OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: STEVEN A. PENSON, Petitioner V. OHIO

CASE NO: 87-6116

PLACE: WASHINGTON, D.C.

DATE: October 12, 1988

PAGES: 1 thru 57

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IN THE SUPREME COURT OF THE UNITED STATES

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STEVEN A. PENSON, :

Petitioner :

V. : No. 87-6116

OHIO :

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Washington, D.C.

Wednesday, October 12, 1988

The above entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

GREGORY L. AYERS, ESQ.; Columbus, Ohio;

on behalf of the Petitioner.

MARK B. ROBINETTE, ESQ., Special Asst. Prosecuting Atty.

for Montgomery County, Ohio; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-6116, Steven Penson v. Ohio.

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

ORAL ARGUMENT OF GREGORY L. AYERS

ON BEHALF OF THE PETITIONER

MR. AYERS: Mr. Chief Justice, and may it please the Court. The issue in this case is whether Steven Penson was denied his right to counsel on his direct appeal in the Ohio Court of Appeals.

We would submit the facts of this case clearly demonstrate that Mr. Penson's lawyer deserted him with the permission of the Court in a case that presented arguable issues.

I'd first like to give the Court some of the factual background of the case, and then get into our legal contentions. Mr. Penson was tried, along with two co-defendants, for a number of criminal charges. After he was convicted, all three, because they were indigent, were appointed counsel.

The two co-defendants' appellate lawyers filed briefs on their behalf. Mr. Penson's lawyer did not file a brief. Instead, Mr. Penson's lawyer filed a one

statement certificate with the Court stating that there were no errors requiring reversal, modification, or vacation of his sentence.

He further indicated that he would not file a meritless appeal, and he moved to withdraw as counsel. A week later, the Ohio Court of Appeals granted his motion without reviewing the record or without requiring a brief from him. The Court subsequently refused to appoint counsel for Mr. Penson upon his request, and then, several months later, proceeded to decide the appeal.

The Court, in its decision, expressly disagreed with counsel as to whether there were reversible errors in the case. In fact, the Court found one reversible error, and reversed one of the counts on the indictment.

The Court further found that there were several arguable errors as presented in the briefs of the co-defendants. But instead of appointing counsel, as we submit the Court was required to do, the Court determined that its own error in not appointing counsel was not prejudicial to Mr. Penson, because it had examined the record and the errors submitted by the co-defendants in their briefs.

QUESTION: Of course, the mere fact that the

Court found an error that counsel did not find doesn't show that he was effectively deprived of the assistance of counsel. I mean, that could have happened if counsel had filed a brief --

MR. AYERS: Well --

QUESTION: That raised nine issues all of which the Court rejected but found, the Court might have found on its own a tenth issue, and you wouldn't --

MR. AYERS: Well --

QUESTION: You wouldn't be able to argue in that case that he was denied effective assistance.

MR. AYERS: Well, I agree with you, Justice Scalia. The Court did give the, the defendant, Mr. Penson, the benefit of one of the issues raised by one of the co-defendants, and that was the count that was reversed.

Where the Court denied Mr. Penson his appellate right to counsel in this situation was where the Court found arguable issues that this Court has held in --repeatedly, in a number of cases, that the Court in that situation must appoint counsel.

QUESTION: What useful relief can we give Mr. Penson in this case, assuming that everything you say is, have said so far is correct? Does he go back and have a lawyer argue his case again to the Ohio Court of

Appeals? Is there any real chance they would change their mind?

MR. AYERS: Well, that is precisely the relief that we are asking. Mr. Penson has never had a lawyer to argue the appeals in his case. We have pointed out in the reply brief a number of issues that were not raised by co-defendants' counsel.

Mr. Penson has not had a lawyer to review the case from the perspective of his position in the case. The co-defendants' lawyers were reviewing the case from the perspective of the co-defendants. They were review --he was -- they were reviewing issues relating to the co-defendants. They were not advocating on behalf of Mr. Penson, and it's a different kind of a representation.

QUESTION: Do you make any argument here as to the fact that this error was not harmless, or do you say no harmless error standard can be applied?

MR. AYERS: We submit that where counsel was denied, this Court has never applied a harmless error standard.

QUESTION: Well -- Mr. Penson had counsel. The counsel didn't perform as he should have.

MR. AYERS: Well, counsel was effectively absent, your Honor. I think the precedents of this

Court indicate that when nominal counsel is not sufficient to satisfy the Constitution, the counsel must engage the adversary process. He must provide some assistance.

Counsel was effectively absent in this case. He did not assist in any way. He did not file a brief, he didn't do anything.

QUESTION: You don't know that.

MR. AYERS: This is a -- this is now --

QUESTION: He certainly purported to do something, Counsel, didn't he? I mean --

MR. AYERS: The only --

QUESTION: He represented to the Ohio Supreme Court that he had studied the case, and in his judgment, there were no issues that would justify reversal. Now, his judgment turned out to be wrong. But it could have turned out to be wrong if he had filed a brief as well. You can't really say that counsel didn't work on the case.

MR. AYERS: Well --

QUESTION: All you know is that counsel, having worked on it, decided, incorrectly, that there was nothing in the case worth arguing. Right?

MR. AYERS: Counsel did state that he carefully reviewed the record, and that he found no

reversible errors in the case.

He did not say the case was frivolous. He did not file a brief, as this Court has --

QUESTION: Wasn't the same type of letter in the Anders case?

MR. AYERS: It was exactly -- it was exactly a no merit letter. It was a one-sentence statement saying there was no merit to the appeal.

QUESTION: Like the Anders letter case?

MR. AYERS: Exactly. He did not present anything to the Court to convince the Court that it was a frivolous appeal, and that is the bright line test that this Court has drawn between providing counsel or requiring counsel and not requiring counsel. This Court said in Anders that counsel must be provided in a non-frivolous appeal where there are arguable issues.

In a frivolous appeal, counsel can withdraw. But that is a very narrow exception, and that is only allowed where counsel demonstrates to the Court that it's a non-, that it's a frivolous case. But counsel in order to do that must present a brief to the Court and must raise issues that might arguably support the appeal. And then the Court has to review the brief and to make that determination as to whether counsel is correct.

Neither of those obligations were met by counsel in this case. In fact, that Court expressly disagreed with counsel and found arguable issues. This Court's decisions in Anders and subsequently, this past term, in McCoy indicate that counsel must be appointed in that situation.

QUESTION: Well, counsel was appointed here.

MR. AYERS: Counsel was appointed.

QUESTION: But he -- he didn't serve the way he ought to have under the Anders rule. But that's not a failure to appoint counsel, that's counsel's mistakes.

MR. AYERS: Well, of course in the McCoy case, the Court said that count -- once the Court determines that there are arguable issues, counsel must be appointed and must be required to file an Anders brief. Otherwise, the right to counsel becomes illusory.

And you can have a defendant with arguable issues not getting his issues presented to the Court. I think the bright line test of Anders is a narrow exception to the Douglas v. California right to counsel, and it has to be a narrow exception, and it has to be strictly applied or the right to counsel becomes very illusory.

And --

QUESTION: Anders doesn't assure that the

arguable issues will be presented to the Court either. It doesn't -- an Anders brief would not give 100 percent assurance that the good arguable issues would be presented to the Court. You could have counsel who files an Anders brief that is simply a bad brief. He misses the real issues and decides to address non-issues.

MR. AYERS: That's -- it's -- that's possible.

QUESTION: That's possible.

MR. AYERS: That's possible. But the Court is still required to look at the brief, and once it reviews the record, it can make that determination as to whether counsel has made an adequate review. If it finds arguable issues, and finds that counsel's conclusion that these errors are frivolous is incorrect, then counsel -- the Court at that point is required to appoint counsel to protect the right to counsel and have those issues presented. That is what Anders requires, and I think that the Court made that clear this past term in McCoy, that once an attorney claims that an appeal is frivolous, that two Constitutional concerns must be met.

One is that the attorney make a diligent review of the record, and the Court is satisfied that he's made a diligent review of the record for arguable claims; and secondly, that his conclusion is correct.

Neither of those concerns were met in this case.

In fact, the lower court found that there were arguable issues. Under Anders and McCoy, the Court was required to appoint counsel. It in effect resulted in Mr. Penson being denied counsel. He did not have an advocate on appeal.

And I think Douglas makes that very clear, that that is not only a denial of due process, it's a denial of equal protection. In a situation where you have arguable issues, a monied defendant can go out and hire a lawyer and obtain the benefit of advocacy in a brief, and have these issues presented to an appellate court.

QUESTION: We wouldn't say that Anders was not satisfied if this same attorney -- let's assume this same attorney, instead of filing a letter with the Court saying "I don't see any arguable issues," suppose he said, "Well, I'll write down nine issues that don't seem to me arguable at all." He writes down those nine issues that he thought in this case were not worth making -- but he writes them out, and he says, "I'll make them anyway" -- missing three good issues. All right? What would be the result? Would Anders have been satisfied?

MR. AYERS: I think not, your Honor, because

once the Court gets his brief, then the Court is further required to review the record and make sure that his conclusion is correct. Once they identify those issues, then the Court is required to appoint counsel at that point.

QUESTION: Oh, I see. What you're arguing in this case is, it's not just the total absence of filing a brief, but rather, whenever a Court finds an arguable issue that is not raised in an Anders brief, it has to appoint new counsel to argue that arguable issue.

MR. AYERS: If the Court disagrees --

QUESTION: I didn't realize --

MR. AYERS: -- with counsel --

QUESTION: I see.

MR. AYERS: -- if the Court disagrees -- I think in most Anders situations, the Court ends up relying upon counsel and accepting counsel's representation.

QUESTION: We've never held that, have we, that you have to -- if the Court disagrees with a no merit presentation in Anders, the Court then has to appoint another counsel?

MR. AYERS: Yes, I think the Court has expressly held that in Anders and McCoy. The Court said in McCoy, to repeat myself, that if the Court determines

that there are arguable issues then the Constitution requires that a lawyer be appointed to argue those issues. Otherwise, the right to counsel can be denied in a situation where you've got non-frivolous issues, and Anders draws the line in terms of the right to counsel between frivolous and non-frivolous procedures.

QUESTION: Well, did either of those cases involve a situation in which a Court had found -- had found that the no merit statement was wrong, and that there were arguable issues?

MR. AYERS: In either the Anders or McCoy situation?

QUESTION: Yes.

MR. AYERS: In the --

QUESTION: I mean, I was asking about a holding, not about language in cases.

MR. AYERS: Yeah. In the Anders situation, the no merit letter was filed, and the Court agreed that there was no merit to the appeal. This Court reversed, finding that the no merit letter was not adequate to protect the defendant's right to due process and the --

QUESTION: Yeah.

MR. AYERS: -- equality with --

QUESTION: But what I was asking about was a situation where Anders is complied with and the Court

disagrees with the presentation. You say there is a case from this Court holding that there counsel -- a new counsel must be appointed.

MR. AYERS: I -- I think Anders expressly says that.

QUESTION: Do -- did it hold that?

MR. AYERS: Yes, I believe it did hold it.

QUESTION: Do you understand what a holding is?

MR. AYERS: Yes.

QUESTION: And you say it held that?

MR. AYERS: The Court did find --

QUESTION: Well, but find -- holding means that a particular question is presented for decision, the case turns on that, and the Court adopts one view or another of --

MR. AYERS: Well, I --

QUESTION: -- that particular question.

MR. AYERS: I understand what the Chief Justice is driving at now. That particular procedure was dicta in Anders. The Court --

QUESTION: It wasn't in McCoy?

MR. AYERS: The -- the issue in McCoy wasn't precisely that. Right, the issue in McCoy was whether or not counsel could be required to show why the issue was frivolous or explain to the Court why.

QUESTION: But if Anders covers you, why do you want to extend it?

MR. AYERS: Anders -- our position is that Anders does cover our situation.

QUESTION: Well, why do you want to extend it?

MR. AYERS: I'm not asking --

QUESTION: Why don't you just rely on that?

MR. AYERS: I'm not asking the Court to extend it.

QUESTION: I think you are trying to extend it, and for no good reason.

MR. AYERS: Our position is that the Ohio Court of Appeals did not comply with the Anders exception. It found expressly that there were arguable issues, and under the Anders decision, the Court was required to appoint counsel.

QUESTION: Was that, this, a harmless error?

MR. AYERS: That's expressly our position, and I don't want the Court to misunderstand that.

QUESTION: Does the harmless error test apply there, or do you say that there can be no harmless error analysis?

MR. AYERS: Well, this Court did not apply a harmless error test in Anders or in Douglas where the Court had reviewed the record and made that conclusion.

We would submit that where there is denial of counsel, this Court has never held that in a harmless error test is applicable. This Court is automatically reversed because the right to counsel is so fundamental to not only the trial process but the appellate process also.

If counsel was not present and participating in the appellate process as an advocate, then the process really hasn't occurred.

QUESTION: Well, but you know, at the trial stage, when you don't have counsel, you -- it's really possible to say, it's hard to say that error is harmless because you don't know what the record would have read like, had you had counsel. You don't know what facts would have been in there. It's very hard to say that the error could be harmless.

At the appellate level, though, the facts are there. The record is already there, and you could say that on the basis of this record -- I don't care what appellate counsel you get -- on the basis of this record which was made with counsel, there's no way that a jury could have found anything except that this person was guilty.

MR. AYERS: Well, I think that --

QUESTION: Isn't that a basic difference between the two levels?

MR. AYERS: I think the problem with that, your Honor, is that it overly burdens the appellate Court to engage in speculation as to what appellate counsel has done.

You've got two different rights here -- the right to effective assistance at trial and a right on appeal. You don't know what counsel would have done on appeal. You can review the record to determine if counsel's performance at trial was adequate, but you have to speculate as to what counsel would have done with that record.

Appellate Courts are not in good positions to be advocates for defendants. Independent review of the record does not satisfy the advocacy of a lawyer in an appellate Court, because the appellate Court has to speculate as to what would have been raised, the arguments that would have been made, and how the issue would have been decided. It really makes -- it really shifts the burden from the lawyer to the Court to decide the case --

QUESTION: Wasn't that the --

MR. AYERS: -- and the advocacy process really hasn't worked.

QUESTION: Wasn't that settled in the Douglas case?

MR. AYERS: Yes, precisely.

QUESTION: I don't see what --

MR. AYERS: We rely upon Douglas as well as Anders.

QUESTION: The Court could have gone on its own.

MR. AYERS: Excuse me?

QUESTION: The Court could have gone on without the lawyer in Douglas, but this Court said that you couldn't do that. You had to give him a lawyer.

MR. AYERS: Exactly, that a defendant on appeal benefits substantially from a lawyer's presentation in a brief of his examination of the record, research of the law, and marshalling of the arguments on his behalf, and that to deny that benefit to an indigent violates the Equal Protection clause, and that's the fundamental denial in this case.

This defendant, because he was indigent, was not able to go out and hire a lawyer to present these arguable issues, which the Court of Appeals found, to the Court. He was stuck with the appellate lawyer, who effectively abandoned him before the Court. He had no advocacy. He had no brief. In effect, he had no assistance.

This Court has said on a number of occasions

that when counsel fails to perform, when he fails to engage the adversary process, that counsel is effectively absent. That was the holding of this Court in Evitts v. Lucey. And that's exactly what we have here: we have no counsel.

QUESTION: In Evitts v. Lucey, no appeal was ever taken, was there?

MR. AYERS: The appeal was filed, and the appeal was dismissed because counsel didn't comply with filing a statement on appeal.

QUESTION: So nothing was done. Here, I think, as Justice Scalia points out, the lawyer did something. You say it was wrong, and grossly inadequate, but I don't think that's the same thing as just saying that he never -- he wasn't even there.

MR. AYERS: Well, the Court recognized, Mr. Chief Justice, in Evitts v. Lucey that the defendant must have more than nominal counsel. Counsel must be effective. He must engage in a performance which activates the adversary process.

QUESTION: But now you --

MR. AYERS: The attorney here did nothing, other than getting the appellate record to the appellate Court. That's all he did in this case.

QUESTION: But you're suggesting that counsel

must be effective, as I take it, the word you just used --in order for there to have been assistance of counsel furnished.

MR. AYERS: No, absolutely --

QUESTION: Now, we have, our Strickland case says exactly the opposite of that.

MR. AYERS: Absolutely -- absolutely not. Counsel is required. Then he is to be appointed, then he is required to engage in a performance. If he's not appointed, that's a Constitutional violation. If he fails to engage in a Constitutional performance, that's a Constitutional violation.

QUESTION: But is -- but then how do you, how do you interpret Strickland? Strickland says if it's claimed as ineffective assistance of counsel, you don't just automatically do the whole thing over. You look at was there any prejudice.

MR. AYERS: Well, Strickland, first of all, applies the prejudice test where you have a performance. Strickland also says that where counsel is denied or is absent or fails to participate in the adversary process, then prejudice must be presumed, because counsel's presence and participation in the adversary process is essential to a reliable result.

Here we had no participation by counsel in the

adversary process. Strickland says that when counsel is absent or doesn't engage that process, then prejudice has to be presumed. So I think in -- we meet, clearly, a Strickland test, if the Court would choose to apply a Strickland test. But I think as Justice Marshall has pointed out, that this is clearly an Anders and Douglas violation. The Court does not have to apply an effective assistance test to this case.

We would submit that the prejudice test applied by the Court of Appeals in this case does not protect the right to counsel. This Court held in Pennsylvania v. Finley that the Anders procedures were designed specifically to protect the right to counsel, and that necessarily -- it necessarily follows if those procedures are not followed -- if counsel may be allowed to withdraw from non-frivolous cases, then the right to counsel becomes illusory, and indigent defendants are not afforded equality with non-indigents on appeal. That's the fundamental due process violation in this case.

It further invites attorneys to abandon appeals. If Courts, or if defense lawyers know that they can be relieved without being required to file an Anders brief and demonstrate to the Court that an appeal is frivolous, then I think it would invite wholesale

abandonment of clients and shifting of the burden to the appellate Court to engage in that decision making process without the briefing and the oral argument -- the cornerstones of effective appellant decision making.

There must be an adversary process here, and counsel did not engage that process. That's why it cannot be relied upon as producing a just result in this case.

We submit that presuming prejudice, if the Court looks at a Strickland test, if it applies to Douglas and Anders decisions, consistently with this case, demonstrates that the violation is easy to identify. And it accords fundamental respect for the right to counsel.

This Court said in Ross v. Moffitt that an indigent must be afforded an adequate opportunity to present his claims to an appellate Court. Mr. Penson was not afforded that opportunity. He did not have his claims presented by a lawyer to the Ohio Court of Appeals. Mr. Penson has simply not had his day in court. We submit that that is a fundamental due process violation.

We've also pointed out issues, in our reply brief, that Mr. Penson would have raised that was raised by neither of the co-defendants. That points out

specific prejudice to Mr. Penson. He has not had an opportunity to have those issues briefed and argued in the Ohio Court of Appeals. That shows specific prejudice, if the Court is looking for prejudice.

If the Court does not have any further questions, I'll reserve the rest of my time for rebuttal.

QUESTION: Thank you, Mr. Ayers.

Mr. Robinette, we'll hear from you.

ORAL ARGUMENT OF MARK B. ROBINETTE

ON BEHALF OF THE RESPONDENT

MR. ROBINETTE: Mr. Chief Justice, and may it please the Court. I think initially I'd like to point out that there's a critical factual distinguishing feature between this case and the Anders case, and that's that in this case, the Court of Appeals found that although the record did contain arguable issues, it also found that those arguable issues had already been raised and decided in the appeals of the co-defendants.

And I would cite to page 41 in the joint appendix the language of the Court of Appeals, where it said "our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals." So I think that's a critical distinguishing factor from the Anders case.

Another point in Anders was that part of the

reason for the reversal was that the appellate Court at the State level made no finding of frivolity. It did not find whether or not there were frivolous issues in the case.

I think basically what we're faced with here is a case of ineffective assistance of counsel and not a case of denial of counsel. I think the case is also distinguishable from the Douglas case because in Douglas the defendant had to make a preliminary showing of merit in order to have counsel appointed in the first place, whereas in this case, counsel was appointed at the outset. As soon as the notice of appeal was filed, counsel was appointed on appeal.

There was no outside interference, there was no State interference with Counsel's ability to handle the appeal. He had plenty of time. He received at least two or three extensions of time to file his brief in the case. There was no argument that there's -- that counsel was laboring under any sort of conflict of interest that would have caused him any problem in his prosecution of the appeal.

I think what the issue boils down to is whether or not an indigent defendant in a criminal appeal has an absolute right to have a brief filed on his behalf, regardless of the merits of the case. And

it's the position of the State of Ohio that he has no such right.

QUESTION: Well, does he have the right --

QUESTION: What does that leave of the Anders rule? Is it -- if we rule for you, doesn't that simply undercut the Anders rule in any case where counsel doesn't want to file a brief? We'll be right back to where we were before Anders.

MR. ROBINETTE: Well, I would point out that there's been a lot of criticism of the Anders briefing requirement --

QUESTION: Well, then we should overrule Anders. But it seems to me that what you're saying, in effect, almost does that.

MR. ROBINETTE: I don't think it exactly overrules Anders, because I think a key feature of the Anders decision is the independent review requirement. The Court is required to make an independent review of the record in order to determine whether or not any prejudicial error existed in the record. I think that's a key here.

QUESTION: Well, but we're talking about the duties of counsel, and Anders does have the administrative convenience of requiring attorneys, at least in the first instance, to identify the arguably

salient issues in the case. And it seems to me that that aspect of Anders is completely gone if we rule for you in this case, because counsel just files a letter that he's withdrawn.

MR. ROBINETTE: I think counsel is still required to be appointed, and he's still required to review the record. I think what's needed is more flexibility on behalf of the State appellate Court. The Court has a number of options. The Court doesn't have to take counsel at his word. It can review the record. If it's not satisfied with his review of the record, the Court can say, "Go back and do it again. We're not satisfied with the job you did."

The Court can refuse to pay counsel if it doesn't think he did an adequate job. The Court can appoint new counsel to go back and do a brief, or it can order the original attorney to file a brief. I think the State appellate Court has a number of options here.

QUESTION: Well, you sure, if you've got those options. But is there any duty to do anything? That's the question. Here it did find arguable issues, and then having found that there were arguable issues, did it have any duty to appoint counsel to argue them?

MR. ROBINETTE: I don't believe so in this case, because the arguable issues had already been

raised and decided. I think if it found new arguable issues --

QUESTION: But they'd been decided in a manner that did not let this litigant have a lawyer argue his view of those issues.

MR. ROBINETTE: Well, he did not have a lawyer argue those issues in the Court of Appeals, I would agree with that. But he did have a lawyer --

QUESTION: The question is whether he was entitled to have that done for him.

MR. ROBINETTE: I don't believe so, under the circumstances of this case.

QUESTION: And what is the circumstance that justifies that result? The fact that somebody else argued them for some other client?

MR. ROBINETTE: I believe if the Court finds arguable issues in the record, and those issues have not been raised and have not been litigated, then I think the Court has the option -- perhaps the duty -- to appoint counsel under Anders. It would have --

QUESTION: Well, if you say "duty", then why didn't it -- then it violated that duty.

MR. ROBINETTE: I don't believe so in this case, because those issues had already been decided. I think it would be a --

QUESTION: But they had been decided in a case to which this litigant was not a party, in which he didn't have a lawyer arguing his view of those issues.

MR. ROBINETTE: But it is the same record, though. They're all -- there were three defendants jointly tried at trial. They were all bound by the same record on appeal.

QUESTION: Well, could you then say that in a joint trial like this, you don't need to appoint lawyers for all three of them, because they're basically the same? Or just appoint one for one of the three?

MR. ROBINETTE: Well, I disagree with that. I think that --

QUESTION: Well, what's wrong with it?

MR. ROBINETTE: I think --

QUESTION: Why wouldn't that rule apply to that situation?

MR. ROBINETTE: I think because -- you might have some equal protection problems if you did not appoint counsel in the first instance.

QUESTION: Well, then why don't you have an equal protection problem here?

MR. ROBINETTE: Because I don't believe, according to --

QUESTION: Two of them got lawyers, and one

did not, and they're similarly situated.

MR. ROBINETTE: Well, as the Court said, as the Chief Justice said in Ross v. Moffitt, the Fourteenth Amendment does not require absolute equality nor precisely equal advantages.

QUESTION: You can argue here but if you have absolute inequality, of three people, exactly the same position, you give a lawyer to two and not to the third, and there's no inequality there?

MR. ROBINETTE: I think there may be an inequality of representation rendered. There's no inequality in the appointment of counsel in this case. That's the key distinction, I believe. Each, each defendant was appointed separate counsel to prosecute the appeal. Two of them filed briefs, one moved to withdraw.

I don't think that creates an equal protection violation on the part of the Court.

QUESTION: Do you think at the time the Court ruled on the motion to withdraw, it had considered the briefs filed by -- on behalf of the other two defendants?

MR. ROBINETTE: Yes, it had. It clearly -- well, not at the time they ruled on the motion to withdraw.

QUESTION: All right. So at the time they

ruled on the motion to withdraw, that -- you admit that was error?

MR. ROBINETTE: I don't think that's the preferred practice. I think they should have --

QUESTION: Well, preferred? Wasn't it rather clear that it was error? I mean, you can admit a few things, I think.

MR. ROBINETTE: Okay, I'll admit that was error.

QUESTION: All right.

MR. ROBINETTE: But certainly if that's error --

QUESTION: And so now, then they find out later on that there are arguable issues in a case in which the person has never -- the defendant has never had an argument made for him. Do they at that point have a duty to appoint counsel?

MR. ROBINETTE: Not if they're not issues yet to be raised that have not already been decided.

QUESTION: Because they've been raised by somebody else representing other clients?

MR. ROBINETTE: In the same case, based on the same record.

QUESTION: Well, on that basis, you would never -- there would be no obligation to appoint a lawyer in the first place.

MR. ROBINETTE: No, I think that --

QUESTION: Suppose there's a request to appoint a counsel, and the Court says, "Well, we'll rule on that at our leisure," and they look over the record, and the only issues they can see -- possibly see -- in the case are issues that have been decided in another case, on the same record. And they say, "Well, you're just not entitled to counsel, and your case is just not any good."

MR. ROBINETTE: I think you would have a problem with Douglas in that situation, your Honor, because counsel --

QUESTION: Well, what's the difference between that one and this one?

MR. ROBINETTE: I think the right to counsel guarantees the opportunity to have the assistance of counsel. It doesn't necessarily dictate what counsel is going to do. I think what counsel does --

QUESTION: Well, this appellant didn't have the opportunity to have counsel. The counsel walked out on him, on arguable issues.

MR. ROBINETTE: Then I think that puts it precisely in the frame of a claim of ineffective assistance of appellate counsel. I think basically what the claim is is appellate counsel did a sloppy job of

reviewing the record.

QUESTION: Well, I know, but he had no -- after that he had no representation in the appellate Court on deciding the issues, did he?

MR. ROBINETTE: That's true.

QUESTION: And you're -- what the argument really boils down to is that, is that -- well, you can't really tell whether a lawyer done him any good, because you never can tell whether a lawyer would do anything -- any good --in which event, why ever appoint a lawyer?

MR. ROBINETTE: I think that you can certainly tell better in the framework of the appellate process. You can measure prejudice much easier in the appellate --

QUESTION: Well, why have any obligation to appoint counsel on appeal at all?

MR. ROBINETTE: Well, Douglas requires it.

QUESTION: Well, maybe we ought to overrule Douglas.

MR. ROBINETTE: Well, I wasn't prepared to address that, but that could be initiated and addressed.

[Laughter]

QUESTION: Well, you have been, it seems to me.

MR. ROBINETTE: Okay. I think the guarantee of equal protection means substantial equality, but doesn't mean precise and absolute equality, so I think

counsel has to be appointed in the first instance.

QUESTION: But on the question of **(inaudible), have in your own practice, have you ever won a case you didn't expect to win?

MR. ROBINETTE: That can happen sometimes.

QUESTION: Sure, it's possible, isn't it?

MR. ROBINETTE: I think, though, there's a key distinction, too, between the trial process and the appellate process, because as Justice Stevens noted in the McCoy case, there's never a duty to withdraw at trial.

QUESTION: Well, on a case on appeal that you didn't expect to win?

MR. ROBINETTE: Probably so. I think that's another part of the problem.

QUESTION: Mr. Robinette, why can't you, why can't you answer the question by saying what equal protection requires is that you have a lawyer who exerts his best efforts to find something in your case that will justify reversal on appeal? And you can't say -- there's no way of saying that the defendant here didn't get that.

MR. ROBINETTE: Well, I agree with that.

QUESTION: We know that the lawyer didn't find issues that could have been found, but that may have

been that lawyer's best effort. And if all that we have held that equal protection requires is that, that you have a lawyer pay attention to the case, and do his best to raise issues on appeal, if that's all that equal protection requires, that was given here. And there was no error.

MR. ROBINETTE: I agree, Justice Scalia. I couldn't have put it better myself. I think equal protection --

QUESTION: What you're saying is now there was no error.

MR. ROBINETTE: What I'm saying is, I think we don't have an equal protection --

QUESTION: That's what Justice Scalia says.

QUESTION: You're saying to affirm, you know.

MR. ROBINETTE: Yes. I think if we have error -- I mean, certainly the Anders issue is a very close issue in the case, and it's close because of the factual distinguishing features between this case and the Anders case, the co-defendants and the fact that they did review the arguable issues in the case. And they had already decided the arguable issues.

But even if there's an Anders violation, I don't believe that precludes this Court from applying a harmless error analysis to an Anders violation,

especially in light of some of the other cases --

QUESTION: On your harmless error argument, are you arguing that we should search the record for harmless error?

MR. ROBINETTE: I think in the ordinary sense, the Court would review the record to see if any error --

QUESTION: That's your argument, that we should make the harmless error, because the Court of Appeals didn't do that?

MR. ROBINETTE: I -- I -- no, I'm not saying that at all, because I think the Court of Appeals in effect made a finding that there was --

QUESTION: They said there was no prejudice, but they didn't say that they could find beyond a reasonable doubt that there was -- that the error was harmless.

MR. ROBINETTE: I think initially this Court has to decide whether or not harmless error analysis is appropriate.

QUESTION: If they -- if we should decide that, then what do we do?

MR. ROBINETTE: I would like to see the Court decide the case. I don't believe remand is necessary, although the Court may feel that the Court of Appeals did not precisely apply a harmless error test, and you

may remand for that purpose. That's a closed question there.

I think in effect they made a finding there was no prejudice, and the error that he may have sustained in the case was harmless.

And I would like to address briefly some of the issues that were raised at the eleventh hour --

QUESTION: Well, just before you do that, what's, what's at stake here for your State? Suppose we do what you say. Isn't that really administratively more burdensome from the Courts? Why not just have them file an Anders brief?

MR. ROBINETTE: Well, there's a lot of arguments made that Anders briefs are much more burdensome than requiring a Court appointed counsel just to file a frivolous brief on the merits --

QUESTION: Burdensome to whom?

MR. ROBINETTE: Burdensome to the Courts, burdensome to counsel -- there are four States now that are refusing to follow the Anders briefing procedure. And they follow the so-called Idaho rule, which is discussed in some of the articles mentioned in the amicus brief of the Ohio --

QUESTION: How does that work?

MR. ROBINETTE: -- Defense Lawyers Association.

The Idaho rule merely says, straightforward, that counsel, appointed counsel may not withdraw from an appeal on the ground that it's meritless or frivolous. So, in effect, what those States hold is he must file a frivolous brief.

QUESTION: Well, that's Anders plus. But you're talking about Anders minus, and there's a difference.

MR. ROBINETTE: That's true. I -- I think McCoy is --

QUESTION: So I think the Idaho procedure is a more, more stringent than Anders, and you're talking about something that is less.

MR. ROBINETTE: Well, the Idaho rule is also unethical, because it requires --

QUESTION: Well, then, why are we talking about the Idaho rule? It doesn't apply.

MR. ROBINETTE: That's true, it doesn't apply here. But I think there's some policy considerations to be considered. I think the Anders case -- that's part of the problem with the Anders case.

QUESTION: Well, you're telling me some States have a more strict rule than Anders, and therefore it follows that others should be able to have a less strict rule. That doesn't seem to me to follow.

MR. ROBINETTE: Well, I think it goes to what Justice Stewart said in his dissenting opinion in Anders. Part of the problem is, there may not be one right answer to cover every situation in the 50 States dealing with court appointed counsel on appeal. And I think the McCoy case has recognized that, because in McCoy, this Court upheld a Court rule in Wisconsin that went beyond Anders. I think that's a recognition that maybe there's not just one right answer in the situation -- that there may be other ways of handling the situation.

QUESTION: Do you think Anders was an equal protection case, or does it rest on the right to counsel, if there was one?

MR. ROBINETTE: I think it was primarily -- I think there's some overlap there, as the Chief Justice has noted in some opinions, between due process and equal protection. I think it was primarily an equal protection case, because they felt like it was not substantial equality in the case, and you had to have substantial equality, although you don't have to have absolute equality.

But in this case, I think you've got --

QUESTION: Well, the real issue then could never be harmless error, in this case, could it? It

should be, just as Justice Scalia suggested, it just don't -- no error at all, no denial of equal protection.

MR. ROBINETTE: I don't believe there was error. I agree with Justice Scalia. I don't think there was error.

QUESTION: Well, then it's an equal protection case.

MR. ROBINETTE: This case, I think, is primarily ineffective assistance of counsel, because there was no equal protection violation.

QUESTION: Well, that's not an equal protection case.

MR. ROBINETTE: Pardon?

QUESTION: That's not an equal protection inquiry, is it?

MR. ROBINETTE: No, it's not. And effective assistance is due process. But my argument here is, there was no equal protection violation. He received substantial equality because he had counsel appointed in the first instance, and counsel had the opportunity to review the record.

That basically the claim is, he just didn't do an adequate job reviewing the record, did not file a brief, and I believe the claim is they think he should have filed a brief.

And I believe the amicus brief filed by the ACLU basically advocates a position that they would rather have a brief filed in every case. But I don't think that's required by the Constitution. And I think the procedure that was employed in this case satisfied both due process and equal protection. And if there's a claim --

QUESTION: Isn't it a very efficient way, however, of making sure that counsel is doing his best, even if his best is no good? At least you make him file a brief.

MR. ROBINETTE: You're referring to the Anders procedure?

QUESTION: Right.

MR. ROBINETTE: It's a way of assuring that. I'm not so sure how efficient it is, because a lot of counsels don't understand exactly what they have to do to comply with the true Anders brief.

QUESTION: Well, what alternative do you have? I mean, suppose, suppose we really want to make sure that this requirement we've imposed in Anders is, is not just symbolism -- that we're really not just naming counsel but getting counsel to work on the case? What, what better way would there be except to make them require either an Anders brief or an un-Anders brief, a

McCoy brief?

MR. ROBINETTE: Um-hum.

QUESTION: Wouldn't that be a --

MR. ROBINETTE: I agree. I think part of the problem is, however, a lot of attorneys don't like the Anders briefing procedure, because they feel like it forces them to brief the case against their client. It puts a counsel into a very difficult situation, because on the one hand, he's moving the Court to withdraw on the grounds that the appeal has no merit, and on the other hand, he's pointing, raising issues in the brief, so-called arguable issues, but he's saying these issues are frivolous. So, therefore, he withdraws from the case on that basis, and that puts counsel in a very difficult situation.

A lot of attorneys, quite frankly, would just rather file a frivolous brief on the merits and be done with it. That's the easiest thing to do. Maybe it's what I would do, if I was in that situation. I don't know, but it's --

QUESTION: All right. We'll accept that, too. I mean, you either file an Anders brief, a McCoy brief, or a frivolous brief on the merits. Why shouldn't we have some kind of rule like that, to make sure that counsel are really putting in their effort in

the case?

MR. ROBINETTE: Well, I think again, the problem with requiring that brief on the merits to be filed is it would be unethical in some cases. I think the independent review requirement where the Court of Appeals independently reviews the record is a way to provide a safeguard --

QUESTION: It's no safeguard at all. You wouldn't need counsel. I mean, you know, the whole reason you need counsel is because you don't trust an independent review by the Court of Appeals. Isn't that why you have counsel?

MR. ROBINETTE: I think you have counsel so he can act on client's behalf and raise the issues that he thinks ought to be raised in the case.

QUESTION: And if you had full confidence that the Court of Appeals would find it on its own, you wouldn't require counsel.

MR. ROBINETTE: I think you at least have to require counsel to examine the record, and obviously this court in Anders didn't feel like that was enough. They felt like the Anders brief was required to ensure that factor, but in any event, even with the Anders requirement in place -- and it doesn't appear this Court is ready to do away with the Anders briefing requirement

-- based on my reading of the McCoy decision, I think there still was no Anders violation in this case by the Court of Appeals.

It still boils down, in my view, to a situation where it's claimed that council just did a sloppy job and did not brief the case, and should have briefed the case. But I think that ought to be judged on a deficient performance standard, not on presumption of prejudice standard. It makes no sense to presume prejudice in a case like this when the Court doesn't presume prejudice in many cases of right to counsel violations at trial.

Recently in the Satterwhite case, Satterwhite v. Texas, the Court held that harmless error analysis applied to a counsel, right to counsel deprivation in a capital sentencing proceeding. And certainly the difficulty of measuring prejudice in a case like that is much greater than the difficulty of measuring prejudice on an appeal situation like Anders, where regardless of who the attorney is, he's bound by the same record.

It doesn't matter who you appoint -- you could appoint 15 different attorneys. They've all got to examine the same record. They can't go outside the record. They can't introduce new evidence. They've got to pull their issues out of that record. And I think

that's -- makes prejudice much easier to measure, and I think certainly if the Court does not want to adopt a Strickland type test in a situation like this, certainly harmless error analysis is appropriate in any event. There's no good reason why harmless error analysis would not apply in a case like this.

Briefly, as far as some of the issues that were raised in the reply brief -- and I'll refer to pages 9 through 11 of Petitioner's reply brief -- he raised some issues that he says prejudiced Mr. Penson, because they were not raised, and they could have been raised.

I would note, also, that Mr. Penson had the same attorney that he has now -- the same office represented him on his discretionary appeal to the Ohio Supreme Court, and basically they were complaining about the job that the Court appointed appellate counsel did in that Court, that they made no effort to raise any of these issues before the Ohio Supreme Court, nor did they make any effort to raise any of these issues at any time until the reply brief was filed in this case.

The first thing they refer to is that the trial court erred in convicting and sentencing Penson for both having the weapon under a disability in Count 29 of the indictment and the firearms specification that

accompanied that indictment. And they claim that that's a violation of Ohio's multiple-count statute, and also a violation of double jeopardy provisions.

QUESTION: What page is that?

MR. ROBINETTE: That's on page 9.

The issues they raise go from page 9 through page 11.

QUESTION: It's difficult to see how we could evaluate some question of Ohio law.

MR. ROBINETTE: That's true. That may be one reason why the Court would want a remand on a consideration of those issues. However, I think that those issues are clearly without merit, and that's why they were not raised until such a late time in this proceeding.

There's Ohio case law that holds that those statutes are not one and the same statute, and they do not violate the multiple count statute.

QUESTION: Well, were these issues decided in a State Court?

MR. ROBINETTE: No, because they were never raised in the State Court.

QUESTION: Well, do we have any jurisdiction to consider those questions? This is from a State Court, isn't it?

MR. ROBINETTE: Yes. And I think Petitioner's argument is that he was deprived of the opportunity to have those issues decided. But my position is, those issues could have been raised under the guise of an ineffective assistance of counsel claim to the Ohio Supreme Court, that's often done. That's a way that's often used to get around the ordinary rule that the Ohio Supreme Court will not rule on an issue that wasn't raised in the lower court. It's done all the time under the guise of ineffective assistance. But yet they were not raised at that point. The Court may not want to --

QUESTION: Well, how could they have been raised before the Ohio appellate Court, though?

MR. ROBINETTE: They were not raised there, it's true.

QUESTION: And the reason they weren't, I suppose, is he didn't have a lawyer.

MR. ROBINETTE: Well, I suppose you could make the argument. You could come up with any number of issues that could have been raised in hindsight.

QUESTION: Well, that's not your answer. Your answer is, it's not because he didn't have a lawyer, but because he did have a lawyer who knew Ohio law, and knew that since they hadn't been raised in the trial court, they couldn't be raised on appeal.

MR. ROBINETTE: Some of these issues could have been raised on appeal, I think, because --

QUESTION: Oh, some could?

MR. ROBINETTE: It's a judgment call whether or not the lawyer thinks they have any merit. Some of these issues had already been decided by the same appellate Court adversely to the position that Petitioner now takes.

I mean, is the lawyer obligated to raise an issue that's already been decided by the appellate Court in his district? I don't think so.

QUESTION: I don't see how we can decide that, when there was no lawyer there.

MR. ROBINETTE: Again, we get back to the situation where a lawyer was appointed in the first instance, and he made a judgment call not to raise certain issues.

QUESTION: Douglas case, that's where we get. He's -- you haven't touched it.

MR. ROBINETTE: He may not have done a lot, that's for sure. But he was appointed. I don't think you can blame the appellate Court for the lawyer's, perhaps poor, performance in the case. I think it's a situation where you have to judge the lawyer's performance, because I don't think the appellate Court

has violated Mr. Penson's rights.

QUESTION: Well, what should an appellate Court do, if midway through an appeal, it's perfectly obvious that the counsel they appointed is a, is a, if he isn't a nitwit, he's pretty close to it, and there's just not going to be any effective assistance?

MR. ROBINETTE: If the Court comes to that conclusion midway through the appeal, they always have the option to dismiss this attorney from the case and appoint another attorney. There's no problem with that.

QUESTION: Well, didn't they here come to the conclusion that the lawyer really didn't, didn't do what he was supposed to?

MR. ROBINETTE: I don't think they were particularly pleased with the job that he did. But I think the viewpoint of the Court was there was no prejudice from what he did, based upon the issues raised in the other cases and its own review of the record, and to appoint another attorney at that point in time to review the same record would have been a fruitless exercise. I think that's basically the Court's position. That's basically a no prejudice, harmless error type decision on their part. And I think they're correct in that determination.

I think what, basically, Petitioner would have

this Court do is give him a windfall, give him a second bite at the apple all the way up the appellate ladder, and for what? When he suffered no prejudice in the first place, I really don't see what it would accomplish, other than to go put the State through another enormous expense.

QUESTION: Is counsel paid in Ohio for representing people on appeal?

MR. ROBINETTE: Yes, yes. I'm not sure what the pay schedule is, but they are appointed by the Court and they are paid by the State.

Now, in this case, maybe he should not have been paid, but as it's been pointed out, it's hard to judge from what appears in the record exactly how much time he put in. They are required to file a statement of their hours in the case. And I haven't seen that -- I don't know how many hours he claimed to have put in, but the transcript was approximately 900 pages. If he just read the transcript, he would have had to put in a number of hours just doing that.

But again, you know, a lot of this is a judgment call, and you're basically judging the attorney's performance. And by judging the attorney's performance, I think it ought to be judged under a prejudice standard as whether or not the client actually

suffered any prejudice.

If there are no further questions, that would conclude my argument.

QUESTION: Thank you, Mr. Robinette.

Mr. Ayres, you have seven minutes remaining.

REBUTTAL ARGUMENT OF GREGORY L. AYRES

MR. AYERS: I'm shocked that counsel for the State of Ohio describes this Court's decision in Douglas v. California as a windfall. I think the right to counsel on appeal, like the right to counsel at trial, is much more fundamental than that.

This Court indicated in Evitts v. Lucey that counsel's presence is essential to adequate and effective review. It certainly cannot be described as a windfall.

QUESTION: So do you think the -- do you think that our decisions, the Court's decisions have now clearly come out to require counsel on appeal, not as a matter of equal protection, but as a matter of some other provision in the Constitution?

MR. AYERS: I think as a matter of due process, equal protection, of course guarantee the right to counsel, but the right to effective assistance is required with the Evitts decisions. The counsel just cannot just be present. He must engage in an effective

performance.

QUESTION: This is not a matter of due process?

MR. AYERS: Well, the Court did rely upon the due process clause in the Evitts decision. That was --

QUESTION: Not the equal protection clause?

MR. AYERS: No. That was the only issue presented by the record on the appeal in Evitts, so that was the only Constitutional provision relied upon by the Court, the due process clause.

But Evitts made it very clear that an attorney must file a brief where there are non-frivolous issues, where there are arguable issues. Evitts specifically reaffirmed Anders, and said that when counsel fails to file a brief, that's un-Constitutional. That denies due process.

Well, that's exactly what occurred here. And for counsel for the State of Ohio to say that it's a windfall just goes against a whole line of decisions, beginning with Douglas and ending with McCoy, four or five decisions in between.

QUESTION: Mr. Ayers, can I ask you a question about your opponent's suggestion that one possible disposition of this case would be to remand it to the Ohio Court of Appeals to decide whether there would be error, assuming it was error -- was harmless or not? If

we should do that, would your client be entitled to have a lawyer represent him in the proceedings before the Ohio Court of Appeals?

MR. AYERS: Well, of course. He's -- our position is, he should have a new appeal which he didn't get in the first place. If the Court were going to remand the proceeding, certainly he should have -- if it's back to the first appeal level, he should certainly have a lawyer. That's what Douglas requires.

QUESTION: But their disposition would give him a lawyer, as I see it now. And I'm not sure one would be any more expensive than the other. I don't know whether it makes any difference whether we would do that, and let your client then have a lawyer to argue, file a brief, or to reverse, since they appoint a lawyer on the appeal.

MR. AYERS: Well, I think that points up the whole problem with this process, your Honor. If the Court of Appeals had applied Anders, the crisp, bright line rule, we wouldn't be here. This simple case has become a complex Constitutional case. Mr. Anders, if he had -- I'm sorry, if Mr. Penson had gotten his appeal in the Ohio Court of Appeals, we wouldn't be here. Might be here on some other issue, but we wouldn't be here on the denial of right to counsel. And that's what happens

when counsel is denied and the Court has to engage in a prejudice evaluation and so forth.

QUESTION: Well, you certainly wouldn't be here if you would have won, would you, counsel?

MR. AYERS: Well, of course.

QUESTION: And how do you know you wouldn't be here if -- if --

MR. AYERS: Well, not on this issue --

QUESTION: If counsel has been appointed and you are?

MR. AYERS: Not on this issue, your Honor.

And I think that that points up the problem with the denial of counsel. You really have to engage in a speculative exercise to figure out what counsel would have done, or should have done, and would it have -- what he would have argued to the appellate Court, what the appellate Court would have decided -- and this Court said in Strickland, when counsel is denied, it really isn't worth the cost of trying to figure out the effect of the denial of counsel.

QUESTION: May I ask another --

MR. AYERS: I think that's the problem with applying a prejudice test in this situation.

QUESTION: May I ask another question about the practice in Ohio in appointed cases? Does the

lawyer get paid so much per case or so much per hour in a case of this kind, the appointed counsel?

MR. AYERS: There are maximums established by the County, and the lawyer gets paid so much an hour.

QUESTION: So much an hour.

MR. AYERS: But -- yes.

QUESTION: So that he wouldn't get the same amount for filing this, this Anders letter as he would if he'd filed a brief?

MR. AYERS: I hope not.

QUESTION: Yeah. Well, of course, if he spent the same amount of time on it, though, I suppose he would. If he put in an hourly statement, showed --

MR. AYERS: If I were on the appellate Court, he wouldn't get anything. Yeah, I think counsel did --

QUESTION: Yeah.

MR. AYERS: -- did nothing other than review the record in this case, and didn't do his job as he is required Constitutionally to do. The Court did not do its job in requiring him to file an advocate's brief where there were arguable issues.

This Court made it very clear in McCoy that where there are arguable issues, the attorney cannot serve the client's interest unless he files an advocate's brief. That did not occur here, and for the

State to argue that Mr. Penson's right to counsel was satisfied by a co-defendant's lawyer is just totally inadequate.

When you're reviewing a record as an advocate, as an appellate lawyer, representing a client, you first of all consult with your client, and then you review the record with a view to seeing if there were errors in the record that pertained to him. You're not thinking about the other co-defendants. You're looking for errors that specifically pertain to him, and then you're filing an advocate's brief advocating on his behalf those particular errors.

Mr. Penson did not get that. This Court made it very clear in Ross that every defendant must be afforded an adequate opportunity to participate in his appeal, and to have meaningful access to the appellate process. That was completely denied here.

One further point that I would like to address is that the State argues that we should apply a prejudice test here because we have a performance. Evitts again points out that counsel, in order to be effective, must engage in a performance. When counsel does not file a brief on appeal, he's engaged in nothing. It's like a lawyer at trial who goes out and talks to all the witnesses but doesn't come into the

courtroom and represent his client.

A brief on an appeal is the primary tool by which the appellate advocate acts as a sword to convince the Court that error has occurred. The attorney was effectively absent in this case. He did not participate in the appeal.

QUESTION: What if paid counsel spends a lot of time examining the case, finds that there's nothing to it on appeal? He tells his client, "I'm sorry, you have no basis for an appeal." Has he done his job? Could he send him a bill for that time?

MR. AYERS: Well, that's between he and his client, I suppose. But the point is, with respect to your question, Justice Scalia, is that client can go to another lawyer and ask him, and that lawyer may find issues.

The monied defendant can get a lawyer to present issues, especially if they're arguable issues as in this case. Mr. Penson could not do that. He was too poor, and he was denied the equal protection which Douglas v. California gives him.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayers.

The case is submitted.

(Whereupon, at 1:57 o'clock p.m., the case in

the above-titled 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:

No. 87-6116 - STEVEN A. PENSON, Petitioner V. OHIO

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

BY alan friedman

(REPORTER)