

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 FLORIDA, :
4 Petitioner :
5 v. : No. 03-931
6 JOE ELTON NIXON. :
7 - - - - -X
8 Washington, D.C.
9 Tuesday, November 2, 2004
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.
13 APPEARANCES:
14 GEORGE S. LEMIEUX, ESQ., Deputy Attorney General,
15 Tallahassee, Florida; on behalf of the Petitioner.
16 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioner.
20 EDWARD H. TILLINGHAST, III, ESQ., New York, New York; on
21 behalf of the Respondent.
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P R O C E E D I N G S

(10:02 a.m.)

JUSTICE STEVENS: We'll now hear argument in
Florida against Nixon.

Mr. Lemieux.

ORAL ARGUMENT OF GEORGE S. LEMIEUX

ON BEHALF OF THE PETITIONER

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

When experienced counsel thoroughly
investigates, prepares for trial, and discusses his trial
strategy with his client, a challenge for effectiveness
may not presume prejudice. Rather, this Court's two-part
inquiry, articulated in Strickland v. Washington, is the
proper measure.

The Florida Supreme Court erred in its decision
below for three main reasons.

First, they failed to apply Strickland's two-
part circumstance-specific, performance prejudice inquiry
to a question of trial strategy.

Second, it improperly presumed prejudice under
this Court's decision in United States v. Cronin where
there was neither a complete denial of counsel, nor did
counsel entirely fail to subject the State's case to
meaningful adversarial testing.

1 Third, the Florida Supreme Court improperly
2 expanded this Court's decision in Boykin v. Alabama from
3 governing pleas of guilt to governing tactical decisions
4 made during full-fledged trials.

5 For these three reasons and because the Florida
6 court's decision conflicts with Strickland and its progeny
7 and will disrupt the effective administration of justice,
8 we request reversal.

9 JUSTICE O'CONNOR: Counsel, was -- was the
10 attorney's essential concession of guilt sort of the
11 functional equivalent of a guilty plea, do you think?

12 MR. LEMIEUX: No, Justice O'Connor, it was not.
13 Mr. Corin, after speaking to his client on three occasions
14 about this trial strategy, sought to concede the
15 underlying -- the underlying crimes but to argue what was
16 the most essential part of this case, and that was whether
17 or not death should be the outcome of the jury.

18 JUSTICE O'CONNOR: Well, yes, he clearly tried
19 to preserve a role in the sentencing, but we often have
20 guilty pleas and then leave the sentencing to be
21 determined. Was -- was what he did concerning the
22 guilt/innocence phase the equivalent of a guilty plea, do
23 you think?

24 MR. LEMIEUX: It was not, Your Honor, because a
25 guilty plea, as this Court talked about in Boykin v.

1 Alabama, gives up rights of the defendant. The lawyer and
2 the defendant waive rights. They waive the right to
3 trial. They waive the right to have the State prove their
4 case beyond a reasonable doubt. They waive the right to
5 have a jury, to confront witnesses, to cross examine, all
6 of the attendant trial rights. Mr. Nixon --

7 JUSTICE O'CONNOR: Was there any cross
8 examination of witnesses conducted?

9 MR. LEMIEUX: There was some cross examination,
10 not a lot. There was cross examination of one of Mr.
11 Nixon's uncles, who was one of the seven confessions in
12 this case, and we don't know specifically why Mr. Corin
13 engaged in that cross examination. It could be because
14 that was probably the weakest of the seven confessions and
15 perhaps he wanted the jury to hear that that confession
16 was weak.

17 JUSTICE SCALIA: There was also an objection to
18 introduction of -- of photographs that -- that were
19 inflammatory, wasn't there?

20 MR. LEMIEUX: Yes, there was, Justice Scalia.
21 In fact, you know, Mr. Nixon was -- was very much engaged
22 in the guilt phase of this trial. He objected to the
23 introduction of evidence.

24 JUSTICE SCALIA: Those photographs would have
25 infected the -- the penalty phase, as well as the guilt

1 phase. So it was important for him to object to them.

2 MR. LEMIEUX: Yes, Your Honor, that's correct.

3 JUSTICE SCALIA: In the guilt phase.

4 JUSTICE KENNEDY: You said Mr. Nixon was -- was

5 the client. Was he in the courtroom?

6 MR. LEMIEUX: Mr. Nixon was in the courtroom for

7 portions of the trial. He was in --

8 JUSTICE KENNEDY: Was -- was he there -- and

9 I'll check the record -- when the attorney told the jury

10 that -- that his client was -- was guilty, that he

11 basically was conceding guilt?

12 MR. LEMIEUX: Mr. Nixon was not in the courtroom

13 for the opening statement or the closing statement.

14 JUSTICE KENNEDY: But not for the opening

15 statement.

16 MR. LEMIEUX: He was there during some of voir

17 dire. He was there after the opening statement when two

18 witnesses testified, one who testified that he was the

19 person who tried to sell the victim's car and positively

20 identified him in the courtroom, and another when the

21 sheriff's deputy positively identified him as the person

22 who confessed and gave the 45-minute confession and the

23 person he arrested. After those two witnesses testified,

24 Mr. Nixon then decided to leave the courtroom on that

25 occasion.

1 JUSTICE SCALIA: The other side says that guilt
2 is not as -- not as clear as you -- as you make it out.
3 Is -- is that -- is that issue even before us here?

4 MR. LEMIEUX: Your -- Your Honor, none of that
5 evidence has been presented in any of the post-conviction
6 proceedings, and while it's creative, I think it's not
7 before this Court because it's never been entered into
8 evidence. It's just speculation.

9 JUSTICE SCALIA: Well, it isn't a matter of
10 whether it's before it. I -- I just wonder whether it
11 goes to -- to the issue here, whether you needed to get
12 his assent or not. It -- it probably goes to the quite
13 separate question of whether there was inadequate
14 performance by counsel. No? Is that question before us
15 also?

16 MR. LEMIEUX: It is, Your Honor. Both questions
17 are before you. I -- I believe that --

18 JUSTICE SCALIA: Was -- was the latter question
19 ruled upon below?

20 MR. LEMIEUX: What the Florida Supreme Court did
21 is they found that since this was the functional
22 equivalent of a guilty plea, if there was not explicit and
23 affirmative consent, that Cronin would apply and a
24 presumption of prejudice would follow.

25 JUSTICE SOUTER: Okay, but -- no. I'm sorry.

1 JUSTICE SCALIA: And never -- and never reached
2 the -- the inadequate performance of counsel question.

3 MR. LEMIEUX: The -- the only thing that they do
4 say, Your Honor, is that they say that the strategy
5 employed by Mr. Corin may well have been in Mr. Nixon's
6 best interests.

7 JUSTICE SOUTER: Okay, but they didn't --

8 JUSTICE GINSBURG: They may, but that wasn't a
9 definitive ruling. So do you agree that if we accept the
10 position that you are taking, a remand would require for
11 that -- for that evidence to be considered on the
12 straightforward question did counsel perform adequately?

13 MR. LEMIEUX: Your Honor, there were three
14 hearings in the post-conviction proceedings, and the --
15 the defense, who had the burden in those cases to prove
16 ineffective assistance of counsel only put on Mr. Corin
17 and the State cross examined Mr. Corin and called some
18 other witnesses. I don't know what further evidence could
19 be adduced that would go to a separate claim.

20 JUSTICE SOUTER: Well, it -- it might be that
21 there would be no justification for further evidence, but
22 there would have to be a Strickland ruling on the merits
23 of the Strickland issue, wouldn't there be?

24 MR. LEMIEUX: I think that this Court could
25 engage in that. I think you could remand and have the

1 Florida Supreme Court engage in that.

2 JUSTICE SOUTER: But nobody has explicitly done
3 that yet. Is that correct?

4 MR. LEMIEUX: They have not because the Florida
5 Supreme Court ruled under Cronic.

6 JUSTICE SOUTER: Because of the Cronic point.

7 MR. LEMIEUX: Yes, Your Honor.

8 JUSTICE SCALIA: What -- what about the courts
9 below the Florida Supreme Court? Didn't they rule on it?

10 MR. LEMIEUX: Yes, Your Honor. Three trial
11 court judges all found that there was effective assistance
12 of counsel.

13 Judge Hall, who presided over the trial, in
14 fact, described Mr. Corin's advocacy as being right on the
15 mark. He found in his approach an excellent analysis of
16 the realities of the case and the preservation of
17 credibility and the credibility of any mitigating
18 circumstances. He also found that it was perhaps the only
19 steps that could have been taken to afford his client some
20 relief.

21 JUSTICE STEVENS: May I ask --

22 JUSTICE KENNEDY: Getting back to the practical
23 equivalent of a guilty plea, Brookhart v. Janis do you
24 think goes to the outer margin of what the functional
25 equivalent is? Are there other examples of what a

1 functional equivalent would be that would fall under both
2 Cronic and Brookhart? We have a line-drawing problem --

3 MR. LEMIEUX: Sure, sure.

4 JUSTICE KENNEDY: -- as -- as to whether or not
5 this is the functional equivalent.

6 MR. LEMIEUX: Your Honor, I think that Brookhart
7 in fact probably supports our position because in
8 Brookhart the situation was factually different. It was
9 more of a -- a guilty plea situation where there was going
10 to be this prima facie trial, which was, in essence, a
11 guilty plea with a profferer through one witness. And in
12 that case, the defendant stood up and said, I want a
13 trial, I want everyone to understand I'm not pleading
14 guilty. And this Court said that counsel can't waive
15 those rights to a full trial when the defendant is
16 objecting to it, but if the defendant consents or
17 acquiesces, this Court said the ruling would be different.

18 Well, certainly Mr. Nixon at least acquiesced.
19 Mr. Corin spoke to him on three occasions -- and that can
20 be found at 255 of the joint appendix -- and talked to him
21 about this strategy. Mr. Nixon never responded either way
22 as to his assent or what he wanted to be done.

23 Now, Judge Ferris, who was the third trial court
24 judge who heard this matter, said that because of the
25 longstanding relationship between this defendant and this

1 lawyer, because he had represented him three times before
2 over a 2-year period, that there was a level of
3 relationship, they were both veterans of the criminal
4 justice system, they had a rapport with each other. And
5 she was able to determine that there was consent to the
6 trial strategy in the fact that Mr. Nixon did not object
7 to it.

8 The Florida Supreme Court wants explicit and
9 affirmative consent, and they want a colloquy on the
10 record. And we think that this will be very problematic,
11 and we're already seeing these problems in Florida.

12 JUSTICE SCALIA: Do we have any cases involving
13 what -- what you describe as tacit consent?

14 MR. LEMIEUX: In terms of a trial strategy, Your
15 Honor?

16 JUSTICE SCALIA: In -- in terms of -- of
17 pleading guilty. Do we have any cases in which a similar
18 thing happened, that the counsel said I'm going to plead
19 you guilty and the -- the defendant doesn't say anything,
20 just passively sits there as though, you know?

21 MR. LEMIEUX: Your Honor, I think you do and I
22 think that Boykin addresses that there has to be a
23 colloquy with a plea of guilty, and that the -- the
24 defendant can't tacitly consent to a plea of guilty.

25 But our position is that this is not a plea of

1 guilty. This is not a complete surrender. This is a
2 tactical retreat made for reasons of trying to contest the
3 one issue in this case that could be contested, and that
4 was trying to save this defendant's life. This lawyer
5 took 52 depositions. He hired medical professionals. He
6 investigated Mr. Nixon's background, going back to the age
7 of 10. He did everything --

8 JUSTICE GINSBURG: What happened to the
9 photographs? I wasn't clear from the submissions. There
10 were inflammatory photographs. Were they in fact
11 admitted?

12 MR. LEMIEUX: They were admitted over his
13 objection, and that was taken up on direct appeal to the
14 Florida Supreme Court, and the Florida Supreme Court, in
15 Nixon I, did not find that they were inflammatory and
16 found that their introduction was proper.

17 JUSTICE GINSBURG: But they were not
18 reintroduced at the sentencing phase.

19 MR. LEMIEUX: They were already in evidence and
20 the State incorporated its evidence from the guilt phase
21 into the sentencing phase. It's just a procedure. The
22 only evidence that the State put on in the guilt phase
23 were his prior two convictions and evidence that Mr. Nixon
24 tortured the defendant by removing her underwear before he
25 burned her alive. Besides that, the rest of the evidence

1 was incorporated from the guilt phase.

2 JUSTICE STEVENS: May I ask if -- do you think
3 his representation would have been inadequate if he had
4 not discussed the strategy with the client but everything
5 else was exactly the same?

6 MR. LEMIEUX: It may -- it may have been but it
7 would be something that would be evaluated under
8 Strickland, Justice Stevens.

9 JUSTICE STEVENS: Well, why would it be -- why
10 would it make any difference under Strickland whether he
11 talked to the client or not if the same -- if the same
12 considerations are in play? In other words, he just knew
13 it was the -- the wiser strategy to try and save him from
14 the death penalty?

15 MR. LEMIEUX: I think the only point I would
16 make there is this Court said in Strickland that counsel
17 should consult with their -- with their client, with the
18 accused, and that that's an obligation on counsel. If
19 there was a failure to consult, perhaps that would be
20 argued that that failure to consult was deficient
21 performance.

22 JUSTICE SOUTER: Isn't that -- isn't that
23 because we -- we take the consultation at -- at least as
24 an indication that the lawyer was -- was adequate in
25 communicating back and forth with the client so that the

1 client could tell him what the lawyer needed to know to
2 defend him?

3 MR. LEMIEUX: Yes, Justice Souter, I think
4 that's correct. I think that there could be meaningful
5 discussions between the defendant and the accused that can
6 help the lawyer represent the defendant at trial.

7 JUSTICE SCALIA: But even apart from the
8 competence of the lawyer, whether it shows adequate
9 performance by the lawyer, can't you -- can't you divide
10 the Boykin rule, which doesn't relate to the lawyer's
11 competence at all, into three different categories:
12 number one, where there is express consent which is --
13 makes it okay; number two, when there's no consent at all,
14 which is bad; and number three, where there is what --
15 what you call here implicit consent? Aren't there really
16 three different situations?

17 MR. LEMIEUX: Yes, Your Honor, that's correct.
18 That's what the Court speaks about in Brookhart, and
19 although we think that that's more of a guilty plea case
20 than a trial strategy case, if this Court were to go in
21 that direction, that standard certainly could apply.

22 JUSTICE GINSBURG: In --

23 JUSTICE STEVENS: It seems to me rather
24 difficult to -- to draw that line. If -- if consent is
25 necessary, why shouldn't it be express? I'm not saying

1 consent is necessary, but normally if you're going to have
2 something this important and consent is necessary, it
3 seems to me it ought to be clear on the record. You
4 certainly wouldn't accept this for a guilty plea, what you
5 have here.

6 MR. LEMIEUX: That's correct, Your Honor, but in
7 -- I think this Court has held in cases like Jones v.
8 Barnes and Taylor v. Illinois, that questions of strategy
9 are questions that are reserved to the lawyer, and that
10 all --

11 JUSTICE STEVENS: That's right, and that's why
12 I'm suggesting if it really is a question of strategy, you
13 don't even need implicit consent.

14 JUSTICE SCALIA: Right.

15 JUSTICE STEVENS: And I'm not sure there's a --

16 MR. LEMIEUX: We --

17 JUSTICE STEVENS: -- three-part rule, as Justice
18 Scalia says. There's just a two-part rule.

19 MR. LEMIEUX: We -- we agree with that position,
20 Justice Stevens.

21 JUSTICE SCALIA: Well, I -- I assume -- I assume
22 your response is that if you eliminate from the Boykin
23 rule the possibility of implicit consent, you are forcing
24 the lawyer who believes he has the consent of -- of a --
25 an intractable client such as this fellow who -- who

1 didn't go into the courtroom, took all his clothes off so
2 they couldn't take him into the courtroom. He was
3 obviously not -- didn't want to be responsive. Your --
4 you would have forced this lawyer to adopt a strategy
5 which the lower court found would have been damaging to
6 this defendant, even though the lawyer believes that the
7 defendant really approved of the strategy that the lawyer
8 was undertaking. Why would we want to adopt a rule like
9 that?

10 MR. LEMIEUX: Your Honor, it's not our position
11 that you should a rule of consent. I was saying if this
12 Court were going in that direction, that the acquiescence
13 level would be what we would suggest.

14 JUSTICE BREYER: What -- what about a --

15 JUSTICE GINSBURG: If there were a plea -- if it
16 were a plea of guilt, wouldn't this be an academic
17 question because I assume Florida has some counterpart to
18 the rule 11 colloquy where the judge must confront the
19 defendant and ask him a series of questions to elicit his
20 consent? So this issue can come up, if you have a
21 counterpart to rule 11, only in the concession of guilt by
22 the attorney but with a trial.

23 MR. LEMIEUX: Your Honor, Florida does have a
24 rule for a guilty plea, but -- and now the Florida Supreme
25 Court says there has to be a colloquy for a strategy

1 decision that -- where there's a concession, but we
2 disagree with that. We don't think that there should be a
3 colloquy. We don't think that that -- that should be
4 required. And we think that that's problematic and we're
5 already seeing in Florida that -- that judges, laboring
6 under the Nixon decision, are asking questions to
7 defendants as to whether or not all sorts of strategy
8 decisions are decisions they agreed to.

9 JUSTICE GINSBURG: If Florida wanted to adopt
10 that procedure on its own, that wouldn't present a Federal
11 question. I mean, the prosecutor would have no -- the
12 prosecutor would have no right to stop it if the -- if
13 Florida said, well, we want that same colloquy to go on
14 whether it's a guilty plea or whether it's a concession of
15 guilt.

16 MR. LEMIEUX: Well -- well, Justice Ginsburg,
17 they're doing it under these decisions of this Court is
18 the reason why that they've articulated that this has to
19 be done. They're saying it's a functional equivalent of a
20 guilty plea. Therefore, Boykin is required and therefore
21 there has to be a colloquy. And we think that those
22 colloquies are tremendously problematic, that they invade
23 the attorney-client privilege. They may affect an
24 accused's right to -- you know, not to self-incriminate
25 himself. There may violate the relationship between the

1 lawyer and his client.

2 JUSTICE STEVENS: Yes, but these -- let me just
3 understand. These colloquies are not, in your view,
4 commanded by the Florida Supreme Court's holding.

5 MR. LEMIEUX: They are. The Florida Supreme
6 Court specifically says you must have these colloquies to
7 determine consent.

8 JUSTICE STEVENS: But only -- is it -- it's not
9 just when there's the equivalent of the guilty plea, but
10 any major trial strategy --

11 MR. LEMIEUX: The lower -- Justice, I'm sorry.

12 JUSTICE STEVENS: Is this -- I want to know if
13 the Florida Supreme Court's holding is limited to cases
14 that are the functional equivalent of -- of a guilty plea,
15 and -- and it's only there that they're requiring the
16 colloquy.

17 MR. LEMIEUX: It's only there that they've
18 required it, but lower courts now defense counsel are
19 making these arguments that, boy, you know, and the judge
20 is concerned this is a strategy decision.

21 JUSTICE STEVENS: Well, but of course what the
22 lower courts are doing may or may not be right as a matter
23 of Florida law, but that's not before us really.

24 MR. LEMIEUX: It's not before Your Honor.

25 JUSTICE SCALIA: Of course, if it were a matter

1 of Florida law, the Florida legislature could change it.

2 MR. LEMIEUX: Yes, Justice Scalia.

3 JUSTICE SCALIA: If it's a matter of Federal
4 law, it can't.

5 MR. LEMIEUX: That's correct.

6 If I may, I'd like to reserve the balance of my
7 time.

8 JUSTICE STEVENS: Mr. Gornstein.

9 ORAL ARGUMENT OF IRVING L. GORNSTEIN

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

12 MR. GORNSTEIN: Justice Stevens, and may it
13 please the Court:

14 The most serious problem with the Florida
15 Supreme Court's explicit consent requirement is that it
16 prevents counsel from pursuing what may be the most
17 effective strategy for saving a defendant's life, even
18 when counsel consults with the defendant on that strategy
19 and the defendant does not object. In that situation, the
20 Florida Supreme Court would require counsel to pursue an
21 alternative reasonable doubt strategy even though that
22 might undermine the case for sparing the defendant's life
23 and even though the defendant has not consented to that
24 strategy either.

25 JUSTICE KENNEDY: Do we take it as a given that

1 if he does not consent, in fact, directs his lawyer not to
2 make this concession, that the lawyer is bound to follow?

3 MR. GORNSTEIN: No, Justice Kennedy. You would
4 still look at that question through the prism of
5 Strickland's reasonableness inquiry. It would raise
6 distinct concerns. A reasonable counsel would make a
7 reasonable effort to iron out differences. Reasonable
8 counsel takes into account the considered views of his
9 client. But if, at the end of that process, counsel
10 reasonably concludes that this is the only effective
11 strategy for saving the defendant's life, then the pursuit
12 of that strategy is not per se ineffective.

13 JUSTICE KENNEDY: Does -- does that up the ante
14 and the defendant now is in the position to terminate the
15 lawyer, or will the judge say it's -- it's too late, I'm
16 not going to grant that motion?

17 MR. GORNSTEIN: Justice Kennedy, the --

18 JUSTICE KENNEDY: As -- as a matter of Federal
19 law.

20 MR. GORNSTEIN: As -- the defendant could go to
21 the -- to the judge and his counsel could go to the judge
22 and say, we have had such a breakdown between us on what
23 should be done here, we think alternative counsel should
24 be appointed. But that would be a discretionary call for
25 the district court. So too, the defendant could say, I

1 want to exercise my right to self-representation, which he
2 has a right to do. So those are the two checks on that.

3 JUSTICE SOUTER: But what -- what if there's a
4 third possibility and -- and the lawyer makes remarks in
5 front of the jury, as -- as this lawyer did, in effect,
6 concession kind of remarks, and the defendant stands up
7 and says, hey, I'm not making those concessions? I am not
8 guilty. I'm not conceding a darned thing. Does the
9 lawyer at that point at least have a -- an option to
10 proceed on the concession theory, leaving it to judge his
11 performance under Strickland afterwards?

12 MR. GORNSTEIN: If I understand your question,
13 Justice Souter, this is a situation where there was no
14 objection initially, the lawyer proceeded to adopt a
15 strategy, and then there was a --

16 JUSTICE SOUTER: Well, I -- actually I -- I
17 didn't get into that one way or the other. Let's assume
18 we've got a case in which the client says, no, I -- I
19 don't agree to these concessions. I'm not guilty and I
20 want a defense. As I understood your -- your earlier
21 answer, you said if -- you know, if it is the lawyer's
22 considered judgment that this is the only way to save his
23 life -- he's talked with him, et cetera -- he -- he still
24 may have that option to concede. And I'm taking the --
25 the facts one step further and saying let's assume the --

1 the client goes whole-hog in his objection. And he stands
2 up or -- or says in front of the judge and the jury, I --
3 I'm not conceding any of this.

4 MR. GORNSTEIN: That -- that sounds to me like a
5 case where there ought to be alternative counsel appointed
6 if there has been such a --

7 JUSTICE SOUTER: I -- I would certainly agree if
8 we get to that point. But let's the lawyer does, as you
9 at least left the door open for him to do, and -- and he
10 does proceed to represent the guy. The judge doesn't
11 remove him and the lawyer continues to concede. Do you --
12 do you think that there is any possibility on a Strickland
13 analysis of finding adequacy of counsel?

14 MR. GORNSTEIN: Probably not, Justice Souter,
15 that you would analyze that under Strickland and you would
16 find that that's not the reasonable performance of counsel
17 in that circumstance.

18 JUSTICE SOUTER: I -- I --

19 MR. GORNSTEIN: And so -- but the question here
20 really is what do you do not in a case where there's been
21 an objection, because there was no objection here.

22 JUSTICE KENNEDY: So a substantial component of
23 reasonableness under Strickland is whether or not you
24 follow the client's instructions?

25 MR. GORNSTEIN: It is one factor that reasonable

1 counsel will take into account, but it is not the only
2 factor. In some situations, if you're not following the
3 defendant's instructions, it can lead to such a breakdown
4 in the attorney-client relationship that you couldn't
5 possibly render effective assistance of counsel. So it is
6 going to be a factor in that respect.

7 But this case presents only the question of what
8 happens when there's no objection, and when there's no
9 objection, it makes no sense to say that where there's
10 been consultation, no objection, that instead of allowing
11 the lawyer to exercise his reasonable judgment on what the
12 best thing to do is, he instead has to pursue an
13 alternative reasonable doubt strategy that is less
14 effective. And the Sixth Amendment simply can't be read
15 to require counsel to pursue a less effective strategy
16 that the defendant hasn't asked for.

17 Now, there's no perfect analogy here, but the
18 closest analogy is to the division of responsibilities for
19 appeal where the defendant has the right to say whether he
20 will appeal, but counsel has the right primarily to make
21 the strategic judgments of what arguments will be raised
22 on appeal. So too here, the -- the defendant has the
23 right to decide to stand trial, but client has primary
24 responsibility for making the strategic judgment of what
25 defenses will be raised at that trial.

1 Now, there is -- this is an important question,
2 and therefore there is a duty on the part of counsel to
3 consult with the defendant, but once that consultation has
4 occurred, and there is no objection, and the choice that
5 counsel made is a reasonable, tactical judgment under all
6 the facts and circumstances, his pursuit of that strategy
7 satisfies constitutional standards. There is no
8 requirement of explicit, affirmative consent, and the
9 Florida Supreme Court's judgment should, therefore, be
10 reversed.

11 If the Court has no further questions, thank
12 you.

13 JUSTICE STEVENS: Thank you, Mr. Gornstein.
14 Mr. Tillinghast.

15 ORAL ARGUMENT OF EDWARD H. TILLINGHAST, III
16 ON BEHALF OF THE RESPONDENT

17 MR. TILLINGHAST: Mr. Justice Stevens, and may
18 it please the Court:

19 The issue before the Court today is whether a
20 defense counsel can concede guilt beyond a reasonable
21 doubt in his opening and in his closing statements in the
22 trial, particularly when the defendant is not present. We
23 submit that the answer is no, and there's two reasons that
24 it's no.

25 First, we believe that it's the functional

1 equivalent of a guilty plea as found by the Florida
2 Supreme Court.

3 Second, because the -- what was stated was so
4 clearly an acknowledgement that the State had proven its
5 case, that there was a complete breakdown of the
6 adversarial process and there was no meaningful testing of
7 the State's case.

8 JUSTICE GINSBURG: Mr. Tillinghast, may I go
9 back to something you said? Because I don't want to lose
10 sight of it. You seem to suggest that the defendant's
11 absence from the trial should work in his favor when this
12 was defendant's own choice not to be there. The judge met
13 with him and said I want to make sure you know what you're
14 doing. Right? Why should we count at all in the
15 defendant's favor that he was -- he absented himself from
16 trial any more than we would give a fugitive credit for
17 not being there?

18 MR. TILLINGHAST: Justice Ginsburg, part of the
19 issue here is -- is the lack of consent. Mr. Nixon was
20 not present during the entire guilt phase of the trial.
21 What we would submit is that in this case where there was
22 the hearing in a holding cell -- it was on the record.
23 It's part of the record before Your Honor -- where the
24 judge inquired about Mr. Nixon's willingness to
25 participate in his trial, and he declined to go into the

1 courtroom, that refusal to go into the courtroom, we
2 submit, was a refusal to attend the -- the hearing on the
3 presumption that he was going to have a trial consistent
4 with his guilty plea -- or not guilty plea -- excuse me --
5 the not guilty plea that was entered. What he anticipated
6 was a trial where the State's case was -- was tested and
7 it was consistent with his not guilty plea.

8 JUSTICE SCALIA: But he --

9 JUSTICE KENNEDY: Well, you -- you equate this
10 to a case where the defendant is just accidentally not
11 present. That's -- that's what I got. I -- I had the
12 same problem with your opening two sentences as Justice
13 Ginsburg did. You said if the defendant is absent from
14 the courtroom. Well, in this case, he was absent because
15 he chose to be absent. You're -- you're equating this
16 case to one in which it was as if for some reason they
17 forgot to have him in the courtroom.

18 MR. TILLINGHAST: Well, the -- the important
19 issue here is there was not consent. The lack of his
20 presence in the courtroom compounded that problem, but the
21 important issue here and the issue before the Court is
22 that defense counsel conceded guilt and conceded that the
23 State had proven its case without the consent of his own
24 client.

25 JUSTICE SCALIA: I don't agree with your earlier

1 statement that what -- what this defendant expected was a
2 contested trial in which, you know, the State's evidence
3 is challenged, blah, blah, blah. That's to the contrary.
4 He said this whole thing is -- is just a big railroad job
5 and that's one reason I don't want to be there. Go ahead
6 and do whatever you want. He wasn't -- he wasn't
7 expecting -- in fact, if you're -- if you're talking about
8 is subjective expectations, they would reinforce the
9 lawyer's belief that he had no objection to conceding
10 guilt because he was referring to this as -- as one big
11 railroad job.

12 MR. TILLINGHAST: Well, respectfully, Your
13 Honor, I would -- I would disagree because that what --
14 what we do have from Mr. Nixon is he stated that -- that
15 he had fired his lawyer. He wanted a black lawyer. He
16 wanted a black judge, and that he didn't want to go into
17 the courtroom because he would be railroaded. That was
18 after in the newspaper it had indicated that he had --
19 that his counsel had pled him guilty in his opening
20 statement, and he was clearly objecting to that conduct.

21 JUSTICE SCALIA: I thought he had made those
22 statements about being railroaded before he found out
23 about the lawyer's concession.

24 MR. TILLINGHAST: Actually the -- you're
25 correct, Your Honor.

1 JUSTICE SCALIA: I think that's correct.

2 MR. TILLINGHAST: The -- the railroading
3 statements were before the opening statements. The
4 objection to the newspaper story was after the opening
5 statement.

6 JUSTICE SOUTER: Let me ask you a question just
7 about what you -- what you're assuming when you make the
8 -- the statement -- prefaced the argument to the effect
9 that there was a complete breakdown of -- of the adversary
10 process. You're assuming, I take it, when you say that,
11 that the guilt phase and the penalty phase have got to be
12 regarded as distinct and separate phases.

13 MR. TILLINGHAST: Yes, Your Honor.

14 JUSTICE SOUTER: You're dividing it in half.

15 MR. TILLINGHAST: Yes.

16 JUSTICE SOUTER: Why is that -- why is that
17 legitimate? Why should a lawyer -- I mean, I presume no
18 defense lawyer tailors his -- his guilt phase
19 representation without a thought to what is going to
20 happen at the penalty phase if they get to the penalty
21 phase. And so I -- I have difficulty in saying that there
22 should be some kind of a firewall for analytical purposes
23 between guilt and penalty when -- when we're in a -- a
24 question of Cronin or Strickland.

25 MR. TILLINGHAST: If the Court -- if the Court

1 was to look at the totality and -- as opposed to looking
2 at the guilt phase, what would happen would be that
3 capital cases would have -- would end up having a lower
4 standard than a non-capital case because --

5 JUSTICE SOUTER: Well, they wouldn't end up
6 having lower standards. They -- they would end up having
7 a -- a standard at the guilt phase which takes into
8 consideration what the lawyer is or is not going to be
9 able to do plausibly at -- at the sentencing phase. And
10 you know, those -- those may be very, very difficult
11 questions, but it's hard for me to say that either the
12 standard is different or that a lawyer should -- or that
13 we, in setting down standards, should pretend that a
14 lawyer somehow has to go into a state of oblivion about --
15 about what's going to happen at sentencing if he gets
16 there.

17 MR. TILLINGHAST: The difficulty here is -- is
18 this was the functional equivalent of a guilty plea
19 without consent, and --

20 JUSTICE O'CONNOR: Well, let me ask you this.
21 Do you think that it's possible that in some instances it
22 is a valid strategy to focus on the punishment/sentencing
23 phase rather than the guilt phase if the lawyer has
24 reviewed all the evidence and it appears to the lawyer to
25 be overwhelming? Is it possible that there's a case where

1 a strategy such as this might make sense?

2 MR. TILLINGHAST: Your Honor --

3 JUSTICE O'CONNOR: Is that possible?

4 MR. TILLINGHAST: With -- with statements in the
5 opening --

6 JUSTICE O'CONNOR: Is that possible?

7 MR. TILLINGHAST: Not without the consent of a
8 client with statements like this.

9 JUSTICE O'CONNOR: Well, now you're building in
10 something that I didn't ask. I'm asking you if it is
11 possible that the better strategy for a defendant in a
12 given case would be to focus on the sentencing rather than
13 the guilt phase based on an evaluation by the attorney of
14 the evidence.

15 MR. TILLINGHAST: There could be circumstances.

16 JUSTICE KENNEDY: I don't know why you're so --
17 I thought that the literature was replete with Law Review
18 articles saying that this is the best strategy. Trial
19 judges have told us this is the best strategy. I -- I
20 don't quite understand your hesitation unless it's to
21 build in this -- this factor of consent.

22 MR. TILLINGHAST: Well, it is the --

23 JUSTICE KENNEDY: I -- I thought this -- this
24 was something you'd say, well, of course.

25 MR. TILLINGHAST: It -- it is the factor of the

1 consent. In -- in this case, in the opening statement,
2 the --

3 JUSTICE KENNEDY: Well, but what -- what about
4 the basic question, that as a matter of trial strategy, it
5 is a recognized, acceptable, sometimes prudent, sometimes
6 wise strategy to concentrate on a sentencing phase?

7 MR. TILLINGHAST: In the general sense, yes.

8 JUSTICE SCALIA: And there's no difference
9 between a capital case and a regular case insofar as the
10 intelligence of that strategy is concerned because even
11 when there is not a separate penalty phase, it is
12 sometimes in the interest of the defendant to, in effect,
13 throw himself on the mercy of the sentencer, whether that
14 is the jury or the judge, by -- by not contesting the --
15 the fact that -- that he did the acts charged. That --
16 that occurs not just in capital case but in -- in regular
17 cases.

18 MR. TILLINGHAST: Well, Justice, the -- the
19 distinction here is -- is it -- it wasn't a strategy to
20 not contest the State's case. What it -- what it was was
21 it was a complete concession in opening statement that the
22 State would prove its case beyond a reasonable doubt.

23 JUSTICE GINSBURG: Not entirely because both in
24 the opening and in closing, the lawyer said to the jury,
25 he did it, but I want you to know from my very opening

1 that this case is about life or death, and that's the
2 ultimate decision you will have to make. He said that in
3 his opening and he said it in his closing. It wasn't
4 simply a case of saying, my client did and now the
5 prosecutor is going to go through the motions. He told
6 the jury, what I want you to focus on is the decision
7 you're going to have to make whether, in the counsel's
8 words, to spare his life.

9 MR. TILLINGHAST: Well, Justice Ginsburg, the
10 issue here is that he did that and he went beyond just
11 saying that he did it. He said that the State has proven
12 its case beyond a reasonable doubt for murder and arson,
13 and he did it without consent. That's --

14 JUSTICE GINSBURG: Well, you say without
15 consent. At least as -- the record that we have suggests
16 that the client was told this is what the lawyer planned
17 to do and said nothing.

18 Justice Scalia asked a question when the prior
19 argument was ongoing. When a client doesn't say yes and
20 he doesn't say no, to take the words of a familiar song,
21 mustn't the lawyer then do what he thinks is best to do?
22 Because if he says, okay, I'm going to -- I'm going to
23 require a full-stop trial, I'm going to cross examine
24 every witness, he may be damaging his client. The client
25 didn't tell him not to do that any more than he told him

1 to do it. So mustn't the lawyer in that situation
2 exercise his best judgment?

3 MR. TILLINGHAST: I would submit that in this
4 case, because that it is the functional equivalent of a
5 guilty plea, and as this Court has held under Boykin and
6 under Brookhart that you must have voluntary and willing
7 and knowing consent --

8 JUSTICE O'CONNOR: Well, what if we think that's
9 not correct, that it is not the equivalent of a guilty
10 plea? There was some cross examination. There was some
11 participation. So if we don't accept your statement that
12 it is the functional equivalent, then what standard do we
13 employ for the tacit consent or the failure to
14 affirmatively respond?

15 MR. TILLINGHAST: Well, Justice O'Connor, if --
16 if you're -- if the Court was to view it as not the
17 functional equivalent, as you've suggested, you could
18 affirm based upon the nature of the statements and finding
19 that there was a complete failure under Cronin.

20 And -- and with respect to the trial, there were
21 -- there were 35 witnesses called by the State. There
22 were five what I would submit were perfunctory questions
23 asked on cross.

24 JUSTICE O'CONNOR: Well, you said we could
25 affirm if we applied Cronin, but I thought the issue was

1 we're talking about what a judge can do. Here we're not.
2 We're talking about what a lawyer can do and when it
3 arises to the level of improper lack of counsel. So I
4 don't think they govern it.

5 Rather, I thought -- and I want your view on
6 this -- that the most relevant case was really Roe v.
7 Flores, you know, where -- where the lawyer did a weird
8 thing. He didn't file an appeal. And here he's doing a
9 little odd thing. So what we said there is you have to
10 consult, which is just what the Government is saying here.
11 I'm exposing that thought process to you to get your
12 reaction.

13 MR. TILLINGHAST: I -- I think, first, under --
14 under Jones v. Barnes, it's been held by this Court that
15 there are three fundamental things that only the client
16 can do, one of which is to plead guilty. And in -- in the
17 Roe case, the -- the record below was -- was unclear as to
18 what happened as to whether there was a duty for the
19 attorney to file an appeal and what the conversations were
20 or were not with -- with the defendant.

21 But we would submit that -- that a guilty plea
22 is something very special because that it goes to the
23 heart of the case.

24 JUSTICE BREYER: This is not a guilty plea and
25 the words -- a guilty plea is something accepted by a

1 judge and the judge didn't. But I grant you it's a very
2 odd situation and very special, and that's why I wonder
3 what the appropriate way to -- what kind of requirement
4 there ought to be. Maybe there should be something. I'm
5 not sure why it should rise above the level of
6 consultation since you know, better than I, you can have
7 some awfully difficult clients who are virtually incapable
8 of understanding what's in their interests. And -- and
9 that's why I'm awfully reluctant to go beyond saying you
10 have to consult with your client. You start insisting on
11 an answer, and you don't know what they're going to say.

12 MR. TILLINGHAST: Well, the -- the lawyer here
13 did have alternatives. He -- he could have put the State
14 to its burden and consistent with the not guilty plea that
15 was entered in the case. Or as an alternative, there
16 could have been an inquiry on the record of -- by the
17 judge with the lawyers of Mr. Nixon to determine whether
18 or not he was consenting to this -- this sort of -- the
19 opening statements and the closing statements, which --
20 which were extraordinary, particularly the closing
21 statement because -- and in the closing statement, he
22 specifically said that the State did prove beyond a
23 reasonable doubt that each and every element of the crimes
24 charged, first degree, premeditated murder, kidnapping,
25 robbery, and arson, had been proven, which is truly

1 extraordinary. Here is a situation where the lawyer who
2 is the only person in the courtroom, because Mr. Nixon was
3 tried in absentia, who -- the only person in the courtroom
4 who was there as the trusted advisor and counselor for Mr.
5 Nixon, stands up in front of the jury in the opening and
6 the closing and concedes guilt beyond a reasonable doubt.
7 I would submit that upon doing that, the -- the whole
8 adversarial process breaks down because it --

9 JUSTICE GINSBURG: Why? When -- when his object
10 is to spare this person's life. He knows the evidence is
11 very strong. He wants, to the extent that he can,
12 insulate the penalty phase from all that damning evidence
13 that's coming out at the trial. So he wants the evidence
14 to come out at the trial, but he doesn't want to be in a
15 situation where the jury has heard the defendant resist
16 the determination that he did it and then have to plead
17 for his life after.

18 MR. TILLINGHAST: The difficulty, again -- it
19 comes back to the lack of consent. Had he had consent, it
20 would be different.

21 JUSTICE GINSBURG: Well, my problem -- and I --
22 I'm not sure I understand your answer to it. In this
23 case, in fact the client didn't say yes and he didn't say
24 no. So if the -- if the lawyer is to assume, well, then
25 since I don't have a positive, explicit yes, I will assume

1 the answer is no, even though that is against the lawyer's
2 best interest -- the -- the lawyer's best judgment, why is
3 he an effective counsel if he assumes the answer is no?

4 MR. TILLINGHAST: In -- in -- particularly in a
5 capital case, what this Court and all courts would --
6 would want is a reliable record where there had been
7 testing. When you have a situation where Mr. Nixon, as
8 here, said nothing, so the -- so Mr. Corin didn't know
9 whether there was consent or lack of consent, we would
10 submit that what should have happened is, as I said --
11 suggested before, he shouldn't have -- he could have not
12 contested certain things, but the admission on the -- what
13 I submit is an admission and a plea of guilty without
14 consent was where the problem was. He could have gone
15 on --

16 JUSTICE SCALIA: Well, that -- but that's not a
17 problem. According to the lower courts, that was a good
18 strategy. I don't know why you want counsel, when -- when
19 the client doesn't answer, to say, gee, I -- you know, I
20 don't know whether he has approved or disapproved, I'm
21 going to have to take the course that will probably get
22 him executed because I -- I haven't received an answer.
23 Why would you force that course on the -- on the lawyer?
24 If the lawyer believes that the silence implies consent,
25 as -- as silence usually does, why not let the lawyer do

1 what's in the client's best interest?

2 MR. TILLINGHAST: He had the alternative of --
3 of having an inquiry with Mr. Nixon, with the court
4 determine whether or not --

5 JUSTICE SCALIA: And Nixon -- okay. You have
6 the inquiry and Nixon just stands there, the same, doesn't
7 say a thing, assuming you could get him into the
8 courtroom, you know, assuming he had put his clothes on so
9 you could bring him into the courtroom. He just -- he
10 just sits there.

11 MR. TILLINGHAST: Well --

12 JUSTICE SCALIA: And -- and you say, well, since
13 we don't have an answer, we have to take the course that's
14 going to get this guy executed. That doesn't seem to me
15 to make much sense.

16 MR. TILLINGHAST: I would respectfully submit
17 that given the nature of the opening and closing, the
18 words that were used, in -- in that kind of a extreme
19 situation, that is a decision that the client should make.
20 This is not a decision that is a normal strategy decision
21 that a lawyer would normally make, such as which witnesses
22 to -- to call, aside from the defendant himself, the order
23 of the witnesses, and -- and types of cross examination.
24 This is a very --

25 JUSTICE SOUTER: No. No, but I don't think

1 years ago that was conducted by Clarence Darrow? If
2 you're not, I won't push you on it.

3 MR. TILLINGHAST: Unfortunately, I'm not, Your
4 Honor.

5 JUSTICE STEVENS: Because he -- he applied
6 exactly this strategy and it was one of his great
7 victories. In -- in fact, it's a long, long time ago.
8 But that was the way Clarence Darrow sized up this very
9 problem, and the -- and I think in that case they were
10 very young clients that he had. They didn't -- they were
11 not -- they did not expressly consent to what he did. But
12 he saved their lives.

13 MR. TILLINGHAST: Well, if -- besides the --
14 what we believe was a fundamental -- what was a complete
15 failure -- excuse me. Aside from the guilty plea, what we
16 submit is a guilty plea, we believe that when these kinds
17 of statements were made, Your Honor, without the consent,
18 that the advocacy system that was envisioned in Cronin
19 completely failed.

20 JUSTICE GINSBURG: May I ask you a question that
21 I asked the other side? And that is, if we don't accept
22 your argument, if we think when the client is silent, the
23 lawyer must exercise his best judgment and not assume that
24 the client would give an answer that would jeopardize the
25 client's position, if that's the position that this Court

1 adopts, what would you say is left over for remand? Is it
2 simply that the Florida Supreme Court then takes the
3 record as it is and determines under Strickland whether
4 there was effective -- ineffective performance?

5 MR. TILLINGHAST: The -- yes, Your Honor.

6 JUSTICE GINSBURG: That would be -- that would
7 be all.

8 So what do we do with, in the brief, all this
9 information about things that the lawyer should have done
10 by way of cross examination? That wasn't put in the
11 record earlier --

12 MR. TILLINGHAST: When I say yes, the -- what
13 would -- what would be left is an entire hearing on the --
14 on the Strickland claims and the motion to vacate. That
15 -- that would be the remaining part of the case --

16 JUSTICE SOUTER: Why -- why do we need a hearing
17 rather than an examination of the record? Tell me why.

18 MR. TILLINGHAST: Because the -- the hearings
19 below, when it was sent back down by the Florida Supreme
20 Court, were only on the issue of whether or not there was
21 consent to -- to the -- what the Florida Supreme Court
22 deemed to be the functional equivalent of a guilty plea.
23 There was not a hearing on the balance of the issues, and
24 it was strictly limited to that.

25 JUSTICE SCALIA: Hadn't there been a hearing on

1 those issues on the way up?

2 MR. TILLINGHAST: No.

3 JUSTICE SCALIA: No?

4 MR. TILLINGHAST: No.

5 JUSTICE SCALIA: Wasn't --

6 MR. TILLINGHAST: It was actually denied by

7 Judge Hall. So the only thing that's -- that's occurred

8 is the hearing strictly on whether or not there was -- was

9 consent.

10 JUSTICE GINSBURG: Why was it denied in the

11 trial court? Why was the introduction of what the lawyer

12 might have done --

13 MR. TILLINGHAST: It was -- it was because of

14 the focus of the Florida Supreme Court on -- on whether or

15 not there was a consent.

16 JUSTICE SCALIA: No. We're talking below.

17 JUSTICE SOUTER: No. We're talking about the

18 trial court.

19 JUSTICE SCALIA: We're talking below on the way

20 up to the Florida Supreme Court. I assume that -- that he

21 raised below the issue of inadequate performance of

22 counsel and he had his opportunity to introduce whatever

23 evidence he had on that subject on the way up to the

24 Florida Supreme Court.

25 MR. TILLINGHAST: He --

1 JUSTICE SCALIA: I don't know why the Florida
2 Supreme Court should be obliged to remand it in order to
3 give him a second bite at the apple.

4 MR. TILLINGHAST: It was raised but -- but he
5 was not given an opportunity for a hearing on that.

6 JUSTICE SOUTER: Well, was he denied the
7 opportunity?

8 MR. TILLINGHAST: Yes.

9 JUSTICE SOUTER: Did the -- did the judge say,
10 look, we're -- we're going to confine it strictly to this
11 one issue?

12 MR. TILLINGHAST: Yes.

13 JUSTICE SOUTER: Okay.

14 MR. TILLINGHAST: So, in conclusion, Your
15 Honors, we submit that there are two -- two approaches to
16 affirming the Florida Supreme Court. First is -- is that
17 it was the functional equivalent of a guilty plea without
18 consent. The second is that because of the nature of the
19 statements, it was a complete failure of the advocacy
20 process where the State's case was not tested in any way.
21 In fact, as I mentioned, there were 35 witnesses. There
22 were five very perfunctory questions asked such as what
23 date was it and when did certain things occur. There was
24 not the material testing of the record to determine the
25 truth, which is what is -- is involved in the Sixth

1 Amendment.

2 And none of -- none of the challenges, that are
3 pointed out in -- to the facts in our brief ever came out
4 because that there was no testing. Simply we have an
5 opening statement where counsel says the State will prove
6 beyond a reasonable doubt that these events occurred.
7 Then we have virtually no cross examination. We have no
8 witnesses called by the State -- excuse me -- by -- by the
9 defendant throughout the entire guilt phase of the trial.
10 And in fact, at one point, the -- the trial judge stopped
11 asking -- asking Mr. Corin if he wished to cross examine.

12 And then we have the closing statement where Mr.
13 Corin stated that the State has proven beyond a reasonable
14 doubt that -- that he is -- Mr. Nixon was guilty of the
15 crimes.

16 And all the while during that guilt phase, Mr.
17 Nixon was not present in the courtroom. So he had no
18 ability to object to the opening or the closing statements
19 because he wasn't here -- there to hear them.

20 And further, as -- as the record indicates,
21 there are issues of -- of Mr. Nixon's competency, that
22 he's mentally retarded. His own lawyer referred to him as
23 nuts. His own lawyer also referred to him as an ogre in
24 his closing argument. These are the types of statements,
25 we would submit, are -- even if they are not the

1 functional equivalent of a guilty plea without consent,
2 they -- they substantially and completely destroy the
3 advocacy process. So there is no testing, and under
4 Cronin, the Court should affirm also.

5 Thank you.

6 JUSTICE STEVENS: Thank you, Mr. Tillinghast.

7 Mr. Lemieux, you have about 4 minutes left.

8 REBUTTAL ARGUMENT OF GEORGE S. LEMIEUX

9 ON BEHALF OF THE PETITIONER

10 MR. LEMIEUX: Thank you, Justice Stevens.

11 I'd like to point this Court to page 486 of the
12 joint appendix where Mr. Corin is asked, do you feel in
13 this case that you were put in a position that you had to
14 make decisions because your client did nothing? And he
15 said, yes, sir. There is ample evidence in the post-
16 trial proceedings that Mr. Corin wanted the help of his
17 client. He did not want to be on the bridge of the ship
18 alone, but Mr. Nixon abandoned the ship. And although he
19 consulted with his client at least three times on this
20 trial strategy, there was no input back that would have
21 given him any reason to believe that Mr. Nixon did not
22 want him to go forward to pursue a strategy that Mr.
23 Corin, in his experience of 14 years as a lawyer, after
24 having taken 52 depositions in this case, believed was in
25 the best interest of his client.

1 I just have a couple of points I'd like to make.
2 There was a question that was asked about whether or not
3 the -- the guilt phase and the penalty phase are distinct
4 parts of a trial. This Court has addressed that in the
5 Monj v. California case when it said that it's really one
6 trial and that issues of guilt and innocence are often, in
7 a capital trial, still being determined in the penalty
8 phase of that matter.

9 I'd also like to mention the point that the
10 counsel made about Cronin. Counsel would ask, as the
11 Florida Supreme Court did, to apply Cronin to this
12 situation. There is a harmony that exists in this
13 jurisprudence between Strickland and Cronin. Issues of
14 trial performance and trial strategy are articulated and
15 evaluated under Strickland's two-part standard. Questions
16 of structural defects that infect the process with error
17 are evaluated under Cronin. And that harmony works in the
18 system. It allows for the independence and vitality of
19 counsel to pursue strategies in their clients' best
20 interests and it also allows when there are structural
21 defects, for them to be taken care of with the
22 presumption.

23 JUSTICE SCALIA: Are you going to get to the
24 point of whether there was, indeed, an opportunity for
25 this defendant to introduce evidence about inadequate

1 performance of counsel?

2 MR. LEMIEUX: Yes, I am, Your Honor, and I'll
3 get to that right now. There was ample opportunity.
4 There were three hearings. And in fact, there was
5 disagreement between the sides as to whether or not there
6 was this opportunity for a Strickland hearing. We don't
7 have Strickland hearings --

8 JUSTICE SOUTER: What -- what did the judge --
9 what did judge say? Your brother said the judge said, no,
10 I won't hear this.

11 MR. LEMIEUX: Your Honor, I would point the
12 Court to pages 385 to 390 of the appendix where Judge
13 Smith denies the Strickland claim.

14 The defense has the burden of proving
15 ineffective assistance of counsel. During the first
16 hearing, there was an issue as to whether or not it was an
17 ineffective counsel hearing because it was still on direct
18 appeal. But certainly in hearings two and three, there
19 was ample opportunity to put that evidence on the record,
20 and they didn't take that opportunity. Now, they quibbled
21 and said they didn't have notice and they didn't know that
22 they were supposed to be here for a Strickland hearing.
23 We disagree with that because there aren't Strickland
24 hearings, there are not Cronin hearings.

25 JUSTICE STEVENS: Why should -- why should they

1 put in Strickland evidence if they've won under Cronic?

2 MR. LEMIEUX: Well, they had not yet won under

3 Cronic, Your Honor. They were still making those

4 arguments.

5 JUSTICE STEVENS: I thought it was remanded for

6 an issue -- for a hearing on the consent issue after --

7 MR. LEMIEUX: This is -- there was a hearing

8 before that and a hearing after that.

9 JUSTICE STEVENS: I see.

10 MR. LEMIEUX: In conclusion, Your Honor, we

11 believe that the harmony between these two lines of cases

12 works, that the Florida Supreme Court got it wrong, and

13 for that reason, we would request reversal.

14 Thank you.

15 JUSTICE STEVENS: Thank you.

16 The case is submitted.

17 (Whereupon, at 10:58 a.m., the case in the

18 above-entitled matter was submitted.)

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