OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: COLEMAN WAYNE GRAY, Petitioner v. J.D. NETHERLAND, WARDEN

CASE NO: 95-6510

PLACE: Washington, D.C.

DATE: Monday, April 15, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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COLEMAN WAYNE GRAY, :

Petitioner :

v. : No. 95-6510

J. D. NETHERLAND, WARDEN :

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Washington, D.C.

Monday, April 15, 1996

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

APPEARANCES:

MARK E. OLIVE, ESQ., Richmond, Virginia; on behalf of the Petitioner.

JOHN H. McLEES, ESQ., Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 95-6510, Coleman Wayne Gray v. J. D. Netherland.

Mr. Olive.

Mr. Olive, the Respondents contend that the points you're raising here were never really raised in the supreme court of Virginia. Sometime during your argument, would you address that?

ORAL ARGUMENT OF MARK E. OLIVE

ON BEHALF OF THE PETITIONER

MR. OLIVE: Certainly, Your Honor.

Mr. Chief Justice and may it please the Court:

Truth is discovered through fair process. Truth is forever lost when an attorney in a case through capital sentencing proceedings, for example, utilizes tactics which violate moral standards of fair play.

In Coleman Gray's capital sentencing proceeding, the process was not fair, and the truth will be forever lost unless this Court reinstates the district court's judgment that the State may not mislead defense counsel regarding the determinative issues at trial.

The Commonwealth's position in this case before this Court is that you can mislead. It's not disputed

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that there was misleading, and the answer to the misleading is, so what? That doesn't matter. The State can do that. The Commonwealth did it, but you're no worse off as a result of it.

QUESTION: Well, I don't think the answer is that, so what? I think the answer is, is that it's not clear that you asked for a continuance, or that that was the appropriate remedy.

As I read the colloquy in the trial court, both on the morning and the afternoon of the first day of the sentencing hearing, the discussion was on the Watkins case and whether or not this type of evidence is proper at all, and it's certainly open to interpretation that the attorney made a strategic choice not to ask for a continuance. That way he could preserve the objection all the way through, and a continuance might have actually hurt him because the prosecution would have had even more time.

So that's my concern.

MR. OLIVE: Let me address that, Your Honor, first with the comment that I've searched the respondent's brief and can't find in there the proposition that this did not happen, that the prosecutor did not mislead on day 1 and then progress in the misleading on the subsequent days.

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But the part of the record which I'll be referring the Court to, of course, is December 2nd and December 6th, and there were three separate requests, Your Honor, at that -- at those points in time for the State to identify what would be introduced under the preferred practice under Peterson.

When they got to the day where the Commonwealth came in and said, we've changed our mind, there was a discussion about Watkins, and the discussion about Watkins, from the point of view of defense counsel, Your Honor, was the comparison between Watkins and what was going on in this case.

And the specific point was made that in Watkins, where murders were introduced at capital sentencing, defense counsel in those cases, in that case was also defense counsel in the case that was being introduced, and there was a charge, and defense counsel knew, had notice of what the facts were involved in that case, and so the Watkins argument really was twofold.

1. Yes, this evidence is admissible, but in Watkins, it was admissible against an attorney and a defendant that were prepared.

The argument in this case, and making the contrast with Watkins, was specifically that -- and I'll give the quote from the record, page 777, it was

another -- this is defense counsel in this case. There was another murder that the defense counsel were actively participating in representing the defendant.

But contrast this case, page 780. The defense in this case, Your Honor, was taken by surprise.

QUESTION: Well, am I correct that trial counsel objected to the admissibility of the Sorrels evidence regardless -- on the independent ground that it was improper --

MR. OLIVE: Both.

QUESTION: -- regardless of the matter -- of the amount of time he had to meet it?

MR. OLIVE: That was one ground.

QUESTION: All right. And if that's one ground, it seems to me that that was the objection that was made.

It's true that they talk about, that you didn't have time, but there was no request for a continuance.

MR. OLIVE: Well --

QUESTION: And that could be a strategic choice.

MR. OLIVE: The direct quote, and to me the letter -- at least the spirit, if not the letter of the request is on page 780 of the record, and this is after Tucker testified. We were prepared for that.

That is, the information that the Commonwealth told us they were going to introduce, the Tucker

statements, we were prepared for that, that's all right, but we're not prepared for this, and the court's response to, you're not prepared, could have been to grant a continuance if they were entitled to be prepared, or to exclude the evidence.

QUESTION: Was there a motion for a continuance?

MR. OLIVE: The words --

QUESTION: You can answer that question yes or no.

MR. OLIVE: No, there was -- the words, we move for a continuance, were not spoken, but under the circumstances of the case, it could hardly be interpreted to me in any other fashion. At least there is record support for, we're not prepared to go forward, as a motion for a continuance --

QUESTION: Mr. Olive, where did the district judge get this notion. The district judge said, despite the defense plea for additional time to prepare, the State trial court proceeded without a break.

That implies that there was a request comparable to one for a continuance.

MR. OLIVE: And those record citations are to the State court trial record that are in the opinion at that point.

QUESTION: But there was no explicit plea for

additional time, as distinguished from exclusion.

MR. OLIVE: It is quite true the words were not spoken, please continue this case, but I -- the -- it has the same effect, and let me say why --

QUESTION: But it's not just yet, it's that the words were spoken, please exclude this evidence.

MR. OLIVE: That's correct, but the court was placed -- the court was observing defense counsel in a predicament, and the court had been there from the beginning of the predicament to the --

QUESTION: Maybe the court should have sua sponte proposed this alternative. I mean, that's another possible argument you have.

MR. OLIVE: I think that -- that's true, and perhaps it is a due process violation when the court --

QUESTION: Was that or any other series of arguments addressing this point developed in the Virginia courts?

MR. OLIVE: On direct appeal, the issue of whether there should have been a continuance or not, or --

QUESTION: Yes, whether you were derelict, or trial counsel was derelict in failing exclusively to ask for a continuance.

MR. OLIVE: No.

QUESTION: Was that developed?

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MR. OLIVE: That was not developed, and the reason -- to me, a fair reading of this record is, you turn to a judge and you say, Your Honor, we need a continuance in this case because we are not prepared, and in this case, the ruling is the law of the Commonwealth of Virginia, which is, that does not state a basis for a continuance because you are not entitled to be prepared under Virginia Commonwealth law.

QUESTION: Well, that would be clear, perhaps, if you had moved for a continuance, but I don't know that the trial court is required by the Federal Constitution to come to the rescue of an attorney who makes these statements but doesn't move for a continuance.

MR. OLIVE: The Federal district court judge found as a matter of fact that what was being said, the spirit of what was being said was, we need more time to prepare, and under Anderson v. City of Bessemer City, even when the court is looking at a paper record, Federal district court is looking at a paper record --

QUESTION: But what is the paper record?

MR. OLIVE: It's --

QUESTION: I mean, there seems to be a request for exclusion. That's the only thing.

MR. OLIVE: Well, you know, when I stand before a trial judge and say, I'm not ready, and the trial judge

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basically says this evidence is admissible whether you're ready or not, then a continuance is superfluous. A continuance could not show anything to the judge that would be of any moment.

QUESTION: You didn't argue this on appeal, either, though.

MR. OLIVE: On appeal to the --

QUESTION: Was the objection on appeal that this evidence was not admissible, or was the objection that you should have been given more time? The only thing I see on the appeal record is that you said it was not admissible.

MR. OLIVE: Oh, on the appeal record at pages -- the direct appeal brief, at page 3 and maybe a little bit before that, again, defense counsel and appellate counsel brings forth the same comparison between the Watkins case and this case, and the comparison is on notice, an opportunity to be heard. It's not on admissibility, or don't admit it. It is in Watkins, counsel knew -- counsel knew this information. They didn't need notice, and that --

QUESTION: The question isn't whether there's notice or not. The question is what is the consequence of not having notice, and as I understand what you argued on appeal, it was that since there was not notice, among other reasons, it should have been excluded.

MR. OLIVE: The remedy that was sought -- I don't know that you have to go to a State or Commonwealth trial court judge and say, please stop this from happening to me, it violates my right to a fair trial, and then because you say, please exclude this evidence, as opposed to please give me more time, that somehow the defendant's due process rights have been waived.

QUESTION: Did you argue to the supreme court of Virginia that your motions or comments at this point in the trial were tantamount to a request for a continuance?

MR. OLIVE: It is -- the language is, we were taken by surprise. We weren't ready, and that's --

QUESTION: But you -- so you didn't argue -- you didn't argue in the supreme court of Virginia that the trial court should have granted you a continuance?

MR. OLIVE: That is not contained in the -- the language of it, directly, is not expressly contained there, Chief Justice.

QUESTION: But the --

QUESTION: On this same line, it appeared to me, reading the Fourth Circuit opinion, that the CA4 was just dealing with the claim and with the district court's holding that your client was entitled to notice of all of the sentencing evidence that was to be used. That seemed to be what the CA4 dealt with and what the district court

dealt with.

MR. OLIVE: The district court actually dealt not with notice but with prosecutor misconduct or deception with respect to what the issues would be.

What the district court expressly focused on and found was not that it was a failure of notice, but that it was the prosecutor violating his unequivocal pledge and ambushing the defense through tactics after violating -- planning to violate his direct promise, and this is the J.A. at 350, and the prosecutor planned to violate his direct promise.

So it was not so much in the district court an issue of notice as an issue of a prosecutor taking away someone's due process rights by saying we're going to do A and then actually introducing the issue of B.

Now, in the Fourth Circuit, it is quite right that the respondent was successful at calling the issue one of notice and actually going so far as to call it one of discovery of every piece of evidence, which has never been the complaint in this case.

The complaint has always been, we were told on day 1 that X was going to happen, and we were told on day 4 that Y was going to happen, and X was an intentional misstatement. It intended to deflect us in developing proof on one of the most inflammatory cases in the history

of the Tidewater area, and the reason that that tactic was utilized is because the case couldn't be proved in a fair proceeding.

The Commonwealth came to this proceeding and said to defense counsel, we're going to do A. If we let you know about B and C too soon, you'll find out that there's no proof that Coleman Gray committed the Sorrells crime. The only way we can prove it by the way we're going to go about proving it is deflection --

QUESTION: Well, but what the district court found was that the constitutional defect in the penalty phase hearing was that Gray was confronted and surprised. It violated Gray's right to fair notice and rendered the hearing unreliable.

Now, the district court went on to talk about the prosecutor's tactics, but in its description of what the constitutional violation was, it was a violation of the right to fair notice, and that seemed to be what the Fourth Circuit dealt with, certainly, in its opinion.

So it does appear that the present focus of your argument before this Court is somewhat different, namely, before us a focus on whether the defendant has a right to rely on the avowal of the prosecutor that all that would be introduced were the defendant's statements, and because of that, find a due process violation, and that does seem

to be something that was not the subject of the holdings below.

MR. OLIVE: In the district court at page 352 of the Joint Appendix, the district court does talk about notice, but the district court also refers to the moral standards of fair play after describing what can only be described of, if you accept it as correct, not especially moral, a plan to violate a direct promise to defense counsel.

QUESTION: Yes, but it described the constitutional violation as the violation of lack of fair notice.

MR. OLIVE: But when I go on in that sentence, the district court Judge Spencer is saying the Commonwealth's Attorney, Ferguson's tactics, and that's not a matter of notice, per se, violated the moral standards of fair play and violated the Due Process Clause, so to me that is -- what went awry here was, indeed, notice, but this is notice plus.

This isn't even very difficult. This is intentional misleading. It's not just a matter of whether or not someone was given 3 days, 2 days, 4 days, or 30 days, and whether due process requires --

QUESTION: Yes, but it has to be that, because let's assume that there was deliberate deception. It

doesn't follow from that that there must be some kind of punitive sanction put on the prosecution. We ask what follows from the deception.

MR. OLIVE: Well --

QUESTION: Is there a request for a continuance? Is there a request to exclude the evidence?

Here, the thrust of the argument made in the State court was that the evidence had to be excluded, and now you're shifting ground.

MR. OLIVE: I -- my position on the State court record, like the district court's position on it, and I don't think it's an unreasonable one, is when I stand up and say, I'm not ready, the judge knows that I'm asking for a couple of things. Either give me more time, or keep this evidence out.

That's the only two ways of interpreting I'm not ready, and the reason the judge did neither is because Commonwealth law doesn't require it. You're not entitled to notice, and you're not entitled to be -- have it kept out, so no matter what you show on a continuance it does not matter.

QUESTION: Well, with respect to your statement that the prosecutor made a certain avowal, I'm going to offer this and this only with respect to this aspect, ordinarily there's not much discovery in a criminal case

in Virginia, is there?

MR. OLIVE: You know whether you're going to have to try a murder case, but not what the specific items of evidence are.

QUESTION: So, I mean, was the prosecutor vouchsafing something to you that he was not required to do by law?

MR. OLIVE: The preferred --

QUESTION: I know that that case is the preferred approach, but --

MR. OLIVE: He -- the judge did not -- the prosecutor did not have to say anything under Commonwealth law. The preferred practice under Commonwealth law, under Peterson, and by the way, Peterson is only cited one other time in the last 13 years. There's not a lot of double homicides people try to give you no notice of and introduce them.

But Peterson says it is the preferred practice, and the prosecutor in response to, here's Peterson, what are you going to do, said to the defense counsel, although did not have to, but said to defense counsel, I've told you, counsel, statements. That's all I'm going to be introducing.

Whereupon, counsel's response would naturally be reflexively, phew, no more about this case. The trial

here is only snitch, and is this Tucker snitch credible, did my client say something to Tucker, instead of a murder trial.

QUESTION: Now, you now know through discovery that even at the time he made that statement he intended to introduce additional evidence, right?

MR. OLIVE: Yes, Your Honor.

QUESTION: But -- and so you can make the sandbagging claim. You did not know that, however, until after direct appeal had been completed, isn't that right, so you couldn't have made this claim on direct appeal.

MR. OLIVE: On direct appeal the claim that was made was that the prosecutor at the time withheld --

QUESTION: Withheld, which is different. I mean, that's just a lack of notice.

MR. OLIVE: Well --

QUESTION: Not that he maliciously, you know, ambushed you.

MR. OLIVE: Well, there was no adjective on it, but what was placed --

QUESTION: Well --

MR. OLIVE: -- in the direct appeal was something to me that sounds relatively volitional, which is withholding. It is relatively affirmative.

QUESTION: But you didn't know that at the

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time --

MR. OLIVE: Well --

QUESTION: -- that you conducted the discovery that enabled you to conclude that he didn't just change his mind but rather intentionally told you one thing when he planned at the time to do the other?

MR. OLIVE: I think that the proof of it came in the district court. I think that the claim, however, was fairly made by standing there on day 1 and having the -- I mean, if you're at trial court and the prosecutor says, I'm only going to do A, and you go, great --

QUESTION: He changed his mind. He might have changed his mind, in which case your argument would be, lack of notice, not --

MR. OLIVE: Well --

QUESTION: -- not malicious and sandbagging prosecutor.

MR. OLIVE: It could actually be a middle ground. It could be wanton. It could be reckless. It could be a circumstance where a prosecutor or a person whose obligation it is to seek justice was just exercising reckless disregard.

QUESTION: Can you give me any reference to the claim you are now making in the State courts, any reference to the fact that the prosecutor, knowing that he

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intended to introduce other evidence, misled you into thinking that he was only going to introduce one type of evidence?

MR. OLIVE: I think on the direct appeal record --

QUESTION: Knowing at the time.

MR. OLIVE: I think on the direct appeal record the best is that it was withheld, and in the trial court --

QUESTION: That's a notice claim.

QUESTION: Well, Mr. Olive, are you making -- you're -- are you making an argument that requires a finding of the prosecutor's bad faith? I know you are claiming that there was bad faith, but are you resting your claim to relief entirely on a bad faith rule?

MR. OLIVE: I -- no.

QUESTION: All right. Now, I thought your claim in the first instance, at the trial court, before you learned about the prosecutor's state of knowledge and intentions, was that the prosecutor had made a representation about what would be offered, you relied on the representation, and you were not prepared to meet anything else. Is that correct?

MR. OLIVE: I think it was more, but for purposes of your question, that was said.

QUESTION: Isn't it a -- I -- isn't it fairly -- I mean, I'm handing you this, I know, but I want to get your response to it. Isn't your claim a reliance claim, a detrimental reliance claim, rather than an affirmative right to notice claim?

MR. OLIVE: I think it's both, yes, Your Honor. I think that there is a detrimental reliance.

QUESTION: You were misled, you're saying.

MR. OLIVE: Completely.

QUESTION: And you -- as I understand your answer to a previous question, you concede that under Virginia law, if you had said, I want to know what the evidence is, and the prosecutor had said, I won't tell you, that you would have no claim under -- for a violation of Virginia law.

MR. OLIVE: Correct.

QUESTION: Would you have a claim -- would you have a constitutional claim under the Due Process Clause?

MR. OLIVE: I think that you would. I don't think --

QUESTION: But that's in fact not the claim that you're making, I take it.

MR. OLIVE: That's correct.

QUESTION: Okay.

QUESTION: Your problem, Mr. Olive, is that the

further you -- the further away you get from prosecutorial misconduct, from knowing lying, the more you back into Teague.

The closer you can bring your case to that, to that the prosecutor said one thing knowing he was going to do another, it's easier to make the argument that Teague doesn't bar this, but as you get away from that, certainly all the way over to a notice claim, and even to a detrimental reliance claim, it may be true, but it's new stuff, and you'd be barred in this habeas proceeding on the basis of Teague.

That's why I think in your brief and in all your arguments to this Court you are trying to push the argument towards affirmative misleading, knowing misleading by the prosecution, because that's your best way out of Teague.

MR. OLIVE: Well, actually it's what the district court held, and that's what we're trying to uphold. It was my impression --

QUESTION: It's what it held, and what it was reversed on, and the issue is whether it was rightly reversed.

MR. OLIVE: The -- Your Honor, I don't think that it is a Teague -- there is a particular Teague issue to the claim of, I am not ready, with notice or not, to

try a double homicide today. Yes, counsel, you will try this double homicide. It is as if-- and I don't think that there's any case law, and if respondent can bring it to our attention, even at this date, it would be interesting, that says, for example, to take something out of the news and not to pander too much, but says at sentencing, counsel in this case, by the way, we're going to introduce evidence that your client actually is the Unabomber, but it's only going to be a snitch.

And then, 3 days later, well, no, actually we're going to show some pictures of victims, and I think, Your Honor, that that's not --

QUESTION: He doesn't need the case. You need the case.

MR. OLIVE: Pardon?

QUESTION: He doesn't need the case. You need the case.

MR. OLIVE: Well, you know, that's --

QUESTION: You're the one that has to show that this is not -- you know, that this is standard law.

MR. OLIVE: Well, it's an interesting battle of who needs the case, and I'll drop back to a few cases I think support my position from the fifties and sixties, but the fact that there is not necessarily a case on point isn't testimony to the rule of law, it's testimony to what

prosecutors normally do.

This doesn't happen, and the reason it doesn't happen is because everybody knows you don't go in and tell counsel on the other side the day you're going to prove a murder case in the capital sentencing proceeding, we're going to prove a different murder today. It's just not done.

So the fact that there aren't a blizzard of cases on it, on either side --

QUESTION: It's certainly not done intentionally, and to say that you did it intentionally, I'd have some -- I'd have some difficulty saying that it might not be covered by Teague, but if it's not done intentionally, if he made one representation then changed his mind and put on something else, that's a quite different situation, and I have no doubt that we would be making new law if we find that that's a violation of due process.

MR. OLIVE: Let's address Ruffalo and Raley, when counsel comes in prepared to do one thing and, in fact, after that's done something else occurs without notice to them about what's going to occur in the case.

Ruffalo is a disbarment case, where after someone testifies another charge arises, and Raley is the Fifth Amendment case, where counsel -- where people are

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told -- at the un-American activities investigation in Ohio, people are told, you know, you don't have to say anything, and you can take your Fifth Amendment right.

They say, great, and they do, and then they're charged with a violation of State law. That's not even intentional misleading. That was just a mistake. In both cases it's just a mistake that misled counsel.

In this case, if it's just a mistake, then there we are with Raley and Ruffalo, but it wasn't just a mistake, according to the district court in this case. It was intentional, it was immoral, and it violated standards of fair play. It disarmed defense counsel, and it was prejudicial.

QUESTION: Well, the -- what did the district court do in order to conclude that it was intentional?

You say the district court actually found that it was intentional.

MR. OLIVE: The best phrase for that is at page 350 of the Joint Appendix, that the prosecutor "planned to violate his direct promise," and the district court then drops a footnote, note 4, which says that Detective Slezak, when he testified, indicated that 30 days before -- and he says somewhere beyond a week, some days, maybe up to 30 days before, he met with Ferguson and knew he would be at the sentencing phase.

And so if that's true, then for counsel to say to the court, and to defense on Monday, there will be no Slezak -- he didn't say that, but --

QUESTION: Well, but that doesn't sound quite like the district court made a finding of intentional misrepresentation. You say it is. We can all look at the record and find out, I suppose.

MR. OLIVE: The record aside, sir, at the Joint Appendix --

QUESTION: Did the district court hold a hearing, to hear witnesses?

MR. OLIVE: Yes, Your Honor.

I'll reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Olive.

Mr. McLees, we'll hear from you.

ORAL ARGUMENT OF JOHN H. McLEES

ON BEHALF OF THE RESPONDENT

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

Stated simply, the essence of Mr. Gray's position is that the common -- is that the Constitution required exclusion of this Sorrell murders evidence because of what was, at the very worst, a discovery violation.

Now, if it was reasonable for the trial court to

conclude that the Constitution did not require exclusion of that evidence, then the ruling that Gray is asking for today would be a new rule in Federal habeas corpus, and it cannot be announced in review of a State court judgment.

We submit that it was eminently reasonable for the trial court to conclude the Constitution didn't require exclusion of this evidence. It would be reasonable even today, much less in 19 --

QUESTION: Well, if the finding were -- and you may dispute this, but if the finding were that the prosecutor intentionally misled defense counsel as to what evidence he intended to use, and that that misleading was important in the preparation of the defense and was relied upon by the defense, that wouldn't be a new rule, would it?

MR. McLEES: Well, if it were a straightforward application of the Donnelly test -- Donnelly v. DeChristoforo, where prosecutorial misconduct, if it infects the entire proceeding with unfairness, amounts to a due process violation -- if it were simply a straightforward application of that standard, no, Your Honor, it would not be a new rule.

A couple of interesting things preliminarily: number 1, if it were -- number 1, in his reply brief at page 6 he says it's not just a prosecutorial misconduct

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case, and we can only take him at his word. We're not sure what it is, but he says it's not a straight prosecutorial misconduct case.

Number 2 --

QUESTION: Well, he says it's that plus a lack of notice.

MR. McLEES: Some kind of hybrid --

QUESTION: He tries to say, I have both here.

MR. McLEES: He tries to make it a hybrid claim, and for that reason we submit it's a new rule, but even if it were simply a matter of applying Donnelly, not only is it contrary to what his conception of his rule is, it wouldn't be cert worthy for this Court to simply decide if the facts of this case met the Donnelly standard.

But even if this Court addressed the Donnelly standard, that requires a showing that the misconduct, or what the prosecutor did, rendered the proceeding fundamentally unfair.

In fact, the touchstone of due process in cases of that sort is not the prosecutor's good faith or bad faith. That's why, in the evidentiary hearing in district court, we didn't ask the prosecutor why he said this, and how this happened, how he made -- how he misspoke himself or what, because that was not an issue.

QUESTION: Well -- I'm sorry.

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QUESTION: No, go on.

QUESTION: I just wanted to clarify the proceeding. The proceeding that we're talking about here is not the entire trial, it's the sentencing, right?

MR. McLEES: That's correct, Your Honor.

QUESTION: Your claim is that assuming there was an intent to mislead, that it was important, as Justice O'Connor put it, to the preparation by the defense to meet the issues raised at sentencing, that that would not infect the fairness of the entire proceeding, sentencing proceeding?

MR. McLEES: Well --

QUESTION: Is that your argument?

MR. McLEES: My --

QUESTION: Do I understand you correctly?

MR. McLEES: My argument, Your Honor, is that on this record, if you -- even if you assume that it was intentional misleading, you cannot find that it infected the entire sentencing proceeding with unfairness for several reasons.

Number 1, as the Court has pointed out in several questions, he could have asked for a continuance when he found what -- when he learned at the outset of the penalty proceedings that there was additional evidence coming in.

Number 2 --

QUESTION: Do you concede that he did say, we are not prepared?

MR. McLEES: He said, we are not prepared, therefore exclude this evidence, because we're not prepared and because it exceeds the parameters of the Watkins case. He never said, we're not prepared, give us more time, and there's a world of difference -- of course, when a lawyer speaks, when a trial advocate speaks, there's a world of difference between saying, we're not prepared, exclude this evidence, which can and very often is for the -- said, that position is taken for the very tactical reasons that Justice Kennedy pointed out.

QUESTION: Mr. --

QUESTION: Is --

QUESTION: Well, it seems to me that if you're talking about whether or not the proceeding is fundamentally unfair, do you agree that that issue has been preserved?

MR. McLEES: He did not present this as a prosecutorial misconduct case in the State courts, Your Honor. He presented it as a case of inadmissible evidence coming in.

QUESTION: Well, but --

QUESTION: In the State courts, did he preserve

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the argument that this was fundamentally unfair as to the -- or that the whole proceeding was defective as to the sentencing?

MR. McLEES: He said it was unfair because this evidence came in, but he said that this evidence should have been kept out for different reasons than what he's saying today.

QUESTION: You're saying that he did not then preserve the argument that it was fundamentally unfair because there was either no notice, or because there was misleading --

MR. McLEES: That's correct.

QUESTION: Well, did you argue --

QUESTION: More specifically that it was fundamentally unfair because he was not given more time.

MR. McLEES: That's correct.

QUESTION: May I --

QUESTION: Did you argue in the district court or in the Fourth Circuit that he had failed to preserve the issue of its unfairness because of misleading, and that therefore you were entitled to prevail on that ground? Was that your position in either the district court or the Fourth Circuit?

MR. McLEES: In the district court, Your Honor, he wasn't talking about misleading. The district --

QUESTION: Well, the judge -- at least there is a way of reading the judge's -- and I think perhaps a fair way of reading the district judge's findings as a finding of misleading, so let's get to the Fourth Circuit. Did you argue in the Fourth Circuit that that was, in fact, not a permissible ground for decision because he had not preserved that issue in the State courts?

MR. McLEES: We argued in the district court and in the Fourth Circuit that all he had preserved in the State courts was the claim that this evidence should not come in, because he had -- it was unadjudicated misconduct, he had no notice of it in advance, and Melvin Tucker's testimony was too slender a reed to rely on to tie it to Mr. Gray. Melvin Tucker's testimony was inherently unreliable.

We argued in the district court and in the Fourth Circuit, as we do here on brief, that all the evidence that he proffered in the district court is barred by Keeney v. Tamayo-Reyes, because he never proffered any evidence in the State court.

QUESTION: Okay. I'm just talking now about the issues that he raised, and are you telling me that in the Fourth Circuit you said he did not preserve the issue of affirmative misleading?

MR. McLEES: Not in the sense --

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QUESTION: And he waived any claim because he did not ask for a continuance. Did you argue those two points in the Fourth Circuit?

MR. McLEES: I don't know that I specifically responded to those points because I didn't understand him to make those points.

QUESTION: No, but were you saying in the Fourth Circuit, you cannot sustain the district court's decision based on a finding that there was intentional misleading because a) he did not make a finding of misleading conduct as opposed to a notice claim in the State courts, and b) he did not ask for a continuance, and therefore waived any claim that he had?

Did you argue either of those two points as a bar to relief when you got to your appeal in the Fourth Circuit?

MR. McLEES: I don't believe that we argued the -- against the idea of misleading prosecutorial misconduct because we did not understand that to be his claim. Nor did the Fourth Circuit. Nor did the district court.

QUESTION: Well, the --

QUESTION: You could -- I take it you could reasonably read the district judge's opinion as not being based on deliberate misconduct.

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MR. McLEES: Absolutely, Your Honor. That's what the Fourth -- that's how the Fourth Circuit read it.

QUESTION: Was there a claim -- sorry. Were you finished responding to the Chief?

MR. McLEES: Yes, thank you.

QUESTION: All right. There was a claim which people have called the inadequate notice claim.

MR. McLEES: Right.

QUESTION: Okay. Let's forget the content of that claim for the moment, but there's something called an inadequate notice claim.

Now, my reading of this suggests that the district court in this case said such claim was consistently raised in the State courts and is not procedurally defaulted, that also in your brief in that court you said, inadequate notice was raised on direct appeal and in State habeas corpus, that in one of the State habeas corpus proceedings they said, or you argued, I guess, that you -- or conceded that the inadequate notice subclaim was raised on direct appeal and in State habeas corpus, that the State habeas corpus court found that number 9, which is the inadequate notice claim, was decided adversely at trial --

MR. McLEES: Yes.

QUESTION: -- and on direct appeal.

MR. McLEES: That's correct.

QUESTION: Okay. So that's why they never -- so then the only question is -- and you never said anything to the contrary in any brief in the Fourth Circuit.

So now we can try to divide that inadequate notice claim into two parts, I guess. One, we could say the claim of, it was inadequate notice and therefore they should have kept the evidence out, versus the claim that, it was inadequate notice and therefore they should have given us more time. That's what you want to do, is that right?

MR. McLEES: Well --

QUESTION: Or, I mean, I've never met in any case in any supreme court, or in any court that I've ever seen that people divided things that finely.

MR. McLEES: I --

QUESTION: I mean, and that's why it's difficult for me to see how we should go off on these procedural bars, and whether it was adequately raised and so forth. That's my problem.

MR. McLEES: Well, because -- because, Your Honor, whether you characterize it as an inadequate notice claim or a prosecutorial misconduct claim, or some hybrid combination of the two, the bottom line is, what effect did it have on the penalty trial? Did it render the

penalty proceeding fundamentally unfair?

QUESTION: That's on the merits, and I thought we granted this case because we wanted to see whether the issue that they were trying to raise was Teague-barred.

Now, all these procedural things and notice things are, I suppose designed to say we cannot reach that issue, and that's why I raise them, and the reason I ask my question is, why can't we reach the issue? These were matters of some controversy, the procedural thing, they've all been decided against you below, et cetera. You've conceded it pretty much. Why don't we get to the main issue?

That's -- I'm looking for an answer.

MR. McLEES: Well, if the issue is the Teague bar to the notice claim, I think there are two aspects to the notice claim. They rely on -- they seem to rely primarily on two cases. One is Gardner v. Florida, which deals with how much the defense has a constitutional right to know about the evidence against him and when, and the other is Langford v. Idaho, that -- which he never cited even in his petition for certiorari, but is heavily relied on in his brief on the merits now, which deals with notice of issues before a proceeding, or during a proceeding.

Now, in Langford, I think it is different from this case and therefore this case doesn't come under the

Langford rule for three major reasons. Number 1, it's different in level of application, number 2, it's different in timing, and number 3, it's different in showing of prejudice.

In --

QUESTION: Mr. McLees, before we get to specific cases, there's one overall problem that's troubling me about saying, I told all the facts about what happened, and I pinned some kind of general due process label on it, but not necessarily the right one, and then I think about how civil proceedings are, where we know, if you don't ask for the right relief but you're entitled to it, Rule 54(c) says you get it, and yet we seem to be demanding this persnicketiness in proceeding on the criminal side, when it's a question literally of life or death. It just seems to me that there's something out of sync there.

MR. McLEES: Well, if it's a question of whether the defense attorney had to expressly ask for continuance, there's a reason why we draw a fine line between asking for a continuance and objecting and asking for exclusion --

QUESTION: That's not going to get you there, Mr. McLees. Isn't the distinction that we don't set aside State court, State supreme court judgments in civil cases?

MR. McLEES: More broadly, it is.

QUESTION: We don't have habeas corpus.

MR. McLEES: Exactly.

QUESTION: And we don't have the problem of sandbagging the State courts by resolving issues that have never been fairly presented to them. If we had it in civil cases, we might behave the same way. We probably would.

MR. McLEES: Exactly, Your Honor.

QUESTION: How, here, in fact, are we interfering with the State court when the State's own court on habeas said all these issues were presented? At least something called the adequate notice claim was presented, and indeed, the reason it wouldn't decide it on State habeas was because it believed that the adequate notice claim had been decided by the State supreme court on direct appeal, or do I have that wrong?

MR. McLEES: The petitioner in his State habeas corpus proceeding in fact on his petition for appeal to the supreme court of Virginia asked the supreme court of Virginia to revisit the claim, the decision that had been made on the direct appeal, and the issue raised on the direct appeal.

QUESTION: Mr. McLees --

QUESTION: Mr. McLees, why do you accede to the notion that there is such a thing as an adequate notion

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claim, or adequate notice claim? It seems to me there are two quite separate claims. One, I was deprived of due process because this evidence was not excluded, as it should have been, and that was the case presented to the Virginia courts.

Number 2, I was deprived of due process of law because I was not given enough time to respond to this new evidence that came in. That claim was never presented to the Virginia courts, was it?

MR. McLEES: No, exactly. I don't accede to that, Your Honor. I don't mean to waive our procedural bar or limit that we've made on brief by addressing other questions.

QUESTION: May I ask you a question about the whole notion of the continuance and so forth? Is the jury that hears the penalty determination the same as the trial jury?

MR. McLEES: Yes, Your Honor.

QUESTION: And if there were, is it customary in penalty hearings after a jury's been impaneled and heard the merits of the case and then sits down to hear the penalty, to grant, say, a 30-day continuance? Would that be normal in your practice?

MR. McLEES: No, Your Honor. It's unusual. In fact, the rule says that the penalty proceeding should be

conducted as soon as practicable after the guilt proceeding, but the trial court certainly would have the discretion to grant a recess for continuance if the defense asked for it and showed good cause for it.

QUESTION: Do you think there's anything -- the lawyer for the defendant did say he was unprepared to meet the evidence. That much is clear.

MR. McLEES: That's correct.

QUESTION: Do you think there's anything in the record that suggests that the judge would have granted a continuance if he'd been specifically asked for it?

MR. McLEES: I don't think that there's anything that suggests that he would not have granted the continuance, but I think the shoe has to be on the other foot.

QUESTION: I mean, he does have a duty to terminate the proceeding as promptly as he can with a sitting jury right there, and if he thinks the evidence is admissible, as he ruled, why would he grant the continuance?

MR. McLEES: If the defense said, we haven't had enough time to marshal rebuttal for this evidence, and we think --

QUESTION: And then he'd say, how much time do you need, and the judge -- and he probably would have

said, I need at least 30 days, wouldn't he?

MR. McLEES: Well --

QUESTION: Or he could have given him 3 days.

MR. McLEES: If you take Mr. Gray at his word, he would have said, Your Honor, no amount of preparation time would ever be adequate to meet this, because that's what they said in their State habeas corpus petition.

QUESTION: Yes.

MR. McLEES: So that's why he wanted exclusion and not a continuance, not a delay, but at the outset of the trial on guilt or innocence, on the Monday the trial began, Detective Slezak, who was the Chesapeake detective, the only connection he has with this case is that he was the investigating officer on the Sorrell murders. Detective Slezak's name was called out in open court as one of the subpoenaed witnesses of the Commonwealth, and that's at page 1484 of the court of appeals --

QUESTION: So you're saying he in effect did have notice.

QUESTION: Let me put another hypothetical question to you. If we assume -- I know you don't think this is correct, in either event. 1) that the prosecutor deliberately misled the defense counsel, and 2) that the judge clearly would not have granted the continuance, and it made it impossible to prepare for -- would the

proceeding then have been fundamentally unfair?

MR. McLEES: No, because still, to show fundamental unfairness of the proceeding, he, Mr. Gray, as a habeas corpus petitioner, would have to show how the result -- how the proceeding would have gone differently, how the result probably would have been different had the evidence either been excluded, or had he been granted the continuance.

First of all, defense counsel who defended Mr. Gray at trial had, after the jury penalty trial in the first week of December 1985, they had 2 months between that time and the sentencing hearing before the judge alone in February 1986, within which they could have investigated the Sorrell murders, uncovered whatever they wanted to say about Timothy Sorrell, and presented that to the trial judge in support of a motion for a new penalty proceeding or a new trial.

They could have done that within that 2 months. They could have done it any time within 21 days after sentence had been pronounced. They did not do that, and I should point out that we introduced --

QUESTION: Well, under Virginia law do you waive your right to object to the regularity of a sentencing proceeding if you don't bring up the same matters on a new trial motion?

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MR. McLEES: If -- if --

QUESTION: Are you required to present these matters on a new trial motion?

MR. McLEES: If your objection is that evidence was wrongly excluded from a proceeding, either a guilt or innocence trial --

QUESTION: Yes.

MR. McLEES: -- or a penalty proceeding, you waive the objection unless you make a proffer of what the evidence would have been.

QUESTION: But how about wrongly admitted?

MR. McLEES: Well, no. Wrongly admitted, it's not waived, but when we go from the -- when we go -- on their claim, when we go from the claim that you just flat shouldn't have admitted this evidence because there was something inherently wrong with it, to the claim that, well, you should have given us more time, because had he given us more time we would have come up with all of this information about Timothy Sorrell, then we're talking about the effect of it being that they weren't able to rebut it with this other evidence.

QUESTION: But when I read --

QUESTION: Did --

QUESTION: -- in the transcript -- my understanding might be factually wrong. I thought the

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trial begins on Monday, and on that day or before, the defense counsel learns there's only going to be snitch evidence about Sorrell.

On Thursday evening, for the first time, after the guilty verdict, trial counsel learns there's going to be pictures, other testimony, a whole lot of things about Sorrell.

On the next morning, Friday morning, not 3 days later, 12 hours later, the trial begins on the guilt phase, and the lawyer goes in and says, judge, I'm totally surprised about this other evidence.

Is that basically what happened?

MR. McLEES: Not exactly, Your Honor. May I just review --

QUESTION: Yes.

MR. McLEES: -- the entire history of it --

QUESTION: Well, I don't need the -- what I'm really interested in is, my impression is it's only a matter of half a day, or hours, between the time that the defense counsel first learns about this other evidence and the time he makes his objection, and then it begins.

MR. McLEES: The prosecutor informed defense counsel that he was going to introduce this Sorrell murders evidence, the photographs and autopsy report --

QUESTION: Yes.

MR. McLEES: -- on Thursday evening before the Friday morning when the penalty phase began.

QUESTION: That's right, and that's when it all came in, Friday.

MR. McLEES: I -- that's correct, Your Honor.

QUESTION: All right, so there's a matter of a few hours. Then on that Friday morning -- I've looked through this testimony, I mean, the motion, and I agree with you, what he calls it at the beginning is a motion. He doesn't say what it's a motion to do.

Then, out of four pages of transcript, approximately three or four paragraphs is devoted to his complaints about the surprise, and then he also says, exclusion, but it's somewhat ambiguous in that first -- would your normal experience in Virginia practice suggest that under those circumstances the judge would think the reason I'm not going to give him a continuance is that he's never asked for it?

MR. McLEES: Yes. Now, that could go either way. Some -- it depends on the judge, and with a given judge, it might depend on the day or the case.

The judge might say, as Judge Spencer did with me in the district court, if you feel surprised, if you want more time, I'll give you a continuance if you want it. The judge certainly wouldn't say, I'm going to delay

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this proceeding for 30 days because of what you said, without clearing with defense counsel that that's what he was asking.

QUESTION: There was no reason at that time to believe that he wanted a continuance, was there?

MR. McLEES: None. None whatsoever.

QUESTION: In fact, even at the time of the State habeas corpus proceeding, there was still no reason to believe he wanted a con -- he is still saying, at the time of the State habeas corpus, that a continuance wouldn't have done any good.

MR. McLEES: Exactly.

QUESTION: What about the four paragraphs in which he complains nonstop, I was surprised, I don't have time, we just learned about this within the last few hours, they're about to go -- I mean, what about all that? Might that not provide a reason for a listener to think he would like some time?

MR. McLEES: Not unless he says he would like some time, Your Honor. We're talking --

QUESTION: Mr. McLees, the district judge, who I understand was an experienced prosecutor himself, read it that way. He read what -- the transcript, and he said the sentence that I recited to you before. He understood this, the district court understood this to be a defense

plea for additional time to prepare, so it certainly could be read that way. It seems to me it's at the least ambiguous.

MR. McLEES: I respectfully disagree, Justice Ginsburg. I think that that is an unreasonable and erroneous interpretation of it.

The district court itself -- and Mr. Gray in his reply brief likes to compare my position at the beginning of the evidentiary hearing with his position at the beginning of the penalty hearing when I objected that the issue that was to be tried was broadened on the morning of the hearing, and the judge said, I'll give you a continuance if you want.

Now, the happenstance that Judge Spencer said that and the State judge does not is not of constitutional dimension. What I did at that point was, I didn't want a continuance because I had gone to a lot of trouble to prepare for that day, and I had my witnesses lined up, the same as the defense counsel in the penalty trial.

I said, if we get to the end of this hearing and there's some more evidence I feel like I'd like to put on, I'd like the opportunity to do that. He said, fine.

In the second day, we put on -- and this is all in the record. In the second day we put in some additional exhibits that we hadn't disclosed to them ahead

of time. He said, fine, and that cured it, but I didn't go to the Fourth Circuit and say, they shouldn't have held that hearing because I didn't know until the day of the hearing what the subject of it was going to be.

QUESTION: Mr. McLees, I want to follow up on this business of meticulousness in pleadings, because it seems that it turns entirely on the lawyer appointed to represent the defendant, because I'm looking at 2254 forms, the forms that people are given to -- when they want to petition for habeas corpus from a State court judgment, and the instructions are, state your facts, tell your story briefly without citing cases or law, and that's adequate. That's the instructions that the pleader was given.

So the pleading is sufficient without citing cases or law, but then the defendant wins or loses depending on what cases and law his appointed counsel cites?

MR. McLEES: I don't think that he wins or loses depending on what cases he cites, Your Honor. He wins or loses depending on what he says the violation of his rights was, and how he ties it to -- or how he explains the right that he says was violated.

If -- the petitioner in this case to comply with that could have simply said, my rights were violated

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because I wasn't given enough time to prepare a defense to this particular Sorrell murders evidence, and if I had been given enough time, I would have come up with this other evidence.

But the evidence -- the information about Timothy Sorrell was published in the newspapers, and we introduced the articles in December of 1984, 5 months before the McClelland murders were committed, and that was open to defense counsel as well as the prosecution.

They could have asked -- they could have presented that evidence. They could have investigated that and presented what they found from that. Just knowing that the prosecution was going to put on Mr. Tucker's testimony about the Sorrell murders evidence, they could have put this other evidence in about Mr. Sorrell if they could find any competent admissible evidence, which they certainly didn't present in the Federal evidentiary hearing.

QUESTION: Well, they could have done so, but what reason would they have done so if their understanding was that the only thing they had to do was to discredit a snitch?

MR. McLEES: Well, because, Your Honor, that's not the position they took at the time. At the time, if the Court looks at the record of the -- when they asked --

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on the Monday morning, when they asked the prosecutor what evidence he's going to present in the penalty phase, they say, we have good reason to believe you're going to put on evidence connecting Mr. Gray with the Sorrell murders, that he may have -- evidence that he may have told some other people he committed the murders. This evidence is absolute dynamite, and we need to be prepared for that.

So even the snitch testimony they regarded as absolute dynamite.

QUESTION: Well, but they only prepared for the dynamite that they understood they were going to be exposed to, and there was no reason that I know of on the record why they would have been -- why they would have prepared for any other dynamite.

MR. McLEES: But even after the penalty phase proceeding, they didn't investigate the other -- they didn't investigate the Timothy Sorrell angle and present that evidence to try to get a new trial, because they concluded that they had adequately --

QUESTION: No, but I think this goes back to something that was raised before. You have never claimed, I think, that they are barred from making the argument they make now because in the period after trial they did not go into -- they did not make an investigation and come forward with evidence that they would have presented.

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MR. McLEES: We have argued that.

QUESTION: Is that in your brief in opposition? Because I mean, if that's the case, and that amounts to a waiver under Virginia law, and that was preserved, then we certainly shouldn't have taken this case, but I -- I don't have the brief in opposition in front of me, but I didn't think you made that argument.

MR. McLEES: I believe we did, Your Honor. We made it in our Fourth Circuit brief.

QUESTION: But you think in the brief in opposition to this Court you said, they are barred because they did not make an investigation in the 2-week or 2-month period, whatever it is, after the trial, and come forward with a proffer of evidence?

MR. McLEES: I believe we did. We said they could have been done then, and therefore could have been presented on direct appeal.

QUESTION: Well, would you agree that if you didn't make it in your brief in opposition, that that would not be an appropriate subject for us to get into here?

MR. McLEES: Not as a procedural bar, but as it reflects to the fundamental fairness of the sentencing proceeding, it's still relevant whether it's a procedural bar or not, because it shows that --

QUESTION: Well, but you in effect, then, are saying that the trial judge should have made a fundamental fairness judgment based upon evidence which the defendant had no reason, based on the prosecutor's representation, to have been prepared to present to the trial judge, and therefore the -- in effect, the -- any ruling by the trial court will either stand or fall depending on what is developed after trial. Is that your argument?

MR. McLEES: Not exactly, Your Honor. What I'm saying is that as a habeas corpus petitioner, it is incumbent upon Mr. Gray to show what difference all these alleged violations make, and how the proceeding --

QUESTION: You mean, in State habeas?

MR. McLEES: In State habeas and in Federal habeas.

QUESTION: Okay.

MR. McLEES: Even if we --

QUESTION: But there again, if you did not raise that in your brief in opposition, it seems to me you're raising a matter which goes to a procedural bar, and if you didn't raise it in the brief in opposition, I'm not sure why we should get into it.

MR. McLEES: Because I think it's relevant, Your Honor, to a showing of prejudice, to showing -- if you just look at this case on the merits --

QUESTION: No, but you let us -- in effect, if you didn't get into this in the brief in opposition, you let us take the case on the assumption that there wasn't this kind of prejudice-bar problem.

MR. McLEES: I see my time has expired.

QUESTION: Well --

QUESTION: Very well, Mr. McLees.

Mr. Olive, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF MARK E. OLIVE

ON BEHALF OF THE PETITIONER

MR. OLIVE: The respondent has not contended that the request or lack of a request expressly for a continuance, or the failure to have developed any information about the Sorrells crime after sentencing, or before sentencing, after the jury verdict, constitutes an adequate and independent State court ground for this Court to observe, because there are no cases that so state.

There is no Virginia case that says, if you want this sort of evidence to be excluded, or you want more time in order to address this evidence, you have to move for a continuance instead of moving for exclusion.

QUESTION: Well, do you feel we should be deciding that issue?

MR. OLIVE: Pardon?

QUESTION: Do you feel that that is a decision

that we should make as to whether, in fact, it would constitute a bar, or wouldn't constitute a bar?

MR. OLIVE: I don't think it's in the cas.

QUESTION: Okay. Was it -- you may recall my question, my last question to counsel which adverted specifically to the obligation to investigate for post trial relief. Was that issue raised as a basis for a bar in the brief in opposition?

MR. OLIVE: I don't recall. I do recall that there has never been any contention by respondent that there is any requirement in the State of Virginia that a person do this, these things, in order to avoid a bar. There are no such cases.

And I would like to address Justice Kennedy's earlier question about tactics and strategy. Defense counsel testified below, and they testified that they were blown away by this, and that they wanted -- I can't quote that they said, we wanted a continuance, but certainly the spirit of their testimony, and I can't call it all, bring it all to mind at this point, was that they needed time, and this was not a trick or a strategy on their part, and they went into great detail about how devastating this was to them.

QUESTION: Why didn't they make that argument on habeas, then, on State habeas? Why did they say on State

habeas --

MR. OLIVE: Well --

QUESTION: -- no amount of time would have done us any good?

MR. OLIVE: Well --

QUESTION: That's what they said. Do you want me to read it to you?

MR. OLIVE: I think -- no.

QUESTION: That's what they said.

MR. OLIVE: I know what that says, and I think that that was hyperbole about how devastating the case was about Sorrells. If you read the newspapers, that case is a devastating case, and I think that that is hyperbole.

QUESTION: I don't think it was hyperbole. I think it was a devastating case, and I think the defense wanted to keep that evidence out.

MR. OLIVE: Absolutely.

QUESTION: I don't think it would have made any difference to the defense if it had 3 more days.

MR. OLIVE: I think that --

QUESTION: I think they wanted above all things to keep that evidence out, and it's very important, it seems to me, that we not let an argument that wasn't made, a request that was not made to the States, later be made to Federal courts when it turns out that the trial

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strategy employed by the defense has not produced the result desired.

MR. OLIVE: They wanted it excluded, but if they had the evidence that was unearthed in the Federal district court, it would have been a powerful tool against it. It was a devastating case only because their hands were tied with respect to --

QUESTION: Mr. Olive, can I ask you kind of a question about Virginia law? What is the threshold, if any, that limits the prosecutor's ability to put in in a penalty hearing evidence of some other murder that you have very little reason to believe the defendant committed?

MR. OLIVE: At the time of this trial, there was no threshold.

QUESTION: No threshold at all.

MR. OLIVE: No, and now there's no threshold, but there is a notice requirement. You don't have to have a certain quantum of proof.

QUESTION: But could they put in, and just say give notice -- I'm going to serve notice that I'm going to prove that the Unabomber committed a lot of crimes?

MR. OLIVE: Yes, Your Honor.

QUESTION: That would be enough?

MR. OLIVE: Yes, Your Honor.

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Finally, let me go back again to the issue of what the law is in the Commonwealth, and that stating that I am not prepared to address this is not a grounds for excluding it, and so a remedy would not be a continuance.

Counsel stated at page 723, we are not prepared for any of this, other than that he may have made some incriminating statements. That is what you told us on Monday. We come in, we're prepared, we don't want a continuance on that, but this new information, we are not prepared, and the judge presiding said, I think it's admissible, prepared or not prepared, and so --

QUESTION: He didn't say, prepared or not prepared, did he?

MR. OLIVE: No, but --

QUESTION: Well, that's very important.

MR. OLIVE: Well, if I'm speaking to -- I see my time is up.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

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COLEMAN WAYNE GRAY, Petitioner v. J.D. NETHERLAND, WARDEN
CASE NO: 95-6510

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

BY Ann Marie Federico

(REPORTER)