OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WARREN McCLESKEY, Petitioner v.

WALTER D. ZANT, SUPERINTENDENT, GEORGIA

DIAGNOSTIC & CLASSIFICATION CENTER

CASE NO: 89-7024

PLACE: Washington, D.C.

DATE: October 31, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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WARREN McCLESKEY, :

Petitioner :

v. : No. 89-7024

WALTER D. ZANT, SUPERINTENDENT, :

GEORGIA DIAGNOSTIC & CLASSIFI- :

CATION CENTER :

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Washington, D.C.

Wednesday, October 31, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

JOHN CHARLES BOGER, ESQ., Chapel Hill, North Carolina; on behalf of the Petitioner.

MARY BETH WESTMORELAND, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Respondent.

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PROCEEDINGS

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-7024, Warren McCleskey v. Walter D. Zant. Mr. Boger.

ORAL ARGUMENT OF JOHN CHARLES BOGER

ON BEHALF OF THE PETITIONER

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

This is a case about State misconduct in a criminal trial, the Massiah violation, about how that conduct was hidden by certain State police officers and other officials for 9 years, and about how both the underlying misconduct and the conspiracy that hid it subsequently came to light.

The case presents two legal issues. The first is whether petitioner should now be entitled to assert that Massiah violation on a second Federal application for writ of habeas corpus, or whether on the contrary he should be held to have used the writ. The second issue is whether the State's use of the fruits of its misconduct, a confession that was obtained from Mr. McCleskey in the cell, was somehow harmless error at both the guilt and the penalty phases of Mr. McCleskey's trial.

QUESTION: Mr. Boger, the court of appeals didn't

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pass on the question of whether there was a Massiah violation, did it?

MR. BOGER: That is correct, Your Honor.

QUESTION: They said they were divided as to it?

MR. BOGER: I believe that is right, Your Honor. As I recall, one of the judges on this circuit questioned whether a Massiah violation was possible absent a payment of money between the informant and the police. And so that issue at least, I know, was flagged.

Let me address the issue of abuse first. In Amadeo v. Zant, decided by this Court two terms ago, the Court was presented with another case in which intentional State misconduct, there a jury discrimination claim, came to light while Amadeo's case was still on direct appeal. For that reason the issue of whether Amadeo could present that evidence in a Federal application was fought out in the context of procedural default. But in resolving the issue in Amadeo, the Court undertook an analysis that drove on doctrine it had long employed in the area of abuse law.

The Court indicated that Amadeo could excuse his failure to raise the claim earlier if he could demonstrate three things. First that some objective factor external to the defense, some interference by State officials, had impeded or impaired Mr. Amadeo's ability to identify and prosecute that claim. Second, that the violation was not

reasonably discoverable independently of State concealment. And third, that the State concealment itself, and not some other tactical consideration of counsel, had led Amadeo to bypass the claim.

Now in the case before the Court this morning the district judge, Owen Forrester, necessarily found himself confronting questions very similar to those addressed in Amadeo. And after an extensive hearing of almost a day's length he made fact findings on those questions. He found first that Atlanta police officers had not only violated Massiah, but had actively concealed that violation. They had, as he put it at one point, lied and lied well in a complicated conspiracy. He also found that the evidence which would have proven this Massiah violation was not reasonably discoverable by counsel. And finally he found that petitioner's deliberate abandonment of the Massiah claim after State proceedings was prompted not by any independent tactical considerations, but solely because of counsel's inability to discover the underlying evidence in support of his claim, evidence that State officials were in fact actively concealing from him.

Having made these specific findings, the district court concluded that petitioner was not guilty of inexcusable neglect -- there was an excuse -- or of deliberate abandonment, since the abandonment was not fully

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knowing of the premises.

QUESTION: It is not clear to me, Counsel, why Worthy's testimony is the critical turning point. Why couldn't Evans have testified and established at least some of the basis for the Massiah claim?

MR. BOGER: Well --

QUESTION: They knew who Evans was, and they had the opportunity to depose him, or at least to ask the district court for permission to depose him --

MR. BOGER: Well, he actually --

QUESTION: -- under Rule 6.

MR. BOGER: He actually appeared, Your Honor, as a witness in the State habeas proceedings, and he was asked a long series of questions which I refer to in Footnote 10 of my brief. He was asked whether there was any special reason he was put in the cell next to McCleskey. He was asked about his relationships with the police officers. He was asked about what was the point of his being put there. He gave answers that were totally nonresponsive on the issues of a possible Massiah violation. So had we gone to the district judge and said we want more deposition of Offie Evans, the judge would have said, what have you done. And we would have said we put him under oath. And the judge would have asked, well, what did you get, and the answer really was nothing, no evidence of a Massiah violation.

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QUESTION: Evans said nothing about conversations with police officials or --

MR. BOGER: He did indicate that he had had a conversation with police officials, and he indicated that one of the officers said he would speak a word for McCleskey, for Evans in exchange for his testimony. That became the basis for our Giglio claim, which we did pursue in Federal habeas corpus. But when pressed about whether there was any special reason he was put in the cell next to McCleskey, asked about whether he had been an informant on subsequent occasions or otherwise worked with the police officers as an informant, his answer didn't reveal anything about this relationship.

QUESTION: Is it the, your theory now that Evans cooked up this story about being a relative of one of the parties with the police or that he invented all this on his own?

MR. BOGER: We don't have evidence about which part of this is his own invention and which part comes from the police. But it is plain that he is a man on a mission, that he comes in not simply to hear what he could hear, but with a story. I was the uncle of a codefendant. I would have been in on this robbery. Please tell me where are the guns, because the guns hadn't been located by the police. Tell me where, who did the shooting. And moreover, evidence

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we point to to link the police, he says I understand you, that you're telling the police in private conversations in the police station that Ben Wright did the shooting. That evidence, to our knowledge, was not known to the public, and we think that it could come only from the police officers themselves.

QUESTION: Well, but that was evident at the time you, let's not use the word abandon, declined to proceed with the Massiah claim. The man on the mission theory was visible, it was obvious --

MR. BOGER: No, Your Honor. We didn't have Evans' 21-page statement until June of 1987. There are really two --

QUESTION: What is there in the statement that wasn't in his testimony?

MR. BOGER: The statement makes quite clear that he is talking about this evidence that, you're telling the police something that I have heard that puts the crime on Ben Wright. That evidence didn't come out at trial. It wouldn't suggest of a Massiah violation. And furthermore, the detail that, in which he elaborated in the 21-page statement, his course of questioning was quite different than what we learned at the time of the trial. At the time of the trial it really sounded like McCleskey himself had volunteered most of this information. What we see in the

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21-page statement is an active, aggressive questioner. As the district judge found, the district judge on page 84 of the Joint Appendix said that the 21-page statement is strong evidence of an ab initio relationship between Evans and the police. So there are really two prongs to our Massiah violation once it unfolded, and one was the statement, and one was Ulysses Worthy's testimony.

Now the court of appeals dismisses the fact finding about the 21-page statement. It says it really wasn't anything except perhaps a prod to further inquiry. But the district judge made a contrary fact finding, and it was not in our judgment reasonably, or clearly erroneous.

QUESTION: Well, why didn't your predecessor ask for or attempt to obtain the written statement?

MR. BOGER: There was a series of requests, Your Honor, made for that statement beginning prior to the trial. There was actually a motion filed by trial counsel --

QUESTION: And that led to the in camera hearing?

MR. BOGER: That led to the in camera hearing. That was renewed, the request for a statement, during colloquy on the examination of Warren McCleskey, as the prosecutor began to ask questions that appeared to set the foundation for an inconsistent statement.

QUESTION: All right, but at the time of the first habeas there was at least a, some degree of suspicion that

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there might have been a Massiah violation.

MR. BOGER: Indeed.

QUESTION: Why wasn't that the time to make every effort to get that written statement, which presumably would have been very germane evidence?

MR. BOGER: We agree, Your Honor, and in fact a deposition was held of the prosecutor, and part of the deposition was an agreement which was incorporated in the letter which was included in the Joint Appendix in which an Assistant Attorney General, Nicholas Dumich, says I am turning over the complete prosecutor's file in this case.

QUESTION: Yeah, but you, the file didn't include the written statement, did it?

MR. BOGER: But we had no knowledge that a written statement existed. Indeed everything --

QUESTION: But I -- then I, I am confused on the facts then, because I thought you had an indication from the in camera ruling at the time of trial that there was a written statement.

MR. BOGER: No, Your Honor. We had an indication that there were two things that were being withheld. One was grand jury minutes and the other one was not identified. Indeed --

QUESTION: Well, it was identified to this extent. It was said he has a statement, referring to Evans. He has

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a statement which was furnished to the court, but it doesn't help your client.

MR. BOGER: Well, that -- let me get the chronology --

QUESTION: What could that have referred to, unless it was this?

MR. BOGER: Let me get the chronology straight on that, Justice Scalia. There had been a statement during the trial by the judge in the colloquy, I don't know that we are talking about any written statement. On appeal the Georgia Supreme Court had said the evidence which you are seeking came out in its entirety through the testimony of Offie Evans. We then got an agreement to get the entire prosecutor's file.

During the State habeas proceedings the defense counsel said, I had an agreement with the prosecutor. He gave me all of the witness statements prior to the time each witness testified. That is the backdrop during which -- when Mr. Stroup asked the prosecutor about the testimony of Evans, the prosecutor makes the remark in passing that you refer to. Mr. Stroup testified he had really misapprehended --

QUESTION: This wasn't the prosecutor. This statement was made by the trial court, as I understand it.

MR. BOGER: I am sorry. I thought you were

talking about the prosecutor's statement.

QUESTION: No, I am talking about the statement by the trial court during cross-examination. Your predecessor objected to cross-examination by the assistant district attorney, indicating that he had asked for all statements, and the trial court said he has a statement which was furnished to the court, but it doesn't help your client.

MR. BOGER: The suggestion of the judge as he goes on is I am not saying it is necessarily a written statement.

QUESTION: No, but wasn't it clear -- I am sorry.

QUESTION: Well, I don't know what it could mean. He has a statement which was furnished to the court. What could that possibly refer to except a written statement?

MR. BOGER: It could be a written transcription of an oral statement. What is clear from the record, Your Honors, is that both the trial judge in the State habeas counsel, and, in reviewing the matter, the Federal district judge, found that it was not at all clear that a written statement existed. Indeed the trial attorney as late as the State habeas proceedings said, I think I got all of the written statements of the witnesses. I had an agreement about that with the -- Mr. Stroup actually testified in State habeas proceedings that he had concluded that the other matter being held in camera was some hair sample

reports. There were other issues that were being pursued and he was not getting response on that issue. There is simply nothing in the record that makes it clear that there was a written statement. If there was we would have turned to it immediately.

Indeed let me ask this question of the Court in this sense, rhetorically. The prosecutor turned over every other document in this case. Is there the slightest doubt why he held back this one piece of information? Is there the slightest doubt whether the State's attorney general, when we asked for all the documents, should have turned it over? I don't think so. And I think the reason it was held back is clear. It was a smoking gun. As the district court found, it did point very strongly toward an ab initio relationship.

QUESTION: Do we know that this statement was in the file and was withheld? Do we know that? I mean, we know it wasn't provided in the file, but do we know that the whole file that the prosecutor had was not provided?

MR. BOGER: We know that the prosecutor had this statement. We, during the Federal habeas proceedings we discovered that he had several things he called a file. He said I have got my file in this case, I have got my private file, and indeed there was a distinction made there that we had never been aware of. But he never suggested that he

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didn't know about this statement, the prosecutor. Indeed, he was present when this statement was taken in August of 1978.

If he was initially correct in simply handing it over in camera, he was certainly in error in failing to correct the record when the judge said, I don't know we are talking about any written statement, or when the supreme court of Georgia said the evidence that you have sought came out in its entirety in the testimony of Mr. Evans, because that didn't happen. And when we got and relied upon the statement of Rich, Nicholas Dumich that we had gotten the entire prosecutor's file in the case, the district judge ultimately held that was not inexcusable.

Let me proceed though to talk about how the court of appeals analyzed this issue. When it came to the questions that the district judge had found no abuse on, no deliberate abandonment, it began its reanalysis as if the State's active concealment and its misconduct were simply irrelevant, and as if the fact findings of the district judge had never been made. On both counts, of course, the court of appeals violated settled law.

When the State's own conduct in litigation is blameless, as in the Wong Doo case or the Salinger case, it is of course appropriate for the district court to focus its attention exclusively on whether the newly available

evidence was available earlier, and whether counsel's steps to find it were reasonable. But when, as in Price v. Johnston, there is a specter of State concealment, then that misconduct must be factored into the judicial inquiry on the question of abuse. And it can suffice, that State concealment, to excuse petitioner's failure to assert the claim. That is what in the procedural default context Amadeo stands for.

The court of appeals totally overlooked, in short, the effect of the State's concealment here as it made its analysis. But the State actions plainly impeded and impaired counsel's investigation. The court of appeals simply didn't deal with that issue.

The court made a second error as well. It purported to determine independently that counsel for petitioner could have discovered evidence of the Massiah violation, specifically Ulysses Worthy, despite any State concealment. Yet Judge Forrester, who heard all of the evidence, made a fact finding directly to the contrary. There is no showing, he says, of any reason that petitioner or his counsel should have known to interview Worthy directly. Faced with this finding, the court of appeals simply wasn't free to substitute its own view of the facts unless the finding was clearly erroneous.

But Judge Forrester had seen for himself that

Ulysses Worthy was tied to this case by a single thread. It turned out that it was in his office where the 21-page statement had been taken by the officers, a statement which I have noted we didn't realize existed, and which was never turned over despite numerous requests for it.

QUESTION: Is that kind of a question a question on which we only, we accept the fact finder's determination? I mean, it seems to me, that seems to me like a question of whether -- like a harmless error question. Would a jury even without this have reached the same conclusion, trying to speculate as to what the state of the mind of the jury would be? We certainly don't say whatever the district court says on that we are bound by. And this is the same thing --

MR. BOGER: I disagree, Your Honor, and Amadeo underlines the point. The question there was whether the incriminating jury memorandum was reasonably discoverable, whether it was likely to have been discovered by counsel who went on a search for it. That was held by this Court unanimously to be a fact finding. What it really asked to do, and Judge Forrester was particularly well suited to make this determination, is to look at the overall state of the record, of the evidence that is already available, look at who the witnesses might be that would lead to other evidence, and make a judgment about whether reasonable

counsel should have followed those leads.

Now what was particularly unique about Forrester's opportunity is that he not only saw individual witnesses and passed on their credibility; in a sense the entire conspiracy came into his courtroom. One by one the State police officers who were responsible for these actions appeared before him under oath, and he watched as we, as the State questioned these officers about the Massiah violation. And he watched as they built, brick by brick, a stone wall against inquiry.

QUESTION: Well, couldn't all of this have occurred on a second examination of your Massiah claim, and you would have just been permitted under the successive petitions rule to file a successive petition based on new evidence? In other words, the reason we are in this position is because the claim wasn't pursued at first. We are not sure whether or not all this would have come out or not, because you declined to pursue the claim in the first habeas. If you had done that, run up against the barn wall and then found this out, I would assume that you would have not been barred by the successive petition rule.

MR. BOGER: Your Honor, we would have had no hearing in Federal court if we had carried that claim forward. I have done capital cases for 15 years, primarily in Georgia, and if we had come in and said we want a hearing

on a Massiah claim, and Judge Forrester had asked well, what did you do in the State habeas court. You said well, we put on the purported informant. We put on the prosecutor, who says there is no informant relationship, to my knowledge.

QUESTION: Well, I am assuming that the statement has come to light between the time your first Federal habeas has been denied and your second, and your second run at it. You wouldn't have been barred under, if you had new evidence, as I understand the successive petition rule. Correct me if I am wrong.

MR. BOGER: Well, if we had gotten, if we had kept the claim in the case, had gotten no further evidence, had gotten all the way through an initial Federal appeal and the evidence had come to light, in a sense we would be in the same position we are in now.

QUESTION: But with one difference. We would then have known for sure that you could not have discovered this evidence if you had pursued your claim diligently. But you prevent us from making that determination by not pursuing the claim.

MR. BOGER: But the reason we made the decision not to pursue the claim is that we found after a serious inquiry, including putting under oath the responsible State official, the prosecutor, whom this Court has held is charged with knowledge of everything that his police

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officers do, and that prosecutor said there is nothing there. The real question for this Court on that point is whether it wants to fashion a new rule that says to defense counsel you must pursue every conceivable plane, past contrary evidence, at all stages of Federal habeas proceedings, on pain of loss of the claim. If we had gone and gotten 20 depositions of jailers in the Fulton County jail it would have been error --

QUESTION: Well, what do you think the standard is? That counsel must apply some reasonable competence standard in pursuing these claims and investigations?

MR. BOGER: I think the inquiry that you outlined in Amadeo is adequate. You do ask, was counsel's investigation adequate. Was it checked at all by State concealment, the failure of the State to come forward. And if the answer is yes, then you excuse the failure to carry the claim forward. But if either the State concealment wasn't the explanation for your failure to discover the evidence, or if the investigation wasn't adequate and reasonable, then at that point, of course, the court is free to brand the claim as barred.

QUESTION: And what do we make of the Eleventh Circuit's finding that in any event there is no reasonable likelihood that this new evidence would have altered the verdict?

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MR. BOGER: I do want to get to the question of harmless error, Your Honor. This, the court of appeals disregarded subsidiary fact findings on the question of harmless error that were made by the district court. But before I get to that Rule 52 problem, the State's case was threefold. The State had the testimony of a codefendant, one Ben Wright, who was the other most likely shooter, saying gratuitously, Warren told me that he did the shooting. That was highly suspect. The jury was skeptical of it, and the judge said it was obviously self-serving.

Then there was this conflicting evidence about who was carrying the weapon. The problem with that is that the State's witnesses couldn't all agree. Two of the furniture store employees said the man who came in the front of the store carried the silver pistol. But another one of the employees said the man who came in the back of the store carried what he called the chrome pistol. And someone who was outside said I saw someone come running out the front with the pearl-handled pistol. So we have got a total confusion of testimony on who had what gun.

Now Mary Jenkins purported to clear that out. She said Warren McCleskey was carrying the .38. But she was the girlfriend of Ben Wright. And on cross-examination when she was asked, she was forced to confront testimony that when she was arrested she told the police, my man Ben carried the

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.38, McCleskey totes a .45. So the State's witnesses were a cacophony of disagreement on who carried that weapon.

What is left then? You have got the self-serving statement of Ben Wright, you have got the other evidence. The key to this case was the confession that Offie Evans came forward and said Ben Wright had given in the jail. He said that McCleskey had not only admitted the shooting but he had bragged about it. He said he would have killed a dozen of them --

QUESTION: Ben Wright had given a confession to Evans in jail?

MR. BOGER: I'm sorry, Warren McCleskey.

QUESTION: McCleskey had given.

MR. BOGER: I misspoke, Your Honor. Warren McCleskey, according to Evans, had said I did the shooting, and I would have killed a dozen officers. This Court has written, I think appropriately, that confessions are rarely harmless error in any case, but in a case like this where the other evidence is so weak we think that the court of appeals is profoundly in error to suggest that it would have made no difference at guilt or at penalty.

Think with me for a moment about the penalty consequences. This Court wrote in Satterwhite that it is much more difficult to assess harmlessness in the context of sentencing because the jury's discretion is so broad.

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What do we have on the issue of harmlessness at penalty? We have got a picture on the one hand of confusion without Evans' testimony, without McCleskey's confession, or with McCleskey's confession we have a picture of a man who said I did it, I would have killed a dozen officers. I don't think it takes any great imagination to suggest that that would have contributed to a jury's judgment on the issue of penalty.

QUESTION: Did -- refresh my recollection. Didn't they have evidence of another confession? Another defendant?

MR. BOGER: No. McCleskey --

QUESTION: Another admission?

MR. BOGER: -- had confessed it when he was picked up by the police that he was present at the robbery scene, but said, I did not do the shooting. The only other confession they had was Ben Wright's.

If there are no questions, I would like to reserve my time for rebuttal. Thank you.

QUESTION: Very well, Mr. Boger. Ms. Westmoreland, we'll hear now from you.

ORAL ARGUMENT OF MARY BETH WESTMORELAND

ON BEHALF OF THE RESPONDENT

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

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This case comes before this Court again challenging petitioner's 1978 murder conviction and armed robbery convictions and the resulting death sentence. Before I proceed to the issues, let me emphasize to the Court that we do not believe this is a case of State concealment. It is not a case of State perjury and lies, as has been characterized by the petitioner both in brief and in oral argument before this Court this morning. It is --

QUESTION: Well, did the State have this Evans statement in some file?

MS. WESTMORELAND: Yes, Your Honor. That is exactly what the State did.

QUESTION: And the State told the defense counsel that they were turning over all the files and witness statements?

MS. WESTMORELAND: Your Honor, if I may clarify exactly what did take place in relation to that.

QUESTION: Thank you.

MS. WESTMORELAND: I think there are some pertinent facts the Court needs to know. If I may backspace to the trial for one moment, counsel did present two documents to the trial court for an in-camera inspection.

QUESTION: Counsel for whom? Counsel for the State?

MS. WESTMORELAND: For the State. The assistant district attorney. Trial counsel was aware of the fact that there were two documents. Trial counsel testified he knew one was some grand jury testimony and one was a statement of a witness who was not named to him at that time.

QUESTION: What was it? This statement that was presented to the trial judge?

MS. WESTMORELAND: Yes, Your Honor. It was this statement.

QUESTION: How do we know that?

MS. WESTMORELAND: That is the testimony of Mr. Parker subsequently, Your Honor, Mr. Parker being the assistant district attorney.

QUESTION: And then after that when he was asked for the full file he didn't include this statement?

MS. WESTMORELAND: Your Honor, I think it's misleading to say he was asked for the full file. That is not the request that was made of Mr. Parker. Mr. Parker's deposition --

QUESTION: Let me put it different. Didn't he say he turned over the whole file?

MS. WESTMORELAND: No, Your Honor, Mr. Parker did not say that. What Mr. Parker says, if you review, and I believe the pertinent part of his deposition, part of his deposition is in the Joint Appendix. His entire deposition

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is in the record. His deposition was taken for the State habeas corpus proceeding. At the beginning of the State habeas corpus hearing Mr. Stroup requested that the court do something in the way of either a continuance or delay the proceedings because he had subpoenaed Mr. Parker to come. He wanted Mr. Parker, he wanted the portion of Mr. Parker's file shown to defense counsel so he could use it to cross-examine defense counsel about the ineffective assistance of counsel claim. The continuance was denied, but counsel was allowed to take the deposition of Mr. Parker, which was done in February of that year.

Mr. Parker came to the deposition, and one of the very first inquiries made by counsel for the petitioner was do you have the file that I asked for, the investigative file that was turned over to defense counsel. Mr. Parker reiterates in his response I have the file that I turned over to defense counsel. That is what I have with me. This is the same file that I turned over to defense counsel. It is said several different times throughout this entire deposition. The agreement that was reached in that deposition was that a copy of the file would be substituted, and the agreement that was reached was we were talking about the file made available to defense counsel.

There is no statement by Mr. Parker at any time that he is turning over the matter, which obviously was not

in the file made available to defense counsel, that is the two documents, part of the in-camera inspection. Mr. Parker goes on, and this is part of the Joint Appendix --

QUESTION: May I interrupt with a question? I want to, I am trying to follow it. Are you trying to convince us that defense counsel was aware of the existence of this statement?

MS. WESTMORELAND: Your Honor, what I am trying to explain, convince the Court of the fact that defense counsel certainly was told there was a statement --

QUESTION: But -- the answer is yes, you are trying to --

MS. WESTMORELAND: That he should have been.

QUESTION: And both the district court and the court of appeals found to the contrary on that. Is that not right?

MS. WESTMORELAND: That is correct.

QUESTION: Okay. So you're asking us to disagree with the finding of fact made by the district court and approved by the court of appeals?

MS. WESTMORELAND: Either disagree with that finding of fact, Your Honor, or on the other hand conclude if counsel was not subjectively aware of it, it certainly was not concealed from him. And the fact that he was not aware of it was not through any State concealment of this

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particular document in question.

That is particularly the case when during examination of the assistant district attorney during his deposition, the assistant district attorney specifically states, when you are talking about Offie Evans, there is a statement of Offie Evans. It was not introduced at trial, it is part of the matter of which the trial judge made an in-camera inspection. It says it point blank. The assistant district attorney acknowledges, this is in February of 1981, there is a written statement.

QUESTION: Where does that appear, this statement that you are just referring to?

MS. WESTMORELAND: Your Honor, that testimony came out in Mr. Parker's deposition. It's in the Joint Appendix at page 25.

QUESTION: And at what point in the proceedings was this deposition?

MS. WESTMORELAND: Your Honor, this was taken in the State habeas corpus proceedings.

QUESTION: In the State habeas proceedings?

MS. WESTMORELAND: The first State habeas proceeding in February of 1981. The original hearing on the State habeas petition was January 30. The deposition was taken, I believe, February 16.

QUESTION: And did he acknowledge that it was

Evans' statement, or just a written statement?

MS. WESTMORELAND: Your Honor, if I -- he says Evans' statement specifically. I think that is virtually the only way you can read what a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part --

QUESTION: But that is, but the testimony at 25 refers to a statement from Ollie Evans that was introduced at trial.

MS. WESTMORELAND: Yes, Your Honor, but I think if you refer, if you look at the answer given by Mr. Parker on that very same page -- Mr. Stroup's questioning goes on further to talk about what took place at trial. Mr. Parker's response is the first answer on that page, refers to, he gave his statement, it was not introduced at trial, it was part of that matter that was made in-camera inspection by the judge prior to trial. That to me clearly identifies -- first of all John Turner, the trial counsel, has already testified he knew there was a written statement of somebody. Mr. Parker, who has just sat there and said that that written statement was of Offie Evans --

QUESTION: Why do you suppose counsel didn't say, may I see that statement?

MS. WESTMORELAND: Your Honor, I think that is a very good question that we do not know the answer --

QUESTION: Do you think they deliberately, they deliberately decided not to take a look at it?

MS. WESTMORELAND: Your Honor, the only explanation offered by counsel was that counsel did not understand that that was what Mr. Parker was telling him.

QUESTION: In view of his earlier question where he thought he was asking about a statement given at trial, he probably assumed the answer was responsive to his question.

MS. WESTMORELAND: Mr. Stroup, I believe, testified before the district court that he thought the answer was not responsive to his question, and therefore he repeated his question, which doesn't detract from the fact that Mr. Parker told him that it was a statement. Whether counsel understood it or not may be a different inquiry. The point being that this is not something that the State has hidden away, has never told anybody existed, and never owned up to having in its possession.

And in fact it was available, could have been obtained in 1981 the same way it was obtained in 1987 through the Open Records Act. There were statutory provisions, there was case law allowing access to this type of information once the conviction became final in the State of Georgia. It was not requested at that time. The request --

QUESTION: It's the State's position that counsel made a mistake?

MS. WESTMORELAND: Yes, Your Honor, that is absolutely correct.

QUESTION: And this man shall die because of his mistake.

MS. WESTMORELAND: Your Honor, --

QUESTION: Is that your position?

MS. WESTMORELAND: Your Honor, my position is that counsel made a mistake, that that constitutes an abuse of the writ, and that there is no miscarriage of justice in this case because there is no question of Mr. McCleskey's guilt in this matter. Yes, Your Honor, that is our position in this matter.

In reviewing the issues before the Court, again it is important to look at what happened in 1981 and what happened in 1987. And 1987 is the time that counsel brings the Massiah claim to the Federal court for the first time, after having raised it in State court, omitted it from the first Federal habeas petition. The only thing counsel knew differently in 1987 was that he had access to this written statement of Offie Evans that he says, that it has been found he was unaware of in 1981, keeping in mind nobody has found that that statement was unavailable to him in 1981, but simply that he was unaware of its existence.

That is the factual finding, which is I think a distinction between this case and Amadeo v. Zant, in which in Amadeo it was found not only was he unaware of it, but it was simply not discoverable under any means. That is not the finding in this Court. That is not the finding that we have. In fact, the State --

QUESTION: But isn't there testimony, I don't have it clearly in mind, that the prosecutor, in effect, assured defense counsel that defense counsel had the entire file?

MS. WESTMORELAND: No, Your Honor. What is referred to by the petitioner in that regard is a letter that is contained in the file that came after Mr. Parker's deposition. As we said, Mr. Parker's deposition was taken, he makes all these references. The discussion is had concerning the investigative file made available to defense counsel prior to trial. It was agreed a copy would be substituted to be attached to the deposition.

QUESTION: For the purpose of showing whether the defense counsel had not well represented his client.

MS. WESTMORELAND: Yes, Your Honor. There was information there that perhaps he could have used better, used differently, something along those lines. That was the purpose stated to the State habeas corpus judge for requesting the file in the first place. When the copy was sent there was a cover letter sent with the copy of the

file. That is what counsel refers to. The cover letter is sent to the court reporter with the file. The cover letter does say here is the complete file of Mr. Parker.

A clear reading of what the record is is this comes on the very heels of the deposition in which the whole discussion takes place involving the file shown to defense counsel. That is, whether it's an inaccurate use of terminology is simply not the question. The question is looking at the totality of what happened, it is clear that what the letter is referring to is this is the file we talked about in the deposition, which was the file made available to defense counsel. Here it is.

QUESTION: But it is true, isn't it, just kind of looking at the picture of all the whole proceedings went on, the only thing that never got in defense counsel's hands was this statement. How does that happen? I mean genuinely, I mean when a defense lawyer is trying to get access to all statements and pertinent records, how does it just so happen there is one very important document somehow gets lost?

MS. WESTMORELAND: Your Honor, this document, and there was also a portion of the grand jury testimony which was not turned over to counsel, and again it was part of the in-camera inspection. And no court has ever found a Brady violation by the failure to disclose this statement prior to trial.

QUESTION: No, but he doesn't have the burden of showing a Brady violation. He is just trying to explain why he didn't pursue this claim, and he says he didn't have a very important piece of evidence and the State is responsible for not making it available.

MS. WESTMORELAND: And, Your Honor, --

QUESTION: And you are saying you're not responsible.

MS. WESTMORELAND: That is exactly right, Your Honor. What our position is is that there was no right to that statement prior to trial, no constitutional right to the statement prior to trial. Once the trial was over and that there was a statement here saying that this, there is testimony that this statement does exist, then at that point in time the State does nothing to prevent counsel for the petitioner from obtaining that document. Absolutely nothing is done by the State to prevent counsel from obtaining it.

Had counsel asked at the time of the deposition of Mr. Parker what was it that we were talking about, what was the in-camera inspection material, I don't know what the response would have been, but I assume that something would have been said to the effect of it was Offie Evans' statement and grand jury testimony. That wasn't asked. There was no inquiry of Mr. Parker what was part of the in-camera inspection, what are those documents. That wasn't

what counsel was even looking for at that point in time.

When it came up to the time in 1987, counsel made a request under the Georgia Open Records Act from the Atlanta Police Department, I might point out, not from the district attorney's office, was provided with the statement, and then, based on the statement alone, filed for Federal habeas corpus, State and Federal habeas corpus actions, raising the Massiah violation at that point in time. The question then becomes, I think, what did counsel know differently in 1987 than what he knew in 1981. The only different thing that he had at the time that the petition was filed raising the Massiah claim is this written statement of Offie Evans.

We disagree with the characterization of the statement in that the statement of Offie Evans does not tell counsel that much that he did not already know. We already knew that Mr. Evans was in the cell next to Mr. McCleskey, that there were conversations between the two of them. If you read the cross-examination by the district attorney at the trial of the case, the district attorney injects a lot of the information.

The district attorney makes inquiry of the petitioner, didn't someone in the cell next to you tell you he was a relative of Ben Wright? The petitioner responds no, that never happened. Didn't you tell someone something

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about having your face made up? No, I never said that. A lot of this inquiry comes out in the cross-examination of the petitioner, who ironically enough denies ever having made these statements, denies even remembering Offie Evans being in the cell next to him, and knows nothing about --

QUESTION: Did McCleskey take the stand at his trial?

MS. WESTMORELAND: Yes, Your Honor, he did. He testified both at trial and at the State habeas corpus hearing in 1981. When Mr. McCleskey testified he denied ever having been present at the store at all, having any participation in the trial, in the crime whatsoever, denied any of these conversations with Mr. Evans. And then he later hedged somewhat and said well, there were some conversations but I never said anything incriminating, and certainly don't remember any of this that you are talking about with somebody talking about a relative of Ben Wright's or something along those lines.

The most that the statement provides, and at the beginning of the hearings in the district court in 1987 the concern of that court was some indication that there were two meetings with Mr. Evans. That Mr. Evans met with the officials once, went back, and then met with them again to give his statement, and perhaps obtained information between those two time periods. That is not new information either. Mr. Evans testified in the State habeas corpus hearing that

he met with two detectives, he met with Mr. Parker. He indicates that he has at least seen somebody with either the police department or the district attorney's office on two occasions, again giving rise to the question of what took place in between these two times, if anything took place in between these two times.

The statement itself simply is a more detailed explanation of what counsel already knew, with some very minimal additional facts that we submit does not give rise to this great new burst of light to justify raising a claim in 1987 which didn't raise in 1981. It simply is not --

QUESTION: What do you think the standard is that we apply in evaluating these abuse of the writs claims?

MS. WESTMORELAND: Your Honor, in relation to counsel's conduct particularly, there are several different areas from which this Court has drawn standards. I think one more particularly appropriate, Rule 2(c) of the rules governing 2254 cases, refers to raising claims and issues of which through reasonable diligence the petitioner, or in this case counsel, should have had knowledge.

QUESTION: Well, is it a reasonable competence standard, basically?

MS. WESTMORELAND: Yes, Your Honor. I think that is accurate.

QUESTION: And was there a determination in the

courts below whether that standard had been met, do you think?

MS. WESTMORELAND: Your Honor, the district court found that there was not inexcusable neglect on the part of counsel, was the terminology utilized by the district court. But the Eleventh Circuit court of appeals said we disagree. We do not find that counsel engaged in a thorough investigation. They did not use the terminology reasonably competent counsel. That was not --

QUESTION: Well, if we think that is the standard, what should we do here?

MS. WESTMORELAND: Your Honor, I think this Court can certainly examine the record itself based upon the findings made of the court below and determine as a legal matter whether the reasonably competent standard has been met. We -- it is not a pure factual finding, obviously. It would be a mixed question of fact and law, similar to ineffective assistance challenges under the Sixth Amendment, and certainly could be examined from the record before the Court. The Court certainly has the option of remanding for consideration under a different standard, if the Court feels that that is necessary.

QUESTION: Counsel, somewhere along the line -- do you have any comment to make about pending legislation in Congress?

MS. WESTMORELAND: Your Honor, I assume the Court is referring to former Justice Powell's committee and the legislation that is being submitted along those lines. Your Honor, I don't think that that necessarily will have an impact on the outcome of this particular case under the factual circumstances of this case. And I don't, I would hesitate to suggest that the Court either wait on legislation, because we do have a case that is ripe for adjudication under the facts that we have. And I also think that this case can be resolved based upon the existing case law that is presently pending, presently before the Court and available for its use.

QUESTION: Well, it is possible if you prevail here that, and that legislation is passed, it might be a meaningless prevailing. As I understand it, bills have passed both the House and the Senate, although they are different.

MS. WESTMORELAND: That is correct, Your Honor. That is my understanding. I am not that familiar with the individual bills, but I do, I believe the Court is correct. I don't recall that the bills would address the precise factual situation that we have here, certainly not --

QUESTION: Have they come out of conference committee?

MS. WESTMORELAND: I don't know, Your Honor. I

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am not certain of that at this point. Petitioner has taken great issue in the abuse of the writ question with the Eleventh Circuit's resolution of certain matters, asserting that the Eleventh Circuit has ignored factual findings by the district court --

QUESTION: I take it you are defending the Seventh, not only the Seventh -- the Eleventh Circuit's judgment, but its reasons?

MS. WESTMORELAND: Yes, Your Honor. I think its reasons are quite justifiable.

QUESTION: So, and you don't claim that, under 2244, that the successive petition should be, should be dismissed because the new factual ground was deliberately withheld?

MS. WESTMORELAND: Your Honor, I think that is one basis upon which this decision can be affirmed. However --

QUESTION: Well, if we accept the findings that the defendant didn't know about this, about this new factual ground he presents, I can't -- you can't say it is deliberately withheld.

MS. WESTMORELAND: Not under the traditional meaning of deliberate withholding as set forth in Sanders.

QUESTION: Well, but 2244 says deliberately withheld or other abuse of the writ. So you must be relying on "or other abuse of the writ."

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MS. WESTMORELAND: That is correct.

QUESTION: And tell me what the abuse of the writ was.

MS. WESTMORELAND: Your Honor, I think it's a twofold aspect in this particular case. The withholding, whether deliberate or otherwise, of the claim is a facet of the abuse of the writ in this case. That is that there was a claim, the legal issue was known, for whatever reasons it was not presented in the first Federal habeas corpus proceeding, is certainly the first facet of abuse --

QUESTION: The legal issue was, but the factual matter that he presents was something he didn't know about.

MS. WESTMORELAND: This particular factual matter. Certainly there was information there sufficient for counsel to raise it in the first State habeas corpus proceeding. He felt he had enough to raise it then.

QUESTION: All right, go ahead. So he didn't, he didn't present the Massiah claim in his first Federal habeas.

MS. WESTMORELAND: That is part of our claim. The second aspect then goes to would be why counsel did not present it. And our position is because the investigation conducted by counsel in 1981 was not adequate, was not reasonable under what term -- whatever terminology you wish to use to come up to a standard to excuse the abuse. In

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other words, counsel's conduct amounted to inexcusable neglect in failing to obtain the information necessary to present a Massiah claim. We are not standing here and going to tell the Court that he necessarily would have found Ulysses Worthy in 1981. I can't tell the Court that, but neither can the petitioner say he would not have found Ulysses Worthy in 1981. The inquiries necessary --

QUESTION: Well, he talked to some police officers. He just didn't get around to talking to Worthy.

MS. WESTMORELAND: Your Honor, I think that what is pertinent here is to examine what counsel did not do in 1981. Counsel says he talked to some members, some officials at the jail. I believe two or three was the wording used. Now whether counsel got around to Mr. Worthy is not really the pertinent question. The pertinent question is what was there that could have been done in 1981 --

QUESTION: So you think that there was ineffective counsel in this case?

MS. WESTMORELAND: Your Honor, I am not, I would not go so far as to say that counsel was ineffective under a Sixth Amendment standard, but certainly I think counsel lacked and failed in, to exercising reasonable diligence in finding the information present here. The key fact that no one did in 1981 that was done in 1987 --

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QUESTION: Well, the Eleventh Circuit seemed to say that because the Massiah claim had been made once and had been rejected, and that counsel, that, nevertheless there was no excuse for counsel, just because he thought it was a poor claim, there was no excuse for him not presenting it in the second time.

MS. WESTMORELAND: That was one of the bases for their decision. They did go on to find fault with the investigation conducted by counsel and note the numerous things counsel did not do in 1981 in the investigation in making this decision not to pursue the claim.

QUESTION: Well, I suppose the court of appeals didn't need to go on and say all that. I thought it said that just because they knew of the claim and it had been presented once, that he should have presented it in the first Federal habeas.

MS. WESTMORELAND: Your Honor, again, I think that is --

QUESTION: No matter what.

MS. WESTMORELAND: That is a part of their decision. They actually make it --

QUESTION: Part? Wasn't it an independent ground?

MS. WESTMORELAND: They make a three-pronged analysis, Your Honor. First of all they disagree and conclude that there was intentional abandonment. The court

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then concludes that counsel did not make a sufficient investigation so as to excuse otherwise abuse of conduct. And then in any event finds that the ends of justice would not require consideration of the claim by finding that the claim would be harmless error under the prevailing standards.

QUESTION: On the second prong, what do you understand the standard of the court of appeals to be with -- what is the duty of counsel in making the investigation? All they said was he didn't make a thorough investigation of the facts.

MS. WESTMORELAND: Your Honor, in reading the court of appeals opinion, while they use the word thorough investigation, it appears that they are examining the question of what was reasonable for counsel to do. They don't articulate it in that fashion, I will acknowledge to the Court. The words they use are thorough investigation. I don't think that is imposing some sort of strict liability standard, as has been suggested by the amicus curiae.

QUESTION: It almost reads as though the failure to discover the key facts is enough to kill the claim.

MS. WESTMORELAND: Your Honor, I think if you read particularly the footnote in that opinion where they are talking about the failure to do various things, it is not just the failure to discover key facts, but it is the

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failure to pursue other avenues that were available in 1981. I think most particularly, one of the things noted by the court of appeals and that we have noted, in 1981 the jail records were available to show why Offie Evans was in the Fulton County jail to begin with, why he might have, where he was put in the Fulton County jail. You could have seen whether he had been moved --

QUESTION: Did those records disclose the name of Worthy?

MS. WESTMORELAND: Your Honor, we don't know that, because those records --

QUESTION: Because that is the big thing they missed, I guess, was not interviewing him. Is there any reason to believe they could have found him on the basis of any of those records?

MS. WESTMORELAND: Not on the jail records themselves necessarily. His name might have been reflected on there. The problem we have in 1987 is that during the normal course of, normal retention schedules of the Fulton County departments, obviously they do not keep these records forever, those records don't exist anymore. They did exist in 1981. I believe the information, or part of them were destroyed in June of 1981 and some others were destroyed in 1986.

QUESTION: Well, how did they find him later?

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Worthy.

MS. WESTMORELAND: Worthy was found later through the testimony of one of the detectives at the Federal habeas corpus evidentiary hearing. Again, and this is another aspect which we submit counsel should have pursued. When Mr. Evans testified in the State habeas corpus hearing he mentioned two detectives by name, Detective Dorsey, Detective Harris. Detective Harris was not talked to by counsel at that time, was not called as a witness, was not offered to testify to anything.

When Detective Harris was called to testify in 1987, Detective Harris took the witness stand, discussed the fact that they went to the jail to talk to Mr. Evans, which seems a logical conclusion if you have an inmate in a jail with information. He was asked where it took place. He said it took place in Captain Worthy's office. That is where the name Ulysses Worthy comes from, is from Detective Harris when asked, telling them exactly where this conversation occurred, in whose office it took place. From that the petitioner went and subpoenaed Mr. Worthy to come in and testify as to his knowledge of the events that took place.

And our position based upon this is that if they had talked to Detective Harris he very well could have mentioned Ulysses Worthy's name. Whether counsel would have

gone on to interview Ulysses Worthy is not the State's burden, it's the petitioner's burden to prove that he would not have known to go ahead and take that further step.

QUESTION: And is it your position that none of these factors are linked to the 21-page statement?

MS. WESTMORELAND: Your Honor, no -- that is correct, Your Honor, that these factors are not linked to the 21-page statement. The 21-page statement was apparently what caused petitioner to re-raise the Massiah claim in the first place, but that doesn't get you to the point of finding Ulysses Worthy. No, Your Honor, it does not.

If I may briefly comment on the harmless error question as it was raised and discussed by the petitioner, we would submit first of all that a review of this record shows that what the Eleventh Circuit court of appeals did was referred back to its original en banc opinion in reviewing Mr. McCleskey's case on the first Federal habeas corpus action, in which they investigated and reviewed thoroughly the testimony of Offie Evans and its impact on the trial.

The Eleventh Circuit acknowledged the difference in the standards that it was concerned with. The first trial we are talking about United States v. Bagley, the second trial Chapman v. California harmless error. But the court went on in looking at its own prior findings,

concluded that under the circumstances of this case that the testimony of Offie Evans, even if improperly admitted, and we certainly do not concede that it was improperly admitted by any stretch of the imagination, would be harmless beyond a reasonable doubt, focusing on all of the factors at trial, including the fact that the evidence showed that the fatal shots were fired from a .38 caliber Rossi, that the evidence showed clearly two eyewitnesses, Mr. McCleskey's own statements to the police, and the testimony of Ben Wright, that Mr. McCleskey came in the front door of the store while the other perpetrators came in the back door of the store, the testimony of the witnesses at the crime that the shots were fired from the front of the store, the testimony of the two eyewitnesses in the front of the store who saw Mr. McCleskey with a silver gun in his hand, the testimony of the witness at the front of the store outside who saw a man running out with a gun with white handles, the testimony of witnesses from a prior armed robbery positively identifying Mr. McCleskey as the individual who committed that robbery and stole during the course of that robbery a .38 caliber nickel-plated Brazilian-made revolver, and a Rossi is a Brazilian-made revolver.

The testimony does, Mary Jenkins places the weapon in hands of Mr. Wright and Mr. McCleskey, stating that well, the last time she had seen Ben Wright with it had been over

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a week ago, but Warren McCleskey did have the silver revolver. And then Mr. Wright himself also places the weapon in Mr. McCleskey's hands.

QUESTION: If the prosecutor knew all of that, why did they violate the Massiah rule?

MS. WESTMORELAND: Your Honor, our submission of course is they did not violate the Massiah rule in this case. We have disputed the fact --

QUESTION: Well, I thought your position was that you couldn't raise it at this late point.

MS. WESTMORELAND: That is also our position.

QUESTION: Are you going to the merits of the Massiah rule?

MS. WESTMORELAND: No, Your Honor. All at this time I am talking about is the harmless error question. The prosecution also only used Mr. Evans' testimony in rebuttal, after Mr. McCleskey took the stand and repudiated his own prior statements. Mr. McCleskey had given two statements to police saying he was there, he participated in the armed robbery -- excuse me, one statement where he says he was in the front of the store at the shot, the time the shots were fired, one more detailed statement saying I was there, I went in the front of the store, I participated in the armed robbery, but I hid under a sofa or a bed at the time the shots were fired and I didn't do that.

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When he took the stand at trial, Mr. McCleskey said I was not there at all. I had absolutely nothing to do with it. I was over at my sister's. I was over at some friend's, establishing an alibi defense. It was after that testimony that the prosecution brought Offie Evans in to come in to impeach Mr. McCleskey's own testimony. In fact the trial court at that point make, gives an instruction to the jury that this testimony coming in after the defense has closed is being offered for impeachment purposes only. That is when Offie Evans is brought in to testify and to make his statement that no, Mr. McCleskey told me that he actually was there, he participated in the crime, and he was the trigger man to this case.

Under the facts as we are looking at the entire proceedings we would submit that it is clear that first of all, there was an abuse of the writ in this case based upon counsel's lack of reasonable diligence, based upon counsel's choosing to abandon the claim. And we would thank the Court for its consideration and urge the Court to affirm the Eleventh Circuit's opinion. Thank you.

QUESTION: Thank you, Ms. Westmoreland. Mr. Boger, do you have rebuttal?

REBUTTAL ARGUMENT OF JOHN CHARLES BOGER

ON BEHALF OF THE PETITIONER

MR. BOGER: Yes, Your Honor. I have answers to

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three questions posed by different justices. I will try to be brief. Justice Kennedy, you asked whether there was any link between the 21-page statement and Worthy. The answer is yes. Harris only gave the name of Worthy when asked, where did you take the 21-page statement. Until you had the statement you had no predicate to ask that question, and therefore there was no reason to link Worthy to the case.

Justice Scalia, you questioned about whether the witness statement was referred to as one of the matters that was heard, reviewed in-camera, and I gave some answer to that. As I thought about it when I sat down, 96 witnesses were endorsed on the indictment on this case, but only a dozen or so testified at trial.

The testimony of John Turner, the defense counsel, in State habeas proceedings is as follows. I entered into agreement with the prosecutor whereby he had agreed to give me copies of the statements prior to the witnesses' testimony, meaning the witnesses who testified, and I think he gave them to me, all that first day, that Monday. So I think that I knew what would have been the actual statements for everybody who testified. See, he is operating on the assumption that wherever, whether there might have been another witness statement of those 85 witnesses who didn't testify, he had gotten the statements of witnesses like Offie Evans.

QUESTION: Did Evans testify on the first --

MR. BOGER: Evans did testify, Your Honor.

QUESTION: On the first day?

MR. BOGER: Not the first day.

QUESTION: He said on the -- I thought what you just read said he had gotten the statements of the witnesses that testified on the first day.

MR. BOGER: No, what he means, I believe, Your Honor, the trial began on a Monday and there is some, it is on page 88 of the State habeas transcript. But the trial began -- not the Joint Appendix, Your Honor, but the State habeas transcript. He says the first day of trial I got all of the witness statements, so I felt I was well prepared. In fact he didn't get Evans' written statement.

Finally, let me ask, or answer Justice O'Connor. You raised a question about whether the reasonably effective counsel standard was at all --

QUESTION: Excuse me, I'm not sure how that fits in with -- what does that show? Does that show that the State was therefore in bad faith? He was just under a misimpression as to what he had received. That still doesn't mean that when the information is later turned over and the affiant says I provided the entire file, this is the entire file that I provided to him, it still wouldn't make that a lie, would it?

MR. BOGER: I don't think we need to make affirmative lies at every point. We do, of course, have the underlying lies and misstatements of Detective Dorsey. Dorsey had committed a Massiah violation, he apparently had misinformed the prosecutor.

QUESTION: We're talking about a cover-up afterwards, that is what --

MR. BOGER: That is right, but of course he misinforms the prosecutor, who then says under oath in the State habeas proceedings there was no informant relationship. He is speaking for the State as a whole, as Justice Stevens has written, under the Sixth Amendment. When the State speaks on a question like that it has to answer for its errant police officers as well as for its core prosecutors. Giglio held the same thing.

Our suggestion, our submission, Your Honor, is that there was enough State concealment here, enough misrepresentations and half-truths and partial answers, that on an equitable matter of abuse of the writ we should not have our client go to the electric chair because we couldn't ferret through this game of 20 questions that was being played by the State. They had the statement, they knew it, they knew it bore on the Massiah violation, and they didn't turn it over.

QUESTION: Mr. Boger, -- go ahead.

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MR. BOGER: I was simply going to respond to Justice O'Connor's question about standards. On page 84 of the Joint Appendix, when the district judge addresses the question of whether counsel's conduct was inexcusable, he recites a standard drawn from a then-current case, the Moore case, and says that the defendant is chargeable with counsel's actual awareness and with the knowledge that would have been possessed by reasonably competent counsel. So having addressed that matter, he finds no inexcusable neglect. I am sorry, Justice --

QUESTION: Do you have any comment about the pending legislation?

MR. BOGER: Your Honor, my understanding is that legislation may have died in committee and would have to be resuscitated beginning in January.

QUESTION: Do neither one of you really know?

MR. BOGER: No, we don't. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Boger. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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#89-7024 - WARREN McCLESKEY, Petitioner v. WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER

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