

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
RICKY BELL, WARDEN, :  
Petitioner :  
v. : No. 01-400  
GARY BRADFORD CONE. :  
- - - - -X

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.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
MICHAEL E. MOORE, ESQ.	
On behalf of the Petitioner	3
LISA S. BLATT, ESQ.	
On behalf of the United States,	
as amicus curiae, supporting the Petitioner	19
ROBERT L. HUTTON, ESQ.	
On behalf of the Respondent	29

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

2 (10:01 a.m.)

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

5 Mr. -- Mr. Moore.

6 ORAL ARGUMENT OF MICHAEL E. MOORE

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

1 the other in that statement, but he specifically --

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

7 MR. MOORE: No, Your Honor.

8 QUESTION: No?

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

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

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

1 sentencing hearing simply is belied by this record.

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

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

11 MR. MOORE: No, Your Honor.

12 QUESTION: It's a two-part question.

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

23 QUESTION: When does Cronic apply?

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

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

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

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

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

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

1 unreasonable.

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

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

22           MR. MOORE: Well --

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



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

2 Respondent's complaint that counsel --

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

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

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

17 MR. MOORE: Yes, Your Honor.

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

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

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

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

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

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

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

1 two questions. You should have just had one.

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

4 On the decision to waive closing argument --

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

8 MR. MOORE: Yes, Your Honor. The record  
9 reflects that opening statements started at approximately  
10 12:07 p.m. and that the jury retired to deliberate at  
11 about 3:05 p.m., and there was about an hour-and-ten-  
12 minute break for lunch in there. And they announced their  
13 verdict somewhere along about a quarter of four.

14 QUESTION: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 QUESTION: And was that allegation denied?

18 MR. MOORE: Yes.

19 QUESTION: Yes.

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

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

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

3 MR. MOORE: No, Your Honor.

4 QUESTION: We should not?

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

6 QUESTION: Why not?

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

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

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

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

25 MR. MOORE: Yes, sir.

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

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

7           QUESTION: Right.

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

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

14          (Laughter.)

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

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

21          (Laughter.)

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

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

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

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

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

25 MR. MOORE: Yes, Your Honor. During the



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

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

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

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

1 record?

2 MR. MOORE: Your Honor, I --

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

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

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

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

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

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

16 QUESTION: -- about the circumstances?

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

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

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

25 QUESTION: And did the lawyer put in any

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

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

8 QUESTION: Thank you, Mr. Moore.

9 MR. MOORE: Thank you, Your Honor.

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

11 ORAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

1 prejudice prong?

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

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

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

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

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

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

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

15 The Court also said --

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

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

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

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

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

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

14 MS. BLATT: Right, and --

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

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

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

1 phase?

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

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

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

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

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

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

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

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

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

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



1       sorry if I misspoke.

2                   QUESTION:  I don't think it is.

3                   MS. BLATT:  I think it's --

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

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

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

1 MS. BLATT: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. BLATT: It was a procedural --

14 QUESTION: Under Burger?

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

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

23 MS. BLATT: Yes.

24 QUESTION: Thank you, Ms. Blatt.

25 Mr. Hutton, we'll hear from you.

1 ORAL ARGUMENT OF ROBERT L. HUTTON

2 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

18 MR. HUTTON: Justice --

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

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

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

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

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

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

21 MR. HUTTON: Justice --

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

1 Ninth Circuit. There'd be an attorney who'd stand up.  
2 He'd talk for just two or three minutes and quietly about  
3 the law and then he'd sit down. And -- and then he'd take  
4 27 minutes on rebuttal to make this huge jury speech. And  
5 so, what they used to do with him was they'd just submit  
6 it on the briefs. And he couldn't say anything at all.  
7 It was a very effective strategy for that particular  
8 advocate.

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

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

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

1 else to say.

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

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

11 MR. HUTTON: Yes, Your Honor.

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

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



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

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

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

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

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

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

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

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

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

14 MR. HUTTON: Yes.

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

20 MR. HUTTON: Okay.

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

1 were irrelevant to those.

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

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

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

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

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

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

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

3 QUESTION: And he did not allude to that  
4 evidence?

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

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

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

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

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

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

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

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

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

18 MR. HUTTON: Yes.

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

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

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

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

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

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

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

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

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

15 MR. HUTTON: No, Your Honor.

16 QUESTION: No. All right.

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

25 MR. HUTTON: Justice Breyer, put another way,

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

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

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

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

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



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

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

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

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

19 MR. HUTTON: No, Justice O'Connor.

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

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

25 First of all, if this Court determines that

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

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

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

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

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

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

5 QUESTION: What were those --

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

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

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

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

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

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

25 With respect to the ineffective assistance

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

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

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

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

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

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

10 MR. HUTTON: Because --

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

14 MR. HUTTON: Justice Scalia, that fits right  
15 into this court's decision with Michael Williams v.  
16 Taylor. 2254(e) allows an evidentiary hearing to be held  
17 in Federal court if it was not the defendant's fault for  
18 failing to develop facts. That provision would make no  
19 sense if a Federal court couldn't look at new facts not  
20 developed in State court to make a determination under  
21 2254(d) as to whether or not the State court findings were  
22 reasonable or unreasonable. In other words, Justice --

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

25 MR. HUTTON: Your Honor, there's several

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

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

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

17           MR. HUTTON: Chief --

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

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

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

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

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

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

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

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

21 MR. HUTTON: Yes.

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

24 MR. HUTTON: It was --

25 QUESTION: He testified at the hearing in 1986.

1 The trial was in 1982.

2 MR. HUTTON: That's correct.

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

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

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

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



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

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

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

24           Number --

25           QUESTION: Was there nothing in the military

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

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

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

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

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

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

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

7 QUESTION: Yes.

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

13 QUESTION: Mr. --

14 QUESTION: Is the first --

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

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

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

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

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

13 QUESTION: Did the mother testify --

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

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

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

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

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

1 sentence by default.

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

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

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

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

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

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

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

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

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

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

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

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

6 The case is submitted.

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

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25