OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5437

TITLE MICHAEL MARNELL SMITH, Petitioner V. EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

PLACE Washington, D. C.

DATE March 4, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL MARNELL SMITH, :

Petitioner, :

V. : No. 85-5487

EDWARD W. MURRAY, DIRECTOR, :

VIRGINIA DEPARTMENT OF :

CORRECTIONS :

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Washington, D.C.

Tuesday, March 4, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 o'clock p.m.

APPEARANCES:

J. LLOYD SNOOK, III, ESQ., Charlottesville, Virginia; on behalf of the petitioner.

JAMES E. KULP, ESQ., Senior Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

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

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

ORAL ARGUMENT OF J. LLOYD SNOOK, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SNOOK: Mr. Chief Justice, and may it please the Court, this case, Smith versus Murray, presents three issues that I would like to discuss briefly here. The first is the issue of the Zant versus Stephens question on which the Fourth Circuit based its holding.

The second is the underlying merits issue of whether the prosecution can call a psychiatrist who has been appointed to assist the defense to prove its aggravating circumstance. And third is whether the consideration of this issue is barred by the failure to appeal this issue after it had been raised at trial.

Now, turning very briefly to the first question, the Zant versus Stephens question, this Court, of course, in Zant versus Stephens specifically reserved the question presented here, and we contend that the Fourth Circuit quoted this Court's decision in Zant versus Stephens out of context. Every statement of the

issue as it was presented by this Court and as it was discussed by this Court specifically talked about the fact that the evidence that was being admitted was in fact admissible.

In fact, the Court enforced the restriction that a different result might be reached in a case where evidence was submitted in support of the statutory aggravating circumstance which was not otherwise admissible and therefore the circumstance failed.

So, Zant does not control this case and it should not. I would note that Zant was basically an Eighth Amendment case where the real question that this Court was confronting was whether to in essence federalize every state law violation. If there was a violation of state law, evidence inadmissible for some reason, for state law reasons, whether that became converted into an Eighth Amendment kind of issue.

The Court basically said no. We, of course, have a different situation here, where our claim is a Fifth Amendment claim. There has never been any suggestion by this Court or any other Court that we are aware of that says that Zant versus Stephens takes Chapman versus California and the harmless error analysis away from capital cases. There is not a case out there. The basic problem is, this is a fifth

amendment case, not an Eighth Amendment case.

Now, on the merits of the issue, I think in order to understand the dilemma that counsel in a capital case in Virginia would find him or herself, you have to picture yourself as that defense counsel. You have just been appointed in a capital case. Virginia law allows the prosecution to prove aggravation, to prove future dangerousness with prior criminal record, with psychiatric evidence, including after Barefoot versus Estelle even hypothetical questions based on instances where there has not even been an examination, and in fact can prove future dangerousness simply from the circumstances of the crime.

If there are enough stab wounds, the Court -- the jury may infer from that something relating to future dangerousness. The problem is, under state law, therefore, you have no notice. The prosecution is not required to give you notice of what they intend to introduce in aggravation. You as defense counsel are sitting there saying in order to prepare my case, not only to get into issues of mitigation, but even to mount a defense as to aggravation, I need to find out whether there is anything that a psychiatrist can say. You are not a psychiatrist. You don't have the ability to give that -- to make that assessment initially. In order to

make that assessment initially, you have to call in a psychiatrist, a psychologist, some mental health professional to give you the expertise to tell you whether there is anything to go on.

Even before you decide to in fact mount some sort of psychiatric case or psychologically based defense, in order to make that initial assessment, you have to have an expert to assist you, and that, of course, is basically what Ake versus Oklahoma said in a slightly different context, that in such a situation where mental condition is fairly an issue, that it is a requirement of the due process clause that indigent defendants have an expert appointed to assist counsel.

The problem is, of course, the Virginia Supreme Court says in essence that is fine, but only if the prosecution can later call that person, that member of the defense team as their own witness. In other words, Virginia says that you can't do you job without giving away your client's privilege against self-incrimination.

And the problem that counsel in this case would be confronted with and counsel in every capital case would be confronted with is how do you balance or should you even be forced to balance those two rights, the right to put on -- the right to put on mitigating

evidence or at least the right to counter the state's proof in aggravation on the one hand, and on the other hand the privilege against self-incrimination.

It is important to remember the facts of this case. The very first witness called by the prosecution at the sentencing phase was Dr. Pile, and Dr. Pile was called for one purpose and one purpose only, and that is to say, Dr. Pile, please tell the ladies and gentlemen of the jury what Michael Smith told you about this earlier incident on the schoolbus.

In other words, everything that happened thereafter, all the psychiatric evidence that came in, all of the opinion evidence, all the cross examination was directly flowing from that problem.

QUESTION: What you are suggesting is that that should be treated the same way under the same rules as though it had been offered by the prosecution in the case in chief where guilt was --

MR. SNOOK: That is right, Your Honor. Gibson versus Zahradnick, of course, is the case that we were working under as we were coming up through the Fourth Circuit, and it is a case that says very explicitly exactly that, and in fact every federal court that has looked at the issue has said that. The Virginia Supreme Court decision on 1975 I think truly was an aberration,

but every federal court has said you cannot call a psychiatrist simply to say in the course of the psychiatric examination the person confessed having committed the crime.

QUESTION: Mr. Snook, when did you make the prosecution aware that you were not going to use the document yourself?

MR. SNOOK: There was no -- there was never any document filed. There was no intent to file. There is no requirement that anything be filed in a case like this.

QUESTION: Even though the prosecution knew you had secured the appointment of a psychiatrist, had you not?

MR. SNOOK: Well, the defense had asked that another examiner, Dr. Pile, be appointed. There was never any indication that Dr. Pile was to be called, I think. Because everyone had copies of the letters from Dr. Pile, I think it is fair to say that the prosecutor would sit there and say, I don't think they are going to want him, but he was not subpoenaed by the defense. He was subpoenaed by the prosecution. So he was called by the prosecution. There is no question the prosecution was making him their witness, and so --

QUESTION: Are you suggesting, Mr. Snook, that

in the penalty hearing at the second stage the same rules of evidence apply across the board as in the basic prosecution?

MR. SNOOK: They don't apply exactly across the board in the same way. There are a few exceptions. One of them, Green versus Georgia, comes to mind, where some mitigating evidence may be admissible that would not otherwise be admissible under a state court rule. But as far as the general rules of the game, of how -- of who has to go forward with what, who has what burden of persuasion, what burden of production, those same basic rules do apply, and in fact the Virginia Supreme Court said so in the Smith case.

Remember, of course, that the Smith case was the first case in Virginia under the new capital sentencing statutes, and so to a certain extent a lot of what was going on in the Smith case was the first run, almost experimentation, if you will, and in that case one of the issues that came up was whether the prosecution had the right to present rebuttal at the argument phase of the sentencing hearing.

And the Court said, yes, basically any time the prosecution has the burden of proof, then they have the right to close. So in every instance under Virginia law certainly it may vary from state to state, but under

Virginia law the courts have always held -- have always decided that procedural rules that govern who does what at what time are basically the same as they would be at guilt phase.

QUESTION: Has the highest court of Virginia passed on that issue in this case?

MR. SNOOK: Not specifically on the question -- I guess the reason it would matter is if there was definitely a question about some evidence being aggravating, some evidence being mitigating, and I suppose the question of whether the door had been opened, the Virginia Supreme Court has never gotten into questions of whether the door was open to a particular kind of testimony or any of the other kinds of considerations that would sometimes get in the way of the trial court. Some of the examples that come to mind are United States versus Nobles, for example, where there is a question about the door having been opened by certain things.

Some of those issues have not really been decided. In every case that has been presented, it has always been assumed, and the Court has never given anybody any reason to think it is not a valid assumption, that the same basic rules apply.

QUESTION: Mr. Snook, in your argument, are

you going to sometimes cover the waiver point that you didn't ever raise this in the state court system?

MR. SNOOK: Yes, Your Honor. In fact, I was sort of wondering whether there was going to be any other question on this, and then I was going to move on to that.

QUESTION: Well, did you object when the doctor which was called to the stand by the prosecution?

MR. SNOOK: Yes, Your Honor. An objection was made at that time.

QUESTION: On what grounds?

MR. SNOOK: The specific ground, the ground was basically -- well, let me see if I can find the exact language. The objection was first, "Your Honor, we are going to object to any testimony made by Dr." --

QUESTION: Excuse me. What page?

MR. SNOOK: I am sorry, Appendix Page 4. "With respect to a case involving or an incident involving the defendant at some time prior to the offense for which he is charged." It goes on to say the Commonwealth has to lay the foundation as to what the doctor instructed Mr. Smith with respect to his rights to say anything to him. Later on, the Court decides over on Page 5, the Court analogizes to Miranda and

basically goes on to say that Miranda is not applicable in a case like this, so that is clearly an instance in which the Fifth and Sixth Amendment concepts of Miranda were in the minds of everyone as the issue is being discussed.

Now, of course, the problem is that the issue was not raised on appeal. The question is, why wasn't it raised on appeal?

QUESTION: Well, before you get there, Mr. Snook, what if your client had elected to put his mental state in issue?

MR. SNOOK: If he had elected to put his mental state in issue, there are a whole variety of possible rules that one might come up with. One position is the position that the American Bar Association has taken, which -- that entire position is cited on Page 31 of our brief, Footnote 23, in which the admissibility disclosures or opinions in criminal proceedings, it says, "No statement made by or information obtained from a person shall be admitted unless the evidence is otherwise admissible and is otherwise relavant to an issue raised by the defendant concerning defendant's mental condition, and the defendant intends to introduce the testimony of a mental health or mental retardation professional to support the

defense claim on this issue."

Now, a mental condition may be put into issue in a number of different ways, I suppose. One of the ways is very simply --

QUESTION: If your client had put it at issue but didn't choose to call Dr. Pile, could the state have done so?

MR. SNOOK: I think if they had chosen to put mental condition in issue by saying, call in one of the other psychiatrists, call in Dr. Dimitris, as an example, to say what he ultimately said in cross examination, which might arguably be mitigating, at that point the prosecution might then be allowed under some rules to call -- and certainly under the ABA rules to call Dr. Pile in to rebut exactly the point raised, in other words, not to go further and say that we get to put on evidence of future dangerousness, but specifically addressed to the question of the mitigating circumstances as to which Dr. Dimitris would testify.

Now, admittedly at some point those two issues begin to blur together, but in this case we don't have to confront that blurring of the issues.

QUESTION: Are you suggesting that all these niceties are governed by the United States Constitution?

MR. SNOOK: No, in fact, most of these niceties are probably to be determined in the first instance by state law by the state statutes. Certainly in Texas, for example, where --

QUESTION: We are talking about Virginia.

MR. SNOOK: I understand.

QUESTION: What has what Texas has said got to do with this?

MR. SNOOK: I was going to distinguish between the Texas statute and the Virginia statute, where Virginia makes future dangerousness and mitigating circumstances totally separately distinct issues, whereas Texas does not. That brings it all under the rubric of one question that the jury has to focus itself on.

QUESTION: But even though the substantive standards in states may differ, isn't ordinarily the order of proof and who can testify to what and what issues you can testify to based on state law? And the ABA certainly doesn't purport to be interpreting the Constitution.

MR. SNOOK: No, and in fact, as I say, if it were not for the fact -- basically every single possible formulation of the test, if it involves any consideration at all of in what order the proof is to

come in, it still comes down to the fact, because in this instance Dr. Pile was the first witness. Everything that flows from what Dr. Pile said, all the psychiatric evidence must be assumed to be flowing from that in terms of evaluating exactly where the error was committed and what the consequences of that error are.

QUESTION: What error is this you are referring to?

MR. SNOOK: The error of allowing Dr. Pile to testify at all. For example --

QUESTION: Are you saying that is a constitutional error?

MR. SNOOK: It is a constitutional error where Dr. Pile is allowed to testify after having been appointed to assist the defense, to give assistance to the defense, then be called in to testify, basically applying the same Gibson versus Zahradnick rationale.

QUESTION: What case from our Court supports that proposition?

MR. SNOOK: This Court has not explicitly stated that. I acknowledge that. This Court has acknowledged in Ake versus Oklahoma that there is a right to consult, a right to, where mental condition is an issue, to have someone to asist the defense, a right to explore those issues, and that is perhaps the basis

or a basis of that right. Estelle versus Smith obviously has some relevance to all of this. One of the concerns that we have with the Estelle case that we mentioned in the brief is that inasmuch as it seems to deal specifically with the question of waiving those rights or by giving notice and reading the Miranda type statement that somehow you cure the error, that while that may well have been relevant in the Estelle case where the problem truly was surprise, it is not going to be helpful in the average case where the problem is not surprise to the defendant, but rather simply the question of whether the defense, including defense counsel, is ever able to explore the possible mitigating evidence. Now --

QUESTION: Could I ask you, is there some -- was there any challenge to the aggravating -- the vileness aggravating circumstance?

MR. SNOOK: Not really. No, Your Honor.

QUESTION: And that was sustained by the Fourth Circuit, and everyone has sustained that.

MR. SNOOK: We acknowledge that under Virginia law the evidence is sufficient for finding vileness.

QUESTION: And so the only problem is the future dangerousness?

MR. SNOOK: Yes. Now, under Virginia law, of

course, because we do not have a mechanical kind of weighing situation, we don't know what would happen if the jury did not find future dangerousness.

QUESTION: Well, the Forth Circuit certainly decided that as long as the vileness aggravating circumstance was left undisturbed, it was quite proper to sustain the death penalty.

MR. SNOOK: And that was based on their, I would argue, misreading of this Court's ruling in Zant versus Stephens.

QUESTION: Well, I know, but insofar as it was an interpretation of Virginia law, we certainly accept it.

MR. SNOOK: Well, first of all, I would note, Your Honor, that at the time that this decision was handed down, there had been no statement by the Virginia Supreme Court.

QUESTION: That may be, but has there been since?

MR. SNOOK: The case of Tuggle versus Commonwealth --

QUESTION: At least the Court of Appeals for the Fourth Circuit thought that it would be wholly consistent with Virginia law to sustain a death penalty on the basis of one of two aggravating circumstances.

MR. SNOOK: I don't believe that they stated that as a matter of interpretation of Virginia law.

QUESTION: They acted on it, didn't they?

QUESTION: They certainly acted on that. It would have been strange if they -- because they put aside your whole point based on the psychiatric testimony. They just put it aside because that was essentially irrelevant as long as the vileness aggravating circumstance --

MR. SNOOK: That's right, and in so doing they cited Zant versus Stephens and they cited Zant versus Stephens as the opinion appears on Page 165.

QUESTION: Well, the point of the evidence being admissible, the inadmissible evidence here only went to one aggravating circumstance.

MR. SNOOK: That is right, but in fact --

QUESTION: Do you think Zant -- you think Zant is contrary to the way they interpret this?

MR. SNOOK: No, what I think is that in Zant versus Stephens, this Court was faced with a question of whether evidence that was inadmissible as a matter of -- an aggravating circumstance that was invalid as a matter of state law would create a federal constitutional violation, and this is not that case.

Now, as to what happens when the Court in

reviewing it tries to weigh what is left after a federal constitutional violation has occurred, that is the question that this Court specifically reserved and, I would argue, it ought to decide under a totally different rationale than was decided in Zant versus Stephens.

QUESTION: Well, there is no question that the Fourth Circuit thought that the death penalty should be sustained because of the single circumstance.

MR. SNOOK: That is right. That is right, and the problem, of course, is that under Virginia's statute, where we have vileness and dangerousness both, and there is no specific rule as to how the jury is to waive these --

QUESTION: I understand. I understand, but certainly Fourth Circuit thought that this would be consistent with Virginia law.

MR. SNOOK: Well, as I say, I don't think that they were focusing as such on Virginia law as they were on a misreading of this Court's decision in Zant.

QUESTION: You are not really claiming that there is an inconsistency in Virginia law, are you, that the Fourth Circuit's decision is inconsistent with Virginia law?

MR. SNOOK: No, I am not claiming that. All I

was pointing out --

QUESTION: Yes, but you are raising a question as to whether or not the death -- under Virginia law the death penalty should be sustained when the jury has found two circumstances and one of them washes out.

MR. SNOOK: That is right.

QUESTION: You are saying that you really don't know what should happen under Virginia law, whether there should be a new sentencing hearing or not.

MR. SNOOK: Well, after Tuggle versus Commonwealth, I assume the Virginia Supreme Court would say that if the Zant versus Stephens situation exactly on those terms came to Virginia, that the Virginia Supreme Court would hold as the Georgia Supreme Court did. In that instance, I am not asking this Court to review and reverse that decision about a purely state law issue.

What I am asking this Court to do is to recognize that Zant versus Stephens and the situation there is at base a state law problem, whereas in this instance we have a federal violation, a federal constitutional violation.

QUESTION: A federal violation that only went to one of the aggravating circumstances.

MR. SNOOK: Yes.

QUESTION: And you are saying that that should taint the finding of the other aggravating circumstance?

MR. SNOOK: No, not that it should taint the finding of the other aggravating circumstance.

QUESTION: What should it be?

MR. SNOOK: But that it should --

QUESTION: Because there was the violation, you automatically set aside the death penalty.

MR. SNOOK: Because there was the violation and because this Court cannot be sure under Virginia statute which permits the jury to find life for no reason at all, including simple mercy, there is no way to know what factors the jury was considering.

QUESTION: So you do get back to Virginia law.

MR. SNOOK: Yes.

QUESTION: Supposing this were coming from the Supreme Court of Virginia rather than the Fourth Circuit, and the Supreme Court of Virginia had written exactly the opinion that the Fourth Circuit had except that as to matters of Virginia law, of course, it would have spoken with finality.

You would still claim that there was a federal constitutional imperfection, wouldn't you?

MR. SNOOK: Yes.

QUESTION: Even though all the state law questions were resolved against you.

MR. SNOOK: That is right, because the basic problem is the Fifth Amendment problem, not the state law problem.

QUESTION: You would still have to be then arguing that the federal violation tainted the vileness finding and hence the Virginia Supreme Court could not write this kind of opinion.

MR. SNOOK: Your Honor, I don't understand this Court's decision in Zant versus Stephens as saying that every finding of an aggravating circumstance must be tainted in a case in which inadmissible evidence has come in. And that, I think, is the fundamental point. Where inadmissible evidence has come in, the jury is considering things that they ought not to hear about.

In Zant versus Stephens, all they were being told is, they had a different rationale for --

QUESTION: Yes, but the evidence that came in wasn't the least bit relevant to the finding of vileness.

MR. SNOOK: That is right.

QUESTION: Not in the least.

MR. SNOOK: And so in finding vileness the

jury made inadmissible evidence which couldn't have had any effect.

MR. SNOOK: What we end up with, Your Honor, if we accept the position that it has to taint every single factor is that if you have a case in which there is no question about vileness, then the Commonwealth is free to do anything it wants to, commit the most egregious errors possible, and know that if they get the death penalty, that death penalty is unchallenged. That is an untenable rule.

QUESTION: Do you concede -- perhaps you have answered this before, but do you concede that there is no weakness or impairment or flaw in the determination of the vileness and wantonness of the crime?

MR. SNOOK: Yes, I concede that. I do concede that.

Your Honor, at this point, unfortunately, I have not gotten to the procedural default issue. I imagine that I will have the opportunity in what time remains to me for rebuttal.

QUESTION: Why don't you address it, because as far as I am concerned it is determinative?

MR. SNOOK: All right. I will then.

QUESTION: May I just ask one question before you proceed? Is it a fact -- look at Page 6 of the

appendix, please, sir -- that the prosecuting attorney asked Dr. File only one question that you objected to?

MR. SNOOK: That's right.

QUESTION: And may I ask you this question? Do you think the cross-examination did your client's case more harm than that one question?

MR. SNOOK: That is the point that we have argued all along, Your Honor.

QUESTION: You agree that the --

MR. SNOOK: Yes, we do.

QUESTION: -- that counsel for the defendant should not have cross examined --

MR. SNOOK: Yes, we do. In fact, we had raised that as an independent grounds of ineffective assistance of counsel, but that was not an issue on which cert was granted. However, as we pointed out, a number of cases that this Court has decided have indicated that we are not going to decide the case in a vacuum without considering that which counsel did after having made the objection. Harris versus United States is the case that comes to mind there.

In terms of the procedural default issue, our grounds for saying that this Court ought to reach the merits are first of all to fall back on the fact that this Court has always maintained that there is an

equitable discretion -- federal habeas court to consider these issues. In terms of the cause and prejudice test, the most obvious ground for cause is the ground of ineffective assistance of counsel.

Now, I understand this Court is considering in the case of Sealoft versus Carrier -- I guess it is Murray versus Carrier by now -- exactly how that will play into the cause requirement, but I would note a couple of things, first of all, that had counsel read Gibson versus Commonwealth before they decided to weigh the issue on appeal, they would have seen the specific incident, the specific citation in there.

QUESTION: Unlike Murray versus Carrier, I suppose, here counsel made a deliberate decision not to argue this on appeal. This isn't some inadvertence as was argued in that case. This was a deliberate decision and choice by counsel not to raise this. He raised 17 other issues, and argued them with vigor, but not this one by choice.

MR. SNOOK: But it was a case in which they did not do what they should have done to research the question. In other words, there was not a decision by informed counsel. They stated -- Mr. Pugh stated --

QUESTION: It was certainly consistent with Virginia law at the time.

MR. SNOOK: It was.

QUESTION: The Fourth Circuit had not issued its holding.

MR. SNOOK: That's right.

QUESTION: So why isn't he bound by it?

MR. SNOOK: Well, if in fact he is bound by that, and if in fact he is bound not to -- if counsel is not supposed to take a good, close look at Gibson, and if in fact he is not supposed to understand that the issue is still in dispute and to understand that this case will ultimately reach a federal court, all of which, I submit, counsel is bound to do, particularly in a capital case, maybe not in a shoplifting case, but it is certain that a capital case is going to result in coming to the federal courts, that he ought to be looking at federal law, that particularly in -- Gibson versus Commonwealth pointed that out, where there were cases coming down right and left in other jurisdictions cited in Criminal Law Reporter and other places where the amicus brief raised the issue, and there wasn't even any sort of attempt to supplement the record or supplement the assignments of error -- I don't know whether such a happening could occur under Virginia law, but even if -- they didn't even try, and if they had tried, maybe the situation would be different.

QUESTION: Well, Engle versus Isaac says that perceived futility alone doesn't count as cause.

MR. SNOOK: That is right.

QUESTION: And that is what we have, and we have a deliberate choice.

MR. SNOOK: And not only is perceived futility but it is specifically futility that is perceived because counsel did not do what reasonable counsel would have done, which is to at least follow up on the statement in Gibson versus Commonwealth --

QUESTION: We didn't grant certiorari on the ineffective assistance of counsel claim.

MR. SNOOK: But if in fact ineffective assistance of counsel as being cause can be considered in rebuttal --

QUESTION: Well, that is the Murray against -- whatever that case you mentioned was.

MR. SNOOK: Right, but even if we don't have ineffective assistance of counsel, I would argue that the policies of Engle versus Isaac, the policies of Wainwright versus Sykes all deal with this equitable discretion, and that in fact the question is whether there is an adequate state ground adequately serving state interests.

In the peculiar facts of this case, where

there is a case immediately decided by the Virginia Supreme Court for the first capital case, where the amicus brief had raised the issue, where after the briefs went in the Fourth Circuit decided the question, the issue was raised at trial, default was only on appeal, under all of these circumstances we submit that the equitable discretion of the federal courts ought to be exercised in terms of hearing the case.

At this point I would like to try to reserve whatever few seconds I may have. Thank you, Your Honors.

CHIEF JUSTICE BURGER: Mr. Kulp.

ORAL ARGUMENT OF JAMES E. KULP, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KULP: Mr. Chief Justice, and may it please the Court, we respectfully submit that the Fifth Amendment issue is not properly before the Court because of this Court's ruling in the case of Wainwright versus Sikes.

As Mr. Snook has indicated, at the trial of the case the defense attorney did make an objection to the testimony of Dr. Pile. I think the reading of the record would indicate that that objection was based solely on the Fifth Amendment ground. The attorney at the state habeas proceeding was asked specifically why

he did not raise the issue on appeal. He testified that he had and his associates had examined the law and determined that in their judgment this issue would not be meritorious.

I think the Court has to recognize that what the attorney has to do and what this Court has indicated that attorneys are supposed to do is exercise professional judgment. In Jones versus Barnes the Court clearly indicated that on appeal, that counsel were not required under the Constitution to raise all non-frivolous issues, that counsel was supposed to winnow out those arguments which they believed would be meritorious and those which they believed would not be meritorious.

In this case, counsel indicated and the testimony is clear that after the trial they went through the transcript and looked at every objection which had been raised during the course of the trial, and they considered each one of those. Then after making the decision that this particular issue would not be meritorious, they then raised 17 issues on appeal.

We submit that what counsel did in this case is fully consistent with what the Court has indicated that counsel is supposed to do. I would respond to Mr. Snook by indicating that there was an amicus brief filed

in the Supreme Court of Virginia on direct appeal. I would disagree with Mr. Snook as to what issues the amicus brief raised.

The amicus brief did not question at all the testimony of Dr. Pile as it related to the bus incident.

QUESTION: Mr. Kulp, let me interrupt you for a minute. In our Court we have a rule that amicus cannot enlarge the issues before the Court that are presented by the parties. Do you know if the Supreme Court of Virginia has a similar rule?

MR. KULP: They do in this respect, Justice Rehnquist. In this specific case that we are talking about, in the Supreme Court opinion, in Footnote Number 1, the Supreme Court of Virginia specifically said they would not recognize any arguments raised by an amicus which had not been raised and briefed by the parties.

So, I think that that is the same rule which this Court applies, and I would say that the amicus brief, as I indicated, did not focus on, did not raise any question about the testimony which is now being raised in this Court as such an egregious admission of evidence.

What they were concerned about, they indicated that, one, an example for competency and sanity was not sufficient to focus on future dangerousness. They also

argued that only forensic psychiatrists should be called upon to determine dangerousness, and further, that the Fifth Amendment applies when the defendant is ordered to undergo an examination to determine dangerousness.

Not once in the amicus brief, even, did they raise the issue that this evidence was harmful in any respect. On the reply brief, the petitioner has tried to indicate that since this is an appellate default, that the rules of this Court in Wainwright versus Sykes would not apply.

I have two answers to that. First of all, when the petition was filed in the District Court, Federal District Court, and we filed our response and for the first time raised the procedural argument under Wainwright versus Sykes, the petitioner did not at that time raise any question that there was any distinction between trial omission and failure to raise the omission on appeal.

Again, when we went to the Circuit Court of Appeals, the petitioner never questioned the fact that Wainwright versus Sykes applied in an appellate default. I would also say I think that this Court has recently addressed that issue in Reed versus Ross, which itself was an appellate default case, and the Court went on to indicate that the reasons that Wainwright versus

Sykes applied even in an appellate default situation is because it affords the states the opportunity to resolve the issue shortly after the trial, while the evidence is still available both to assess the defendant's claims and to retry effectively if the defendant prevails, and seconily, to foster finality of the decision by forcing the defendant to litigate all claims together as quickly after trial as the docket will allow while the appellate court has its attention focused on the case.

We submit that in this case the District Court clearly found there was a waiver under Wainwright versus Sykes. The Fourth Circuit in our view did not address the issue. We believe they should have affirmed on that ground alone, and we wouldn't have the issues being raised in this Court such as the questions of whether the Fifth Amendment applies or whether it does not apply as the amicus in this Court have tried to bring in a Sixth Amendment claim, which we submit has never, ever been raised in the state courts.

So, we submit that this issue is not properly before the Court. I would also indicate that the question is whether counsel was ineffective in failing to raise the claim on appeal, thereby meeting the cause -- of Wainwright versus Sykes.

The petitioner refers to the Fourth Circuit

ruling in Gibson versus Zahradnick. The author of that opinion was Chief Justice Hainsworth. It is notable that in a subsequent case, Conquiss versus Mitchell, Judge Hainsworth indicated that Gibson versus Zahradnick did not apply in those circumstances where the defendant retained a private psychiatrist.

Now, in the Conquiss case were the same facts as this case. The defendant came in and asked the Court to appoint a private psychiatrist. The Court merely entered an order so that the psychiatrist could be paid, but the Court did not choose the psychiatrist, had nothing to do with it other than entering the order for the payment.

Those are precisely the same facts in this case. At the state habeas hearing, the trial judge indicated that the only thing he had to do with the psychiatrist, Dr. Pile in this case, was simply to enter the order to allow him to be paid. The Judge did not select him, did not require him to be examined. We think that the facts are identical here.

We would also submit that in this case there is no question, and as Mr. Snook has conceded today, as he had in the Fourth Circuit, this evidence in no way had any effect upon the separate and distinct finding of violence.

I would also note that this evidence is not evidence which would mislead the jury. It is not evidence which is erroneous because there is no question but this evidence was in fact true. So, to try to indicate that this evidence which the jury could incur if we assume for a minute that there would be something wrong with Dr. Pile testifying, which we do not concede, but just assuming it, the jury could clearly have heard the same type of evidence, the same exact statement about the bus incident from some other declarant.

QUESTION: Yes, but can you use that as a justification for putting inadmissible evidence in, that they might have gotten the evidence from another source?

MR. KULP: Justice Stevens --

QUESTION: If you assume for the moment it is inadmissible, which --

MR. KULP: No, sir, we don't really say that. I think that --

QUESTION: If you assume it is inadmissible, and if you also assume it would tend to make the jury more likely to impose the death sentence, what difference does it make that there is another -- I don't understand your argument relying on the other aggravating circumstance.

MR. KULP: Well, I think in this case that the

evidence is so clear on the aggravating circumstance of violence that whether this evidence had been introduced or not introduced, or whether you had had any finding or any evidence at all --

QUESTION: That is the harmless error argument. That is Chapman against California.

MR. KULP: Yes, sir.

QUESTION: But that is quite different from the rationale of the Court of Appeals.

MR. KULP: I think the Court of Appeals viewed the case in the context that the evidence of the bus incident had nothing to do whatsoever with the violence finding.

QUESTION: And you have just agreed that would not be a sufficient rationale if it was prejudicial evidence and inadmissible.

MR. KULP: Well, I don't -- Justine Stevens, I don't think that just any type of evidence would call for a harmless error rationale necessarily. I think that obviously hypotheticals could be thought up where, as Mr. Snook indicates, a prosecutor could simply open the door and try to put in everything that the Court would allow, and we don't really try to suggest that that would be permissible.

QUESTION: It seems to me that -- but then it

is not a Zant argument. Then it is a harmless error argument, it seems to me. That is what I am trying to --

MR. KULP: Well, I think --

QUESTION: There is -- theoretically, at least, there is quite a difference between the two approaches.

MR. KULP: I think, though, that in Zant the Court recognized at least in a footnote in Barclay versus Florida the Court indicated that it had applied a federal harmless error standard in Zant, and I think that what the Court did in Barclay is a similar situation as to what the Fourth Circuit did here.

That is, one of the underlying rationales in Zant was the fact that there was mandatory appellate review which we have in Virginia just like it was in Georgia. And I would point out, and I think this is very significant, when the Supreme Court of Virginia on direct appeal reviewed this very case, when it talked about dangerousness, the Supreme Court of Virginia never considered this bus incident. I think that is important, because I think that simply goes to the overall way the case has come about is that I think everyone, the Fourth Circuit as well as the Virginia Supreme Court, has considered that that evidence was just inconsequential, and had no impact.

Now, the Fourth Circuit did not specifically say harmless error.

QUESTION: No, they said something quite different.

MR. KULP: Well, I think that --

QUESTION: They said, as I understand them, that as long as there is one aggravating circumstance supported by the evidence, it doesn't matter how much error there is with regard to the other aggravating circumstance. I think that is the logical extreme, I suppose. I am overstating it, but that is really what the position amounts to.

MR. KULP: Well, that is what they said, and that is basically what the Virginia Supreme Court has said in the case that Mr. Snook mentioned.

QUESTION: You are making sort of a different argument. You are saying really it is harmless and it is close enough --

MR. KULP: I don't want to limit myself, Justice Stevens --

QUESTION: No, of course not.

MR. KULP: -- to just that argument, because if this Court should not accept that rationale, then we think we have a harmless error argument, so we would certainly take the position that the Fourth Circuit --

QUESTION: But the harmless error argument is one that you would be asking us to make the harmless error determination. We can't really read the Fourth Circuit. Or are you saying we should read the --

MR. KULP: Well, I think you can, Justice Stevens, read the Fourth Circuit opinion, and the reason I say that is because in one of the footnotes they talked about the counsel, they didn't believe that counsel probably was ineffective because they said we don't think that there was any prejudice, and I believe, and if you look at the District Court opinion, they clearly found no prejudice from the failure to raise the Fifth Amendment issue.

So, I think that it is there. They didn't specifically use it in the terms of harmless error, but I do think it is there. And we would submit that the defendant or the petitioner in this case is basically trying to ask the Supreme Court to be the court of record to decide this issue for the first time.

The Virginia Supreme Court never had an opportunity to look at this situation at all, and the Federal District Court clearly held that it was waived under Wainwright versus Sykes, and we believe in fact that it was.

QUESTION: The Fourth Circuit law is clear on

the admissibility of this evidence, or not?

MR. KULP: I don't think it is absolutely clear. I think that in Gibson there you have --

QUESTION: Under Gibson how would the admissibility of this evidence be decided?

MR. KULP: I think that the admissibility of this evidence would really come under the Conquiss versus Mitchell case, not the Gibson case, and the reason I say that is because in Gibson the facts were that the court ordered the examination. And they said there that Fifth Amendment privilege would -- that the prosecution could not use in its case in chief ever.

But I submit that a reading of what Judge Hainsworth said in his concurring opinion in Conquiss was that that does not -- Gibson simply does not apply to a fact situation where in this case, as it was in Conquiss, the defendant comes in and asks the court to appoint him a private psychiatrist, whom he names, and all the court does is simply enter the order to allow him to be paid.

In other words, there is no state action involved in this case to call for a Fifth Amendment application. And so I think that while Judge Hainsworth is in the concurring opinion there -- that is why I say I am not sure that they have cleared that up.

QUESTION: What did the Fourth Circuit -- how do you think -- the Fourth Circuit said it didn't want to avoid deciding the merits in this case and then promptly didn't decide it.

MR. KULP: I don't think they did. I think they --

QUESTION: You would have thought they -- I gathered from what they wrote that they thought -- this panel thought Gibson controlled --

MR. KULP: They may have, Your Honor. I just can't read that with any assurance, and we cited Conquiss to them, and I say, you read the opinion, and I don't think they really resolved the issue. I think what they did is, they felt there simply was no reason to get embroiled in that, and -- we asked them to accept our argument on labor, and for some reason they sort of bypassed that and just said, well, we don't have to get to that because we had the one untainted aggravating circumstance, and under Virginia law and under Zant that is sufficient.

So, for those reasons, we would ask this Court to affirm the holding of the Fourth Circuit.

CHIEF JUSTICE BURGER: Mr. Snook, you have three minutes remaining.

ORAL ARGUMENT OF J. LLOYD SNOOK, III, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. SNOOK: Thank you, Your Honor. There are just a couple of points I would like to make.

First of all, as far as the question of whether the amicus brief even in fact presented this issue, the answer is, it did, and if you look at the amicus brief that is in the record, Pages 56 through 61, there is a six-page discussion based on Smith versus Estelle of exactly how this evidence ought to be treated and how it ought to be ruled inadmissible.

Now, as far as the procedural default issues there are a couple of points that I think need to be reiterated. One is that this is in fact a capital case. That means not only that somebody is going to be executed about all -- if in fact this issue is not -- doesn't result in a reversal, but more importantly, the additional obligations that are imposed by this Court on the Virginia Supreme Court in reviewing these cases have to be considered as well.

QUESTION: Do you think it requires the Supreme Court of Virginia to take up a case where the issue is presented only in a way that is contrary to its rules?

MR. SNOOK: Your Honor, the one point that I --

QUESTION: Do you?

MR. SNOOK: Not -- first of all, there is no -- well, okay. Yes, in order to answer that question very specifically, no, I do not think that necessarily. I do say, however, that where -- I mean, this Court has always prized thorough appellate review, including review that goes into issues not presented to it, issues raised below.

QUESTION: You think this Court feels better about a state court opinion which passes on a lot of the questions that weren't raised in that court than it does about an opinion which just passes on questions that were raised?

MR. SNOOK: If in fact you accept what Mr. Kulp is suggesting, that this Court ought to give great deference to what happens below because of that mandatory appellate review, yes, I would think you would feel better about it if in fact they reviewed the record in its entirety.

Now, the other point that I wanted to make relating to that is simply that counsel's failure in this case was the failure to research the law, not just to make the appeal, but failure to research the law, and that was the inexcusable neglect. That is the cause for the failure to appeal. As far as the Zant versus Stephens questions, first of all, we obviously agree

with Justice Stevens that what we are talking about here is a harmless error inquiry.

In neither Zant nor Barclay was there an independent constitutional violation. Those cases do not displace the harmless error analysis. Michael Smith was entitled to a constitutionally fair sentencing hearing free of harmful error, free of harmful constitutional error.

Finally, the constitutional flaw is not in the vileness finding, but is in the jury's decision to impose the death sentence. It is not enough under Virginia law to find one aggravating circumstance. You have to go beyond that to find that the jury is going to recommend the death sentence based on all the evidence that it has heard.

In other words, we are back to the question of harmless error. You cannot say beyond a reasonable doubt using the harmless error analysis that this jury heard and based its decision on only admissible evidence. For that reason we ask that you reverse the conviction and send it back for a new trial.

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

(Whereupon, at 1:47 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:

#85-5487 - MICHAEL MARNELL SMITH, Petitioner V. EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

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BY Paul A. Richardson

(REPORTER)