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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: WALTER ZANT, WARDEN, Petitioner V. WILLIAM NEAL MOORE

CASE NO: 87-1104

PLACE: WASHINGTON, D.C.

DATE: November 29, 1988

PAGES: 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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WALTER ZANT, WARDEN, :

Petitioner :

v. : No. 87-1104

WILLIAM NEAL MOORE :

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Washington, D.C.

Tuesday, November 29, 1988

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:

SUSAN V. BOLEYN, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Petitioner.

JOHN CHARLES BOGER, ESQ., New York, New York; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in No. 87-1104, Walter Zant v. William Neal Moore.

5 Ms. Boleyn, you may proceed whenever you're

6 ready.

7 ORAL ARGUMENT OF SUSAN V. BOLEYN

8 ON BEHALF OF PETITIONER

9 MS. BOLEYN: Mr. Chief Justice, and may it

10 please the Court:

11 This is a second application for federal

12 habeas corpus relief that raises both old and new

13 grounds. On the new grounds, they allege that a change

14 in the law permits them to present these new claims for

15 the first time in a second or subsequent application.

16 It's the Petitioner's position that the failure of the

17 Respondent to include these so-called new claims in his

18 first application was inexcusable neglect and,

19 therefore, this application should have been dismissed

20 as an abuse of the writ.

21 There are three major points which the

22 Petitioner would like to discuss today and these three

23 points are as follows.

24 First, when a district court is faced with

25 reviewing a second or subsequent application for federal

1 habeas corpus relief that raises new claims based on
2 alleged changes in the law, the district court should
3 not focus on whether or not the decision that's cited by
4 the applicant is in fact new law. Instead, the proper
5 focus of the district court's consideration should be
6 whether at the time the first application was filed and
7 it was pending in the district court that the claim was
8 reasonably available to the applicant at that time.
9 The second point the Petitioner would like to
10 make is that reasonably available means was there a
11 sufficient legal basis in existence at the time the
12 first application was filed and during the time it was
13 pending to enable the applicant to raise the claim.
14 And finally, under our standard that we're
15 proposing to the Court today, the burden would remain on
16 the applicant to excuse his omission of the new claims
17 from the earlier application and to show that it was not
18 inexcusable neglect to fail to include these claims.
19 If we take the reasonably available standard
20 that we're propounding to the Court today and apply it
21 in the practical context, this is what occurs. Of
22 course, the applicant files a second or successive
23 application for federal habeas corpus relief and the
24 government, as is its burden, pleads abuse of the writ
25 with clarity and particularity. And essentially

1 implicit in our response to their second or successive
2 application is our belief that there is no newly
3 available facts and no newly available law which would
4 allow the applicant to raise a claim at this time which
5 he didn't have at a previous application time.
6 Of course, once we plead abuse of the writ and
7 we say that there's new -- no new law, then of course
8 the applicant has to respond to the pleading of abuse of
9 the writ. And what generally happens is they simply say
10 change in the law and they cite a case for it that was
11 rendered to the time that the first application was
12 disposed of. They hope by mouthing what are sometimes
13 thought of as magic words of "change in the law," that
14 they can thereby excuse their inexcusable neglect in
15 failing to raise that claim at the first time. And, of
16 course, they also hope that what will happen is that the
17 district court will look to the government to determine
18 whether or not the claim was reasonably available at
19 that time.
20 When the district court then is faced with our
21 allegation of abuse of the writ and their allegation
22 that there's new law, what does the district court have
23 to do? Well, essentially the district court can't
24 decide whether the decision is new law in a legal
25 vacuum. Instead, what the district court has to do is

1 look at the claim and decide whether or not at the time
2 the first application was filed and was pending that the
3 claim was reasonably available. So, they compare the
4 date of the decision cited back to the date that the
5 first application was filed.

6 QUESTION: Ms. Boleyn, may I inquire how your
7 proposed standard differs from that in Reed against Ross
8 for the novelty standard for procedural defaults?

9 MS. BOLEYN: Your Honor, our reasonably
10 available standard differs from the, the standards set
11 forth in Reed v. Ross for the cause standard in several
12 respects. First of all, our standard is not as high a
13 standard as a Reed v. Ross standard because we don't
14 have the additional element of prejudice.

15 And second, of course, primarily when you're
16 discussing a procedural default, you're looking at
17 whether counsel failed to preserve the issue and why the
18 issue was not preserved; whereas on our reasonably
19 available standard, the focus that you have is why the
20 claim could not have been presented.

21 So, really in a procedural default context, a
22 Reed v. Ross type situation, one of the things you're
23 looking at is foreseeability; whereas in our test you
24 have the benefit of hindsight and you can look back to
25 the legal environment as it existed at the time the

1 first application was filed.

2 Then, of course, too, when you're looking at a

3 procedural default context, the prior proceeding that

4 you're examining is a proceeding in which you had the

5 right to counsel and you had the right to effective

6 assistance because it's trial or appeal. But in our

7 standard, you're looking at a proceeding where you did

8 not have the right to counsel and so, in effect, it just

9 doesn't factor in.

10 QUESTION: How does your standard differ from

11 that suggested by Judge Tjoflat below?

12 MS. BOLEYN: Our standard is very similar to

13 that of Judge Tjoflat. We just -- he, he used the tools

14 language of Reed v. Ross, and we simply said was it

15 reasonably available, was there a sufficient legal basis

16 for the claim. And it's similar for the tools language

17 that Judge Tjoflat adopted.

18 The only thing that Judge Tjoflat did was he

19 referred to the Reed v. Ross language about whether

20 other petitioners were raising the claim at the same

21 time. And we've simply said in our standard that that

22 might be germane, but it might not be

23 outcome-determinative in determining whether the claim

24 was reasonably available. So, it's very similar to what

25 he's -- what he's alleged.

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1 QUESTION: Could you -- could you tell me how
2 it could ever be held that the claim -- that the claim
3 was not reasonably available when there has been a
4 change in the law? I mean, almost by definition
5 somebody else thought of it. So, how could you possibly
6 ever -- I mean, why not just adopt a simpler rule that
7 you simply can't do it at all? Period. Is there any
8 difference?
9 MS. BOLEYN: We think we have adopted a
10 simpler rule because part of it depends on the way you
11 look at new law. I mean, new law could be viewed as
12 every decision that this Court decides or every decision
13 that any court decides. So, the question can't focus on
14 whether it's new law unless you relate it to some point
15 in time. To say whether it's new law for retroactivity
16 purposes or new law for prophylactic purposes, all
17 different types of purposes is where it's new law.
18 So, the only way you can do when you're in a
19 habeas corpus setting is you have to look at the conduct
20 of the applicant for the writ. And when you're looking
21 at his conduct, you have to look at the point in time
22 when he sought to avail himself of the federal habeas
23 corpus remedy. So, the new law or the, the decision
24 only has relevance in the context of the habeas corpus
25 proceeding back to the time of the first application.

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1 QUESTION: But at least if he -- if his trial
2 where he didn't raise the point was simultaneous with
3 the trial in which the point was raised that came up
4 here that produced the decision which is allegedly new
5 law, at least in all those cases you would have to say
6 it was reasonably available, wouldn't you? So, you
7 would only be talking about those cases that were
8 earlier than the one at which the point was first raised.
9 MS. BOLEYN: You would only be talking about
10 those cases that were earlier than the one in which the
11 point raised, but that would not necessarily be an
12 excuse because you should have --
13 QUESTION: I understand.
14 MS. BOLEYN: -- earlier decisions that
15 foreshadowed the new or clear break or precedent-setting
16 decision. We're not going to have to wait until this
17 Court gives a decision to hold that it would be
18 reasonable for an applicant to raise the claim.
19 Of course, as this Court is aware, many of the
20 1960s and 1970 cases clearly outlined for persons
21 dealing in federal habeas corpus the expansion of rights
22 that was going to be available to criminal defendants
23 and foreshadowed many of the decisions that came out in
24 the 1970s and 1980s.
25 So, you had the tools. You had these basic

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1 decisions, and applying them to the factual context in
2 which you're dealing with is the job of the attorney.
3 He has got to have some ability to determine whether
4 there are some, some basic landmark cases out there that
5 might be extended to cover the factual situation that's
6 in that case. So --
7 QUESTION: Can you give me some specific
8 examples of decisions of this Court that the Petitioner
9 could rely on as new law under your standard?
10 MS. BOLEYN: Your Honor, that's a difficult
11 question to ask unless you can pinpoint the time period
12 that we're talking about I think, as I've already said.
13 But let's suppose that you are a, a capital
14 litigant in Georgia in the period between Gregg v.
15 Georgia, 1976, and Green v. Georgia. And in Green v.
16 Georgia, of course, they said that the hearsay
17 prohibitions under Georgia law weren't applicable to the
18 sentencing phase.
19 It's possible that a petitioner in that time
20 period between those two decisions would have no
21 reasonably available basis to allege that the hearsay
22 prohibitions that are -- that are in the guilt phase
23 were also applicable to the sentencing since those two
24 phases under Georgia law are the same. So, it's
25 arguable that that's an example of a case which was

1 clearly new law, at least under Georgia law, to require
2 those hearsay restrictions to be taken out of the
3 sentencing proceeding. So, arguably he might have a, a
4 claim based on that that would be excusable neglect for
5 failing to raise it in the first application.
6 QUESTION: And no examples occur to you of our
7 decisions in the 1980s?
8 MS. BOLEYN: Your Honor, I've spent a lot of
9 time thinking about that. Some of the major 1980s
10 examples that I can think of would depend on the state
11 of the law in other states of which I'm unfamiliar.
12 For example, Caldwell v. Mississippi. The
13 Caldwell -- so-called Caldwell argument has been against
14 the law in Georgia for 200 years. Apparently it wasn't
15 against the law in Mississippi. So, perhaps some
16 applicant, depending on the timing of their first and
17 second applications, Caldwell v. Mississippi might be
18 new law in their jurisdiction.
19 So, the problem is if you -- if you don't
20 place it in the context of a particular jurisdiction or
21 a particular time frame, it's difficult to answer
22 whether some of the major decisions that we're all
23 familiar with really would be an excuse in the abstract.
24 QUESTION: Even in your Green example,
25 somebody, somebody prior to Green had the -- had the

1 necessary tools.

2 MS. BOLEYN: Yes, they did.

3 QUESTION: Or else Green would not have been

4 decided that way.

5 MS. BOLEYN: Yes, they did.

6 QUESTION: So, how can you even say that with

7 respect to Green?

8 MS. BOLEYN: Well, I think you'd have to look

9 at the circumstances. First of all, you'd have to look

10 at what would be reasonable in that time frame, what

11 decisions they had that might have foreshadowed Green.

12 And that's why I say it's possibly an excuse. It

13 wouldn't necessarily be an excuse.

14 And the only reason I use that is because I'm

15 familiar with Georgia law, so that might possibly be an

16 excuse for him. But even still, of course, you know,

17 stare decisis and all of the decisions of the Court

18 really rely on something else. The question is maybe

19 under Georgia law or some other authority that I'm not

20 familiar with, that claim could be made.

21 But the fact that -- that somebody was -- was

22 smart enough to raise a claim that ultimately got relief

23 doesn't necessarily mean that it was unreasonable for

24 them not to raise it previously.

25 If we apply the reasonably available analysis

1 to the new law claims in this application, this is what
2 results. There's two new law claims. The first of
3 these in our case is the Proffitt v. Wainwright claim.
4 And essentially when we pled abuse of the writ, the
5 Respondent in this case said I needed Proffitt to make
6 this claim. Without Proffitt, this claim was
7 unavailable to me at the time of the first application.
8 QUESTION: May I just ask one, one preliminary
9 question? You're basically asking us to overrule
10 Sanders, are you?
11 MS. BOLEYN: No, we're not, Your Honor. Our
12 view of Sanders is that is to prohibit piecemeal
13 litigation which Sanders defines as any litigation whose
14 intent is to vex, harass or delay. And --
15 QUESTION: Do you accept the interpretation of
16 abuse of the writ terms in Sanders?
17 MS. BOLEYN: Your Honor, if you look at
18 Sanders, plus Rule 9(b) and the advisory notes referring
19 back to Sanders, they talk about several types of abuse
20 of the writ that are available. Intentional --
21 QUESTION: I'm not sure that's -- I'm not sure
22 that's answering my question.
23 MS. BOLEYN: May -- if you'd restate, Your
24 Honor, I'll try to be --
25 QUESTION: Do you agree with what -- do you

1 agree with everything in the Sanders opinion, I'll put
2 it that way, insofar as it discusses abuse of the writ
3 and Rule 9(b)?
4 MS. BOLEYN: Insofar as it states that
5 equitable principles govern habeas corpus, insofar as it
6 states that any type of --
7 QUESTION: Would you agree with everything in
8 the opinion? If not, what do you disagree with?
9 MS. BOLEYN: Insofar as some courts have read
10 Sanders to limit abuse of the writ solely to types of
11 things like sandbagging or deliberate withholding, I
12 would disagree with those interpretations of Sanders.
13 My interpretation of Sanders is that it
14 prohibits any types of abuse of the writ and it gives
15 illustrative examples that we say are nonexhaustive of
16 what type of proceedings would abuse the writ. But when
17 they put that word "delay" in there, they're talking
18 about capital litigation. They are talking about the
19 fact that it's commonplace now for capital litigants to
20 file a second round of federal habeas corpus proceedings
21 whose only intent is to delay. And so that part of
22 Sanders directly feeds in to this case and to our, our
23 abuse of the writ standard.
24 Again, if we try to apply the reasonably
25 available standard to the two claims that we have here,

1 the first one is Proffitt v. Wainwright. And as I've
2 said, they said until the Fifth Circuit entered Proffitt
3 v. Wainwright, we could not have raised the claim.
4 Under our analysis, then of course in our
5 pleading of abuse of the writ, we would tell them, as we
6 did tell them, that Proffitt was based on -- primarily
7 on Gardner v. Florida, and that in Gardner v. Florida in
8 1977 this Court clearly foreshadowed the result that the
9 Fifth Circuit reached in Proffitt. And, of course,
10 Gardner was decided in 1977, and this application, the
11 federal habeas corpus relief, the initial one, was filed
12 in November of 1978.
13 And then, of course, Gardner had prior law
14 supporting it: this Court, Douglas v. Alabama,
15 California v. Green, Chambers v. Mississippi. So, if
16 you didn't want to use Gardner, you still had other
17 similar decisions of this Court that you could have
18 relied on.
19 QUESTION: Ms. Boleyn, did either the Eleventh
20 Circuit or the -- or the parties address the
21 retroactivity of Gardner or Proffitt?
22 MS. BOLEYN: No, we did not address the
23 retroactivity question, solely on abuse.
24 So, essentially they said we needed Proffitt
25 to make this claim. Our response is you didn't need the

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1 -- you didn't need Proffitt because you had Gardner v.
2 Florida and the prior decisions in that. And therefore,
3 since you didn't need it to raise the claim, the claim
4 was reasonably available to you in 1978. Since it was
5 reasonably available, your failure to present it was
6 inexcusable neglect, and since inexcusable neglect is
7 one of the forms of abuse of the writ now that abuses
8 have become more sophisticated, then therefore you have
9 abused the writ of habeas corpus and you are not
10 entitled to review this issue on the merits.
11 With reference to the other new law claim,
12 Estelle v. Smith, again we apply the reasonably
13 available test to Estelle v. Smith. They say until this
14 Court's decision in Estelle v. Smith, they couldn't have
15 raised the claim. We say, yes, you could. You could
16 have raised In re Gault. You could have used Miranda v.
17 Arizona, and you could have even used the district
18 court's decision in Smith v. Estelle, which was decided
19 one year before this first application was filed, and if
20 not that, you could have used the Fifth Circuit's
21 decision in Smith v. Estelle, which was entered while
22 the application was pending in the district court.
23 So, we essentially say you didn't need this
24 Court's decision in Estelle v. Smith to raise the
25 Estelle v. Smith claim. And since you didn't need it,

1 the claim was reasonably available to you, and your
2 failure to present it constituted inexcusable neglect,
3 which should have been dismissed as abuse of the writ.
4 QUESTION: Ms. Boleyn, you say the point of
5 focus when you're talking about abuse of the writ is
6 what was available at the time of the first habeas
7 application, not the trial. Is that correct?
8 MS. BOLEYN: You take into -- that's correct,
9 Your Honor. You take into consideration whether there
10 was any foreclosure of a right to object in the trial.
11 So, that, that does work into the equation, but the
12 primary point of focus is the time the application was
13 filed and the period of time it was pending in the
14 district court. You do have to look back to the
15 procedural history to determine whether -- what the
16 existence of state law was because what is part of the
17 legal environment that you're looking at is -- involves
18 the state statute and state law, as well as federal law
19 and federal constitutional principles.
20 The only claim we haven't addressed so far is
21 -- and I'll, I'll go off of the new law claims at this
22 time -- is we have one old claim we'd like to discuss,
23 and that's the Gardner v. Florida claim. We're trying
24 to take the easy road out in this and say that Sanders
25 allows us to determine that no relitigation of the

1 Gardner claim is necessary because this claim is
2 conclusively without merit. So, we would not ask the
3 Court to reach the ends of justice on this old claim in
4 the context of this case.
5 QUESTION: (Inaudible) Eleventh Circuit
6 (inaudible) claim.
7 MS. BOLEYN: The Eleventh Circuit treated it
8 -- Judge Tjoflat, the dissenter of course, treated it as
9 having been --
10 QUESTION: (Inaudible).
11 MS. BOLEYN: They treated it as -- they
12 treated it as both in discussing it, but they treated it
13 as an old claim.
14 QUESTION: And so -- and so that came down to
15 a ends of justice issue.
16 MS. BOLEYN: Yes. They remanded it for ends
17 of justice inquiry and they specifically directed that
18 the district court look at Smith v. Murray. They wanted
19 them to look at the procedural default context of that.
20 As we've said, we think the Gardner claim is
21 conclusively without merit. The Gardner claim was
22 raised both in the motion for declaratory judgment
23 before the State Supreme Court. It was also raised and
24 fully litigated at the state habeas corpus proceedings
25 and found to be conclusively without merit. The bottom

1 line is the presentence report was given to trial
2 counsel and shown to Mr. Moore, and they tried to
3 litigate that and prove otherwise and were unsuccessful.
4 It was also raised, we might add, in the first
5 application for federal habeas corpus relief, but only
6 in the procedural history portion of that application.
7 It was not raised in the claims. It wasn't until two
8 years later that they raised the Gardner claim by means
9 of amendment when the switched counsel and got new
10 habeas counsel in there. Then they put the Gardner
11 claim in their amendment. Of course, this amendment was
12 disallowed by the district court, and that finding was
13 upheld in the first appeal in the Eleventh Circuit.
14 So, there has been no change in the law, and
15 there has been no change in the facts because it's
16 obviously based on Gardner, 1977, before the first
17 application in 1978.
18 QUESTION: May I just make sure of one -- your
19 point on the Gardner claim? Did he have a -- have a
20 federal habeas corpus hearing on the merits of the
21 Gardner claim?
22 MS. BOLEYN: No, he didn't because Mr. Bonner,
23 his first habeas counsel, admitted to the court there
24 were no new facts that needed a hearing.
25 QUESTION: So --

1 MS. BOLEYN: He did --

2 QUESTION: So, then he -- is it correct that

3 he has never had a hearing in federal court on the

4 merits of his Gardner claim?

5 MS. BOLEYN: No, he has not, Your Honor. He

6 had an oral argument before the magistrate which he

7 simply argued the points and, and said that there were

8 no new facts and he did not need an evidentiary hearing.

9 That was the first counsel, Mr. Bonner.

10 QUESTION: Why isn't he entitled to a hearing

11 now? I'm not quite clear.

12 MS. BOLEYN: Well, first of all, Your Honor,

13 there's no --

14 QUESTION: You say there's no merit -- it's

15 wrong on the merits.

16 MS. BOLEYN: Right.

17 QUESTION: But it has been determined wrong on

18 the merits by the state court.

19 MS. BOLEYN: He's not entitled to relitigate a

20 claim that was exhausted and fully litigated in the

21 state courts prior to the first application and we

22 submit deliberately left out. It was cited in the

23 procedural history. So, we know that Mr. Bonner knew

24 about it. He was the attorney who had litigated in the

25 state habeas corpus court.

1 QUESTION: Your point on the Gardner claim is
2 not that it's without merit, but rather it was
3 deliberately withheld.
4 MS. BOLEYN: I think we both -- we've said
5 both, Your Honor.
6 QUESTION: Well, it can't be both, can it?
7 How, how could it -- if it was never litigated, how can
8 you say it has no merit?
9 MS. BOLEYN: The basis of their Gardner claim
10 has always been that they didn't ever get to see the
11 report at all.
12 QUESTION: Right. And -- and no federal court
13 has passed on the accuracy of that contention.
14 MS. BOLEYN: Yes, they have, Your Honor. The
15 district court said that this issue was fully -- in
16 disallowing the amendment, the district court looked
17 back at the development of the claim in the state habeas
18 corpus court, and he said he had no sound reason to
19 doubt the judgment of the state habeas corpus court.
20 And he listed the various findings the state courts had
21 made and said he saw no reason and there was no new
22 evidence on that point. And he found it to, to be
23 unpersuasive that there was any merit to the contention
24 that they did not see, see the presentence report. So,
25 the main thing is they've never been able to factually

1 establish that the report wasn't made available to him.

2 Then they sort of shifted in midstream and

3 said, well, we might have seen it in that period that

4 the judge took the recess between the sentencing

5 proceedings taking place and the actual pronouncement of

6 sentence, but we only have 30 and 45 minutes. No, we

7 didn't get an adequate opportunity to see it. So, they

8 really switched their Gardner claim around a little bit

9 which is why our position may appear to be

10 inconsistent. The first thing we're saying it's without

11 merit because they did get to see the report.

12 QUESTION: When you say they switched it

13 around, who -- I'm still not -- it's a little difficult

14 to keep all the facts clearly in mind.

15 MS. BOLEYN: Yes.

16 QUESTION: They switched it around in federal

17 court or in state --

18 MS. BOLEYN: Yes, in the amendment. In the

19 amendment they said they didn't have an adequate

20 opportunity.

21 QUESTION: And has the -- has the federal

22 court ever decided they did have an adequate chance to

23 look at it?

24 MS. BOLEYN: The federal court only addressed

25 the, the amendment and the merits of the Gardner claim

1 in the order disallowing the amendment. That's the only
2 time it was addressed by the district court. But it
3 said -- it basically found it to be without --
4 QUESTION: It sounds -- from the way you
5 describe it, it sounds like the district court made a
6 factual determination without taking evidence on the
7 point.
8 MS. BOLEYN: It had the evidence of the state
9 court proceedings, which there was no evidence that it
10 was not full and fair. In fact, counsel had admitted
11 that they had no new evidence and they didn't request a
12 thorough evidentiary hearing. So, essentially they had
13 a full and fair proceeding in state court, so they
14 didn't need to have a, a further litigation.
15 In the state court what happened is Mr.
16 Pierce, who represented Mr. Moore at the time of his
17 sentencing proceeding -- he testified -- and Mr. Moore
18 was there and the probation officer, who submitted the
19 report, submitted an affidavit. So, you had the three
20 main parties who could have established the claim. They
21 were there in state court subject to cross-examination,
22 except for Mr. Rachels who did the probation report.
23 And so, they could have presented anything they wanted
24 to at the time. So, there was really no -- nothing
25 further to present in the federal evidentiary hearing

1 except perhaps to recall them to hear the same
2 testimony.
3 And finally, I'll reserve the remaining time
4 for rebuttal by simply saying that if the Court declines
5 to accept our invitation to adopt the reasonably
6 available test, we ask the Court please to give the
7 district courts a practical, workable test to evaluate
8 claims of new law. And in any test that the court
9 adopts to make the test objective, to not make it
10 relevant to foreseeability and to make certain that the
11 burden remains on the applicant to demonstrate that his
12 omission of the claim was not the result of inexcusable
13 neglect.
14 QUESTION: Should there be a difference in a
15 pro se petitioner and one with counsel?
16 MS. BOLEYN: Yes, Your Honor. You factor that
17 into the process. Instead of using what a reasonable
18 attorney would have raised, you use what a reasonable
19 person standing in the shoes of that particular
20 petitioner could have raised. So, you do -- you do
21 incorporate a lower standard in there if it's a pro se
22 petitioner.
23 I'll reserve the remainder of my time.
24 QUESTION: Thank you, Ms. Boleyn.
25 Mr. Boger, we'll hear from you now.

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1 ORAL ARGUMENT OF JOHN CHARLES BOGER
2 ON BEHALF OF THE RESPONDENT
3 MR. BOGER: Mr. Chief Justice, and may it
4 please the Court:
5 There are two central questions on this
6 appeal. The first is whether the federal courts have
7 the authority to modify standards that were established
8 by Congress for the evaluation of new constitutional
9 claims that are presented for the first time in a second
10 habeas corpus petition. This question has a subpart:
11 may the federal court substitute a standard that is
12 stricter, less equitable and harsher to habeas
13 defendants?
14 The second central question in this case
15 involves the decision of the district court to dismiss
16 Mr. Moore's constitutional challenge to the state's use
17 of a presentence report at his sentencing hearing. The
18 district court dismissed the challenge -- and I'll
19 answer your question now, Justice Stevens -- without
20 ever addressing its merits, either on the first
21 application or the second one, finding it to be an abuse
22 of the writ.
23 The question here presented with respect to
24 that Gardner claim is whether the district court should
25 reconsider its dismissal in the ends of justice when the

1 presentence report in question was so marred by false
2 and misleading information that it provoked the district
3 court to find -- and I quote -- "that sufficient
4 likelihood exists that a wrongful sentence was imposed
5 on Mr. Moore based on inadequate information."
6 If I may, I'll begin with the first of these
7 questions.
8 Our principal submission is that the standards
9 that govern successive habeas corpus petitions have been
10 set by Congress. While fair-minded persons undoubtedly
11 disagree and disagree sharply on the wisest treatment of
12 such petitions, Congress itself during a 40-year
13 dialogue with the Judicial Conference, with attorneys
14 general, with other interested parties, none of them
15 shy, has repeatedly considered the diverse policy
16 interests and has struck for itself a clear balance
17 that's reflected in 2244(b) and Rule 9(b), which embody
18 its own legislative judgment about how the competing
19 interests should be reconciled.
20 If federal courts are bound by the
21 congressional choices reflected in 2244 and Rule 9, the
22 judgment of the court of appeals, though not its precise
23 holding, should be affirmed.
24 QUESTION: Well, what congressional choice,
25 Mr. Boger, do you think was involved in the language

1 involving the abuse of the writ in Rule 9?

2 MR. BOGER: Well, the legislative history,

3 Your Honor, I believe reflects a choice --

4 QUESTION: How -- how does the statute itself

5 read?

6 MR. BOGER: The statute itself, Your Honor,

7 says -- asks whether defendant has deliberately withheld

8 or otherwise abused the writ.

9 The legislative history, though, I'm sure is

10 well-known to this Court. This Court, through the Rules

11 Enabling Act, promulgated rules for adoption by --

12 approval by Congress, including a Rule 9(b), that had

13 different language from what finally appears. The

14 language was "not excusable." Congress held up the

15 enactment or the approval of that set of rules. It did

16 so holding hearings the summer after they were proposed.

17 The hearings focused on four rules, one of

18 them Rule 9(b). There was concern expressed during

19 those hearings as to whether this proposed language of

20 not excusable might change the standards that had

21 formerly been followed, the standards reflected in

22 Sanders. There's colloquy in the hearing that we cite

23 to the Court in our brief between Father Drinan and --

24 and, for example, who was on the House Judiciary

25 Committee and someone from the Judicial Conference

1 saying --

2 QUESTION: A colloquy is -- is legislative

3 history?

4 MR. BOGER: No, Your Honor, it's not. It

5 certainly helps to guide the Court's judgment as it

6 looks through what happened.

7 But the question back and forth, because it

8 ultimately winds its way into a report, was are we doing

9 anything more here with this new proposed language than

10 incorporating Sanders v. United States? And the answer

11 is no. That's what's being done with this language.

12 QUESTION: Well, do you think Sanders froze

13 the abuse of the writ doctrine for all time?

14 MR. BOGER: As a judicial holding perhaps it

15 did not. When it has been ratified by Congress, first

16 in 2244(b) and then in Rule 9(b), yes. I think --

17 QUESTION: But if -- if you ratify a judicial

18 holding that left things fluid, why doesn't the

19 ratification also leave them fluid?

20 MR. BOGER: I don't believe that it did leave

21 things fluid on this point, Your Honor. The rule in

22 Sanders reflected it -- the judgment that what was of

23 concern were parties who had deliberately withheld new

24 claims or who had engaged in conduct that was

25 inexcusably neglectful. The court pointed to the kind

1 of conduct it meant, and the conduct reflected, in
2 essence, bad faith behavior by the defendant or his
3 attorney. That's the essence of the equitable
4 underpinnings of both deliberate withholding and
5 inexcusable neglect.
6 When the Congress in 1966 then turned to
7 2244(b), it reflects in the legislative report the kind
8 of behavior it's worried about are parties who bring
9 identical petitions one after another, or who withhold
10 claims, as it put it, obviously well-known to them.
11 That language, which is in the legislative report, was
12 drawn from Judicial Conference report to Congress. That
13 was what Judge Orey Phillips said had concerned the
14 Judicial conduct -- Conference: petitioners who
15 withheld claims obviously well-known to them. That's a
16 league -- two leagues -- away from the kind of standard
17 that Ms. Boleyn and the State of Georgia are proposing
18 here.
19 And what Congress did in, in 1966 it further
20 ratified in 1976 with Rule 9(b). It said in its
21 legislative report that modified the proposed Rule 9(b)
22 we are afraid that this new not excusable language might
23 give federal judges too great a discretion to dismiss
24 claims. And then it cited Sanders v. United States in
25 passing, once again reflecting congressional judgment

1 that Sanders and the standards reflected there were
2 those than Congress had chosen.
3 I think the legislative history, particularly
4 as it involves two separate actions --
5 QUESTION: Excuse me. What if -- what if I
6 didn't agree with that -- what legislative report was
7 that?
8 MR. BOGER: Well, we have -- we have two
9 reports. We have I think a Senate report in 1966.
10 QUESTION: If I were a member of the Senate,
11 could I have voted against that report?
12 MR. BOGER: You could have, Your Honor. There
13 are no dissenting voices I think on that report.
14 QUESTION: Can a member of the Senate vote
15 against a report? I didn't know that a report went up
16 for a vote.
17 MR. BOGER: I'm sorry. I think they can --
18 I'm not clear on that, but I thought there could be
19 dissenting opinions by -- by a member of a committee.
20 QUESTION: A member of the committee, but
21 certainly the rest of the Senate didn't vote on the
22 report, did they?
23 MR. BOGER: No. That's correct.
24 QUESTION: You're hanging an awful lot on, on,
25 on the report from the committee, and you're speaking as

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1 though Congress said this.

2 MR. BOGER: Well, let me -- let add, Your

3 Honor, it's not as if Congress was unaware of other

4 voices. There had been legislation virtually every

5 session of Congress from 1953 through 1988 proposing

6 habeas corpus amendments. The voices of the attorney

7 generals and others have been quite firm in those

8 legislative debates.

9 There have been floor debates as well.

10 Indeed, in 1966 there was a proposal to enact a

11 negligence standard. And on the floor, the

12 Congressional Record reflects, that -- that proposal was

13 rejected.

14 So, of course, congressional disapproval of a

15 bill is not decisive, but seen in the context of the

16 approval of standards that reflect and are said to

17 reflect Sanders v. United States, I think it's, it's

18 awfully strong legislative history, Your Honor.

19 QUESTION: It -- granting, granting all that

20 you say, why does it -- and maybe this is the same as

21 the Chief Justice's question -- why does it show

22 anything more than that Congress was not willing to

23 change the rule? You, you, you have to establish

24 something further than that, namely, that Congress did

25 not want us to be able to change the rule.

1 MR. BOGER: Well, my understanding of the way
2 the -- both the substantive law works and the Rules
3 Enabling Act works is that this Court may propose rules
4 to Congress which Congress then accepts or rejects.
5 That's what happened. That dialogue took place with
6 Rule 9(b). A proposed rule which contained language
7 which Congress feared might give too great a discretion
8 to dismiss successive petitions was rejected. That
9 seems to me is the congressional response saying, no, we
10 don't want a rule that may go that far. That's
11 precisely what the report said in explaining the change
12 in Rule 9(b) back to the language "or otherwise abuse of
13 the writ."
14 So, I don't think the Court has power, if, if
15 Congress has acted in a statutory area like habeas
16 corpus, to disregard that rule, that standard that
17 Congress has set.
18 One can contrast this with the procedural
19 default area. Where Congress is silent, where Congress
20 has not spoken a jurisprudence can develop. And
21 certainly this Court has developed such a jurisprudence
22 in cases from Davis and Francis on through Sykes and
23 Engle v. Isaacs and so forth. That's not the history of
24 successive petition law. Successive petition law by
25 contrast, by marked contrast, has had two congressional

1 interventions in this period, and both of them reflect
2 strong adherence to the Sanders v. United States
3 standard.
4 Let me, though, move to the new law claim that
5 is among those that our client tried to present in his
6 first application.
7 He sought to raise a claim under Estelle v.
8 Smith, a 1981 decision of this Court. Ms. Boleyn wants
9 to suggest that Estelle v. Smith was foreordained, was
10 clear to any reasonable counsel. But it's not at all
11 clear. It certainly wasn't in 1978 when Mr. Moore filed
12 his first federal application, that the Fifth Amendment
13 rights survived the guilt determination at a trial.
14 I remember being here in the Court for oral
15 argument in 1980 when Estelle v. Smith was argued. I
16 remember the Texas attorney general saying there simply
17 is no right of self-incrimination left once guilt has
18 been adjudicated. That was conventional wisdom in 1980.
19 Indeed, in Estelle v. Smith itself, three Justices of
20 this Court declined to reach the Fifth Amendment ground,
21 the self-incrimination ground. And one, Chief Justice
22 Rehnquist, says I'm not at all persuaded that there is a
23 Fifth Amendment right that survives the guilt
24 determination.
25 There's contemporary evidence that, that

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1 demonstrates exactly how novel that rule was at the
2 time. Justice Kennedy may remember a case of Bauman v.
3 United States out of the Ninth Circuit, which was a 1982
4 decision that came up less than a year after Estelle v.
5 Smith. An Estelle claim was raised in Bauman, but the
6 Ninth Circuit said we do not blame the district court
7 for giving this claim short shrift. It arose only a
8 month before Estelle v. Smith was decided, and until
9 that time, until Estelle was pronounced by this Court,
10 we know of no Supreme Court opinion or circuit court
11 opinion that ever suggested that the Fifth and Sixth
12 Amendment rights addressed in Estelle v. Smith extend
13 past the guilt determination phase and into the
14 sentencing phase of trial. That was a Ninth Circuit
15 contemporaneous, if you would, witness to the novelty of
16 Estelle v. Smith.
17 The Fifth Circuit itself subsequently held, as
18 we cited in our brief, in Gray v. Lucas that reasonable
19 counsel in 1979, a year after Mr. Moore had filed his
20 petition, could not have been expected to foresee a
21 change like that in Estelle v. Smith.
22 There's an additional point on Estelle, and
23 that is that our client, Mr. Moore, is not in the shoes
24 of Ernest Benjamin Smith himself. It was not a
25 psychiatric interview that Mr. Moore has challenged.

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1 Instead, he has extended Estelle v. Smith to the
2 probation officer context. If Estelle itself was a
3 surprise, was novel, we submit that the extension of
4 Estelle to the probation officer's situation was far
5 from clear to counsel, even reasonable counsel, other
6 than Moore's in 1978.
7 My understanding, indeed, is this Court
8 granted certiorari last term in Cox v. Vermont to ask
9 and answer the question whether Estelle applies in
10 non-capital cases to probation officer reports. The
11 matter is still unresolved in 1978 -- or 1988.
12 Once again, Bauman held, the Ninth Circuit
13 case, that in the probation officer setting, Estelle v.
14 Smith didn't apply. Bauman also pointed out that it was
15 a non-capital case and made some capital/non-capital
16 distinctions which I think are quite important. But
17 what I'm trying to do is to suggest that Estelle was far
18 from clear in 1978 or even '80 or '81 or '82.
19 There are other cases that I could cite that
20 express the sense of the novelty of that doctrine, but
21 let me move on for a moment to Proffitt v. Wainwright, a
22 second new law claim.
23 When this case was decided by Justice Crabbage
24 -- or Judge Crabbage in the Eleventh Circuit in 1982,
25 four years after Mr. Moore had come into federal habeas

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1 for the first time, she wrote whether the right to
2 cross-examine adverse witnesses extends to capital
3 sentencing proceedings has not been specifically
4 addressed by the Supreme Court and is an issue of first
5 impression in this circuit. Our research suggested
6 maybe at that time, 1982, an issue of first impression
7 everywhere.

8 The State, of course, has cited Gardner v.
9 Florida, and said Gardner clearly presaged Proffitt v.
10 Wainwright. We respectfully disagree. Gardner merely
11 held that presentence reports could be made available to
12 defense counsel for their rebuttal. It said nothing
13 about whether the longstanding, widespread practice of
14 submission of written documents at sentencing was to all
15 of a sudden be overturned, and any defense counsel who
16 wanted to cross-examine anyone who had filed a document
17 as part of that report could come into court and be
18 confronted and cross-examined.

19 I'm still not sure whether Proffitt has been
20 extended very far in, in the non-capital context to this
21 date. We don't have very much information that I've
22 been able to amass on that. So, in other words --

23 QUESTION: Proffitt is a decision of the
24 Eleventh Circuit.

25 MR. BOGER: That's correct. It's not yet a

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1 decision this Court has passed on.

2 My, my point, once again, is that these claims

3 in retrospect may seem obvious once all of the woof and

4 the warp has been put together. They're far from

5 obvious at the time. It's as if one were to say of a

6 chemist that the atomic table was always present. So,

7 therefore, it's obvious that someone should have come up

8 with the new formula that has been devised.

9 Let me move quickly, though, to the Gardner v.

10 Florida claim because I think --

11 QUESTION: On Gardner, Mr. Boger, didn't the

12 state court determine that the attorney had seen the

13 report, the presentence report?

14 MR. BOGER: The, the state court does make a

15 holding that the claim is without merit. It does so

16 after it recites a portion of the sentencing transcript

17 where the report is put into evidence and an affidavit

18 from the probation officer who says that he gave the

19 report to defendant -- the defendant's counsel and saw

20 defendant's counsel discuss the confession portion.

21 QUESTION: I thought it could be fairly read

22 as finding that the attorney had seen the report.

23 Why didn't Respondent raise the Gardner claim

24 in the first federal habeas petition?

25 MR. BOGER: We don't know why Mr. -- Mr.

1 Bonner did not. Of course, the Respondent did through
2 substitute counsel the day after she entered the case.
3 And I want to clarify the question a little
4 further that Justice Stevens asked. Mr. Bonner did not
5 raise the Gardner claim. He was the initial counsel.
6 But he filed the petition and very shortly thereafter
7 moved to withdraw from the case citing to the federal
8 judge that he was overworked, that he thought that Mr.
9 Moore's constitutional interest would suffer prejudice
10 if he continued in the case.
11 He then went to an evidentiary hearing so --
12 or a status conference, so-called, during which the
13 magistrate asked him if he wanted to put on evidence on
14 any of the claims that were in the case, and he said
15 no. Gardner, of course, was not in the case, so he
16 never said we don't need any more evidence taken on the
17 Gardner point.
18 When subsequently Mr. Bonner left the case and
19 new counsel came in, still seven months before the
20 district court decided it, new counsel immediately moved
21 to amend to add the Gardner claim, which had been
22 exhausted. She asked for an evidentiary hearing on the
23 claim. And let me explain, Justice O'Connor, what that
24 evidentiary hearing was intended to do.
25 Although it may have been true that the

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1 74-page report in toto was given to Mr. Pierce, the
2 trial counsel, during the proceeding, there is no
3 finding on whether he realized that within that report
4 there was a five-page narrative by Officer Rachels that
5 contained a good deal of the most damaging evidence that
6 was submitted against the defendant. There is certainly
7 no finding on whether he realized that was in the larger
8 document. Indeed, he both signed affidavits and swore
9 in state habeas corpus proceedings that he never saw it.
10 Moreover, there's certainly no finding on
11 whether the opportunity afforded was reasonable. Under
12 federal standards, Rule 32 of the Federal Rules of
13 Criminal Procedure, to hand counsel a presentence report
14 at the very outset of the sentencing hearing would
15 likely not be deemed reasonable. And certainly our
16 argument is under Gardner this was unreasonable notice.
17 Whatever kind of notice it was, it wasn't
18 sufficient notice for Mr. Pierce to have realized that
19 his client's whole case was being jeopardized by this
20 report because the report included, among other things,
21 the suggestion that Mr. Moore had 10 prior crimes when
22 in fact he had four juvenile adjudications. The report
23 suggested that the crime was a great deal more
24 deliberate and premeditated.
25 For example, it's the only document -- the

1 only evidence before the sentencing judge that Mr. Moore
2 may have fired first. The sentencing report -- the
3 presentence report suggests Mr. Moore began firing four
4 or five shots, and the victim fired in response. Every
5 other document and every other piece of testimony in
6 this case is that Mr. Moore entered the bedroom window,
7 came into the living room. The bedroom door opened.
8 The victim came out of the bedroom door in the dark, hit
9 Mr. Moore on the leg with a shotgun barrel, fired the
10 shotgun, and then Mr. Moore, who was drunk, responded by
11 firing four or five shots from his pistol.
12 The degree of deliberation, on the one hand,
13 cold-bloodedly shooting this man four or five times, on
14 the other hand, responding to his own initial shot with
15 the shotgun is a very serious one in terms of judging
16 the heinousness of this crime. And it was the
17 presentence report that contained that one variant
18 account, an account that the judge apparently credited
19 because his trial judge's report, which judges submit in
20 Georgia at the State Supreme Court, reflected that view
21 of the crime.
22 There are other serious errors and omissions
23 in that presentence report as well.
24 Let me -- let me add that the district judge
25 who is the closest to this case and saw the facts in the

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1 greatest degree of complexity was the person who
2 suggested that, that if Mr. Pierce had failed to see
3 this report, an issue which he didn't pass on, as
4 Justice Stevens points out, since he never reached the
5 merits of the claim, he thinks that a wrongful sentence
6 may have been imposed based on inadequate information.
7 QUESTION: Well, why did he not reach the
8 claim?
9 MR. BOGER: Initially, Your Honor, he denied
10 the motion to amend to add the Gardner claim in the
11 context of granting full sentencing relief on another
12 issue. In other words, let me -- let me explain the
13 status of this case.
14 Ms. Hicks comes in the case in the fall of
15 1980. She immediately raises the Gardner claim among
16 several others.
17 QUESTION: When you say she immediately raises
18 them, she files a motion to amend the petition?
19 MR. BOGER: She filed a motion to amend saying
20 I want to amend to add in the Gardner claim.
21 At this point it is unclear even who the judge
22 is because Judge Lawrence who originally had the case
23 had died and there had been about a year in which there
24 had been activity. So, so, she filed a motion for
25 clarification of who the judge was. That was clarified.

1 She filed a motion for an evidentiary hearing.
2 She wrote a letter to the court saying there's -- I want
3 to sort of begin to, to reassemble this case. I want to
4 explain what issues we believe are before the court,
5 ready for a hearing, what issues we've move to add and
6 seek a hearing on, and what issues we have to go back
7 and exhaust further in the state courts. So, she filed
8 a series of documents which reflect that attempt to
9 reorganize the case.
10 What, what followed is that the district judge
11 in April of the following year without notice denied the
12 motion to amend, denied her motion for a hearing --
13 QUESTION: You say without notice. Are you
14 suggesting there's some impropriety --
15 MR. BOGER: Oh, none at all. None at all.
16 QUESTION: Then why do you mention the fact it
17 was without notice?
18 MR. BOGER: I simply meant that Ms. Hicks, and
19 by this time Mr. Givelber, didn't know until they had
20 received full sentencing relief what the dispositions
21 were going to be on the Gardner or other motions.
22 But the relief they received -- and this is
23 important to understand as well -- was not just a
24 resentencing hearing. The district judge concluded on a
25 ground subsequently overturned that Mr. Moore could not

1 be resentenced to death because his death sentence was
2 disproportionately excessive.
3 Consequently, there was no point to go back,
4 as Ms. Boleyn suggested, to start adding Estelle claims
5 or Proffitt claims or Gardner claims. They would all
6 have been moot applications. The client at that point
7 had a -- had a ruling from a district court that full
8 sentencing relief should be given. And, of course, that
9 was then what was litigated up to the court of appeals.
10 QUESTION: That, that was reversed by the
11 court of appeals?
12 MR. BOGER: That's right. The court of
13 appeals said that the analysis conducted by the district
14 court was improper.
15 The court of appeals panel, I might add,
16 granted relief on yet another ground. Mr. Moore has had
17 relief from the district court, from the circuit panel
18 and now from the circuit en banc. The court of appeals
19 panel said a non-statutory aggravating circumstance
20 played a major role in the sentencing judge -- judge's
21 decision, and that's unconstitutional. It unfortunately
22 gave out its ruling on June the 23rd, the same day in
23 which this Court decided Zant v. Stephens in 1983 and
24 said a non-statutory aggravating circumstance doesn't
25 invalidate the death sentence. So, once again Mr.

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1 Moore, who had obtained relief on another ground, found
2 himself without relief.
3 He pursued those matters to, to the Supreme
4 Court, lost on certiorari, and at that point quickly
5 came in and filed the new law claims under Estelle and
6 Proffitt and sought a first adjudication on the merits
7 of the Gardner claim. The district judge denied relief
8 on the Gardner claim, as you know, finding that it was
9 an abuse. It's a -- it's a difficult finding because
10 it's not a second adjudication on the merits. But he
11 says sufficient opportunity had earlier been afforded
12 that he was not going to award relief or even an
13 opportunity to be heard on the merits at this time. He
14 didn't consider the ends of justice question.
15 The court of appeals reluctantly or with some
16 hesitation said we will not find it an abuse of your
17 discretion, district court, to have dismissed this
18 petition as abusive, but we do think the interests of
19 justice call for you to give further consideration to
20 whether you ought to reach the merits even if there's an
21 abuse.
22 Our submission to the Court on the ends of
23 justice point is that no matter what standards the Court
24 majority ultimately holds meet the ends of justice test,
25 Mr. Moore will be one of the people who falls within the

1 core of that test. In Kuhlmann v. Wilson, four members
2 of the Court, as you remember, suggested that ends of
3 justice might be best defined in terms of actual factual
4 innocence. And then in a related context in Smith v.
5 Murray, a majority of the Court suggested that in the
6 capital sentencing phase, the receipt of false or
7 misleading information was sufficient to meet that
8 related test for procedural default.

9 Well, what we have in this case is precisely
10 that. The receipt of false and misleading information
11 by the sentencing judge upon which he relied, with the
12 district court finding that it may well have made a life
13 or death difference, that is within the core of the
14 equity jurisprudence that has long marked habeas corpus.
15 And for that reason, we've submitted that the court of
16 appeals was certainly right to remand this case in the
17 interest of justice.

18 If there are no further questions, thank you.

19 QUESTION: Thank you, Mr. Boger.

20 Ms. Boleyn, you have eight minutes remaining.

21 REBUTTAL ARGUMENT OF SUSAN V. BOLEYN

22 MS. BOLEYN: Let me clarify that under the
23 standard that we've proposed, which we think is clearly
24 authorized by both Sanders and Rule 9(b), we're not
25 asking counsel representing a habeas corpus petitioner

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1 to be able to foresee all the types of matters that Mr.
2 Boger has discussed before the Court this morning.
3 We're asking them to look around them, see what legal
4 precedents they have available and whether they can
5 mount a claim applying those precedents to the facts of
6 their case. That's what lawyers do, and that's all that
7 we're asking them to do.
8 Of course, it's interesting to me, if I were --
9 QUESTION: (Inaudible) court of appeals ask
10 that question? What did they ask?
11 MS. BOLEYN: Excuse me, Your Honor?
12 QUESTION: What did the -- what did the court
13 of appeals -- what was their test?
14 MS. BOLEYN: The court of appeals test, Your
15 Honor, was that reasonably competent habeas counsel
16 could not have foreseen the cases that ultimately came
17 out.
18 QUESTION: Is your -- is your test different
19 from that?
20 MS. BOLEYN: Yes, Your Honor, very different.
21 QUESTION: What is it? It has to be -- you
22 have to be extremely reasonable or what?
23 MS. BOLEYN: You have to be reasonably
24 competent habeas counsel, but you don't have to have
25 this clairvoyance that is implied at least by -- to some

1 extent --

2 QUESTION: Well, I, I just don't understand

3 how you differ -- how your test differs from the court

4 of appeals.

5 MS. BOLEYN: Let me see if I can clarify that.

6 QUESTION: Reasonably competent counsel was

7 the court of appeals test?

8 MS. BOLEYN: But they said reasonably

9 competent counsel could not have foreseen the confluence

10 of all these decisions. And our focus is not what you

11 could have foreseen in the future, but did you look

12 around and was something reasonably available then. So,

13 it's a difference in focus. You still got reasonable

14 counsel, but what is reasonable, when you're looking at

15 procedural default and which we said is -- shouldn't be

16 applied over in this context, isn't the same thing

17 that's reasonable when you're talking about why didn't

18 counsel raise the claim.

19 And, of course, it's very interesting that --

20 and my understanding is that Mr. Boger along with Mr.

21 Givelber came into this particular case in the district

22 court right before decision, and Mr. Boger had been one

23 of the counsel listed on behalf of Mr. Smith and Smith

24 v. Estelle in the Fifth Circuit.

25 QUESTION: Well, do you think Judge Tjoflat

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1 really differed with the standard the majority applied,
2 or was he just differ -- differing with the application
3 of the standard?
4 MS. BOLEYN: He differed with the standard,
5 Your Honor, because he wasn't going to say the question
6 was whether a reasonably competent habeas attorney could
7 have foreseen. What he was talking about were there the
8 ingredients -- he called them ingredients instead of
9 tools I think -- were the ingredients there to raise the
10 claim. So, it's a difference in focus, and we're, of
11 course, going with Judge Tjoflat.
12 QUESTION: But is there -- is the difference
13 only in the, - the time on which you focus?
14 MS. BOLEYN: No.
15 QUESTION: Or is it something more? It's
16 really just on the time, isn't it?
17 MS. BOLEYN: It's not only just the time that
18 you're focusing on; it's a matter of perspective. In
19 one you're talking about why was it not preserved. In
20 another case, you're talking about why was it not
21 presented. And if there's, there's something that you
22 can cite for that principle even if it's not directly on
23 point, then it's available because you're always -- the
24 problem is you're always going to have new law. So, if
25 something stays in the district court long enough or in

1 the Eleventh Circuit or another court of appeals long
2 enough, there are going to be new decisions that you can
3 cite for the same proposition. So, the question is was
4 there anything that you could use to cite the
5 proposition in that case?

6 And so, it's more than just the point in time
7 -- the focus -- although that's the most important --

8 QUESTION: So, you say you shouldn't ask
9 whether, whether a later decision was foreseeable, but
10 you ask whether or not the claim should have been made?

11 MS. BOLEYN: And were there decisions then
12 that they could use, not could they foresee the one that
13 ultimately came, but were there decisions around them
14 that they could use to mount the claim based on their
15 factual situation? So, it's other than foreseeability.

16 The other thing that I'd like to point out is
17 that I don't believe that the Sanders court could in any
18 way envision the types of abuses of the writ that are
19 taking place today. I don't believe that they could
20 envision that piecemeal litigation would just be out --
21 astounding in its number and in the sophisticated types
22 of abuses of the writ that there are. I think they
23 viewed abuse of the writ as a very simple form more like
24 deliberate withholding or deliberate bypass, but now we
25 have new claims and old claims and withheld claims and

1 bypass claims and claims based on new law and claims
2 based on new facts. And when you have more
3 sophisticated types of abuses, it cries out for the
4 interpretation of the general standard in 9(b) by this
5 Court.
6 It's interesting to note, if we want to talk
7 about the committee notes, that the committee's notes to
8 Rule 9(b) say we are leaving it to the courts to
9 interpret this standard on a case-by-case basis in the
10 exercise of their judicial discretion. So, Rule 9(b)
11 itself has left it to this Court and other courts to
12 interpret the standard because as Sanders simply says,
13 we're not going to permit abuse and abuse is conduct
14 that is abusive. So, the question is what is abusive
15 conduct? And that's why they try to get around their
16 own abuse by talking about new law claims.
17 That's all I have if there's no further
18 questions.
19 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
20 Boleyn.
21 The case is submitted.
22 (Whereupon, at 1:54 o'clock p.m., the case in
23 the above-entitled matter was submitted.)
24
25

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:

NO. 87-1104 - WALTER ZANT, WARDEN, Petitioner V. WILLIAM NEAL MOORE

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

BY Judy Freilicher

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