OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: J. C. KEENEY, SUPERINTENDENT OREGON STATE PENITENTIARY Petitioner, v. JOSE TAMAYO-REYES

CASE NO: 90-1859

PLACE: Washington, D.C.

DATE: Wednesday, January 15, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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J. C. KEENEY, SUPERINTENDENT, :

OREGON STATE PENITENTIARY, :

Petitioner :

v. : No. 90-1859

JOSE TAMAYO-REYES :

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Washington, D.C.

Wednesday, January 15, 1992

The above-mentioned matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

JACK L. LANDAU, ESQ., Deputy Attorney General of Oregon, Salem, Oregon; on behalf of the Petitioner.

STEVEN T. WAX, ESQ., Portland, Oregon; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-1859, J.C. Keeney v. Jose Tamayo-Reyes.

Mr. Landau.

ORAL ARGUMENT OF JACK L. LANDAU

ON BEHALF OF THE PETITIONER

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

This case presents the straightforward question of when a habeas petitioner who failed to fully develop the facts of his case in a State post-conviction proceeding is nevertheless entitled to a Federal evidentiary hearing. It is the State's position that he should be entitled to that Federal hearing only when he can demonstrate cause for his failure to present his evidence and prejudice that results.

My argument this afternoon will focus on two propositions in support of that conclusion. First, that cause and prejudice is required in this case because of the -- because the Court's recent decisions requiring the application of that test in other circumstances are not distinguishable here.

Second, that section 2245(d) of the 1966 Federal Habeas Act does not preclude the adoption of a cause and

prejudice standard under these circumstances. The statute does not address the question of whether an evidentiary hearing is required, but rather the weight that must be given to State fact-findings when the hearing is to be held.

Before turning to those contentions, let me briefly recount the factual context for those contentions.

Jose Tamayo-Reyes was charged in State court with the crime of murder. In accordance with a plea agreement, he agreed to plead no contest to the lesser charge of manslaughter. Ten months later, Tamayo-Reyes filed a State post-conviction petition challenging the voluntariness of that plea. The State post-conviction court gave him a fair opportunity to present all of the evidence that he thought should be before the court on that issue. He now says that he didn't develop that record as completely as he should have and that he would like to supplement that record through a Federal court evidentiary hearing.

The Federal court denied his request for petition -- or request for the evidentiary hearing. The Court of Appeals for the Ninth Circuit agreed that Tamayo-Reyes received a full and fair hearing, but nevertheless reversed a holding that the district court should have applied the rule of Townsend v. Sain, which

requires a Federal evidentiary hearing as long as the petitioner's failure to develop the facts in the State post-conviction proceeding was not deliberate.

Thus, the Ninth Circuit's ruling means that once petitioners raise their claims, they are not responsible for failing to fully develop this claims in the State post-conviction proceeding, unless they did so as the result of conscious, considered, deliberate decision.

In all other cases -- he forgot, he failed to discover evidence that was reasonably available to him, or anything other -- virtually anything other than a tactical decision -- his failure to develop those facts at the State court proceeding requires the Federal court to hold an evidentiary hearing.

The precise question before this Court, then, is whether the Ninth Circuit was correct and whether Townsend's deliberate bypass rule is still good law.

Turning to our first proposition, that cause and prejudice --

QUESTION: (Inaudible) courts as to these issues, was there?

MR. LANDAU: That is correct, Your Honor, there was no --

QUESTION: And yet you obtained grant of cert.?

MR. LANDAU: I beg your pardon?

QUESTION: And yet you obtained a grant of cert.?

MR. LANDAU: Yes, we did, Your Honor.

Returning to our first proposition that cause and prejudice and not mere deliberate bypass must be applied in this case, I suppose the short answer is that Townsend borrowed the deliberate bypass test from Fay v. Noia, which was decided the same day. Fay v. Noia, however, has since been limited in a number of decisions, and was ultimately overruled this last term in Coleman v. Thompson. The basis for Townsend's deliberate bypass standard, then, is gone. And so also, we argue, should the rule itself.

There are, however, more fundamental reasons for rejecting the deliberate bypass standard in this case than the overruling of Fay v. Noia. The court rejected the deliberate bypass test in that case and criticized it in other cases for good reasons. And those underlying reasons apply with equal force here. In those cases, the Court addressed the question of whether deliberate bypass or cause and prejudice should apply where habeas petitions -- petitioners fail to raise claims, fail to appeal, or fail to conform to any number of other State procedural rules.

The same principle must apply here where the

issue is whether or when to grant a State habeas petitioner a Federal evidentiary hearing. This is so for at least three reasons.

QUESTION: Well, of course, in all those other instances, I suppose it is true that we could look to an adequate and independent State ground as the basis for the procedural bar and so forth. That is not present here.

MR. LANDAU: Justice O'Connor, it is true that the Court has looked at the policies that underlie the adequate and independent State ground in some of its decisions, though not all, in those decisions in which the cause and prejudice standard is adopted. In the Davis case, in the Francis case, in a number of others, the Court has applied the cause and prejudice test for different reasons.

Having said that, we would still submit that the policies that are underlying the adequate and independent State ground test that were applied in those other cases apply here as well.

QUESTION: Well, of course one other concern might be that here the Federal court has agreed to entertain the legal issue. The Federal court is going to hear that issue and decide it on habeas. And maybe the Federal court should -- maybe it's desirable that it be decided based on all the facts as they could be developed

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rather than simply on the record below. I think there are some differences here that you have to come to grips with.

MR. LANDAU: My response to that, Justice O'Connor, would be that Federal habeas petitioners get a single opportunity to make their factual record or show cause for failure to do so, as this Court held in the McCleskey case just this last term. Why should State petitioners be treated differently and have an easier time of obtaining the second evidentiary hearing? As this Court said in the Francis case when considering whether or not to adopt the deliberate -- or the cause and prejudice standard that it had in Davis, we shouldn't be treating State and Federal petitioners differently.

QUESTION: Well, McCleskey was a State prisoner. He was a State prisoner on Federal habeas.

MR. LANDAU: That is true, Justice Kennedy. But the question in that case was the extent to which you get a successive habeas --

QUESTION: Yes, and we made it very clear that it is the duty of the petitioner to the extent possible to bring all of his claims in the first proceeding. But doesn't that mean that that first proceeding is of the greatest importance and so -- isn't that an argument, at least, for saying that there should be a full fact-finding and evidentiary hearing at that stage?

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MR. LANDAU: Absolutely. And that, we believe is one of the most important reasons why there should be a cause and prejudice test applied in this circumstance and cases like it, so that there is the proper incentive for petitioners to develop the facts at the first opportunity, which is the State petition.

QUESTION: Well, I said first opportunity and my submission to you was that it was the first hearing in Federal court where the statute, one of the provisions of the statute for disregarding the State's finding is that the facts were not adequately developed.

MR. LANDAU: Well, as the Court has observed repeatedly in its cause and prejudice tests, one of the most important defects of the deliberate bypass test is that it fails to pay proper respect to the State's role in the overall criminal adjudication process. This consideration is what underlies all of those cases. It should apply here.

Why, for example, should we require habeas petitioners to raise a claim and then not require them to offer all the evidence in support of that claim? What's the purpose of having them raise that claim if not to offer all the evidence in support of that claim at one time? The consequences of failing to treat those two situations is the same, whether we're talking about the

difference -- the similarities between failure to raise a claim and to provide all your evidence, or the Federal evidentiary hearing, in the question that you put to me, is more than rhetorical. And that is because the Court has repeatedly said that it is the State court that is the best place to develop the factual record.

The State court hearing is the closest in time to the factual events that are the heart of these petitions. The witnesses are available. They have fresh memories. The court sees all of them at once, not piecemeal over the course of 6, 8, or 10 years. And the State court is best able to see how all those parts fit into a coherent whole. So accuracy, efficiency, and justice on the part of all parties involved in the system are served by having the factual record developed as early as possible in the State court. Deliberate bypass works against those interests. It provides, we submit, insufficient incentive for petitioners to develop as fully as they can the record in the post-conviction hearing.

Excuse me. This in turn imposes costs on both the Federal and State components of this partnership that is the joint Federal and State criminal justice system. For example, it wastes the resources of the State and frustrates their attempt to come to the right decision based on all the evidence that is before it.

QUESTION: Mr. Landau, can I interrupt with just one question? You're making a policy argument in favor of your position that may make a lot of sense. Do you think that -- your position does require overruling a portion of Townsend.

MR. LANDAU: That is correct.

QUESTION: What about -- how consistent is your position with subsection (d)(3) of 2254?

MR. LANDAU: I'd be happy to turn to that portion of my argument, Justice Stevens. It is true that the respondent, Tamayo-Reyes, has argued that in enacting the statute in 1966, specifically section 2254(d), that Congress somehow adopted the deliberate bypass test of Townsend. We think that's incorrect. The statute and Townsend serve related but very different purposes.

Townsend identifies the situations in which the Federal courts are required to offer petitioners an evidentiary hearing. The statute, by way of contrast, section 2254(d), defines the weight that must be given the State court determinations. Those are two different functions. And so to say that one adopts the other is, if you'll excuse the colloquialism, mixing apples and oranges.

If it's -- even if it's assumed that the act somehow bore on this situation, I think that if you look

at the structure of the act as a whole, the only possible standard that could be drawn from that is the cause and prejudice statute. If you look, for example, at the other two sections that relate to additional evidentiary hearings in the same enactment in the 1966 act, they require a cause-type standard, and it doesn't make any sense that Congress would not apply the similar standard in the similar circumstance.

Section 2244(b), for example -- this is the statute, the successive petition statute that was at issue in McCleskey -- defines the extent to which successive Federal habeas petitions can be filed, and provides that new grounds will not be allowed unless the petitioner can establish cause and prejudice.

QUESTION: That's a successive petition.

MR. LANDAU: That's correct.

QUESTION: But this is not a successive petition.

MR. LANDAU: That's correct.

QUESTION: Then I'm not quite sure I understand why that section should inform the problem before us.

MR. LANDAU: As this Court said in Brown v. Allen, the same policies that underlie the successive petition sections also inform the evidentiary hearing.

QUESTION: Do you think the same strict

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standards that apply to second habeas petitions should apply to first habeas petitions?

MR. LANDAU: This is true. That's correct. What we're talking about is trying to provide incentives for petitioners to bring all their evidence to court as early as possible so that the court that is hearing this matter in the first instance can make its decision based on the best record possible. And to the extent that you allow petitioners, or that you provide less incentive for petitioners to do that, you frustrate the process. You frustrate the State court's ability to arrive at a correct decisions. You also frustrate the Federal court.

QUESTION: I wasn't quite sure when you answered Justice Steven's first question about 2254(d)(3). I thought the substance of your answer was that well, the hearing doesn't have to be held. Of course the proceeding must be held in any -- you're absolutely entitled to bring the first proceeding. And 2234(d) begins that way: in any proceeding instituted in Federal court. And then it says that the State's fact-finding should be deemed adequate unless -- then (d)(3), the material facts were not adequately developed.

MR. LANDAU: That is absolutely correct, Justice Kennedy, but what -- if you look carefully at the language of the statute, I think it works in the following way. If

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you have a Townsend-type case, if you have any of the eight circumstances listed in the statute, there is no presumption of correctness attached to the State court fact-finding. What that -- and in all other cases, the find -- the presumption of correctness does attach. To the extent that the presumption does not attach, it is only to the findings. And so the court in a proceeding can evaluate the evidence that is before it in the factual record developed below, and render its independent decision, draw its own legal conclusions from the historical facts that are on that record.

QUESTION: Well, provided it finds that the facts were adequately developed.

MR. LANDAU: I'm sorry, I'll have to take a look at my statute here. I'm not sure where it is that you are reading from.

QUESTION: Well, 2254(d)(3).

MR. LANDAU: Oh, certainly, that is one of the --

QUESTION: But isn't that the gravamen of the respondent's argument, that the facts weren't adequately developed?

MR. LANDAU: Yes, and if the facts were not adequately developed under Townsend, and if, depending on what standards you apply under Townsend, you determine

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whether or not there will be a hearing. Once it is determined that there will be a hearing, then you have to determine what the evidentiary presumption will be with respect to the State court factual findings.

QUESTION: And there's no evidentiary presumption if the facts were not adequately developed.

MR. LANDAU: That's correct. And what that means is, Your Honor, that the State court may not presume that the State court determination, the conclusions that were drawn by the State court, that those are no longer entitled to a presumption of correctness.

QUESTION: You mean the Federal court may not make the presumption?

MR. LANDAU: That is correct.

QUESTION: But that's this case.

MR. LANDAU: That's correct. Well, no. If -- to the extent that it applies to this case, it is only if the court determines in the first instance, by applying Townsend, that there will, in fact, be a hearing.

QUESTION: What you're saying, basically, is that there's going to be some form of waiver under section 3 anyway. That -- you say it should be based on cause and prejudice; your opponent says it should be based on deliberate bypass. Nobody says, I take it, that a Federal habeas petitioner can come into Federal court after a

State hearing and say the material facts were not adequately developed in the State court, period, without having any inquiry made as to what the proceedings in the State court were and what position he took.

MR. LANDAU: That is correct. I believe that neither party are taking issue with that. It is a given that the Court will need under Townsend to apply either the deliberate bypass test that was expressed in Townsend, or the cause and prejudice test which we are proposing here.

QUESTION: You're saying that subsection (3) is given application, under your theory, when a case is accepted by the Federal court because there was cause and prejudice. And then having accepted it, finding that as to a particular matter, the material facts, because of the cause and prejudice, were not adequately developed. As to that item, having accepted the case, the court will not give any deference to the State court determination.

MR. LANDAU: Precisely.

QUESTION: So it still does have some application.

MR. LANDAU: As I said, they are related, but they serve distinctly different purposes.

QUESTION: My only point was that the State -- that the district court on the first Federal

petition has not option but to accept the proceeding.

MR. LANDAU: That is correct. It does have an option --

QUESTION: The question is whether or not there should be an evidentiary hearing.

MR. LANDAU: Correct. Correct. And I think that's borne out by the second paragraph of the statute, which provides that in an evidentiary hearing in a proceeding, this is how you rebut the presumption. This is how you offer evidence to controvert the presumption. The first portion of the statute refers to those cases where there is no evidentiary hearing.

QUESTION: But in this respect it's different from McCleskey because McCleskey said there should be no proceeding, that proceeding itself is barred.

MR. LANDAU: I will grant you that distinction. My point, though, is simply that the policies that undergirded the Court's decision in McCleskey I think are applicable here. Trying to --

QUESTION: Well, except they're interpreting different statute. They're interpreting the successive petition statutes.

MR. LANDAU: That is correct.

QUESTION: I was going to ask you. You started to refer to a second statute and never quite got to it, I

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think, in answer to one of my earlier questions. Is there a statutory provision that directs itself at the question whether a hearing shall be held?

MR. LANDAU: Whether a hearing shall be held for State -- petitioners who had a State hearing?

QUESTION: Yes.

MR. LANDAU: No, there is not, Your Honor.

QUESTION: So all we have is the law as interpreted in Townsend and the question is whether to revise judge-made law.

MR. LANDAU: That is correct.

QUESTION: Did you have a second statutory provision you wanted to mention to me earlier?

MR. LANDAU: Certainly. My first point was that the successive petition statute, as interpreted in McCleskey, requires a finding of cause. I also wanted to point out that the -- there's a second section, 2244(c), in the same enactment, also requires a cause-type standard. Under that subsection, if this Court reviews a State court judgment, then its resolution of the State defendant's Federal claim is conclusive unless the defendant can show that the facts he or she wishes to add to the record were not known despite the exercise of reasonable diligence.

And I will grant that it doesn't say cause and

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prejudice, but I think the import of that is that the petitioner must exercise some reasonable diligence, must take responsibility, must explain the failure to offer the evidence in the first instance.

And my point was simply that if you accept for the sake of argument that the statute even does speak to the question of when there is a hearing, it only makes sense to apply the cause and prejudice test because it is applied in the same enactment. It was all part of a package in 1966, and it doesn't make any sense.

QUESTION: Where is that provision? Is it in your brief somewhere?

MR. LANDAU: Yes, it is. It's certainly in the reply brief in the section in which we discuss --

QUESTION: Do you set it forth? I know you mention it. Do you set it -- set forth the text?

MR. LANDAU: Actually, I don't believe, Justice Scalia, that we actually set forth the text of that section.

QUESTION: You should do that.

MR. LANDAU: Beg your pardon for not doing that.

The point, though, I think, as I tried to mention just a minute ago, is that these were part of a package in 1966, and it doesn't make any sense that Congress would require a deliberate bypass under section

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2254(d), but a cause-type standard in the others.

QUESTION: I don't think you even cite it in your reply brief. It's not in your statutory authorities.

QUESTION: It's in your principal brief.

QUESTION: It's cited in your principal brief, but --

MR. LANDAU: Thank you.

Returning to the --

QUESTION: What section is it that the question and your answers have just been referring to?

MR. LANDAU: Sections 28 U.S.C, section 2244(b) and (c).

QUESTION: Thank you.

MR. LANDAU: Returning to our discussion of the policies that have undergirded the Court's recent decisions on cause and prejudice and our contention that those same policies apply here, a second failing of deliberate bypass that this Court has observed is that the deliberate bypass pays insufficient attention to the State's interest in obtaining finality to criminal litigation. If the State criminal justice system is to have any credibility, if it's to have any deterrent effect at all, it must be in the certainty that final judgment will be rendered, and that the convicted criminals can't litigate and relitigate the facts underlying those

convictions.

The same has to be said here. Nearly every State post-conviction case could have been tried differently. What trial lawyer doesn't complete a trial only to think of some point forgotten, or some material question not answered? It is in fact hard to imagine a prisoner who could not come up with an additional fact to offer in a subsequent hearing. And the -- if anything, the application of the deliberate bypass in this case creates precisely the situation that the Court observed must be avoided, and that is turning the State court hearing from the main event to a try-out.

Mr. Chief Justice, I'd like reserve any remaining time for rebuttal.

QUESTION: May I just ask one question?

QUESTION: Justice Stevens has a question.

QUESTION: It isn't that turning them into trial is the main event, right? The question here is whether the first State collateral proceeding was it. And that's not the main event.

MR. LANDAU: What I'm arguing here is that the same reasoning that applied with respect to that comment, trying to get resolution --

QUESTION: Same reason it applies to the main event also applies to the second most important event.

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MR. LANDAU: That's correct.

QUESTION: Very well, Mr. Landau.

Mr. Wax, we'll hear from you.

ORAL ARGUMENT OF STEVEN T. WAX

ON BEHALF OF THE RESPONDENT

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

Mr. Tamayo-Reyes is entitled to a Federal habeas corpus hearing in the circumstances of this case under several enactments of Congress and decisions of this Court. A hearing is critical in this case in order for the Federal courts to fairly and properly carry out their responsibilities to do justice, as the habeas corpus statute requires. A hearing is critical here so that the Federal court can consider the information contained in the affidavit which was obtained for the Federal hearing, an affidavit which casts serious doubt on the accuracy of the interpretation which was provided by the State to Mr. Tamayo-Reyes at the time that the no-contest plea was entered.

QUESTION: Does it also cast doubt on the adequacy of the determination? Is that the semantic equivalent to what you just said? In other words, you said it cast doubt on accuracy. Is that the same as the standard required in 2254(d)(3)?

MR. WAX: I believe it is, Your Honor. I believe that that affidavit does --

QUESTION: You talked about adequate development, not the accuracy of the determination.

MR. WAX: I do not believe that the affidavit in and of itself is the reason why we're entitled to a hearing. I believe that that affidavit is evidence which shows that the hearing in the State court did not result in adequate development of the facts.

But even absent that affidavit, we have on the meager record which was created in the State post-conviction proceeding, the person who was hired as an interpreter saying that all he told Mr. Tamayo-Reyes was murder is killing someone without permission and manslaughter is less than murder.

The importance of the Federal hearing would be to more fully develop the manner in which the interpretation defect did not convey what is required in order for a person to understand the mens rea elements.

The standards under which Mr. Tamayo-Reyes is seeking a hearing have been in effect for nearly 30 years -- standards which were set out in Townsend and adopted at least twice by enactments of Congress, standards which have provided strong protection to State interests during that time.

We submit that this Court should not and perhaps cannot change what Congress has enacted. Moreover, we submit that as a policy matter, no change is needed because very few hearings are in fact held in habeas corpus cases. And because the entire scheme of the law in the habeas area provides very strong protection to State interests, not only through the Townsend standard, but also through the exhaustion requirements and the separate presumption of correctness which would apply once an evidentiary hearing is held.

The question presented here, as distinguished from the question presented in McCleskey, Coleman, and all of the other cases in which the cause and prejudice standard has been adopted, is not whether the Federal courts should exercise their jurisdiction but how the Federal courts should carry out their functions once they have made the decision that the door to the courthouse should be opened. The interests of the Federal courts and of the Federal Government in that situation are distinct from the interests which apply and which have been balanced in those areas when this Court has concluded that State interests are sufficiently strong so that the courthouse door should not be opened.

What the State is seeking here is a rule which ignores those distinctions and which would push the

pendulum of federalism too far toward the interests of the States and intrude on the function which is inherent in the Federal bench in carrying out its responsibilities.

As we take a more detailed look at the issues and interests which are applicable here, I believe that we see at least three separate lines of argument which support the position which Mr. Tamayo-Reyes is advancing.

QUESTION: Are these basically policy arguments, Mr. Wax, or are they based on the statute or our cases? Or are they a little of each?

MR. WAX: They're a little of each, Mr. Chief Justice.

First, I believe that there are very strong statutory arguments which are evident from a review of the entire habeas corpus statutory scheme, not only section 2254. As part of that statutory scheme, I will refer to the rules promulgated in 1976 and '77. The second tier of argument involves the interests which are at stake in this situation, as distinguished from the interests at stake in McCleskey or the Wainwright-type of situation. And third, we have the multileveled interests -- protections to the State interest which exist through the exhaustion requirement and the presumption of correctness.

In looking at the statutory scheme, I believe that it is critical to examine not only what Congress did

in section 2254 in 1966, but also what it did in section 2244 and did not do in section 2254. In 1966, Congress created a presumption of finality in section 2244. Congress concluded that when a successive petition is filed it is appropriate to preclude additional evidentiary review.

Congress did not import that same concept of finality into section 2254. To the contrary, in section 2254, Congress created an evidentiary rule which would be applicable once the hearing was being held. At the same time, in section 2241, Congress expanded the jurisdiction of the district courts so that the evidentiary hearings which Congress was clearly contemplating would take place under the decisions which were handed down in 1963 -- could take place in a more convenient form.

So that the entire scheme as enacted in 1966 is replete with reference to hearings. And indeed, when Congress passed section 2254 and established the presumption of correctness, it assumed and built on and around the standard which had been set down in Townsend.

QUESTION: Well, then, Mr. Wax, when you look at subsection (3), which is and exception, I guess, to the presumption of correctness, and there that the material facts were not adequately developed at the State court hearing. I mean, that's what the Ninth Circuit relied on

here.

MR. WAX: That's correct.

QUESTION: Now, that section as written doesn't say anything about either cause and prejudice or about deliberate bypass, does it?

MR. WAX: No, the language of the statute does not. However --

QUESTION: So both of those are really judicially created modifications or amendments to that section of the statute. You concede that there's some form of waiver here. You say it's deliberate bypass.

MR. WAX: Mr. Chief Justice, we say that because Congress used the identical language that was used in Townsend. And when Congress took the language from the Townsend decision and imported it into the statute, Congress took with it what this Court had said those words meant in Townsend.

QUESTION: But why do you say that since the only thing they took from Townsend was this particular phrase with no reference to any concept of waiver?

MR. WAX: In the legislative history, which appears in both the 1964 House report and again in the 1966 reports, one finds Congress specifically adverting to the decision in Townsend.

QUESTION: Do you find them specifically

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adverting to deliberate bypass?

MR. WAX: No, that specific language does not appear. However, the action that Congress took in 2244 and 2241 makes reference to the fact that, under Townsend, Congress thought at that time, that there would be more evidentiary hearings than had occurred previously.

Now, it's turned out that they were wrong, and in fact, the number of hearings has decreased dramatically. But when they acted, they said in the portions of the legislative history which are more applicable perhaps to section 2241, we need to expand the jurisdiction of the district courts because under Townsend there will be more hearings.

QUESTION: Mr. Wax, 2254 also includes subsection (b), which says that an application shall not -- for Federal habeas shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective.

That's rather a useless provision if it means it that all he has to do is show up and doesn't have to make his available argument there, but can do a shoddy job and then await a Federal proceeding to do it.

Don't you think that that points in the opposite direction from what you're arguing here?

MR. WAX: I believe that it does not. I believe that existence of the exhaustion requirement in the statute, and as that has been interpreted by this Court, provides significant protection to the State. The exhaustion requirement precludes a petitioner from coming into the Federal court and significantly reformulating his claims.

If, however, the exhaustion requirement were read to preclude a petitioner from offering any new fact -- and I submit that the State's position is not just -- would not be limited, if adopted as they set it out, to subsection (3), but would eliminate the ability to present any new fact which they call material in any situation. That would in essence convert Federal habeas into an appellate process.

Perhaps that is what they want. But I submit that the exhaustion requirement requires the petitioner to come in on the same claim, but to give the Federal court the benefit of, as in this case, and as in the first McCleskey and as in Vasquez and as in Townsend itself, the benefit of an expert's assistance in understanding what the facts were. And in this case, that's in essence all that we're talking about.

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QUESTION: I must say that's an unusual application of exhaustion. I think the terminology really comes from administrative law that you had to exhaust your administrative remedies before you came into Federal court. And it was, you know, unthinkable that any fact you didn't present to the administrative agency you could then present to the Federal court and could still be deemed to have exhausted your original remedy. It seems to me the Federal court would say why didn't you tell this to the administrative agency. And it seems to me the same thing here.

Now, if there's cause -- if there's cause for his reason not to present it, I can understand it. But it seems a strange exhaustion requirement to say that you can put before the State court whatever he chooses to put, but it doesn't matter because he can make a whole new case when he gets before the Federal court. That doesn't seem to me to be real exhaustion.

MR. WAX: We are not urging a rule which would permit a petitioner to come in a do that without showing the absence of the deliberate bypass. My understanding of the decisions of this Court and of all of the circuit courts which have analyzed the exhaustion requirement is that the Federal habeas petitioner has historically and properly been permitted to come into the Federal court and

offer something new.

If the rule were the same as you've indicated exists in the administrative law area, there would be no Federal habeas corpus hearings. If we had to present every fact to the State court, there would be no reason for a hearing. Come in and argue, but you would never present --

QUESTION: You can show cause and prejudice.

MR. WAX: I believe -- I'm not sure though whether Justice Scalia's comment, if I understood it correctly, would extend or could extend to precluding a hearing even if cause and prejudice were shown.

QUESTION: Well, you're entitled to answer him on his hypothesis. I think petitioner's submission says cause and prejudice.

MR. WAX: That's correct.

QUESTION: I think you're mistaking my point. I'm not saying that 2254(b) by its literal application prevents what you tried to do here. I'm just saying it seems to me rather incompatible with a mentality that puts in an exhaustion requirement that Congress would allow you to put in anything new that you want, so long as there was not a deliberate bypass. The two don't readily go together.

MR. WAX: Most of the discussion of exhaustion

comes up in the context of having presented a claim to the State court and not coming into Federal court and significantly changing the claim. I'm not aware, and this may be a failing in my research, of any cases which have interpreted the exhaustion requirement to preclude the offering of facts under a deliberate bypass or any other standard.

Vasquez v. Hillery, I submit, is very difficult to distinguish from this case. And in Vasquez, petitioner was permitted to come into Federal court and offer a better expert's opinion. The same was true in McCleskey I. Indeed the same was true, as I indicated, in Townsend. And I believe that historically that is what we find.

QUESTION: But the fact does remain that, of course, (d) on its own terms, taken with or without conjunction with (b), sets forth some very substantial State policies. And if you interpret (3) to say that the petitioner has in effect the option not to develop the facts adequately by a poorly presented State case gives very little effect to the whole purpose of the main paragraph in (d), which is to respect the judgments of the State.

MR. WAX: I believe, Justice Kennedy, that the existence of 2254(d) assumes the type of standard that was

set up in Townsend. If they are seen as applying at separate stages of the proceeding, so that one would have to first overcome Townsend before getting a hearing, then in that hearing have to overcome the presumption. I think that it is reasonable to assume that Congress enacted a very difficult evidentiary presumption for a petitioner to overcome, based on the type of standard which would be applied in the first instance in determining whether or not the hearing should be held.

If the presumption of correctness as it applies in 2254(d) is made more difficult for a petitioner to overcome, it seems to me that the Court would be undoing what Congress set out to do when it enacted that statute. If we can't get a hearing unless cause and prejudice is shown, Congress' desire to provide protection through the presumption of correctness is less necessary. And I don't believe that this Court should take that step.

In addition to the statute, however, I believe it is important to look at the rules which were adopted in 1976 and '77. Rule 8 in particular, and the advisory committee notes to rule 8, again, make reference to Townsend. And those rules, as are the statutes, are full of reference to evidentiary hearings. They are built on the assumption that habeas corpus is not an appellate process and that hearings will be held. And the fact that

Congress adopted those rules in 1976 with knowledge of, we have to assume, what they meant, and with the advisory committee report available to it, provides further evidence that the Townsend language has been adopted.

In addition, a number of decisions of this Court have called section 2254(d) a codification of Townsend. I recognize that there is some dispute in the case law about that. However, in a number of decisions, including decisions in the last several years, this Court has used that language. And to the extent that the Court has recognized that section 2254(d) codified Townsend, the State is not only asking you to overrule Townsend, but also to revisit a number of other cases in which that position has been stated.

In looking at the decision in McCleskey, which was handed down last term, the State says that it is indistinguishable. We respectfully submit that it is not only distinguishable, but the analysis which the Court undertook in that case supports the position that Mr. Tamayo-Reyes is taking here.

First, McCleskey specifically acknowledged that it was not changing the law, and that what was being stated in that case was consistent with the historical decisions of the Court in the area. That is clearly not the situation that we're dealing with here.

Second, in McCleskey, the Court acknowledged that that was an area in which the Court had taken the lead, and in which Congress' enactments had not been intended to preclude further judicial development of the law. That is distinguishable from this situation in which the entire history of congressional enactments in the area of habeas corpus is replete with evidentiary hearing language.

Third, McCleskey saw a very close parallel between the question of inadequate and independent State ground, which underlies the cause and prejudice analysis, and the procedural default which occurs in the successive petition area.

Here we do not have a procedural default. To the extent that the State was attempting to suggest in its reply brief that Oregon law might consider this situation a procedural default situation, it is important to look not only to the rules which they have cited, but in addition, rule 71 of the Oregon Rules of Civil Procedure.

As we indicated in our brief, the Oregon courts have in some areas adopted the Townsend and Fay language. Rule 71 of the Oregon Rules of Civil Procedure provides for relief from judgment under certain circumstances. And those circumstances include mistake, inadvertence, surprise, or excusable neglect.

And I submit that the entire Oregon statutory scheme, if it is applicable at all -- and I don't know that that is clear in this situation -- makes it crystal clear that we are not dealing here with a procedural default. The State court reached the merits, decided the case on the merits, and that is entirely distinct from the types of cases in which cause and prejudice has been applied.

The McCleskey decision is distinguishable for yet another reason. In looking at section 2244(b), one finds a compound standard. Congress has indicated that a successive petition can be precluded if a claim was deliberately withheld or a petitioner otherwise abused the writ. To the extent that the discussion in McCleskey looked at the statutory language, it would have been focusing perhaps on both sections. The fact that Congress has in it otherwise abuse the writ makes it very clear that Congress was not intending to limit this Court's authority to continue to define when an abuse of the writ should be found.

McCleskey is further distinguishable because here we have an entire statutory scheme to inform the discussion about when a hearing should be held. There, nothing similar exists to the language which we have in 2241, 2243, 44, and most of the statutory and rule

provisions.

When the State suggests that the policy which has led this Court to conclude that the cause and prejudice standard should be applied is applicable here, we submit that they overlook several important distinctions. One of the most important is the interest that the Federal court has in being able to faithfully carry out its responsibilities when the door is opened.

QUESTION: Is it correct, Mr. Wax, that the district court has the discretion to hold a hearing if it chooses to do so?

MR. WAX: It is certainly correct that they have the discretion to do so. If however, this Court adopts the rule which the State is suggesting, it is entirely possible that that discretion could be removed. And if the Court is to focus on the circumstances set out in Townsend in which a hearing is mandatory and addressed only that question, the discretion arguably would remain unlimited.

QUESTION: Well, even under the deliberate bypass standard, does the court have discretion to go ahead and hold a hearing?

MR. WAX: I believe that it does since Townsend says that a hearing is mandatory in the six enumerated circumstances, but is discretionary in any other --

QUESTION: Does that circumstance work for you or against you in this case, the fact that there is discretion to ignore the deliberate bypass rule, if that's the rule, or I assume, the cause and prejudice rule, if that's the rule we adopt?

MR. WAX: The reality, I'm afraid, is that that works against us because the district judges are not, in my experience, exercising their discretion in that way. They are looking to the first part of Townsend and, in most instances, not looking to the fact that there is discretion available.

QUESTION: Well, does it work for you to the extent that if the rule is valid, it indicates that the statute is not binding on the district court?

MR. WAX: Yes, it would. When viewed in that way, it certainly would.

QUESTION: But the discretion described in Fay v. Noia was not discretion to hold a hearing. It was discretion to grant relief. It was discretion to deny relief. There's no suggestion in Fay v. Noia that that standard applies to whether or not a hearing should be held. And there's no talk about discretion in Townsend except discretion to hold additional hearings other than those that fit the six categories. Nothing about discretion to deny a hearing.

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MR. WAX: That is correct. The discretion is, as you've indicated, as I understand the statute --

QUESTION: Grant hearings for additional reasons.

MR. WAX: Yes. In looking at the decision in Coleman, one finds further support for Mr. Tamayo-Reyes, because in that decision the Court noted that the costs in the federalism calculus are particularly high when a procedural default has occurred. And that recognition, I submit, is applicable here and further underscores the fact that in balancing the Federal/State interests in this situation, the interest of the States are adequately protected.

If there are no other questions, I will complete my argument and thank you very much for your time.

QUESTION: Thank you, Mr. Wax.

Mr. Landau, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JACK L. LANDAU

ON BEHALF OF THE PETITIONER

MR. LANDAU: Thank you, Mr. Chief Justice.

I would like to make a couple of points following up on Mr. Wax's remarks. First, he has referred to the record to demonstrate the deficiency of the State court hearing and the necessity for the Federal evidentiary hearing in this case. I want to refer to that

bit of the record as well because I think it makes the point that I'm trying to make, or that I tried to make in my opening remarks.

If you take a look at that in the joint appendix, the deposition of the interpreter indicates not that the translation was in anyway inadequate, it demonstrates that he didn't have a very good memory at that point 2 years after the fact. How much more so, I would submit, would he have that problem, were the evidence to be adduced some 6 years in addition after that, or 8 years after the fact?

That is the very point that we are asserting here, is that there needs to be built into this system incentives for petitioners to put all of their evidence in at the earliest possible point so that the witnesses, whose recollections are fresh, or as fresh as possible at the time, can have that evidence.

QUESTION: Why isn't that incentive provided by the natural desire of a person in prison to try to get out as soon as possible?

MR. WAX: Justice Stevens, there's no question that there is that incentive that works in the system. Our concern is that the application of the deliberate bypass works against that and that the cause and prejudice tests provides the kind of further incentive that would

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ensure that the record is --

QUESTION: You're arguing for -- the rule you're arguing for is really for the benefit of the prisoners, to make sure they make their cases as promptly as they can.

MR. WAX: I think, as I said in my opening remark, that adoption of the cause and prejudice test ultimately will benefit the prisoners because it will promote the ability of the Federal/State fact-finders to make accurate decisions as early on in the process.

QUESTION: Well, that just means it'll benefit those prisoners who deserve to get off.

MR. WAX: That's true.

QUESTION: It will not benefit those who don't deserve to get off, because in those cases, bad memory is a positive advantage, isn't it?

MR. WAX: Well, that is true, but --

QUESTION: So you have to judge for yourself which percentage is the higher, I --

MR. WAX: Without attempting to be glib in the slightest, what we are after here is the accurate determination of the facts. And to the extent that it weighs in favor of the petitioner, so much the better. To the extent that it weighs against the petitioner, it certainly helps the balance of the system, which would otherwise be wasting its time.

And that was the point that I wanted to emphasize, was that is also works in the favor of the Federal courts which might not otherwise have to hear the matter at all if the full record were put before the State -- or the State court in the first instance.

Mr. Wax also mentions the legislative history and says in that in the '64 and '66 act legislative history there is some aversion -- or some reference to Townsend. That is true, but if you look at that legislative history, the comments are twofold. First, that there was -- there's concern about the effect of Townsend being too many additional hearings. And second, the inappropriateness from a federalism point of having the Federal courts reviewing the State fact-finding process.

As the Court has -- as this Court has observed in Sumner v. Mata, the whole underpinning of the statute is to reduce the friction that necessarily follows when you have any evidentiary hearings on -- in Federal court to review those findings of the State court. If that is so, it makes no sense to argue that the statute -- I see that my time is up.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Landau.

The case is submitted.

(Whereupon, at 1:58 p.m., the case in the

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above-entitled matter was submitted.)

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OREGON STATE PENITENTIARY Petitioner, v.

JOSE TAMAYO-REYES

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

BY Michelle Sanders

(REPORTER)