OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TERRY WILLIAMS, Petitioner v. JOHN TAYLOR, WARDEN

CASE NO: 98-8384 c.1

PLACE: Washington, D.C.

DATE: Monday, October 4, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY WILLIAMS, :

Petitioner :

v. : No. 98-8384

JOHN TAYLOR, WARDEN :

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Washington, D.C.

Monday, October 4, 1999

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

APPEARANCES:

JOHN J. GIBBONS, ESQ., Newark, New Jersey; on behalf of the Petitioner.

ROBERT Q. HARRIS, ESQ., Assistant Attorney General, Richmond, Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 98-8384, Terry Williams v. John Taylor.

Mr. Gibbons.

ORAL ARGUMENT OF JOHN J. GIBBONS

ON BEHALF OF THE PETITIONER

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

I represent the petitioner, Terry Williams, who appeals from a judgment of the Court of Appeals for the Fourth Circuit reversing a United States court district judgment which granted Williams a new sentencing hearing because of ineffective assistance of counsel during the sentencing phase of his trial.

The petition presents two issues, the first, was Williams prejudiced as that term is defined in Strickland v. Washington, by the undisputed failure of his counsel to investigate and present available and compelling mitigation evidence?

The second is, if Williams was prejudiced by that failure, must an Article III court, including this Court, nevertheless deny habeas corpus relief because section 2254(d)(1) of title 28 compels it to defer to an

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erroneous legal decision of the Virginia supreme court on the Strickland v. Washington issue?

Williams' position on the first issue is that the experienced State trial judge and the experience district court judge correctly applied the Strickland prejudice standard to the undisputed facts respecting counsel's deficient performance.

QUESTION: Well, what about the seven experienced judges of the supreme court of Virginia?

MR. GIBBONS: The seven experienced judges of the supreme court of Virginia committed legal error. The two trial judges got it right.

With respect to the second issue, Williams' position is that section 2254(d)(1), properly interpreted, does not require the entry of a judgment by an Article III court inconsistent with the constitutional law pronounced by this Court simply because a State court entered such a judgment. The language of section 2254(d)(1) did not, indeed could not constitutionally require this Court to enter a judgment inconsistent with its own view of constitutional law.

Now, if I may, Mr. --

QUESTION: Well, (d)(1) says, resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law as

determined by the Supreme Court of the United States. Would it be fair to say that if the Fourth Circuit in this case made a reasonable application, say of our decision in Strickland v. Washington, then the -- your client would not prevail?

MR. GIBBONS: No, Mr. Chief Justice. A reasonable application that is nevertheless an incorrect application of the law should be reversed.

QUESTION: But how --

MR. GIBBONS: That's what courts do.

QUESTION: But the statute says, it has to have involved an unreasonable application. By definition a reasonable --

MR. GIBBONS: Well, if unreasonable application means erroneous application in the view of five members of this Court, then the decision should not stand as a bar to habeas corpus relief.

QUESTION: Well then, you say in effect that (d)(1) really did nothing.

MR. GIBBONS: (d)(1) in effect codified the Teague standards.

QUESTION: Mr. Gibbons, do you argue that in reading Strickland as modified generally by Lockhart that a legal error was made?

MR. GIBBONS: Yes, I do.

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QUESTION: Does that, then -- let's assume that I agree with you there, assume for the sake of argument. In your judgment, does that legal error itself entitle you to a reversal on the ground that the decision was contrary to the law as established by this Court, without going any further?

MR. GIBBONS: Yes, Justice Souter. It -- the contrary-to language in 2254(d)(1) seems to me refers to the selection of the wrong legal standard, and as I read the cases that have been decided in the courts of appeals, they all agree that when the State court chooses the wrong legal standard, there's plenary review.

QUESTION: Now, suppose it chooses the right legal standard, but it misapplies it. Does the contrary-to clause become inapplicable, and you're then in the next clause?

MR. GIBBONS: Well, Justice Kennedy, I read the clause as one whole clause dealing with legal error. Factual errors are dealt with in the next provision, in 2254(d)(2), so what the court is -- what the Congress is saying in (d)(1) is contrary to or an unreasonable application, in other words, wrong within the ordinary scope of review rendered to decisions of State courts by this Court.

QUESTION: Well, I'm asking you, if the correct

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legal standard is incorrectly applied, you can say that that is contrary to law.

MR. GIBBONS: Yes.

QUESTION: How can you say -- you might say it's contrary to law, but how can you say that it's contrary to clearly established Federal law where you have a -- one Federal case, and your assertion is, you haven't applied it properly to another situation, or you've mixed up Strickland and Lockhart?

I can see how you can say it's contrary to Federal law, but I can't see how you can say it's contrary to clearly established Federal law.

MR. GIBBONS: If you read the whole clause, Justice Scalia, it refers to contrary to clearly established law by the Supreme Court of the United States, and --

QUESTION: Ex ante, or ex post? I mean, are you saying so long as we say it's wrong later, it's contrary to clearly established law?

MR. GIBBONS: No. I'm saying that what the statute does is codify the old law rule of Teague, with this qualification, that under Teague you could look to old law established, for example, in the circuit courts, but under this statute Congress has said you can't, but that issue is not presented in this case.

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QUESTION: But you don't have to say clearly established in order to achieve that. You could have just said, a reasonable application of Federal law as determined by the Supreme Court of the United States, but Congress is going out of its way to say that it's contrary to clearly established Federal law.

MR. GIBBONS: Well, if Congress meant that you can't decide the case because in the view of, say, one justice Strickland v. Washington didn't clearly establish something, that seems to me to put you right within City of Boerne against -- whatever the name, the case where you have that RFRA was unconstitutional. It's a case of Congress telling this Court how to decide an issue of constitutional law --

QUESTION: Mr. Gibbons --

MR. GIBBONS: -- and Congress never intended that.

QUESTION: Well --

QUESTION: Mr. Gibbons, I thought your position was, and correct me if I'm wrong, that this was a clearly established violation. This was contrary. What the Virginia supreme court did, what the Fourth Circuit did was contrary to Strickland, because Strickland never required this additional test of beyond prejudice, and both the Virginia supreme court and the Fourth Circuit

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added something in addition to incompetence and prejudice.

MR. GIBBONS: That is my position, Justice Ginsburg. This -- in this case, Strickland is a clearly established rule, and the supreme court of Virginia departed from it. That should end the inquiry.

QUESTION: So we get no --

MR. GIBBONS: Now, of course, Virginia suggests that that's not what the supreme court of Virginia did, that it actually applied Strickland.

I suggest that if you read the opinion of the Virginia supreme court fairly, that's not what it did. But even if that were the case, even if it were an application of Strickland, choosing the right rule, the question then would be, what is your rule in reviewing that mixed question of fact and law.

QUESTION: Why do you say it's a mixed question of fact and law?

MR. GIBBONS: Well, if I'm right that Virginia simply chose the wrong governing standard, chose the rule against perpetuities instead of Strickland v. Washington, that ends the inquiry.

QUESTION: But what if the --

MR. GIBBONS: But you'd have to go further --

QUESTION: What if the supreme court of Virginia -- the supreme court of Virginia cited

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Strickland, and it seemed to me said the correct rule. Now, your quarrel really is with the way they applied it to the facts of this case, isn't it?

MR. GIBBONS: Well, if -- only if the majority of you agree that the supreme court of Virginia chose the right rule. I don't think you can fairly read that opinion in that way.

But if you think that the supreme court of Virginia applied the right rule, since Strickland is a mixed question of fact and law, you must exercise plenary review.

QUESTION: May I ask this question: isn't there a debate between the parties as to what the right rule is, whether Strickland is Strickland by itself, or Strickland as modified by Lockhart?

MR. GIBBONS: There is a debate between the parties on that, and I don't think it's much of a debate, because I don't think you can fairly read Lockhart as across-the-board modifying Strickland.

QUESTION: No, but if the Virginia supreme court did do that, then one could argue they applied the wrong rule.

MR. GIBBONS: Yes, and that's --

QUESTION: Right.

MR. GIBBONS: Let's assume they did --

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QUESTION: Was it the supreme court of Virginia or the Fourth Circuit that relied on Lockhart?

MR. GIBBONS: The supreme court of Virginia relied on Lockhart. The Fourth Circuit relied on section 2254(d)(1) to hold that if any justice or any judge could imagine that the supreme court of Virginia was right, 2254(d)(1) requires a denial of habeas corpus relief, and I suggest that is simply a misreading of congressional intention.

QUESTION: Well, we can accept that and still say that if there is reasonable room for disagreement among judges.

MR. GIBBONS: Reasonable room for disagreement among judges with respect to a rule of law, or the application of a rule of law to undisputed facts.

Justice Scalia, I suggest that that's not what judges do. Law professors talk about pure questions of law, but judges enter judgments, and sometimes they're not unanimous, and if Congress were to tell you in, for example, in exercising your section 1257 jurisdiction, reviewing a State court judgment, that you can only reverse a State court judgment if you're unanimous, I am confident that a majority of you would say, Congress has violated separation of powers. You can't tell the judge that.

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QUESTION: They're not telling us how to decide it, counsel, they are telling us not to decide it. There's a difference between telling us how to decide a case, which was Boerne, and telling us that we have no jurisdiction over a case, which is what Congress is doing in its habeas corpus statutes.

Now, it says in that statute, not contrary to Federal law, which it seems to me is what you're saying. They went out of their way to say that it has to be contrary to clearly established Federal law. I take that to mean Federal law that is so clear that there's no room for disagreement among reasonable judges as to what the law requires, and if it doesn't mean that, I don't understand what it means.

MR. GIBBONS: It means, Justice Scalia, what you said in Teague. It means that old rules that are settled must be followed.

QUESTION: But --

MR. GIBBONS: New rules need not be, and the clearly established reference is simply to the old rule, new rule distinction.

QUESTION: But it would have been so easy for Congress to use the language of Teague if that's what it wanted to do. This isn't the same language as Teague.

MR. GIBBONS: Well, the language chosen --

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reasonable application, and clearly established and so forth -- you find in the Teague line of cases, and I'll grant you that this is not a model of clear statutory draftsmanship, but on the other hand, when the President looked at it, and in his signing statement interpreted it, he read it to mean what we suggest, that it did not affect the ability of this Court, or any Article III court, to decide a pure question of law or a mixed question of fact and law, all constitutional law.

QUESTION: What deference do we give to signing statements by the President?

MR. GIBBONS: Well, Your Honor, considering the amount of time and space that this Court has devoted to the Presentment Clause, it seems -- it would seem to me to be surprising not to treat a presidential signing statement as a significant piece of legislative history. The President was a participant in the legislative process.

QUESTION: Do any of our cases speak to that at all, one way or the other?

MR. GIBBONS: No, not -- well, I take that back. I think I could probably refer you to a law review article that collects some case law, but I cannot refer you to a case where this Court has specifically addressed --

QUESTION: The President gets these things after

Congress has done, so I mean, that's sort of very -- what if a congressional conference committee has said one thing, and then it comes to the President and he says just the opposite, I understand this statute to mean X --

MR. GIBBONS: Well --

QUESTION: -- and the congressional conference committee had said, we understand it to mean Y?

MR. GIBBONS: Well, that hypothetical, of course, is not this case, because there are no committee reports.

QUESTION: Well, I understand, but it's sort of a dirty trick to come in at the end of the game and say that it means X when you know Congress thinks it's Y, which may have been the case here.

MR. GIBBONS: Well, there is no significant evidence that that was the case, and the signing --

QUESTION: But we really don't know.

MR. GIBBONS: -- statement refers to the fact that some people make that contention --

QUESTION: Mr. Gibbons, wasn't there --

MR. GIBBONS: -- and he said no, that's wrong.

QUESTION: Mr. Gibbons, wasn't there a modification from the original language in AEDPA, that there was a standard calling for greater respect for the State court decision, and that was qualified in the final

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statement?

MR. GIBBONS: Yes, Your Honor. The House version would have gone much further and might even have achieved, at least from a point of view of a statute, the -- what Virginia contends for, but that version was rejected, and this language is clearly a compromise.

Now, there's no -- nothing new or startling about compromises with respect to habeas corpus statutes. In the 49 years that I've been at the bar, one side or the other, there has never been a time when there wasn't somebody in Congress trying to repeal the 1867 habeas corpus statute, and the whole history of it is compromise, and this is another compromise, and you simply should not attribute to Congress an intention to tell an Article III court how to decide an issue of constitutional law, because there are enough lawyers in Congress who know that they can't do that, and that is precisely what Virginia is contending.

QUESTION: Mr. Gibbons, they are not telling us how to decide a question of constitutional law, they are telling us not to decide particular cases. Congress tells us not to decide particular cases all the time. The Constitution gives them the authority to do that.

MR. GIBBONS: If you read this as a jurisdictional statute, you could reach that conclusion.

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I don't contend that Congress could not abolish the 1867 habeas corpus statute. It could abolish section 1257, it could abolish section 1331, but that's not what Congress did.

You have jurisdiction. The district court had jurisdiction. The court of appeals had jurisdiction. The question is squarely the question presented in Klein and in City of Boerne. Can Congress, in a case where you undoubtedly have jurisdiction, tell you how to decide an issue of constitutional law?

QUESTION: Well, certainly Congress can limit the scope of review on habeas corpus in a way that perhaps it couldn't on direct review. Don't you agree with that?

MR. GIBBONS: If you mean, Mr. Chief Justice, that Congress can tell you to abandon your historic practice of deciding mixed questions of fact and law like plenary review, I suggest no. I realize that you joined in an opinion at least hinting otherwise.

(Laughter.)

MR. GIBBONS: But I suggest that --

QUESTION: Pretty strong hint. Pretty strong hint.

MR. GIBBONS: -- you're wrong.

(Laughter.)

QUESTION: Well, could Congress -- could

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Congress --

MR. GIBBONS: There are four things that courts do.

QUESTION: Could Congress make a statute codifying our successive writ jurisprudence, where you cannot bring successive writs?

MR. GIBBONS: Yes, and --

QUESTION: Well, why isn't that telling us how to decide a case, under your view?

MR. GIBBONS: Well, for example, when Congress, or in this case a rule of court approved by Congress, tells you when a petition for certiorari is timely, Congress isn't telling you how to decide a case. It's telling you, no, you can't decide the case. That's jurisdiction. When Congress --

QUESTION: Well, that's this statute in a way, because we could have taken this from State on review of the State collateral proceedings and reached the same issue.

MR. GIBBONS: You could have taken it on review of this -- the Virginia decision, and if you had, under section 1257, at least I have no doubt that you would have reversed because Virginia misapplied the governing -- chose the wrong governing precedent.

The question is whether Congress can tell you

you can decide a case one way in section 12 -- in a section 1257 review, but you must decide it another way in a section 1254 review, and I suggest to you, Congress didn't intend that, because Congress couldn't get away with that.

QUESTION: Could Congress get away --

QUESTION: It certainly intended that the review in a habeas review could be much more limited than section 1257. Don't you agree with that?

MR. GIBBONS: Well, it has to some extent, but in this instance the issue is before you, you have jurisdiction to decide it, and you must.

QUESTION: Is it within the power of Congress to say that habeas relief will never be granted for an error of law alone, however clear that error may be? In other words, you always have to look in effect to the bottom line of the determination, or the verdict, or a judgment below, and only if that bottom line involves in effect an error may you grant habeas relief? Is that within the power of Congress?

MR. GIBBONS: Well, if Congress added that to the present limitation on review of facts, that would be the equivalent, Justice Souter, of a repeal of habeas corpus, but that's not what Congress did.

QUESTION: Well, there's an argument here that

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when Congress uses the word decision, a decision that was contrary to clearly established law, what it was trying to get at was some kind of a, in effect a bottom-line review as distinct from a review in which a Federal court says, there was a clear error of law, habeas relief granted.

Couldn't Congress do that and, if it could, do you think that's what it was doing when it used the word decision here?

MR. GIBBONS: When Congress -- well, there are two questions.

QUESTION: Right.

MR. GIBBONS: I'll address the last ones first. When Congress used the word decision, it obviously referred to judgment, because that's what courts do when the court makes a decision. It can't make a decision other than in connection with a judgment, and I don't think you can read anything into decision other than that.

QUESTION: And it doesn't mean opinion, so if -- so long as they reach the right result, even if their opinion is all messed up, and recites the law quite incorrectly, so long as they stumbled into the right result somehow, that's okay.

MR. GIBBONS: That's what plenary review means, yes, but of course, that's not where you're going to go with this case, because this case satisfies the Strickland

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test.

QUESTION: Well, that may be, but I think that is different from what I, at least, understood you to be saying at the beginning, and I thought you were saying at the beginning that if they made a clear error of law about Strickland, i.e., in saying that Strickland was generally modified by Lockhart, that that would be a basis for habeas relief. Maybe I misunderstood you.

MR. GIBBONS: Well, it would be a basis for habeas relief if habeas relief is properly available, and it is in this case.

QUESTION: Mr. Gibbons, as I read your brief, you first established without regard to AEDPA that this was a clear violation of Strickland --

MR. GIBBONS: Yes.

QUESTION: -- because the ruling on prejudice was simply wrong, and only after you established that did you go on, because I assume that your position was, if there hadn't been a showing of prejudice, that would be the end of the case and the rest would be academic. Do I understand you right? Is that --

MR. GIBBONS: Yes. Yes.

QUESTION: That you first said, here was a clearly established violation of the Strickland standard.

MR. GIBBONS: Yes, and if you were to

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independently conclude that the Virginia trial court and the district court, both of whom found the Strickland violation were wrong, yes, I'd lose, or my client, Mr. Williams, would lose, but that I don't think is likely, given this record. I don't think it's the least bit likely.

Your Honor, I see my white light is on. I would like to reserve some time for rebuttal, if I may.

QUESTION: Very well, Mr. Gibbons.

Mr. Harris, we'll hear from you.

ORAL ARGUMENT OF ROBERT Q. HARRIS

ON BEHALF OF THE RESPONDENT

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

This Court has long recognized that Congress has the power to determine the scope of the habeas corpus remedy, and what we see in the act of 1996 is Congress taking substantial measures to change the rule, to change the amount of deference that is allowed to a State court judgment.

If I could briefly address what Congress said they were doing in their statute before moving on to the specific statutes, it is clear from the entire debate in Congress that we are talking about reform of existing habeas corpus law. It is also clear that Congress

intended a deferential standard of law, and we know from the --

QUESTION: May I ask one general question about that history? Does that history indicate that the legislature debated which view was correct as between Justice O'Connor's view and Justice Thomas' view in Wright v. West?

MR. HARRIS: Not specifically.

QUESTION: They didn't really focus on that.

MR. HARRIS: Wright v. West was cited by the opponents of the reform that were suggested in this bill on the basis of Justice O'Connor's opinion that the Federal courts should be exercising independent judgment over the decisions raised in the Federal habeas petition.

Congress clearly was intending to present a different rule. There were specific references to reasonable applications of Federal law to the facts of a particular case by the State courts, but if we look at the particular amendments at the very end of the enactment of this statute, we had Senator Kyl offering an amendment which would have changed the standard we now see and instead substituted an inadequate or ineffective State remedy level, which is roughly similar to the full and fair standard that Congress had debated previously. That was rejected. The Senate did not intend to have that

restrictive a standard.

At the other extreme, Senator Biden offered an amendment which would have deleted the standard of deference in the statute altogether, and would have left it as he specifically said, as de novo review of all the issues presented in the case. That also was rejected. What was left was the standard which was described, indeed, as a realistic compromise between the various points of view, a middle level of deference, if you will, between none and absolute.

Mr. Chief Justice, in response to your question about the authority of the President to determine the legislative intent in his action on the signing, I believe that the rule is, where it is an administration bill, and the President is responsible for presenting the bill to Congress in the first place, that his opinion on what it means, it may be given weight, but certainly when he is merely offering an opinion on something that Congress has decided independently, his opinion is not persuasive of the legislative intent.

QUESTION: What is your authority for that statement?

MR. HARRIS: I do not recall the case off the top of my head. That is not an issue that was, I thought, presented in this case.

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The words that we are left with in the 1996 act deal with several statements that the courts below have uniformly read as setting up a deferential standard of review in eliminating the previous practice of de novo review. Clearly established law, as determined by this Court, is now the law that all courts must look at in Federal habeas corpus review.

QUESTION: The problem I have is that this is not usually how courts work, that this is a very different approach for the Congress to impose on this Court, is it not?

MR. HARRIS: It is a different approach than Congress has chosen to impose in the past, certainly in the Federal habeas context, but it's not --

QUESTION: In the Ornalis case, where we talked about mixed questions of law and fact in the probable cause for search area, we said that independent review is necessary if we are to maintain control and to clarify Federal principles.

MR. HARRIS: And again, that is in the context of a direct review system, and the direct process of review between the trial, the probable cause determination, the trial, and the direct appeal, but this Court has recognized there are significant differences between the process of direct review and the process of

collateral review.

QUESTION: Of course, competency cases usually occur on collateral review, State and Federal, do they not?

MR. HARRIS: That is true, but we are now seeing in several States, as anticipated by the capital case provisions of the act, a process of unitary review, where now claims of ineffective assistance of counsel can be raised, in addition to the direct appeal claims, in one proceeding, but still, as a matter of course, most States would follow the practice of these competency claims being raised in State collateral proceedings, but still subject to this Court's review.

QUESTION: In effect, what Congress has done, is tell us, say it once, and then don't say it again, but that's not the way the law develops.

MR. HARRIS: I'm not sure I understand the question.

QUESTION: Congress has said, once we announce the principle, we cannot refine it, apply it, explain it, expand it, contract it --

MR. HARRIS: I don't think that's what this statute says, and I don't think that's what the proponents of the statute would have had this Court conclude.

I think what this statute is saying is simply

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saying that the process of direct review, of determining issues of Federal law, is adequate, is adequate guidance for the State courts to make their own decisions, and their reasonable decisions applying this Court's clearly established precedent must be honored.

I think that's the difference, I suppose, on the view of this statute between Williams and the State.

QUESTION: If I understand your argument, Mr. Harris, there could never be any determination that a State court misapplied Strickland, because on your view and the Fourth Circuit's view of what is contrary to clearly established Federal law, it must be a case that's on all fours.

The bottom line in Strickland was that the defendant lost.

MR. HARRIS: That's correct.

QUESTION: The court announced a standard, so you could never have a case on all fours with Strickland that the petitioner could win, in your view of this.

MR. HARRIS: I think that the contrary-to clause is not addressed to determining that issue. That is a question of application of Strickland, applying Strickland to the facts of a particular case.

QUESTION: Well, can you tell me if, in your view, a defendant, a petitioner for habeas corpus, Federal

habeas corpus, could ever prevail on a Strickland claim given that Strickland himself did not prevail?

MR. HARRIS: It would be contrary to Strickland, as the clearly established precedent of this Court, if the State court failed to recognize and apply Strickland. Once the State court has applied this Court's clearly established precedent, it is a matter to be reviewed for reasonableness for the result, the application of the precedent to the case.

QUESTION: Do you mean, then, that the Court would have had to say, Strickland doesn't govern, but we're not looking at Strickland, or what -- I don't quite have a grasp on what you mean by --

MR. HARRIS: I think that would certainly satisfy it, if this -- look back --

QUESTION: I think your opponent says that, if I understood the argument correctly, it doesn't matter what the Court says about Strickland, that this statute only applies to decisions contrary to Strickland, so even if you misdescribe what Strickland says, we don't really have to look to the opinion at all.

MR. HARRIS: I --

QUESTION: We just look to the result.

MR. HARRIS: I can understand that reading of the statute, and it -- that certainly is implicit in

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focusing on the decision of the State.

QUESTION: Do you agree with that reading?

MR. HARRIS: I don't think you need to go that far in this case.

QUESTION: Why?

MR. HARRIS: You don't need to --

QUESTION: It's not a matter of going that far. I want to know what the -- what decision means. I have to come to some --

MR. HARRIS: Well, I think in the context of this case, the decision is the adjudication of the facts and the law of the case. We have an opinion in this case. We know what the Virginia supreme court said, both about the law and the facts presented by Williams' case.

I think there may be occasions, if you have a decision of the State court --

QUESTION: What if it said something clearly contrary to Strickland, but the result -- it might have been contrary to Strickland, might not have been contrary. The result's pretty close. It's -- you know, Strickland might have produced that result, but it's clear that the court was not applying Strickland. It was using some other rule entirely that was totally wrong.

MR. HARRIS: I cannot object to that rule, but I'm not sure that that's what Congress had in mind.

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Congress was allowing a rule of deference, assuming the faithfulness of the State courts to the clearly established precedent of this Court. The whole basis for allowing deference to the State court decision is the assumption that State courts are just as good, and are applying the correct law.

QUESTION: You would say that if the State court did not use Strickland, or misdescribed Strickland, that their decision would be covered by this provision, we could reverse them on habeas, even though the result, if you applied Strickland correctly, might have been missed or might not have.

MR. HARRIS: I understand that reading, but I'm not sure the Court needs to go to that point. I do not --

QUESTION: Let's assume the Court does think it has to go that far. What is the answer? Do we -- on Justice Scalia's hypo do we -- T

MR. HARRIS: The strict reading of the statute is correct.

QUESTION: -- grant relief or not? Pardon?The

MR. HARRIS: The strict reading of the statute, Justice Scalia, is certainly correct. The statute requires that decisions, the absolute decision of the Court that is not contrary to or an unreasonable application of this Court's precedent, may not --

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QUESTION: So on his hypothetical, on which the law is clearly wrong, the decision may or may not be right, we're not sure, no relief?

MR. HARRIS: As a practical --

QUESTION: That's your position?

MR. HARRIS: As a practical matter, that will be the result, but because --

QUESTION: Well, I want to know what your position is in answer to the legal question. Is that your answer, no relief as a matter of law?

MR. HARRIS: If the decision is not contrary, or an unreasonable application, no relief.

QUESTION: Well, if you take that position, you leave the court, this Court and perhaps other Federal courts, to have to analyze intensively the facts of each case. Supposing the supreme court of Virginia here had not even mentioned Strickland, but used its own standard, which was much less demand -- much more favorable to the State than ours, then is your position that we could not reverse that, but we would have to go through the facts and say, well now, if we were to apply Strickland to these facts, what would we come up with?

MR. HARRIS: Again, I don't think the Court needs to go as far as to reach Justice Scalia's question in this case, and again, as a practical result, if the

State court decision affirmatively gives the Federal reviewing court reason to doubt seriously whether or not the State court correctly applied the correct law, or unreasonably applied the correct law, what the Court in effect is doing is a de novo review at that point, and trying -- and that -- you get to the same point as you would under 2254(d)'s contrary-to. Where the State has affirmatively failed to apply the correct law, you would then lead the Federal court into reviewing --

QUESTION: It seems to me this is kind of an unlikely hypothetical. In all these cases, the State court's going to know Strickland is on the books and they're going to cite Strickland, they're going to at least repeat the basic rule it sets forth.

What troubles me is, it seems to me your view, and the view of the Fourth Circuit is that if the State supreme court correctly cites the rule and says, we've looked at the record and we think there's no prejudice here, that the man was -- and we're reasonable judges, unless you could say that no reasonable judge could reach that conclusion, there's no relief. I think that's the view of the Fourth Circuit.

MR. HARRIS: I would agree the Fourth Circuit --

QUESTION: So is there ever a chance -- this kind of goes back to Justice Ginsburg's case. As long as

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a unanimous State supreme court says there was no prejudice, there really is no opportunity for relief in Federal habeas corpus.

MR. HARRIS: That has not been this Court's treatment of the objectionable reasonableness component of Teague. This Court hasn't merely counted to see --

QUESTION: No, but that's the Fourth Circuit's treatment of it, I think.

MR. HARRIS: The Fourth Circuit is identifying the precisely identical standard that was applied by this Court in Teague as far as objective reasonableness of a State court decision. This Court has explained reasonableness as an objective standard on whether reasonable jurists can agree.

QUESTION: But Mr. Harris, the Fourth Circuit said it means reasonable jurists would all agree that the interpretation was unreasonable, so to apply that to this case you would have to say that the jurists on the Virginia supreme court were not reasonable. That was the Fourth Circuit's interpretation. All reasonable jurists would have to come to this same bottom line.

MR. HARRIS: I think that is the same way of stating the Teague analysis of objective reasonableness, whether reasonable jurists can disagree, and as this Court made --

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QUESTION: But reasonable jurists always disagree. I mean, is there any instance where you could get a State supreme court to say, we think there was no prejudice, and meet this standard, without saying well, those judges on the Virginia supreme court were unreasonable?

MR. HARRIS: Well, I think that this Court's understanding of objective reasonableness through the Teague cases is not focusing on the particular jurists involved. It's focusing on the reasonableness of the decision, and again, as this Court pointed out in a Teague case, sometimes lower courts make serious mistakes.

QUESTION: I began to think, after reading 11 briefs on this, that if we take this statute, which is clearly a compromise, and interpret it literally, we're going to have a system that's so complicated that virtually no trial judge is going to be able to administer it, and few appellate judges, so I wondered what you'd think of reading this statute as legislating a mood, rather like Universal Camera and the APA.

They're saying in this statute that the work is done by the words, contrary to. That keeps us our independence, except in rather unusual fact-mixed questions, and the rest of it is, they're saying to the judge, judge, pay attention to the State courts.

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Remember, they're judges, too. It's a mood.

And we've written opinions like that, namely, Universal Camera.

MR. HARRIS: I think Congress has taken an additional step beyond that, Justice Souter, by -- that -- your suggestion that there may be highly unusual particular cases outside the contrary-to, I would suggest that it's the unreasonable applications here that is going to provide the gist of the work for the Federal courts.

Where this Court has stated a specific rule for deciding Federal claims, and the State court has correctly identified and selected that as the rule prior to this petitioner's claims, the only issue I think the Congress intended for the courts is whether or not that result, that decision is a reasonable one, a reasonable application of this Court's precedents.

QUESTION: Suppose the unreasonable application clause were not in the statute. All we have is contrary-to. Then you have a case where they get the correct standard. It's a close case. They come out one way, we think they should have come out the other way. What result?

MR. HARRIS: Under my understanding of 2254(d), it looks like you're describing basically a Teague issue, where you're simply looking at the State court's choice of

the legal rule that's going to control a claim.

QUESTION: The legal rule is right, they just got it wrong. That's not Teague. Isn't that contrary to law?

MR. HARRIS: Well, again --

QUESTION: If the statute just had the phrase, contrary to law --

MR. HARRIS: If they got the legal rule wrong, what this statute allows is, the exception is met --

QUESTION: Let's say they get the legal rule right, a close case, we think they're wrong. It's Justice Breyer's point that I'm trying to pursue.

MR. HARRIS: Without --

QUESTION: And if just contrary-to is the operative phrase, and involved and unreasonable application is not in the statute at all, what result?

MR. HARRIS: Without the addition of unreasonable application, I think this Court would be left and Federal courts would be left with the authority to disagree with the application of the --

QUESTION: Well, that depends on how literally you take the word decision, and I thought you were -- you said earlier you were going to take decision quite literally, because the decision would be contrary to clearly established Federal law, if you apply the clearly

established law incorrectly to the facts, so maybe you don't think decision really means decision.

MR. HARRIS: Decision clearly does mean decision.

QUESTION: Well then, it seems to me saying contrary-to would have been enough, because every decision involves applying the law to the facts. You apply law to the facts, and you get a decision.

MR. HARRIS: I think what we need to keep in mind is that Congress has given us both, because Congress intended both to have an operative effect in this statute.

I think what we also need to keep in mind is that the ordinary usage of the contrary-to in this type of situation is the law identification, and the unreasonable application quite clearly places a responsibility on the court, the Federal court reviewing it, to apply the law.

I would point out in addition to -- on this issue that Williams has actually offered this Court an interpretation of 2254(d) that would have this Court conclude that after the extensive debates on the standard of review, after considering various amendments on the standard of review, and after, indeed, considering every statement that was made, that Congress has done nothing at all.

His opinion is that this statute is limited to

Teague and nothing but Teague, as if Congress basically had not acted at all. That clearly cannot be the meaning of this statute.

QUESTION: Well, that's not quite correct, because Teague prior to the statute was just a judge-made rule, and conceivably Congress might have wanted to include that in statutory law.

MR. HARRIS: And I think clearly Congress has brought in what Teague would have given as a judge-made rule. Congress has now made it part of the statute, but Congress clearly has --

QUESTION: So the statute is not a nullity even if you read it as just codifying Teague.

MR. HARRIS: Well, Congress said they were reforming existing law, and it's a nullity in that sense, if you say it does no more than codify existing law.

Now, if I could address for a moment the question of whether or not the Virginia supreme court did pick the right law, Williams' argument in front of this Court is that the Virginia supreme court erred. It simply erred in referring at all to Lockhart v. Fretwell in addition to the Strickland v. Washington decision, and first of all, I think it is clear from the supreme court opinion that they conducted a Strickland analysis of the claims that were raised in this case.

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They correctly identified Strickland as the controlling rule, they identified the Strickland standard, they applied the Strickland standard, and they clearly repeatedly said that Williams had not shown a reasonable probability of a different outcome in this case, which was --

QUESTION: Mr. Harris, may I ask you one question on that point. The very judge who sat on the trial, when presented with this mitigating evidence that was not presented at the trial, said, it seems to me that at least one and perhaps all of the jurors would have been affected by this.

Now, trial judges generally have a better feeling for jurors and their reaction. Does that factor into this at all, or must we just shut from our sight that the very judge who conducted this trial thought that there was a reasonable probability that the result would have been different?

MR. HARRIS: Well, to the last point of that question, what the trial judge said in this case was to define reasonable probability in a way that is simply incorrect. The trial judge --

QUESTION: Why?

MR. HARRIS: Well, the trial judge said, in a capital case mitigating evidence is important, and if it's

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not offered, it is prejudice. The trial judge made a very short and simple per se rule that if mitigation evidence can be identified in a later proceeding --

QUESTION: I didn't see that in his opinion. Perhaps you could point it out to me. I thought he said that this evidence, this very evidence would have persuaded at least one and perhaps all of the jurors to come to a different result.

MR. HARRIS: Looking in the appendix at page 424 --

QUESTION: Page what?

MR. HARRIS: 424. It's volume 2 of the appendix. I'll simply read it: Counsel's failure to present favorable mitigation evidence which was available upon investigation and development falls below the range expected of reasonable professional counsel. Because this evidence is so crucial, it is prejudicial to a defendant when it is not presented.

If you look down at the following paragraph, he says, this court believes this is the case. Terry Williams needed anything and everything. Anything less is not enough. That is simply describing a per se standard that is not the Strickland standard.

QUESTION: Well, of course, that was in a context when this defense counsel came up with no specific

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arguments on his behalf. Didn't -- nothing about the family background, the child abuse, and then Dr. Santora's conclusion that he would be okay in a structured environment. That would have been -- that would have completely changed his summation, because he would have had something specific to give to the jury.

MR. HARRIS: Well, if I could look back, then, at those particular facts, what trial counsel did in this case is what this Court has recognized in Strickland and in Berger v. Kemp as what counsel do. They talk to their client, they talk to the client's family members, and in this case, as in those, there was no suggestion that there was anything particular in his background to present to the jury.

Trial counsel did have a psychiatric evaluation done of his client. He made --

QUESTION: Mr. Harris, I thought we were to assume that there was -- it was incompetent not to present this testimony, and the only question was prejudice.

MR. HARRIS: Well, even if we assume that, then, the question is whether or not what he has shown is prejudicial to the -- under the Strickland standard, I would say that the Virginia supreme court got it right.

At this point we have to keep in mind that the trial court and the habeas court made findings on what

evidence was available, what should have been presented. Among other things, the State court -- no court that has reviewed this case has ever suggested that the opinion of Dr. Santora, as far as Williams' dangerousness in prison, was a factor worth considering at all. It has never been identified as a factor.

All the trial court identified in the habeas as worthy of a jury's consideration was the testimony of additional character witnesses. That was the finding of the trial court, and he indicated that there was other evidence was available that reasonable counsel could have investigated and looked at to determine if additional mitigation evidence could be developed.

But what the habeas court relied on in its findings was particular testimony of particular witnesses, which I would suggest is not that different from the witnesses, the character witnesses that trial counsel in fact had presented in the sentencing phase of this trial.

QUESTION: Wasn't there a reference to the testimony that could have been brought in about the horrendous conditions in which Williams was brought up, and none of that was presented, I take it.

MR. HARRIS: The trial court made a reference to documents where trial counsel could have investigated those documents to determine if reasonable -- to determine

if reasonable -- not reasonable, determine if mitigating evidence could be developed.

QUESTION: Is it assumed --

MR. HARRIS: It's a given.

QUESTION: Is it assumed for the sake of argument that there was such mitigating evidence?

MR. HARRIS: It is assumed for the sake of this case, but records --

QUESTION: Okay. Isn't the question, then, on -- or isn't it a question, then, on prejudice whether, given the open-endedness of the present Federal law on the admissibility of mitigating evidence, whether one reasonable juror could have heard the testimony about this guy's childhood and said, here but for the grace of God go I, I'm not going to vote to execute somebody who has come out of these circumstances.

That reasonable probability, in fact possibility, is all you have to show under Strickland, and isn't that enough? Does that not demonstrate prejudice in this case?

MR. HARRIS: The courts -- the Virginia supreme court and the Fourth Circuit reviewing this case -- and, of course, the Fourth Circuit also agreed as a de novo decision in this case that he had not met the Strickland standard of prejudice.

QUESTION: Well, I know that's what they concluded, but I'm giving you a specific example of what would in fact be admissible mitigating evidence under the law as it is now, and I'm saying, isn't it reasonable to suppose that one juror could have heard that evidence and said, I'm not going to execute for that purpose, and if the answer is yes, isn't that a sufficient showing of Strickland prejudice?

MR. HARRIS: The answer to that is no.

QUESTION: Why?

MR. HARRIS: Strickland is not a standard that focuses on the views of one juror.

QUESTION: Well, I -- that -- I guess that gets us to the issue implicit in my question. Strickland prejudice is a standard that, in fact, looks to the possibility of a different result.

What is or is not possible as a different result, I take it, is a function of way -- in part, of the way the State structures its process of making decisions, and if in the State structure one juror's decision not to impose the death penalty is sufficient to bar the death penalty, then why do we not look, for Strickland purposes, to the possibility, the reasonable possibility, or the reasonable probability of what one juror out of 12 would do and let it go at that? Why isn't that the way we go

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about it?

MR. HARRIS: Justice Souter, as I'm sure the Court is aware, you have never indicated that the Strickland standard is to address the hypothetical views of a single juror on a jury. Strickland speaks to a decision by a fact-finder, and --

QUESTION: Mr. Harris, if we went that far, why shouldn't we go even a little further and acknowledge the reasonable probability that one of the 12 jurors is unreasonable?

MR. HARRIS: Well, again, the Strickland itself I think is designed --

QUESTION: So that if you could sow that you had one of the 12, and maybe bring in evidence to show that one of the 12 was a bleeding heart and had an abused childhood himself or herself and would have given enormous undue weight to this -- which you're allowed to. I mean, that's what all the mitigating evidence is, isn't it? I mean, to talk about reasonable mitigation, I -- you know, I don't know what that means.

MR. HARRIS: I --

QUESTION: It's sort of throwing yourself on the mercy of the jury, isn't it?

MR. HARRIS: I --

QUESTION: Do you want to talk about reasonable

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mercy?

MR. HARRIS: I'm not trying to put this in terms of a reasonable mitigation. Strickland gives us a test, I think, that would answer the first part of your question. We're not looking at the particular jury who sat on a case. We're not looking at the specific decisionmaker who decided this case, and Strickland --

QUESTION: We are making the assumption that the jurors are reasonable, and we are asking how a particular kind of mitigating evidence, admissible mitigating evidence could affect a reasonable juror.

MR. HARRIS: Well, I think that Strickland's asking how it affects a reasonable jury.

QUESTION: And if you say, well, we're going to translate that into a scheme that demands unanimity of reasonableness, as Justice Ginsburg said a moment ago with respect to judges, reasonable judges are disagreeing all the time, and if you translate this into a hypothetical unanimity of 12 people in responding to a particular piece of evidence, as opposed simply looking to the question of what a reasonable juror might reasonably have done, it seems to me you're reading the practicality of the standard right out of the law.

MR. HARRIS: Justice Souter, if we're talking about a reasonable juror in the sense of 12 reasonable

jurors, all of whom are looking at this case conscientiously, impartially, and faithfully applying the law, then it's no difference looking at one as it is looking at 12.

QUESTION: Reasonably merciful jurors is what you're saying, right?

MR. HARRIS: No, I'm not saying that at all. Strickland specifically says you're not to look at the predispositions for leniency or for harshness. It's looking at --

QUESTION: Right. Strickland understands what I think our mitigation jurisprudence understands, that the significance of this kind of evidence is for the jury to decide, once it is determined to be admissible, so that the only question, once it is admitted, is whether a reasonable juror could find, or could find not to a degree of probability but to a high degree of possibility, that this was evidence that ought to be treated in mitigation and hence bar the death penalty. That's the only question, isn't it?

QUESTION: Is the question what the reasonable juror would find, or what a reasonable juror would find? Is there a difference?

MR. HARRIS: I think it is in -- Strickland speaks in terms of the jury reaching a decision on the

issue of guilt or innocence, or sentence. I think it would have to be a universal, the juror. You cannot allow --

QUESTION: All right, if that's --

QUESTION: Is there a reasonable disposition in these mitigation cases? I mean, can you say that, you know, giving the death penalty is reasonable and giving -- I mean, in every case there is a reasonable decision and an unreasonable decision in these mitigation cases?

MR. HARRIS: I don't think I understand that concept.

QUESTION: The concept of reasonableness means nothing to me when you're talking about throwing yourself on the mercy of the jury and saying, look, I had a terrible childhood. You know, it's been a long haul. Is this a question of reason, or is it a question of disposition towards mercy, which different people may have in different degrees. I don't know how to analyze that under a standard of reasonableness.

MR. HARRIS: Well, I don't think that's the standard at all. If you look at what Williams is asking for, he's asking for a jury -- for the court to look at in Strickland, a jury that has at least one juror that's on his side. I mean, he is specifically saying that there must be a range of jurors with different opinions --

QUESTION: I didn't see that --

QUESTION: Thank you, counselor. I think you've answered the question.

Mr. Gibbons, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JOHN J. GIBBONS

ON BEHALF OF THE PETITIONER

MR. GIBBONS: May it please the Court:

With respect to what the Virginia supreme court decided, I refer you to the joint appendix at page 444, 443 and carry on to 444, where it -- the court makes it perfectly clear that it is applying Strickland plus. It says, the court --

QUESTION: Whereabouts on the --

MR. GIBBONS: -- the Virginia trial court erred. Excuse me.

QUESTION: Whereabouts on the page are you reading from, Mr. Gibbons?

MR. GIBBONS: 444.

QUESTION: 444?

MR. GIBBONS: Yes, the end of the opinion.

The court makes it perfectly clear it's reversing the Virginia trial court because the Virginia trial court applied the reasonable probability of a different outcome test announced in Strickland.

QUESTION: Well, in the penultimate paragraph

starting, in conclusion, the court simply is quoting from language in Strickland.

MR. GIBBONS: But the previous paragraph makes it perfectly clear that the error that it identified was the trial court's error in using the Strickland test. The court makes it clear that something else in Virginia is required, and that was legal error.

QUESTION: Well, turning back to 443, the beginning of the paragraph that you're referring to, the first sentence is -- this is the supreme court of Virginia -- unfortunately, the circuit court appears to have adopted a per se approach to the prejudice element. Now, that is not -- that in itself is not a misapplication of Strickland, is it, to say the circuit court was wrong for adopting a per se approach?

MR. GIBBONS: Well, if you read that in the context of the trial court's decision, yes, it's wrong, because what the trial court looked at was the fact that the Virginia legislature had opted for a scheme in which the jury must be unanimous before it can impose death.

What else is that, except the reasonable probability that the jury will not be unanimous, and the court says, that's a per se rule. Well, it's the per se rule adopted by the Virginia legislature.

QUESTION: I read that differently, Judge

Gibbons. I thought the per se approach that the Chief Justice referred to was what he -- the court referred to in the last sentence of the run-over paragraph, mere outcome determination. In other words, I thought they were saying that the mere fact that the result would have been different is not enough under Strickland. You must also have some sort of an unfairness in the trial.

MR. GIBBONS: That's exactly what the Virginia court held, and that's legal error. Now --

QUESTION: I don't understand. Certainly you need an error in the trial. The mere fact that the outcome would have been different, I mean, let's assume that counsel fails to play the race card in the trial, and that had he done so, his client might have gotten off. Would that be enough to -- of course not. It wouldn't be enough.

MR. GIBBONS: No, that would be Fretwell. That would be a --

QUESTION: The outcome would be different. It would not have been an unfair trial in which he didn't --

MR. GIBBONS: No --

QUESTION: Outcome different as a result of the failure of adequate performance by counsel.

MR. GIBBONS: Failure of adequate performance by counsel in investigating and presenting something that the

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petitioner was legally entitled to --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. --

MR. GIBBONS: -- not something the petition --

CHIEF JUSTICE REHNQUIST: I think you've answered the question, Mr. Gibbons.

MR. GIBBONS: Yes, right.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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TERRY WILLIAMS, Petitioner v. JOHN TAYLOR, WARDEN
CASE NO: 98-8384

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)