IN THE SUPREME COURT OF THE UNITED STATES

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RICKY BELL, WARDEN, :

Petitioner :

v. : No. 01-400

GARY BRADFORD CONE. :

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Washington, D.C.

Monday, March 25, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MICHAEL E. MOORE, ESQ., Solicitor General, Nashville, Tennessee; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

ROBERT L. HUTTON, ESQ., Memphis, Tennessee; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 01-400, Ricky Bell v. Gary Bradford Cone.

Mr. -- Mr. Moore.

ORAL ARGUMENT OF MICHAEL E. MOORE

ON BEHALF OF THE PETITIONER

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

The court of appeals was without authority to grant habeas relief under 28 U.S.C. 2254(d)(1) on respondent's ineffective assistance of counsel claim for two reasons: first, because the State court decision rejecting the claim correctly identified this Court's decision in Strickland v. Washington as the clearly established Federal law governing this case, not United States v. Cronic as respondent contends; and second, because the State court's application of Strickland to the facts of respondent's case was not objectively unreasonable.

Turning to the first point, respondent's ineffective assistance claim from the outset of this case has asserted two specific errors that his attorney allegedly committed during the sentencing phase of his capital trial: first, counsel's alleged failure to

present available mitigating evidence; and second, his counsel's decision to waive closing argument.

This Court held in Strickland that such claims are properly analyzed under the two-part actual deficient performance/actual prejudice test announced in that case itself.

QUESTION: Mr. Moore, I think what happened in this sentencing proceeding, if I remember correctly, is that the attorney made some remarks at the beginning of the sentencing hearing?

MR. MOORE: Yes, Your Honor. He delivered an opening statement, during which he specifically called the jury's attention, as he is permitted to do under Tennessee State law, to guilt phase evidence, mental health evidence, upon which he was relying in mitigation. He explained to the jury its mitigating significance by relating that evidence specifically to three statutory mitigating factors.

In addition, during that opening statement, he emphasized his client's remorse for his role in the crimes. He emphasized his client's honorable service for his country.

QUESTION: Did he explain that he wouldn't be presenting any evidence or saying anything more?

MR. MOORE: He -- he did not indicate one way or

the other in that statement, but he specifically --

QUESTION: Now, would you be here -- would you still be here if he had not said anything at the opening? Then what rule applies? Suppose the defense attorney just totally remained silent in the sentencing phase. Would Cronic be the test?

MR. MOORE: No, Your Honor.

QUESTION: No?

MR. MOORE: It is our -- it is our position that if the claim focuses on counsel's conduct during the trial and it is not alleged that any errors or omissions he made were the result of State interference or so-called surrounding circumstances, then such a claim is properly analyzed under Strickland's two-part test.

QUESTION: The attorney here did successfully object to the presentation of some evidence during the sentencing phase, didn't he?

MR. MOORE: Yes, indeed, Your Honor, he did. He vigorously objected and -- to the admission of some very gruesome crime scene photographs that the prosecution sought to introduce to establish the heinous, atrocious, and cruel aggravating circumstance, and he succeeded in excluding that testimony. In addition, he -- he objected to some hearsay evidence. And so, the -- the Sixth Circuit's suggestion that counsel simply sat mute at the

sentencing hearing simply is belied by this record.

QUESTION: Just to go back to Justice O'Connor's question, suppose the attorney says nothing and later says, you know, I was just -- I don't know -- stressed out, traumatized. I -- I really blanked out during that proceeding. No Cronic there?

And -- and do you say Cronic doesn't apply because he did participate in the earlier phase of the case and you don't want us to bifurcate guilt phase and sentencing? Was -- was that the basis of your answer?

MR. MOORE: No, Your Honor.

QUESTION: It's a two-part question.

MR. MOORE: No, Your Honor. Our position is that if the ineffective assistance claim asserts that the lawyer, for whatever reason, failed to do something or did something in error, that -- those kinds of claims are properly analyzed under Strickland, and we think that's a fair reading of Strickland. Strickland itself says conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to the general requirement that the defendant affirmatively prove prejudice.

QUESTION: When does Cronic apply?

MR. MOORE: Cronic in our view is properly read to apply only when surrounding circumstances or State

interference renders it unlikely that any lawyer could have rendered effective assistance of counsel. Of course, Cronic itself --

QUESTION: Well, in my -- in my hypothetical, he said I just blanked out for a minute.

MR. MOORE: But that circumstance is the lawyer's own problem. For our -- for analytical purposes in our view, it shouldn't matter whether counsel's failure, for example, to make a critical objection or to do something he should have done was the result of his being asleep or his working a crossword puzzle or his ignorance of the law. What ought to matter is whether his conduct, what he did or failed to do, violated prevailing professional norms. If -- if it did, that's deficient performance, and then the Court under Strickland examines the record to ascertain whether that error --

QUESTION: Do we take it as a given in this case that the attorney did provide -- that there was ineffective assistance at sentencing? Do we take that as a -- a given?

MR. MOORE: No, Your Honor. No, Your Honor. Our petition challenges the correctness of the court of -- of appeals decision under section 2254(d)(1), and that involves our argument that the State court's application of Strickland to the facts of this case was not

unreasonable.

The actual ineffectiveness claims Mr. Hutton's client raises are twofold. He complains that available mitigating evidence was not presented, but the record simply does not support that claim. Counsel was under no obligation to reintroduce the mental health evidence that had been introduced during the guilt phase because Tennessee State law specifically allows counsel to rely on guilt phase evidence. As I earlier indicated, counsel specifically explained the mitigating significance of that evidence to the jury during his opening statement and related it to three specific statutory mitigating circumstances.

QUESTION: This is not the first time in one of these cases I've been surprised at how skimpy the presentation is at -- by the defense counsel on sentencing. Maybe there's some dynamic in the courtroom: the jury knows how important it is; he doesn't want to destroy a -- a certain intensity that they're bringing to their case. But on the cold record, it certainly seems skimpy.

MR. MOORE: Well --

QUESTION: I'm tempted to ask you if this is usual, but that -- that's probably not a fair question as there are so many differences in so many cases.

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

Respondent's complaint that counsel --

QUESTION: Mr. -- Mr. Moore, may I ask you? On that -- on that branch of it, it seems to me that there was, the prosecutor's presentation to the jury was about a match for the defense attorney's. Neither one -- both of them were skimpy.

MR. MOORE: Yes, Your Honor. And that is -- that point is critical to our assertion that counsel's decision to waive closing argument was not deficient performance.

QUESTION: But I had another question that I wanted to ask you, and that was you presented two questions. One is that the Sixth Circuit never should have reached the merits, and two, on the merits they were wrong.

MR. MOORE: Yes, Your Honor.

QUESTION: As a matter -- and the Sixth Circuit proceeded just the other way. It decided the merits first and then it -- it said it was clearly established. Are you asking this Court or don't you care what -- what order we take these up in, or do you have a preference?

MR. MOORE: Well, it's our -- it's our position, Your Honor, that it is not the function of this Court under 2254(d) to reach -- to actually address the merits

as if it were deciding this claim de novo. The only question to be resolved here is whether the State court's rejection of the claim was either contrary to or involved an unreasonable application of clearly established law.

We would suggest that the Williams v. Taylor opinion provides the blueprint for the decision here. The first question is did the State court correctly identify the governing legal principle.

QUESTION: Don't you think it would be a little coy for us to decide, well, it wasn't an unreasonable application of -- of Federal law when we, in fact, know that -- or believe that it was a correct application of Federal law? Do you insist that we simply say -- and go no further than to say, oh, it was -- it was not an unreasonable application?

MR. MOORE: I certainly would not begrudge the Court's agreeing that the State court had indeed correctly applied Strickland. But it -- it is my assertion that under 2254 the language of the statute contemplates that the Federal court -- court approach the case by looking at the bottom line decision of the State court and ascertaining whether it is reasonable.

QUESTION: Indeed, if we could go no further than -- than the coy statement that it was not an unreasonable application, I suppose you shouldn't have had

two questions. You should have just had one.

MR. MOORE: That's correct, Your Honor. I think that's right.

On the decision to waive closing argument --

QUESTION: Mr. Moore, let -- let me interrupt you. How -- how -- does the record show how long the penalty phase of the trial took?

MR. MOORE: Yes, Your Honor. The record reflects that opening statements started at approximately 12:07 p.m. and that the jury retired to deliberate at about 3:05 p.m., and there was about an hour-and-ten-minute break for lunch in there. And they announced their verdict somewhere along about a quarter of four.

QUESTION: Thank you.

MR. MOORE: And so, indeed, counsel could have reasonably believed that all of the points he had made during his opening statement, his plea for mercy, his emphasis on his client's remorse, and the mitigating significance of the guilt phase evidence, were fresh in the jury's mind when the jury retired to deliberate because that --

QUESTION: What did he -- what did he say about the Bronze Star?

MR. MOORE: During his opening statement, he did not specifically mention the Bronze Star because that

evidence was not elicited until his cross-examination of one of the witnesses during the sentencing phase. He did, however, emphasize during his opening statement his client's service in Vietnam and the toll that service had taken on his client and his mental health status.

QUESTION: So, your answer is he didn't mention it in his argument.

MR. MOORE: He did not mention the Bronze Star.

Now, counsel's complaint that the Bronze Star had some mitigating significance beyond the fact of its award is simply not supported by the record. No evidence was presented to the State post-conviction court that the Bronze Star, other than the fact of its award and the fact that of -- that it indicated Mr. Cone had been decorated -- no evidence elaborating on that was ever presented to the State courts.

Similarly, no evidence concerning Mr. Cone's family background, social history, military record, educational record, none of the evidence that Mr. Hutton complains was not presented during the sentencing phase was ever presented to the State courts during the post-conviction hearing.

Accordingly, under this Court's decision in Burger v. Kemp, we say that the State courts reasonably concluded that there was no deficient performance in -- in

that regard in this case because no record was ever made in the State court concerning what the allegedly available mitigating evidence might have been. No testimony was introduced indicating what these witnesses who allegedly had knowledge concerning these matters would have said had they been called at the sentencing.

QUESTION: But am I right that such evidence was introduced in the Federal court?

MR. MOORE: No, Your Honor. This case was resolved on summary judgment, and so none of -- none of that evidence --

QUESTION: Were allegations that such evidence was available made in the Federal proceeding?

MR. MOORE: The allegation that it was available was made in the Federal proceeding, but there was no evidentiary --

QUESTION: And was that allegation denied?

MR. MOORE: Yes.

QUESTION: Yes.

MR. MOORE: Well, I don't know that it was denied. Our -- our point in the Federal court was that no mitigating evidence was presented to the State court, and so therefore --

QUESTION: But if we're not deciding the case on the basis of what that evidence would prove or disprove,

but rather on whether counsel was deficient in failing to introduce it, should we not assume the evidence exists?

MR. MOORE: No, Your Honor.

QUESTION: We should not?

MR. MOORE: No, Your Honor. If -- if --

QUESTION: Why not?

MR. MOORE: Because the burden rests with the petitioner, the habeas petitioner, to demonstrate its existence. If -- if the State court -- if it was never presented to the State court, there is no basis for assuming it exists.

QUESTION: What -- what was the -- what was the case you just cited to us for that proposition?

MR. MOORE: Burger v. Kemp. In that case, Your Honor, just as here, the complaint was that counsel was deficient for failing to put on any mitigating evidence, and in a couple of particulars, this Court noted that counsel had failed to make a record in the State courts concerning whether the -- the allegedly omitted evidence would have had any substantial mitigating impact. And in that circumstance, this Court said that it could not find deficient performance, let alone prejudice.

QUESTION: Mr. Moore, are you done with that point?

MR. MOORE: Yes, sir.

QUESTION: It isn't stated in your brief, but I assume that it's -- it's the Tennessee rule that if -- if the defense doesn't make a closing -- a closing statement, the prosecution doesn't either. Is that it?

MR. MOORE: That's right, and that was the -- the State court found, based on the evidence --

QUESTION: Right.

MR. MOORE: -- presented to it during the post-conviction hearing that counsel made a tactical decision to waive in -- in order to prevent the senior prosecutor from delivering what he --

QUESTION: The fearsome Mr. Strother. Could -- could we get him to argue a case up here?

(Laughter.)

MR. MOORE: I am not -- I am not acquainted with General Strother, so I'm not sure, Your Honor.

QUESTION: But I gather that this isn't the only occasion on which defense counsel have eschewed the making of closing argument for fear that Mr. Strother would be enabled to unleash his -- his weaponry.

(Laughter.)

MR. MOORE: That's correct, Your Honor. In fact, one of respondent's own experts at the State post-conviction hearing stated that he had waived closing argument as a defense counsel for precisely the same

reason, to -- to prevent Mr. Strother from delivering what was typically a killing rebuttal argument. And he pronounced that this was a -- clearly a viable trial tactic.

In -- in addition, both he and another expert were asked point blank whether waiver of closing in -- in these circumstances with these advocates amounted to essentially a -- a breach of prevailing professional norms. And both refused to say whether it would or wouldn't.

Indeed, we think that that testimony is absolutely critical, because surely if the only witnesses who are actually qualified as experts and competent to testify whether a particular decision of counsel breached prevailing -- prevailing professional norms are unwilling to state that they -- that there has been a breach, surely a State court does not act unreasonably in concluding that the defendant has failed to overcome Strickland's strong presumption that all significant decisions of counsel are made in -- in the exercise of reasonable professional judgment.

QUESTION: Can we go back to the Bronze Star? It certainly did come out in the sentencing phase. How did it?

MR. MOORE: Yes, Your Honor. During the

testimony of the criminal court clerk, who had been called by the State merely to establish the prior violent felonies, respondent's three convictions for armed robbery in Oklahoma, during that -- during Mr. Dice's cross examination, defense counsel's cross examination, of the criminal court clerk, he had the criminal court clerk read from, I believe it was, Mr. Cone's sentencing records or prison records from -- prison classification records from Oklahoma, the fact that Mr. Cone had been awarded a Bronze Star in Vietnam. That's how that evidence came into being. Indeed, it was the result of cross examination by defense counsel during the sentencing phase of this trial.

QUESTION: Do we have any evidence to indicate whether Mr. Dice would have put on evidence showing the Bronze Star if he had not been able to bring it out in cross examination?

MR. MOORE: The record simply doesn't reflect whether or not that would have been the case. Mr. Dice testified that he viewed that as an opening that he had and that he -- he was actually quite pleased with himself, if Your Honor will read his testimony about his ability to get that accomplished without presenting direct evidence on it.

QUESTION: Do you think he was entitled to be pleased with himself for the way he got that in the

record?

MR. MOORE: Your Honor, I --

QUESTION: Is that the way you would have done it if you had been the lawyer?

MR. MOORE: I'm not certain that -- that hearsay evidence in a prison record is the best evidence of that fact. We don't really know anything about the Bronze Star other than it is mentioned in this prison record. We don't know if there is a --

QUESTION: And that's all the jury found out about it, too.

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

QUESTION: And we know nothing more about it now? Nothing came out in the Tennessee proceedings --

MR. MOORE: No, Your Honor, and -- and --

QUESTION: -- about the circumstances?

MR. MOORE: -- respondent introduced no evidence before the State courts concerning why the -- the Bronze Star was awarded, anything about the circumstances of its award.

QUESTION: Was it -- were there any problems in his service record? He served in Germany and Vietnam.

MR. MOORE: Not insofar as this record reflects, Your Honor, no.

QUESTION: And did the lawyer put in any

evidence about his -- what kind of a person he was before he went to Vietnam?

MR. MOORE: During sentencing? No. There was no evidence concerning his background or character at all, but we don't know what such evidence would have been, because none was presented to the State court during the post-conviction proceeding.

QUESTION: Thank you, Mr. Moore.

MR. MOORE: Thank you, Your Honor.

QUESTION: Ms. Blatt, we'll hear from you.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

The United States has addressed the second question presented, which is whether a defendant must show prejudice to establish a claim of ineffective assistance.

Strickland holds that to establish such a claim, counsel's performance must be both deficient and prejudicial. Respondent's claims fall within Strickland because he alleges that counsel was deficient in failing to present mitigating evidence --

QUESTION: Well, do you want us to assume then that the performance was deficient and then address the

prejudice prong?

MS. BLATT: No. I think the -- when the Court addresses the section 2254, the threshold question, if the Court uses Williams v. Taylor as a road map, is whether Strickland is the clearly established law. And it is the clearly established law because this claim is an ineffective assistance of counsel claim.

Now, if the Court determines that Strickland is the correct decision and that the State court correctly identified that decision, then the remaining question is whether the State courts unreasonably applied Strickland on the facts of this case.

QUESTION: So, you don't get to question 2 at all, then.

MS. BLATT: You get to -- you can -- you get to question 2 if, in determining that Strickland and not Cronic is the clearly established law, this Court holds that Cronic does not apply when the claim is an actual ineffective assistance claim. And that is because Strickland squarely governs claims alleging deficiencies in attorney performance and that's -- that's what this case is.

Cronic did make an observation that prejudice may be presumed when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. But

that's not this case. Counsel put on a meaningful case for life and he did it in his opening statement. He had already introduced the substantial mitigation evidence during the sentencing proceeding and the State court procedures expressly allowed the jury to consider that evidence in its sentencing deliberations in determining whether to impose the death sentence.

Now, to take a claim of ineffective assistance and just to presume prejudice under Cronic would be inconsistent with what the Court said in Strickland, and that is, absent a showing of prejudice, it cannot be said that a verdict of a death sentence resulted from an adversarial breakdown that renders the death sentence unreliable.

The Court also said --

QUESTION: What -- what if the defense counsel presented nothing at all at the sentencing phase, do you think that there is potential for application of Cronic in those circumstances?

MS. BLATT: Yes, Justice O'Connor. We think Cronic is --

QUESTION: So, you differ from Mr. Moore in that regard.

MS. BLATT: We do but our difference is very narrow. We think Cronic refers to an extreme situation

where counsel provides absolutely no assistance at trial and, in effect, the defendant has been denied the assistance of counsel under Gideon v. Wainwright because essentially the defendant lacked counsel. And that's a very rare situation and exceedingly narrow.

QUESTION: Why divide trial into, you know, the one phase and then the -- the mitigation phase? It's all part of the same trial. Couldn't you likewise divide it into the -- the direct examination phase and the cross examination phase and say that he totally failed to do his job in the cross examination phase? I mean, you -- you know, you can cut up a -- a trial into as many little pieces as you want --

MS. BLATT: Right, and --

QUESTION: -- and say counsel utterly failed to -- to litigate this particular piece.

MS. BLATT: We couldn't agree with you more. To do that would just swallow the rule in Strickland and would be inconsistent with the idea that counsel could reasonably omit to cross examine a witness or fail to produce evidence.

QUESTION: What justification do you have for -- for separating out the mitigation phase from the other, especially when some of the evidence that went to mitigation was presented during -- during the direct

phase?

MS. BLATT: Right. And -- and the prosecution may have a reasonable argument in many cases that counsel did not entirely fail to provide assistance. We just don't take issue with the idea that when Cronic spoke of a situation of counsel entirely failing to -- to provide assistance, that the presumption of prejudice would be assumed. But I think in -- in many cases, we're talking about the entire trial.

QUESTION: But you're giving up the principle. Once you -- once you allow that you can split it into the -- into the guilt phase and the mitigation phase, it can be split other ways as well, I assume.

MS. BLATT: We don't think so, and --

QUESTION: I mean, why wouldn't it just be here's a counsel who litigated the case properly but he made -- he made a mistake in -- in his litigation? He didn't put on any evidence in the -- in the mitigation phase. You don't want to do it that way. You want to say, no, we can look at -- look at this trial as really two separate trials, and because he did nothing in the -- in the mitigation phase, it is not a situation of -- of inadequate counsel, it's a -- it's a situation of no counsel. I -- once you've given up that principle, I don't know why we don't split it up other ways as well.

MS. BLATT: We don't think so. In this case, it would -- it -- it reasonably could fall on the Strickland side if there's a State procedure that allows a jury to consider mitigation evidence, but if there is an entire failure to do anything throughout the entire trial, it is exceedingly unlikely that that could be the result of any --

QUESTION: Well, when -- when you say the entire trial, are you talking about the penalty phase or the whole -- the whole trial?

MS. BLATT: We would be talking about a penalty phase although I agree with Justice Scalia that in the unique situation of this case, where there's an express procedure that allows the jury to consider the mitigation evidence, it's critical to look at counsel's performance during the -- the guilt phase of the trial.

But this is not a -- a case where we think there's reasonable dispute about whether this falls under Cronic or Strickland. Counsel --

QUESTION: Excuse me. Is -- is that unique? I mean, if -- if -- is it unique that -- you mean in -- in other States, the jury in the mitigation phase is not allowed to consider evidence that -- that came in during the penalty phase?

MS. BLATT: I don't think that is unique and I'm

sorry if I misspoke.

QUESTION: I don't think it is.

MS. BLATT: I think it's --

QUESTION: Which means the two phases are linked. If -- if it were unique, you -- you might have some basis for saying the mitigation phase is so separate that if he doesn't introduce evidence there, he is absent. It's like not having counsel. But that's not my understanding of what happens in most States. It's one trial.

MS. BLATT: Right, and if you -- if we're just talking -- if you take it out of the capital proceeding so you don't have the split trial, all we're saying is if there's an entire failure, we would think that it would be appropriate to presume prejudice. But we won't -- there's just not that many cases because counsel usually is providing some assistance, and the claim is that the assistance that was provided was ineffective for a number of reasons. And that is this case. The --

QUESTION: Why isn't the line -- is it -- you know, that you can draw a line one place doesn't mean it's sensible to draw it every place. And they are discrete phases, the trial -- and it's not a mitigation stage. It's a sentencing, where aggravating factors come in as well. Is that not so?

MS. BLATT: That's correct.

QUESTION: So, if one can say, yes, I see these are two parts, it doesn't follow from that that I have to then separate every examination and every cross examination. It's a question of where you draw the line.

MS. BLATT: Well, I think that's correct, and however you draw the line, this case falls on the Strickland side of the line because this is not a case where counsel didn't do anything. This is a case where it is just alleged that what -- the two strategic judgments that counsel made were unreasonable.

QUESTION: May I ask? Supposing you had a case -- and I know this is not quite it -- in which there is strong evidence that counsel was mentally disabled and that that made him less effective throughout the entire sentencing hearing. Would you judge that kind of a case under Cronic or Strickland?

MS. BLATT: It would be under Strickland. Usually counsel's --

QUESTION: Even if there was severe mental illness on the part of counsel?.

MS. BLATT: Is counsel's -- things that would go to impair counsel judgments are generally irrelevant unless they manifest themselves -- manifest themselves in objectively unreasonable conduct. And so if -- if counsel

is performing objectively reasonable, that counsel is no different than someone who makes a mistake because --

QUESTION: And you treat the failure to make a closing statement or the failure to put in any evidence whatsoever exactly as if he were a fully qualified lawyer in such a case.

MS. BLATT: That's right. You'd look at whether it's objectively reasonable, and that would be whether counsel is inexperienced or had some substance abuse problem. Those cases are -- are all governed under Strickland.

And continuing why it would be inappropriate to -- to apply Cronic as opposed to Strickland to claims of attorney errors, I just want to make one last point, and that is that a test that would sort of say, well, if counsel's performance was just not meaningful enough, that this would be judicially unmanageable and would lack any of the policy justifications for presuming prejudice that the Court noticed in Strickland, because the Court would have to look at the entire record and determine whether counsel's performance was deficient enough so as to warrant a presumption of prejudice.

QUESTION: Do you agree that under Burger v. Kemp, if the district court in this case had wanted to inquire about the availability of other evidence, it was

precluded from doing so because it hadn't been introduced in the State collateral proceedings?

MS. BLATT: The district court ruled that that -- that those claims were procedurally barred under an adequate and independent State procedure. Now, if the Court reverses the Sixth Circuit, I think respondent would be able to argue that those weren't procedurally barred on remand, but those -- those claims were not considered by the district court or the State court proceedings --

QUESTION: So, it's a State procedural bar rule if the evidence is not adduced at the State collateral proceeding, as opposed to Federal deference?

MS. BLATT: It was a procedural --

QUESTION: Under Burger?

MS. BLATT: In this context, the claims were not made until subsequent post-conviction State court proceedings. So, the State courts held that those -- those additional grounds for ineffective assistance were procedurally barred.

QUESTION: So, it was just the failure to adduce the -- to make the claim rather than to elicit the evidence?

MS. BLATT: Yes.

QUESTION: Thank you, Ms. Blatt.

Mr. Hutton, we'll hear from you.

ORAL ARGUMENT OF ROBERT L. HUTTON

ON BEHALF OF THE RESPONDENT

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

The main problem in this case is not specific attorney errors. The problem in this case is the failure of John Dice to make a case for life in response to the State's case for death in the penalty phase of a capital trial.

QUESTION: Well, he did say something initially, did he not, at the sentencing phase?

MR. HUTTON: Justice O'Connor, he did but I would like to clear up one thing that Mr. Moore stated.

QUESTION: Just -- I hope you will address that because if he actually did something but it was somehow inadequate assistance, then perhaps Strickland is the test.

MR. HUTTON: Justice --

QUESTION: But if he did absolutely nothing, then we have to wrestle with whether you divide it from, you know, sentencing phase from guilt/innocence phase, and so forth.

MR. HUTTON: Justice O'Connor, Mr. Dice did make an opening statement, but in that opening statement, he also told the jury that he had a right to put on evidence

at the penalty phase and had a right to make a closing argument in the penalty phase.

QUESTION: And it's really bad performance, you can argue, having -- especially having made that statement, not to do it. But that's -- you know, you -- you can prove it was bad performance, and if you can prove that it -- that -- that it adversely affected the outcome, then -- then you have a case. But -- but I don't think that it proves that he wasn't there.

MR. HUTTON: Justice Scalia, the problem in this case and the reason there's a total abdication of advocacy is because after the State made a case for death, after the State put on proof of aggravating circumstances and then argued to the jury that the law required the jury to put Mr. Cone to death, there was silence. Mr. Dice put forth no countervailing proof and made no countervailing argument.

QUESTION: Well, he had -- he had asked questions on cross examination, and it may be that he was satisfied that the State hadn't shown much.

MR. HUTTON: Justice --

QUESTION: And he wasn't going to give them an opportunity to have some stem-winder -- and -- and this is not standard but it is -- it is not an unknown strategy. It used to happen in the -- in the Court of Appeals in the

Ninth Circuit. There'd be an attorney who'd stand up. He'd talk for just two or three minutes and quietly about the law and then he'd sit down. And -- and then he'd take 27 minutes on rebuttal to make this huge jury speech. And so, what they used to do with him was they'd just submit it on the briefs. And he couldn't say anything at all. It was a very effective strategy for that particular advocate.

MR. HUTTON: Justice Kennedy, the only role of an advocate in the penalty phase of a capital trial is to make a case for life. A case for life is made by evidence and argument. Those are the only two tools that a lawyer has. For the lawyer, after the State makes a case, to say nothing implies to the jury that I have no good reply for that.

QUESTION: Or it implies to the jury that the State has shown nothing. That's a completely permissible inference, and counsel does that -- has been known to do that.

QUESTION: We have counsel up here sometimes who say, I -- I waive rebuttal. I mean, you know, I do not take that to mean I agree with what our opponent has said. To the contrary, I take it to mean our opponent's -- our opponent's case -- the additional facts he's -- he's brought up are so insignificant that I don't have anything

else to say.

MR. HUTTON: But Justice Scalia, if a member of the Court asked a question of counsel and counsel stood silent, the necessary implication of that is I have no good reply for that question.

QUESTION: Mr. Hutton, this was a very short proceeding. The opening was no shorter than the rather mild presentation by the prosecutor. And one thing that really surprised me is -- I'm looking at pages 23 to 27 of the appendix.

MR. HUTTON: Yes, Your Honor.

QUESTION: It shows that Mr. Dice did -- did something. And his last statement to the jury -- you said he didn't -- didn't ask for mercy. Well, what do you make of this statement where he said, "And I would say to you that mercy -- if you consider life under the mitigating circumstances, and the aggravating circumstances -- raises you above the State, raises you above the king, if you will. It raises you to the level of God." I thought that was a pretty affecting plea for mercy.

MR. HUTTON: Well, Your Honor, I would submit we know that Mr. Dice was suffering from mental illness at the time he testified. He was declared incompetent to practice law in February 1986 by Dr. Hutson, his own doctor.

QUESTION: I'm asking you about those words. That sounds like a plea for mercy to me.

MR. HUTTON: Your Honor, I think -- I would submit that that's more of a statement of grandiosity, but even if it was a plea for mercy, our position is that after the opening statements, nothing happened to make a case for life.

QUESTION: I'd like you to go into that. I had exactly the same reaction as Justice Ginsburg. I didn't understand why this isn't a very competent presentation, let alone ineffective. What's ineffective about it?

His whole case, which the jury heard the day before, was that this man suffered from Vietnam Syndrome and he had four psychiatrists testifying, and by the time you finish reading the excerpts of it, he had a point. And his point was that the personality of the defendant changed totally after he went to Vietnam, which drove him to drugs, which led to this killing, to the point where he was irresponsible and couldn't be held legally responsible for the death.

Now, the jury the day before has heard all that. Out of a two-hour presentation on the death penalty part, he -- 15 minutes of it is taken up by him going back over that. His having reviewed the whole thing, and the prosecution having put on three witnesses, who were

irrelevant, because they talked about his criminal behavior after he returned from Vietnam, leads the defense lawyer to say I'm saying nothing. Well, why should he say anything? The prosecution just made his case for him.

Now, I'm telling you my reaction after reading it, so that I can get your response.

MR. HUTTON: Justice Breyer, there -- there are two points in response. First of all, in a weighing State, our position is that the failure to make a case for -- for life after the State's case for death, necessarily implies resignation to the State's case.

QUESTION: In other words, you're saying on that part --

MR. HUTTON: Yes.

QUESTION: -- that when Paul Freund sometimes has said, a lawyer in this Court who sits down saying nothing makes not just a good argument, but a perfect argument. Now, we all know that. Right? I'm calling that to your mind.

MR. HUTTON: Okay.

QUESTION: My reading this transcript led me to think maybe it wasn't the perfect response, but it was a good one, because in the introductory statement -- I'll repeat myself -- he made all these arguments. The prosecution never refuted one of them, and the witnesses

were irrelevant to those.

Now, my question to you is, why does he have to come back and make a statement that he knows will elicit an answer?

MR. HUTTON: Number one, Your Honor, it's not just the failure to make a statement. It's the failure to put -- to make a statement and put on proof. The guilt phase proof was not sufficient for a couple of reasons.

The first reason it wasn't sufficient is because, number one, the jury -- it was never explained to the jury that evidence that they had just rejected for an insanity defense could, nonetheless, be mitigating evidence.

Number two, there was a problem in this record that the State post-conviction --

QUESTION: Excuse me. Before you go on to number two, didn't -- didn't he make that clear to the jury in his -- in his opening statement in the -- in the penalty phase?

MR. HUTTON: No, Your Honor. He never explained to the jury. What he explained to the jury was there would be a jury instruction that they could consider any evidence of aggravating circumstances or mitigating circumstances raised by the evidence. It was never explained to the jury, though, that evidence that they had

rejected for an insanity defense could, nevertheless, be used for mitigating evidence in the penalty phase.

QUESTION: And he did not allude to that evidence?

MR. HUTTON: No, Your Honor. He alluded to the evidence, but he did not allude to the fact that they could consider -- he did not explain to the jury that they could consider that evidence for mitigating evidence.

QUESTION: Well, but surely the jury would assume that they could consider it if he referred to it.

MR. HUTTON: Your Honor, for a jury who's just rejected an insanity defense -- and this will -- Justice Scalia, this plays into the second point, too. There was --

QUESTION: What about this statement? He says, the defense has put on proof of those mitigating circumstances during its case. Now I'd like to review those for you. And at that point, he goes back over the testimony that the psychiatrists had given the day before. What's that, but to present to the jury the mitigating evidence that took place the day before?

MR. HUTTON: Justice Breyer, the -- the problem with that evidence was that the post-conviction court made a finding there was prosecutorial misconduct where the prosecution improperly argued that the jury should not

believe the evidence with respect to drug usage. That's on page 81 of the joint appendix.

There was a finding that the lawyer for the State in the closing argument said, Gary Cone is a drug dealer. You can find that because of the evidence of the money in the car. The State court on post-conviction said they should not have argued that because they knew the money came from a robbery.

But the problem was that even though that didn't raise to a substantive claim for relief, it nonetheless tainted the evidence for mitigation evidence because the prosecution's misstatements led the jury to believe, oh, he was not a drug user, he was a drug dealer. Mr. Dice never cleared that up in the sentencing phase.

QUESTION: All right. Can you go to -- I don't want you to lose two, though. You were cut off. I asked my question and I colored the facts against you.

MR. HUTTON: Yes.

QUESTION: Because I want to elicit from you what your response is. And I've got your first, and now I want the second.

MR. HUTTON: The second response is a temporal response, Justice Breyer, that in a weighing State, when a jury is told they have to weigh the evidence for life, a life sentence versus the evidence for death, for the

lawyer, after the State makes a case for life, to put forth no affirmative proof, and then when the State argues to the jury why the evidence that just mounted a case for death necessitates under the law a sentence of death, to fail to respond with argument as well is an abdication of advocacy.

QUESTION: Well, you know, I have trouble with that because I don't think the State put on very much, and if I'm sitting waiting for this closing argument, I know what I'm going to hear. This is a brutal crime spree where he shot a police officer, shot a citizen, robbed a jewelry store -- I forget all of the facts. But he goes through a high-speed chase. He murders an elderly, helpless couple. That's the kind of thing that I'd be terrified to have the jury hear, and the State is waiting for closing argument, and he prevents that by sitting down. That may be a good strategy.

MR. HUTTON: Justice Kennedy, the problem is when there is no -- there was no strategy, because after the opening statements -- it's just like another trial where you have opening statements, argument, and closing. After the opening statements, there was nothing that was put on. He failed to make a case for life when cases for life could have been made about his being awarded with the Bronze Star for heroic combat in Vietnam. Even though

there was an elicit -- it was elicited on page 31 of the joint appendix in cross examination, that there was a Bronze Star --

QUESTION: But then the prosecutor says, this man with a Bronze Star killed a helpless, innocent couple. Is this a hero? He avoids all of that.

MR. HUTTON: But Justice Kennedy, at least then the jury has something to weigh. There's not the problem with Mr. Dice's silence saying, now that I've heard the State's case, I have no good reply for it.

QUESTION: All right. So, what I -- I think maybe some of us are worried about the same thing. In this case if Mr. Dice was following the strategy that my question suggested, it didn't work, did it?

MR. HUTTON: No, Your Honor.

QUESTION: No. All right.

But there could be a future case in which a similar strategy would work. So, how can I write an opinion that says to a defense lawyer in a future death case, even though your best judgment is to keep quiet at this moment, nonetheless the Supreme Court of the United States has said you have to get up and say something, with the consequence that the jury comes back death? What do I do about that in your opinion?

MR. HUTTON: Justice Breyer, put another way,

the question the Court is asking is whether or not a lawyer can strategically decide to abandon advocacy.

QUESTION: All he has abandoned is his closing statement. He put all the thing in front of the jury in his opening statement. So, he's abandoning his closing statement. Now, you want me to say that he cannot abandon that.

MR. HUTTON: No, Justice Breyer. It's the -- a combination of abandoning the closing statement and any case for life, any affirmative case which leads to there being no case for life in response to the State's case for death.

QUESTION: No, but Mr. Hutton, the problem that I think we're all having with your argument is -- is illustrated by the -- the colloquy that keeps going on. You're saying that in these circumstances the deficiency was so clear that it should be treated as a Cronic case, as if the lawyer were not there at all. But the very fact that we're having the discussion that we are shows that it isn't so clear.

And -- and the point that I wish you'd address -- and I -- I have to say that I don't know how you can address it, but the point that you've got to address if -- if you're -- if you're going to prevail here is how can we apply Cronic if we are to apply in -- in any intelligible

way, in any way that has a limiting principle to it, if the application of Cronic is going to depend on assessments of lawyers' judgments which are as disputable as this assessment?

MR. HUTTON: Justice Souter, it's our position that, in essence, the lawyer's judgments are irrelevant to a Cronic analysis, that Cronic looks at the structure --

QUESTION: Well, that's the whole problem, because if we were analyzing it under Strickland, we would have a different sort of inquiry, and maybe it fits better here.

Let me ask you this, Mr. Hutton. Suppose we disagree with you and with the Sixth Circuit that Cronic is the test. We have two questions here: the Williams v. Taylor issue under section 2254, and then this Strickland/Cronic. Suppose we think that Strickland provides the test. That isn't the end of the road for your client, presumably?

MR. HUTTON: No, Justice O'Connor.

QUESTION: What would happen then? And how should we address it with these two questions? Do we deal with 2254 first as a threshold question?

MR. HUTTON: Justice O'Connor, if I could take both of your questions in the order you presented them.

First of all, if this Court determines that

Strickland applies, the case would have to be remanded to the Sixth Circuit. We had requested an evidentiary hearing to develop many of these facts in the district court, which was denied. The Sixth Circuit never addressed the issues about the failure to afford a -- an evidentiary hearing and many State procedural default issues that were raised that concern a novel interpretation of State law being raised in Mr. Cone's own case, and whether there were adequate and independent State grounds.

QUESTION: You know, it's -- it puts you in a bad position for me to ask you this, but just assume, if you would for a minute, that we think Strickland applies. Then what should we do here in the face of these two questions, and where does that leave your client?

MR. HUTTON: Justice O'Connor, the -- if Strickland did apply, the 2254(d) question could not be resolved until first the procedural default issues and the failure to afford an evidentiary hearing questions are resolved by the Sixth Circuit.

QUESTION: Why do we not decide the -- the Strickland question here?

MR. HUTTON: Chief Justice, there are several issues that -- that of -- that were not developed in the district court with respect to deficient performance and

prejudice. Those facts would have -- would have to be developed before this Court could make a determination of whether or not the State court unreasonably applied clearly established Federal law.

QUESTION: What were those --

QUESTION: Were these questions dealing with the guilt phase or the penalty phase?

MR. HUTTON: Your Honor, these are all questions that apply to application of Sixth Amendment, the failure to develop evidence --

QUESTION: I -- I asked you a specific question. Were these questions devoted to the penalty phase or the guilt phase?

MR. HUTTON: With respect to the penalty phase specifically, Chief Justice Rehnquist, with respect to developing proof as to deficient performance, why the findings of fact should not be trusted because --

QUESTION: Mr. Hutton, didn't the Sixth Circuit reject your claim about the guilt phase?

MR. HUTTON: No -- what they rejected, there was an issue of waiver of certain claims, not the Sixth Amendment claims, but other claims that was denied by the district court, and the Sixth Circuit found that those issues were waived.

With respect to the ineffective assistance

claims, the issue has to do with in State court there was a finding that those claim -- that those aspects of the Sixth Amendment claim were previously determined, and in, this case is the first time that the State court held a finding of previous determination can act as a procedural bar to developing those issues in -- in State court. So, there's a novel issue of State law that --

QUESTION: Can you -- can you point to me where in the Sixth Circuit opinion -- I thought in their opinion they rejected your claim insofar as the guilt phase. Perhaps I'm wrong.

MR. HUTTON: No, Justice Ginsburg. They rejected the issue of waiver. They did not address at all in the opinion the claim in the brief with respect to why the State court finding of previous determination with respect to aspects of a Sixth Amendment claim raised in the subsequent State post-conviction petition -- why we argued that that cannot be a bar to reaching the issues on the merits in Federal court because it was a novel rule. It was a rule announced for the first time in Mr. Cone's own case.

Secondly, there are Michael Williams v. Taylor problems because there are facts -- when we asked for an evidentiary hearing, we were not afforded an evidentiary hearing to develop many of these facts with respect to the

Bronze Star. The district court didn't give us a hearing. And we have cause. It wasn't our fault for failing to develop those in -- in State court.

QUESTION: Excuse me. I -- I don't -- I don't really understand. If the test -- if the criterion is -- is going to be whether the -- as the statute says, whether the State court was reasonable in what it did, what right do you have to introduce new evidence that wasn't presented to the State courts?

MR. HUTTON: Because --

QUESTION: I don't understand why we can't just -- just look at the evidence that was available and -- and decide the Strickland question then.

MR. HUTTON: Justice Scalia, that fits right into this court's decision with Michael Williams v. Taylor. 2254(e) allows an evidentiary hearing to be held in Federal court if it was not the defendant's fault for failing to develop facts. That provision would make no sense if a Federal court couldn't look at new facts not developed in State court to make a determination under 2254(d) as to whether or not the State court findings were reasonable or unreasonable. In other words, Justice --

QUESTION: Do we have any indication here as to whose fault it was?

MR. HUTTON: Your Honor, there's several

different issues, Justice Souter. First of all, in State court, capital defendants were not allowed experts or investigators until 1995, years after Mr. Cone's first post-conviction petition. So, there's an issue about cause with whether or not he had cause to develop that.

Number two, with the aspects of the Sixth Amendment claim raised in a second post-conviction petition, there are issues as to whether the State procedural bar was clearly established, because Mr. Cone's case was the very first case where there was a holding that previous determination acted as a State bar to developing facts in State court. All of those issues go to whether or not Mr. Cone has a right under Michael Williams v. --

QUESTION: What facts is it -- what facts is it -- are they that you sought to develop --

MR. HUTTON: Chief --

QUESTION: -- as bearing on the ineffective assistance claim?

MR. HUTTON: Chief Justice, there are several facts, starting with the deficient performance aspect. We know because we were able to issue a subpoena in Federal court to get John Dice's medical records. He committed suicide after the post-conviction hearing. His own records show at the time that he testified in post-

conviction, he was suffering from impaired memory, confused thinking, and had been incompetent to practice law.

QUESTION: well, why -- how does that bear on whether or not the State court's finding of -- against you on the Strickland claim was unreasonable?

MR. HUTTON: Because, Chief Justice, many of the findings by the State court relied on the testimony of John Dice, and just like under the old Townsend v. Sain --

QUESTION: Well, Townsend against Sain is pretty well gone.

MR. HUTTON: No, Your Honor, but it also comes into Michael Williams v. Taylor, this Court's 2000 term -- year 2000 opinion, where if it's not -- if we didn't fail to develop facts in -- in State court that are relevant, we can develop them in Federal court.

QUESTION: What is -- what is the particular thing, though, because I mean, you've mentioned three times now that he has some mental problem that led him to commit suicide.

MR. HUTTON: Yes.

QUESTION: I gather that must have been at least four or five years after these events.

MR. HUTTON: It was --

QUESTION: He testified at the hearing in 1986.

The trial was in 1982.

MR. HUTTON: That's correct.

QUESTION: All right. Now, I've seen many bad cases of bad representation in death cases that I think is terrible. But I have to say, having read through this record, this doesn't seem to be one of them. Now, you obviously think it is.

So, what is it specifically? What is it specifically that -- that you think was absolutely terrible by way of representation here, other than not making the closing statement? I've got that one. I understand that. You've made a major point of that. But what are the things that really went wrong in this case?

MR. HUTTON: Justice Breyer, with respect to your first question, we're raising the fact that he committed suicide after the post-conviction testimony so that -- that raises --

QUESTION: That does not suggest that four or five years earlier -- it might suggest a cause of bad representation, but it doesn't suggest there was the bad representation. And my question is what did he do wrong? I'm not an experienced trial lawyer. That's why I put these questions to you. I expect my objections will be overwhelmed by you, but I want you to -- to focus you on doing it.

MR. HUTTON: Justice Breyer, he failed to make a case for life. In the penalty phase of a capital trial, it's like a totally new trial, and a lawyer has one goal. It's to mount a case for life, for the jury to have some reason not to sentence his client to death.

QUESTION: Mr. Hutton, may I interrupt you with this? And I -- because I think we're all trying to get at the same thing. When you get beyond that generality, what was it that he should have put in that he didn't put in? And my understanding was that there were three items that you thought would be favorable. One was the Bronze Star. One was the fact that this man's brother died when he was young, and the third was that this man's girlfriend was murdered. Am I -- am I right that those are the three points upon which you thought he was deficient in -- the lawyer, Dice, was deficient in failing to present evidence?

MR. HUTTON: With -- Justice Souter, there are many cases for life that could have been made. It is true that he failed to develop the Bronze Star and failed to develop that Mr. Cone was a hero, that that is an award for heroism in combat. That was never presented to the jury as a case for life.

Number --

QUESTION: Was there nothing in the military

record that the lawyer might have been fearful about if he pursued that beyond where he did?

MR. HUTTON: No, Justice Ginsburg. And that also reminds me I'd like to clarify something. There is testimony in the post-conviction record at page 158 of the post-conviction testimony -- it's not in the joint appendix, unfortunately. But John Dice did testify that he would have given his right arm for a Bronze Star, that that was an award for combat in military service.

QUESTION: May I just -- I've looked back at the opinion, and twice the Sixth Circuit says that they deny the -- they affirm the dismissal. They affirm the dismissal with respect to the conviction. We now affirm the denial of this petition with respect to the offense of -- of conviction. And if you missed it there, then on the very last page of this opinion, they say again, we affirm the district court's refusal to issue a writ of habeas corpus with respect to the petitioner's conviction. And you didn't cross appeal from that.

MR. HUTTON: No, Your Honor. The -- the issues -- the issue is whether or not counsel was ineffective for the sentencing phase. We did not -- the -- we --

QUESTION: I thought you -- you told me when I asked you, no, the Sixth Circuit didn't affirm with respect to the sentence of conviction. I take from what I

just read to you that they did, and that's a closed door, and the only thing that's up now is the sentencing phase.

MR. HUTTON: Oh, I'm sorry, Justice Ginsburg. I must have misunderstood your question. The -- the conviction of guilt was affirmed by the Sixth Circuit and we did not file a cross petition.

QUESTION: Yes.

MR. HUTTON: Okay. The -- so, the issues which we are raising have to do with why Mr. Dice was ineffective to the point that it amounted to a total abdication of advocacy in the penalty phase of the capital --

QUESTION: Mr. --

QUESTION: Is the first --

QUESTION: Can I ask you one question following up on Justice Souter? He listed three things. He said that you argue he failed to put in. But I thought the most significant material that was omitted was the story of what kind of a person this man was before he went to Vietnam, which the lawyer said he had investigated and described in detail at page 62 of the joint appendix. Now, did he explain why he didn't put all that evidence in?

MR. HUTTON: No. Your Honor, there were some references by Mr. Dice's testimony that he thought that

the mother, Valeree Cone, did not make a good witness and that generally the family members he thought did not make a good witness.

QUESTION: Did that come during the -- had that come in during the guilt stage?

MR. HUTTON: Your Honor, he -- when he tried to introduce evidence in the guilt phase, there were objections as to relevancy which were sustained by the court, because the court found that all that was relevant in the guilt phase was the issue of mental insanity. So, all the background to -- was not relevant in that particular --

QUESTION: Did the mother testify --

QUESTION: Mr. Hutton, you -- you think we have to send -- this conviction and sentence occurred in 1982. I am trying to think, you know, what I was like in 1982. It's 20 years ago, and you think it has to go back for further fact finding, presumably back to the court of appeals and then back to the district court?

MR. HUTTON: Your Honor, first of all, this case was filed --

QUESTION: How -- how old is -- is Mr. Cone?

MR. HUTTON: Mr. Cone was 33 in 1982, so that would make him 50 --

QUESTION: Yes. Well, he may get a -- a life

sentence by default.

MR. HUTTON: Justice Scalia, the -- the fact of the matter is, though, that Mr. Cone has been trying to develop these claims.

QUESTION: No, but when you go back to that, what is it that you -- that you say should have gone on in as evidence at the sentencing phase that didn't? The Bronze Star. Justice Stevens mentioned the change in personality. Is that something that you say should have gone in?

MR. HUTTON: Your Honor, that should have gone in. The fact about the Bronze Star and being developed what happened in the war should have gone in. There are claims about Mr. Dice's --

QUESTION: What -- what about the other two that I mentioned, the -- the death of the sister and the murder of -- of the -- the girlfriend? Should those things have gone in?

MR. HUTTON: Yes, Your Honor, because they would portray --

QUESTION: Okay. I'm pushing you because your time is running out. What else? Is there anything else?

MR. HUTTON: Your Honor, those should have gone in, but more importantly, those should have been woven into an argument as to why that reasoned moral judgment --

a reasoned moral judgment called for this man not to be put to death. And the fact of the matter is the combination -- we can't piecemeal the no evidence and no argument. It's the combined force of both of them. The failure to do anything in response to the State's case for death is what makes this a total abdication of advocacy in the context of a penalty phase of a capital trial.

So, Your Honors, in preparing for this argument, I read an article that one of Your Honors wrote several years ago about how important oral argument was before this Court and how in many cases this Court -- argument had affected the minds of members of this Court. And if oral argument is so important for members of this Court who have the benefits of briefs, training, legal training, the benefits of clerks, how much more important is argument for a jury that's not trained in the law, that doesn't have the benefits of briefs, that has to make the most difficult decision they ever made as to whether somebody should live or should die? And how much more devastating is it when the jury is told they have to weigh evidence, they hear a case for death, they hear the prosecutor argue a case for death, and then there's silence from the defense?

Your Honor, that amounts to a total failure in the penalty phase to -- to subject the prosecution's case

to meaningful adversarial testing. That's why this Court wrote Cronic, to talk about problems just like this case. And Cronic has been sparingly applied by the lower courts.

CHIEF JUSTICE REHNQUIST: Thank you. Thank you, Mr. Hutton.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)