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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 84-1479

TITLE EUGENE LeFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, Petitioner V. JOSEPH ALLAN WILSON

PLACE Washington, D. C.

DATE January 14, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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EUGENE LeFEVRE, SUPERINTENDENT, :

CLINTON CORRECTIONAL FACILITY, :

Petitioner, :

v. : No. 84-1479

JOSEPH ALLAN WILSON :

- -x

Washington, D.C.

Tuesday, January 14, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

STEVEN R. KARTAGENER, ESQ., Bronx County, N.Y.;
on behalf of Petitioner.

PHILIP S. WEBER, ESQ., New York, N.Y.;
on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in LeFevre against Wilson. Mr. Kartagener, you may proceed whenever you're ready.

ORAL ARGUUMENT OF STEVEN R. KARTAGENER, ESQ.

ON BEHALF OF PETITIONER

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

As this Court is well aware, perhaps nothing tears more at the fabric of federal-state relations in the criminal law area that federal habeas corpus review of state criminal convictions, and it is a case such as the present one that helps make clear why that's so.

More that 15 years ago, on July 4th, 1970, Respondent Wilson and two unapprehended accomplices murdered a fellow by the name of Sam Reiner during the course of a robbery of a taxi garage in the Bronx. The accuracy, the reliability, the validity of that state jury verdict convicting him of that crime has never really been open to question, because there's no question that we're dealing with a guilty man. Innocence is not part of this case before the Court.

Since 1972 when the case did proceed to the state court trial, the defendant has been litigating a Sixth Amendment claim that has had nothing to do with

the accuracy or integrity of the truth-finding process at his state court trial. The issue related to the manner in which manifestly reliable and voluntary admissions were obtained from him from a jailhouse informant, one Benny Lee.

And I say he's been litigating it since 1972, and litigate it he certainly has been doing. He had the opportunity to litigate this issue in the state court at a pretrial hearing. He litigated it at trial in 1972. He litigated his Sixth Amendment issue without success in the state appellate courts.

When that was unavailing, he moved into the federal courts, pursuing federal habeas corpus review. He had a full and fair opportunity to litigate the issue before a district court, which found that the statements were not obtained improperly.

Proceeding on to the Second Circuit Court of Appeals, they too found that there was no impropriety in the manner in which the statements were obtained.

Then this Court decided United States v. Henry in 1980 and the Petitioner, or I should say the Respondent before this Court, Wilson, started all over again. He went back into federal court, commencing a new habeas corpus action, claiming then, which is contrary to the argument he makes now, that Henry

established a new rule of law entitled to retroactive application in habeas corpus.

He lost in the district court because the district court found, as we argued, that Henry really didn't change the law. It found that he'd really had an ample bite at the apple the first time around, and it also gave appropriate recognition and paid due deference to some very important factual findings that emanated from not only the state court, but from the federal courts during the first habeas corpus application, and that important factual finding is that the statements, the incriminating statements that he made to the jailhouse informant, were spontaneous, were completely unsolicited.

He did then, in about 1982 or 1984, move on to the Second Circuit Court of Appeals, a second panel of that court, which for the first time found a constitutional error, where no other court found it to exist. And I point out, it was not a unanimous court, it was a split panel of that court that said: Yes, the Sixth Amendment was violated.

And so in 1974 the people of New York State were told, you're back to square one.

QUESTION: You mean 1984?

MR. KARTAGENER: Excuse me. I'm sorry, Your

Honor.

1984, 14 years after the murder, you're back to square one. All that went before you is of no moment, because we are also going to disregard the factual findings of spontaneity that were made by all the courts that went before us. All that went before is of no moment. You retry this man, 14 years after the crime, or let him free.

And I suggest that when one looks at the history of this case and the manner in which the writ of habeas corpus was used here, one can understand why there is this terrible friction that results between federal and state relations because of habeas corpus review.

And this Court has seen instances in which it's been argued that a Petitioner has abused the writ, and that's a term of art, abuse of the writ. And in fact we're really not dealing with an abuse of the writ case as that term of art is generally used in the law, but there is an abuse of the writ here, not by the Petitioner so much as by the Court of Appeals, the manner in which it employed the writ to grant relief so long after the fact, on the same ground that had previously determined on the merits and rejected by all the courts that went before it.

I would like at this point to make very clear that I do not wish to come before this Court and suggest that the federal writ of habeas corpus is unimportant. We recognize that it is a very important protection and clearly, other than in Fourth Amendment litigation, where a state prisoner does generally not have the right to come into federal court of a federal habeas corpus application, in the other areas of constitutional law we do not dispute that where a constitutional issue affects, may affect the validity of a state criminal conviction, a state prisoner should have one full and fair opportunity to come into federal court and have the federal court examine that constitutional issue before a conclusive presumption of finality attaches to that state court criminal conviction.

What we are asking the Court to reject in this case is the suggestion by the Second Circuit Court of Appeals that what habeas corpus really is is a never ending merry go round ride, available to state habeas -- excuse me, state prisoners, who will have the opportunity, based on the most recent advance sheet or the most recent slip opinion that adds a nuance on wrinkle or further dimension to an issue of constitutional law that they previously litigated and lost on, to come right back into the federal courts,

start that merry go round ride all over again, with the hope that they'll get lucky this time around.

We think that the rule followed by the Court of Appeals in this case allows for that conclusion, and we do believe that that rule, seemingly founded on this Court's 22 year old decision in United States v. Sanders, is an erroneous one if it's applied today.

And I say that because if you look at the Court of Appeals, the 1984 decision of the Court of Appeals in this case, they view their obligation in this case to be one in which they would have to give, have to give, some consideration to the repetitive, successive, identical claim under the Sanders analysis, unless it could be shown that there had been a previous merits determination and the ends of justice would not be served by reaching the merits of the subsequent application. That's the old Sanders test.

And what has gone largely unnoticed, it seems, in the law for many years is that is 1966 the Sanders analysis was made wholly inapplicable to state prisoners. Sanders is largely a case of statutory construction as applied to repetitive, successive claim situations.

I'm not talking about abuse of the writ situations, where the defendant comes to court with a

new claim which he has previously withheld. And Sanders addresses both aspects of habeas corpus. But insofar as it addresses repetitive, successive claim situations, which was governed at the time in 1963 by 28 U.S. Code 2244, which was then applicable to both state and federal prisoners, and did have this ends of justice language and a strong presumption of consideration of a successive claim, in 1966 Congress changed the law.

It said, as to state prisoners, you're out of 2244, which is now 2244-called ends of justice before you ca and (c), and the pertinent provision for this Court's consideration with respect to this case is 2244(b), which now tells the federal judiciary: You're no longer hampered by that hurdle of giving consideration to the so-called ends of justice before you can give controlling, conclusive weight to a previous determination.

The law under 2244(b) is that you need not consider a subsequent, successive, repetitive petition unless it raises a new ground, and only if it is found that the Petitioner has not improperly withheld that ground the first time around or somehow abused the writ.

QUESTION: But it's cast, isn't it, Mr. Kartagener, in terms of the thing may be, the writ may

be dismissed, not that the writ must be dismissed?

MR. KARTAGENER: Well, Justice Rehnquist, what it says is the court need not entertain the successive petition unless. And I would agree with you that it does not contain the type of mandatory language that we would prefer to see, you shall not, you can not.

But we suggest that the whole purpose of that statute, when read in accord with the Congressional intent, which is shown in the Senate report that accompanies it, was to have that statute interpreted as one in which there would ordinarily be, rather than a presumption of let's consider the repeated claim, the presumption should be you don't consider the repeated claim.

QUESTION: But even if Sanders by virtue of the rules and the advisory notes still governed, I would think that you could use the term "ends of justice" for your purpose as much as your opponent could.

MR. KARTAGENER: I would certainly agree with that position, Your Honor, and in our brief we argue as a final subsection that, even if the ends of justice analysis were to be considered extant, notwithstanding the Congressional mandatory legislation of 1966, we should still prevail under that analysis. Why? Because in 1966, aside from all of the important concerns that

the Court has so recently articulated in the area of habeas corpus -- the need for finality, the need for a conclusion in state criminal litigation, the important need to have the state criminal trial be the main bout and not just the preliminary bout in a long line of knock-down, drag-out fights in the federal courts on constitutional issues -- there is a very important other reason why that end of justice argument would support us.

And that is because there was a strong suggestion in the amendatory legislation of 1966 that -- and this is in the Senate report, which we cite at length in our brief -- that the purpose of the amendment in 1966 was to bring a greater degree of finality to state habeas corpus applications, and indeed a qualified application of the doctrine of res judicata, which as this Court is well aware until that time was essentially missing, almost in its entirety, from habeas corpus.

And I would suggest that we're not really asking for res judicata principles to be applied under our rule in this case, not in the strictest sense, because res judicata, if strictly applied, would say that if you have brought one habeas corpus application and you left out a claim and you come back into court later with a new claim, under pure res judicata

principles that claim would be barred as well.

That's really not what we're arguing about here. What we're suggesting to the Court and what we're asking the Court to do in exercising its supervisory capacity over the lower federal courts, just as the Court did in Sanders in interpreting Section 2244 as it then existed, what we're asking the Court to do is, consistent with the amendment of 2244 making it 2244(b), consistent with that Congressional intent, consistent with all of the important concerns that the Court has articulated about the need to bring finality to habeas corpus litigation, we're asking for a rule not really of res judicata effect, but really a qualified rule of issue preclusion.

And it's a rather simple rule, we suggest, and a rather fair rule. We ask the Court to interpret the general procedure to be that once a state prisoner has had one full and fair opportunity to litigate the merits of a constitutional claim in the state courts, and once he's had an additional full and fair opportuntity to litigate the merits of his constitutional claim in the federal courts, then generally that should be the end of the matter.

But recognizing, Justice Rehnquist, your noting that the language of 2244(b) is less than

absolutely mandatory, and recognizing that you may need some limited room for an exercise of discretion, consistent with the need for finality, we suggest that there are two areas where you might allow a repetition of a claim previously heard and rejected on the merits. And I think it's a very important two exceptions, a very important qualification, because I think one of the things that would certainly bother the Court in a habeas corpus situation is if we're dealing with a claim that really raised some shadow of a doubt as to the innocence of the state prisoner, or some claim that truly goes to the accuracy, integrity, or validity of the factfinding process.

And what we suggest as the exceptions is the appropriate suggestions are two in which you have -- well, excuse me -- the first one being if there are new-found facts alleged, new facts that would be outcome determinative, facts that nobody was aware of the first time, facts which suggest -- perhaps that a confession that was previously found to be acceptable, suddenly we find out newly that the police beat it out of him. That type --

QUESTION: Something along the lines of Judge Friendly's article, "Is Innocence Irrelevant?"

MR. KARTAGENER: Absolutely, Your Honor. We

quote from that article in our reply brief, I believe in our main brief as well, and I suggest that the title of that article really makes a very important point. Innocence should not be irrelevant, as Judge Friendly has suggested and many other legal scholars have suggested.

But we take into consideration the need for some flexibility by saying, where there are new-found facts, number one, which will go to the issue possibly of guilt or innocence or the validity of a confession, to make sure that it wasn't beaten out of him by the police, or if you have a new rule of law that would be found to be retroactively applicable on habeas corpus, the Petitioner should get the benefit as well.

And as this Court is well aware, the most common rule to be given retroactive analysis in a collateral proceeding would be one that goes to the very integrity or accuracy of the factfinding process.

QUESTION: What was the trial court finding with respect to who prompted the conversations?

MR. KARTAGENER: The state court finding was that the statements were spontaneous and completely unsolicited. 2254(d) told the federal courts to give deference to that finding, and until the Second Circuit's most recent opinion the lower courts did

that.

And that is a very important point when we discuss the merits as to why this case really, as we've argued all along, has nothing to do with Henry or Maine v. Moulton. I draw the Court's attention to Justice Powell's concurring decision in Henry. I draw attention as well to the Chief Justice's concurrence, and of course the Chief Justice was the author of Henry, his concurrence is Snead v. Stringer, which Justice Rehnquist wrote, which was a dissent from the denial of certiorari, where there has been, I suggest, some uniformity of agreement that spontaneous, truly spontaneous statements, fall outside of the pale of Sixth Amendment concern, if they really are spontaneous.

And we suggest in this case that one of the critical errors of the lower, of the Court of Appeals, is that they paid no deferences to those factual findings of spontaneity. And we further argue that the record really does support that factual finding, that these statements were spontaneous.

Unlike Henry, there was a factfinding hearing in this case. In Henry there was not. The jailhouse informant, Benny Lee, testified, and he was absolutely credited, that there was never any asking of questions.

He made it very clear that there was no attempt to inveigle or solicit information from this Respondent Wilson.

His sole job, the job given him by the detective that he spoke with, was to keep his ears open, not to obtain incriminating information about Wilson, but really to try to identify the two other participants in the robbery, who were responsible for the murder. And I point out, to this day they still go unapprehended.

The importance of this rule that we argue in terms of issue preclusion blends with the merits of this case, because we think that one of the evils that you see where there is going to be constant, repetitive consideration of the same claim time and time again is that there will end up -- you will end up with new factual findings, new factual inferences being drawn by the most recent courts if they disagree for their own reasons with other courts.

And that shouldn't be the rule of law in a sane and rational system of justice. Historical facts shouldn't change. They don't change. The law can change, but historical facts don't.

And the Second Circuit, in deciding that it would consider this matter on the merits, really ignored

the fact that they should not have been ignoring so blithely the factual findings of spontaneity that occurred in this case.

What we are asking this Court to do in positing this rule of qualified issue preclusion is really to breathe life into the Congressional intent when it enacted 2244(b), and we also ask the Court to announce a rule that will bring habeas corpus litigation involving successive, repetitive claims into accord with the general concerns that this Court has in bringing a greater degree of finality to habeas corpus litigation, which can be traced back to Justice Powell's opinion in Schneckloth v. Bustamonte, before that, if we were to go back further, perhaps Justice Harlan's dissent in Sanders, but echoed in Wainwright v. Sykes and Engle v. Isaac and Barefoot v. Estelle, that state court proceedings are important. They should not be that first bout, as I made mention of.

And I would like to suggest as well that it really doesn't matter that courts will not regularly and routinely grant relief under the type of circumstances that the Second Circuit did in this case the second time around. And I would concede that you probably do not have a lot of reported decisions where either district courts or circuit courts of appeal on a successive,

repetitive claim have granted the relief.

But the real evil is not in the case in which it happens to be granted. True, you have that miscarriage of justice here because an effective retrial of this fellow has been rendered virtually impossible due to the passage of time. But the real sin of the Second Circuit's rule and the rule that Respondent would have you accept in this case, that there can be a repetitious consideration of state criminal convictions, the evil of that is the potential that a court can take the case in the so-called ends of justice, whatever that amorphous term might mean.

And it is that possibility which holds out a beacon to disgruntled state prisoners, always looking at those advance sheets, trying to get back into federal court. And I think that the better position should be that, once you have assured that one full and fair bite at the apple in state court, that second full and fair bite at the apple in federal court, that the defendant, that the state defendant, should not have the right really in effect to devour the entire apple. That would be silly, and that's what they're asking to have the right to do.

And I suggest that if this Petitioner had lost in the Second Circuit -- excuse me; I apologize. This

habeas Petitioner, who is now the Respondent, had he lost in the Second Circuit on his Henry claim, by his analysis perhaps he'd be able to bounce into court once again on a claim that, well, maybe Moulton really makes clear finally that he is right and everybody else has been wrong all along.

I just don't think that that's what habeas corpus is about, that every time a new decision comes down the race should start all over again. I know Respondent comes before this Court suggesting, well, but here there was really plain error in view of Henry, and I think we've dealt with that on the merits and shown why Henry has not been violated here.

But they'll come and say, but it was plain error, there's really a differential basis here as to why this Court should have been allowed to consider the successive, repetitive claim. I don't think that argument holds water.

Most good lawyers can find in a new decision some basis for suggesting that an older decision really may not have been as correct as the court that rendered it at a given point in time thought it was. But the finality concepts are just so important and the search for absolute justice or absolute correctness in judicial decisions, ultimate truth in judicial decisions, it's

just too elusive to warrant the endless perpetuation of habeas corpus litigation on the possibility, as I say, that evetually you'll strike it lucky with some sympathetic federal court.

In the end, we do think, and we've chronicled at length in our brief the statutory and Congressional intent basis for our argument, we think we've also supported out contentions for limiting the older Sanders rule as applied to repetitive, successive claims. And by the way, I point out that we're not arguing that Sanders has been undercut in the abuse of the writ area.

Justice O'Connor is Rose v. Lundy makes note that Sanders is applicable in dealing with abuse of the writ, because at the time it came down there was no statute that governed and the subsequent statutes that were enacted, the rules that were enacted, really abide by the Sanders analysis in dealing with "abuse of the writ" situations.

But we're not talking about that here, and insofar as it applies to -- excuse me. Insofar as we're dealing with a successive, repetitive, same ground type claim, we think that we have shown the statutory basis, the Congressional intent basis, the purposes of this Court in dealing with habeas corpus litigation, the

purpose of bringing finality, reasonable finality, to habeas corpus. We think we justify the rule that we urge upon the court.

Therefore, I would like only briefly to move on to our contention that this was really much ado about nothing in some respects, because, contrary to the arguments made by Respondent, this is not a case in which the state is coming into court and saying, don't look at the merits, go with the procedural arguments that we're talking about, because if you do look at the merits the state has to lose under Henry. That's just not clear and it's not accurate.

What you had here, and we think it's just so critical, are very important factual findings of spontaneity. As I've already indicated, the lower court, the state court, found it. The district court the first time found it. The Second Circuit certainly the first time gave recognition of the doctrine that spontaneous statements are outside of the Sixth Amendment concerns of Massiah.

The district court the second time around gave also appropriate respect to those findings of spontaneity, and it was just the Second Circuit that chose willy-nilly to disregard them. We think that for there to be a violation of Henry what you need is some

form of -- excuse me, a violation of the Sixth Amendment as interpreted by Henry and other decisions of the Court -- you have to have some form of deliberate elicitation.

Now, what that is -- I'm not suggesting that is interrogation, which is an argument that's been put to the Court before in Brewer or in perhaps Maine v. Moulton. What I am saying is that it can be -- excuse me, Your Honors. I see that my time --

CHIEF JUSTICE BURGER: That's just your warning light.

MR. KARTAGENER: Excuse me?

CHIEF JUSTICE BURGER: That's just your warning light.

MR. KARTAGENER: Yes, but I was hoping to reserve my remaining five minutes. So I will pick up in reply if I may be permitted to, Your Honor. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Weber, you may proceed whenever you're ready.

ORAL ARGUMENT OF PHILIP S. WEBER, ESQ.

ON BEHALF OF RESPONDENT

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

The facts of this case show a glaring

violation of Wilson's constitutional right to counsel. He was placed in a holding cell with a secret informant after his right to counsel had attached.

QUESTION: What about the finding of the trial court that these were spontaneous statements? You say they're clearly erroneous?

MR. WEBER: Your Honor, we haven't argued that that is a clearly erroneous finding. What we believe is that the state court found a mixed conclusion of law and fact that the statements were voluntary and unsolicited and spontaneous, and that the federal court on a habeas petition could re-examine that finding.

But what's more important, perhaps, is that a finding of spontaneity or voluntariness of unsolicitedness perhaps, if you will, does not answer the inquiry that Henry requires of the federal court on habeas corpus. What's required of the federal court on habeas corpus in this context is that the court ask whether the statement was deliberately elicited from the accused in the absence of his counsel by the conduct of the state, in which the state created a situation that is likely to induce the accused to make his statement to the informant.

Here that was exactly what was done, and these facts are legally indistinguishable from those of United

States against Henry. In Henry, as in the present case, the state deliberately elicited the statement. Under Henry it does not matter whether the questions were asked by the informant or whether the informant interrogated Wilson. That has all gone by the boards and it is now clear, although it was not after Brewer, that interrogation or questioning is not an essential element of a violation of the right to the assistance of counsel under the Sixth Amendment.

Accordingly, if Wilson's case were tried in 1985 there could be no doubt that his testimony would not be admissible at trial. The decision of the court below should be affirmed because, in the light of Henry, that evidence was erroneously admitted in 1970 at Wilson's trial.

My argument today will consist of two points: First, it was entirely appropriate for the Court of Appeals and the district court to entertain Wilson's current petition in light of United States against Henry, which was an intervening authority with direct and substantial bearing on Wilson's constitutional claim.

Second, in correctly entertaining Wilson's current application, the court below complied with Section 2254(d) by giving due regard to the finding of

fact that the state trial court made when it determined Wilson's motion to suppress Lee's testimony.

QUESTION: Mr. Weber, has your client in the second federal habeas proceeding made anything that you would describe as a colorable claim of factual innocence?

MR. WEBER: Your Honor, the court --

QUESTION: You can answer that yes or no, can't you?

MR. WEBER: There has been no change in the facts, Your Honor. The same facts that were presented on the first petition were presented on the second petition. To the extent that whenever the accused is denied the right of the assistance of counsel his innocence is called into question, that issue is present here.

The Court --

QUESTION: Well, but would you seriously contend before a neutral body, say of arbitrators rather than lawyers, that there isn't enough evidence to support your client's conviction for the crime?

MR. WEBER: Your Honor, what I would argue is probably not pertinent here. But what would be argued at the new trial is that he is innocent and that the evidence, absent Lee's testimony, does not sustain a

conviction.

QUESTION: Has that argument been made before in these federal habeas proceedings?

MR. WEBER: Well, that is something that would have to remain for trial, Your Honor.

QUESTION: Well, I said has it been made before.

MR. WEBER: No, it hasn't, Your Honor.

With regard to the first point, Section 2244(b) does not provide a basis for the federal courts to foreclose Wilson's habeas corpus petition, because the statute is purely permissive, and, second, because under the circumstances of this case, the court below correctly exercised its discretion to entertain the petition.

As to the permissive nature of Section 2244(b), it only authorizes a federal court to decline to entertain a successive habeas corpus petition if it so chooses. The statute does not command the court to dismiss the petition under any circumstances.

Under Section 2244(b), the court may refuse to entertain a successive petition in two situations. First, it may refuse to entertain the petition if it is persuaded that there is no new grounds. Second, if a new ground is asserted, it may dismiss the petition if

the prisoner deliberately withheld the new ground or otherwise abused the writ.

The legislative history of the 1966 amendments, contrary to the Petitioner's argument, shows no intention of Congress to overturn the rule of guidance that this Court announced in 1963 in Sanders. By enacting two new subsections governing state prisoners, Congress legislated two bases on which a federal court might decline to entertain a successive petition from a state prisoner.

These sections do not prevent the court from determining, in accordance with the rule of Sanders and the universal practice of the federal courts since Sanders, whether the ends of justice would be served by its entertaining the successive petition. That decision of whether to entertain a successive petition that was previously decided on the merits on the same ground below rest in the sound discretion of the federal courts in two respects.

First, it is up to the court to decide whether to exercise its prerogative to decline to entertain the successive petition, giving as its reason that the petition was already decided once before on the same grounds on the merits below. This is inherent in the use of the word "may" in both Sanders and in Section

2244(b).

QUESTION: Well, do you think it's just a standardless discretion?

MR. KARTAGENER: I think that the discretion is controlled by an abuse of discretion standard.

QUESTION: Well, how would you decide in a particular case whether a district court or Court of Appeals had properly either considered the petition or refused to consider?

MR. KARTAGENER: Your Honor, I think if the case comes up on appeal, for example to a Court of Appeals, where the district court refused to consider the petition, I think the Court of Appeals would then have to decide whether, given all the facts and circumstances, the ends of justice would have been served by the district court considering the petition.

QUESTION: There's nothing more general than that? Each case is entirely fact specific?

MR. WEBER: Well, I think that that was the holding of the Court in Sanders, Your Honor. There the Court said that the ends of justice could not be too finely particularized because --

QUESTION: Well, but Sanders no longer governs this situation by its terms. Sanders was a federal habeas corpus case.

MR. WEBER: Yes indeed.

QUESTION: Now, there may be carryover from the language of Sanders, but I don't see that you can argue that particular language in Sanders that wasn't carried over in the advisory committee notes is binding.

MR. WEBER: Your Honor, I do argue that it's binding, for two reasons perhaps. One is that Sanders, even though it was a federal case, said that it was deciding the matter also with respect to state cases.

QUESTION: That would have to have been dicta, I suppose.

MR. WEBER: Well, in a sense the rule of guidance is dictum, because it wasn't necessary for the holding of the case. So in a strict sense, yes, Your Honor. But in the sense that it's the central teaching of the case, I think that it would be necessary to overrule the case in order to adopt the Petitioner's rule.

QUESTION: Well, I guess you concede that it is open to this Court to give substance and meaning to the situations that this Court thinks are appropriate for federal courts in entertaining petitions from state cases?

MR. WEBER: Yes, Your Honor.

The Sanders Court purposely left the ends of justice standard loosely defined. What the Court left quite clear is that, even if the same ground was previously determined on the merits, it is open to the prisoner to show that the ends of justice would be served by a redetermination of the same ground.

The ends of justice language in Sanders and in the old Section 2244 never served as a means by which the federal court could entertain a petition which it was not otherwise entitled to review. Contrary to the Petitioner's argument, the ends of justice language in Sanders did not provide a loophole for the courts to use to entertain petitions that otherwise they did not have jurisdiction to entertain.

Indeed, Section 2254(a) of Title 28 provides that the court shall entertain an application of a prisoner who alleges that his confinement is unconstitutional. Needless to say, that is encrusted with many exceptions, which are not applicable here.

Section 2244(b) provides a certain permissive exception to this, to this commandment that the Court shall entertain the petition. In certain cases the court need not entertain the petition. But nowhere does Section 2244(b) or any other statute that would be applicable to this case say that the court shall not

entertain the petition.

This Court should now reject the state's argument that dismissal should be mandatory because, as the Court recognized in Sanders, the considerations governing each case must be weighed individually. Both the district court and the Court of Appeals correctly decided to entertain Wilson's current petition for habeas corpus.

The jurisdiction of the courts below did not depent upon a finding that the ends of justice would be served. However, the Court of Appeals by deciding that the ends of justice would be served simply foreclosed the option of not entertaining the petition. Sanders holds that if the ends of justice would be served then the court must entertain the petition.

One of the specific instances in which the ends of justice would be served, according to Sanders, is the case where there is an intervening change in the law. The Court below correctly perceived that Henry is a directly applicable case with a direct and substantial bearing on the case before the Court today. This is because Henry developed and clarified the law which is applicable to this case and, even as the Petitioner concedes, lends some support to Wilson's claim of unconstitutionality.

QUESTION: What if we were to think that Henry didn't articulate new legal principles, but simply applied the same legal principles previously established to new facts?

MR. WEBER: I think in that case, Your Honor, what we would have is a case that makes clear that the prior legal determination of the courts that considered the first petition was a plain error, and that is the contention that the Petitioner alluded to in his argument and we think that that is within the purview of the Court on habeas corpus to reconsider that.

QUESTION: You think there should be no limit, then, on when courts will consider the same issue again and again?

MR. WEBER: Your Honor, at common law there was no limit to the number of times a prisoner could bring a habeas corpus petition. Congress has not acted to limit that, and indeed --

QUESTION: You think that the evidence of the legislative history then is entirely free from an indication that Congress thought there should be some limit someplace?

MR. WEBER: Your Honor, I think that the legislative history shows that Congress believes that there should be some limit, but it has not made a limit

as to this particular point. It has limited the right of the Petitioner to bring successive petitions in the case of abuse, for example, which is 2244(b), or for example in a case where this Court has previously determined the issue at the bar.

Those were the innovations of the amendments of 1966. The amendments of 1966 do not refer to the ends of justice. I don't think that when Congress enacted those subsections that it intended to foreclose the ability and the power of the court to consider the ends of justice when deciding whether a successive petition deserved to be reviewed.

QUESTION: Well, would you say that the ends of justice language in the section and the notes always indicate an argument in favor of extended review, or would you say that the ends of justice might on occasion, perhaps in the fourth or fifth petition or if there isn't any colorable claim of innocence, indicate that the petition shouldn't be reviewed?

MR. WEBER: Absolutely, Your Honor. I think the ends of justice may well indicate and often probably does indicate that a petition should not be reviewed. I think that in the case of a petition that raises no new ground, that perhaps is the third or fourth or fifth petition on the same basis, that the ends of justice

would certainly indicate that the petition should not be reviewed.

That's not the case here, Your Honor. This petition does contain a new element. It's not a new ground within the meaning of Sanders, because Sanders defined the ground to mean the sufficient legal basis on which the petition is brought, so that a claim of unconstitutionality under the Sixth Amendment for a violation of the right to the assistance of counsel is a ground, and therefore most likely this petition does not assert a new ground, although in Sanders the Court said that when there is a question about that is should be interpreted favorably to the applicant.

But coming back to the main thought, here we have something new under the sun. There is a case, an intervening authority with a direct and substantial bearing on Wilson's claim. It lends support to his claim, and all that Wilson is asking for is for an opportunity to present that claim to the court.

By entertaining the petition, it does not mean that the petition will be favorably decided for the Petitioner. It means that the court will consider the claim. It means that it will not be summarily dismissed. It means that the Petitioner will have a hearing before the court. That is all that the ends of

justice requires.

If the federal courts refuse today to hear Wilson's petition merely because he had previously attempted to obtain relief, it would be to penalize him for asserting his right too soon. Today we have the benefit of a new precedent with a direct and substantial bearing on his constitutional claim. The federal courts that considered Wilson's first petition did not have the benefit of Henry, and neither did the state court that originally determined his claim.

The federal courts that considered his petition the first time assumed that the state of the law was such that interrogation or behavior tantamount to interrogation was necessary in order to find a violation of the Sixth Amendment right to the assistance of counsel.

It would be unjust to refuse to re-examine Wilson's claim today as it stood before Henry, when Henry lends this support, as even the Petitioner agrees, to Wilson's claim of unconstitutional confinement.

I should now like to turn to my second argument, which is that the Court below treated the state trial court's finding of fact with due deference under Section 2254(d). In the course of entertaining Wilson's current petition, the Court of Appeals accepted

the state court's finding that the informant did not interrogate Wilson. This was the finding of fact that the state trial court relied on when it determined Wilson's motion to suppress Lee's testimony.

This is evident from the finding of the state court which is in the joint appendix and which the statute specifically requires that the federal habeas court defer to. In other words, it is the written finding in the record and not the full record which comprises the facts that the state trial court found and to which deference is deserved.

The state court amply discussed the basis for its holding in its decision. Section 2254(d) makes it clear that deference is due to these findings of fact, and the findings of fact here and the ones that the state court considered determinative were the findings of no interrogation.

The court below accepted this finding and so it did not violate Section 2254(d), even though it did reach the opposite legal conclusion from the state court. The state urges this Court to engage in speculation concerning the cause of Wilson's inculpatory statement. It asks this Court to suppose that Wilson's statement was caused by a visit from his brother.

In doing so, the state goes beyond the record

to which deference is due for its facts, because the state court never mentioned the visit from Wilson's brother even once in the course of its decision. But more importantly, this argument of the state shows a misunderstanding of the Henry decision.

This Court held in Henry that the correct inquiry is whether the state deliberately elicited a confession by creating a situation that was likely to induce the accused to speak to the informant. This is not a subjective inquiry and it does not require an inquiry into the state of mind of the prisoner. If in fact the state deliberately set out to elicit a damaging statement from the accused by using a strategem that was likely to succeed and did obtain such a statement, then the Henry test has been satisfied and the right to counsel has been violated.

QUESTION: What about the purpose here?

MR. WEBER: Pardon me, Your Honor?

QUESTION: What about, did the state deliberately set out to elicit something?

MR. WEBER: Absolutely.

QUESTION: Is there a finding to that effect?

MR. WEBER: No, there isn't a finding of that in the state court's decision, because the state court didn't know that that was what it was supposed to be

investigating.

QUESTION: Yes, but how about, are there any findings anywhere to that effect?

MR. WEBER: Well, the Court of Appeals below correctly determined --

QUESTION: What about the district court?

MR. WEBER: The district court held that the visit from Wilson's brother was in fact the cause.

QUESTION: Well, what about the purpose of the --

MR. WEBER: I don't think there's any question, Your Honor, that the purpose of the state's employing an informant --

QUESTION: Was to elicit something?

MR. WEBER: -- was to elicit a statement from the accused. Now, the Petitioner --

QUESTION: Well, that's different than saying the purpose was to report to us if he says anything.

MR. WEBER: That's not all that the investigating officer said, Your Honor. The investigating officer also said that the informant was to find out about the crime from Wilson, and that seems to me to have quite a bit more breadth to it than just finding out about the two accomplices, which is all that the state mentioned.

QUESTION: You don't purport to be quoting what he actually said, do you?

MR. WEBER: Pardon?

QUESTION: You're not purporting to quote what he said?

MR. WEBER: No.

QUESTION: He said you are to listen, you are not to initiate.

MR. WEBER: That's true. There's testimony --

QUESTION: And the court found that that added up to a spontaneous declaration.

MR. WEBER: But there is more to it, Your Honor. In the state court's hearing record, there is testimony by Lee that the investigating officer, whose name was Cullen, asked him to find out -- and I believe I'm quoting directly from that testimony, not the hearing court's decision but the testimony -- asked him to find out about the crime from Wilson.

And that, as I said, seems to have much greater breadth than does the mere inquiry about the two accomplices.

QUESTION: He was to find out by keeping his ears open, wasn't that essentially the statement?

MR. WEBER: Yes, that's true. And he was

instructed not to ask any questions. And the state court even found that he did not ask any questions.

But the catch here is that that's not important. What's important is that he was there, he did engage in conversation, he was placed in proximity to the accused, he was a secret informant, and he was retained by the state for this purpose.

QUESTION: Suppose that there had been a recording device in the cell and there was just some other prisoner, just a casual occupant of the cell --

MR. WEBER: That's the hypothetical --

QUESTION: -- and this gentleman talked and said all the things he said here.

MR. WEBER: Yes, Your Honor, and that' -- the hypothetical question that was left open by the Court in Henry in footnote number 9. We call it the listening post hypothetical, and this Court hasn't spoken on that. Luckily for Wilson, that's not the case here. The case here is that the informant provoked Wilson by making comments, by engaging him in conversation, and that's all that's necessary under the holding of Henry in order to find a violation of the Sixth Amendment right to the assistance of counsel.

The court below did not refind the facts that the state court relied on. The court merely looked to

the facts and drew a different legal conclusion from those of the state court. Its conclusion rested on a different legal standard that the state court's, and is informed, as the state court's was not, by United States against Henry.

Accordingly, there are two particular reasons why the Court of Appeals did not violate the presumption of Section 2254(d) when it rendered its decision below. First, it did not make factual findings "considerably at odds" with those of the state court, as the Court of Appeals had in Sumner against Mata.

Sumner against Mata was quite a different case from this one. There the issue was whether the facts adequately supported the prisoner's contention that the pretrial identification procedure used there violated his right to due process. There the Court of Appeals applied the same legal standard as the state court and arrived at a different result.

Here the Court of Appeals applied a different legal standard to the facts. The inquiry conducted was whether the state deliberately elicited the statement from the accused by creating a situation likely to induce him to make such a statement. It thus differed from the state court not on the facts, but on the correct legal standard, and on this it was entitled to

disagree.

The second reason why the court below did not err, even though it did not cite Section 2254(d), is that when it disagreed with the state's conclusion, it disagreed with a conclusion on a mixed question of law and fact. This Court has consistently held that Congress 2254(d) does not restrict the power of the federal court on habeas corpus to reach its own conclusion on a mixed question of law and fact.

The state apparently concedes that deliberate elicitation is a mixed question of law and fact, beyond the presumption of Section 2254(d). Given this, the Court of Appeals was entitled to reach its own conclusion about whether the Henry test was satisfied. This is especially so since the state court and the federal courts on the first petition did not have the Henry decision to guide them.

Nevertheless, the state argues that the Court of Appeals should have adhered to the state court's conclusion that the confession was voluntary. And here, Your Honor, I submit that the state court's determination, which is a mixed conclusion of law and fact, that the statement was spontaneous or unsolicited or voluntary are all in pari materia, they are all pointed in the same direction and have the same

purpose.

Indeed, the trial court's decision really only had one finding of fact, and that was no interrogation, and that is the one that the state trial court considered determinative. The latter, the voluntariness issue, is a mixed question of finding of fact, mixed question of law and fact, pardon me, and as to voluntariness this Court has recently held in Miller against Fenton that it is a mixed question and it is not subject to the strictures of 2254(d).

QUESTION: Mr. Weber, I don't want to interrupt you. I want to go back to the first branch of your argument for a minute, if I might. Justice Rehnquist brought out with your opponent that the statutory language isn't "must"; it's "need not entertain".

Is it your view that the district court in this case had discretion either to entertain or not entertain, or that he had an absolute obligation to entertain the application?

MR. WEBER: Your Honor, I think that the Court of Appeals' finding is correct that the ends of justice would be served, and --

QUESTION: Well, let me just put a second question that's related --

MR. WEBER: Yes.

QUESTION: -- and then you might want to cover them both. If one takes the view that the district court had discretion, what is the function of the Court of Appeals? Is it to decide whether the district court abused its discretion or whether the Court of Appeals would have thought the ends of justice were served and made the initial determination?

MR. WEBER: Your Honor, I think that probably it would serve two purposes. I think that in the threshold there certainly is an inquiry as to whether the discretion was abused, and that is always within the power of the Court of Appeals.

But moreover, I think that the Court of Appeals may review as a matter of law whether the ends of justice was -- whether the ends of justice analysis was in fact correctly applied in the district court.

QUESTION: See, they didn't really do that. They just in effect, as I read the Court of Appeals opinion, they just said, we think the ends of justice will be served.

MR. WEBER: Correct.

QUESTION: And they didn't really say whether the district court was plainly wrong in coming to a contrary conclusion or whether the district court had a

duty simply to entertain the petition. I'm a little unclear as to exactly what the procedural posture you think -- what you think the correct procedural rulings were.

MR. WEBER: Well, Your Honor, the district court did entertain the petition and --

QUESTION: It denied it without a hearing, did it not?

MR. WEBER: No, no. Well, there was a hearing on the law, and so that is entertaining the petition in the language of Sanders and the cases that have followed it.

QUESTION: So the district court denied it on the merits, rather than on the ground that it was a successive petition raising the same issue?

MR. WEBER: Correct. And I think, quite frankly, on that point, the system, the habeas corpus system and the system created by Sanders and 2244(b), worked just as it's supposed to in this case, except perhaps that the district court erred when it decided to deny the petition after entertaining it.

The decision of the Court of Appeals, the decision of the Court of Appeals that the statement elicited from Wilson was indeed deliberately elicited, under the facts of this case is a mixed question on

which it was entitled to differ from the state trial court after giving due regard to the historical facts.

For this reason and for the reasons that I have stated before --

QUESTION: Do you think that you must show that what your client said was the result of conversing with the informant?

MR. WEBER: No, Your Honor, I don't think that Henry takes in a result test. I don't think that there is a cause and effect element that's implicit in Henry, and I think that is supported by Maine against Moulton. I think what the inquiry is and what this Court's holdings have been is that the court must examine the state's conduct and must determine from the state's conduct whether that conduct was such as to create a situation which had the foreseeability element, that it was likely to induce the statement from the prisoner, given all the facts.

And once there has been a determination that the state acted in that way, that in fact that leads to a violation of the Sixth Amendment.

QUESTION: Well, the Court of Appeals referred to Henry and said that there were some conversations with the defendant while he was in jail, and the defendant's incriminatory statements were the product of

these conversations.

MR. WEBER: Yes, Your Honor, there is --

QUESTION: Now do you -- must we -- you are asserting that these admissions were a product of the conversations?

MR. WEBER: I think it is true in this case, Your Honor, that the admissions were the product. I don't think --

QUESTION: Can they be that and be spontaneous, too?

MR. WEBER: Perhaps they can.

QUESTION: Don't you think spontaneity is a historical fact?

MR. WEBER: No, Your Honor. I think that --

QUESTION: Voluntariness may not be, but why isn't spontaneity?

MR. WEBER: Well, I think that the way the court, the state trial court which determined Wilson's suppression motion, used the word, it used it as essentially a paraphrase or an equivalent of the word "voluntary." It meant nothing different.

What it meant was that Lee did not interrogate Wilson and therefore there had to have been something within him that made this confession burst out.

I see my time is up. Are there any further

questions?

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, counsel?

REBUTTAL ARGUMENT OF

STEVEN R. KARTAGENER, ESQ.,

ON BEHALF OF PETITIONER

MR. KARTAGENER: Yes, Mr. Chief Justice. If I might take my five minutes remaining and discuss a few --

CHIEF JUSTICE BURGER: You have five minutes.

MR. KARTAGENER: Excuse me, Your Honor?

CHIEF JUSTICE BURGER: You have five minutes remaining.

MR. KARTAGENER: Thank you, Your Honor.

-- discuss a few of the points that I finished on, also some that were raised by the Court during the course of my adversary's argument.

We read Henry and the Henry line of cases as requiring some product coming from the defendant whose in the jailhouse --

QUESTION: By that you mean some stimulation?

MR. KARTAGENER: There has to be a stimulation by the Government that bears fruit. And I think that's rather clear when you look at the Henry case, in which

Nickles testified that he wasn't just a passive listener in the room. He had -- and this is quoting from Nickles' testimony at his trial, and this is from the decision in Henry -- he had "some conversations with Mr. Henry while he was in jail," and Henry's incriminating statements were "the product of this conversation."

To the contrary, in this case you have a clear factual finding that the statements made by Respondent Wilson were not the product of whatever conversations were going on between him and Bennie Lee. And I draw attention, of course, to Mr. Justice Powell's concurrence in Henry and also a footnote in Maine v. Moulton which certainly suggests that you have to have something that really is tantamount in some sense to interrogation, and if it's not interrogation it still has to be deliberately elicited.

It has to come to the Government because the Government because the Government inveigled it in some way surreptitiously from the speaker. And what you have in this case is a very important factual finding. The factual finding is that the stimulus that prompted Respondent Wilson to make the statement came -- and this is a factual finding which basically everybody below prion to the Second Circuit the second time around agreed in, that the stimulus for the incriminating

statement came because -- came from a very disconcerting visit to Wilson in jail from his brother.

It was a visit by his brother, I would say, in which he communicated to Wilson that the family was very upset with him for having killed Reiner. Wilson's brother worked at the taxicab garage himself. They were very upset, and after this, as is clear from the record, he became very upset.

This is what prompted him to talk. It was clear that he was looking for a shoulder to cry on. Benny Lee offered him the shoulder, but he didn't cause the tears. The tears came from an attenuated independent source apart from the Government.

Even if the Court were to find in this case an effort at deliberate elicitation under Henry, it still wasn't fruitful.

QUESTION: Well, surely the Court of Appeals took a different view of the record in that regard.

MR. KARTAGENER: They did, and we suggest to the Court, as we've pointed out in both our main brief and our reply brief, that their view of the record did not accord with the factual findings made by courts before it, and that there are historical facts here of spontaneity, that they just --

QUESTION: Well, nobody --

MR. KARTAGENER: Forgot about.

QUESTION: No one denies that the informant did engage in conversations?

MR. KARTAGENER: No, there was no question that there were conversations.

QUESTION: Over several days.

MR. KARTAGENER: Yes. But clearly there were no questions. That's a clear factual finding.

QUESTION: Well, that may be. There may have been no questions. But would you say that there wasn't any elicitation if the informant said, I've been listening to you and, look, fellow, you ought to go and confess?

MR. KARTAGENER: Well, if that were --

QUESTION: That's -- you're going to be much better off if you just confess.

MR. KARTAGENER: And if the Respondent -- or if the defendant or his partner did immediately go and confess to him, let's say --

QUESTION: No. He thought it over and the next day he called in the policeman.

MR. KARTAGENER: I would suggest then that is a product of the stimulus offered by the governmental agent. I believe I agree and I would --

QUESTION: Well, what did he say in this

instance? He says, look, Mister, you ought to come up with a better story than that.

MR. KARTAGENER: I suggest, Justice White, that that's a straw man in the case. That occurred the first day, when Wilson walked into the cell. If I might amplify upon that briefly, Justice White. Well, what happened is Wilson walks into the cell, he starts running off at the mouth about --

QUESTION: What if immediately after the informant said that to him he said, well, I guess I will, I guess I'll -- and then he really told him something.

MR. KARTAGENER: And will you help me come up with that better story; I would say then you have, then you might have the type of elicitation that would be in violation of Henry. But that's not what you have here. What you have in response to the statement when he walks into the cell and he says he's upset about what happened, they're accusing him of the crime, and he gives this false story to Lee as to what had occurred, Lee says: That sounds lousy; you ought to come up with a better story.

It's clear from the record, the Respondent didn't change his story. He kept his mouth shut. He didn't say a thing. What prompted him to start speaking

about the crime was this very upsetting visit from his family.

I think it's particularly interesting to note that at the suppression hearing the notes that were taken by Benny Lee were introduced into evidence, and it's interesting that right in those contemporaneous notes that he was keeping are the following words: "All my family asked me, why did I kill Sam, he was such a nice man. This worries him a lot. He swears to kill uncle if he's ever free, because uncle is telling the family he killed the boss."

QUESTION: May I ask you just one question. Your time's up and I just didn't get a chance. On the first point, in the district court on the second habeas petition, did you argue in the district court that the district court should not entertain the petition because the same issue had been raised in a prior habeas hearing?

MR. KARTAGENER: We did argue that, Justice Stevens, and in effect the court essentially disregarded it, went to the merits and threw it out, not purely on the merits from a Henry standpoint, but finding that he was going to give due deference to the spontaneity finding of the earlier courts --

QUESTION: I understand.

MR. KARTAGENER: -- and that took it outside of the Sixth Amendment.

QUESTION: Okay.

MR. KARTAGENER: I thank the Court.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, oral argument in the above-entitled case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1479 - EUGENE LeFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY,

Petitioner V. JOSEPH ALLAN WILSON

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

BY Paul A. Richardson

(REPORTER)