IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, :

Petitioner :

v. : No. 03-931

JOE ELTON NIXON. :

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Washington, D.C.

Tuesday, November 2, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

GEORGE S. LEMIEUX, ESQ., Deputy Attorney General, Tallahassee, Florida; on behalf of the Petitioner.

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

EDWARD H. TILLINGHAST, III, ESQ., New York, New York; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

JUSTICE STEVENS: We'll now hear argument in Florida against Nixon.

Mr. Lemieux.

ORAL ARGUMENT OF GEORGE S. LEMIEUX

ON BEHALF OF THE PETITIONER

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

When experienced counsel thoroughly investigates, prepares for trial, and discusses his trial strategy with his client, a challenge for effectiveness may not presume prejudice. Rather, this Court's two-part inquiry, articulated in Strickland v. Washington, is the proper measure.

The Florida Supreme Court erred in its decision below for three main reasons.

First, they failed to apply Strickland's two-part circumstance-specific, performance prejudice inquiry to a question of trial strategy.

Second, it improperly presumed prejudice under this Court's decision in United States v. Cronic where there was neither a complete denial of counsel, nor did counsel entirely fail to subject the State's case to meaningful adversarial testing.

Third, the Florida Supreme Court improperly expanded this Court's decision in Boykin v. Alabama from governing pleas of guilt to governing tactical decisions made during full-fledged trials.

For these three reasons and because the Florida court's decision conflicts with Strickland and its progeny and will disrupt the effective administration of justice, we request reversal.

JUSTICE O'CONNOR: Counsel, was -- was the attorney's essential concession of guilt sort of the functional equivalent of a guilty plea, do you think?

MR. LEMIEUX: No, Justice O'Connor, it was not. Mr. Corin, after speaking to his client on three occasions about this trial strategy, sought to concede the underlying -- the underlying crimes but to argue what was the most essential part of this case, and that was whether or not death should be the outcome of the jury.

JUSTICE O'CONNOR: Well, yes, he clearly tried to preserve a role in the sentencing, but we often have guilty pleas and then leave the sentencing to be determined. Was -- was what he did concerning the guilt/innocence phase the equivalent of a guilty plea, do you think?

MR. LEMIEUX: It was not, Your Honor, because a guilty plea, as this Court talked about in Boykin v.

Alabama, gives up rights of the defendant. The lawyer and the defendant waive rights. They waive the right to trial. They waive the right to have the State prove their case beyond a reasonable doubt. They waive the right to have a jury, to confront witnesses, to cross examine, all of the attendant trial rights. Mr. Nixon --

JUSTICE O'CONNOR: Was there any cross examination of witnesses conducted?

MR. LEMIEUX: There was some cross examination, not a lot. There was cross examination of one of Mr. Nixon's uncles, who was one of the seven confessions in this case, and we don't know specifically why Mr. Corin engaged in that cross examination. It could be because that was probably the weakest of the seven confessions and perhaps he wanted the jury to hear that that confession was weak.

JUSTICE SCALIA: There was also an objection to introduction of -- of photographs that -- that were inflammatory, wasn't there?

MR. LEMIEUX: Yes, there was, Justice Scalia. In fact, you know, Mr. Nixon was -- was very much engaged in the guilt phase of this trial. He objected to the introduction of evidence.

JUSTICE SCALIA: Those photographs would have infected the -- the penalty phase, as well as the guilt

phase. So it was important for him to object to them.

MR. LEMIEUX: Yes, Your Honor, that's correct.

JUSTICE SCALIA: In the guilt phase.

JUSTICE KENNEDY: You said Mr. Nixon was -- was the client. Was he in the courtroom?

MR. LEMIEUX: Mr. Nixon was in the courtroom for portions of the trial. He was in --

JUSTICE KENNEDY: Was -- was he there -- and I'll check the record -- when the attorney told the jury that -- that his client was -- was guilty, that he basically was conceding guilt?

MR. LEMIEUX: Mr. Nixon was not in the courtroom for the opening statement or the closing statement.

JUSTICE KENNEDY: But not for the opening statement.

MR. LEMIEUX: He was there during some of voir dire. He was there after the opening statement when two witnesses testified, one who testified that he was the person who tried to sell the victim's car and positively identified him in the courtroom, and another when the sheriff's deputy positively identified him as the person who confessed and gave the 45-minute confession and the person he arrested. After those two witnesses testified, Mr. Nixon then decided to leave the courtroom on that occasion.

JUSTICE SCALIA: The other side says that guilt is not as -- not as clear as you -- as you make it out. Is -- is that -- is that issue even before us here?

MR. LEMIEUX: Your -- Your Honor, none of that evidence has been presented in any of the post-conviction proceedings, and while it's creative, I think it's not before this Court because it's never been entered into evidence. It's just speculation.

JUSTICE SCALIA: Well, it isn't a matter of whether it's before it. I -- I just wonder whether it goes to -- to the issue here, whether you needed to get his assent or not. It -- it probably goes to the quite separate question of whether there was inadequate performance by counsel. No? Is that question before us also?

MR. LEMIEUX: It is, Your Honor. Both questions are before you. I -- I believe that --

JUSTICE SCALIA: Was -- was the latter question ruled upon below?

MR. LEMIEUX: What the Florida Supreme Court did is they found that since this was the functional equivalent of a guilty plea, if there was not explicit and affirmative consent, that Cronic would apply and a presumption of prejudice would follow.

JUSTICE SOUTER: Okay, but -- no. I'm sorry.

JUSTICE SCALIA: And never -- and never reached the -- the inadequate performance of counsel question.

MR. LEMIEUX: The -- the only thing that they do say, Your Honor, is that they say that the strategy employed by Mr. Corin may well have been in Mr. Nixon's best interests.

JUSTICE SOUTER: Okay, but they didn't --

JUSTICE GINSBURG: They may, but that wasn't a definitive ruling. So do you agree that if we accept the position that you are taking, a remand would require for that -- for that evidence to be considered on the straightforward question did counsel perform adequately?

MR. LEMIEUX: Your Honor, there were three hearings in the post-conviction proceedings, and the -- the defense, who had the burden in those cases to prove ineffective assistance of counsel only put on Mr. Corin and the State cross examined Mr. Corin and called some other witnesses. I don't know what further evidence could be adduced that would go to a separate claim.

JUSTICE SOUTER: Well, it -- it might be that there would be no justification for further evidence, but there would have to be a Strickland ruling on the merits of the Strickland issue, wouldn't there be?

MR. LEMIEUX: I think that this Court could engage in that. I think you could remand and have the

Florida Supreme Court engage in that.

JUSTICE SOUTER: But nobody has explicitly done that yet. Is that correct?

MR. LEMIEUX: They have not because the Florida Supreme Court ruled under Cronic.

JUSTICE SOUTER: Because of the Cronic point.

MR. LEMIEUX: Yes, Your Honor.

JUSTICE SCALIA: What -- what about the courts below the Florida Supreme Court? Didn't they rule on it?

MR. LEMIEUX: Yes, Your Honor. Three trial court judges all found that there was effective assistance of counsel.

Judge Hall, who presided over the trial, in fact, described Mr. Corin's advocacy as being right on the mark. He found in his approach an excellent analysis of the realities of the case and the preservation of credibility and the credibility of any mitigating circumstances. He also found that it was perhaps the only steps that could have been taken to afford his client some relief.

JUSTICE STEVENS: May I ask --

JUSTICE KENNEDY: Getting back to the practical equivalent of a guilty plea, Brookhart v. Janis do you think goes to the outer margin of what the functional equivalent is? Are there other examples of what a

functional equivalent would be that would fall under both Cronic and Brookhart? We have a line-drawing problem --

MR. LEMIEUX: Sure, sure.

JUSTICE KENNEDY: -- as -- as to whether or not this is the functional equivalent.

MR. LEMIEUX: Your Honor, I think that Brookhart in fact probably supports our position because in Brookhart the situation was factually different. It was more of a -- a guilty plea situation where there was going to be this prima facie trial, which was, in essence, a guilty plea with a profferer through one witness. And in that case, the defendant stood up and said, I want a trial, I want everyone to understand I'm not pleading guilty. And this Court said that counsel can't waive those rights to a full trial when the defendant is objecting to it, but if the defendant consents or acquiesces, this Court said the ruling would be different.

Well, certainly Mr. Nixon at least acquiesced. Mr. Corin spoke to him on three occasions -- and that can be found at 255 of the joint appendix -- and talked to him about this strategy. Mr. Nixon never responded either way as to his assent or what he wanted to be done.

Now, Judge Ferris, who was the third trial court judge who heard this matter, said that because of the longstanding relationship between this defendant and this

lawyer, because he had represented him three times before over a 2-year period, that there was a level of relationship, they were both veterans of the criminal justice system, they had a rapport with each other. And she was able to determine that there was consent to the trial strategy in the fact that Mr. Nixon did not object to it.

The Florida Supreme Court wants explicit and affirmative consent, and they want a colloquy on the record. And we think that this will be very problematic, and we're already seeing these problems in Florida.

JUSTICE SCALIA: Do we have any cases involving what -- what you describe as tacit consent?

MR. LEMIEUX: In terms of a trial strategy, Your Honor?

JUSTICE SCALIA: In -- in terms of -- of pleading guilty. Do we have any cases in which a similar thing happened, that the counsel said I'm going to plead you guilty and the -- the defendant doesn't say anything, just passively sits there as though, you know?

MR. LEMIEUX: Your Honor, I think you do and I think that Boykin addresses that there has to be a colloquy with a plea of guilty, and that the -- the defendant can't tacitly consent to a plea of guilty.

But our position is that this is not a plea of

guilty. This is not a complete surrender. This is a tactical retreat made for reasons of trying to contest the one issue in this case that could be contested, and that was trying to save this defendant's life. This lawyer took 52 depositions. He hired medical professionals. He investigated Mr. Nixon's background, going back to the age of 10. He did everything --

JUSTICE GINSBURG: What happened to the photographs? I wasn't clear from the submissions. There were inflammatory photographs. Were they in fact admitted?

MR. LEMIEUX: They were admitted over his objection, and that was taken up on direct appeal to the Florida Supreme Court, and the Florida Supreme Court, in Nixon I, did not find that they were inflammatory and found that their introduction was proper.

JUSTICE GINSBURG: But they were not reintroduced at the sentencing phase.

MR. LEMIEUX: They were already in evidence and the State incorporated its evidence from the guilt phase into the sentencing phase. It's just a procedure. The only evidence that the State put on in the guilt phase were his prior two convictions and evidence that Mr. Nixon tortured the defendant by removing her underwear before he burned her alive. Besides that, the rest of the evidence

was incorporated from the guilt phase.

JUSTICE STEVENS: May I ask if -- do you think his representation would have been inadequate if he had not discussed the strategy with the client but everything else was exactly the same?

MR. LEMIEUX: It may -- it may have been but it would be something that would be evaluated under Strickland, Justice Stevens.

JUSTICE STEVENS: Well, why would it be -- why would it make any difference under Strickland whether he talked to the client or not if the same -- if the same considerations are in play? In other words, he just knew it was the -- the wiser strategy to try and save him from the death penalty?

MR. LEMIEUX: I think the only point I would make there is this Court said in Strickland that counsel should consult with their -- with their client, with the accused, and that that's an obligation on counsel. If there was a failure to consult, perhaps that would be argued that that failure to consult was deficient performance.

JUSTICE SOUTER: Isn't that -- isn't that because we -- we take the consultation at -- at least as an indication that the lawyer was -- was adequate in communicating back and forth with the client so that the

client could tell him what the lawyer needed to know to defend him?

MR. LEMIEUX: Yes, Justice Souter, I think that's correct. I think that there could be meaningful discussions between the defendant and the accused that can help the lawyer represent the defendant at trial.

JUSTICE SCALIA: But even apart from the competence of the lawyer, whether it shows adequate performance by the lawyer, can't you -- can't you divide the Boykin rule, which doesn't relate to the lawyer's competence at all, into three different categories: number one, where there is express consent which is -- makes it okay; number two, when there's no consent at all, which is bad; and number three, where there is what -- what you call here implicit consent? Aren't there really three different situations?

MR. LEMIEUX: Yes, Your Honor, that's correct. That's what the Court speaks about in Brookhart, and although we think that that's more of a guilty plea case than a trial strategy case, if this Court were to go in that direction, that standard certainly could apply.

JUSTICE GINSBURG: In --

JUSTICE STEVENS: It seems to me rather difficult to -- to draw that line. If -- if consent is necessary, why shouldn't it be express? I'm not saying

consent is necessary, but normally if you're going to have something this important and consent is necessary, it seems to me it ought to be clear on the record. You certainly wouldn't accept this for a guilty plea, what you have here.

MR. LEMIEUX: That's correct, Your Honor, but in -- I think this Court has held in cases like Jones v. Barnes and Taylor v. Illinois, that questions of strategy are questions that are reserved to the lawyer, and that all --

JUSTICE STEVENS: That's right, and that's why I'm suggesting if it really is a question of strategy, you don't even need implicit consent.

JUSTICE SCALIA: Right.

JUSTICE STEVENS: And I'm not sure there's a --

MR. LEMIEUX: We --

JUSTICE STEVENS: -- three-part rule, as Justice Scalia says. There's just a two-part rule.

MR. LEMIEUX: We -- we agree with that position, Justice Stevens.

JUSTICE SCALIA: Well, I -- I assume -- I assume your response is that if you eliminate from the Boykin rule the possibility of implicit consent, you are forcing the lawyer who believes he has the consent of -- of a -- an intractable client such as this fellow who -- who

didn't go into the courtroom, took all his clothes off so they couldn't take him into the courtroom. He was obviously not -- didn't want to be responsive. Your -- you would have forced this lawyer to adopt a strategy which the lower court found would have been damaging to this defendant, even though the lawyer believes that the defendant really approved of the strategy that the lawyer was undertaking. Why would we want to adopt a rule like that?

MR. LEMIEUX: Your Honor, it's not our position that you should a rule of consent. I was saying if this Court were going in that direction, that the acquiescence level would be what we would suggest.

JUSTICE BREYER: What -- what about a --

JUSTICE GINSBURG: If there were a plea -- if it were a plea of guilt, wouldn't this be an academic question because I assume Florida has some counterpart to the rule 11 colloquy where the judge must confront the defendant and ask him a series of questions to elicit his consent? So this issue can come up, if you have a counterpart to rule 11, only in the concession of guilt by the attorney but with a trial.

MR. LEMIEUX: Your Honor, Florida does have a rule for a guilty plea, but -- and now the Florida Supreme Court says there has to be a colloquy for a strategy

decision that -- where there's a concession, but we disagree with that. We don't think that there should be a colloquy. We don't think that that -- that should be required. And we think that that's problematic and we're already seeing in Florida that -- that judges, laboring under the Nixon decision, are asking questions to defendants as to whether or not all sorts of strategy decisions are decisions they agreed to.

JUSTICE GINSBURG: If Florida wanted to adopt that procedure on its own, that wouldn't present a Federal question. I mean, the prosecutor would have no -- the prosecutor would have no right to stop it if the -- if Florida said, well, we want that same colloquy to go on whether it's a guilty plea or whether it's a concession of guilt.

MR. LEMIEUX: Well -- well, Justice Ginsburg, they're doing it under these decisions of this Court is the reason why that they've articulated that this has to be done. They're saying it's a functional equivalent of a guilty plea. Therefore, Boykin is required and therefore there has to be a colloquy. And we think that those colloquies are tremendously problematic, that they invade the attorney-client privilege. They may affect an accused's right to -- you know, not to self-incriminate himself. There may violate the relationship between the

lawyer and his client.

JUSTICE STEVENS: Yes, but these -- let me just understand. These colloquies are not, in your view, commanded by the Florida Supreme Court's holding.

MR. LEMIEUX: They are. The Florida Supreme Court specifically says you must have these colloquies to determine consent.

JUSTICE STEVENS: But only -- is it -- it's not just when there's the equivalent of the guilty plea, but any major trial strategy --

MR. LEMIEUX: The lower -- Justice, I'm sorry.

JUSTICE STEVENS: Is this -- I want to know if the Florida Supreme Court's holding is limited to cases that are the functional equivalent of -- of a guilty plea, and -- and it's only there that they're requiring the colloquy.

MR. LEMIEUX: It's only there that they've required it, but lower courts now defense counsel are making these arguments that, boy, you know, and the judge is concerned this is a strategy decision.

JUSTICE STEVENS: Well, but of course what the lower courts are doing may or may not be right as a matter of Florida law, but that's not before us really.

MR. LEMIEUX: It's not before Your Honor.

JUSTICE SCALIA: Of course, if it were a matter

of Florida law, the Florida legislature could change it.

MR. LEMIEUX: Yes, Justice Scalia.

JUSTICE SCALIA: If it's a matter of Federal law, it can't.

MR. LEMIEUX: That's correct.

If I may, I'd like to reserve the balance of my time.

JUSTICE STEVENS: Mr. Gornstein.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

The most serious problem with the Florida Supreme Court's explicit consent requirement is that it prevents counsel from pursuing what may be the most effective strategy for saving a defendant's life, even when counsel consults with the defendant on that strategy and the defendant does not object. In that situation, the Florida Supreme Court would require counsel to pursue an alternative reasonable doubt strategy even though that might undermine the case for sparing the defendant's life and even though the defendant has not consented to that strategy either.

JUSTICE KENNEDY: Do we take it as a given that

if he does not consent, in fact, directs his lawyer not to make this concession, that the lawyer is bound to follow?

MR. GORNSTEIN: No, Justice Kennedy. You would still look at that question through the prism of Strickland's reasonableness inquiry. It would raise distinct concerns. A reasonable counsel would make a reasonable effort to iron out differences. Reasonable counsel takes into account the considered views of his client. But if, at the end of that process, counsel reasonably concludes that this is the only effective strategy for saving the defendant's life, then the pursuit of that strategy is not per se ineffective.

JUSTICE KENNEDY: Does -- does that up the ante and the defendant now is in the position to terminate the lawyer, or will the judge say it's -- it's too late, I'm not going to grant that motion?

MR. GORNSTEIN: Justice Kennedy, the --

JUSTICE KENNEDY: As -- as a matter of Federal law.

MR. GORNSTEIN: As -- the defendant could go to the -- to the judge and his counsel could go to the judge and say, we have had such a breakdown between us on what should be done here, we think alternative counsel should be appointed. But that would be a discretionary call for the district court. So too, the defendant could say, I

want to exercise my right to self-representation, which he has a right to do. So those are the two checks on that.

JUSTICE SOUTER: But what -- what if there's a third possibility and -- and the lawyer makes remarks in front of the jury, as -- as this lawyer did, in effect, concession kind of remarks, and the defendant stands up and says, hey, I'm not making those concessions? I am not guilty. I'm not conceding a darned thing. Does the lawyer at that point at least have a -- an option to proceed on the concession theory, leaving it to judge his performance under Strickland afterwards?

MR. GORNSTEIN: If I understand your question, Justice Souter, this is a situation where there was no objection initially, the lawyer proceeded to adopt a strategy, and then there was a --

JUSTICE SOUTER: Well, I -- actually I -- I didn't get into that one way or the other. Let's assume we've got a case in which the client says, no, I -- I don't agree to these concessions. I'm not guilty and I want a defense. As I understood your -- your earlier answer, you said if -- you know, if it is the lawyer's considered judgment that this is the only way to save his life -- he's talked with him, et cetera -- he -- he still may have that option to concede. And I'm taking the -- the facts one step further and saying let's assume the --

the client goes whole-hog in his objection. And he stands up or -- or says in front of the judge and the jury, I -- I'm not conceding any of this.

MR. GORNSTEIN: That -- that sounds to me like a case where there ought to be alternative counsel appointed if there has been such a --

JUSTICE SOUTER: I -- I would certainly agree if we get to that point. But let's the lawyer does, as you at least left the door open for him to do, and -- and he does proceed to represent the guy. The judge doesn't remove him and the lawyer continues to concede. Do you -- do you think that there is any possibility on a Strickland analysis of finding adequacy of counsel?

MR. GORNSTEIN: Probably not, Justice Souter, that you would analyze that under Strickland and you would find that that's not the reasonable performance of counsel in that circumstance.

JUSTICE SOUTER: I -- I --

MR. GORNSTEIN: And so -- but the question here really is what do you do not in a case where there's been an objection, because there was no objection here.

JUSTICE KENNEDY: So a substantial component of reasonableness under Strickland is whether or not you follow the client's instructions?

MR. GORNSTEIN: It is one factor that reasonable

counsel will take into account, but it is not the only factor. In some situations, if you're not following the defendant's instructions, it can lead to such a breakdown in the attorney-client relationship that you couldn't possibly render effective assistance of counsel. So it is going to be a factor in that respect.

But this case presents only the question of what happens when there's no objection, and when there's no objection, it makes no sense to say that where there's been consultation, no objection, that instead of allowing the lawyer to exercise his reasonable judgment on what the best thing to do is, he instead has to pursue an alternative reasonable doubt strategy that is less effective. And the Sixth Amendment simply can't be read to require counsel to pursue a less effective strategy that the defendant hasn't asked for.

Now, there's no perfect analogy here, but the closest analogy is to the division of responsibilities for appeal where the defendant has the right to say whether he will appeal, but counsel has the right primarily to make the strategic judgments of what arguments will be raised on appeal. So too here, the -- the defendant has the right to decide to stand trial, but client has primary responsibility for making the strategic judgment of what defenses will be raised at that trial.

Now, there is -- this is an important question, and therefore there is a duty on the part of counsel to consult with the defendant, but once that consultation has occurred, and there is no objection, and the choice that counsel made is a reasonable, tactical judgment under all the facts and circumstances, his pursuit of that strategy satisfies constitutional standards. There is no requirement of explicit, affirmative consent, and the Florida Supreme Court's judgment should, therefore, be reversed.

If the Court has no further questions, thank you.

JUSTICE STEVENS: Thank you, Mr. Gornstein.

Mr. Tillinghast.

ORAL ARGUMENT OF EDWARD H. TILLINGHAST, III

ON BEHALF OF THE RESPONDENT

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

The issue before the Court today is whether a defense counsel can concede guilt beyond a reasonable doubt in his opening and in his closing statements in the trial, particularly when the defendant is not present. We submit that the answer is no, and there's two reasons that it's no.

First, we believe that it's the functional

equivalent of a guilty plea as found by the Florida Supreme Court.

Second, because the -- what was stated was so clearly an acknowledgement that the State had proven its case, that there was a complete breakdown of the adversarial process and there was no meaningful testing of the State's case.

JUSTICE GINSBURG: Mr. Tillinghast, may I go back to something you said? Because I don't want to lose sight of it. You seem to suggest that the defendant's absence from the trial should work in his favor when this was defendant's own choice not to be there. The judge met with him and said I want to make sure you know what you're doing. Right? Why should we count at all in the defendant's favor that he was -- he absented himself from trial any more than we would give a fugitive credit for not being there?

MR. TILLINGHAST: Justice Ginsburg, part of the issue here is -- is the lack of consent. Mr. Nixon was not present during the entire guilt phase of the trial. What we would submit is that in this case where there was the hearing in a holding cell -- it was on the record. It's part of the record before Your Honor -- where the judge inquired about Mr. Nixon's willingness to participate in his trial, and he declined to go into the

courtroom, that refusal to go into the courtroom, we submit, was a refusal to attend the -- the hearing on the presumption that he was going to have a trial consistent with his guilty plea -- or not guilty plea -- excuse me -- the not guilty plea that was entered. What he anticipated was a trial where the State's case was -- was tested and it was consistent with his not guilty plea.

JUSTICE SCALIA: But he --

JUSTICE KENNEDY: Well, you -- you equate this to a case where the defendant is just accidentally not present. That's -- that's what I got. I -- I had the same problem with your opening two sentences as Justice Ginsburg did. You said if the defendant is absent from the courtroom. Well, in this case, he was absent because he chose to be absent. You're -- you're equating this case to one in which it was as if for some reason they forgot to have him in the courtroom.

MR. TILLINGHAST: Well, the -- the important issue here is there was not consent. The lack of his presence in the courtroom compounded that problem, but the important issue here and the issue before the Court is that defense counsel conceded guilt and conceded that the State had proven its case without the consent of his own client.

JUSTICE SCALIA: I don't agree with your earlier

statement that what -- what this defendant expected was a contested trial in which, you know, the State's evidence is challenged, blah, blah, blah. That's to the contrary. He said this whole thing is -- is just a big railroad job and that's one reason I don't want to be there. Go ahead and do whatever you want. He wasn't -- he wasn't expecting -- in fact, if you're -- if you're talking about is subjective expectations, they would reinforce the lawyer's belief that he had no objection to conceding guilt because he was referring to this as -- as one big railroad job.

MR. TILLINGHAST: Well, respectfully, Your Honor, I would -- I would disagree because that what -- what we do have from Mr. Nixon is he stated that -- that he had fired his lawyer. He wanted a black lawyer. He wanted a black judge, and that he didn't want to go into the courtroom because he would be railroaded. That was after in the newspaper it had indicated that he had -- that his counsel had pled him guilty in his opening statement, and he was clearly objecting to that conduct.

JUSTICE SCALIA: I thought he had made those statements about being railroaded before he found out about the lawyer's concession.

MR. TILLINGHAST: Actually the -- you're correct, Your Honor.

JUSTICE SCALIA: I think that's correct.

MR. TILLINGHAST: The -- the railroading statements were before the opening statements. The objection to the newspaper story was after the opening statement.

JUSTICE SOUTER: Let me ask you a question just about what you -- what you're assuming when you make the -- the statement -- prefaced the argument to the effect that there was a complete breakdown of -- of the adversary process. You're assuming, I take it, when you say that, that the guilt phase and the penalty phase have got to be regarded as distinct and separate phases.

MR. TILLINGHAST: Yes, Your Honor.

JUSTICE SOUTER: You're dividing it in half.

MR. TILLINGHAST: Yes.

JUSTICE SOUTER: Why is that -- why is that legitimate? Why should a lawyer -- I mean, I presume no defense lawyer tailors his -- his guilt phase representation without a thought to what is going to happen at the penalty phase if they get to the penalty phase. And so I -- I have difficulty in saying that there should be some kind of a firewall for analytical purposes between guilt and penalty when -- when we're in a -- a question of Cronic or Strickland.

MR. TILLINGHAST: If the Court -- if the Court

was to look at the totality and -- as opposed to looking at the guilt phase, what would happen would be that capital cases would have -- would end up having a lower standard than a non-capital case because --

JUSTICE SOUTER: Well, they wouldn't end up having lower standards. They -- they would end up having a -- a standard at the guilt phase which takes into consideration what the lawyer is or is not going to be able to do plausibly at -- at the sentencing phase. And you know, those -- those may be very, very difficult questions, but it's hard for me to say that either the standard is different or that a lawyer should -- or that we, in setting down standards, should pretend that a lawyer somehow has to go into a state of oblivion about -- about what's going to happen at sentencing if he gets there.

MR. TILLINGHAST: The difficulty here is -- is this was the functional equivalent of a guilty plea without consent, and --

JUSTICE O'CONNOR: Well, let me ask you this. Do you think that it's possible that in some instances it is a valid strategy to focus on the punishment/sentencing phase rather than the guilt phase if the lawyer has reviewed all the evidence and it appears to the lawyer to be overwhelming? Is it possible that there's a case where

a strategy such as this might make sense?

MR. TILLINGHAST: Your Honor --

JUSTICE O'CONNOR: Is that possible?

MR. TILLINGHAST: With -- with statements in the opening --

JUSTICE O'CONNOR: Is that possible?

MR. TILLINGHAST: Not without the consent of a client with statements like this.

JUSTICE O'CONNOR: Well, now you're building in something that I didn't ask. I'm asking you if it is possible that the better strategy for a defendant in a given case would be to focus on the sentencing rather than the guilt phase based on an evaluation by the attorney of the evidence.

MR. TILLINGHAST: There could be circumstances.

JUSTICE KENNEDY: I don't know why you're so -- I thought that the literature was replete with Law Review articles saying that this is the best strategy. Trial judges have told us this is the best strategy. I -- I don't quite understand your hesitation unless it's to build in this -- this factor of consent.

MR. TILLINGHAST: Well, it is the --

JUSTICE KENNEDY: I -- I thought this -- this was something you'd say, well, of course.

MR. TILLINGHAST: It -- it is the factor of the

consent. In -- in this case, in the opening statement, the --

JUSTICE KENNEDY: Well, but what -- what about the basic question, that as a matter of trial strategy, it is a recognized, acceptable, sometimes prudent, sometimes wise strategy to concentrate on a sentencing phase?

MR. TILLINGHAST: In the general sense, yes.

JUSTICE SCALIA: And there's no difference between a capital case and a regular case insofar as the intelligence of that strategy is concerned because even when there is not a separate penalty phase, it is sometimes in the interest of the defendant to, in effect, throw himself on the mercy of the sentencer, whether that is the jury or the judge, by -- by not contesting the -- the fact that -- that he did the acts charged. That -- that occurs not just in capital case but in -- in regular cases.

MR. TILLINGHAST: Well, Justice, the -- the distinction here is -- is it -- it wasn't a strategy to not contest the State's case. What it -- what it was was it was a complete concession in opening statement that the State would prove its case beyond a reasonable doubt.

JUSTICE GINSBURG: Not entirely because both in the opening and in closing, the lawyer said to the jury, he did it, but I want you to know from my very opening

that this case is about life or death, and that's the ultimate decision you will have to make. He said that in his opening and he said it in his closing. It wasn't simply a case of saying, my client did and now the prosecutor is going to go through the motions. He told the jury, what I want you to focus on is the decision you're going to have to make whether, in the counsel's words, to spare his life.

MR. TILLINGHAST: Well, Justice Ginsburg, the issue here is that he did that and he went beyond just saying that he did it. He said that the State has proven its case beyond a reasonable doubt for murder and arson, and he did it without consent. That's --

JUSTICE GINSBURG: Well, you say without consent. At least as -- the record that we have suggests that the client was told this is what the lawyer planned to do and said nothing.

Justice Scalia asked a question when the prior argument was ongoing. When a client doesn't say yes and he doesn't say no, to take the words of a familiar song, mustn't the lawyer then do what he thinks is best to do? Because if he says, okay, I'm going to -- I'm going to require a full-stop trial, I'm going to cross examine every witness, he may be damaging his client. The client didn't tell him not to do that any more than he told him

to do it. So mustn't the lawyer in that situation exercise his best judgment?

MR. TILLINGHAST: I would submit that in this case, because that it is the functional equivalent of a guilty plea, and as this Court has held under Boykin and under Brookhart that you must have voluntary and willing and knowing consent --

JUSTICE O'CONNOR: Well, what if we think that's not correct, that it is not the equivalent of a guilty plea? There was some cross examination. There was some participation. So if we don't accept your statement that it is the functional equivalent, then what standard do we employ for the tacit consent or the failure to affirmatively respond?

MR. TILLINGHAST: Well, Justice O'Connor, if -- if you're -- if the Court was to view it as not the functional equivalent, as you've suggested, you could affirm based upon the nature of the statements and finding that there was a complete failure under Cronic.

And -- and with respect to the trial, there were -- there were 35 witnesses called by the State. There were five what I would submit were perfunctory questions asked on cross.

JUSTICE O'CONNOR: Well, you said we could affirm if we applied Cronic, but I thought the issue was

whether perhaps Strickland applied, and if Strickland applies, I wouldn't think we'd be affirming necessarily.

MR. TILLINGHAST: Well, Strickland is -- is respectfully not before the Court. It was -- the record below was strictly on --

JUSTICE O'CONNOR: Well, the -- the question of which standard applies I thought was before the Court. Was it correct for the Florida Supreme Court to employ the Cronic standard or should it have reviewed it under Strickland? Is that not before us? Is that not --

MR. TILLINGHAST: Yes.

JUSTICE O'CONNOR: -- one of the questions?

MR. TILLINGHAST: Yes.

JUSTICE O'CONNOR: Okay. Thank you.

JUSTICE BREYER: I thought that Boykin and -- Boykin and -- and Brookhart were about really a somewhat different matter. The language, functional equivalent of a guilty plea, is lifted from Brookhart. Boykin and Brookhart are about what a judge does, not about what a lawyer does. In Boykin, the judge accepted the guilty plea, and the Court said you can't do it without the express consent of the defendant. In Brookhart, it was a judge who accepted -- now, here it was an odd procedure, and it was that procedure that the Court called the functional equivalent of a guilty plea. And therefore,

we're talking about what a judge can do. Here we're not. We're talking about what a lawyer can do and when it arises to the level of improper lack of counsel. So I don't think they govern it.

Rather, I thought -- and I want your view on this -- that the most relevant case was really Roe v. Flores, you know, where -- where the lawyer did a weird thing. He didn't file an appeal. And here he's doing a little odd thing. So what we said there is you have to consult, which is just what the Government is saying here. I'm exposing that thought process to you to get your reaction.

MR. TILLINGHAST: I -- I think, first, under -- under Jones v. Barnes, it's been held by this Court that there are three fundamental things that only the client can do, one of which is to plead guilty. And in -- in the Roe case, the -- the record below was -- was unclear as to what happened as to whether there was a duty for the attorney to file an appeal and what the conversations were or were not with -- with the defendant.

But we would submit that -- that a guilty plea is something very special because that it goes to the heart of the case.

JUSTICE BREYER: This is not a guilty plea and the words -- a guilty plea is something accepted by a

judge and the judge didn't. But I grant you it's a very odd situation and very special, and that's why I wonder what the appropriate way to -- what kind of requirement there ought to be. Maybe there should be something. I'm not sure why it should rise above the level of consultation since you know, better than I, you can have some awfully difficult clients who are virtually incapable of understanding what's in their interests. And -- and that's why I'm awfully reluctant to go beyond saying you have to consult with your client. You start insisting on an answer, and you don't know what they're going to say.

MR. TILLINGHAST: Well, the -- the lawyer here did have alternatives. He -- he could have put the State to its burden and consistent with the not guilty plea that was entered in the case. Or as an alternative, there could have been an inquiry on the record of -- by the judge with the lawyers of Mr. Nixon to determine whether or not he was consenting to this -- this sort of -- the opening statements and the closing statements, which -- which were extraordinary, particularly the closing statement because -- and in the closing statement, he specifically said that the State did prove beyond a reasonable doubt that each and every element of the crimes charged, first degree, premeditated murder, kidnapping, robbery, and arson, had been proven, which is truly

extraordinary. Here is a situation where the lawyer who is the only person in the courtroom, because Mr. Nixon was tried in absentia, who -- the only person in the courtroom who was there as the trusted advisor and counselor for Mr. Nixon, stands up in front of the jury in the opening and the closing and concedes guilt beyond a reasonable doubt. I would submit that upon doing that, the -- the whole adversarial process breaks down because it --

JUSTICE GINSBURG: Why? When -- when his object is to spare this person's life. He knows the evidence is very strong. He wants, to the extent that he can, insulate the penalty phase from all that damning evidence that's coming out at the trial. So he wants the evidence to come out at the trial, but he doesn't want to be in a situation where the jury has heard the defendant resist the determination that he did it and then have to plead for his life after.

MR. TILLINGHAST: The difficulty, again -- it comes back to the lack of consent. Had he had consent, it would be different.

JUSTICE GINSBURG: Well, my problem -- and I -- I'm not sure I understand your answer to it. In this case, in fact the client didn't say yes and he didn't say no. So if the -- if the lawyer is to assume, well, then since I don't have a positive, explicit yes, I will assume

the answer is no, even though that is against the lawyer's best interest -- the -- the lawyer's best judgment, why is he an effective counsel if he assumes the answer is no?

MR. TILLINGHAST: In -- in -- particularly in a capital case, what this Court and all courts would -- would want is a reliable record where there had been testing. When you have a situation where Mr. Nixon, as here, said nothing, so the -- so Mr. Corin didn't know whether there was consent or lack of consent, we would submit that what should have happened is, as I said -- suggested before, he shouldn't have -- he could have not contested certain things, but the admission on the -- what I submit is an admission and a plea of guilty without consent was where the problem was. He could have gone on --

JUSTICE SCALIA: Well, that -- but that's not a problem. According to the lower courts, that was a good strategy. I don't know why you want counsel, when -- when the client doesn't answer, to say, gee, I -- you know, I don't know whether he has approved or disapproved, I'm going to have to take the course that will probably get him executed because I -- I haven't received an answer. Why would you force that course on the -- on the lawyer? If the lawyer believes that the silence implies consent, as -- as silence usually does, why not let the lawyer do

what's in the client's best interest?

MR. TILLINGHAST: He had the alternative of -- of having an inquiry with Mr. Nixon, with the court determine whether or not --

JUSTICE SCALIA: And Nixon -- okay. You have the inquiry and Nixon just stands there, the same, doesn't say a thing, assuming you could get him into the courtroom, you know, assuming he had put his clothes on so you could bring him into the courtroom. He just -- he just sits there.

MR. TILLINGHAST: Well --

JUSTICE SCALIA: And -- and you say, well, since we don't have an answer, we have to take the course that's going to get this guy executed. That doesn't seem to me to make much sense.

MR. TILLINGHAST: I would respectfully submit that given the nature of the opening and closing, the words that were used, in -- in that kind of a extreme situation, that is a decision that the client should make. This is not a decision that is a normal strategy decision that a lawyer would normally make, such as which witnesses to -- to call, aside from the defendant himself, the order of the witnesses, and -- and types of cross examination. This is a very --

JUSTICE SOUTER: No. No, but I don't think

you're getting to -- at -- at what bothers us. Nobody is saying that the client should not make a decision. The problem is that the client won't make a decision, and the client acts as if he had made the decision to allow the lawyer to do what the lawyer proposes. This isn't a question of whether he should be heard or not, but what -- what to make of the behavior. And you're saying when -- when the behavior appears to be acquiescence from silence, you nonetheless -- the lawyer is, nonetheless, obligated to take the course which is coming closest to guaranteeing that he will receive the death penalty. And that's what's bothering us.

MR. TILLINGHAST: The -- in -- in this situation, it's -- it's the nature of what was said and his lack of presence in the courtroom where there was no affirmative defense. And in -- in the record below where the Florida Supreme Court sent it down to determine whether or not there was consent, there was no acquiescence. Mr. Nixon simply did nothing. When -- when asked -- when Mr. Corin testified and was asked about whether he discussed the trial strategy and whether Mr. Nixon agreed or disagreed, Mr. Nixon simply did nothing. He -- he didn't acquiesce to the strategy.

JUSTICE STEVENS: Mr. Tillinghast, can I ask you if you are familiar with the Loeb/Leopold trial many, many

years ago that was conducted by Clarence Darrow? If you're not, I won't push you on it.

MR. TILLINGHAST: Unfortunately, I'm not, Your Honor.

JUSTICE STEVENS: Because he -- he applied exactly this strategy and it was one of his great victories. In -- in fact, it's a long, long time ago. But that was the way Clarence Darrow sized up this very problem, and the -- and I think in that case they were very young clients that he had. They didn't -- they were not -- they did not expressly consent to what he did. But he saved their lives.

MR. TILLINGHAST: Well, if -- besides the -- what we believe was a fundamental -- what was a complete failure -- excuse me. Aside from the guilty plea, what we submit is a guilty plea, we believe that when these kinds of statements were made, Your Honor, without the consent, that the advocacy system that was envisioned in Cronic completely failed.

JUSTICE GINSBURG: May I ask you a question that I asked the other side? And that is, if we don't accept your argument, if we think when the client is silent, the lawyer must exercise his best judgment and not assume that the client would give an answer that would jeopardize the client's position, if that's the position that this Court

adopts, what would you say is left over for remand? Is it simply that the Florida Supreme Court then takes the record as it is and determines under Strickland whether there was effective -- ineffective performance?

MR. TILLINGHAST: The -- yes, Your Honor.

JUSTICE GINSBURG: That would be -- that would be all.

So what do we do with, in the brief, all this information about things that the lawyer should have done by way of cross examination? That wasn't put in the record earlier --

MR. TILLINGHAST: When I say yes, the -- what would -- what would be left is an entire hearing on the -- on the Strickland claims and the motion to vacate. That -- that would be the remaining part of the case --

JUSTICE SOUTER: Why -- why do we need a hearing rather than an examination of the record? Tell me why.

MR. TILLINGHAST: Because the -- the hearings below, when it was sent back down by the Florida Supreme Court, were only on the issue of whether or not there was consent to -- to the -- what the Florida Supreme Court deemed to be the functional equivalent of a guilty plea. There was not a hearing on the balance of the issues, and it was strictly limited to that.

JUSTICE SCALIA: Hadn't there been a hearing on

those issues on the way up?

MR. TILLINGHAST: No.

JUSTICE SCALIA: No?

MR. TILLINGHAST: No.

JUSTICE SCALIA: Wasn't --

MR. TILLINGHAST: It was actually denied by Judge Hall. So the only thing that's -- that's occurred is the hearing strictly on whether or not there was -- was consent.

JUSTICE GINSBURG: Why was it denied in the trial court? Why was the introduction of what the lawyer might have done --

MR. TILLINGHAST: It was -- it was because of the focus of the Florida Supreme Court on -- on whether or not there was a consent.

JUSTICE SCALIA: No. We're talking below.

JUSTICE SOUTER: No. We're talking about the trial court.

JUSTICE SCALIA: We're talking below on the way up to the Florida Supreme Court. I assume that -- that he raised below the issue of inadequate performance of counsel and he had his opportunity to introduce whatever evidence he had on that subject on the way up to the Florida Supreme Court.

MR. TILLINGHAST: He --

JUSTICE SCALIA: I don't know why the Florida Supreme Court should be obliged to remand it in order to give him a second bite at the apple.

MR. TILLINGHAST: It was raised but -- but he was not given an opportunity for a hearing on that.

JUSTICE SOUTER: Well, was he denied the opportunity?

MR. TILLINGHAST: Yes.

JUSTICE SOUTER: Did the -- did the judge say, look, we're -- we're going to confine it strictly to this one issue?

MR. TILLINGHAST: Yes.

JUSTICE SOUTER: Okay.

MR. TILLINGHAST: So, in conclusion, Your Honors, we submit that there are two -- two approaches to affirming the Florida Supreme Court. First is -- is that it was the functional equivalent of a guilty plea without consent. The second is that because of the nature of the statements, it was a complete failure of the advocacy process where the State's case was not tested in any way. In fact, as I mentioned, there were 35 witnesses. There were five very perfunctory questions asked such as what date was it and when did certain things occur. There was not the material testing of the record to determine the truth, which is what is -- is involved in the Sixth

Amendment.

And none of -- none of the challenges, that are pointed out in -- to the facts in our brief ever came out because that there was no testing. Simply we have an opening statement where counsel says the State will prove beyond a reasonable doubt that these events occurred. Then we have virtually no cross examination. We have no witnesses called by the State -- excuse me -- by -- by the defendant throughout the entire guilt phase of the trial. And in fact, at one point, the -- the trial judge stopped asking -- asking Mr. Corin if he wished to cross examine.

And then we have the closing statement where Mr. Corin stated that the State has proven beyond a reasonable doubt that -- that he is -- Mr. Nixon was guilty of the crimes.

And all the while during that guilt phase, Mr. Nixon was not present in the courtroom. So he had no ability to object to the opening or the closing statements because he wasn't here -- there to hear them.

And further, as -- as the record indicates, there are issues of -- of Mr. Nixon's competency, that he's mentally retarded. His own lawyer referred to him as nuts. His own lawyer also referred to him as an ogre in his closing argument. These are the types of statements, we would submit, are -- even if they are not the

functional equivalent of a guilty plea without consent, they -- they substantially and completely destroy the advocacy process. So there is no testing, and under Cronic, the Court should affirm also.

Thank you.

JUSTICE STEVENS: Thank you, Mr. Tillinghast.

Mr. Lemieux, you have about 4 minutes left.

REBUTTAL ARGUMENT OF GEORGE S. LEMIEUX

ON BEHALF OF THE PETITIONER

MR. LEMIEUX: Thank you, Justice Stevens.

I'd like to point this Court to page 486 of the joint appendix where Mr. Corin is asked, do you feel in this case that you were put in a position that you had to make decisions because your client did nothing? And he said, yes, sir. There is ample evidence in the post-trial proceedings that Mr. Corin wanted the help of his client. He did not want to be on the bridge of the ship alone, but Mr. Nixon abandoned the ship. And although he consulted with his client at least three times on this trial strategy, there was no input back that would have given him any reason to believe that Mr. Nixon did not want him to go forward to pursue a strategy that Mr. Corin, in his experience of 14 years as a lawyer, after having taken 52 depositions in this case, believed was in the best interest of his client.

I just have a couple of points I'd like to make. There was a question that was asked about whether or not the -- the guilt phase and the penalty phase are distinct parts of a trial. This Court has addressed that in the Monj v. California case when it said that it's really one trial and that issues of guilt and innocence are often, in a capital trial, still being determined in the penalty phase of that matter.

I'd also like to mention the point that the counsel made about Cronic. Counsel would ask, as the Florida Supreme Court did, to apply Cronic to this situation. There is a harmony that exists in this jurisprudence between Strickland and Cronic. Issues of trial performance and trial strategy are articulated and evaluated under Strickland's two-part standard. Questions of structural defects that infect the process with error are evaluated under Cronic. And that harmony works in the system. It allows for the independence and vitality of counsel to pursue strategies in their clients' best interests and it also allows when there are structural defects, for them to be taken care of with the presumption.

JUSTICE SCALIA: Are you going to get to the point of whether there was, indeed, an opportunity for this defendant to introduce evidence about inadequate

performance of counsel?

MR. LEMIEUX: Yes, I am, Your Honor, and I'll get to that right now. There was ample opportunity. There were three hearings. And in fact, there was disagreement between the sides as to whether or not there was this opportunity for a Strickland hearing. We don't have Strickland hearings --

JUSTICE SOUTER: What -- what did the judge -- what did judge say? Your brother said the judge said, no, I won't hear this.

MR. LEMIEUX: Your Honor, I would point the Court to pages 385 to 390 of the appendix where Judge Smith denies the Strickland claim.

The defense has the burden of proving ineffective assistance of counsel. During the first hearing, there was an issue as to whether or not it was an ineffective counsel hearing because it was still on direct appeal. But certainly in hearings two and three, there was ample opportunity to put that evidence on the record, and they didn't take that opportunity. Now, they quibbled and said they didn't have notice and they didn't know that they were supposed to be here for a Strickland hearing. We disagree with that because there aren't Strickland hearings, there are not Cronic hearings.

JUSTICE STEVENS: Why should -- why should they

put in Strickland evidence if they've won under Cronic?

MR. LEMIEUX: Well, they had not yet won under Cronic, Your Honor. They were still making those arguments.

JUSTICE STEVENS: I thought it was remanded for an issue -- for a hearing on the consent issue after --

MR. LEMIEUX: This is -- there was a hearing before that and a hearing after that.

JUSTICE STEVENS: I see.

MR. LEMIEUX: In conclusion, Your Honor, we believe that the harmony between these two lines of cases works, that the Florida Supreme Court got it wrong, and for that reason, we would request reversal.

Thank you.

JUSTICE STEVENS: Thank you.

The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)