

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

RONALD ROMPILLA, :

Petitioner :

v. : No. 04-5462

JEFFREY A. BEARD, SECRETARY, :

PENNSYLVANIA DEPARTMENT OF :

CORRECTIONS. :

- - - - -X

Washington, D.C.

Tuesday, January 18, 2005

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

APPEARANCES:

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

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

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

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	
BILLY H. NOLAS, ESQ.	
On behalf of the Petitioner	3
AMY ZAPP, ESQ.	
On behalf of the Respondent	27
TRACI L. LOVITT, ESQ.	
On behalf of the United States,	
as amicus curiae, supporting the Respondent	44
REBUTTAL ARGUMENT OF	
BILLY H. NOLAS, ESQ.	
On behalf of the Petitioner	53

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

P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Nolas.

ORAL ARGUMENT OF BILLY H. NOLAS

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. NOLAS: This Court made very clear in

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

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

11 Number two, whenever they were --

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

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

18 JUSTICE SCALIA: What she testified to makes no
19 sense.

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

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

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

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

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

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

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

10 JUSTICE GINSBURG: Mr. Nolas?

11 MR. NOLAS: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 alcohol history.

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

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

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

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

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

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

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

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

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

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

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

18 JUSTICE SOUTER: And what would they have found?

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

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

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

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

13 MR. NOLAS: Yes, Justice Stevens.

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

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

18 Now, Pennsylvania lawyers --

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

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

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

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

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

11 MR. NOLAS: When --

12 JUSTICE SCALIA: -- as a constitutional matter.

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

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

18 MR. NOLAS: Yes --

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

21 MR. NOLAS: Yes, plus.

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

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

3 MR. NOLAS: Yes, Your Honor.

4 JUSTICE BREYER: All right.

5 MR. NOLAS: And --

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

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

14 JUSTICE SOUTER: What -- what --

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

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

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

22 MR. NOLAS: Yes, Your Honor.

23 JUSTICE SCALIA: In -- in what respect?

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

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

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

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

20 MR. NOLAS: Yes, Your Honor.

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

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

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

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

14 JUSTICE GINSBURG: Wiggins.

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

16 JUSTICE GINSBURG: Wiggins.

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

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

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

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

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

13 MR. NOLAS: The --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Don't leave any eyewitness.

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

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

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

19 MR. NOLAS: And -- and --

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

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

1 witnesses behind.

2 JUSTICE SCALIA: But -- but that --

3 MR. NOLAS: I --

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

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

23 Also, the prior victim --

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

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

4 MR. NOLAS: But --

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

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE STEVENS: Yes, you may reserve your
23 time.

24 MR. NOLAS: Your Honor, thank you.

25 JUSTICE STEVENS: Ms. Zapp.

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

ORAL ARGUMENT OF AMY ZAPP
ON BEHALF OF THE RESPONDENT

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

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

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

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

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

1 stands?

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

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

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

13 JUSTICE SOUTER: Well --

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

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

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

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

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

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

1 can be --

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

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

24 JUSTICE SOUTER: What --

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

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

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

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

9 MS. ZAPP: We are not making the argument.

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

12 MS. ZAPP: Yes.

13 JUSTICE SCALIA: -- and before our later
14 jurisprudence.

15 MS. ZAPP: Yes, Your Honor.

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

18 MS. ZAPP: Because --

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: You're saying it has to be

1 argued.

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

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

7 MS. ZAPP: But by --

8 JUSTICE SCALIA: -- is dangerous in the future.

9 MS. ZAPP: But by contrast --

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

12 MS. ZAPP: Exactly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MS. ZAPP: Right.

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

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

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

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

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

25 JUSTICE BREYER: I understand that. You're

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

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

6 MS. ZAPP: The -- the --

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

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

12 JUSTICE SCALIA: Came up late.

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

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

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

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

4 MS. ZAPP: I believe --

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

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

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

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

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

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

22 JUSTICE BREYER: Do you agree with that?

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

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

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

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

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

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

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

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

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

1 information.

2 Thank you.

3 JUSTICE STEVENS: Thank you, Ms. Zapp.

4 Ms. Lovitt.

5 ORAL ARGUMENT OF TRACI L. LOVITT

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

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

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

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

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

8 MS. LOVITT: I -- I think --

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

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

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

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

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

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

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

17 MS. LOVITT: Dr. --

18 JUSTICE GINSBURG: The primary reason.

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

22 JUSTICE GINSBURG: Where -- where is this?

23 MS. LOVITT: First, Dr. Cooke is at JA1079 and
24 1069. Dr. Sadoff is at 1105 and 1122.

25 JUSTICE GINSBURG: I thought it was not

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

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

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

16 MS. LOVITT: Yes.

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

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

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

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

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

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

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

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

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

1 Every court in this case has recognized --

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

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

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

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

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

16 MS. LOVITT: But the Sixth Amendment question --

17 JUSTICE STEVENS: Do you agree with that?

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

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

1 that the other side is going to offer.

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

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

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

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

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

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

19 MS. LOVITT: But they did not --

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

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

25 JUSTICE BREYER: Well, the serious question to

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

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

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

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

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

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

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

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

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

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

11 JUSTICE STEVENS: Thank you, Ms. Lovitt.

12 Mr. Nolas, you have about 4 minutes left.

13 REBUTTAL ARGUMENT OF BILLY H. NOLAS

14 ON BEHALF OF THE PETITIONER

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

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

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

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

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

1 what's she referring to at page 506.

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

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

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

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

15 JUSTICE SCALIA: Only? Only? Only? `

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

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

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

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

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

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

19 JUSTICE STEVENS: Thank you, Mr. Nolas.

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

21 JUSTICE STEVENS: The case is submitted.

22 (Whereupon, at 11:04 a.m., the case in the
23 above-entitled matter was submitted.)
24
25