OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RONALD D. EDWARDS, WARDEN, Petitioner v.

ROBERT W. CARPENTER

CASE NO: 98-2060 cf

PLACE: Washington, D.C.

DATE: Monday, February 28, 2000

PAGES: 1-40

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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RONALD D. EDWARDS, WARDEN, :

Petitioner :

v. : No. 98-2060

ROBERT W. CARPENTER :

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Washington, D.C.

Monday, February 28, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

EDWARD B. FOLEY, ESQ., State Solicitor, Columbus, Ohio; on behalf of the Petitioner.

J. JOSEPH BODINE, JR., ESQ., Assistant State Public Defender, Columbus, Ohio; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 98-2060, Ronald Edwards v. Robert Carpenter.

Mr. Foley.

ORAL ARGUMENT OF EDWARD B. FOLEY

ON BEHALF OF THE PETITIONER

MR. FOLEY: Thank you, Mr. Chief Justice, and may it please the Court:

This habeas case is about the need for an explanation when a defendant misses his opportunity in State court to assert ineffective assistance of appellate counsel in order to reopen his original direct appeal.

The Sixth Circuit here held that no such explanation is necessary before a Federal court in effect may reopen the appeal, but that holding is serious error, because it undermines the State's ability to have the reopened appeal occur in the same court that heard the original appeal.

To put the matter more concretely, respondent here is seeking Federal habeas relief on the ground that his guilty plea was invalid but he didn't raise that claim in his original direct appeal. He asserts as cause for that default ineffective assistance of appellate counsel,

but he defaults in his ineffective assistance claim as well.

The State permits a defendant to raise ineffective assistance in order to revive a claim originally defaulted on direct appeal, here, the underlying plea-related claim, but respondent did not take advantage of that opportunity in State court in a timely manner under State law, and our position is that his failure to do so requires an explanation before the Federal court can revive that defaulted claim, the plea claim.

QUESTION: Mr. Foley, as I understand it, the district court in this case held that there was not an adequate and independent State ground for the State court ruling, and the court of appeals simply didn't pass on that. Is that right?

MR. FOLEY: That is correct.

QUESTION: So that -- if we were to reverse on your point, that would be open in the court of appeals to the respondent here.

MR. FOLEY: Exactly. We're asking this Court to reverse on the question presented in the cert petition, and it may remand for further determination on the adequacy issue.

QUESTION: Is there any suggestion here that the

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respondent can show cause and prejudice for the procedural default of the ineffective assistance of counsel claim?

MR. FOLEY: We don't believe so, and for one reason is that he had a lawyer in 1992 in a time in which he could have raised his ineffective assistance claim, so we don't think he can make out the showing, but no court in this case has yet entertained the cause inquiry.

QUESTION: What are we supposed to do with his claim that, look, this lawyer on appeal, the reason that I didn't file my request on time there is because the Ohio statute which sets up a procedure whereby an appellate court reopens a matter was itself very confused in light of a Supreme Court decision which suggests for this class of case you didn't use that procedure, and therefore there was nothing to use, and that whole matter wasn't clarified until much later and, in respect to the time it was clarified, my thing was timely.

Now, that's a very complicated question, but I guess that's what the district court went on here, didn't it, and anyway, what do we do with that?

MR. FOLEY: No, Your Honor. Respondent here missed multiple opportunities to raise his ineffective assistance claim. In 1991, at the end of his direct appeal, he could have brought that claim in a variety of forums, but he didn't bring it anywhere.

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In 1992, after the Ohio supreme court decided that Murnahan decision, that decision makes it clear how to bring that claim, and he could have brought it in 1992, after that decision, and he had counsel. He had new post-conviction counsel at that time.

QUESTION: Mr. Foley, may I ask you to back up, because as I understand Justice Breyer's question, you have already said the district court ground is not the issue before us now and that, indeed, if we reverse on the ground on which the Sixth Circuit rested, that would be wide open, that the grounds on which the district court ruled were never passed on by the Sixth Circuit, and they would be open to be considered on remand.

MR. FOLEY: Correct.

QUESTION: So we should focus only on what the Sixth Circuit ruled, because the district court's ruling would be open for review by the Sixth Circuit.

MR. FOLEY: Correct. Respondent makes two points with respect to the adequacy ground that was not passed on by the Sixth Circuit. One, he says that's an obstacle to this Court reaching the question in the petitioner for certiorari, and that's incorrect. The question that we raised in the cert petition is properly before this Court.

It was the question decided by the Sixth

Circuit, and it was the question that respondent, indeed, asked the Sixth Circuit to decide, and it was respondent's view in the Sixth Circuit that you didn't need to address the adequacy issue and instead decide --

QUESTION: Mr. Foley, do you know whether respondent, in its brief in opposition to certiorari, made that point?

MR. FOLEY: I do know the answer to that, and respondent did not object in the opposition to certiorari on that ground, in effect recognizing that the question was properly presented, suggesting that it wasn't worthy of the Court's review.

So to answer your question, Justice Ginsburg, the question the Sixth Circuit decided is properly here.

Now, respondent also raises the adequacy issue as an alternative ground. Our view is that that should be remanded, because the Sixth Circuit didn't reach it, but if this Court does reach that issue as an alternative ground, we think the Court should reject it as without merit because, as I was suggesting, for two reasons.

First, he had multiple opportunities to raise his ineffective assistance claim. He could have raised it at three different times in 3 different years, and the State court ground was that he missed all those opportunities, and secondly, Justice Breyer, in response

to your question about the district court's reasoning, the district court's view was that the good cause standard in Ohio law was, there was some variation --

QUESTION: Your answer to Justice Ginsburg resolves my question.

MR. FOLEY: Okay. Turning, then, to the question that the Sixth Circuit decided, our position is that the Sixth Circuit was wrong, because the State's interest here is to have the plea claim, the originally defaulted claim, heard in the forum that it should have been heard in the first place.

The allegation here is that it would have been heard in that forum but for ineffective assistance of counsel. If that's true, then what the State wants to do is to rectify that constitutional violation by restoring that plea claim to the forum that it should have been in the first place, but the Sixth Circuit's view frustrates the State's effort to get that claim back into the forum in which it belongs if the Federal court is permitted to entertain that plea claim without any showing of why the defendant, respondent here, did not take advantage of the State court opportunity.

The State has a process for raising ineffectiveness claims to reopen a direct appeal, and what the Sixth Circuit does is, it substitutes the Federal

court for that process. It makes the Federal court engage in exactly the same reopening process, because as the Federal court hear's that underlying plea claim, and does so because it finds ineffective assistance is cause, then the Federal court is doing precisely what the State court wants to do, and the State court, as this Court's precedents make clear, the State needs to have the opportunity to do that.

Now, we're not saying that just because he missed the State court deadline means that he gets no habeas review no matter what. All we're asking for is that explanation, the cause and prejudice test. In other words, it's our position that where the Sixth Circuit error was was in failing to run this claim through the cause and prejudice analysis that applies in all procedural default contexts. That's what Coleman says. It talks about the uniformity of procedural default analysis, and that uniformity should occur in this context as well.

QUESTION: What bothers me about it is, I mean, it's a totally logical argument that you've made and it is, State, there's a constitutional claim, 1) blocked by State ground, right?

MR. FOLEY: We're talking about the three --

QUESTION: Then we have step 2. You can get

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around the State ground by asserting cause, blocked by a different State ground, i.e., cause wasn't done right, and I suppose you could have cause for getting around State ground 2, which could be blocked by State ground three. They didn't do that one right.

And this could go on, like Kepler's epicycles, indefinitely and no human being, let alone a petitioner without any lawyer, would ever understand what to do.

Now, the reason I put it is, it seems to me there is a separate and different way to look at it, that of course the substantive claim can be blocked by a State ground that's adequate, but the matter of cause is basically a question for the Federal judge, and that cuts through everything, says of course, with Carrier, you have to present it to the State court so they get a shot, but if they have four other State ground rules that stop it, that's their problem.

The matter of cause for getting around -- the matter of, is there a State ground for not hearing the prosecutorial claim, that's up to the State, but the matter of cause for getting around it, that's up to the Federal judge, basically.

Now, isn't that how we handle most matters of cause, or is it?

MR. FOLEY: Several responses, Justice Breyer.

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First, I don't think we have an infinite regress problem here because we only have two steps. We have two defaults, and if respondent can show cause for that second default you don't have to go any further. He does get habeas, Federal habeas relief if he can show cause and prejudice or actual innocence under the test, so you don't have to look for a third, or a fourth, or an infinite regress.

Now, as to the point about, well, yes it is true, it causes a Federal question, and there's no doubt that the cause inquiry as it applies to that underlying plea claim is a Federal question, but he has asserted ineffective assistance as that cause, and Carrier makes it plain that once he asserts ineffective assistance as the cause he has to do several things.

First, he has to meet the Sixth Amendment standard for ineffective assistance. It can't simply be poor lawyering that doesn't meet the Sixth Amendment. And secondly, he must exhaust that Sixth Amendment claim in State court.

So Carrier already tells us that when ineffectiveness is asserted as cause we have to go back into the State system and it is not sufficient -- to answer the third point of your question, it's not sufficient simply to have presentment or exhaustion

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because, as this Court recognized unanimously last year in O'Sullivan -- this was the point where there was agreement in O'Sullivan -- exhaustion must be coupled with procedural default analysis, and the reason is, as this Court explained, is that procedural default doctrine protects the integrity of the exhaustion rule.

So once Carrier says that this ineffectiveness claim, the Sixth Amendment claim, the second part, which is asserted as cause for the underlying plea claim, once that has been raised it has to go back to State court not just for presentment but for proper presentment, and that's why procedural default analysis must apply to both claims, the plea claim and the ineffectiveness claim. The Sixth Circuit held to the contrary, and that's why it was erroneous.

QUESTION: Is one way, then, to state the difference between the parties in this case that the difference is one of the definition of exhaustion, that he -- that the respondent concedes there has to be exhaustion, but he defines it just in terms of presentment, whereas you agree there has to be exhaustion, but you say exhaustion must be a proper presentment. Is that the issue in the case?

MR. FOLEY: Well, we definitely believe there must be proper presentment, and we think that's the

procedural default requirement, because exhaustion would be satisfied if a State like Missouri -- which has a strict 90-day deadline, no exceptions whatsoever -- exhaustion would be satisfied on day 91 no matter what the reason for the default.

On day 91, we know as a matter of the exhaustion doctrine there's no further State remedy, but that's not proper presentment, and that doesn't give the State court the opportunity to pass on the claim. There has to be meaningful opportunity.

QUESTION: Yes, I recognize there can be procedural defaults that are not exhaustion. Procedural defaults is the larger category. Exhaustion is a subclass of procedural default, as I understand your position, and that exhaustion means proper exhaustion, not mere presentment. Is that a correct statement of your position?

MR. FOLEY: Correct. In other words, he --

QUESTION: And in this case could we resolve the case in your favor by saying that what we're concerned with here is exhaustion as a subset of different kinds of procedural defaults, and that the exhaustion here was not complied with because there was not proper presentment of the claim?

MR. FOLEY: I think --

QUESTION: I -- and maybe you have a different theory of the case.

MR. FOLEY: No. I think in substance we're saying exactly the same thing. I think my terminology might be slightly different. In other words, I would reserve the word exhaustion for simply the presentment and say that the question of proper presentment is what the default doctrine looks to, but I think in substance we're saying that a default occurred here because it was time-barred under a higher law.

QUESTION: Well then, you would agree with the respondent that exhaustion is satisfied if there's mere presentment, even though it hasn't been properly exhausted, and you would say it's something other than exhaustion. You're telling me, please don't use exhaustion as the basis for the decision in my favor. Use procedural default as some broader classification.

MR. FOLEY: Well --

QUESTION: I take it you'd be pleased with a judgment in your favor under any circumstances.

MR. FOLEY: Absolutely.

(Laughter.)

QUESTION: But what is the theory that you think is the proper one for us to adopt in this regard?

MR. FOLEY: Well, I think in my view it's

analytically a little clearer to say that exhaustion only asks for whether there's been presentment, or, alternatively, it would be futile to present, because the Court's cases do say that exhaustion is technically satisfied if you can look to a rule, like the Missouri rule, and you know that it would be absolutely futile to present, you've satisfied exhaustion.

QUESTION: Is it the case that, if I agreed with you, would I -- is there -- would I be accepting -- would I have to accept the following: there is a constitutional ground, unfair trial. It's blocked by an adequate State ground, and now the defendant asserts cause.

There are many kinds of cause. This kind of cause happens to be an independent constitutional violation. Another kind could be an earthquake occurred and destroyed all the papers. A third kind could be that the State doesn't apply its own State ground fairly, you know. That's common. A fourth kind could be that the State rule's no good anyway for 15 other reasons.

Now, if I agree with you that they have -- that the State can block consideration of that by saying you didn't apply the right State rules, you didn't satisfy the State requirements for raising that in State court, that applies to all these causes.

MR. FOLEY: No.

QUESTION: No? Why not?

MR. FOLEY: Well, I think if I understand correctly we're only saying that the double default situation, if you will, the need to have two causes applies in a situation where it is the constitutional claim, and all we're asking for in this --

QUESTION: But how do I say that? How do I say, look, you say the reason you didn't raise your constitutional point on time. Why not? Because my lawyer was inadequate, and that's cause. And you say, you have to make that claim one time itself, right?

MR. FOLEY: Correct.

QUESTION: All right. Now, suppose my claim were, because the courthouse suffered a hurricane and all the documents were lost, or suppose I say, because the State itself doesn't apply this rule fairly. Now, why isn't it equally open to you to come back and say, but you have to make that claim on time? Now, how could I distinguish them? I'd love to be able to distinguish them, but I can't think of a way to do it.

MR. FOLEY: Well, Carrier answers that question. Carrier itself distinguishes between two kinds of causes. One kind is where it's the independent constitutional claim -- here, the Sixth Amendment claim -- and Carrier's explicit as to that you have to have exhaustion.

As to the earthquake example, Carrier itself says that doesn't require exhaustion, so Carrier sets up this analysis, and this case is an easy one under Carrier because it's the exact same claim. It's the same ineffective assistance of appellate counsel claim, the Sixth Amendment. So if there are difficult cases, given the line that Carrier draws, this case isn't one of them. This case is the easy case, because it's the same case as Carrier.

The only ruling that we're asking from this Court in this case is that procedural default analysis accompany the Carrier exhaustion requirement. Carrier exhaustion requirement already exists, and to reverse the Sixth Circuit is simply to say that procedural default analysis must supplement that exhaustion requirement, and the reasoning for that is the reasoning that this Court has always said, that procedural default analysis should accompany an exhaustion requirement.

QUESTION: May I ask you two questions? The first question is, am I correct in understanding that we don't have a statutory problem in this case at all, as we do in the preceding case. This is basically a refinement on the doctrine that originated in Wainwright v. Sykes, carried to its logical conclusion. It's a judge-made rule that we have to answer, so we can -- we have our own

decision to make, rather than asking what Congress intended.

MR. FOLEY: Absolutely. That's our exact understanding.

QUESTION: My second question is, the underlying claim here, am I correct in saying that the failure to put in any evidence, other than the statements of the prosecutors that supported a guilty plea, that the absence of witness testimony, is that just a State law requirement or is this a Federal constitutional requirement that there had to be something more?

MR. FOLEY: To answer that question, we don't think there's a Federal constitutional requirement. We don't think the claim has merit as a Federal claim, but we do think that Federal claim has been asserted in this case. As we understand --

QUESTION: I see. I see. But is there -- if I can just try to -- is there a State law requirement that was perhaps missed in this case that you only get to because it's -- you know, for all these procedural reasons?

MR. FOLEY: I want to answer that in --

QUESTION: As to actual testimony, to take a guilty plea in a case of this kind?

MR. FOLEY: I'd like to answer that in a couple

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of parts, if I might. First, there is a State statute that does call for witness testimony in this context, but our understanding of Ohio law is that there can be a waiver of that requirement of sworn testimony, and we believe that waiver occurred on the facts of this case, so we don't believe that there was a violation of Ohio law.

We also think, based on the Engle case, that that State law claim cannot be independently cognizable in Federal habeas.

QUESTION: I understand that. I understand.

MR. FOLEY: But what's been presented is this alternative Federal alpha derivative claim.

Just to say one more point about the State's interest, the argument here is that the State doesn't need to have this inquiry take place in State court, and we say that it does, because again, the State's interest in reopening a direct appeal is as strong as its interest in the appeal itself. In other words, what the State's process here is trying to do is to use ineffective assistance as a vehicle to get to that underlying claim, because it's the underlying claim that the State wants to reopen and have heard, and it's that interest that we think that the Sixth Circuit has not respected, and for that reason we ask that the Sixth Circuit's holding be reversed.

May I reserve the --

QUESTION: Yes, you may, Mr. Foley.

Mr. Bodine, we'll hear from you.

ORAL ARGUMENT OF J. JOSEPH BODINE, JR.

ON BEHALF OF THE RESPONDENT

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

Robert Carpenter's appellate ineffectiveness claim is not procedurally defaulted. He presented it to the Ohio courts in the manner in which he is entitled to under Ohio Rule of Appellate Procedure 26(B). He presented it to the court of appeals and to the supreme court of Ohio.

At the district court proceedings in Federal habeas Mr. Carpenter alleged that Rule 26(B) was inadequate and, in the alternative, he argued that if it was adequate --

QUESTION: Are you talking about an Ohio rule?

MR. BODINE: Yes, Your Honor. Rule 26(B) is the process by which Ohio defendants must challenge their appellate counsel's ineffectiveness. Mr. Carpenter specifically challenged that rule at the district court proceedings, saying that it was inadequate, but he argued in the alternative that, if that rule was adequate and could effectuate the default of his appellate

ineffectiveness claim, he could present cause in prejudice for that default.

The Warden did not defend Rule 26(B) at the district court, and never responded to the cause in prejudice arguments. Those are the same cause in prejudice arguments the Warden now asks this Court to force Mr. Carpenter to present.

The district court agreed with Mr. Carpenter that Rule 26 is inadequate because the good cause provision has not been consistently applied by the Ohio courts. The district court also determined that Mr. Carpenter was denied the effective assistance of counsel, and that he was prejudiced because of that, and accordingly the district court issued a writ of habeas corpus.

On appeal before the Sixth Circuit, the circuit did not reach the merits of Rule 26(B) but indicated in dicta that it likely agreed that the rule was inadequate. The Sixth Circuit then agreed that Mr. Carpenter was denied the effective assistance of counsel --

QUESTION: Would you point out exactly where the Sixth Circuit did that, because I don't recall it.

MR. BODINE: Your Honor, it's in the joint appendix. It's in a footnote 11 at page 64. I'm sorry. Footnote 13, Your Honor, on page 65 of the joint appendix.

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The Sixth Circuit stated in that footnote that it wasn't going to reach the merits of rule 26(B), but that it likely agreed that the rule was inadequate because the good cause provision has not been consistently applied.

QUESTION: Well, how does that footnote bear on the question presented here, Mr. Bodine?

MR. BODINE: It bears on the question presented here, Your Honor, because unless the rule is adequate --

QUESTION: But we -- the court of appeals didn't pass on it. Are you asking us to pass on it in the alternative?

MR. BODINE: No, Your Honor. The question that was presented here is whether a procedurally defaulted claim may nevertheless be used as cause to excuse the default of a different merit claim.

QUESTION: Right.

MR. BODINE: There has been no Federal finding in any court that Mr. Carpenter's appellate ineffectiveness claim is procedurally defaulted, and our argument is, until there is a cognizable procedural default, Mr. Carpenter need not present cause in prejudice arguments.

QUESTION: But the State raised that question in the Sixth Circuit and -- as I understand it, and the Sixth

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Circuit said no, you don't need to show -- you don't need to show the cause here for this kind of claim, and that's the question we granted certiorari on.

MR. BODINE: Whether a procedurally defaulted claim may nevertheless be used as cause.

QUESTION: Right.

MR. BODINE: There's another reason, though. Even if this Court --

QUESTION: Another reason for what?

MR. BODINE: Another reason the question is inadequately presented here, Your Honor, is because Mr. Carpenter has --

QUESTION: Well, are you saying that the question presented that we granted certiorari on isn't adequately presented?

MR. BODINE: That's our first argument.

QUESTION: Well, what does that mean?

MR. BODINE: It means that there's no controversy in the case. Mr. Carpenter has already done everything the State is asking him to do in this case.

QUESTION: I would suggest you pass on to your next argument.

MR. BODINE: The second argument that we're asserting is that the procedural default argument should not be applied to cause arguments. Cause arguments have

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always been used to explain a procedural default, and in that context this Court has always been focusing on merit claims. All of this Court's authority only applies to procedural default doctrine to merit claims.

QUESTION: How about Stewart v. LaGrand?

MR. BODINE: Stewart v. LaGrand, as we note in the merit brief, Your Honor, was a case about waiver. Mr. LaGrand waived both his merit claim and his cause argument, and therefore there was technically nothing for this Court to review. At the tail end of Stewart v. LaGrand this Court did note that the cause argument was procedurally defaulted, but it was an alternative holding. If there were no merit claims and no cause arguments presented to this Court, the Court never could have reached that issue.

Just last term, though, in Strickler v. Greene, the Court dealt with a similar structural argument with respect to a defaulted Brady claim, and in that case the Court held that a defaulted Brady claim and a defaulted cause argument could nevertheless be considered, even though the cause arguments themselves were not properly presented to a State court.

The same analysis should apply here. Mr. Carpenter presented his claims. He presented his cause claims, fully exhausted them, and did not procedurally

default them. It is immaterial at that point whether or not he must present cause in prejudice arguments if his cause argument itself, the second one, is not procedurally defaulted.

Justice Breyer, you asked a question earlier about the perpetual abyss that we can get into with respect to these questions. That's exactly what the Court dealt with in Strickler v. Greene. No matter how many times that question was asked, the answer to why was the Brady claim defaulted was always the same answer: because the State withheld evidence.

There's only one way to get out of that loop. Either go to the merits of that claim, or continue asking the question. We assert, or argue, that this Court did the correct thing by not continually asking cause questions when the Court can go straight to the merits of the claim and resolve it at that point.

Now, ineffective assistance of counsel is very similar to a Brady claim, because those claims both ask two fundamental questions: Is there State conduct that must be attributed to the individual petitioner and, if so, has the petitioner been prejudiced because of that State conduct? If a Brady claim can be reached even though the cause arguments are themselves defaulted, then so should an ineffectiveness claim be reached when the

answer is always ineffective assistance of counsel.

I want to note two other points in the --

QUESTION: I really thought, counsel, that Murray v. Carrier indicates that the -- that if the ineffective assistance of counsel claim was procedurally defaulted, that the court can't go on and reach the sufficiency of the evidence claim. I mean, that seemed clear to me from Murray, and what's been omitted is a determination about whether the ineffective assistance claim was procedurally defaulted.

MR. BODINE: In this case, yes, Your Honor, although the district court did hold that there was no default. The Sixth Circuit --

QUESTION: But that hasn't been reviewed, as has been pointed out and --

MR. BODINE: By the Sixth Circuit, correct, Your Honor.

QUESTION: -- I don't see how the Sixth Circuit judgment can stand in light of Murray v. Carrier.

MR. BODINE: If that's the case, Your Honor, then the adequacy of the rule certainly would need to be resolved, but Murray v. Carrier does say that before ineffective assistance of counsel can be asserted as cause it need be presented to the State court, it need rise to a level of Sixth Amendment violation, and an individual need

be prejudiced by it.

Murray v. Carrier does not say that the procedural default doctrine applies to ineffective assistance of counsel, and it's our position that an individual only need exhaust that claim, or present it to the State courts, before he can use it as cause in a Federal habeas proceeding, but Mr. Carpenter went far beyond that. He didn't merely present the claim, he presented it to two separate courts, and the claim is not procedurally defaulted. Therefore, he should be permitted to exercise that cause argument with respect to his underlying illegal plea argument.

QUESTION: May I ask a question about the ineffective assistance of counsel claim? The basis for it, as I understand it, is that counsel just challenged a 30-year sentence as opposed to a 20-year sentence, and failed to challenge the entire guilty plea on the ground that the -- no evidence was put in.

Am I correct in assuming that had he done what you say he should have done and prevailed, then your client would have been eligible for the death penalty?

MR. BODINE: No, Your Honor. Mr. Carpenter was acquitted of the death penalty because in Ohio you cannot plead to the sentence in a capital case. The court is required to go through the sentencing phase hearing, which

is a judge or jury trial, depending on how it proceeds.

QUESTION: I thought he only was -- eliminated the possibility of the death penalty by reason of the agreement with the State that enabled him to make this plea, and that if you set aside the plea, that would have put everything back to square 1.

MR. BODINE: Honestly, that's how we get around the problem in Ohio. You can plead guilty to a capital offense in Ohio, but the Court cannot impose a prearranged sentencing, or set a penalty. The court always has to go through the evidentiary process of aggravating circumstances, the mitigating factors, balance them, and make an appropriate determination.

QUESTION: Yes, but he avoided all that --

MR. BODINE: Correct.

QUESTION: -- by the deal that he made, and it seems to me -- and you're telling me that, as a matter of Ohio law, if you prevail he would not be exposed to the death penalty now?

MR. BODINE: Under Ohio law, if an individual goes to a sentencing phase and is essentially acquitted of the death penalty, the State may not later on remand charge him, but --

QUESTION: I don't want a general answer, but what happened in this case? If the proceedings in the

trial court are vitiated and you start over again, you're telling me that there's something else happened that would make him ineligible for the death penalty?

MR. BODINE: If we were in that position, I would certainly argue that --

QUESTION: Oh, okay.

MR. BODINE: -- the sentencing phase, penalty phase proceeding was an adjudication.

QUESTION: Because it seemed to me that counsel might well, even if he had a valid reason for attacking the plea arrangement, it might have been a very sound strategy, just as it was in the initial plea agreement, not to do that, because he wouldn't want to risk the death penalty for his client.

MR. BODINE: Exactly, Your Honor, and as I said, that type of arrangement is how the courts have permitted us to get around the problem with pleading guilty to a capital crime and then, by default, pleading guilty to the death penalty itself.

But again, it's not implicated here. The problem with that culpability hearing was that there was absolutely no evidence presented whatsoever --

QUESTION: Well, I'm sorry, I don't understand your answer that it's not implicated here, because one of the striking things about this case is the difference in

the bottom line, that the district court was just going to send it back to have another direct appeal, but the Sixth Circuit said no, you go all the way back to square 1. You have a new culpability hearing.

A new culpability hearing implies that you wipe out the former one, and so it seems to me that what Justice Stevens was suggesting, that the prosecutor could say, fine, you've wiped out the prior culpability hearing, no plea.

MR. BODINE: I was answering a different question I think, Your Honor.

What the district court did is, it stopped short in its analysis and granted relief on the ineffective assistance, and thereby required a new appeal.

The Sixth Circuit held that the district court should have gone one step further and actually granted the new culpability hearing. Now, at that point, I agree with you, the question whether or not an individual can then be subjected to the death penalty is certainly -- well, it hasn't been resolved in this case, definitely. Ohio law would support the fact that he may have been acquitted of the death penalty, but it has not considered it in the context of a guilty plea with a deal, so that --

QUESTION: Suppose I then agreed with you -- suppose I agreed with you on your point here. What's my

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bottom line supposed to be?

MR. BODINE: If you agreed with my point with respect to the cause in prejudice argument, Your Honor?

QUESTION: Yes.

MR. BODINE: Then Mr. Carpenter has proved two constitutional claims and he is entitled to a new trial.

QUESTION: Why? Because your basic claim, I take it, is a claim, as you make it, that the Federal Constitution forbids finding a person guilty on the basis that the prosecutor recites the facts, and he doesn't disagree. I've never seen a Federal constitutional case that said that.

The alternative way of looking at your basic claim is that the lawyer gave him ineffective assistance by not raising that very point on appeal, which he would have won on under Ohio law, but then we run into what Justice Stevens said, which is bothering me, too, so what's my bottom line?

MR. BODINE: Two separate claims. The bottom line in your question, Your Honor, is go back and get the direct appeal. That way, you don't run into a question of whether or not --

QUESTION: No, but go back and get the direct appeal under Ohio law? Why are you -- I can't think that one through. Help me on that. Suppose I agree with you

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on your cause and prejudice claim. Then what do I say, because I'm not prepared to say that it's a violation of the Federal Constitution to have this procedure that Ohio doesn't like, but -- you know, maybe it's a violation of Ohio law, but if it's a violation of Ohio law, the claim becomes one of ineffective assistance at the first level, and I don't know about that.

MR. BODINE: What the Sixth Circuit said is that the violation carried with it due process implications, because Ohio has established a procedure to protect against an inappropriate plea to a capital crime.

That was the basis for the Federal constitutional violation in the Sixth Circuit, the due process implications that a State has set up a procedure that an individual avails himself on and then does not follow that procedure properly. Under that circumstance, the Sixth Circuit held, it was appropriate to go back to have a full culpability hearing.

QUESTION: What about -- what do you think of his responses to the two things that were worrying me on your cause in prejudice point? His first response was -- of course, there is no infinite regress. It's possible to -- but he says, look, it's not really going to happen that you have cause for not asserting the first claim, the cause was defaulted, and then you try to assert cause

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there, and then they say that was defaulted, and then you try to assault cause there and that was defaulted. He said, that's imaginary. We're only talking about two levels here.

And his other answer was not bad. He said that this applies only to instances where the cause happens, by coincidence, to be itself a violation of the Federal Constitution, because that's what Carrier dealt with, so don't worry about suddenly creating this kind of problem with all the other more common causes that are raised.

What's your answer?

MR. BODINE: On those two particular points I actually agree, because in this case, no matter how many times the question is asked with respect to what is cause for the default, it is always the ineffectiveness of Mr. Carpenter's original appellate counsel.

Secondly, we also agree, and we argued that in our merit brief, it is only the constitutional claims themselves that have to be presented to the States. If it's a nonconstitutional claim, then there's no requirement that that cause argument be presented to the State. So in the earthquake example, that doesn't rise to the level of a constitutional claim. It certainly wouldn't have to go through the State system, and that's the difference here.

QUESTION: Is there any reason for that distinction?

MR. BODINE: The comity doctrine, the interest in finality that a State has always asserted, has only ever revolved around constitutional claims. State courts have an obligation to apply Federal constitutional law. Therefore, they must be given an opportunity in the first instance to apply it. The court has never extended it beyond that, I think probably to accommodate situations like that, the unforeseen circumstance that would deprive an individual of presenting his claim fairly to the Ohio -- to the State courts.

Mr. Carpenter presented all of his claims to the Ohio courts in the manner in which he was permitted to do so under Ohio law. He demonstrated that he did that to two Federal courts. He demonstrated that the procedural default of his underlying merit claim could be excused through the ineffective assistance of his appellate counsel, and he proved to two Federal courts that he was, in fact, denied the ineffective assistance of his appellate counsel.

QUESTION: May I ask another question about the appointment of counsel? He's now represented by the Ohio Public Defender's Office. You're a member of that office.

MR. BODINE: Yes, Your Honor.

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QUESTION: Was he also represented by your office in the plea negotiations?

MR. BODINE: He was represented by a different public defender office. In Ohio we have several different public defender-type agencies. Mr. Carpenter was represented by the Franklin County Public Defender, which does exclusively trial work and appeal work stemming from that county.

QUESTION: But they do -- that county public defender does appellate work as well as trial work?

MR. BODINE: For Franklin County, Ohio.

QUESTION: Well, then when he got new counsel for appeal, was that a different lawyer within the Franklin County Public Defender's Office?

MR. BODINE: Within the Franklin County, and the supreme court of Ohio has addressed that issue and said that that is acceptable. They're technically different attorneys. Therefore, one may raise the ineffectiveness of the other.

QUESTION: I see.

MR. BODINE: I think that's the question you're getting at, is it essentially the same individual who represented him through that direct appeal process.

QUESTION: But presumably there would be -- those lawyers would talk to one another. It isn't as

though a complete new stranger came into the case. There'd be some -- because they share their files, and --

MR. BODINE: Presumably, Your Honor.

QUESTION: And so at least it's conceivable that whatever motivated the trial counsel to enter into the plea negotiation might also have motivated the appellate counsel not to challenge the plea negotiation.

MR. BODINE: Conceivably, but we're not aware of that.

QUESTION: But we should treat them as different lawyers?

MR. BODINE: Absolutely, Your Honor. Ohio law certainly does.

QUESTION: And your office, Mr. Bodine, is a State Public Defender?

MR. BODINE: We're Statewide, Your Honor, and what we do is, we represent individuals in counties that do not have a public defender system set up, especially in those smaller counties where there are not enough appointed counsel to represent individuals.

QUESTION: So how did you happen to pick up this case? I -- just as a -- it has nothing to do with the merits of the argument.

MR. BODINE: We do a lot of outreach training and try to provide what support we can, Your Honor.

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Mr. Carpenter's former counsel had worked with us throughout the Federal court proceedings here, and when the case was granted, Mr. Belli, who's a sole practitioner, simply didn't think he could do both. That's how we got the case.

QUESTION: Thank you.

MR. BODINE: If Your Honors don't have any other questions, thank you.

QUESTION: Thank you, Mr. Bodine.

Mr. Foley, you have 7 minutes remaining.

REBUTTAL ARGUMENT OF EDWARD B. FOLEY

ON BEHALF OF THE PETITIONER

MR. FOLEY: A few brief points. First of all, in response to Justice Breyer, one of your questions, the ineffectiveness claim is not an independent basis for relief, given the current posture that the case is in, so if the Sixth Circuit view were to prevail it could only be -- the only habeas relief that could be granted would be on the plea claim, so they can't assert the Sixth Amendment ineffectiveness claim without proceeding under a different track, because under the Sixth Circuit track only the plea claim is --

QUESTION: But even under the Sixth Circuit's view, if I understand it, there would have to be established that it was a Federal constitutional violation

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of the plea agreement, not merely that it violated Ohio law.

MR. FOLEY: Absolutely correct, and also, just to reiterate, we don't want to concede in any way that there was a violation of Ohio law, and in fact the Court of Appeals for the Sixth Circuit remanded for some further proceeding on this waiver issue, so we want to preserve that point.

I thought I heard Mr. Bodine say -- make the argument that was also in his brief that exhaustion's enough in the Ohio context, as opposed to the Missouri example that I gave you where there's a strict 90-day deadline, because -- well, because the Ohio court could have passed on the claim because it has a limited narrow safety valve, and the only point I'd like to make beyond what's in our brief is that there shouldn't be any penalty for a State to have a limited safety valve of that kind and, indeed, in the Engle case that I mentioned earlier, this Court explicitly rejected the idea that cause in prejudice analysis does not apply in that context.

The same kind of argument was made, namely, don't do cause in prejudice analysis, where Ohio had another very narrow safety valve, and this Court explicitly rejected that argument, so I think that takes care of that issue as well.

Mr. Bodine mentioned the Strickler case, the Brady case, as an example where a constitutional violation can be its own cause. That is true in the Brady context, and it may in some fact patterns be true in the ineffective assistance context, and we don't dispute that. Again, all we're asking for here is that the cause inquiry take place, and there may be an example in a different case where you can use ineffective assistance as its own cause. We don't think that's true in this case for a variety of reasons, but the only relief we're seeking from this Court is that that cause inquiry be undertaken, that an explanation be made.

And finally Justice Breyer, again, as to the distinction between the earthquake example and the Carrier situation, where it's a constitutional violation, I think Mr. Bodine covered this, but essentially the State's interest here is to rectify constitutional error, so that's why it's important that if there's an allegation that ineffective assistance infected the original State appeal, that there be an opportunity for the State to correct that error when the State has its own procedure to do so, as it does here.

That interest doesn't apply in the earthquake context, and so all we're asking is that when a defendant doesn't take advantage of the process the State creates,

that he be put to the explanation to explain why he didn't take the advantage.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Foley. The case is submitted.

(Whereupon, at 11:50 a.m., the case in the above-entitled matter was submitted.)

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