ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BRYAN STUART LANKFORD, Petitioner

V. IDAHO

CASE NO: 88-7247

PLACE: Washington, D.C.

DATE: February 19, 1991

PAGES: 1 - 49

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - X

BRYAN STUART LANKFORD, :

Petitioner :

v. : No. 88-7247

IDAHO :

- - - - - - - - - - - - - - - - - X

Washington, D.C.

Tuesday, February 19, 1991

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

APPEARANCES:

JOAN MARIE FISHER, ESQ., Genesee, Idaho; on behalf of the Petitioner.

LARRY ECHOHAWK, ESQ., Attorney General of Idaho, Boise, Idaho; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(12:58 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 88-7247, Bryan Stuart Lankford v. Idaho. Ms. Fisher.

ORAL ARGUMENT OF JOAN MARIE FISHER

ON BEHALF OF THE PETITIONER

MS. FISHER: Mr. Chief Justice, and may it please the Court:

I represent the petitioner, Bryan Stuart Lankford. I have represented Bryan Lankford since September 20, 1984. At the time of my appointment, which was as cocounsel pursuant to a pro se motion to dismiss his trial counsel, Bryan Lankford stood convicted of two counts of first degree murder due to his participation in a robbery which resulted in two homicides. One week prior to my appointment, namely September 13, 1984, the State of Idaho, through the prosecuting attorney, had writ -- had filed pursuant to a court order a written affirmative pleading that it was not seeking the death penalty. Following the -- my appointment, Bryan -- and because of the notice filed by the State, Bryan Lankford faced a maximum penalty at sentencing of life without the possibility of parole.

QUESTION: Ms. Fisher, you say, you intimate

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that if the prosecution doesn't seek the death penalty under Idaho law, then the death penalty cannot be imposed under Idaho law. Is that a correct statement of Idaho law?

MS. FISHER: That is not a correct statement of Idaho law, especially in light of this case. However, it had never occurred before that the State had affirmatively pled a, or taken the death penalty out of the sentencing proceeding, and the court had imposed the death penalty.

QUESTION: Why would the death penalty -- there is an Idaho case that neither side cites, by the way, called State v. Rossi, which didn't involve the death penalty, but it involved a case in which the judge imposed a sentence double that that the State had recommended. And it was appealed on the same grounds that you are using today to the Idaho Supreme Court, and the Idaho Supreme Court said, we hold that a trial court is not bound by a sentence recommendation made by the State, even though that recommendation was offered in conjunction with a negotiated plea. Why, why would it be any different for the death penalty?

MS. FISHER: The major difference, of course, or the critical difference, is that this is a death penalty case in which we --

QUESTION: Well, why is that critical? I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

mean --

MS. FISHER: We go beyond a mere recommendation of sentence into an affirmative pleading that they're not seeking the death penalty. Obviously, capital cases or capital sentencing proceedings under Idaho law are significantly different than noncapital sentencing proceedings.

QUESTION: Not insofar as whether you're bound by the recommendation of the prosecution is concerned. I mean, I can understand thinking in some newly created judicial system that whatever the State recommends is the maximum you could get, but you know in Idaho that that's not the case. This case, Idaho Supreme Court case was before this litigation.

MS. FISHER: Well, State v. Rossi, if it was before the litigation, there's two things. Number one, if it was entered in accordance to a plea agreement, so he entered a plea of guilty, obviously the court at that time advised the defendant they were not, that he was not bound by the State's recommendation. In this case the court order requiring the State to advise the defense whether or not they were seeking the death penalty, and if they were seeking the death penalty to state the specific statutory aggravating factors upon which it relied, was an affirmative notice order leading the def -- leaving no

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

reason for the court to have ordered that notice unless the State could have, unless the defense could have relied on it.

QUESTION: Suppose what the court had said was, in a third paragraph of that order, and in the event the state does not educe further evidence of aggravating factors, the court will, on its own motion, weigh the aggravating factors disclosed at trial and determine whether or not the death penalty is appropriate. Could the court have done that?

MS. FISHER: The court could have done that. Had the court done that I would have been --

QUESTION: So then it's not the question of whether or not the State can in effect waive the death penalty, it's a question of whether or not you had notice. Isn't that true?

MS. FISHER: That's correct, Justice Kennedy.

QUESTION: And -- in that respect I'm concerned that, unless I misread the record, you indicate nothing in your briefs and nothing in the trial court to indicate that you would have done anything any differently, nor did you express any surprise or make any objection when the penalty was imposed, but correct me if I'm wrong.

MS. FISHER: Um -- insofar to the first ques -- the first portion of that question, yes, things

would have been done differently had I known it was a capital proceeding.

QUESTION: Well, has there been any showing of that in this record?

MS. FISHER: Your Honor, there has always been argument that I would have treated the case differently because, because there were a number of things that would be relevant, a certain amount of evidence that could have been marshaled in argument that went directly to the aggravating factors, but I didn't know that the aggravating factors were at issue.

QUESTION: Well, you knew those aggravating factors were at issue with reference to the length of the prison sentence. I would assume that if you had something that was important in mitigation you would have brought it up in connection with the, the sen -- the hearing on the length of the prison sentence.

MS. FISHER: There are a number of items that I would have done had I known it was a capital sentencing that I would not have done, and did not do because it was a noncapital sentencing. For instance, I certainly would have organized my time, my research, and my energies towards the sentencing proceeding and not gone into the motion for new trial. I would have listened to the tapes. I would have developed the forensic evidence at trial. I

would have called the polygrapher who would not have, whose testimony would not have been admissible in a noncapital case, but certainly would have been admissible under the mitigating circumstances in a capital case --

QUESTION: Well, you're telling us that now, I'm not sure that it's an appropriate argument for us to take into account when you did not make that submission at any point below or in your briefs.

QUESTION: Ms. Fisher, this was a capital case. I mean --

QUESTION: Justice Kennedy asked her a question, I think.

MS. FISHER: I -- we have always argued that there were things that I would have done -- and I have always argued that there were things that I would have done had I known it was a capital case. At the postconviction hearing, which was the first available time which I could raise the issue of notice, I said I wouldn't have done it this way as a result -- I would have addressed, I would have developed the evidence in conjunction with the statutory aggravating circumstances at trial. I indicated that the effect of the lack of notice or the affirmative misleading of the notice led me to act differently. At oral argument in the State supreme court I advised the State supreme court that there was a

number of things that I would have done differently. So this is --

QUESTION: Where did you advise -- in the record does it show that you have advised the trial court of that?

MS. FISHER: I believe it's in the -- there's an excerpt in the J.A. on the postconviction proceeding.

QUESTION: Well, you can return to it later if you wish. I think it's an important point.

MS. FISHER: The argument has been made, certainly, as to specific things that I would have done differently, they have been argued -- it has not been argued. It has been argued in general terms because no one has ever asked. When the Idaho Supreme Court asked, I did in fact refer to specific things that would have been done differently.

QUESTION: I don't see how the calligrapher is one of them. Are you saying you couldn't have introduced the calligrapher because it wasn't a capital case? I was a capital case.

MS. FISHER: It was a nondeath case. We were -- this proceeding --

QUESTION: As far as that rule of evidence is concerned?

MS. FISHER: Yes, Your Honor. In the

presentence -- It's a polygrapher, I'm sorry. The polygraphist. The trial court, there was a reference to a polygraph in the presentence investigation. I attempted to correct it because the reference in the presentence investigation was incorrect, and the trial court advised me that it was not admissible. I acquiesced in the fact that the results of the polygraph were not admissible because it was a noncapital proceeding. Had I known it was a capital proceeding, I would not have acquiesced in that inadmissibility.

QUESTION: But your objection would have, would have been just as valid whether it was a capital, whether you knew the death sentence was going to be imposed or not, wouldn't it?

MS. FISHER: Well, the issue, the issues to which the polygraph had been, had been given were specifically in reference to those issues that arise under the statutory aggravating factors.

QUESTION: But -- but aren't those aggravating factors relevant to the length of the prison sentence as well?

MS. FISHER: They are relevant. But the admission of the polygraph is not -- well, it was my understanding of the law and it was the court's understanding of the law that in a, that polygraphs were

not admissible. Had I known it was a capital sentencing, I would not have agreed to that interpretation of the law because of the broad rulings that this Court has given in that all mitigation evidence can come before the trial court in a capital sentencing hearing.

QUESTION: And you think we would not have applied that rule simply because the State here had said that it was not going to, going to seek the death penalty?

MS. FISHER: That's correct. Certainly polygraphs have been held inadmissible in other, in noncapital sentencings. But certainly a major difference, or what the defendant was deprived of in this case was the ability to argue against the appropriateness of the death penalty. For 3 weeks we had a number of proceedings in the court, each time the court taking some significant amount of effort to advise the defendant of the matters at risk.

For instance, at the motion to dismiss his trial counsel, the first one where I was appointed as cocounsel, he discussed the risks of getting new counsel at this stage. He does not mention the risk of the death penalty. In, on March 10 when we had the hearing to dismiss the trial counsel, the trial judge goes into significant lengthy colloquy with the defendant to advise him of the risk because I had not read the record, because I had not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

been present at the prior proceedings, because I was not aware of everything that had taken place. What he doesn't advise the defendant, and what he doesn't advise me, is that the significant risk here is that he is facing the death penalty.

QUESTION: At the conclusion of the sentencing hearing, Ms. Fisher, the judge did say that one possible upshot of it would be the death penalty, did he not?

MS. FISHER: At the conclusion, after all of the evidence, all of the argument and evidence was heard in the sentencing, there is a reference by the trial judge to "or death." Taken in the context of those proceedings and taken in the context of the affirmative notice otherwise, that comment was not regarded as a statement that he in fact was considering the death penalty, but rather as a statement to the prosecution that these had been my options, and you come in here and recommend the minimum. But in hindsight, and looking at the cold record --

QUESTION: Don't you think that had you to do it again, and perhaps any lawyer exercising a reasonable judgment in that situation, when the judge said that, it would have alerted them if they hadn't been alerted before?

MS. FISHER: No question that if I had to do it again, I, it would have alerted me. Whether or not it was

reasonable at that time, I believe in the context of the proceedings and the fact that we had gone 3 weeks without ever mentioning the death penalty -- there are two times prior in the sentencing proceeding where the words "or death" would have had a significant impact, would certainly have alerted me. When the prosecutor stands up and says well, as the court required, we filed the formal pleading waiving the death penalty -- he doesn't say specifically waiving, but saying that we weren't seeking the death penalty, so what are the options left, indeterminate life or determinate life. Had the judge interjected there "or death," that would have alerted me. Had, when I stood up and said to the trial judge, the question that I have to argue here is whether or not this court should impose an indeterminate life or a determinate life on the defendant, had the judge interjected the words "or death," that certainly would have alerted me. But if --

QUESTION: Well, sometimes counsel don't want to mention the most frightening possibility for their case. They want to get the judge thinking in another direction. It's like a punitive damages cases. All you want to talk about is compensatory damages. The less said about punitive, the better, just in order to have a context within which it's difficult for the judge to make that

decision. So you could interpret this record as a tactical decision to focus on the determinate sentences simply in order to put the judge's mind in that frame.

MS. FISHER: Well, there is no question that at trial counsel where they received affirmative notice from the State that they're not seeking death is in a dilemma as to whether or not argue against, set up argument as to the potential of the death penalty. And as the case law now is in Idaho because of this case, trial counsel are in that dilemma. At the time there was no reason to believe that the death penalty was at issue.

QUESTION: You say there was no reason -- under Idaho law there was no reason to believe it was at issue?

MS. FISHER: That's correct.

QUESTION: Why was that? Do you have any case that even suggests that what the prosecutor asks is the upper limit?

MS. FISHER: There has to be -- there has to be a distinction between a recommendation -- I obviously knew that the court was not bound by the recommendation of the State. The State recommended the minimum of 10 years. What Idaho had so far was Osborn 1. Osborn 1 said that in a case where the defendant has no, has had informal notice of the aggra -- evidence in aggravation and argument to be had, in a case where he has been present at all the prior

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

proceedings, in a case where the trial court has advised him at the time of his plea of the potential of the death penalty, then the requirement of a formal notice that the state is seeking the death penalty is not required.

Osborn 2 -- or, Gibson then comes down in 1983 and refers to this mandatory procedure, and includes the notice that the State is seeking the death penalty. Osborn 2 then comes down and says in a noncapital sentencing case, even though clearly Osborn was a first degree murder conviction where the State, I mean where the court imposed life, they said in a noncapital sentencing, Idaho Code 2515(d), which is the necessity of inquiry under the death penalty statute, doesn't apply. So there wasn't any reason to believe, in 1984, that if the State didn't seek the death penalty, that the court would impose it sui sponte without any comment as to the possibility or to the fact that he was in fact considering that option.

QUESTION: Well, there might not have been a reason to think that a judge would normally do that, but you think there was no reason to think that it could be done in law? I mean, I understand how you could reasonably believe the chances were 99 to 1 that the judge would, of course, if the State wasn't seeking death, not impose death. But you're saying that you thought as a matter of law that the judge could not do it? Is that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

what you're saying?

MS. FISHER: Well, certainly -- you know, my thoughts are not in the record, but I never contemplated the possibility that the judge could in fact impose the death penalty at --

QUESTION: The legal possibility.

MS. FISHER: That's correct.

QUESTION: Did Osborn 2 advert specifically to Gibson?

MS. FISHER: No, it did not. Gibson -- and the reference in Gibson is simply a, an outline of the capital, the mandatory capital procedure. Gibson and Osborn were not interrelated in any way.

QUESTION: I take it that outline was not the holding of the case in Gibson, however?

MS. FISHER: Well, they had a number of holdings because there were a number of issues. I don't believe that the issue was notice in Gibson.

QUESTION: Ms. Fisher, when was the first time that the judge made it known that death was still in the case? You have mentioned before that he did it; was that the first time?

MS. FISHER: Assuming that you accept the reference at the conclusion of the sentencing hearing as such notice, that would have been the first time. As

taken in the context of proceedings, the first time that the judge made it known was when he actually imposed the death penalty, and that was on October 15, 1984.

In this case there is more than a lack of notice. Assuming that the constructive notice of the statutory requirement, or statutory sentencing, was in fact constructive notice, once the trial court exercised its discretion, which it clearly had under Idaho sentencing law, to notify, or to order notice in regard to the issues to be litigated, the -- and the subsequent court compliance with the order, it moved beyond a lack of notice into an affirmative misleading situation where the defense detrimentally relied on the fact that the death penalty was not in the case. As a consequence Bryan Lankford stands sentenced to death under procedures that were not reasonably calculated to give him the opportunity to defend against the death penalty.

QUESTION: Did Idaho law permit you to move the trial court to reconsider the sentence?

MS. FISHER: The post -- because of the post -- the consolidation statute in capital cases, the first opportunity to raise that issue would have been in the postconviction --

QUESTION: You mean at the time he enters a sentence in the trial court you can't ask him to consider

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

whether or not he might withdraw that determination --

MS. FISHER: The motion --

QUESTION: -- based on a showing that you were surprised?

MS. FISHER: I -- the motion -- there is a Rule 35 in which you can move to reduce a sentence. And that, that motion is a one-time motion that can be, could have been made at the time of Bryan Lankford's sentencing either within 40, within the 42 days that you have for an appeal or within 120 days after a mandamus. Consequently, and because of the consolidation statute where I was required by law to raise any and all issues within 60 days of the imposition of death, that Rule 35 was exercised after the mandamus. If you understand what I mean -- we had, in Idaho we have two -- at the time of this sentencing there was an opportunity to raise a motion to reduce the sentence one time. You could only raise it once. We could have raised it either within the initial period of appeal, or we could raise it within 120 days after the affirmance --

QUESTION: Did you raise it at one of those two points?

MS. FISHER: Yes, I did, Justice Kennedy.

QUESTION: And did you include -- at which point? The 120-day point?

MS. FISHER: 120 days after the affirmance, yes.

QUESTION: Did you include in there an affidavit or a showing or an allegation that you had been surprised?

MS. FISHER: Yes.

QUESTION: And does that contain an enumeration of the things you would have done differently?

MS. FISHER: I don't believe that it does, Justice Kennedy. It -- you know, it certainly contains the argument that if I had adequate -- if there was adequate notice through the statute, then Bryan Lankford, then the flip side of the issue was that I had not presented what needed to be presented in a capital case.

QUESTION: Is that motion and those proceedings, are they in that record, in the record?

MS. FISHER: The -- I believe it's a different appeal, because we also appealed that, that ruling. I'll reserve my remaining time for rebuttal.

QUESTION: Very well, Ms. Fisher. General Echohawk.

ORAL ARGUMENT OF LARRY ECHOHAWK

ON BEHALF OF THE RESPONDENT

GEN. ECHOHAWK: Mr. Chief Justice, and may it please the Court:

I believe what we have here today is a claim by the petitioner that he was totally surprised on the day of

sentencing, October 15, 1984, when he received the death penalty. The law clearly states from the very beginning when he was charged with first degree murder that the sentencing court upon conviction would have two options; a life or a death sentence. The record is replete with examples of how the defendant was aware that the death penalty was at stake.

I believe the claim of the petitioner turns on an unfounded assumption, and that is that in some way the prosecutor, by making a recommendation that it did not intend to seek the death penalty, could bind the court in limiting the option that the court could consider at the time of sentencing. And there is virtually no case law or statutory authority to back up that assumption.

QUESTION: Do you consider --

QUESTION: What do you make of the --

QUESTION: Do you consider it fair play?

GEN. ECHOHAWK: Your Honor --

QUESTION: Yes or no?

GEN. ECHOHAWK: I believe that it is.

QUESTION: And you believe that if that grew up to be a practice it would be legitimate all over the country if we say so?

GEN. ECHOHAWK: Your Honor, I believe that the petitioner and the petitioner's counsel are presumed to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

know the law. The law speaks for itself. And under Idaho --

QUESTION: And doesn't the law speak that prosecutors shall tell the truth?

GEN. ECHOHAWK: Your Honor --

QUESTION: Or would you like to see it be the law?

GEN. ECHOHAWK: Your Honor, I believe the prosecutor gave a recommendation in good conscience to the court that the death penalty was not appropriate; but under Idaho law it's not the prosecutor's job to decide what that ultimate sentence will be. That's reserved to the court, and the court followed the Idaho statutory proceedings very carefully. What you have in this case is a argument on the part of the petitioner that there needed to be some kind of extraordinary warning or signal that the court intended, regardless of the prosecutor's recommendation, to consider 19-2515 and to consider the aggravating factors that are set forth.

QUESTION: Well, it's something more than that, isn't it? The order of May 17 directs that in the event the State shall seek the death penalty, it shall formally file with the court a statement listing the aggravating circumstances, and the defendant shall specify in a concise manner all the mitigating factors. Is it -- would

it be a reasonable construction of that order to conclude that when the submission has not been made by either counsel that the court will not consider the death penalty? Is that a reasonable construction?

GEN. ECHOHAWK: Your Honor, I don't believe it is. And I believe that --

QUESTION: So you, you interpret this order as saying that the -- could the State have argued for the death penalty after failing to make this file?

GEN. ECHOHAWK: Your Honor, I believe the State would be in a position as it approached to change its recommendation.

QUESTION: Despite noncompliance with the court's order of May 17?

GEN. ECHOHAWK: Well, Your Honor, I think it's important to recognize that the, the order that the court released in May was as a result of a hearing that was held on April 5; and the counsel has, the petitioner's counsel has argued that this was something that the court pretty much thought up on its own. And the fact is that it came as a request from the defendant. And I think that that April 5 --

QUESTION: Well, but whatever its genesis, it's a court order, and each side is ordered to set forth the aggravating or mitigating circumstances, as the case may

be. And when this isn't done, all I'm suggesting is that it might be a reasonable interpretation that the death penalty may not be considered absent these filings.

GEN. ECHOHAWK: Your Honor, the way that the Idaho capital punishment law is structured, it is very clear that it is the judge who makes that sentence. And the law in Idaho is also very clear that the prosecutor may give a recommendation, but in no way is that binding. And I think that the April --

QUESTION: Well, suppose the judge said the death penalty is not going to be part of my consideration, then he changes his mind after the arguments. Would that be proper?

GEN. ECHOHAWK: Well, that's not the case here, Your Honor.

QUESTION: I know that's not the case. What if it were the case?

GEN. ECHOHAWK: Well, I think ultimately the --

QUESTION: I'm testing whether or not the trial court can take any action which misleads counsel.

GEN. ECHOHAWK: Well, Your Honor, the point is that the court has the ultimate decisionmaking authority on the sentence, and if it were to change its mind and some way give a false signal and then come back and do, do something else, I believe that the counsel would be in a

better position to make the argument. But here the court gave a very consistent statement all the way through the proceedings about what it intended to do. Upon the request of defendant, it's true the court did ask the State to identify whether or not it was going to seek the death penalty.

But I think that, this is not in the Joint Appendix, but I think that the Court ought to look very carefully at the record in the supreme court, the transcript from the April 5 proceeding, because in that proceeding the court makes this statement after there is some discussion about and recognition that notification by the State is not required as to its position. The court goes on to say, there obviously needs to be inquiry pursuant to 19-2515 as to the statutory aggravating circumstances that may exist, regardless of whether or not the State intends to pursue the death penalty. I think the court made it pretty clear in that statement that yes, we're going to identify what the prosecutor's position is, but the court has an independent authority here in the sentencing structure, and the court is going to consider 19-2515 regardless of what the State's position may be.

QUESTION: That was an opinion of the Supreme Court of Idaho you were quoting from?

GEN. ECHOHAWK: No, Mr. Chief Justice, that was

an actual proceeding where the --

QUESTION: This was an arraignment, wasn't it?

GEN. ECHOHAWK: Your Honor, this, this language that I quote comes out of a, this was after conviction, just 5 days after the conviction --

QUESTION: In this case.

GEN. ECHOHAWK: Yes, in this case. Mr. Longeteig, the trial counsel for Bryan Lankford, was present. The prosecutor was present. They were discussing when to set the sentencing date. The defendant's counsel asked for the State to disclose what its position would be. The court says yes, I'll do that, but you have to understand, obviously there needs to be an inquiry into 19-2515, and regardless of whether the State --

QUESTION: Well, was the present counsel for the defendant counsel at that time?

GEN. ECHOHAWK: Your Honor, Ms. Fisher was not counsel --

QUESTION: Was she in the room when this happened?

GEN. ECHOHAWK: She did not enter the case until --

QUESTION: Was the record of this colloquy that you describe provided to her at any time?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GEN. ECHOHAWK: Your Honor, Ms. Fisher had available to her under court order the services of the trial attorney right up through sentencing --

QUESTION: So she could have asked him about it and found out by making the appropriate inquiry, but she didn't hear it said herself?

GEN. ECHOHAWK: No, Your Honor. The defendant was personally present.

QUESTION: And that's what you regard as the best example of advance notice?

GEN. ECHOHAWK: Your Honor, I think the --

QUESTION: The transcript, there was a transcript of the hearing, and --

GEN. ECHOHAWK: That's the transcript of the April 5 hearing.

QUESTION: -- I think we have it in the record here, too.

QUESTION: And he could have told her, I suppose, he could have volunteered to her, now bear in mind that the death penalty is at issue here because the judge told me that; and I was counsel for the defendant at the time he told me. He could have volunteered that to her, I assume?

GEN. ECHOHAWK: Your Honor --

QUESTION: Probably should have, if, if there

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

was any doubt about the point.

GEN. ECHOHAWK: He could have volunteered that information. Counsel --

QUESTION: This also was before the order requiring the prosecutor to take a position, wasn't it?

GEN. ECHOHAWK: Yes, Your Honor, that's correct.

QUESTION: May I ask something? Reading the trial judge's findings, is it clear from the record whether the judge thought this defendant or this defendant's brother did the actual killing?

GEN. ECHOHAWK: Well, Your Honor, I believe that the evidence showed that the person that actually struck the deadly blow was Mark Lankford, the brother of the petitioner.

QUESTION: The brother. But can you tell that from the judge's findings? The judge's findings are really quite ambiguous on who did the actual killing, as I read them.

GEN. ECHOHAWK: Your Honor, I believe that the judge, judge's findings would have identified that this was a common scheme to commit the murderous act.

QUESTION: No, but my question is can you tell from the judge's findings which person the judge thought actually did the killing?

GEN. ECHOHAWK: Your Honor, I believe that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

judge thought that the person that actually delivered the deadly blow was Mark Lankford, but that the --

QUESTION: How do, how do we know that? How do we know that? His findings don't reveal that, do they?

GEN. ECHOHAWK: Well, Your Honor --

QUESTION: And isn't it a fact that had he had the results of the polygraph examination, which apparently were part of the attempt to work out a plea bargain before this defendant testified at his brother's trial, those would have shown who did the actual killing?

GEN. ECHOHAWK: Your Honor, I don't think it was in dispute as to who struck the deadly blow. But the, the court made a finding that this defendant intended to kill.

QUESTION: But there is no -- you cannot tell from the judge's findings who did the actual killing, can you?

GEN. ECHOHAWK: Your Honor, I'd have to go back and read that specifically to see if there's, you know, one comment. But with regard to the, to the polygraph that counsel for petitioner says would be, would have been helpful, actually I believe that that was more damaging than helpful. There were essentially 10 questions that were asked through two polygraph examinations; and six of those the defendant was found to be deceptive.

QUESTION: That's right, but on the questions

that related to who did the killing and which were the basis for the prosecutor being willing to make a plea bargain, he was truthful on those. Is that not right?

GEN. ECHOHAWK: Your Honor, where he failed is where he identified that he did not know that these people were going to be killed, and that where he passed was where he identified that his brother was the one that actually struck the blow.

QUESTION: Which is the fact that was material to the prosecution when it negotiated, when it negotiated the plea bargain that the judge refused.

GEN. ECHOHAWK: Your Honor, clearly the prosecutor thought that Bryan Lankford was the less culpable of the two. I think it's important when we talk about what the judge was thinking to recognize that in Idaho there is a very specific procedure that can be followed if you want to bind the judge to a sentencing alternative. That's what we call Rule 11. And if -- counsel may have had a pretty good argument to make if at the time that she handled the sentencing proceeding she walked into the courtroom with a Rule 11 plea in hand that really does bind the judge. But in this case that was not the situation.

The judge, in fact, at the close of the sentencing argument noted that the death penalty was an

option, and that he was rejecting the prosecutor's recommendation. Now at that point the defense attorney objects because she said I want him to be sentenced today. If she really thought that it was a surprise, believe me, I believe she would have gone right through the ceiling and asked for more time, asked for a rehearing, reconsideration. That just didn't happen. I believe that it was really a matter of trial strategy on her part.

And looking at the facts in this case, the defendant was benefitting by that prosecutor's recommendation rather than being harmed. The benefit came because the prosecutor was very articulate in closing argument at sentencing identifying that in his opinion the defendant was the less culpable. But the judge is the one that has to make that ultimate decision; and under Idaho law he is required to follow a step by step procedure. He is required to hold a sentencing hearing. He is required to review the evidence that is submitted at trial. He had 5 days worth of evidence that he had to consider. And he is also required to consider whatever mitigation or aggravation factors are presented.

In this case the State presented no additional aggravating factors. The defendant called seven mitigating witnesses. And I assert, Your Honors, that the evidence that came in at sentencing hearing applies

whether you're talking about a life term with no possibility of parole or a death sentence. The information that was presented to the court is mitigating, period. And the court considered that and made written findings. I think --

QUESTION: What significance, if any, should we put in the language quoted on page 45 of the opposing brief from Gibson which refers to the procedures which they are claiming should have been followed as being mandated in potential death penalty cases?

GEN. ECHOHAWK: Justice Souter, I believe that this Court should place no significant, significance to that language because that was not at issue.

QUESTION: What language we're talking about, please? Where would I find this language?

QUESTION: I'm sorry. I was quoting from page 45 of the opposing brief, the -- there's a quotation from Gibson.

QUESTION: The red brief?

QUESTION: No, the blue brief.

QUESTION: Thank you.

GEN. ECHOHAWK: Your Honor, that was not the issue in the case. The court simply made the statement that the mandated provisions under Idaho law were followed, and then went down and listed several that had

been, several of the procedures that had been followed by the court, including notification. But there is no place in the Idaho statute or no other case where it's identified that the State is required to give that notification. In fact, the first major supreme court case in Idaho to interpret 19-2515, State v. Osborn, held just the opposite; where the prosecutor did not make a recommendation for death, the death penalty was imposed, and the court considered whether or not there was some requirement that the State should notify the defendant. And the court found that there was no requirement.

QUESTION: General Echohawk, I don't, I don't understand. That language is not inconsistent with anything that you have told us anyway, right? If that language is accepted as entirely true, all it proves is that the State must make known its intent to seek the death penalty or not.

GEN. ECHOHAWK: That's correct.

QUESTION: It doesn't at all say that once the State does make known its intent not to seek the death penalty, the death penalty can't be imposed. So that was complied with here anyway, even if you accept that language as supplementing the statute. It was complied with in this case, wasn't it?

GEN. ECHOHAWK: Yes, Your Honor. And I believe

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that the way that the Idaho sentencing laws for capital offenses are structured, the judge is placed in a position to make that decision to avoid inconsistencies. And to allow a prosecutor to bind the judge is a way that will probably lead to more inconsistencies in terms of what is handed down. The judge is the ultimate authority. The judge is given 10 aggravating factors; that you have to examine, you have to find at least one of those to be present before the court can impose a death penalty, and that that aggravating factor or factors, whichever are found, have to be weighed with the mitigating circumstances.

QUESTION: But just to be clear on the point, what you, what you are saying in effect is that when the court referred to a potential death penalty case it was referring to a case in which at any time capital sentencing was a possibility. It was not referring to these as conditions upon which a capital sentence, as necessary conditions upon which a capital sentence could be imposed. In other words, it was stating a description of a generic kind of case rather than setting out a procedural condition. Is that what you're telling us?

GEN. ECHOHAWK: Well, Your Honor, I believe that what a judge has to do is examine independently --

QUESTION: No, I realize that. I'm just going

back to the, to the colloquy that you and I, and Justice Scalia and I have had about the language from Gibson. And I just want to get clear on this that when Gibson refers to a potential death penalty case, you in effect are telling us that what Gibson is referring to is a case in which at any time the death penalty might have been or might indeed be a possibility. But it is not, the court was not by that language referring to the preceding procedures as conditions which must be satisfied before a death penalty can be imposed. Isn't that what you're saying?

GEN. ECHOHAWK: That's what I'm saying, Your Honor. Your Honor, I believe that it's important to note that at no time has the defendant in this case made any factual representation about what evidence would be available to specifically address the death penalty that was not presented --

QUESTION: Well, but counsel, your opponent did that today. She said that she would have argued that even though polygraph at testimony is not admissible in a normal trial or a normal sentencing hearing, she would have argued in view of our Lockett case and the requirement of all mitigating circumstances being admissible, she would have argued that under that rule it was admissible. She might not have prevailed, but she

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

said she would have made that argument.

GEN. ECHOHAWK: Well, Your Honor, I think the polygraph evidence would have presented an issue for the trial court to consider, but the fact is that she did not offer that proof.

QUESTION: Well, right. And she said the reason she didn't do it is because she thought it was inadmissible because she didn't think it was a death case. Whereas she would have made the different argument had she realized it was a death case. And you say, basically, well, she should have realized it. That's what, it kind of boils down to that, I think.

GEN. ECHOHAWK: Your Honor, I believe that my assertion today is that, that evidence would have made, she has made no showing that the evidence, the outcome would be any different from anything that she could have produced.

QUESTION: Well, it's pretty hard for her to make that showing. How does she know what the judge would have done? But it does seem to me rather strange that the judge, on the very point that would have been involved in that testimony, makes such an ambiguous statement of findings in his explanation of the death sentence.

QUESTION: Is your opponent saying that this wasn't a death case? I mean, if it wasn't -- if the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

effect of not giving the notice that death was still at issue was not to make it a death case, then presumably she didn't even think that you had to go through the separate sentencing phase at all. Was there any indication of that in the record?

GEN. ECHOHAWK: Well, Your Honor, I think she was clearly --

QUESTION: I didn't know that we were arguing about whether this was a death case or not. Is that really what's at issue?

GEN. ECHOHAWK: Your Honor, I understand that the petitioner's argument is that once the prosecutor made the recommendation, that it became a nondeath case, that the prosecutor could bind the court unless the court came out and made some specific statement that I'm going to ignore what the prosecutor's recommendation is.

QUESTION: I didn't understand her brief to say that. I didn't understand her brief to say that. Because if that is the case, then, then there would follow the rule about the polygraph would change, but there would also follow a lot of other things, including the fact that you wouldn't have to have a special separate sentencing hearing anyway.

QUESTION: Well, is that true? I thought you had a separate sentencing hearing anyway. Even if it had

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

not been death in the wind, there still would have had to have been a separate sentencing hearing, wouldn't there?

GEN. ECHOHAWK: Your Honor, death was in the wind all the way through --

QUESTION: No, but even if it hadn't been. Had it not been, just for, to take her assumption for a hypothetical, you still would have had this very same hearing, wouldn't you?

GEN. ECHOHAWK: Your Honor, the petitioner knew that the judge --

QUESTION: Can't you answer my question? Even if the judge had agreed that he was not going to impose the death penalty, would he not have held the same hearing he did in fact hold?

GEN. ECHOHAWK: Yes.

QUESTION: General Echohawk, under Idaho law if the judge is debating a sentence, there is no possibility of death, does the defendant ordinarily, is the defendant ordinarily allowed to call a number of mitigating circumstance witnesses?

GEN. ECHOHAWK: Yes, Your Honor, in all cases, whether it be capital or noncapital, the defense can call mitigation witnesses.

QUESTION: Even in a robbery case, say where the maximum is 20 years?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

GEN. ECHOHAWK: Yes, Your Honor.

QUESTION: At a sentencing hearing, the defendant can call witnesses?

GEN. ECHOHAWK: That's correct, Your Honor.

QUESTION: So there was nothing about this hearing, per se, that would indicate that it's a death penalty hearing? The same hearing would have been held even if it were just a question of what the sentence should be, anything from a determinate number of years to life?

GEN. ECHOHAWK: I think, Your Honor, it was very clear that this was a capital sentencing.

QUESTION: Well, but so far as all the evidence and all of the arguments, those same evidence and same arguments would routinely have been presented in Idaho even if death had not been one of the options?

GEN. ECHOHAWK: Yes, Your Honor. I believe that any, the problems that counsel for the petitioner basically speak to are greatly related to the fact that she did not become counsel until September 20, and then after she became cocounsel moved to discharge a trial counsel. And this is something that the defendant brought upon himself. The judge made it very clear from the beginning that he would have problems with continuing the hearing because witnesses were under subpoena, and the

case had already been, had been tried actually back in March, and this was an October sentencing.

I believe that to a great extent any problems that exist have to be laid at the doorstep of the defendant himself. Throughout this sentencing proceeding trial counsel was available. Trial counsel knew, and admitted it through testimony given at a motion for new trial, that the death penalty was at stake. And in fact during one question and answer period when Ms. Fisher questioned Mr. Longeteig on the point, the comment was made, Mr. Longeteig, did you understand that death was a possibility here, or an option, and he said yes, I read the statute.

And that's essentially what our position is, that in reading the statute for first degree murder and the punishment provisions, it's very clear that death was an option and that a sentencing judge would be called upon to follow the provisions of 19-2515. And that the prosecutor could not in any way alter the course of that proceeding by a recommendation. His recommendation was merely advisory. What you have here is a situation where the judge was required also to take the evidence that was produced at trial and apply it to the standards in 19-2515, essentially providing, applying known facts to a known procedure in the capital sentencing process.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Thank you very much.

QUESTION: Before you sit down, General, when was the notice -- was the notice given to the court of the, of the sentence that the prosecution was seeking before or after the presentence investigation? What is the order of that? Did the presentence investigation precede or follow the prosecution's recommendation?

GEN. ECHOHAWK: Your Honor, I don't recall the date that the presentence investigation was filed. The, the court --

QUESTION: Well, the order is May 17, at page 22 of the Appendix, and it sets the presentence investigation report to be filed on June 14.

GEN. ECHOHAWK: There was a subsequent order in early September dealing with notice, and the prosecutor actually filed his notice, or, of intent not to seek the death penalty, I believe that was on September 13.

QUESTION: So that was after the presentence investigation was completed and filed, then?

GEN. ECHOHAWK: I think perhaps you have both sides covered, both before and after.

QUESTION: Let me just ask the same question in another way. Did the presentence investigation report refer to the fact that during the interval, there was a fairly long continuance, as I remember it, that the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

defendant had testified at his brother's trial pursuant to the prosecution's request? Was that in the presentence report?

GEN. ECHOHAWK: Your Honor, I believe there was an addendum to the presentence investigation that addressed that.

QUESTION: That addressed that cooperation, yeah.

QUESTION: Thank you, General Echohawk. Ms. Fisher, do you have rebuttal? You have 9 minutes.

REBUTTAL ARGUMENT OF JOAN MARIE FISHER

ON BEHALF OF THE PETITIONER

MS. FISHER: Thank you, Chief Justice. There is a few matters in which the State has spoken to that I would like to address. Number one is the April 5th hearing in which the defense requested notice. I think if you look at that transcript there is, there is a couple of things that you have to remember. First, the defense, when they requested it, said, whether or not the State seeks the death penalty will materially alter the manner in which we approach this, this case. Secondly, the prosecutor indicated his intent to let the defense know in an early manner so that the defense would have plenty of time. Now the court does, following that colloquy between the defense attorney and the trial, the prosecutor, does

say well, regardless of the notice there will have to be an inquiry under 2515.

However, I didn't have the transcript. I asked for the transcript. And Mr. Echohawk indicates that Mr. Longeteig was available to me; however, the record will reflect that the trial court had to order Mr. Longeteig to stay in the courtroom at my beck and call. The transcript of Mr. Longeteig's testimony at postconviction will reflect that he had one contact with me from the date of my appointment on September 20.

QUESTION: Well, Ms. Fisher, do you think you can just take the case stepping into, as counselor, as, be kind of a tabula rasa, and not be bound by anything that has gone before in the case?

MS. FISHER: Not be bound -- no, I do not, Chief Justice. However, what -- what had occurred in the case when I stepped in was an affirmative court ordered notice that the death penalty wasn't at issue. What had never been litigated --

QUESTION: How did you know that?

MS. FISHER: How did I know that? It was on file. It was filed as a formal pleading.

QUESTION: And, and it was entered, that order was entered, or that letter -- was it a letter or what?

MS. FISHER: No, it was a formal pleading

indicating that the State was not recommending the death penalty.

QUESTION: But that, that was filed because, as a result of this hearing --

MS. FISHER: Well, certainly the hearing --

QUESTION: -- when the judge, the judge says I don't know whether or not the statute calls for this, and the defense attorney says I don't either, but I'm asking for it anyway. And -- at that hearing, this pleading was filed as a result of that hearing?

MS. FISHER: It's reasonable to infer. The hearing takes place on April 5th. Certainly the court's order --

QUESTION: You just said that that transcript of that hearing was not available to you.

MS. FISHER: That's correct.

QUESTION: Well, did you ask for it?

MS. FISHER: Yes. I asked for it, the transcript of the trial and all prior proceedings. And I was denied.

QUESTION: You were denied?

MS. FISHER: Denied.

QUESTION: And what was the ground for the denial? You couldn't even get a transcript of the trial?

MS. FISHER: That's correct, Justice White. I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

asked for the transcript. He said well, you've got the preliminary hearing transcript and you've got the transcript of your client, and you have Mr. Longeteig, who I am ordering to be at your beck and call, and that's all you need.

QUESTION: Um hum.

QUESTION: Didn't he also say that you had tapes of the hearings?

MS. FISHER: He -- on October 10 he said we will try to make available to you tapes of the trial. Those tapes were made available to me on October 11. Certainly, because I was trying to get ready because my motion for continuance of the sentencing had been denied, I was trying to get my witnesses ready for the sentencing, and I also had to represent Bryan Lankford at his codefendant's motion for new trial, so I was unable to review the tapes.

QUESTION: In any case, I take it from what you say that you would, you never did get a tape of the hearing that we're discussing here.

MS. FISHER: No. It was only the tape of the trial itself.

QUESTION: Where did we ever get a transcript of that hearing, do you suppose?

MS. FISHER: The transcript was developed during the postconviction and the appellate process in the Idaho

Supreme Court.

QUESTION: What do you mean developed? It was transcribed from --

MS. FISHER: Well, it was typewritten.

QUESTION: Typewritten from a tape?

MS. FISHER: I have, I have no idea, Justice White. I'm sure that there was a tape. That tape was not made available to me. The only tapes made available to me were the 5-day jury trial.

Mr. Echohawk makes remarks that my surprise was never litigated. This case has never been litigated on my actual knowledge. Certainly when I filed the postconviction, the State responded that this was a legal issue. It was a question of whether the statutory notice carried through and negated the effect of any affirmative action by the trial court and the prosecutor. The Idaho Supreme Court did not go on the issue of actual notice, or my actual knowledge. It has never been litigated because it has never been raised. The question is, did the constructive notice of the statute effectively pass through that affirmative trial court's order?

QUESTION: Well, now, it's not as though anything that was done by the prosecutor or the trial court contradicted the statute. I mean, it isn't as though -- you didn't receive any assurance, did you,

affirmative assurance that the death penalty was not at issue?

MS. FISHER: The court order says, says -- well, I suppose I took assurance from the court order and from the resulting notice. Certainly the trial court never said to me --

QUESTION: The court order said what? Said that the prosecution was not seeking the death penalty?

MS. FISHER: That's correct.

QUESTION: All right.

QUESTION: They ordered the --

MS. FISHER: They ordered the prosecutor to say --

QUESTION: They ordered the prosecutor to say, and then the prosecutor filed a pleading in response to that.

MS. FISHER: That's correct, Justice White.

QUESTION: So the court never said anything about, about whether the death penalty would be sought or not.

MS. FISHER: That's correct. And that's the bottom line here. All we, all that the trial court needed to do, having ordered a notice which appeared to have, which was certainly discretionary and within the power of the court to do under the general sentencing statute,

having ordered it, having received the formal pleading from the State, all the court had to do was somewhere give the defendant an opportunity to know that regardless of the State's order, regardless of the State's filing pursuant to the order, he was still considering the death penalty.

QUESTION: The -- I suppose that judge, had that judge tried a death case before?

MS. FISHER: These were his first two death cases. He had not.

QUESTION: He seemed to think that it was sort of a strange request. He didn't know whether the statute provided for it, and the pros -- and the defense attorney said he didn't either, but he was still asking for it. Is that the regular procedure in -- or, have there been many death cases --

MS. FISHER: There have been a number of first degree murder cases. There are currently 19 death, people sentenced to death in Idaho. It's not normal procedure for the State to affirmatively order the, I mean for the court to affirmatively order. It is the court taking the unusual action under its general discretionary power to order such notice as the court may require that changes the whole structure of this case. Had the State simply made no recommen -- or simply said nothing about the death

penalty one way or the other, then we'd be in an Osborn situation.

QUESTION: Is there something, from something you said before it sounded as though when you get to the penalty phase in a capital case, is there something like a pretrial order entered outlining the issues that are to be tried?

MS. FISHER: In a death penalty case?

QUESTION: Yeah.

MS. FISHER: Not generally. In this case the, the issues were defined by the court's order. And then when this --

QUESTION: Which order?

MS. FISHER: Only the court order regarding whether the State was seeking the death penalty. If they sought the death penalty, then to, you know, to define the aggra -- statutory aggravating factors. The diffi --

QUESTION: Ms. Fisher, could I ask you --

MS. FISHER: Yes.

QUESTION: What you're asking us to -- what you think the trial court had to say was not merely to clarify for you that legally he could impose the death penalty despite the State's recommendation, but as I understand what you're saying, you want him to say not merely I legally can, but I am considering the death penalty.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

You --

MS. FISHER: That the death penalty is still, is still a consideration, yes, Justice.

QUESTION: A live consideration, not just that legally I may do it. You, you want him to affirmatively let counsel knowing that I am still thinking about that because I think it's a possibility here. That's what you're asking?

MS. FISHER: Yes. Yes.

QUESTION: Why did he have to do that? Isn't it enough if the law is clear?

MS. FISHER: The law is not clear. It was not clear in 1984.

QUESTION: Let's grant that. Why wouldn't it be enough for him to say, I want you to know, I'm not telling you what I'm thinking about because I haven't thought about it yet, I want to leave my mind open to all the arguments first. But I want you to know that I may legally impose the death penalty. Would that be enough?

MS. FISHER: That would have been enough.

QUESTION: Thank you, Ms. Fisher.

MS. FISHER: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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:

#88-7247 - BRYAN STUART LANKFORD, Petitioner V. IDAHO

---

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

BY Rodgerstuart Hunter

(REPORTER)