50 o'clock a.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:

84-1661 - IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL.,

Petitioners V. NEIL MORRISON

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BY Paul A. Richardson

(REPORTER)