

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TOMMY DAVID STRICKLER, Petitioner v. FRED W.
GREENE, WARDEN

CASE NO: 98-5864 c.2

PLACE: Washington, D.C.

DATE: Wednesday, March 3, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOMMY DAVID STRICKLER, :
4 Miguel A. Petitioner :
5 v. : No. 98-5864
6 FRED W. GREENE, WARDEN :

7 - - - - -X
8 Washington, D.C.
9 Wednesday, March 3, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:16 a.m.

13 APPEARANCES:

14 MIGUEL A. ESTRADA, ESQ., Washington, D.C.; on behalf of
15 the Petitioner.
16 PAMELA A. RUMPZ, ESQ., Assistant Attorney General,
17 Richmond, Virginia; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-5864, Tommy David Strickler v. Fred W.
5 Greene.

6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL A. ESTRADA

8 ON BEHALF OF THE PETITIONER

9 MR. ESTRADA: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 My client was found guilty of abduction,
12 robbery, and capital murder on the basis of testimony by a
13 purported eye witness who claimed at trial that he had
14 seen him forcibly abduct the murder victim in the parking
15 lot of a busy shopping mall. That testimony went largely
16 unimpeached, because the Commonwealth of Virginia withheld
17 evidence that cast significant doubt on the reliability
18 and truthfulness of the purported eye witness.

19 My submission here is twofold. First, that
20 Virginia clearly violated the rule of Brady v. Maryland,
21 by withhold material exculpatory evidence; and, second,
22 that there is nothing in this Court's habeas case law that
23 authorizes the withholding of a remedy for that clear
24 violation.

25 QUESTION: Your second point would cover both

1 default and prejudice, then, I take it.

2 MR. ESTRADA: Yes, it would. It would cover the
3 issues that were framed as issues 2 and 3 in the Court's
4 order granting cert, Mr. Chief Justice.

5 QUESTION: I'm not sure what you mean by your
6 second point. You mean if there's a Brady violation,
7 that's the end of it, you don't have to show cause and
8 prejudice?

9 MR. ESTRADA: We -- yes, in this case, Justice
10 Scalia, and what I mean by that is this. The standard
11 that applies to the prejudice issue under *Wainwright v.*
12 *Sykes* is the same standard that the Court recognized in
13 *Schlup v. Delo* that would apply to the materiality issue
14 under *Brady*. There would still remain the issue of cause.

15 QUESTION: Of cause, well, let me ask you about
16 cause here. How was this Brady violation discovered, and
17 why could it not have been discovered prior to the filing
18 of the State habeas petition?

19 MR. ESTRADA: It was discovered, Justice Scalia,
20 by sheer happenstance. In connection with a contemplated
21 filing of Federal habeas, but before any papers were
22 actually filed for Federal habeas, the district court,
23 under this Court's ruling in *McFarland v. Coz*, named
24 counsel for petitioner so that he could help him with the
25 Federal habeas papers.

1 The record discloses that the district court
2 also issued an order that was not directed at any
3 particular claim but that did authorize new counsel to
4 secure pretty much anything in the world that would have
5 my client's name on it, including the files ultimately
6 found to contain the evidence at issue here.

7 QUESTION: Couldn't that have been obtained
8 before the filing of the State habeas?

9 MR. ESTRADA: Well --

10 QUESTION: The same thing?

11 MR. ESTRADA: No, Justice Scalia. Whether in
12 Federal court or in State court we would have had to make
13 a showing directed to the claim that we were seeking to
14 pursue. What the record indicates here is that the court
15 issued an order that was not based on any showing, or that
16 was not -- and that did not have in mind any actual claim.

17 QUESTION: Wasn't one of the claims in the State
18 habeas precisely a Brady violation? Wasn't that one of
19 them?

20 MR. ESTRADA: No, Justice Scalia, with all due
21 respect, that is not actually correct. It was a claim --

22 QUESTION: With respect, I'm asking a question.
23 I --

24 MR. ESTRADA: Well --

25 QUESTION: Wasn't it part of the inadequate

1 assistance of counsel claim that was made at one time in
2 State habeas? They said one of the reasons for inadequate
3 assistance of counsel was, he didn't make a Brady motion,
4 so isn't the Brady -- the allegation that there was no
5 Brady motion subsumed in the inadequate assistance of
6 counsel?

7 MR. ESTRADA: Justice Kennedy, no. In fact, the
8 factual bases for the ineffective assistance claim that
9 was pled in the State habeas is a basis that would not
10 give us a freestanding Brady claim. If you look at what
11 we claim in State habeas is in effect that counsel failed
12 to do so many things that he was in effect absent, he
13 might as well have been a bump in the log, and it was
14 based on a legal theory that was wholly directed to the
15 first prong of the Strickland test.

16 In other words, counsel for the State habeas
17 case sat down with the trial record and in 25 pages listed
18 96 instances of things that the lawyer did not, that
19 seemed from the record were not done, that tended to
20 indicate that for all intents and purposes he might as
21 well have been not there.

22 QUESTION: And one of those things you say was
23 that he did not pursue a Brady violation.

24 MR. ESTRADA: Yes, Justice Scalia.

25 QUESTION: So he was on notice at that point

1 that the Brady violation issue should have been pursued,
2 and yet he did not pursue it.

3 MR. ESTRADA: No. He was on notice that counsel
4 had failed to file a motion. That is, I think, the fair
5 reading of the ineffective assistance --

6 QUESTION: Okay, but if he had failed --

7 QUESTION: But that's ineffective assistance of
8 counsel, certainly it must be ineffective assistance of
9 counsel because the Brady violation at least theoretically
10 would have turned up something.

11 MR. ESTRADA: Mr. Chief Justice, that is the
12 legal theory under which one would usually plead an
13 ineffective assistance claim. It is possible, and it is
14 certainly open under this Court's cases, to say that
15 someone who at every turn failed to do everything you
16 would expect of a lawyer in a criminal trial might as well
17 not have been there, such that if he was, indeed, absent
18 from the trial, you don't need to show any actual harm
19 with respect to any individual ruling.

20 Now, one may not agree with the legal theory,
21 but all I need to show here is that the legal theory is
22 not one that would give notice of the actual existence of
23 a Brady claim.

24 QUESTION: But in any case, I think it's also
25 your argument that, even assuming that they would sensibly

1 have thought at least of a Brady claim, there would still
2 have been cause here, because, consistently throughout the
3 litigation, the Commonwealth of Virginia had taken the
4 position that in fact they had an open file and therefore
5 that, after all, would be cause not to pursue the claim
6 any further than you went.

7 MR. ESTRADA: Yes, Justice Souter, and in
8 addition there is an additional factor that bears on the
9 issue that was raised by Justice Scalia here. Not only
10 did they say at page 212 and page 213 of the J.A. --
11 that's at the outset of Volume 2 -- that from the outset
12 of litigation, i.e., from the trial, we have been in
13 compliance with Brady through the open file so that it was
14 a representation that they had always been in compliance.

15 QUESTION: Well, leaving Brady aside, and
16 correct me if I'm wrong, leaving Brady aside, my
17 understanding is that Virginia does not have in its open
18 file or in its prosecutor's file investigative reports
19 such as Claytor's, correct?

20 MR. ESTRADA: That is actually not accurate,
21 Justice Kennedy. If you look at page --

22 QUESTION: Well, but I had thought part of your
23 submission was that you couldn't get these reports under
24 Virginia rule because they're investigative reports that
25 are not disclosable.

1 MR. ESTRADA: Once --

2 QUESTION: Absent Brady.

3 MR. ESTRADA: Once the State had made a judgment
4 that they were not covered by Brady, we could not go into
5 a court because it would be deemed privileged. If you
6 look at page 368 of the J.A., when counsel for the State,
7 who was the trial lawyer for the State, was asked, how did
8 you comply with Brady, his response was, my open file
9 contained everything that was discoverable under Brady,
10 including any reports that were discoverable under Brady.
11 To -- in fact --

12 QUESTION: Well, but then you're making Brady
13 more or less self-executing. If you don't produce under
14 Brady, it's automatically cause.

15 MR. ESTRADA: Justice Kennedy, given that this
16 Court held in the Amadeo case that concealment is always
17 cause if it is established, and given that it is an
18 element of the Brady claim that there would be withholding
19 of the evidence, it would ordinarily be the case that if
20 you have a Brady claim in which you are able to make out
21 the elements of the claim, you would almost be there on
22 the issue of cause.

23 QUESTION: Concealment suggests something
24 affirmative though, does it not?

25 MR. ESTRADA: Concealment suggests, indeed,

1 something affirmative, and --

2 QUESTION: Not just a failure to disclose, but
3 an effort to actually hide.

4 MR. ESTRADA: Well, it is a failure to disclose
5 and at least coupled with a representation that everything
6 had been turned over.

7 QUESTION: And I take it that's --

8 QUESTION: And you do -- you do assert here that
9 there was a representation by counsel for the State, both
10 at the trial level and then again by the Attorney General
11 on post conviction.

12 MR. ESTRADA: Yes, we do, Justice O'Connor.

13 QUESTION: You do not at the trial. You do not
14 at the trial level assert that he said there were -- you
15 had the open files, and everything relevant was in the
16 open files.

17 MR. ESTRADA: No, but --

18 QUESTION: You -- that statement is only made in
19 the middle of the State habeas proceeding and therefore
20 cannot explain your failure to do anything at the
21 commencement of the State habeas proceedings. You were
22 deceived after you had already been in default of your
23 obligation.

24 MR. ESTRADA: Justice Scalia, that is not so for
25 two reasons. The representation that we got at the trial

1 was that there was something called an open file, and the
2 open -- and the issue then is, is that a representation
3 that that is how they are complying with Brady, because if
4 the words open file mean, this is in discharge of my Brady
5 duties, the representation was unquestionably made at the
6 trial level, and we --

7 QUESTION: But prosecutors always say they
8 comply with Brady. And you're in effect saying, once
9 there's a representation we've complied with Brady, you
10 have no independent obligation to pursue a Brady
11 violation, and I just don't think you have any law for
12 that play.

13 MR. ESTRADA: Well, Justice Kennedy, two points.
14 I do have the Amadeo case for the proposition that
15 concealment by the State is actually a showing of cause,
16 and the other point that I think is significant for
17 further purposes, for these purposes is that this is the
18 type of evidence that is uniquely in the possession of law
19 enforcement.

20 These are not matters that might conceivably be
21 in the public record, and that the lawyer for the
22 Government somehow also has. These are matters that are
23 the byproducts of the investigation itself, so if we're
24 talking about a class of evidence as to which the rule
25 that I'm urging and that I think is warranted by the

1 Amadeo case makes perfect sense, it is in this very
2 context.

3 To get back to the point that I was just about
4 to make to Justice Scalia, the State did represent at
5 trial that there was an open file, and it seems clear from
6 the record that we have now -- that the words open file
7 were an affirmative representation that this was in
8 compliance with Brady for at least two reasons.

9 Number 1, at page 368 of the joint appendix,
10 when the trial lawyer for the State was asked, in Federal
11 habeas, when his interests to say that it meant something
12 else would have been strongest, he said, I comply with
13 Brady through my open file. That's what I was giving the
14 other side. It was Brady that was the open file.

15 QUESTION: That says nothing more than what
16 Justice Kennedy says. There's always an implicit
17 representation, and sometimes an explicit representation
18 by the prosecution that it has turned over the files that
19 the law requires it to turn over. That's always an
20 implicit -- every Brady violation constitutes that, and
21 therefore you're in effect saying you don't have to show
22 cause as well as not having to show prejudice once there's
23 a Brady violation.

24 MR. ESTRADA: Justice Scalia, I think it is not
25 quite the same thing, because failure to disclose the

1 exculpatory evidence under the Brady case law without a
2 request and without a representation of any sort, implied
3 or expressed, is a completed Brady violation if the
4 materials are exculpatory and material, if they're
5 important enough.

6 In other words, there need not be a
7 representation by defense counsel or by the prosecutor for
8 a Brady claim to arise, so I am saying something that is
9 not quite what you adverted to, because I am saying that
10 here we could have a Brady violation that flows from the
11 withholding of the information alone, and we have more.
12 We have the prosecutor in effect quelling any doubts that
13 reasonable defense counsel might have had by saying --

14 QUESTION: May I ask you something about a
15 procedural course, even before you get into all of this?
16 I understand there's a notion of exhaustion. That's why
17 we require you go through the State habeas, first.

18 Nothing more was known at the Federal level than
19 was known at the State level. The motion for discovery,
20 for sweeping discovery that was made successfully in the
21 Federal court, was not made in the State court. So a
22 remedy that was availed of in the Federal court was not
23 even sought.

24 Now, if they had asked and the State said no,
25 you can't discover, and then you came to Federal court and

1 asked for the same thing, that would be one thing, but
2 what excuses the failure to make in the State court the
3 procedural move that you made in the Federal court?

4 MR. ESTRADA: Two -- two issues, Justice
5 Ginsburg. I think that first, for all intents and
6 purposes, we did. In the State habeas, when the State
7 moved to dismiss the ineffective assistance of counsel
8 point, they did so on the legal theory that was earlier
9 outlined by the Chief Justice. They said in effect, you
10 have no basis for thinking that any of these failures by
11 counsel caused you actual harm. And we replied by saying,
12 you're absolutely correct, we do not. That's why we want
13 an investigator, and we want to have funds so that we may
14 investigate further.

15 The State said, once you've conceded that you
16 have no current basis for thinking that any of these
17 rulings caused you harm, there is no need for further
18 investigation. There is no need for anything further to
19 be done. Your case should be dismissed.

20 It seems to me that once the State came back and
21 said that we had no actual basis for the assertion of any
22 harm from any of the many items that added up to
23 ineffective assistance of counsel, and we asked for the
24 court's help so that we could investigate it further and
25 were successfully opposed by the State, it would have

1 been -- it is really the functional equivalent of asking
2 for the information.

3 QUESTION: Whenever you ask for the court's
4 help, you implicitly ask for whatever you should have
5 asked for, is that the principle you want us to accept?

6 MR. ESTRADA: No. The principle is that --

7 QUESTION: You should have asked for these --
8 for the documents that related to your client that were
9 the documents of the investigation. And I don't see how a
10 general throwing yourself upon the assistance of the court
11 complies with that. The court has some basis to know more
12 precisely what it is you're seeking from the State.

13 MR. ESTRADA: Well --

14 QUESTION: Not just say, give us help for
15 whatever we need.

16 MR. ESTRADA: Well, that's -- but this is highly
17 germane to the questions that Justice Ginsburg asked,
18 because that was exactly the motion if -- if one was made
19 in Federal court.

20 If you look at the order that issued from
21 Federal court, and by the way, we have been working on the
22 assumption that it was a result of a motion, though I
23 can't find any such motion in the record. The order is,
24 you may take this order, new counsel, and go to anyone who
25 conceivably may have a document with your client's name on

1 it and see if you can get it.

2 QUESTION: And it had nothing to do with Brady
3 or not specifically to do with -- it was just a total,
4 sweeping, discover anything about this case --

5 MR. ESTRADA: Yes.

6 QUESTION: -- psychiatric evidence --

7 MR. ESTRADA: And as it happens the Fourth
8 Circuit since then has ruled that this sort of ex parte
9 discovery may not be conducted, so this is something that
10 could not arise in the Fourth Circuit in the present day.
11 That is why I said at the outset that it is important to
12 note that the documents came up as -- by sheer
13 happenstance. This is exactly like the Amadeo case.

14 QUESTION: Mr. Estrada, the State seems to
15 suggest that the petitioner's lawyers knew of the witness
16 Stoltzfus' materials at the time of the trial. How do you
17 respond to that? I understand that to be --

18 MR. ESTRADA: One of their claims.

19 QUESTION: -- one of their claims.

20 MR. ESTRADA: And they have several variants of
21 that.

22 QUESTION: What we're really talking about here
23 are a series of statements made over a period of time by
24 the witness Stoltzfus, right?

25 MR. ESTRADA: Mm-hmm, and we did not have those

1 statements. The trial lawyer --

2 QUESTION: You had some of them, three of them?

3 MR. ESTRADA: It is conceded for present
4 purposes in this Court, and because of the posture of the
5 case at summary judgment, that we will assume we had three
6 of them.

7 QUESTION: And we take the case on that
8 assumption.

9 MR. ESTRADA: And you take the case on that
10 assumption, at least for ruling --

11 QUESTION: And so how do you respond to their
12 assertion that you had them all?

13 MR. ESTRADA: I -- their claim is based on a
14 one-paragraph affidavit by one of the counsel for
15 Mr. Strickler, Mr. Roberts, who asserts in fact that he
16 does not recall ever seeing any of these documents, but
17 that he does recall some unspecified information that is
18 reflected in them that led him to think that her story had
19 gotten better over time.

20 The district court was faced with that affidavit
21 and concluded that weighed against the affidavit from the
22 very same trial prosecutor that he could not recall ever
23 seeing any of these five documents, it was insufficient to
24 give rise to an issue of fact on whether, on the five
25 documents that the case is here on, we in fact ever had

1 those documents.

2 The evidence that is reflected in those five
3 documents is qualitatively and quantitatively different
4 from what we may have had from other sources at the time
5 of the trial.

6 QUESTION: But that isn't the point, whether you
7 had the other five documents. Yeah, they said you didn't
8 have the other five documents, but the point is whether
9 you had reason to believe during the trial that in fact
10 this witness's testimony had been considerably elaborated
11 over the course of her interviews with the prosecution and
12 with the boyfriend of the deceased.

13 MR. ESTRADA: Justice Scalia, there are two
14 answers to that. You know, the first one is that a trial
15 lawyer may have reason to think that, as Roberts put it,
16 this is too good to be true. But for Brady purposes there
17 is a vast difference between saying this can't be right
18 and being able to take the documents and confront the
19 witness with them. And unless we had the --

20 QUESTION: True, but that isn't the issue,
21 whether he could have confronted the witness. The issue
22 is whether he should have at that point pursued a Brady
23 claim.

24 MR. ESTRADA: Justice Scalia, the answer to that
25 is no, because if all you thought was that she had had

1 interviews with the detective, or she had met with the
2 prosecutor, that did not give you any notice that she had
3 made inconsistent statement, much less, did she give you
4 notice.

5 QUESTION: In other words, you have three
6 documents that you're conceding for the sake of argument
7 here would have put you on notice, in effect, of just what
8 you would have suspected at the trial, and that is should
9 she talked with the --

10 MR. ESTRADA: That's correct, and I will point
11 out that we sent an investigator to talk with
12 Ms. Stoltzfus in advance of the trial, and his affidavit
13 is in the record, and she inquired on whose behalf he was
14 there for, was told that it was on behalf of Strickler,
15 and she said, have a good day, goodbye. So it is not as
16 though we did nothing in the trial court and at all times,
17 whatever doubts we had we had to weigh against the
18 representations by the State of Virginia --

19 QUESTION: Well, I --

20 MR. ESTRADA: -- that everything was all right.

21 QUESTION: Well, may I take you back to one
22 other representation, because we were on the State habeas,
23 and then we got off it, and there's just one thing I want
24 to make sure I'm clear on.

25 In the State habeas the ineffective assistance

1 claim, or one ineffective assistance claim referred to the
2 failure to file a Brady motion.

3 MR. ESTRADA: That is correct, Justice Souter.

4 QUESTION: You were asked -- I don't remember
5 whether it was by the court or put on as, it were, on the
6 spot by the State in saying, do you have any specific
7 reason to believe, or any evidence that you were in fact
8 prejudiced.

9 MR. ESTRADA: Uh-huh.

10 QUESTION: And your response to the court was,
11 no, that's why we want discovery.

12 MR. ESTRADA: That's why we want expert
13 assistance.

14 QUESTION: Okay, expert assistance. I take it
15 at that point that the State in effect was mute in the
16 sense that the State obviously did not say at that point,
17 well, you know, there may be some material that's
18 exculpatory that we haven't provided.

19 MR. ESTRADA: That is right, and in fact --

20 QUESTION: Do you --

21 MR. ESTRADA: -- they were worse than being
22 mute.

23 QUESTION: What did they say?

24 MR. ESTRADA: By that time, they had already
25 made the representation in the motion to dismiss that is

1 at page 212 and 213 of the joint appendix, which is --

2 QUESTION: The open file representation?

3 MR. ESTRADA: -- you know, from the outset of
4 the trial we complied with Brady through the open file.

5 QUESTION: Okay.

6 MR. ESTRADA: And after we pointed out that we
7 in effect did not have a basis for claiming harm from the
8 various items that we claimed, and that is at page 234 of
9 the J.A., paragraphs 2 and 3, the State did better than
10 standing mute. At page 242 they came back, and this is
11 paragraph number 9. They say, Strickler, and I'm quoting,
12 is implicitly conceding that he is not aware of factual
13 support for the claim he has already made. Respondent
14 agrees. So they didn't --

15 QUESTION: Respondent agrees with what, that
16 Strickler concedes something?

17 MR. ESTRADA: That we had no factual support for
18 the claims that we had made, for the claims of harm. This
19 was in the context of they're moving to dismiss our State
20 ineffective assistance of counsel claim on the theory that
21 it was not good enough to plead it on the first prong of
22 Strickland, and that we have to show some harm from each
23 of the individual rulings.

24 In response to that, we in effect conceded that
25 we were not on notice of any basis on which we could think

1 that we were harmed by any one of the rulings and asked
2 for an investigator. The reaction by the State --

3 QUESTION: Well, can we get down to the harm? I
4 mean, you said it was no question that this woman had been
5 several times interviewed by Claytor. That was clear when
6 she was on the stand. That was tipped off in the three
7 letters that we assume -- documents that you had.

8 So that was known, that she had several times
9 met with the State's investigator. It was also known in
10 one of those letters that she said my memory is sometimes
11 muddled, one of the letters that we assume --

12 MR. ESTRADA: Uh-huh.

13 QUESTION: And as I understand it, although
14 you've used the word concealment, there's no suggestion
15 here that it was anything but some kind of negligence
16 involved that these weren't turned over.

17 MR. ESTRADA: Let me take the last question
18 first, Justice Ginsburg, because under the Brady doctrine
19 the good faith and the bad faith of the prosecutor is
20 irrelevant, and under Kyles, they had an affirmative duty
21 to seek out law enforcement agents who may have had
22 involvement in the investigation to ensure that they had
23 discharged their constitutional duties, so it is not as
24 though the fact that if in good faith they did not have
25 the documents answers the question of whether there was a

1 Brady violation.

2 To take your --

3 QUESTION: I didn't think that, but I'd really
4 like you to concentrate on the prejudice for this reason.
5 Kyles was a case where the argument was that the Brady
6 materials really made a case for actual innocence.

7 Here, as I understand, it's not -- that's not
8 the claim. You are not claiming, or are you, that
9 Strickler would be a nonparticipant? I thought that the
10 only thing that you thought you could do with this is to
11 say, the chief man was Henderson and not Strickler.

12 MR. ESTRADA: Well, that is not, in fact, our
13 theory, Justice Ginsburg. Our -- he pleaded not guilty,
14 and he has always maintained that he is not guilty of
15 these crimes. Our theory is that the State went to the
16 jury on the basis of an eye witness whose testimony,
17 coming from somebody who has no apparent stake in the
18 controversy, must have weighed heavily with the jury, and
19 they played on that jury in their closing and in the
20 sentencing, and --

21 QUESTION: But they went on abduction as well as
22 armed robbery, did they not?

23 MR. ESTRADA: That is right, Mr. Chief Justice,
24 but this was a general verdict. And if the jury chose to
25 sentence him to capital murder because they found him

1 guilty of the abduction, we don't know, and it is no
2 answer to say, as the State does, that there was in
3 addition something else wrong with the abduction
4 predicate.

5 QUESTION: But clearly you're not contending
6 your client was not implicated in this killing.

7 MR. ESTRADA: We have --

8 QUESTION: You would be on very shaky ground, I
9 would think, in view of the evidence, if you did.

10 MR. ESTRADA: Well, I do not think that that is
11 correct, Mr. Chief Justice, because I think you are
12 implicitly giving way to the testimony of Donna Tudor, who
13 a jury would be entitled to find is entitled to no
14 credence.

15 QUESTION: Well, if Stoltzfus had not testified,
16 are you saying there wouldn't have been enough evidence to
17 go to the jury?

18 MR. ESTRADA: That is not a -- that is not the
19 same question you asked earlier, because in asking the
20 question you just asked, I must assume that the evidence
21 is truthful.

22 If it's all right with the Court, I would like
23 to --

24 QUESTION: I have one question, just on this
25 line. The one question I have is, I'd like you to state

1 precisely what the prejudice in your opinion is, assuming
2 that you're right on every other matter.

3 MR. ESTRADA: The prejudice, as --

4 QUESTION: You have to show cause and prejudice.

5 MR. ESTRADA: We were --

6 QUESTION: It's the same question you began to
7 answer to the Chief.

8 MR. ESTRADA: We were --

9 QUESTION: And I'd like to know precisely what,
10 in your opinion, does the prejudice -- because the circuit
11 said there is no prejudice. There was loads of other
12 evidence, and I agree that Donna Tudor is a little shaky.
13 That's one point in your favor, but what precisely is the
14 prejudice?

15 MR. ESTRADA: The prejudice is that a jury of 12
16 citizens can sleep very soundly at night thinking that
17 they sent somebody to death on the word of a perfectly
18 reliable witness.

19 QUESTION: No, look, she -- I want to be more
20 precise than that. I take it Mrs. Stoltzfus, assuming she
21 didn't know what she was talking about and hadn't even
22 appeared, what would have happened is you wouldn't have
23 established that your client kidnapped this woman.

24 MR. ESTRADA: We would have --

25 QUESTION: Fine. You wouldn't have established

1 what happened at the parking -- with the car at the
2 beginning, in the shopping mall. But this murder didn't
3 take place then, it took place much later, there were
4 other witnesses, et cetera, and so that's what I want you
5 to address.

6 MR. ESTRADA: That is not true, Justice Breyer,
7 because there were in effect two other witnesses, one of
8 them is Donna Tudor, and she has terribly incriminating
9 things to say, which, for the reasons I pointed out in the
10 brief, should be discounted.

11 The other one was Curt Massey, who all he could
12 say was that he saw my client on the road, it was night,
13 she had the number of people in the car wrong, and the
14 race of the people in the car wrong, if one were to
15 credit --

16 QUESTION: So what I should do to satisfy myself
17 is read through the record, and if I think there is
18 sufficient evidence, leaving Ms. Stoltzfus aside, and
19 discounting Ms. Tudor, if I think nonetheless there is
20 sufficient evidence so I have no doubt, or virtually no
21 doubt that your client was at the place where this woman
22 was killed, and participated in a kidnapping, I should
23 then reject your argument?

24 MR. ESTRADA: That is not true.

25 QUESTION: Okay. Good. Why not?

1 MR. ESTRADA: Because under Kyles the prejudice
2 test, which is the same as the Bagley materiality test, is
3 not a sufficiency of the evidence test. That is my first
4 point.

5 And my second point is that the whole harm of
6 what happened here is that the evidence that the State put
7 forth, which was one-and-a-half hairs that could have come
8 from any white person and two witnesses who could be
9 heavily impeached but were not --

10 QUESTION: You left out Virginia Smith.

11 QUESTION: What I'm trying to drive at is, is it
12 that you're saying the prejudice comes from your client
13 being there, or is it that you're saying it's from what he
14 did there?

15 MR. ESTRADA: The prejudice comes from --

16 QUESTION: Or both.

17 MR. ESTRADA: -- the fact that once the jury
18 heard that he was at point 1 in the State's time line, it
19 could not but find that he was everywhere else.

20 QUESTION: Thank you, Mr. Estrada.

21 Ms. Rumpz, we'll hear from you.

22 ORAL ARGUMENT OF PAMELA A. RUMPZ

23 ON BEHALF OF THE RESPONDENT

24 MS. RUMPZ: Mr. Chief Justice, and may it please
25 the Court:

1 To be clear, Strickler never raised a
2 freestanding Brady violation in the State court. To be
3 clear, he never sought discovery of any sort of Brady
4 materials in the State post conviction court.

5 QUESTION: Well now, if we accept the argument
6 that the State represented all along that everything that
7 complied with Brady was in the open file, then does it
8 matter that he didn't seek discovery?

9 MS. RUMPZ: If you accept that what the State
10 did was misrepresentation, and if you accept --

11 QUESTION: No, representation that everything
12 complying with Brady was in the open file.

13 MS. RUMPZ: All right. If you accept that
14 that's what the State's representations were, and if you
15 accept that this is indeed Brady material, then that's a
16 different question, but that's not what we have here.

17 We have a prosecutor who asserted at trial that
18 he had an open file and nothing else. We proceed to State
19 post conviction court. He is appointed State post
20 conviction lawyers 11 months before he files a State
21 habeas petition, and he files the State habeas petition
22 2-1/2 months before the State ever makes any sort of
23 representation in its motion to dismiss that Brady
24 material was turned over.

25 QUESTION: But it seems to me --

1 QUESTION: In your view, at that time was there
2 grounds for a Brady motion?

3 MS. RUMPZ: In my view at the time of the
4 representation in State habeas?

5 QUESTION: No, when he filed the State
6 collateral -- the habeas in the State collateral
7 proceeding.

8 MS. RUMPZ: Absolutely. At the time he filed
9 his petition in the State habeas --

10 QUESTION: What was the ground for the Brady
11 motion at that time?

12 MS. RUMPZ: First of all, as someone here
13 pointed out earlier this morning, an ineffective
14 assistance of counsel claim for failure to seek Brady
15 motion was made in the State habeas petition, thereby
16 alerting the State post conviction counsel, or giving rise
17 to an inference that this ought to be something that
18 should have been looked into. But more important --

19 QUESTION: Well, to -- to succeed on the Brady,
20 on a motion to have Brady discovery in the State
21 collateral proceeding, do you not have to show some reason
22 to believe that Brady material was withheld?

23 MS. RUMPZ: You have --

24 QUESTION: Or am I wrong about that?

25 MS. RUMPZ: No. No. The Virginia rule for

1 discovery in State post conviction is almost identical to
2 Rule 6a in the Federal court. You have to do it with
3 leave of the court, and you have to establish some sort of
4 good cause. So it's always been the Commonwealth's
5 position that whatever was asserted in the Federal
6 district court after the statement had been made certainly
7 could have been asserted at the inception of State post
8 conviction --

9 QUESTION: No, but as I under --

10 QUESTION: But I need to know what was the good
11 cause? That's all I need to -- what was the cause for
12 a -- to grant a Brady motion at the State collateral
13 proceeding?

14 MS. RUMPZ: As the Fourth Circuit noted in its
15 opinion, the fact that Ann Stoltzfus had testified during
16 cross-examination that she had spoken with Detective
17 Claytor a number of times certainly should have alerted a
18 reasonable, diligent State habeas lawyer that they needed
19 to investigate further into what she might have said.

20 QUESTION: Well, but don't you have to show that
21 there's cause for a Brady viol -- don't you have to show
22 that there's reason to know that she might have changed
23 her story?

24 MS. RUMPZ: Yes, and that that representation,
25 coupled with the fact that prior to trial, the Sunday

1 before trial began, Ms. Stoltzfus gave a detailed
2 interview to the Roanoke Times newspaper. And in that
3 interview she -- there are statements attributable to her
4 which do not -- which are different from what she
5 testified to at trial. So we do have differing statements
6 in the public record which Strickler knew about
7 attributable to Ann Stoltzfus.

8 In addition, shortly after the conclusion of
9 trial, Ms. Stoltzfus wrote a letter to another newspaper,
10 and she talked about her sometimes muddled memories and
11 how the police had helped her get a big, whole picture of
12 what she had witnessed there at the mall. So when you
13 are --

14 QUESTION: But may I just ask on that point, at
15 the -- in your motion to dismiss at the commencement of
16 the State collateral proceeding, you represented, or the
17 State did, given that counsel were voluntarily given full
18 disclosure of everything known to the Government, there
19 was no need for a formal motion. So your position many
20 months later was that everything you knew had been turned
21 over; is that right?

22 MS. RUMPZ: The position is -- well, that is the
23 statement that was made.

24 QUESTION: So that was the position of the State
25 of Virginia at that time.

1 MS. RUMPZ: I don't think that can be taken,
2 first of all, as an unequivocal statement for a number of
3 reasons. First of all --

4 QUESTION: Well, you said known to the
5 Government. Doesn't that mean any agency of the
6 Government for purposes of Brady?

7 I mean, Brady -- it's very clear at this point
8 that the Brady obligation does not depend on the
9 prosecutor's particular knowledge of an item of evidence.
10 If anyone representing the Government in that
11 investigation had the evidence, the Government has an
12 obligation to turn it over.

13 So that when you make a -- or when someone made
14 a statement that everything known to the Government had
15 been disclosed, and it's in connection with, among other
16 things, a Brady issue that arises because of the
17 ineffective assistance of counsel motion, isn't the only
18 natural reading of that response to be, yes, for Brady
19 purposes everything known to the Government has been
20 disclosed? Isn't that the fair reading?

21 MS. RUMPZ: It may be a natural reading, but
22 interestingly enough it was not the reading by either of
23 the parties in this case. It wasn't intended that way by
24 the warden and, as Strickler acknowledged --

25 QUESTION: Well, it may not have been intended

1 by the warden, but isn't that a proper basis upon which
2 defense counsel could have understood it and, if so, why
3 in the world is that not adequate cause for going no
4 further?

5 MS. RUMPZ: Well, all right, assuming that this
6 is -- that is exactly how counsel could have understood
7 it, as an unequivocal admission that there were no further
8 Brady motion, the reason why it can't operate as cause in
9 this case is very simple. The timing of the statement was
10 made 2-1/2 months after Strickler filed his State habeas
11 petition, which contained no claim of Brady error.

12 QUESTION: Well, it raised a claim of
13 ineffective assistance predicated upon the failure to make
14 a Brady motion. The only way that claim of ineffective
15 assistance could have succeeded would ultimately have been
16 with a showing of prejudice. Assuming you get over the
17 prong of reasonable competence, you then have to show
18 prejudice.

19 In order to show prejudice you at least would
20 have to have shown Brady prejudice, and therefore the --
21 it seems to me the filing of that motion raised the entire
22 Brady issue right then and there. And the response of the
23 State was, there's no reason to go into this court because
24 the State, the Government has turned over all the evidence
25 that it's gotten.

1 MS. RUMPZ: Well, I have to disagree. I don't
2 believe that a separate and distinct allegation of
3 ineffective assistance of counsel for failing or not doing
4 something raises --

5 QUESTION: All right, then let me ask you this.

6 MS. RUMPZ: -- a distinct claim.

7 QUESTION: Let me ask you this. Let's assume
8 that motion had been pursued. And let's assume that
9 the -- that counsel for the petitioner here had
10 demonstrated to everyone's satisfaction, including the
11 court's, and the court had said so, that in fact the
12 lawyer's failure to file a Brady motion during trial, or
13 at the trial stage, had in fact been an inadequacy. It
14 had been a failure of reasonable representation.

15 Would the State at that point then have said,
16 okay, we concede that there should be a new trial for
17 failure of assistance of counsel?

18 MS. RUMPZ: I guess I'm not following you.

19 QUESTION: My question is, would you have
20 conceded error. And I think the answer is, of course you
21 wouldn't have conceded error.

22 MS. RUMPZ: Well, I think that's true.

23 QUESTION: You would have said, look, they've
24 only gone half-way on the ineffective assistance point.
25 They've got to prove prejudice, and in order to prove

1 prejudice they would have to have shown that if the Brady
2 motion had been filed there would have been material
3 forthcoming. And if that material had been forthcoming,
4 there is a reasonable probability within the meaning of
5 that term in Brady that the result would have been
6 different. You would have required them to show
7 prejudice.

8 And the reason I make this argument is that
9 you're saying, oh well, that's -- filing an inassistance
10 motion is not like filing a Brady motion. And my point
11 is, of course it's like filing a Brady motion, because you
12 would not have conceded that they were able to succeed on
13 the ineffective assistance unless they had proved what in
14 effect would have been a Brady violation.

15 MS. RUMPZ: And if they had made the required
16 good cause threshold showing in State court they would
17 have or could have been entitled to have their claim
18 decided in the Federal courts.

19 QUESTION: Well, sure.

20 QUESTION: Ms. Rumpz --

21 MS. RUMPZ: But they didn't.

22 QUESTION: -- I notice that the opinion of the
23 supreme court of Virginia in the State habeas proceeding
24 came down in January 1995, which I think was somewhat
25 before our decision in the Kyles case. When were the --

1 do you know when the actual proceedings in the Augusta
2 County trial court were conducted in that case?

3 MS. RUMPZ: In the State post conviction
4 proceedings?

5 QUESTION: Yes.

6 MS. RUMPZ: Yes, I do. He filed his State
7 habeas corpus petition in the Augusta County Circuit Court
8 in September of 1992. We filed our motion to dismiss
9 2-1/2 months later in November of 1992.

10 QUESTION: Thank you.

11 QUESTION: What is -- may I just finish up,
12 because my reason for calling your attention to the
13 statement in the -- your motion to dismiss was not as
14 profound as what you've discussed with Justice Souter. It
15 was to ask you whether, given the fact that the State at
16 that time, which presumably would have read the newspapers
17 at the time of trial and all the rest, was still able to
18 say they thought everything had been turned over to the
19 defendant.

20 Why is it that you can say the defendant should
21 have read the newspapers and figured out otherwise a long
22 time earlier?

23 Do you understand my question?

24 MS. RUMPZ: I think I do.

25 QUESTION: You earlier said to me, well, they

1 were on notice that there was -- might well have been a
2 Brady claim because the newspaper stories indicated that
3 this wouldn't have -- may not have been reliable, a lot of
4 other stuff. But then 2 years later you're saying the
5 State is still taking the position that everything
6 relevant had already been turned over, so it seems to me
7 you can't have it both ways.

8 MS. RUMPZ: The State took the position that
9 everything they were entitled to -- I guess the question
10 assumes that --

11 QUESTION: Maybe the State was lying. You don't
12 have to take the position that the State wasn't lying, do
13 you?

14 (Laughter.)

15 MS. RUMPZ: Well, I'd like to take that
16 position.

17 QUESTION: I mean, I know you'd like to, but is
18 that essential to your case? Let's assume it was a
19 misrepresentation by the State. Would that make any
20 difference?

21 MS. RUMPZ: In this case, no, it definitely
22 would not.

23 But I guess your question, Justice Stevens,
24 assumes that the evidence is Brady material. And the
25 Commonwealth's position has always been that this evidence

1 is not Brady material.

2 Now, the statement by the Warden could have been
3 a reflection that there was nothing to be disclosed
4 because none of this is Brady material, and that --

5 QUESTION: But is said --

6 QUESTION: It said, Counsel, we're voluntarily
7 giving full disclosure of everything known to the
8 Government, which suggests that they knew about the police
9 files -- which suggests that they didn't know about the
10 police files. I think that's your view.

11 Let me ask you this, did the lawyers at this
12 time know about the police files?

13 MS. RUMPZ: Did the State habeas lawyers --

14 QUESTION: Yes.

15 MS. RUMPZ: -- representing the Commonwealth
16 know? Actually, I'm not clear whether they did or didn't.
17 I think no.

18 QUESTION: And don't you also think, no, that
19 the prosecutor didn't know at the time of trial?

20 MS. RUMPZ: The prosecutor didn't know of the
21 five documents at the time of trial. He had
22 interrogatories where he says that he's never seen those
23 five documents before.

24 QUESTION: And do you also agree that if he had
25 known of them, he would have had a duty to turn them over?

1 MS. RUMPZ: Absolutely not.

2 QUESTION: You don't agree with that?

3 MS. RUMPZ: No. Virginia law does not require
4 the disclosure of mere witness statements.

5 QUESTION: What about Brady?

6 MS. RUMPZ: Brady, of course, Virginia is
7 required to with -- to disclose --

8 QUESTION: This is dynamite impeachment
9 material. Let's just assume that.

10 MS. RUMPZ: I'll assume that. I won't agree
11 with that, but I will assume that.

12 QUESTION: Well, I think it is. But in all
13 events, one of the things that puzzles me in this case,
14 and I don't know which way it cuts, is it seems to me that
15 any attorney, trial, habeas, prosecutor, defense, ought to
16 know that there's witness notes taken by the officer, and
17 nobody seems to ask for them, and I'm baffled by that.

18 MS. RUMPZ: Well, in this case especially, I
19 mean, the lawyers -- of course, under Virginia law he
20 wasn't absolutely entitled to these statements.

21 QUESTION: That's my next point. As trial
22 counsel it's not completely clear, assuming they're not
23 Brady material, that he could get these notes anyway, is
24 it? He'd have to call Claytor to the stand, he, the
25 defense counsel, and ask Claytor, did you take any notes?

1 MS. RUMPZ: Well, sure. If --

2 QUESTION: That's about the only way you could
3 do it, I suppose.

4 MS. RUMPZ: He certainly could have asked the
5 judge to review them in camera. He certainly could have
6 probed Ann Stoltzfus' testimony more when she said, hey,
7 every time I spoke to the police it was Detective Claytor.
8 He could have talked to Detective Claytor about it --

9 QUESTION: Under Virginia law, once she says she
10 talked to Detective Claytor, can the defense counsel say
11 to the prosecution, I'd like Claytor's notes, please, and
12 be assured that he'll get them?

13 MS. RUMPZ: No.

14 QUESTION: Pardon me?

15 MS. RUMPZ: No.

16 QUESTION: That's what I thought.

17 QUESTION: Is --

18 QUESTION: Ms. Rumpz, are you going to get to
19 the prejudice half of the case?

20 MS. RUMPZ: I'll be happy to do that right now.

21 QUESTION: Thank you.

22 MS. RUMPZ: There is, for the same reasons that
23 the Fourth Circuit found that there was no prejudice is
24 also why there is no merit to the Brady claim. First of
25 all, it's -- the district court accepted as true, as true,

1 the affidavit of Thomas Roberts, which said that Strickler
2 was aware, or the defense team was aware at the time of
3 trial that Stoltzfus' testimony had evolved over time and
4 that he was aware of the information contained in the
5 Stoltzfus materials.

6 Now, contrary to what counsel said here this
7 morning, Mr. Roberts' affidavit didn't say, I don't recall
8 seeing these documents. He said, I don't know whether
9 I've seen them. I don't remember whether I've seen them,
10 but I know that I knew what was in them, and I know that
11 we were aware at the time of trial that her testimony had
12 apparently evolved.

13 QUESTION: That isn't the argument given by the
14 Fourth Circuit. The Fourth Circuit says, let's assume
15 that Stoltzfus never testified. There was no prejudice,
16 because even if she hadn't testified, Strickler never
17 contested that he abducted and robbed Whitlock. In fact,
18 counsel for Strickler argued to the jury during the guilt
19 phase they should convict Strickler of first degree murder
20 rather than capital murder because Henderson rather than
21 Strickler actually killed Whitlock.

22 Thus, Stoltzfus' testimony was not critical to
23 the Commonwealth's case, especially in view of the
24 overwhelming evidence in the record independent of
25 Stoltzfus' testimony. That's the Fourth Circuit's

1 argument.

2 MS. RUMPZ: And I stand corrected. The Fourth
3 Circuit did not mention the affidavit of Thomas Roberts.

4 QUESTION: No, no, but I want to know what you
5 think of that argument, because when I read this sentence,
6 in fact, counsel for Strickler argued to the jury during
7 the guilt phase that they should convict Strickler of
8 first degree murder rather than capital murder because
9 Henderson rather than Strickler actually killed Whitlock.

10 When I focused on that I wondered, I'm not sure
11 about Stoltzfus' testimony. Maybe it is critical, because
12 maybe it was Stoltzfus who said that because Strickler was
13 the gang leader, that put the idea in the jury's mind that
14 indeed Strickler was the one who threw the rock, or helped
15 throw the rock, or directed the throwing of the rock, and
16 without that testimony the jury would have thought no such
17 thing.

18 Now, why isn't that prejudice?

19 MS. RUMPZ: First of all, under Virginia law it
20 doesn't matter who dropped the rock.

21 QUESTION: No, I'm not talking about that. It
22 certainly matters whether the jury thought Strickler was
23 somewhere on the edge of the area in a car looking the
24 other way, or whether Strickler participated in the
25 throwing of the rock and killing the victim. That's --

1 QUESTION: At least for purposes of the sentence
2 it matters.

3 QUESTION: Yes, that's what I'm talking about,
4 just for purposes of the sentence. So I would think it
5 would matter a lot whether the jury did or did not think
6 that Strickler was involved and participated in the actual
7 killing.

8 MS. RUMPZ: Stoltzfus' --

9 QUESTION: Doesn't it? Does that not matter
10 whether he participated or not? You're free to please
11 disagree with me if you do. I mean --

12 MS. RUMPZ: In Virginia --

13 QUESTION: -- don't -- yes.

14 MS. RUMPZ: In Virginia there's what's called
15 the joint triggerman rule. If both participants
16 participate equally in inflicting the fatal blows, they
17 are both guilty of capital murder.

18 QUESTION: No, no, but suppose Strickler was in
19 the car looking the other way. Would that make a
20 difference under Virginia law?

21 MS. RUMPZ: It certainly would.

22 QUESTION: All right.

23 MS. RUMPZ: But Ann Stoltzfus' testimony
24 certainly doesn't establish that once they reached that
25 field --

1 QUESTION: No. What Stoltzfus' testimony
2 establishes is that Strickler was the leader of the group,
3 and that makes it more likely that Strickler would have
4 participated in the killing itself, rather than been
5 looking the other way. That's the chain of reasoning.

6 MS. RUMPZ: Well, it --

7 QUESTION: Now, I want you to address that chain
8 of reasoning.

9 MS. RUMPZ: It was the --

10 QUESTION: You can pick it apart, or say it's
11 irrelevant, whatever you like.

12 MS. RUMPZ: It was the Commonwealth's position
13 at trial, and perhaps you have to see the rock to
14 understand, but it was the Commonwealth's position at
15 trial that both parties would have had to participate in
16 this killing. The rock was a large, 69-pound-plus boulder
17 that was long and narrow and required a substantial
18 effort --

19 QUESTION: Required two people.

20 MS. RUMPZ: Yes, required two arms at least to
21 hold the rock, and then to actually --

22 QUESTION: Somebody else to hold the victim.

23 MS. RUMPZ: And actually somebody would have had
24 to hold her down to --

25 QUESTION: Why is that? I never did follow --

1 if she had just been raped and brutally attacked, isn't it
2 possible that she was immobile at that time?

3 MS. RUMPZ: I guess it's possible, but I
4 think -- I, of course, stand to be corrected, but I
5 believe that there's testimony in -- from the medical
6 examiner that indicates that probably the first blow with
7 the rock rendered her unconscious and she didn't feel the
8 other blows.

9 Now, whether the medical examiner was asked
10 whether she was unconscious at the time of that first
11 blow, I can't recollect. I'm sorry.

12 QUESTION: Well, I think your response that you
13 gave to Justice Breyer is rational and responsive, but
14 it's very thin evidence. And if you couple it with
15 Stoltzfus' testimony that what -- a Mountain Guy or
16 Mountain Man, who was Strickler, was really the agitator,
17 the prime actor the whole time she observed them at the
18 shopping center, and this was the prosecution's case, it
19 would seem to me fairly clear that he was the one that
20 killed her. And without that testimony you have
21 something -- a very, very different case.

22 MS. RUMPZ: I don't think so for a couple of
23 reasons. First of all, we know that Strickler was the one
24 driving the car when he entered the field where Whitlock
25 was eventually murdered. And second of all, we know that

1 Strickler's hairs appeared, or hairs microscopically
2 identical in all respects to Mr. Strickler's appeared on
3 Whitlock's discarded clothing, and those hairs --

4 QUESTION: Were they discounted as being just
5 microscopically also similar to Henderson's? Was there
6 any test of Henderson's hair so we could know? I mean --

7 MS. RUMPZ: No.

8 QUESTION: This -- this --

9 MS. RUMPZ: I don't believe that there was.

10 QUESTION: You said that there was overwhelming
11 evidence, apart from Stoltzfus' testimony, that Strickler
12 was the one, the prime mover in the abduction and the
13 robbery of Whitlock. So I notice there was one witness
14 that Mr. Estrada didn't mention, and that was Virginia
15 Smith. Tell us what is your strongest case for saying
16 there was overwhelming evidence without this witness.

17 MS. RUMPZ: My strongest case is that Strickler
18 was placed at the mall by two other independent witnesses
19 at the time that Leanne Whitlock was due to return her
20 boyfriend's car to that very same mall. Strickler was
21 seen heading towards the exit of that mall at the same
22 time that Whitlock was due to return that car to the mall.

23 Now, if you take out everything that Ann
24 Stoltzfus saw after that --

25 QUESTION: Who were those two people?

1 MS. RUMPZ: They were the mall security guard,
2 Virginia Smith, who had received a report that two white
3 males had been earlier trying to steal a Lincoln
4 Continental from the mall parking lot. She identified
5 those males as Strickler and Henderson, and then she
6 proceeded to watch them for the remainder of the
7 afternoon.

8 QUESTION: Yes, but I don't think the argument
9 is the implication of Strickler in the murder. I think
10 the question that arises, at least it's my question that
11 arises on the prejudice issue, is this.

12 Stoltzfus' testimony was not only, as has been
13 pointed out, that Strickler seemed to be the lead person
14 in this group, but the testimony also was that Strickler
15 was slightly crazy. And when we get to the point of
16 trying to assess the probability that Strickler and not
17 Henderson was the person who smashed the skull with the
18 rock, the fact that the person is agitated to the point of
19 being strange and weird and crazy is certainly evidence
20 which I think the jury would have considered in saying,
21 yes, the probability is that he was the one who used the
22 rock and for that reason our discretionary decision at the
23 sentencing phase is going to be to recommend death.

24 Without her testimony it seems to me the State's
25 case, as it were, for that train of reasoning would have

1 been weaker --

2 MS. RUMPZ: Well --

3 QUESTION: -- and for that reason it seems to me
4 that there may be materiality as to the discretionary
5 sentencing decision.

6 MS. RUMPZ: Well, Strickler has never claimed
7 that Stoltzfus' testimony was in any way material to the
8 sentencing.

9 QUESTION: Well, regardless of what he's
10 claimed, the question is whether the jury would have come
11 to the same discretionary decision if, as -- and let's say
12 on the reasoning of the Fourth Circuit, if her testimony
13 had been excluded, was subject to very substantial
14 impeachment on cross-examination. And it seems to me that
15 the answer is quite possibly not. And that, it seems to
16 me, is the strongest argument for materiality here, and I
17 want to know what your response is to that.

18 MS. RUMPZ: I guess my response is, as I said
19 earlier to another question, that under Virginia law both
20 participants were equally culpable and equally guilty of
21 capital murder.

22 QUESTION: Oh, and that goes to their guilt?
23 That goes to their eligibility, I presume under Virginia
24 law --

25 MS. RUMPZ: Uh-huh.

1 QUESTION: -- for the death penalty.

2 But my question is directed to the jury's
3 ultimately discretionary decision. The jury says, okay,
4 we understand that each one of them is subject to the
5 death penalty. We understand the joint triggerman rule.

6 Our question is -- will, either, I guess, if
7 they weren't joint trials, our question is, will Strickler
8 get the death penalty. And the suggestion is that this
9 woman's testimony in showing him as the leader and a bit
10 of a nut is testimony that would have probably had an
11 influence on the jury, without which the jury might well
12 have come to a different discretionary decision.

13 MS. RUMPZ: Well, I guess I do disagree with
14 that for a number of reasons. First of all, Ann Stoltzfus
15 still would have testified, and she still would have
16 testified that that's what she saw.

17 Now, assuming that this -- she would have been
18 impeached with this material, her testimony is still
19 there, and the jury still knows what she saw.

20 QUESTION: But the jury might have said, this
21 witness is unreliable.

22 MS. RUMPZ: Second of all --

23 QUESTION: Mightn't it?

24 MS. RUMPZ: -- Strickler was found eligible for
25 the death penalty because he was future dangerousness --

1 he was future dangerous. He had 12 prior crimes that were
2 used to prove his future dangerous, and because his crime
3 was --

4 QUESTION: That's death eligibility, and that's
5 conceded. There's no question about that.

6 MS. RUMPZ: And because his crime was vile. And
7 I think that when you -- whoever dropped the rock, when
8 you kidnap a woman, when you take her out into a remote
9 field, you drop a rock on her head four times so badly
10 that her skull is embedded in her brain, and there are
11 indentations inches deep on the ground full of blood, that
12 the fact that an earlier witness is impeached may affect
13 the jury's ultimate sentencing decision is quite a
14 stretch.

15 QUESTION: Why didn't Henderson get the death
16 penalty?

17 MS. RUMPZ: Because Henderson got the benefit of
18 an improper jury instruction in his trial.

19 QUESTION: What was the instruction?

20 MS. RUMPZ: The -- he did not receive the joint
21 triggerman instruction, the instruction in Virginia that
22 says, if both parties are joint participants in inflicting
23 the fatal blows, each is eligible for the death penalty.

24 QUESTION: So they could have found him
25 ineligible --

1 MS. RUMPZ: So --

2 QUESTION: -- under the Henderson instruction.

3 MS. RUMPZ: Yes. Henderson, if he had been, if
4 his jury had been instructed as Strickler's jury was
5 instructed, then the results of Henderson's trial may have
6 been the same as Strickler's.

7 QUESTION: Wasn't there other direct evidence
8 of -- that he was the one that dropped the rock?

9 MS. RUMPZ: And -- thank you, Justice Scalia,
10 there is. There's a wealth of other evidence that shows
11 that he is the one that dropped the rock and that he was
12 the instigator and the leader.

13 QUESTION: What other than Tudor?

14 QUESTION: What was the evidence other than
15 Tudor?

16 MS. RUMPZ: Tudor. That's the evidence.

17 QUESTION: Anything else? Just Tudor.

18 MS. RUMPZ: Tudor is the evidence, and --

19 QUESTION: Is there any reason why Tudor would
20 have wanted to put it on him rather than on Henderson?

21 MS. RUMPZ: None that I know of. I mean,
22 there -- the theory has always been that Donna Tudor was
23 trying to protect herself. Well, she could have protected
24 herself equally by ratting out Henderson as opposed to
25 Strickler, but the fact of the matter is, she testified

1 that she was riding around in a car with him --

2 QUESTION: Strickler was her boyfriend as
3 opposed to Henderson --

4 MS. RUMPZ: Her week-long boyfriend, yeah.

5 QUESTION: Did she testify at the Henderson
6 trial, too, and was the prosecution's theory there that
7 Henderson was the second man?

8 MS. RUMPZ: Yes, and she did not testify at
9 Henderson's trial. She testified at Strickler's trial.
10 Henderson had made a confession to another gentleman who
11 ultimately was called at Strickler's trial in defense of
12 Strickler, but the Commonwealth called this gentleman to
13 prove Strick -- to prove Henderson's involvement in Leanne
14 Whitlock's killing. Tudor wasn't needed in that regard.

15 And in Strickler's trial Tudor was needed
16 because she was the one that overheard him talk about using
17 a rock crusher on a nigger, and Whitlock, of course, was
18 black, so that definitely is additional evidence
19 besides --

20 QUESTION: Was she ever indicted for anything?

21 MS. RUMPZ: -- Ann Stoltzfus' testimony that she
22 was the -- he was the leader in this crime.

23 QUESTION: Was she ever indicted for anything?

24 MS. RUMPZ: She was -- I believe she was
25 indicted for some sort of car theft. Now, whether she was

1 ever convicted or tried, or those were dismissed is not
2 clear from this record.

3 QUESTION: Of course, she had all the jewelry
4 from the victim and all and so forth, didn't she?

5 MS. RUMPZ: She had the victim's earrings, and
6 that's another, I guess, factor that tends to show that
7 Strickler was actively involved in what went on in the
8 field, because he had Whitlock's pearl earrings that she
9 was wearing and --

10 QUESTION: But Henderson had the watch, as I
11 recall, and --

12 MS. RUMPZ: Well, that's true, but --

13 QUESTION: -- Henderson gave the watch to his
14 girlfriend.

15 MS. RUMPZ: Co-participants --

16 QUESTION: That's a wash.

17 MS. RUMPZ: Co-participants in the crime.

18 But interestingly enough, Stoltzfus' testimony
19 is enhanced, or not enhanced but is supported by
20 Strickler's own post verdict admissions to the trial
21 judge. He admits that he was at the mall. He admits that
22 he got in the car with Whitlock at the mall, and he admits
23 he went to the murder scene.

24 QUESTION: None of that goes to the sentencing
25 factor, however.

1 MS. RUMPZ: No. It definitely goes to the
2 materiality of Stoltzfus' testimony, because Strickler --
3 and in closing argument, additionally, never contested
4 that any of what Stoltzfus saw at the trial was correct,
5 and he couldn't have. Even if he had --

6 QUESTION: No, because she was an extremely
7 credible witness. Everybody thought she was telling the
8 truth.

9 MS. RUMPZ: Even if he had impeached Stoltzfus,
10 even if he had impeached Stoltzfus with his testimony he
11 still would have had to explain why he was at that mall,
12 because two other people put him at that mall. He still
13 would have had to explain his possession of the car not an
14 hour later, after what happened at the mall. So her
15 testimony becomes less critical.

16 QUESTION: Yes, in order to prove his innocence
17 he would have had to do that, but in order to disprove the
18 notion that he was the ringleader and all, he wouldn't
19 have had to do that.

20 MS. RUMPZ: And he would have had to discredit
21 Donna Tudor's testimony, and he tried at trial. He tried
22 to discredit Donna Tudor's testimony that --

23 QUESTION: But you have to acknowledge that she
24 was not as credible a witness as Stoltzfus was.

25 MS. RUMPZ: Donna Tudor wasn't?

1 QUESTION: Yes. I mean, she had all sorts of
2 reasons why one could be skeptical of her. Maybe she told
3 the truth 100 percent and Stoltzfus apparently did not,
4 but nevertheless, the way they appear to the jury you
5 can't be sure which one seemed the more credible.

6 MS. RUMPZ: Well, I see that I'm out of time and
7 I guess I regret that I can't answer that, but I think
8 they both were important parts of the Commonwealth's case.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Rumpz.
10 The case is submitted.

11 (Whereupon, at 12:17 p.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

TOMMY DAVID STRICKLER, Petitioner v. FRED W. GREENE, WARDEN
CASE NO: 98-5864

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

BY: *Siona M. May*
(REPORTER)