OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-5375

TITLE CHRISTOPHER A. BURGER, Petitioner V.
RALPH KEMP, WARDEN

PLACE Washington, D. C.

DATE March 30, 1987

PAGES 1 thru 54

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER A. BURGER,

Petitioner

v. : No. 86-5375

RALPH KEMP, WARDEN

Washington, D.C.

Monday, March 30, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JOSEPH M. NURSEY, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

WILLIAM B. HILL, JR., ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No1 86-5375, Burger against Kemp.

Mr. Nursey, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOSEPH M. NURSEY, ESQ.,

ON BEHALF OF THE PETITIONER

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

At the time of the offense Chris Burger and his older co-indictee were privates in the United States Army stationed at Ft. Stewart, Georgia.

They were drinking heavily at a club on base, and when they ran out of money, the co-indictee devised a plan where they would rob a cab driver to obtain some more money.

The cab was called out to the base, and after riding with the cab driver for awhile, on a prearranged signal, the robbery was accomplished.

After the robbery was accomplished, the co-indictee forced the cab driver into the back seat of the cab where he sexually assaulted him, and the cab driver was forced by the co-indictee into the trunk of the cab.

Chris and the co-indictee continued driving to

the Savannah, Georgia airport, where they went to pick up a fellow soldier who was flying home -- was flying back to the base from his home.

This fellow soldier is the only uninvolved eye witness to any of the incidents which occurred that night. This fellow soldier testified that during the ride from the Savannah, Georgia airport back to the base, the co-indictee was essentially gloating and bragging about the crime, while Chris essentially was driving the cab silently, occasionally agreeing with some of the statements that the co-indictee was making.

When the co-indictee during the drive suggested that they should kill the cab driver, Chris argued against this and said that they should just release the cab driver and get rid of the cab.

After the -- after the fellow soldier was dropped off at the base, they continued riding in the cab for a period of time, and then the co-indictee directed Chris to drive the cab to an area in the woods in rural Wayne County, Georgia, that both he and Chris were familiar with.

The cab was parked at a pond at -- in the woods. The co-indictee then removed the CB radio from the front of the cab, and taking the CB radio to dispose of it in some bushes. During this time, Chris opened up

the trunk of the cab and asked the cab driver if he was all right.

After receiving an affirmative reply, he closed the trunk of the cab. By this time, the co-indictee had returned to the cab and Chris began to walk away, and the co-indictee asked him, where are you going? And Chris said, we're leaving now, aren't we? And the co-indictee said, no, we've got to get rid of the cab, and directed Chris to drive the cab into the water, which he did, resulting in the death of the cab driver.

QUESTION: When you say, he directed him, what do you mean by that, Mr. Nursey?

MR. NURSEY: He -- as Chris was starting to walk away, the co-indictee said, we have to get rid of the cab. And he told Chris, you drive the cab into the lake, which he did.

QUESTION: Was he a superior officer or something like that?

MR. NURSEY: He was an older person. They were both privates in the Army.

The order in which I'd like to address the issues before this Court if the failure of Chris' trial counsel to conduct reasonable investigation, a reasonable inquiry for the sentencing phase of trial;

then the pervasive conflict of interest that existed in this case; and then the burden-shifting jury instruction on malice and intent that was given at the guilt-innocence phase of the trial.

The most important consideration in the death sentence which Chris received in this case is that this death sentence is not reliable as society's reasoned moral response to Chris' individualized background.

Chris was twice tried in Wayne County, Georgia. After the first trial, the Supreme Court of Georgia affirmed the conviction but reversed the death sentence, sending the case back for retrial solely on the issue of sentencing, and he was again sentenced to death.

At both of these trials, the jury had absolutely no knowledge of the individualized characteristics of Chris or his background other than the state's version of the crime for which he was convicted.

They knew only the crime that was committeed; they did not know the person they were sentencing.

In making what this Court has referred to as the unique, difficult, individualized, subjective decision which the jury must make at sentencing, this difficult decision was rendered impossible by the fact

that they had absolutely no knowledge of the background of the person they were sentencing.

There's a wealth of information that a reasonably informed attorney would want to have presented before the jury. There's a wealth of information that a reasonably informed attorney would have wanted to consider as potential mitigating circumstances to be presented at the sentencing phase of trial.

Some of these potential mitigating circumstances, which a reasonably informed attorney would have wanted to have presented, were estalished at the Federal evidentiary hearing in this case.

Chris had absolutely no prior record. He was 17 years old at the time of the offense. But more than just his chronological age, he had an IQ in the lower 10 percent of the population.

He was suffering from brain damage, most probably caused by blows to his head when he was young. He was functioning at the mental level of a 12-year-old child.

Chris was the offspring of a teenage marriage --

QUESTION: By Chris, you mean the petitioner here, Mr. Burger?

MR. NURSEY: Yes. He was the offspring of a teenage marriage, and his family -- and his parents were divorced when he was very young.

He spent the rest of his youth being kicked back and forth between two parents who wanted to have nothing to do with him.

His father would not want him to live with him. He'd throw him out of the house, send him to live with his mother, who also wanted to have nothing to do with him. And as soon as the opportunity arose, she'd kick him out of the house and send him back to live with his natural father.

He was physically and psychologically abused by his natural father, and when he came back to living with his mother and with a stepfather, this stepfather introduced him to drug abuse and alcohol abuse at the age of 11.

He was physically beaten by this stepfather, and his mother was also physically beaten by the stepfather.

When he tried to intervene in the beatings that his mother was receiving at the hands of his stepfather, he would be beaten for trying to intervene.

Chris was then sent back to live with his natural father. And because of the physical abuse he

was suffering there, he ran away from home, trying to hitchhike to Florida to live with his mother who had moved to Florida.

After hitchhiking from Indiana to Florida and arriving in Florida broke at his mother's home, she told him he wasn't wanted and threw him out of the house and sent him back again to live with his natural father, who also locked him out of the house.

So for the last few months before his enlistment in the Army, he was forced to live with a neighbor who took him in because he had nowhere else to go.

Not one word of this individualized background of Chris was heard by either one of the juries that sentenced him to death.

Under the -- the death penalty scheme in Georgia, only one juror is required to impose a sentence of life imprisonment. If one juror had been persuaded by the mitigating evidence in this case, Chris would have received -- if one reasonable fact-finder on that jury had been persuaded -- Chris would have received a sentence of life imprisonment.

This is not a case of second guessing some strategic or tactical decision that was made by his trial attorney. This is, rather, a case where the trial

attorney made absolutely no effort to become reasonably informed about Chris' background.

The trial attorney in his --

QUESTION: Counsel -- counsel, may I ask this question?

MR. NURSEY: Yes.

QUESTION: How did your client, Mr. Burger, get into the United States Army if his mental capacity was that of a 12-year-old child?

MR. NURSEY: Justice Powell, at the time that he was enlisted into the Army, this was in the early years of the all-volunteer Army. And I think it's pretty well known that they were fudging a lot on their enlistment quotas, because of the -- the enlistment quotas they had, they were fudging a lot on the qualifications of the people they were accepting.

He was a 10th grade dropout with an IQ of 82. I don't understand how he could have been allowed into the Army.

QUESTION: Did the jury at the sentencing hearing know the age of the defendant?

MR. NURSEY: They knew that he was 17. They did not know anything about his mental impairment, and they didn't know that he had an IQ of only 82.

QUESTION: Did counsel argue at that time, or

has it been argued at anytime since, that it's unconstitutional to impose a death sentence on a minor?

MR. NURSEY: The counsel at trial never made that argument, either at trial or on appeal. The post-conviction in this case -- the state post-conviction in this case was handled by an attorney who was recruited by a lay person from the ACLU in Georgia.

This attorney -- the State of Georgia provides absolutely no provision for the appointment of counsel in state post-conviction.

This attorney had just passed the Georgia bar exam, and had not even established an office; was basically operating out of his home, and knew nothing of the constitutional jurisprudence before this Court, and did not raise it in state habeas corpus, so it's never been exhausted in this case.

QUESTION: So it's never been raised?

MR. NURSEY: No. It was not exhausted in the state courts and was not raised.

QUESTION: Mr. Nursey?

MR. NURSEY: Yes, Justice Scalia.

QUESTION: How would this information have gotten to the jury? I mean, what witnesses would have had to be put on? I gather than one of the arguments

made by the attorney was that his reason for not putting it on, at least that portion of it that he knew, was that he was worried that the cross-examination would do more harm than the direct testimony would do goo.

Now, how would he gotten it on? He would have put the mother on?

MR. NURSEY: That's correct, Justice Scalia. I think that's what I can only best refer to as the monster in the closet theory that the attorney used in trying this case.

He kept at the Federal evidentiary hearing making vague references to trouble that Christopher Burger had been in, that there was some sort of trouble in his background that would come out before the jury if he attempted to put in this evidence of his background.

The only trouble Chris has ever been in is that he was adjudicated a delinquent for the status offense of being a runaway and for being truant at school, which certainly under the facts of his background, is more mitigating than aggravating in the case; far more mitigating.

There is nothing in terms of criminal convictions or anything else like that in his background that would have been presented had this evidence put on.

QUESTION: Are we sure about that? I mean, is

that the only thing that the lawyer had in mind? I mean, might there have been some other testimony that he expected from the mother that we don't know about?

MR. NURSEY: There's nothing to indicate that. And he -- the lawyer testified about the investigation he did for the sentencing phase of trial.

And to begin with, he never even contacted Chris' mother. She had to contact him. And the only way she found out that her son was charged with murder and was about to face trial in Georgia was that she got a phone call from a relative in Indiana who read about it in an Indianapolis newspaper.

And she went to Wayne County, Georgia. And this was just three days before the trial was scheduled. The lawyer was perfectly willing to go to trial at that time without ever even spoken to anyone about Chris' background.

And then when he finally did get around to speaking with her, he testified that he never explained the penalty phase of trial to her, and never told her what type of evidence could be presented in mitigation.

He had no way of drawing from her this information about the background --

QUESTION: Well, he had talked to Chris about it for, what, about six hours in all?

MR. NURSEY: A total of about five, if the time records are to be accepted.

QUESTION: And was all of this information volunteered by your client? Did the lawyer have reason to know?

MR. NURSEY: This is very significant. He testified that he spoke with Chris about the penalty phase of trial.

But when he was asked, what did you tell Chris about the penalty phase of trial, he said, I told him that we could present evidence of, quote, something good about you.

Now, a lay person would not understand something good about you means that you have an IQ of 82, that you're brain damaged, that you came from this horrible background of child abuse and neglect.

Certainly the average lay person wouldn't understand that to mean, something good. A 17-year-old of very low mentality coulin't be expected to understand when he was asked, tell me something good about you, that that meant all of this terrible information that's in Chris' background.

QUESTION: So we don't know that the lawyer knew all of this that you're telling us and didn't put it on?

MR. NURSEY: He apparently didn't know. I don't even think the word "apparently" would be correct. He didn't know it, because he testified at the habeas hearing, all I could see to put on would be to put on a mother expressing her love for her child, and I couldn't see any good in presenting that. And what could he say, that he was a quote good boy who went to church?

If he had known anything about the background, he'd know that that wasn't the type of mitigation that we're talking about, a quote good boy who went to church. But we're talking about this terrible background of child abuse and mental deficiency from which Chris came.

An important factor of this is that after the original death sentence was reversed by the Supreme Court of Georgia, the case was remanded for retrial, solely on the issue of sentencing.

And it was remanded in September, and the case was not retried until July of the following year. So the attorney, knowing that all considerations of guilt-innocence were gone now, the Supreme Court of Georgia had affirmed the conviction, and knowing the case was coming back solely on the issue of sentencing, and having nine months to prepare for it, he testified

that during that nine months he conducted no investigation for the sentencing phase of trial; that during that nine months he interviewed no witnesses for the sentencing phase of trial; he testified that he simply opened up his file, reviewed the file, and decided to try the case the same way he had before, which he knew had failed the first time he'd tried it.

Exacerbating this problem of the failure of the counsel to conduct any sort of reasonable inquiry for sentencing in this case is the pervasive conflict of interest that existed in this case.

The law firm of -- the two-partner law firm, the law partner Leaphart and the law partner Smith, were appointed to represent the two co-indictees in the case. Although the formal appointment was, law partner Leaphart to represent Chris, and law partner Smith to represent the co-indictee, in reality they took it as a law firm effort.

They both -- both law partners conducted attorney-client interviews with both of the clients. The law partners researched the law together. They made preparations for the case together. They discussed the strategies of the case together.

QUESTION: How were they tried? What order were they tried in? Who was tried first?

MR. NURSEY: Okay. Chris' guilt-innocence trial was tried first, and then the co-indictee's guilt-innocence trial.

They were reversed on appeal, and when it came back to Wayne County, Chris' penalty trial was tried first, and the co-indictee's penalty trial was tried second.

QUESTION: So both for the guilt phase and the penalty phase, your client came first?

MR. NURSEY: That's correct. I think -- I think something's very significant about that is that these cases were tried in a very small tightly-knit rural community in southeast Georgia, Wayne County, a community of slightly over 17,000 persons.

And the attorney testified at the evidentiary hearing that everybody in the county knows what everyone else is doing. He testified that these cases were well publicized, well known, in this community; and that there's no way you could keep a secret.

QUESTION: Well, you have to rely on that, don't you? Because there's nothing that could have been said, so long as they're not being tried together, there's no reason why one lawyer wouldn't put on everything in your client's defense that he had available.

Because it couldn't possibly -- it couldn't possibly hurt the other defendant; he's not being tried at the same time. Be a totally different jury.

MR. NURSEY: There are two different -- two important factors about that. The first is that in this small community, an attorney's integrity and credibility in a small community is extremely important, much more important than, say, an attorney in a large community who can be anonymous before a jury.

Especially by the time of the second set of trials, there's no way that this community wouldn't -- couldn't know that the law partners were representing the two co-indictees, and representing them on exactly opposite defenses.

And the defenses were exactly opposite. Chris' defense, which was supported by the testimony of the eyewitness who rode with them in the cab for awhile, was that he was the less culpable party, and that the co-indictee was the one taking the dominant role in this.

The co-indictee's defense was the exact opposite. His defense was that he did not know that Chris was going to drive the cab into the pond, and that he tried to stop -- that he tried to talk Chris out of doing it.

QUESTION: Well, doesn't that cut against your argument? I mean, I could understand your argument that a conflict of interest had affected the case if that defense hadn't been put on.

But in fact you're telling me that he put on the defense which you -- which you now argue conflict of interest would have induced him not to put on?

MR. NURSEY: He put on the defense, to an extent, but he would have no credibility in this small town. He testified the reason he didn't move for a change of venue --

QUESTION: He came first. It didn't matter.

MR. NURSEY: But at the second trial -- it came first, but that doesn't mean the community didn't know that's what the defenses were at the first trial.

QUESTION: How could they know it?

MR. NURSEY: But certainly by the second trial. Because this was a very well known even in that community.

He testified the reason he didn't move for a change of venue is because if he moved for a change of venue, he knew there was no way he could have kept it secret from the community because everybody knows everything there, and that they would have held it against him for moving for one.

And then certainly by the second trial, everybody in the community by that time, he testified there was general knowledge in the community that the case was being retried. Everybody would have known what was going -- what had gone on the first time.

And the second factor is that although the lawyer testified that he attempted to plea bargain the case, and approached the district attorney more than once attempting to plea bargain the case, he never offered the most important thing he had to offer in the plea bargain.

He never offered the testimony of his client against the co-indictee in exchange for a life sentence. And he couldn't do that because they were -- because he had some duty to protect the co-indictee at the same time with his law partner.

QUESTION: Is there any indication in the record that the prosecutor would have accepted a deal like that? Or any indication that there was a need to?

Usually prosecutors aren't looking for a deal like that unless there's some need to get the testimony.

MR. NURSEY: I think the prosecutor would not have had any trouble accepting a deal for a 17-year-old. That would not be a problem.

And I don't know any district attorney who

doesn't want to present a case with that -- without an eyewitness there.

He had to present both cases without eyewitness testimony of what actually happened.

QUESTION: Well, now wait, he had an eyewitness who was riding in the car.

MR. NURSEY: Up until the point where --

QUESTION: Right.

MR. NURSEY: Yes.

QUESTION: That's right. An eyewitness, the fellow they picked up at the airport who knew the fellow was in the trunk. They told him that the fellow was in the trunk. In fact, they called back to him, how you're doing, while he was in the car.

And later that same car is found in the bottom of a pond. And you think that isn't a strong case?

MR. NURSEY: I'm certainly not going to argue --

QUESTION: With the fellow still in the trunk.

MR. NURSEY: I'm certainly not going to argue, Justice Scalia, that it's not a strong case. I just think --

QUESTION: Do you think there was any chance that you'd take a plea bargain in order to get additional -- additional evidence of whether they

committed the crime or not?

MR. NURSEY: Most capital cases are plea bargained, and it generally doesn't have a whole lot to do with the strength of the case.

And it would have -- and I don't know a district attorney who doesn't want to have an eyewitness anyway, no matter how strong the case, who doesn't want to have an eyewitness at the time of the commission of the crime.

And the most important thing is, he never offered it. He never offered it, and he couldn't offer it because he and his law partner had an obligation to the co-indictee too which created this conflict of interest.

In the --

QUESTION: You say he couldn't have offered it, but he testified to the contrary, didn't he? The lawyer testified, if crucifying Stevens would have helped Bruger, would you have done it? Yes, sir.

So he -- he -- his testimony indicated he was not -- did not feel himself under any inhibition by reason of the conflict.

MR. NURSEY: He made those conclusory statements in his testimony, that yes, I would have crucified Stevens had I had the opportunity to do so.

I think as this Court noted in Wood v. Georgia, an attorney suffering under a conflict of interest is not going to concede that he acted improperly.

I think his actions speak louder than his testimony. And his action was, he never offered the one thing he had -- the most -- the strongest point he had to offer in terms of plea bargain, which was his client's testimony against the co-indictee.

And it's important that Chris was never informed about this conflict of interest. The circumstances of the appointment weren't that he was brought into court formally and appointed the counsel. And like what happens under rule 44(c) in the Federal procedures, he was informed of the possibility of the conflict.

The way the appointment occurred in this case is that the -- is that the appointing judge called up the clerk of court in an ex parte communication -- conversation, and told the clerk of court to call the law partners and tell them they had been appointed.

So the clerk of court then called the law partners, telling them they had been appointed, and at no time was Chris brought into this process, or any inquiry was made of him whether there was a problem with

this for him, or whether it -- it wasn't told --

QUESTION: Well, Mr. Nursey, we appoint counsel here on occasion for people who don't have counsel. And I don't think we make any inquiry.

We simply contact a lawyer, and assume he will contact the client.

MR. NURSEY: I'm not arguing that it's constitutionally required to have consultation with the client before the appointment of counsel is made.

What I'm saying is that the circumstances of this appointment made it impossible for the court to inquire as to the problem with the conflict of interest.

There was no inquiry made, and more importantly, there was no telling Chris that there might have been a problem of conflict of interest.

QUESTION: But Mr. Nursey, do you think there's a flat rule against appointing two law partners to represent co-defendants like this?

MR. NURSEY: In a capital case --

QUESTION: I mean, are you asking us -- maybe that's what you want us to do in this case, is hold there is a per se rule.

MR. NURSEY: I don't think the Court needs to go that far in this case, but yes, I believe there should be a flat rule against appointing law partners in

a --

QUESTION: Because if you don't have a flat rule, I don't know what good it would do to talk to this not very intelligent young man about whether he sees any problems of conflict of interest in appointing two law partners.

I think he might well think that they'd probably be able to work together and save some time on the law and it might work out better. I mean, I don't know how he could judge that very well.

MR. NURSEY: They couldn't work together, because the interest was so divergent in the two cases. They had the greatest adversity of interest you could ever poassibly have in a criminal case, each blaming the other.

There's no way.

QUESTION: But isn't that potential almost always there where you have two accomplices in this kind of a transaction? I mean --

MR. NURSEY: That potential is almost always there, but --

QUESTION: -- it's fairly obvious that one is going to say, the other was more to blame than I, or something like that.

MR. NURSEY: That potential is almost always

there, but that doesn't actually occur in every case. And in this case, it actually occurred, and it was known very early that it actually occurred.

And there's the problem that this Court address in Tyler v. Sullivan that a trial judge is supposed to make inquiry when it becomes obvious to him that there may be a conflict of interest.

QUESTION: But in fact what you're complaining about is that that defense was made which is precisely the defense that you claim a conflict of interest would induce not to be made; and that that defense was not made which a conflict of interest would have caused to be used instead.

MR. NURSEY: The fact --

QUESTION: That is to say, this lawyer relied on the fact that his client had not done as much as the other defendant, which you would think the conflict of interest, if that's what he was worried about, he wouldn't have made that argument.

He would have tried to rely on the other things that you tell us he should have relied on, namely this --

MR. NURSEY: He made -- he made --

QUESTION: -- fellow came from a bad background and all of that.

MR. NURSEY: He made that argument, but he couldn't have made that argument with any credibility.

QUESTION: I don't understand why you say that. That I don't understand. He couldn't have made it with any credibility?

MR. NURSEY: Because at the time of the second sentencing trial, of the 36 jurors that the record reflects responses for, 23 answered that they knew about this case. And he conducted no further voir dire of them to find out if they knew -- what they knew about the case was that they had conflicting defenses; that they knew the law partners were representing the two opposite clients; none of this was done.

And this is in a --

QUESTION: You think it'd make a difference to the jury that they knew it was two partners in the same firm who were making inconsistent arguments, as opposed to two different lawyers?

MR. NURSEY: Yes, I think --

QUESTION: Suppose they had known that --

MR. NURSEY: -- if they think it's two unrelated lawyers, they can sit there and judge out, now which one do we believe from the evidence we've heard.

QUESTION: Right.

MR. NURSEY: When there's two law partners --

QUESTION: They'd still have to say one of them's lying.

MR. NURSEY: Pardon?

QUESTION: I mean, they'd still have to conclude, one of them is wrong, or one of them is lying.

MR. NURSEY: That's right. That's right. But when you're dealing with two law partners, they have to conclude the law firm is pulling a charade on us. The law firm is just -- just, you know, making a joke out of this.

They're going in and arguing, whoever is not on trial happens to be the most culpable person.

QUESTION: Yes, but insofar as your client is concerned, the only conclusion that is relevant is that one of them is lying, and that's the same conclusion that the jury would draw, whether they were partners from the same firm or not.

MR. NURSEY: I think if they knew that it was people who were related and working together, they'd look at as, the law firm is lying to us.

Further unreliability in the fact-finding process was created the jury instruction, the burden-shifting jury instruction on the essential elements of malice and intent.

This is the virtually identical instruction to

the one that was condemned by this Court in Francis v. Franklin.

The essence of the defense being lesser culpability, and that Chris was under the direction and domination of his co-indictee.

The important thing that the jury had to decide in making a decision whether the requisite malice and intent existed was not determining whether the intent was formulated by some 30-year-old adult, but whether or not the intent -- the -- the requisite intent was formulated by a 17-year-old operating at the thought processes of a 12-year-old.

And this decision about Chris' formulation of intent was taken away from the jury by an instruction that told them that they are to presume that malice and intent exists from the natural and probable consequences of any life-threatening acts which Chris may have committed.

After Furman v. Georgia, the Georgia legislature enacted a bifurcated system for capital trials, establishing a sentencing phase where a complete portrait of the person to be sentenced is presented.

Especially in the case of a 17-year-old, we want to be certain that the fact-finders on the jury make the sentencing determination with adequate

knowledge.

Chris was alive about 6,000 days at the time of this offense; had lived about 6,000 days at the time of this offense. But the jury's entire knowledge of his background, their entire knowledge of his background consisted of the state's version of a few hours of one day of this life.

And the reason that was the state's entire knowledge of his background was because he was not provided with the counsel which our Constitution requires.

The death sentence in this case is not reliable. We cannot be -- we cannot feel comfortable saying that it reflects the reasoned moral judgment of the people of Wayne County under the circumstances under which it occurred.

And for that reason, the death sentence in this case should be vacated.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nursey.

We'll hear now from you, Mr. Hill.

ORAL ARGUMENT OF WILLIAM B. HILL, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

First I'll address myself to petitioner's claims of a violation of the Sixth Amendment rights, and then I'll address myself to the correctness of the trial court's charge.

In this case petitioner claims that his trial counsel labored under a conflict of interest, and that this conflict manifested itself in two respects -- only two respects identified by this petitioner from the record.

And that is, the alleged shortcomings of trial counsel in not offering this petitioner's testimony against his co-indictee in exchange for a sentence less than death; and trial counsel's alleged failure, because of this conflict of interest, not arguing alleged lesser culpability on direct appeal.

One thing I'd like to make clear to this Court before I proceed further is the respondent's position with reference to this conflict of interest claim.

And the respondent's position is, as found by the District Court -- and the District Court in this case was the fact-finder; the evidentiary development was in that Federal court, not in a state court -- the District Court found, under the facts of this case, no joint representation, no conflict of interest, and no adverse affect on counsel's representation.

Now moving directly to those only two respects in which this petitioner contends that this conflict manifested itself in adverse effects on counsel's representation, though counsel here would have you to believe that because of a conflict of interest, Mr. Leaphart did not offer Christopher Burger's testimony against his co-indictee, the actual facts reveal that Mr. Leaphart at all times, prior to trial, and in that interim period of time between the decision on direct appeal which reversed the first death sentence, and the trial -- the retrial on sentencing, Mr. Leaphart attempted to engage in plea negotiations.

Now Mr. Leaphart was experienced trial counsel. He had litigated in this area for some 15 years; had tried 10 to 12 death penalty cases; and had been litigating against the same district attorney for eight year.

This district attorney --

QUESTION: Mr. Hill, is it -- is it common for a state judge in your state to appoint law partners to represent law partners to represent codefendants?

MR. HILL: It is not uncommon, Your Honor.

QUESTION: It is not uncommon?

MR. HILL: It is not uncommon. I would not go so far as to say it is common. But what is important

here is that Mr. Leaphart and Mr. Smith were experienced criminal lawyers.

This was a death penalty case, an extremely heinous death penalty case. And that trial judge appointed the most experienced attorneys that he could. He appointed Mr. Smith and Mr. Leaphart.

And Mr. Leaphart attempted to engage in plea negotiations with Glen Thomas, this district attorney. But the unrefuted testimony in the record -- unrefuted -- is that the district attorney flatly refused to open any avenues for plea negotiations; thus plea negotiations were never engaged in; and Mr. Leaphart never had the opportunity to make any type of offer, however characterized by this petitioner.

QUESTION: Well, it would have been -- you say he tried to engage in plea negotiations after the -- after the overturning of the first death sentence.

MR. HILL: Yes, Your Honor.

QUESTION: But by that time the district attorney has the conviction in his pocket.

MR. HILL: Yes, he has the conviction in his pocket. But trial counsel -- it is not uncommon. This is a south Georgia community. And counsel who routinely represent death row inmates, as does my opponent here at the bar who I've litigated against for some 10 years,

one of the things you consider is that in a small community like this that's usually rural in nature, death penalty cases cost money.

And after reversal on the first appeal, maybe you can incline the district attorney to take a plea to a life sentence.

Mr. Leaphart tried to do this in this case. But the district attorney refused to even discuss it.

So the facts in this record reflect that there was no offer of a plea not because of some conflict of interest, but because the district attorney opened no channels for communication.

QUESTION: Were both sentences reversed on appeal?

MR. HILL: Yes, Your Honor. There was --

QUESTION: So he could have offered his testimony on the penalty phase? Could he have offered his testimony?

MR. HILL: He could have offered it. But the district attorney never gave him an opportunity to, and under the facts of this case, why would he want it?

You've got a detailed confession from Christopher Burger, not only signed but sworn to; and that after making this confession, Christopher Burger took the authorities to the area where this burrow pit

filled with water, where the car was located.

Why would he want testimony.

QUESTION: (Inaudible) Burger's confession introduced against the other defendant?

MR. HILL: No, Your Honor, it was not.

QUESTION: So that's why he'd want it.

MR. HILL: Stevens had also confessed in intricate detail to all the facts and circumstances of the crime, including the oral and anal sexual assault of this fellow soldier who they killed.

Yes, Your Honor.

QUESTION: What was done during this nine-month period?

MR. HILL: Mr. Leaphart testified that after his reversal on appeal, and his billing records to the County reflect, he had further conferences with the mother, with Christopher Burger, and even as -- Mr. Leaphart testified to and the record reflects that the jury was out for a period of time before returning the original sentence of death.

And they came back and asked for another charge on the possibility of parole.

Mr. Leaphart after the original trial did not doubt his strategy, but having to try this case again before a new jury, and after having found no additional

information favorable to Mr. Burger, had no reason to depart from his strategy.

As a matter of fact, he supplement and amplified his strategy by use of a graph at the second retrial in which he listed the disparities in age and criminal actions accomplished by both this petitioner and his co-indictee.

And what is important is that it was some six years after retrial when the Federal evidentiary hearing was had, and present counsel before this Court still has not come up with any additional information of substance that Mr. Leaphart could not find in that period of time between the reversal of the original death sentence and the retrial on sentencing.

QUESTION: What is the answer to my -- what did he do?

MR. HILL: He consulted again with his client, with his client's mother, and those were the only two individuals --

QUESTION: And what else did he do during the nine-month period?

MR. HILL: He consulted with his client, his client's mother, the only two individuals known to him. He perused the trial transcript. He rethought his strategy. He supplemented his strategy. And he retried

the case.

QUESTION: Did he do any investigating at all of any kind or any fashion? If so, what?

MR. HILL: Mr. Leaphart testified that he was never given any information by his client or his client's mother on which to move.

QUESTION: Then your answer is nothing?

MR. HILL: No, Your Honor, that is not my answer. My answer is --

QUESTION: (Inaudible.)

MR. HILL: He reevaluated the case in consultation with his client.

QUESTION: Reevaluating. That's thinking?

MR. HILL: No, Your Honor. He reevaluated the case after consultation with his client and his client's mother, the only two individuals known to him.

He had no new evidence. And even at this point present counsel has not shown this Court any new evidence.

QUESTION: When did he find out he had an IQ of 12?

MR. HILL: Your Honor, Mr. Leaphart --

QUESTION: When? When? When?

MR. HILL: I'm trying to answer the Court's question, Your Honor.

QUESTION: My answer is when. That's one date.

MR. HILL: Prior to trial.

QUESTION: When? One day? Nine months? Six months? When?

MR. HILL: Prior to trial, Your Honor. Mr. Leaphart retained a psychologist to examine Christopher Burger.

This psychologist retained by trial counsel evaluated the defendant and informed Mr. Leaphart that Mr. Burger had an IQ of 82, and that Mr. Burger could distinguish right from wrong at the time of the offense; that Mr. Burger was a sociopath; that Mr. Burger, to quote the psychologist's language, was as compelled to do evil as a minister was to do good, that Mr. Burger was prone to hurt people.

Mr. Leaphart knew this to be the testimony of the psychologist that he had retained, and this testimony was previewed at the Jackson Denno hearing.

And Mr. Leaphart made the decision that that type testimony, though favorable to his client with reference to his IQ, was too detrimintal in other respects, especially if the psychologist was going to be subjected to a thorough and sifting cross-examination by the district attorney, which under Georgia law, is not limited to issues delved in on direct.

So prior to trial, Mr. Leaphart knew his client's IQ, as a result of his investigation in preparing for trial.

QUESTION: (Inaudible) seven months? Six months? How many months before the trial?

MR. HILL: Your Honor, I'll be honest with you, I cannot remember that specifically from the record. But I'm sure the record will reflect it.

QUESTION: That's perfectly all right. That's the only answer I've been seeking.

MR. HILL: Yes, Your Honor.

The only other respect in which counsel contends, or petitioner contends, that trial counsel representation was adversely affected by this conflict of interest was counsel's alleged failure, because of the conflict, not to argue lesser culpability on appeal.

Now what the record evidence reflects is that Mr. Leaphart testified -- keeping in mind that Mr. Leaphart was the attorney who got the original death vacated -- he testified at the conclusion of the retrial on sentencing, he perused the transcript and the record, and he raised every meritorious issue on appeal he could identify.

He specifically testified that while in his judgment an argument of less culpability under the facts

of this case was palatable when presented to a jury and in the imaginative form in which he did, when the facts actually reflected that his client was the killer, the actual killer, it would have been frivolous to argue lesser culpability to the Georgia Supreme Court.

He testified that was his reason for not raising that allegation, which relieves this Court of any necessity to speculate as to some conflict of interest.

That testimony is unrefuted in the record. What the facts in this case reveal is that this petitioner was afforded an opportunity at the Federal evidentiary hearing to present facts in support of his claims of a conflict of interest.

He has not done that. The facts in this record, nor prevailing constitutional principles, would afford him relief on this claim, and the District Court and the Circuit Court so held.

Secondly, this petitioner contends that trial counsel was ineffective for not presenting potentially damaging character evidence on the sentencing phase of trial.

Now this is not a case in which trial counsel did not present mitigating evidence. From the very presentation of the first witness of any substance by

the prosecution, Mr. Leaphart began developing mitigating evidence on behalf of Christopher Burger.

On cross-examining Mr. Botsford, he brought out the fact that Mr. Burger was 17 years old at the time of the crime, and his co-indictee was 20. On the cross-examination of the officers who took the confession, he brought out the fact that Christopher Burger stated, in his confession, that Thomas Stevens told him to drive the car in the pond.

On cross-examination of Botsford, who was present at all those acts preceding the murder, Mr. Leaphart brought out the fact that Botsford characterized this petitioner's involvement as following the directions of Thomas Stevens.

So it would be incorrect to characterize this case as one in which no mitigating evidence was presented.

What this Court is called upon to do, in this situation, is to examine the totality of the circumstances, all those facts as they existed and were known to counsel at the time of trial, to determine whether Mr. Leaphart's decision not to present that potentially damaging character evidence that was available to him at the time of trial was a reasonable decision.

Mr. Leaphart testified, unrefuted, and this petitioner was present at the Federal evidentiary hearing, did not take the witness stand and testify contrary.

Mr. Leaphart testified that his client provided him the names of no individuals that he could talk to or use as potential witnesses; no one.

Mr. Leaphart testified that notwithstanding that failing of his client, he spoke to the petitioner's mother and had consultations with her.

Now petitioner's mother testified that Leaphart never made any efforts to contact her, and that she only talk to him because she came --

QUESTION: Mr. Hill, can I interrupt you for just a second?

Maybe neither the petitioner nor his mother had the names, but there was this psychologist who -- or psychiatrist who interviewed the petitioner at some length.

Surely some of this background must have been discussed there, and wasn't he a potential source of information?

MR. HILL: Yes, Your Honor, he was.

Mr. Leaphart testified that after Mr. -- Dr. O'Hare examined the petitioner -- now Dr. O'Hare had

been used on numerous occasions by Mr. Leaphart in the past -- Mr. Leaphart discussed in great detail the petitioner's testimony with Dr. O'Hare.

Now what is curious, too, is that in his consultations with Dr. O'Hare, this petitioner told Dr. O'Hare, and it was the basis for his evaluation and determinations of his IQ, that he had been struck in the head some five times between the ages of nine and 16, severe blows to the head, and this was the possible source of his brain damage; that his mother was dead, which was not true because his mother was at trial and testified at the evidentiary hearing.

Mr. Leaphart consulted with Dr. O'Hare, went over his evaluation and diagnosis, and decided that this testimony would not be favorable.

But he used it on the Jackson Denno hearing in an effort to show that Christopher Burger lacked the requisite intellectual capacity to intelligently waive his Fifth Amendment rights under Miranda.

Now that testimony is available to this Court because it's in the Jackson Denno hearing of the trial transcript.

After having actually heard his witness testify, after being subjected to cross-examination by the prosecution, Mr. Leaphart made a strategic trial

decision. And strategic decisions, once made after reasonable investigation of the law and facts, are virtually unchallengeable, to use this Court's language.

He decided it would not be beneficial to his client to use that testimony.

In addition, Mr. Leaphart review with this psychologist psychologists' reports from Indiana. He consulted with an attorney in Indiana who had served as a big brother.

Mr. Leaphart testified that after that telephone consultation that he and that attorney both agreed that that attorney could present no testimony favorable to Mr. Barger.

MR. HILL: Well, I understand that the psychologist couldn't have, or the attorney, but the argument your opponent makes, and I just want to be sure you respond to it properly, was that the way in which Mr. Leaphart questioned the mother and presumably also the psychologist did not let them know the kind of information that was readily available about his bouncing back and forth between his father and mother and all the difficulty he had as a young child.

Now, certainly the sources of that information were avialable if he'd asked the right questions.

MR. HILL: Your Honor, with all due respect, I

think that opposing counsel's characterization of the record is not a fair characterization.

Mr. Leaphart testified that he consulted with the mother and with Christopher Burger. He testified that he told Chris -- in response to a question from counsel for the petitioner -- that mitigating evidence was basically anything -- you can put up anythinn in mitigation under Georgia statute; anything at all.

QUESTION: But did he use the words, "anything good about you"?

MR. HILL: He said, anything good about you. But in addition, Mr. Leaphart also testified that he was aware of Christopher Burger's background, and obviously he acquired this information from questioning of Christopher Burger, the attorney in Indiana, his psychologist, and the mother.

Now the distinction in the point that counsel for petitioner makes here today is that he contends that Mr. Leaphart did not make it clear to the mother what it was he needed.

Counsel does not contend that Mr. Leaphart did not get from the mother the information he needed upon his questioning of her.

QUESTION: So your position is that Leaphart had all this information and elected not to use it.

Your opponent seems to suggest he didn't even have the information.

MR. HILL: Your Honor, the record reflects that what Mr. Leaphart had is the information I have been detailing to the Court.

The only information that --

QUESTION: Well, did he have information that your opponent opened his argument -- he spent about three or four minutes describing his very difficult background as a young man.

MR. HILL: Yes, Your Honor.

QUESTION: Was that information known to Leaphart?

MR. HILL: Yes, Your Honor. And Mr. Leaphart specifically testified that the only way he could get that information across to that jury was either to put the petitioner on the witness stand, which he did not because of the petitioner's sadistic attitude and his gloating attitude in describing the facts and the circumstances surround the kidnapping, the sexual assault and the murder.

He was afraid he would alienate the jury, number one. Number two, he couldn't control what his client would say. Because he had told him not to talk to authorities, but Christopher Burger continued to talk

to anyone who would listen.

And number three, he was afraid of what the district attorney would do with Christopher Burger would do on cross-examination in front of a jury.

He testified that he did not use the mother, because the mother, subjected to cross-examination, would undercut his argument and his entire strategy to the jury, which is apparent from the first inception of cross-examination of the first witness through the conclusion of closing argument, which was that Christopher Burger was the less culpable of the two defendants, and because there are two punishments in Georgia for murder, life or death by electrocution, my client ought to get the least harsh punishment.

If the mother had taken the witness stand, she would have testified to the troubled background, but also, the involvement with marijuana, the fact that he had been in trouble before in the past.

Mr. Leaphart testified about prior assaultive encounters that Mr. Burger had had. And though the record is not extremely extensive on that point, it does show that Mr. Leaphart had reasonable strategic decisions for not using the mother.

And the only two people was the mother and Christopher Burger.

Counsel now only belatedly some six years after trial has been able to find affidavits from seven people; only seven people.

And while those seven individuals attest to the troubled background of Christopher Burger, they also carry with them in their affidavits, which I assume were drawn more favorably to this petitioner, extremely damaging testimony.

The grandmother testified that Christopher Burger was a very bright child, which is contrary to the representation --

QUESTION: You say, testified. Do you mean swore in the affidavit?

MR. HILL: Swore in the affidavit that Christopher Burger was a bright child; totally contrary to the representations made by counsel here today.

The uncle testified that at one moment Christopher Burger would be a nice, normal guy, and that the next moment he would flip out and become violent.

The girl friend testified that Christopher Burger had a hair trigger temper, and that on one occasion he had gotten so mad he had broken his knuckles slamming his fist through the wall.

QUESTION: Would a jury conclude from that that he was nuts?

MR. HILL: Your Honor, it is not -- it is not impossible that a jury could conclude that.

QUESTION: (Inaudible.)

MR. HILL: But it is also reasonable for Mr. Leaphart to have decided, if that testimony had been made available to him, which his testimony, unrefuted, was that he did not have it; but if it had been made availble, it would not have been unreasonable for Mr. Leapart to adhere to his original strategy.

But in using this belated affidavit testimony, in this analysis, the proper question is, whether if you inject this lukewarm but still extremely potentially damaging character evidence, does it render the sentence imposed -- does it create a situation where it was reasonably likely that a different sentence would have been reached by this sentencer.

In light of the overwhelming evidence of the sadistic and heinous nature of this crime, then the only reasonable answer is now.

QUESTION: May I ask one other just -- did his co-indictee also get the death penalty on the retrial?

MR. HILL: Yes, Your Honor, he did, and he's presently under the death sentence.

QUESTION: Is he still alive?

MR. HILL: Yes, Your Honor, he is. And we're

conducting evidentiary proceedings in the District Court at this time.

Your Honor, what this Court must do is evaluate those circumstances as known to Mr. Leaphart at the time of trial.

At the time of trial, Mr. Leaphart only had this petitioner and his mother. And the testimony I have detailed from the psychologist and the psychological evaluations.

Mr. Leaphart travelled to Hindsville, where this petitioner was stationed at Ft. Stewart, and he ascertained no favorable testimony. Which is not unreasonable when a soldier and a fellow soldier kidnap, armed rob, sexually sodomize and assault, and then murder another soldier.

Mr. Leaphart testified that the only way to get any character evidence as far as background was through the petitioner or the petitioner's mother, but it carried with it substantial risks that outweighed the nature of that character testimony; which was not an unreasonable decision under the facts and circumstances of this case.

The District Court so opined, and the Eleventh Circuit so found, and we ask that this Court concur in that judgment.

In my remaining time, I'd like to address the trial court's charge on intent.

What this petitioner advocates before this Court is that on reviewing a trial court's charge, a state trial court's charge for burden-shifting effect, mere identification anywhere in that trial court's charge of the Franklin language constitutes constitutional error without more.

No consideration to the charge as a whole; no consideration as to how a reasonable juror, hearing this charge in this sequence, the words actually spoken, in the context of this case, would have understood this charge.

Now, this charge is different from and constitutionally distinguishable from the charge reviewed in Franklin, which, frankly, it is our contention, is a case that should be limited to its facts.

It is a fact-specific application of those principles enunciated in in re Winship, and talked about in Sandstrom v. Montana.

This jury, in a case in which physical acts were not at issue -- there was no contention here, because there was a confession -- this jury was told that while an individual can be presumed to mean -- to

intend to do what he usually does, under our law, in order to have a crime, there must be a union of act and intent.

And in this case, criminal intent is an element that rests upon the state beyond a reasonable doubt. They were told that intent can never be presumed. It is always a question of fact to be ascertained by the jury.

They were told that in resolving the issue of the existence or nonexistence of intent, you may look to the facts and circumstances of the case, including the conduct and actions of the defendant, and from those facts, proven beyond a reasonable doubt by the prosecution, you may infer intent.

But they were never told that you had to presume intent to kill.

This jury, under the facts of this case, knew that in looking at the conduct of this defendant, Christopher Burger, who was the actually murderer, who shortly before the murder opened the trunk, asked the victim, hey man, you all right, closed the trunk, and immediately drove that car into that burrow pit filled with water after having first wiped his fingerprints to further secret his identity.

They were told that from those facts, you may

infer that Christopher Burger had the subjective mens re, the criminal intent to kill; but they were never told that you had to presume it.

So this charge does not suffer from the defects found to exist in the case of Raymond Lee Franklin.

Your Honor, the position of the respondent in this case is that this petitioner, who was afforded ample opportunity in the District Court to make out facts in support of his constitutional claims, never carried his burden.

Under prevailing constitutional principles, he is not entitled to Federal habeas corpus relief.

Those conclusions were reached by the District Court and affirmed by the Circuit Court.

QUESTION: Well, the Court of Appeals, did it say the instruction was erroneous or not?

MR. HILL: Your Honor, this case was remanded to the Circuit Court.

QUESTION: Yes.

MR. HILL: The Circuit Court at that time had before it the decision in Franklin, not yet Rose v. Clark.

The Circuit Court said, pretermitting the question of burden shifting, we will not answer that.

But under the facts of this case, it is apparent that this charge, if burden-shifting, was harmless beyond a reasonable doubt.

QUESTION: And you defend that?

MR. HILL: Your Honor, I'll agree, that these facts -- if this is not a harmless error case, Your Honor, there doesn't exist one. I agree with that.

But I have to also urge before this Court that this charge, though the Circuit Court --

QUESTION: There's no error at all?

MR. HILL: Yes, that's right, Your Honor. It is not a burden-shifting charge.

And so we ask that this Court affirm the denial of habeas corpus relief to this petitioner.

If there are no further questions, that concludes my presentation, Your Honors.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hill.

The case is submitted.

(Whereupon, at 1:54 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#86-5375 - CHRISTOPHER A. BURGER, Petitioner V. RALPH KEMP, WARDEN

that these attached pages constitutes the original
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BY Paul A. Richardson

(REPORTER)