IN THE SUPREME COURT OF THE UNITED STATES

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RONALD ROMPILLA, :

Petitioner :

v. : No. 04-5462

JEFFREY A. BEARD, SECRETARY, :

PENNSYLVANIA DEPARTMENT OF :

CORRECTIONS. :

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Washington, D.C.

Tuesday, January 18, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

BILLY H. NOLAS, ESQ., Assistant Federal Defender, Philadelphia, Pennsylvania; on behalf of the Petitioner.

AMY ZAPP, ESQ., Chief Deputy Attorney General, Harrisburg, Pennsylvania; on behalf of the Respondent.

TRACI L. LOVITT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

JUSTICE STEVENS: We will now hear argument in Rompilla against Beard.

Mr. Nolas.

ORAL ARGUMENT OF BILLY H. NOLAS

ON BEHALF OF THE PETITIONER

MR. NOLAS: Mr. Justice Stevens, and may it please the Court:

Profound mitigating evidence concerning Mr. Rompilla's life history was not heard by the capital sentencing jury in this case because his trial counsel did not secure a single scrap of paper about his life history.

As to the trial prosecutor, his argument, what he elicited from the defense witnesses, and what he presented affirmatively sent the message to this jury of future dangerousness.

When the jury inquired whether in Pennsylvania there is parole from a life sentence, they were not given the simple, straight answer that Pennsylvania law clearly indicates, no. Instead, they were told -- instead, their question was not answered.

What I would like to do, unless the Court has specific inquiries, is to make certain points about the ineffectiveness issue and then turn to the sentence issue.

As to the ineffectiveness issue, Your Honors, this Court has made very clear in Williams v. Taylor, in Wiggins v. Smith, reiterating the concept established originally in Strickland v. Washington, that a trial defense counsel has a duty to conduct a thorough investigation for mitigating evidence in a capital case.

JUSTICE KENNEDY: Well, you're asking us, I suppose, to make a rule that you have to get paper records. We've seen a number of capital cases, you know -- as you know. This counsel seemed to me to be quite articulate and -- and had a very sound theory of -- to argue to the jury for mitigation. It didn't work, of course. I -- I just don't know what constitutional rule you want to ask us for, that you have to look at record evidence?

MR. NOLAS: We are not asking the Court to set a constitutional rule that a capital defense counsel must obtain records in every capital case. We are asking this Court to apply the rule articulated in Strickland v. Washington itself where the Court indicated that counsel has a duty to make a reasonable investigation.

JUSTICE KENNEDY: Well, you had three forensic experts, outside experts, and they didn't seem to think the papers were relevant either.

MR. NOLAS: Yes, Your Honor. And as to the

experts themselves -- and that's actually -- the experts and the family are the core of respondent's argument against Mr. Simmons' claim.

The simplest answer is to look at Wiggins v. Smith where this Court held very clearly that the retention of mental health experts sheds no light on the reasonableness of counsel's life history investigation. That is especially appropriate in this case because in this case the counsel who had contact with the experts testified very clearly at the post-conviction hearing that the experts were never asked -- never asked -- to develop life history mitigating evidence. And as my friend, Ms. Zapp, indicates in her brief at page 43, there was no tactical decision in this case by counsel to not pursue life history mitigating evidence.

JUSTICE O'CONNOR: Well, counsel -- counsel did make use of several relatives of the defendant who testified. I -- I think weren't there about four relatives who testified?

MR. NOLAS: Yes, Your Honor, including his son.

JUSTICE O'CONNOR: And he talked to all of them and talked to the defendant as well. So would a reasonable person think that's enough to find out family history and -- and the concerns that you had?

MR. NOLAS: This Court made very clear in

Strickland and Williams and in Wiggins that an assessment of counsel's representation must be done from counsel's perspective at the time. Counsel's perspective at the time, as Ms. Dantos clearly testified at the hearing, was that the family were not good sources of information for petitioner's life history. She gave three reasons for that.

She said, number one, whenever life history was pursued with them, they did not want to deal with it because they thought he was innocent.

Number two, whenever they were --

JUSTICE SCALIA: That -- that seems to me an -- an extraordinary non sequitur. I don't understand. They didn't want to deal with it because they thought he was innocent. I -- how does that make any sense?

MR. NOLAS: That -- that's what she testified to, Your Honor. I'm not --

JUSTICE SCALIA: What she testified to makes no sense.

MR. NOLAS: She gave a second reason which was that counsel, when they pursued life history mitigation, the family would respond, we hardly know him. He was in juvenile facilities as a youth, and then he was in prison as an adult. We don't have any knowledge of his life history.

JUSTICE SCALIA: Well, the -- the portions of his life history that -- that are the most appealing are the portions from his youth, before he went into the -- into the juvenile institutions, and they were certainly with him during that period.

MR. NOLAS: And third and most significantly, Justice Scalia, she testified that they were not willing to provide life history mitigating -- facts about his life history because of, quote, whatever else was going on with them, unquote. Or as Mr. Charles, the other attorney, put it, these were not the type of family that would provide information when asked.

Bear in mind, both of these counsel knew what the respondent's post-conviction rebuttal psychologist testified to, that when you're dealing with abuse, neglect, a dysfunctional home, people don't want to talk about that. They want to withhold that.

JUSTICE SCALIA: Let me -- let me take you back to the -- to the experts. You say he did not specifically ask the experts to go -- to go into his childhood problems. You know, I can imagine when the expert comes on the stand, the first question being asked is, now, Mr. Expert, were you told by counsel to look into the childhood problems? You know, as though counsel were planting in the expert's mind what the expert should say.

What would anyone who hires a psychologist or a psychiatrist -- what would anyone expect him to look into in -- in determining whether the person is -- is mentally injured but -- but the childhood? Do you really think counsel could not have expected with total assurance that these people would do that?

MR. NOLAS: Sure, because counsel themselves testified to that at the post-conviction hearing and the experts themselves said -- now, let me --

JUSTICE GINSBURG: Mr. Nolas?

MR. NOLAS: Yes, Your Honor.

JUSTICE GINSBURG: Wasn't it the case that those experts were hired not primarily or even secondarily for mitigation purposes? They were hired in connection with the possibility of a defense at the guilt stage, number one, that he was insane at the time he committed the crime, in which case what he was when he was a child would be irrelevant, and number two, that he was presently incompetent to stand trial. So they were asked specifically to inquire into his present mental situation, and their testimony was relevant to the guilt phase of the trial. So that's the instruction. Naturally they -- what -- why are we engaging you? We're engaging you to tell us do we have a basis for an insanity plea, do we have a basis for an incompetent to stand trial plea.

MR. NOLAS: Yes, Your Honor, and the -- the respondents use the word mitigation that Ms. Dantos used in her testimony. I only ask the Court to look at the joint appendix at page 472 where Ms. Dantos says very clearly, I explained to them the purpose for my contacting them, and the purpose was to initially see if there was any issue of mental infirmity or mental insanity for the guilt phase and subsequently to possibly use in mitigation any mental infirmity if it -- if the jury came back first degree.

JUSTICE KENNEDY: Was there any indication that after the guilt phase was over and before the sentencing phase began -- I take it it was just a matter of hours or almost days till the sentencing -- till the sentencing phase began. Was there any contact with the psychiatrists or with experts after the sentencing phase and the -- pardon me -- after the guilt phase and before the sentencing phase?

MR. NOLAS: No, Your Honor. The record is very clear that the experts were asked, as Justice Ginsburg indicated, about mental infirmity at the time of the offense. They reported back that they could provide no assistance in that regard, and then there was not further contact with them. They were also asked about competency, which is not at issue before the Court.

The -- the key thing to bear in mind is you can look through Ms. Dantos' entire testimony and look -- you could look through Mr. Charles' entire testimony at the hearing. Nowhere do they say we asked the experts to develop life history mitigating information. This isn't the case where the lawyers say to the doctor, Doctor, I'm looking into this man's life history, go investigate it. Tell me what there is. Tell --

JUSTICE SCALIA: I thought what you just quoted said that they -- that they would intend it to be used in the mitigating phase.

MR. NOLAS: Mental infirmity at the time of the offense at the penalty phase, not life history mitigation, not how did he do in school, was there abuse in the home, was there neglect in the home, was their mistreàtment in the --

JUSTICE SCALIA: Doesn't -- doesn't all that bear upon mental infirmity at the time of the offense? Isn't the reason that -- that one considers these factors mitigating is that they reduce the guilt at the time of the offense? I -- I thought that that's the whole --

MR. NOLAS: No, Your Honor. That is -- with all due respect, that is too constricted a view of what --

JUSTICE SCALIA: We -- we just let him off because we're -- we're sympathetic to his present state?

I thought that mitigation means that it reduces the guilt of the offense at the time that he commits it.

MR. NOLAS: It's -- it's not let him off, Your Honor. It's a -- a request to the jury, that was out for over 12 hours, that this man receive a life sentence.

And you've already resolved this issue in Wiggins v. Smith. In Wiggins v. Smith, counsel hired a mental health expert, provided that expert 200 pages of DSS records, provided a PSI, had the expert interview all of Mr. Wiggins' family members, had the expert report back on, quote/unquote, mitigating evidence, and this Court found that counsel had failed to provide reasonably diligent effective assistance because counsel had not developed life history mitigating evidence.

JUSTICE SOUTER: Mr. Nolas, you haven't mentioned it, but didn't one of the three experts suggest that there be a -- a follow-up inquiry into the -- the abuse of alcohol by the defendant?

MR. NOLAS: Dr. Gross suggested that there be a follow-up inquiry into -- into alcohol, and that --

JUSTICE SOUTER: My understanding is that nothing was done in response to that. Is that correct?

MR. NOLAS: In response to that, the reasonable thing would be why did this man's parole records indicate that he should abstain from alcohol. Let's look into his

alcohol history.

And to back to -- to your question, Justice --

JUSTICE SOUTER: Which -- which you're saying they did not do. I mean, just to get it --

MR. NOLAS: They testified that what they did they asked -- they asked the other experts to look into it.

And bear in mind, all of the experts in this case had less than the expert in Wiggins. All of the experts in this case had less than the expert in Williams. What these lawyers gave the expert is a client that they themselves said is not a reliable source of information, a client who did not want to discuss his life history, a client who misled counsel, a client who these lawyers said we can't rely on -- on this fellow.

JUSTICE GINSBURG: Mr. Nolas, there were some records that the prosecution sought and used. Was it -- the records that were in the very courthouse.

MR. NOLAS: Yes, Your Honor, and that was, I guess, the simplest way to respond to Justice Kennedy's original question, which is what is the duty that these lawyers have. Well, at its simplest, in Wiggins this Court said counsel has a duty to conduct a thorough investigation for mitigating evidence, a thorough investigation into the aggravation. The trial prosecutor

tells these counsel, I'm going to use that information in that file against your client.

The file was maintained in the same courthouse in which this case was tried. Counsel never goes and looks at that file. When the prosecutor brings it to the penalty phase, they complain, we've never seen this file before. In that file --

JUSTICE KENNEDY: What did the prosecution use? The fact of early -- early conviction and the details of the crime. Right?

MR. NOLAS: And the transcript that's included of -- in that trial of the prior offense victim's testimony.

But the thing is what if these lawyers what -- what I -- I hope this Court would expect any lawyer to do when the prosecutor says, I'm going to use that folder against you. You go and you open up the folder.

JUSTICE SOUTER: And what would they have found?

MR. NOLAS: They would have found achievement test scores in that prior conviction case file indicating that Mr. Rompilla had never progressed beyond the third grade, indicating that he functions below 96 percent of the population. He lived a nomadic life. He -- and -- and test results indicating that he was elevated on scales for schizophrenia, paranoia, neurosis, indicating that he

grew up in a slum environment, and that he was an alcoholic, bearing in mind Dr. Gross' original inquiry. These are also lawyers who knew that Mr. Rompilla had a juvenile history and had a prior adult criminal history.

And Pennsylvania lawyers know -- we've discussed this in the brief -- that PSI records, presentence reports in Pennsylvania, and juvenile records are very special things compared to such records in other States. In --

JUSTICE STEVENS: Mr. Nolas, are you telling us that all that information would have -- was in the file that described the -- the criminal history that the prosecutor used in his case?

MR. NOLAS: Yes, Justice Stevens.

JUSTICE STEVENS: And they didn't even look at that file?

MR. NOLAS: Yes, Justice Stevens, what I just read to you.

Now, Pennsylvania lawyers --

JUSTICE BREYER: Is this the document that's on the lodging at page 31-34?

MR. NOLAS: If I may have Your Honor's indulgence for a moment. Yes, Your Honor.

That -- because in this case, that prior conviction court file contained records that were produced when Mr. Rompilla was evaluated for that prior conviction.

One point that I don't want to escape this Court's attention is in Pennsylvania, the Pennsylvania Supreme Court and Pennsylvania -- the Pennsylvania statutes indicate that presentence investigation reports and juvenile records have to contain information relating to, quote, educational history, psychological history, marital history, family history, military history --

JUSTICE SCALIA: You -- you want us to adopt a constitutional rule that at least in Pennsylvania counsel have to consult these -- these records --

MR. NOLAS: When --

JUSTICE SCALIA: -- as a constitutional matter.

MR. NOLAS: Justice Scalia, when State law tells you that what you're going to find in juvenile and adult records is exactly what the ABA standards say capital lawyers should pursue, it's not diligent to ignore the --

JUSTICE SCALIA: So your -- your answer is yes.

MR. NOLAS: Yes --

JUSTICE SCALIA: You want a constitutional rule that in Pennsylvania counsel must look into these records.

MR. NOLAS: Yes, plus.

JUSTICE BREYER: What about a rule that says you must consult the file of the case that's being used by the prosecutor to produce seriously aggravating circumstance, at least where that file is readily available, and you

must follow up indications in that file that suggest a significant mitigating defense?

MR. NOLAS: Yes, Your Honor.

JUSTICE BREYER: All right.

MR. NOLAS: And --

JUSTICE GINSBURG: And that's nothing special to Pennsylvania if you know that the prosecutor is going to use a certain file.

MR. NOLAS: The -- the only that's special to Pennsylvania is what Pennsylvania law tells you you're going to find in those files. That makes it different than, say, Georgia where there's no provision for having that material in those files.

JUSTICE SOUTER: What -- what --

JUSTICE SCALIA: For what purpose did the prosecution use the files?

MR. NOLAS: The prosecution told counsel I'm going to use these files as part of my case and eventually use them for aggravation purposes.

JUSTICE SCALIA: Use them for -- he did use them for aggravation.

MR. NOLAS: Yes, Your Honor.

JUSTICE SCALIA: In -- in what respect?

MR. NOLAS: He put on -- he -- he had an assistant district attorney take the stand and read the

transcript of the victim's testimony in the prior case, which was included in that folder. He also used information about when Mr. Rompilla incarcerated, paroled, et cetera that was reflected by that folder. So plainly these lawyers knew that that trial was going to be used because the prosecutor told them.

One other factor on -- on the duty of the counsel. These counsel testified that they knew that Mr. Rompilla had problems in school and left school early. The school administration building in Allentown is across the street from the capital case courthouse. Ms. Zapp will confirm this. It says school administration building. You walk by it when you go into this courthouse. They knew he had problems in school. They never walked in there and asked somebody, let me look at the file.

JUSTICE KENNEDY: I -- I don't like to either direct your own argument or the questions from my colleagues, but the Simmons issue here --

MR. NOLAS: Yes, Your Honor.

JUSTICE KENNEDY: -- it seems to me is important and --

MR. NOLAS: Yes, Your Honor, I will turn to that. I will to turn to that with more sentence on the ineffective issue, and that sentence is that the

respondent's argument in this case misstates, with all due respect to -- to my friend, Ms. Zapp -- misstates the holding of Wiggins. The respondent reads Wiggins as holding only that when counsel has a lead, counsel should pursue a thorough life history investigation.

I -- I think it's pretty clear these lawyers here had leads, but even if they didn't, the holding of Simmons -- the first holding of Simmons is that counsel has a duty to conduct a thorough life history mitigation investigation and cannot rely on rudimentary knowledge from a narrow set of sources. These counsel had less of a rudimentary knowledge than the counsel in Simmons because they relied upon --

JUSTICE GINSBURG: Wiggins.

MR. NOLAS: In Wiggins. I'm sorry, Your Honor.

JUSTICE GINSBURG: Wiggins.

MR. NOLAS: Because they relied upon what they themselves knew was a remarkably set of sources, a family and a client who were not willing to discuss the information when they knew records were available that would have discussed the life history.

Turning to the Simmons issue, Justice Kennedy, the core of the Simmons issue, the core debate before the Court, is what does Justice O'Connor's concurring opinion in Simmons mean. The --

JUSTICE KENNEDY: If there had been no questions from the jury, it seems to me that you wouldn't have had an argument at all because the counsel was allowed -- the counsel was allowed to argue this to the jury and did argue it to the jury.

MR. NOLAS: The -- the questions are very significant, Your Honor. My -- my instinct would be there would be --

JUSTICE KENNEDY: Would you -- would you agree that but for the questions from the jury, Simmons was complied with? The counsel argued the point to the jury --

MR. NOLAS: The --

JUSTICE KENNEDY: -- without being -- without being contradicted.

MR. NOLAS: Justice Kennedy, the caveat is that the court instructed the jury that the arguments of counsel are not evidence and that the law would come from the court. And in that context, how much weight did they give on the passing reference in Ms. Dantos' closing argument? You don't have to reach that issue in this case because we know what the jury was concerned about. They were concerned about parole and they were concerned about that because the prosecutor --

JUSTICE KENNEDY: No. So now -- now we have a

situation where the case, by my suggestion in any event, was properly presented to the jury, and the only question is what the constitutional obligation is once the jury brings in a question.

MR. NOLAS: The constitutional obligation under Simmons itself would be to say is there something here or in -- in the words of Justice O'Connor, did the State put future dangerousness in issue. And in this case --

JUSTICE O'CONNOR: Well, it didn't expressly. I mean, there -- there were arguments about his behavior, but the problem I think we have with the Simmons claim here is that the Kelly case had not yet been decided, and you now have the AEDPA situation of trying to show that the State court's resolution was objectively unreasonable. And prior to Kelly, that's a pretty tough road for you.

MR. NOLAS: And that may be -- that would have been the case, Your Honor, had the Pennsylvania Supreme Court not adopted the very interpretation of Your Honor's concurrence in Simmons that Kelly adopted. The Pennsylvania Supreme Court three times said Simmons means you get a life without parole instruction in Pennsylvania when the State puts future dangerousness at issue. The construction that the respondent gives to Simmons and that the court of appeals below gave to Simmons, specifically that it only applies when the prosecutor argues that the

death penalty should be imposed because of future dangerousness, not only is not to be found in Justice O'Connor's concurrence, but it is not to be found anywhere in the Pennsylvania Supreme Court's opinion in this case.

JUSTICE KENNEDY: And what's the best argument you have that future dangerousness was an issue?

MR. NOLAS: There are several factors in that regard, Your Honor. As to the argument itself, the prosecutor called Mr. Rompilla a very strong individual, a very violent individual. He asked the jury, isn't it frightening the similarity between his past crime and this crime? He sent the clear signal to the --

JUSTICE KENNEDY: Well, of course, that also bears on the -- on the fact of his depravity, that he was just -- he just didn't learn.

MR. NOLAS: He -- he sent the --

JUSTICE KENNEDY: I don't know if that's necessarily future dangerousness or -- it's equally blameworthiness.

MR. NOLAS: Justice Kennedy, he sent the clear signal to the jury that this is a violent, frightening man, and then he tied it all together with this comment. And I think he learned a lesson from his prior -- prior crime, and that lesson was don't leave any witnesses. Don't leave anybody behind that can testify against you.

Don't leave any eyewitness.

JUSTICE KENNEDY: Well, that goes to his blameworthiness. He didn't learn anything in prison. I -- I suppose future dangerousness is -- in a sense is always in question, but I think our precedents say it has to be specifically or -- or clearly implied.

MR. NOLAS: I would submit to the Court that that argument indicates to a reasonable jury future dangerousness as much as the argument in Simmons itself --

JUSTICE SCALIA: Can you imagine any capital case, if we accept that argument, in which future dangerousness is not at issue? Because whenever you show the depravity of the defendant, what a horrible crime it was, you're going to be able to make the same argument. Any jury is going to be frightened of this man and think he's going to be dangerous in the future. If that's all -- if that's all that Simmons means, we should just say in all capital cases, you assume that it's at issue.

MR. NOLAS: And -- and --

JUSTICE SCALIA: And that seems to be not what we've said.

MR. NOLAS: And, Justice Scalia, that's not, however, the issue before the Court. What this prosecutor told the jury is this man learned a lesson that when he commits his repeated crimes, he shouldn't leave any

witnesses behind.

JUSTICE SCALIA: But -- but that --

MR. NOLAS: I --

JUSTICE SCALIA: -- that goes -- I -- I would make that argument to show how -- how horrible this crime was. He killed this person specifically in order to prevent testimony, which makes the -- the crime worse. I don't think it necessarily goes to future dangerousness any more than any of the element -- other elements of depravity or -- or the horribleness of the crime goes -- goes to future dangerousness.

MR. NOLAS: And -- and this is in the context of a prosecutor who elicited that Mr. Rompilla had been paroled 3 and a half months before the offense, that his niece and nephew were scared of him, that he could not rehabilitate yourself. Indeed, I -- I urge the Court to read the cross examination of the defense witnesses at the penalty phase. It's short, it's narrow, and it focuses on this guy couldn't rehabilitate himself. This guy was just paroled 3 and a half months and then goes and commits this brutal murder. And this guy's niece and nephew are afraid of him. That's the context.

Also, the prior victim --

JUSTICE SCALIA: And -- and you -- you expect us in all future cases to read the prosecution's argument and

-- and say, well, has it gone over the line from just his depravity into he's future -- you know, he's going to be dangerous in the future?

MR. NOLAS: But --

JUSTICE SCALIA: I think that puts too much of a burden on -- on the Federal courts.

MR. NOLAS: But, Justice Scalia, it's not just the depravity argument. The argument is he learned a lesson to leave no witnesses behind. And the -- the simplest answer to your question is to compare the argument in Simmons to the argument in this case. You quoted the argument in Simmons in your Simmons dissent. It was the -- this is the prosecutor in Simmons. The defense in this case as -- the defense in this case as to the sentence is a diversion. It's putting the blame on society, on his father, on his grandmother, on whoever else he can, spreading it out to avoid his personal responsibility. But we are not concerned about how he got shaped. We are concerned about what to do with him now that he is within our midst. And that was the argument that Justice O'Connor and the plurality in Simmons cited as bringing future dangerousness to the jury's attention. To put it --

JUSTICE GINSBURG: This -- this prosecutor also said, before he got into isn't it frightening, I'm not

asking you for vengeance. So if he's not putting it on for vengeance or the bad acts that he did, then what else could it be?

MR. NOLAS: Future dangerousness is -- is what we would submit to the Court.

JUSTICE SCALIA: How about justice? I mean, is that the only alternative to vengeance, is -- is future dangerousness? I don't think so at all.

MR. NOLAS: When you tell a jury that a person is a violent recidivist who learns the lesson -- he's a recidivist. He's going to commit more crimes if he's out. The lesson he learns is when he commits those more crimes, don't leave anybody behind.

I -- I see that as an argument that -- that is far beyond Simmons itself as to future dangerousness. In future dangerousness, Justice Scalia, you -- you argued in the dissent that the future dangerousness -- that what the plurality and Justice O'Connor construed as a future dangerousness argument could have had another purpose. Only in a State like Texas where you have a pure future dangerousness argument, in every State where you have other aggravators before the jury, of course you can construe it for another --

JUSTICE GINSBURG: I thought that there was no problem in any State but Pennsylvania because now all of

them -- when the jury wants to know does life mean life, the judge says yes.

MR. NOLAS: In all of them except Pennsylvania, Your Honor. I'm not saying it's a problem, but in response to Justice Scalia's question, only in a pure future dangerousness State will you have a pure future dangerousness argument.

And just one final comment on Simmons. As a prosecutor, if I'm putting on a future dangerousness case, I do it just like this prosecutor do it. I put on this man's significant violent criminal history. I tell the jury the lessons he learned from that history is to be violent and to not leave anybody behind. And I tell the jury that's what he's like. That's what he learned from his prior crimes. That's the message of future dangerousness you send to the jury. That's the message that this prosecutor sent, exactly how you would do it if you were arguing future dangerousness. You know from the jury's question they got that message.

If I may, I'd reserve the rest of my time for rebuttal.

JUSTICE STEVENS: Yes, you may reserve your time.

MR. NOLAS: Your Honor, thank you.

JUSTICE STEVENS: Ms. Zapp.

ORAL ARGUMENT OF AMY ZAPP

ON BEHALF OF THE RESPONDENT

MS. ZAPP: Thank you, Justice Stevens, and may it please the Court:

I'll address first the Simmons issue and then move on to the ineffectiveness issue, which will also be addressed by the Solicitor General's office.

The ruling of the Pennsylvania Supreme Court in this case, which denied the petitioner relief under Simmons v. South Carolina, was objectively reasonable and therefore did not provide a basis for habeas relief.

Simmons could reasonably be understood to require an instruction about parole ineligibility only in situations where the prosecution had argued that the defendant posed a future danger when it was asking the jury to sentence him to death. Simmons was a narrow exception to the abiding practice of this Court to allow the States to make decisions about what types of information the sentencing jury should receive with respect to the potential for early release.

JUSTICE SOUTER: Well, do you -- do you take the position that the -- that the argument that the prosecutor makes has got to refer explicitly to future dangerousness, a kind of talismanic words criterion so that we'll have a bright line rule and everyone will know where -- where he

stands?

MS. ZAPP: Well, I think Simmons could be understood -- and in fact did establish a bright line rule that the prosecutor had to actually argue it had to invite the --

JUSTICE SOUTER: No. But has -- has the prosecutor got to use a phrase like future dangerousness or a synonym for that phrase?

MS. ZAPP: I think he had to use words that communicated that. I'm not sure there's any one particular phrase, but a prosecutor can certainly put that into issue --

JUSTICE SOUTER: Well --

MS. ZAPP: -- using different -- different words.

JUSTICE SOUTER: -- if we -- if we don't adopt that kind of explicit words criterion, do you deny that the -- that the argument that the prosecutor made, particularly the -- by -- by introducing the -- the evidence of -- of the prior crime for purposes of the aggravating factor and the argument that he made about how the defendant had learned from his prior crime -- do you -- do you deny that -- that those were in fact, not with the talismanic words, but that those in fact were -- were arguments that suggested future dangerousness?

MS. ZAPP: I do, Your Honor. And my -- my reason for that is when you look to the argument itself, those words were used in a very controlled situation. They -- they did not by their tone or the overall tenor of the argument or their content tell the jury to take the -- the defendant's future dangerousness into account.

JUSTICE SOUTER: But I -- I don't see how the -- I -- I guess my -- my point is I don't see how you can avoid it. The -- the argument -- I think we would all agree that the argument was this person has committed repeated crimes. We're asking you to bear that in mind for the purposes of applying one of the three aggravating factors. In the course of committing repeated crimes, he has learned from past mistakes; i.e., he knows this time not to leave any witnesses.

How can you divide the tendency of that argument, repeated crimes for purposes of aggravation, from the tendency of that argument to say repeated crimes in the future if he gets a chance? This is the kind of guy we're dealing with. How can you draw that line?

MS. ZAPP: Well, I think this Court has said that you can draw that line because -- and you have to draw that line because in this situation -- because in every situation, every capital situation, the evidence that necessarily has to be discussed as part of sentencing

can be --

JUSTICE SOUTER: No, but this is -- this is a special case. This is not a general argument to the effect that this is a very bad person and we can expect bad persons to be bad in the future. This is a more specific argument. This is an argument that says he's now done it twice. This is the second crime and he's getting better at it as he goes along because now he kills the witnesses. This isn't just generalized badness. This is criminal repetitiveness. It is recidivism. And it seems to me that that is a much clearer argument. It is much closer to the explicit argument that he will do it in the future.

MS. ZAPP: I -- I don't think so in the specific context of this case, Your Honor, and that's again because the evidence in this situation really did not show a continuing sequence of -- of conduct and only talked about two episodes. And the fact that there was evidence in -- or there were remarks in this case about how the violence had escalated did not, again, go to -- suggest and -- and clearly the tone of the prosecutor did not suggest that the jury should draw from that a conclusion that the defendant would be dangerous.

JUSTICE SOUTER: What --

JUSTICE SCALIA: Ms. Zapp, I guess -- I guess

I'm confused about your case. I had thought that you were not arguing that Simmons requires a talismanic word or even that it requires much more than existed here. I thought what you were arguing is simply that Simmons could at that time have been interpreted that way.

MS. ZAPP: We are, Your Honor, and -- and --

JUSTICE SCALIA: So you're not -- you're not making the argument.

MS. ZAPP: We are not making the argument.

JUSTICE SCALIA: But you're saying the argument could have been made at -- at the time of this trial --

MS. ZAPP: Yes.

JUSTICE SCALIA: -- and before our later jurisprudence.

MS. ZAPP: Yes, Your Honor.

JUSTICE SOUTER: And why would that argument have been reasonable?

MS. ZAPP: Because --

JUSTICE SOUTER: In other words, why -- why would we -- why would it be reasonable to assume that this Court had -- had established a constitutional rule going to jury instruction that rested on a kind of talismanic criterion?

MS. ZAPP: Well, because the concurring opinion, which provides the -- this precise holding, identified

that specific conduct as triggering and could be understood at the time to require that specific conduct to trigger an instruction in these circumstances.

JUSTICE SOUTER: What -- what specific words in -- in the concurring opinion gets to the talismanic point?

MS. ZAPP: The specific words were the -- the Court's instruction that an -- about a charge on all ineligibility had to be supplied, and I'm going to quote from the Court's opinion where -- where the prosecution argues that the defendant will pose a threat to -- to society in the future.

That -- that opinion -- and just a few lines earlier it also said, again -- and I'm going to quote the words -- if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only sentencing alternative to death is life in prison without the possibility of parole.

JUSTICE SOUTER: And -- and you're -- you're depending on the word, in effect, argue as -- as requiring -- or as -- as being a basis to say the argument has got to use talismanic words.

MS. ZAPP: Not -- not that -- not that it has to use talismanic --

JUSTICE SCALIA: You're saying it has to be

argued.

MS. ZAPP: Exactly, that has to be argument as opposed to some other form of communication --

JUSTICE SCALIA: Not -- not just intimated, not just suggested, but the jury -- you have to argue that this person --

MS. ZAPP: But by --

JUSTICE SCALIA: -- is dangerous in the future.

MS. ZAPP: But by contrast --

JUSTICE SCALIA: That's a reasonable interpretation of it I would think.

MS. ZAPP: Exactly.

JUSTICE SOUTER: And on that interpretation, why wasn't it an argument within the meaning of -- of your point, when the prosecutor here got up and said, isn't it frightening, he has, in effect, learned from his past experience, now he knows enough to kill the witnesses?

MS. ZAPP: Well, first of all, Your Honor --

JUSTICE SOUTER: Wasn't that an argument which -- which goes to future dangerousness?

MS. ZAPP: Well, first of all, Your Honor, he did not make that argument. He never asked if it was frightening that he had learned from this. The word frightening -- again, this has been used out of context by my -- my learned colleague -- went to -- strictly went to

the discussion of similarities between the crimes, not the defendant. And in this situation --

JUSTICE GINSBURG: Ah, but what immediately follows -- first he said it's absolutely frightening twice. But there is one difference, one major difference, and the difference is that he has learned to leave no witnesses. That is tightly connected. He says this is an absolutely frightening crime, but there's something more. He's learned not to leave any witnesses.

MS. ZAPP: But -- but again, Justice Ginsburg, that goes to the idea that the defendant has ratcheted up his crime, that instead of taking the opportunity to reform his life, he's gone further and that makes this crime worse and -- and more worthy of harsher treatment from a punishing standpoint.

MS. ZAPP: It is our position that in 1998 when the State courts ruled, it was entirely reasonable for the Supreme Court to view Simmons as requiring that issues of future dangerousness be generated by the prosecution's argument.

JUSTICE KENNEDY: I -- I know you want to get to the other issue in this case, but let me ask you. You've, I assume, read these cases. In -- in other States where this instruction is given, is the prosecutor free to say, well, sure, there's life without parole, but that can

change? We don't know what the law will be like 3 years from now, 5. Have there been any problems along that -- along those lines? Have there been any problems generally in giving this instruction to the jury?

MS. ZAPP: Well, Your Honor, I'm not sure of the practice in other States, but I can tell you that in Pennsylvania -- and this is a point I need to correct from my opponent's argument. The answer to the question about parole eligibility is not a simple no. And that -- our supreme court has said that. We have a statutory prohibition in granting the -- granting parole to someone who's sentenced to life, but we also have a constitutional provision that allows the sentence to be commuted to, among other things, parole or other forms of early release. Our State supreme court has said you -- in order to be entirely accurate for sentencing jury, you've got to communicate both of those conducts.

And -- and the second part that has over the years -- and this goes to respond to your question -- has caused our court some pause in why we retain the rule. And that is they are very concerned. Our courts have expressed the view that by letting the jury know that the operation of the constitutional provision which can theoretically -- and, in fact, in the past often has resulted in a life sentence being commuted -- it may be

skewing the jury's perception of the punishments adversely to a defendant. It's one of the reasons why they have made a decision not to introduce sentencing information into -- early release information into the sentencing process in Pennsylvania, the concern that if a jury hears that there's some theoretical possibility or learns that it has been -- been actual -- there's been actual early release in the past, that it may -- may, out of an exercise of caution, automatically choose a death sentence.

JUSTICE SCALIA: And that explains why your State is the only holdout.

MS. ZAPP: Well, I'm sorry. Well, that it's -- they -- they have serious concerns, Your Honor, that -- that this is something that is necessary to the integrity of the process.

And there are two other concerns they've also mentioned too. They're -- they're concerns that -- that the jury be deflected from the specific process that we have under law which -- which is -- which is specified in our law for -- for imposing a sentence and not be distracted by undue speculation about whether or not the defendant is ever going to be released from prison.

And the second -- or excuse me. The third point that they're worried about is that a sentencing jury who,

for whatever reason, becomes reluctant to -- to carry out its duties may see this as an opportunity to shift the sentencing burden to somebody like a parole board or -- or other sentencing authority. And so that's why they have -- they've enforced this rule because they just see it as underscoring the integrity of the process.

JUSTICE STEVENS: May I ask you a question about the competence of counsel issue? One -- I'm -- I'm very sympathetic to the problems of busy lawyers who have so much to do and they're preparing for a penalty hearing. But one -- one aspect of this case -- I hope you'll comment -- and that is, the fact that the prosecutor had told the defense they were going to use certain aggravating circumstances, and the files in those -- relating to those circumstances were available in the courthouse. And as I understand -- and you correct me if I'm wrong -- counsel did not examine those files, and had he examined those files, he would have opened the door to a wealth of information. Isn't that a fairly serious mistake by the lawyer?

MS. ZAPP: Not in this circumstance, Justice Stevens, and -- and for this reason. The information that is typically contained in those files -- and -- and again, I -- I want to add some additional information for the -- for the Court on this point. As Mr. Nolas says,

Pennsylvania law does require preparation of records, including certain types of information. But as -- as is often the case, the -- the -- in -- in practical -- and the practical realities are not necessarily all records are equal. So as a matter of practice, in Pennsylvania attorneys cannot necessarily -- or would not automatically have reason to think these may give them a wealth of information.

But in this situation we had counsel seeking to obtain that very same information, in fact, had previously discussed that sort of thing with the family members. And so they at that point would have reasonably expected that they had a fair picture of the defendant's formative years --

JUSTICE STEVENS: Well, maybe they -- assume that's all true. They thought they knew everything --

MS. ZAPP: Right.

JUSTICE STEVENS: -- they needed to know. But still, if you say to me I'm going to put on certain exhibits, A, B, and C, and the defense says I'm not even going to even take a look at them before you put them on, I find that quite unusual.

MS. ZAPP: Well, they knew from interviewing their client what his criminal history was, and at that -- this point, they had every reason to believe they

possessed a fair and accurate assessment of his background, and the decision not to -- to go -- to -- to take a look at this was -- was reasonable under the circumstances. Counsel thought they already had that information and no reason to expect there was anything else in there based on their discussions with their own client.

JUSTICE GINSBURG: They thought they had -- it was reasonable when they, on their own, suspected that this man might not even be competent at the moment to stand trial, that he -- that they might have a -- a basis for an insanity plea, that it was reasonable for them to rely just on what he told them without looking at the record that was in the prosecutor's hands?

MS. ZAPP: Oh, no, Justice Ginsburg. `And again, we're talking about the sequence of events here. The -- this -- this came up relatively later on in the proceedings after counsel had already expended much of their time gathering information in the -- the information about what was going to be introduced. It -- it happens, in -- in terms of the time line of this case, relatively late, after counsel has already talked to experts and obtained information, talked to family members and -- and --

JUSTICE BREYER: I understand that. You're

repeating that point which -- so I might ask this question on this very point.

JUSTICE SCALIA: Could -- could I find out what she said came late? I -- I didn't understand. You said --

MS. ZAPP: The -- the --

JUSTICE SCALIA: -- it came -- what came relatively late?

MS. ZAPP: The -- I'm sorry. The -- the file itself, the -- the information the file was going to be used.

JUSTICE SCALIA: Came up late.

MS. ZAPP: Comparatively late over the course of this case. The counsel had already done things in that respect that would have led them to conclude that there would be no profit in -- in searching out additional records.

JUSTICE BREYER: My question is this, that I take it on page L31 is the record that existed in this horrendous rape '74 case with Jo, whatever, the woman, the bartender. And the prosecution was making an enormous amount out of that. We've just heard about it. That's true, isn't it? Am I right about the case? Have I got that right?

MS. ZAPP: This is the record that did exist.

JUSTICE BREYER: Yes. This is -- I'm thinking of it correctly, that this is the record in the case that the prosecution made a lot out of.

MS. ZAPP: I believe --

JUSTICE BREYER: I'm -- I'm back with Justice Stevens then and I wonder how it's possible a lawyer wouldn't look at the record in that very case if only to see if the prosecutor is characterizing the situation accurately. And had he done so, he would have seen on the next page, alcohol problems. He would have seen a complete list of siblings, and he would have seen, four pages later, a one-page list of criminal behavior with identification of crimes that took place when he was a child. That's all true.

Now, if he had then noticed these early criminal records when he was a 17-year-old and simply gotten the record in that one, he would have come across the document that is on page L44 and L45 which says, among other things, Ronald comes from the notorious Rompilla family. And then there is a list of why they are called the notorious Rompilla family which is fairly horrendous.

Now, I do not understand how any person, getting the first record, wouldn't have been led to the second, and I do not understand how any person who read pages 44 and 45 of the second would not have thought what the

siblings are telling me is wrong. I better go check on a few more siblings who happen to have their names and addresses here right in the pieces of paper he's looking at. And he would then have discovered this absolutely horrendous background that Judge Sloviter mentions. So I do not understand why that one incident, leaving aside all the other ones, but I do not understand why that one failure to consult the record that is being used by the prosecutor horrendously against him is not a failure.

MS. ZAPP: Well, Your -- Your Honor, in response to that, I would say this. It's clear from the testimony of counsel in the State post-conviction proceedings that they had interviewed their client in great detail about his prior conviction, that they were aware of what had -- what it had involved.

JUSTICE KENNEDY: This sounds to me like a constitutional argument for serendipity. You're held to be negligent if you don't look at the record for -- for one purpose and -- and discover by accident something that's there for another purpose. I -- I don't know what the logic of that is.

JUSTICE BREYER: Do you agree with that?

MS. ZAPP: Well, I think there is --

JUSTICE BREYER: No. We don't -- you agree with that or not?

MS. ZAPP: Well, I think there's -- there is an element.

JUSTICE BREYER: You either agree with Justice Kennedy or not.

MS. ZAPP: I can agree with -- I do agree with it in part.

JUSTICE BREYER: You do agree. All right. Now, if you --

MS. ZAPP: I -- I do agree that there is -- that there is certainly that involved in -- in this.

JUSTICE BREYER: I mean, my question, obviously, is, is not the reason that you want to examine the criminal record in the case that is being used horrendously against your client is to find out both as to what happened at the time and also the background that would be relevant in respect to your client? For example, alcohol abuse, which happened to be checked.

MS. ZAPP: But -- but, Justice Breyer, yes, certainly looking at a record would serve those purposes. But again, the information in those records was available from other sources. It was not the only source. And -- and the question that we have to look at here was did counsel set out on a plan to try to get the same information, which clearly they did, and they -- they sought to get it from people who ostensibly knew that

information.

Thank you.

JUSTICE STEVENS: Thank you, Ms. Zapp.

Ms. Lovitt.

ORAL ARGUMENT OF TRACI L. LOVITT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MS. LOVITT: Thank you, Justice Stevens, and may it please the Court:

Petitioner's ineffectiveness argument seems to be hinging on four things which are the court records in the aggravation case, the charge to the expert, the family members' level of cooperation, and the petitioner's level of cooperation. But a fair reading of the record demonstrates that counsel was reasonable with respect to all. But I want to start with the court records because that appears to be what's concerning the Court.

I think there's a misperception here that counsel did nothing to prepare for the aggravation case. The record, fairly read, reflects that they received through the discovery process the rap sheet and everything they needed to know in order to challenge the -- the aggravation case, and that's at JA664 and 667, is Attorney Charles testifying that he received the rap sheet through discovery and that the prosecutor, in order to try and

induce a plea, was very, very clear about what he intended to do in aggravation and what the aggravation case would be.

JUSTICE BREYER: But a rap sheet and so forth will not have normally what this person is like. You're dealing with a client who has serious problems of some kind as the crimes themselves reveal. They're terrible.

MS. LOVITT: I -- I think --

JUSTICE BREYER: And -- and so I -- don't you think it's a reasonable -- or do you think it's a reasonable constitutional requirement to say that where cases of prior history of the client are being used by the prosecution to say what a terrible person he is -- and he may be -- that you -- the -- the lawyer in a capital case at least should look at the court records in that case to learn something about what this human being is like and why? Because court records, but not rap sheets do contain that kind of thing.

MS. LOVITT: I think there are two answers to that question. First is that counsel was, in fact, looking at the testimony that would be read at -- during the aggravation and sentencing case to determine how to challenge that, how best to challenge that.

And second, the assumption of the question is that the court records were somehow superior to the

sources that counsel actually looked to. And I don't think on the record of this case, that's objectively true. Counsel is -- has -- has hired three independent experts, all of whom are specifically trained --

JUSTICE GINSBURG: Experts that were hired primarily to say what is his present mental condition, not what happened in the past.

MS. LOVITT: No, Justice Ginsburg, and I'm glad you brought this up because I'd like to point the Court to JA1069 and 1079 which is where Dr. Cooke testifies, as Justice Scalia anticipated, that he was, in fact, asked to -- asked to look at the mitigation evidence, and he did look at mitigation evidence. Dr. Sadoff has the same testimony --

JUSTICE GINSBURG: What was the primary reason that those experts were engaged?

MS. LOVITT: Dr. --

JUSTICE GINSBURG: The primary reason.

MS. LOVITT: Dr. Cooke's and -- Drs. Cooke and Sadoff testified that they were given an open-ended charge to look at mitigation --

JUSTICE GINSBURG: Where -- where is this?

MS. LOVITT: First, Dr. Cooke is at JA1079 and 1069. Dr. Sadoff is at 1105 and 1122.

JUSTICE GINSBURG: I thought it was not

contested that in fact the primary reason why these doctors were engaged was that the defense attorney wanted to see if there was a basis for a plea of insanity. He wanted to see if there was a basis to claim that his client was incompetent to stand trial.

MS. LOVITT: That is -- that is definitely contested with respect to Drs. Cooke and Sadoff. With respect to Dr. Gross, who was the first expert that was hired, he testified that his marching orders were fairly limited, and I think that's where this idea is coming across that all the experts were only charged to look for competency to stand trial.

JUSTICE SOUTER: And Dr. Gross is the one who -- who in his report suggested a follow-up on alcoholism I think.

MS. LOVITT: Yes.

JUSTICE SOUTER: And one way, at least a kind of a threshold step to follow up on alcoholism, would have been to look at the -- the personal history report in the file of the prior case. If they had done so, they would have found something on that subject.

So even -- even if we forget the question of the -- the scope of the expert's original brief and we look to Dr. Gross' suggestion and we look to the failure to look in an obvious place, i.e., the -- the personal history

report and -- and the case file, which the State said it was going to use, don't we have a problem with competence of counsel?

MS. LOVITT: No, because counsel looked -- followed up in an objectively reasonable place. Their testimony was that they hired two more experts to look at this issue, and Dr. Gross did not conclude --

JUSTICE SOUTER: The -- the two other psychiatrists or psychologists?

MS. LOVITT: The two -- the two other psychiatrists. Because the issue wasn't alcoholism.

JUSTICE SOUTER: Wel, were they -- were they hired to -- to look into alcoholism?

MS. LOVITT: No. Dr. Gross' report says he might have a violent reaction to alcohol. And he testified that was -- I was throwing that out as a theory. I have no idea. I had ruled out alcoholism. I had ruled out blackouts. And so the question to me was maybe there's something out there about violent chemical reactions to alcohol. Counsel testified that the -- that they followed up on that by hiring experts who they thought could examine that issue, and they both concluded that there was nothing there.

This is not an instance where you have, you know, open inquiries that counsel didn't follow up on.

Every court in this case has recognized --

JUSTICE STEVENS: Would you tell me again? I'm -- I'm just afraid I missed it before. What is your justification for failing to look at the -- at the criminal files?

MS. LOVITT: That they received everything they needed to challenge the aggravation case through discovery. And there's a little bit --

JUSTICE STEVENS: So even if they did, would it -- you still think it would be prudent not even to look at the file?

MS. LOVITT: They had everything they needed to challenge the aggravation --

JUSTICE STEVENS: Well, they didn't have as much as they would have had if they'd looked at the file.

MS. LOVITT: But the Sixth Amendment question --

JUSTICE STEVENS: Do you agree with that?

MS. LOVITT: I -- I think that they had -- obviously, in retrospect, the court files would have been helpful, but they had nothing to signal that the court files would give them more information.

JUSTICE STEVENS: Well, I understand that. I'm just -- I'm just asking you whether, as a matter of routine preparation for a contested hearing, it is not the duty of counsel to take -- at least glance at the exhibits

that the other side is going to offer.

MS. LOVITT: They did. They received them through discovery. And this is -- there's some testimony during -- during the court proceedings, Attorney Dantos does not have the transcript with her, and she clarified in the testimony at post-conviction --

JUSTICE STEVENS: You're saying they did get copies of the --

MS. LOVITT: Yes, yes, and that's her testimony at JA506 to 508. She says, we received it in discovery and I had it and I've looked it, but I didn't have it with me at that moment.

JUSTICE GINSBURG: What is the it? What is the it?

MS. LOVITT: The it being the transcripts of the proceedings that were used in the aggravation phase.

JUSTICE GINSBURG: But not everything that was in that file.

MS. LOVITT: But they did not --

JUSTICE GINSBURG: There was a lot more than just the transcript of the proceedings in that file.

MS. LOVITT: Exactly. Because they had conducted an objectively reasonable investigation into anything else that might be in that file.

JUSTICE BREYER: Well, the serious question to

me is -- is -- in many of these cases which we see, there are horrendous child abuse histories, and child abuse is a terribly difficult thing to get at and it's something that might not convince most juries of anything because they're all over the place. But nonetheless, counsel should have to make a reasonable decision about whether to take the child abuse route or to take some other route. And would it cause constitutional harm, that is, would it cause harm even from a prosecutorial point of view, if you just said, well, you should follow up and look at records of prior cases being used against you to see if you get a clue there?

MS. LOVITT: Well, the testimony is clear. Counsel knew about the abuse denial dynamic and they did follow up on it by hiring three experts who were charged to ferret this out. And it would do constitutional harm to say, notwithstanding the fact that you did that, you still have to go to records because as Strickland recognizes, counsel, even where you have diligent, devoted counsel, as here, have to make decisions about resource and time allocation.

JUSTICE GINSBURG: But Strickland was about a strategic decision to pursue one kind of defense rather than another.

The Government's brief, I must say, was candid

and, I think, useful. I'm talking about footnote 5 on page 22 where you say the Federal public defenders in Federal death penalty cases -- they get a mitigation specialist and the mitigation specialist, of course, gets records. What records? Exactly what we're talking about in this case. Gets records, birth, schools, social welfare, employment, jail, medical, and other records. And here, not one of those -- not one -- was sought.

MS. LOVITT: But this was the current -- this is the current Federal practice. I think Attorney Charles testifies at length that the prevailing practice in 1988 in Pennsylvania was not to get records, that it was, as the ABA guidelines and even the Goodpaster article suggests, to first sit down with your client, have an extensive conversation with your client, get a relationship of trust, talk to family members, talk to friends, get experts, and then get a game plan together about what records to go to. And in this case --

JUSTICE GINSBURG: About what records to go to, and here they went to none.

MS. LOVITT: Because that objectively reasonable investigation affirmatively indicated that the records would contain nothing.

In hindsight, we have the benefit of hindsight to know that they did contain something, but at that point

you have three experts, siblings who bracket petitioner in age and were living in the same household that -- during the time that's at issue here, and you have extended family members, including an ex-wife, who aren't subject to an abuse denial dynamic, and they're all saying the same thing. There's no abuse. There's no alcohol problem with either him or the family. And the experts are telling you he's not mentally retarded. And you have experts who are specifically charged to look at the mitigation case and they're not finding anything.

JUSTICE STEVENS: Thank you, Ms. Lovitt.

Mr. Nolas, you have about 4 minutes left.

REBUTTAL ARGUMENT OF BILLY H. NOLAS

ON BEHALF OF THE PETITIONER

MR. NOLAS: Yes, Your Honors. Thank you very much.

Justice Kennedy, you asked a question about serendipity. That's why you conduct an investigation. That's why you look into records. That's why this Court has said counsel has a duty to conduct a thorough, diligent investigation. When I go and I look at a prior conviction court file, I don't know if it's going to say that my client is the worst person on the face of the earth or, as in this case, that it's going to provide evidence leading to mental retardation, significant mental

disturbance, and a critically abusive childhood. You do that investigation because the prior conviction court file may contain information that reduces the weight of the aggravating factor.

In this case, had counsel gotten that court file, as Justice Breyer summarized, they would have had evidence that not only would have reduced the weight of that prior aggravating factor that -- but that would have provided something mitigating for this jury. Indeed, Ms. Zapp quotes at page 41 the 1980 ABA standards that very clearly say, please, for mercy, do not substitute for an actual thorough investigation of mitigating evidence and presentation of mitigating evidence. And all these lawyers ended up with was an unconnected plea for mercy because they didn't take the steps that reasonable counsel take in a capital case.

I also urge this Court not to be misled by -- by some commentary today about the testimony of the lawyers. At page 506, Ms. Dantos very clearly says that she's read the transcript of the penalty phase when that prior conviction court file is brought in by the trial prosecutor. And at that point, Mr. Charles, her co-counsel, says, I object. I've never seen that before. And the trial prosecutor says, you could have walked down the hall and gotten it just like I did. That's -- that's

what's she referring to at page 506.

As far as the doctors are concerned, I'll just read to Your Honors just from Ms. Dantos herself. She has read at pages 473 and 474 what Dr. Gross had said. I only looked at mental state at the time of the offense. Is that the purpose of the -- is that what the purpose of the evaluation was? Yes, that's what it was as to Dr. Gross.

Then at page 475, Dr. Cooke, the second guy. Did the same evaluation? Yes, the same evaluation.

At page 476, Dr. Sadoff, the third doctor. And is that also what Dr. Sadoff did? Yes. Page 476.

All three of the mental health professionals looked at Mr. Rompilla's mental state at the time of the commission of the crime.

JUSTICE SCALIA: Only? Only? Only?`

MR. NOLAS: That's the lawyer herself saying what she asked the doctors to do. And if you look at --

JUSTICE SCALIA: I think it's uncontested that all three looked into that, but the point that has been made is that the last two went beyond that. Do you disagree with that?

MR. NOLAS: I disagree with that, Your Honor, and you should look at those pages from Ms. Dantos and then look at the pages from Dr. Cooke and Dr. Sadoff.

This is Dr. Sadoff at page 1105. I would have

examined him, Rompilla, for competency to stand trial. I would have examined him for criminal responsibilities, and I would have examined him for possibility of mitigating circumstances at the time of the commission of the crime.

There is a universal difference between that type of mental health examination and a life history mitigation examination that looks to are there factors in your life that the jury should consider as mitigating. Was there abuse? Was there neglect? Was there mistreatment in the home? Was there all the stuff that is in the records about this case that these counsel did not obtain? Not one piece of paper. Justice Kennedy, not even to rebut the aggravating factor, not even to do that. A basic duty. Even if you put a spin over mitigation, I as a lawyer want to rebut that aggravating factor. The prosecutor tells me that's the file to go look at. I go look at it. Any reasonable lawyer, I would think, would do that.

JUSTICE STEVENS: Thank you, Mr. Nolas.

MR. NOLAS: Your Honors, thank you very much.

JUSTICE STEVENS: The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)