OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT WAYNE SAWYER, Petitioner V.

JOHN WHITLEY, WARDEN

CASE NO: 91-6382

PLACE: Washington, D.C.

DATE: February 25, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT WAYNE SAWYER :

Petitioner :

v. : No. 91-6382

JOHN WHITLEY, WARDEN :

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Washington, D.C.

Tuesday, February 25, 1992

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

APPEARANCES:

R. NEAL WALKER, ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

DOROTHY A. PENDERGAST, ESQ., Assistant District Attorney, Parish of Jefferson, Gretna, Louisiana; on behalf of the Respondent.

PAUL J. LARKIN, JR., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae supporting Respondent.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in 91-6382, Robert Wayne Sawyer v. John Whitley, Warden. Mr. Walker.

ORAL ARGUMENT OF R. NEAL WALKER

ON BEHALF OF THE PETITIONER

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

Robert Sawyer's mental disorders were well-documented when he went on trial for his life in a Louisiana courtroom. Hospital records show that Sawyer had consistently been diagnosed with chronic brain damage and mental retardation. These records could have been obtained and presented to the jury with the ease of licking a postage stamp, but Sawyer's trial lawyer neglected to do so. Thus, the jury which condemned Sawyer to die was unaware of the fact that he had chronic brain damage and was mentally retarded.

Sawyer presented this indisputably critical evidence in a successive habeas corpus petition claiming that his trial lawyer performed ineffectively under the Sixth Amendment, but the Fifth Circuit --

QUESTION: Do you mean he presented those in both the first and the second habeas petitions,

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ineffective assistance claim?

MR. WALKER: That's correct, Your Honor. Technically we're speaking here with a successive claim, and that is to say the claim was presented in the initial petition but was not supported with the hospital records we refer to here today.

QUESTION: Were these claims exhausted in the State courts?

MR. WALKER: Yes, they have been.

QUESTION: On State collateral?

MR. WALKER: Yes, on State collateral.

QUESTION: How were they disposed of? I take it they were denied.

MR. WALKER: They were denied on the merits, that's correct.

QUESTION: After a hearing?

MR. WALKER: There was no hearing on the second petition.

QUESTION: Why did they deny it?

MR. WALKER: They denied on the merits with no reasons.

QUESTION: On the merits?

MR. WALKER: That's correct.

QUESTION: It wasn't a procedural default.

MR. WALKER: It was not a procedural default.

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QUESTION: Well, do we know why they denied it?

MR. WALKER: Denied on the merits as a ruling of the State trial judge and State supreme court in the exercise of its discretionary jurisdiction declined to exercise jurisdiction and denied on the merits.

QUESTION: In what proceeding were the hospital records first annexed?

MR. WALKER: The first annexation of hospital records, Justice Kennedy, was in the successive State post-conviction.

QUESTION: In the second State proceeding --

MR. WALKER: That's correct.

QUESTION: Second State collateral proceeding.

MR. WALKER: That's right. The Fifth Circuit --

QUESTION: And that was just summarily denied also?

MR. WALKER: That's correct.

QUESTION: Was the first State collateral proceeding summarily denied, too?

MR. WALKER: The first State collateral proceeding resulted in an evidentiary hearing in the trial court, in the sentencing court.

QUESTION: On the ineffective assistance of counsel?

MR. WALKER: There was an ineffective assistance

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of counsel claim then, Chief Justice. The essence of that claim was that trial counsel had not been barred for 2 years. There is a 2-year requirement for capital defenders in indigent cases in Louisiana, so there was no extensive evidentiary showing made.

QUESTION: But there was no specific allegations of how he was delinquent.

MR. WALKER: There were some, but they were record-based, Your Honor, they were not based on allegations that he neglected to investigate the case.

QUESTION: Was an opinion written?

MR. WALKER: From the State post-conviction denial?

QUESTION: The first one.

MR. WALKER: No. I would add, though, that even in that proceeding the State supreme court denied review by a vote of 4 to 3, but there was no opinion that was generated.

QUESTION: They could have put in evidence at that point about his incompetencies apart from performance at trial, right?

MR. WALKER: That's correct.

QUESTION: They just did not.

MR. WALKER: That's right. Justice Scalia, there was an allegation that he had not effectively

investigated the case, and in fact there was an allegation that although he knew Sawyer was in a mental hospital he did not present the court with any evidence about that commitment. In effect, when the successive claim came before the Federal district court the Federal district court faulted -- I'm sorry, not the successive claim. When the initial claim came before the Federal district court, the district court adopted the opinion of the magistrate, the magistrate faulted initial collateral counsel for not demonstrating what the records would have shown.

Now, when the successive claim was dismissed by the Fifth Circuit Court of Appeals, the Fifth Circuit fashioned a standard for reviewing successive claims which forecloses any constitutional challenge to a death sentence in a successive posture unless the constitutional claim carries with it a challenge to all the aggravating factors relied on by the jury.

QUESTION: So you agree that you couldn't satisfy the cause in prejudice.

MR. WALKER: We cannot demonstrate cause, Justice White.

QUESTION: Yes, and so you must rely on the --

MR. WALKER: Fundamental miscarriage of justice.

QUESTION: Yes.

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QUESTION: Factual innocence.

MR. WALKER: That's correct.

QUESTION: Of the death penalty.

MR. WALKER: We submit that this Court's fundamental miscarriage of justice doctrine will be rendered meaningless if the Fifth Circuit's rigid and inequitable eligibility test is upheld and Sawyer is denied the opportunity to prove the claims in a successive petition.

Before I turn to a discussion of the standard developed by the Fifth Circuit and Sawyer's alternative proposed standard, I'd like to spend a brief minute discussing the two views of Robert Sawyer that emerge from this record. The first view, of course, is the view that was presented to the jury in this case.

The picture of Robert Sawyer that the jury considered was a picture of a person portrayed by psychiatrists, and even his own lawyer, as a sociopath, a person who has the ability to control his behavior but freely chooses to engage in conduct harmful to others; a person who beat up and ultimately set Fran Arwood on fire because he likes to do those things; a person who had been in a mental hospital one time, quote, for no reason.

A very different picture of Robert Sawyer emerges from the evidence presented in support of the

successive habeas claim. That picture of Robert Sawyer is a picture of a person who has been committed twice in his life to mental hospitals and in fact had been declared on one occasion incapable of competing for employment in the outside world.

For that Robert Sawyer the world is a very confusing place, and when that Robert Sawyer arrived back at his residence the day the homicide was committed, he was confronted with a terribly confusing situation, because after entrusting the care of his adopted children to Fran Arwood, the babysitter, he thought one of them had been drugged.

Now, Robert Sawyer's world is a very menacing world, one where people are constantly out to get him. A normal person may not have thought that that child was drugged, but Robert Sawyer thought that child was drugged, because Robert Sawyer sometimes sees problems where they don't exist because of his disabilities.

Robert Sawyer couldn't think this problem through. His mind doesn't work this way. His mind won't work that way. His mind became clouded with rage and he exploded, his rage feeding on itself, and he beat and brutalized Fran Arwood.

Now, there is evidence in this record now -- and I refer to the Brady claim -- that indicates that Sawyer

in fact did not participate in the burning of Fran Arwood. That is the evidence in the successive petition, and obviously it paints a very different picture of Robert Sawyer's culpability and a picture which would be presented and would have been presented if the case had been litigated effectively by trial counsel.

One quick review of the medical evidence presented in the successive petition. We have records of Sawyer's two commitments to mental institutions and references to a third treatment at an outpatient clinic in Tennessee: City of Memphis Hospital's discharge diagnosis, chronic brain syndrome with unknown cause manifested by mild mental retardation and abnormal EEG with behavioral disturbances. Western State Mental Hospital, similar diagnosis, incompetent.

Recent evaluations in 1990 corroborate those older historical diagnoses, same diagnoses -- mental retardation, organic brain damage.

QUESTION: Mr. Walker, you're not asserting that your client was innocent by reason of insanity, are you?

MR. WALKER: That's not an issue in this litigation, because in part of Louisiana's rigid insanity law, Your Honor. It's the McNaughton right-wrong test.

QUESTION: So he is guilty of the crime?

MR. WALKER: He is guilty, but we believe guilty

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of second degree murder, because under Louisiana law in order for one to be found guilty of first-degree murder the murder must have been committed while the offender was engaged in a commission of another aggravated felony, in this case the arson.

QUESTION: Well then you say he is innocent of the crime for which he was convicted.

MR. WALKER: Well, that's correct. I thought you meant because of the mental state evidence.

QUESTION: Did you make that claim before the lower courts?

MR. WALKER: The Brady claim was made before the lower court.

QUESTION: And that as a result he was guilty of only second-degree murder?

MR. WALKER: That's correct, and the Fifth Circuit addressed that.

If I may move on to the question of eligibility, the integrity of the concept of eligibility, the starting --

QUESTION: Let me ask you a question if I may, Mr. Walker, on the same subject. Let's say that in Sawyer's first Federal habeas petition he brought an ineffective assistance of counsel claim and the court denied it because he'd failed to show prejudice, prejudice

I take it being an element of the ineffective assistance of counsel claim. Then he brings a second Federal habeas petition, he brings another ineffective assistance of counsel claim. What does he have to show in order for the court to examine the merits of the successive claim under the miscarriage of justice, an actual innocence exception, that he wouldn't have had to show in showing prejudice the first time?

MR. WALKER: Let me move to a discussion of our standard, Chief Justice. Under our proposal --

QUESTION: Can you answer my question?

MR. WALKER: Yes. Under our proposal, first he would have to show a factually inaccurate sentencing profile and then, to respond directly to Your Honor, he would have to show under either our proposal a fair probability that the outcome would have been different -- that's drawn from Kuhlmann -- but we recognize that this Court may feel it desirable to strengthen or rigidify that standard, because it's admittedly --

QUESTION: Isn't that just about the same thing as the prejudice element of Strickland?

MR. WALKER: It is, Your Honor, and that's why we have also --

QUESTION: So really the actual innocence thing really means almost nothing, if you take that view.

MR. WALKER: I beg to differ. Let me qualify that. If you take that view, perhaps that's correct, except that under our standard one doesn't just look to the burden of proof but to the nature of the claim, and in this case the subset of Strickland errors that would be cognizable under this exception would be a very small subset, not the broad array of, he should have objected to this testimony, he should have objected to that exclusion of a death-qualified juror.

Our standard, Chief Justice, is the fair probability standard, but we also endorse a much more strict standard that was on the table in Strickland. One of the standards that was on the table in Strickland before the Court in trying to divine what an appropriate prejudice standard was in that context, was the strict -- as it was described, the strict outcome determinative standard more probable than not.

Now, Johnson v. Singletary, the decision of the Eleventh Circuit Court of Appeals which of course also adopts the eligibility concept as a definition of death innocence, we believe has a very persuasive dissenting opinion joined, I think, by four justices. Judge Anderson, writing for the dissenters, said look, we got to recognize here the State's interest in finality, but we also have to recognize that some prisoners are entitled to

be freed up from the constraints of cause and prejudice. We believe a standard that is faithful to both of those principles is the more probable than not standard, Chief Justice, which is --

QUESTION: More probable than not what?

MR. WALKER: More probable than not that but for the jury's consideration of a fundamentally distorted view of the defendant's culpability that it's more probable than not that the trier of fact or the sentencer would not have voted death.

QUESTION: That the jury would not have found him guilty at all?

MR. WALKER: No. We're talking about the sentencing phase now.

QUESTION: Well, I know, but how about the guilt?

MR. WALKER: The standard that emerges from this Court's miscarriage cases in the liability phase, Kuhlmann, is fair probability.

QUESTION: Well, but there wouldn't be a fair probability that he would not have been found guilty of the crime charged?

MR. WALKER: That Sawyer would not have been found guilty?

QUESTION: Yes.

MR. WALKER: We believe that there is a fair probability that considering the Brady violation he would not have been found guilty, but I'm addressing the Chief Justice's concern with how we translate that guilt-innocence exception into the penalty phase, and we're suggesting that although our standard, the standard that we advocate, is the Kuhlmann standard, that an appropriate standard might indeed be the more probable than not, the strict outcome determinative standard that the dissenters in the Eleventh Circuit suggested was appropriate.

QUESTION: Why should it be translated into the penalty phase at all? I mean, why -- I had thought that we're making an exception for compelling circumstances to our normal rules that you've had a fair trial and that's the end of the matter, and we've said, you know, why isn't it reasonable to say well, if in fact you weren't guilty of the crime, that's an extraordinary circumstance, but you're saying even if you are guilty of the crime you might have gotten a lesser sentence. I don't find that as extraordinary a circumstance at all.

MR. WALKER: Well, Justice Scalia, just as we have a right to have a fair trial under this Court's jurisprudence there was an equally strong right to a fair sentencing hearing.

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QUESTION: Well, that's certainly not our jurisprudence in most areas. You wouldn't be making this argument if he got 50 years instead of 10 years, would you?

MR. WALKER: No, we wouldn't, because we're talking now about a fundamentally different sort of proceeding, and we're talking about a proceeding where the stakes are not whether he goes to prison or not, or the degree or length of a period of incarceration, we're talking about whether or not a person will live or die, and this Court has noted in its jurisprudence since Gregg itself that death is a qualitatively different kind of punishment than any other punishment that can be doled out by a sentencing judge in the United States of America.

And again I think that if we reference the facts of this case, all reasonable people would agree that it's fundamentally unfair that Robert Sawyer has not at least had a chance to put before some tribunal his severe and crippling mental disabilities and have a tribunal at least evaluate whether or not if that evidence had been presented the jury may have voted for a life sentence.

QUESTION: Well, I agree that death is different from other punishments, but so is punishment different from -- so is the nature of the punishment different from the question of innocence, and up to now our cases have

only held that if you are innocent can you have a second trial, and you're urging us to carry that over into a whole new area where you are not innocent, but you say I should not have gotten as severe a penalty as I did.

Even if I acknowledge that death is a different penalty, I don't know why that compels me to say that this particular doctrine should be extended from innocence over to penalty.

MR. WALKER: Well, my reading of Smith, Justice Scalia, is that that's a settled question.

QUESTION: I don't agree with you on that. It seems to me there is language in Smith and language -- that is fairly ambiguous. You certainly can't say it's settled the other way, but I for one don't regard it as settled, contrary to Justice Scalia's view.

MR. WALKER: Well, I might say that this Court in its guilt phase miscarriage cases has indicated that what is important in that context in assessing innocence is whether or not inaccurate evidence with regard to culpability was put before the jury. Our standard adopts that concept and inquires as to whether or not false, inaccurate, or misleading evidence relative to culpability was put before a sentencing jury.

Perhaps a look at the Court's --

QUESTION: Can you tell me, how is your proposed

standard different from our usual harmless error inquiry? I take it it's somewhat heightened --

MR. WALKER: It's --

QUESTION: The one you propose?

MR. WALKER: Yes, Your Honor. It's radically heightened from the harmless error standard, and more importantly the burden falls on the petitioner and not the State in this instance. The burden is not on the State to show that there's no reason --

QUESTION: But is the standard the same?

MR. WALKER: No, the standard is not the same. The standard is not the same under either our proposal or the proposal which we also endorse out of the Eleventh Circuit, and fundamentally more important again, it's the petitioner's burden and not the burden of the State to show that the error had no effect.

Perhaps I might briefly discuss this Court's Eighth Amendment jurisprudence, because hopefully, Justice Scalia, it will answer your concern. We believe that as a construction of death innocence eligibility is a fundamentally flawed concept, because it collides with the Eighth Amendment's core concern of individualized sentencing. Implicit in the concept of eligibility is that anyone who is a member of a legislatively defined death eligible class is deserving of punishment and that

therefore no fundamental injustice can occur by executing anyone within that class, deserving not only of punishment but deserving of the death penalty.

Now, of course this validates the Eighth Amendment's narrowing function, the Furman half, but it is utterly unfaithful to the Eighth Amendment's core consideration of individualized sentencing.

In our view, the problem with eligibility is a problem with the mandatory death penalty statutes this Court struck down 15 years ago. This Court struck those statutes down because they negated the individual worth of a human being. This Court struck those statutes down, and the principle that emerged from those holdings is that a capital defendant must be treated as an individual, and of course that is recognized --

QUESTION: It violates that, but the question isn't whether you're entitled to individualized sentencing, the question is whether you're entitled to two swings at it. Just as in other cases whether there's any violation of law in the first trial, the question isn't whether you are entitled to whatever that violation of law denied you -- of course you are by definition -- but the question we're speaking to today is whether, having through your own fault not made that assertion at the first trial, you're entitled to have a second trial, and

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we do that when you're innocent, that's clear. But you're saying we should also do it when you've gotten too high a sentence, at least where that sentence is the death sentence.

MR. WALKER: Well, I'm not saying that we should do it when we have too high a sentence at all. I'm saying that we do it when the death penalty has been imposed. I'm saying that there should be -- and admittedly it will be a very, very rare, small universe of cases, but that there is that universe of cases where a jury was so radically misinformed, like in this case, as to the petitioner's individual culpability, that it would be a fundamental miscarriage of justice not to allow a petitioner to litigate the merits of a claim that addresses that issue, even though --

QUESTION: There may be a small universe of cases where it's true, but there won't be a small universe of cases where it's litigated. It'll be litigated fully in every capital case.

MR. WALKER: Well, I think that our district courts can dispose of these claims quickly on the paper if a very strong threshold showing is not made. I might also point out --

QUESTION: Well, I'm not sure about that, counselor. It seems to me that in this case in order to

adjudicate the right to file the second habeas under your standard you would have to go through an inquiry which is just as extensive as ruling on the merits. It would seem to me that you would have to have a full and complete record and review of that record just in order to determine whether or not the exception applies.

MR. WALKER: Well, I would disagree again, Justice Kennedy. I think that a district judge could winnow out the huge majority of filings under this standard that we propose on the paper -- no hearing, no stay.

QUESTION: Well, you say on --

QUESTION: You mean like the State court did?

MR. WALKER: Yes, exactly, the State court.

QUESTION: Well, I know, but the State court winnowed out, but you weren't satisfied with that.

MR. WALKER: Well --

QUESTION: You presented the same claim in the second habeas proceeding in the State, didn't you?

MR. WALKER: That's correct.

QUESTION: And the State court apparently winnowed it out.

MR. WALKER: Well, that's correct, Justice White. That's why we're in Federal court now.

QUESTION: And you think you have a

constitutional right to a hearing that the State court denied.

MR. WALKER: That's correct.

QUESTION: Well now, let's take this in the real world that we deal with all the time and you deal with all the -- that maybe the day the execution is set the lawyer comes in for Mr. Sawyer, Mr. ABC, and says I have this claim under Sawyer v. Whitley which has been resolved in your favor, let's assume. I can show it's more probable than not that the jury would have come out the other way. Here are five affidavits. The district judge is sitting there, the execution is scheduled for that night. What does he do?

MR. WALKER: Well, the claim is filed, and if the claim is not made out on the face of the pleadings it's --

QUESTION: Well, but you've got to do some weighing of the various affidavits. You've got to determine whether it's more likely than not the jury would have come out the other way. This is really not a paper shuffle, I wouldn't think.

MR. WALKER: Well, first of all I would say that you can't keep people from knocking at the door. If there's an eligibility standard there will be trials.

QUESTION: You can certainly try.

MR. WALKER: I'm sorry.

QUESTION: I said, you can certainly try.

MR. WALKER: Well, you can narrow the door, no question about it, but there will be filings under eligibility, there will be filings under the actual innocence to the crime exception. The question a moment ago was apropos. You know, why didn't you make a challenge to the State's burden of proof on its element to prove mens rea.

QUESTION: But the number of elements that go into innocence of the crime are relatively limited. The number of elements that go into whether it's more likely than not that you would have gotten a lighter sentence, or a sentence less than death are, God, innumerable. So I mean it's not just opening the door another crack, it's a substantial extension.

MR. WALKER: Well, I'm not so sure it's as substantial as the Court -- as Your Honor feels it is. Again, I think that the claim itself is a factually very narrow claim, and if a Federal district judge looks at the claim and there's no showing that the sentencing profile was radically distorted, it's dismissed on the merits that quickly. If a judge --

QUESTION: Well, I'd have to say, Mr. Walker, listening to your argument today, and your very moving

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description of Sawyer's condition, I would have to read the sentence -- the transcript of the trial itself, of the sentencing hearing and all of the affidavits and all of the submissions before I could pass on the validity and the strength of your argument.

MR. WALKER: I'll answer that and then reserve the rest of my time. At least in the Fifth Circuit that's not a problem, Justice Kennedy, because the same panels remain on the cases as they proceed from one writ to the next if it goes so far.

QUESTION: Before you sit down, counsel, I want to ask whether it isn't appropriate that in this particular context, where you're looking for an exception on the successive habeas petition, that you apply a standard that is tougher than the standard that would be applied the first time around, something more.

MR. WALKER: Absolutely, Justice O'Connor.

QUESTION: Something more than harmless errors, something more than the Strickland prejudice standard --

MR. WALKER: That's correct.

QUESTION: And I don't see that in your proposal.

MR. WALKER: Well, that is in our proposal, I believe. It's a strict outcome determinative test again that Your Honor in writing for the Strickland court noted

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was a much stricter test than the reasonable probability test. We think that that would satisfy the State's interest in finality.

QUESTION: It seems to me, counsel, that even if you prevail I would think the maximum we should do is to remand to the State court to have the hearing that was denied to you in the Federal courts. Why have the hearing in the Federal court at all?

MR. WALKER: Well, if the Court chooses to remand it to the State court, that's fine as well. We think the proper remand would be to the district court.

Thank you.

QUESTION: Thank you, Mr. Walker. Ms. Pendergast, we'll hear from you.

ORAL ARGUMENT OF DOROTHY A. PENDERGAST

ON BEHALF OF THE RESPONDENT

MS. PENDERGAST: Chief Justice, and may it please the Court:

The State of Louisiana endorses the Fifth Circuit's definition of actual innocence of the death penalty and urges this Court to adopt that definition at the very least. Since Louisiana narrows --

QUESTION: When you say at the very least, Ms. Pendergast, I think the Solicitor General here has perhaps taken a narrower position than the Fifth Circuit.

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Do you agree with that position as an alternative?

MS. PENDERGAST: I do agree with it, because Louisiana narrows the class of persons eligible for the death penalty at the definitional stage, so it really is -- the Solicitor General's definition is a workable and acceptable definition to the State of Louisiana, and I propose to defend the Fifth Circuit's definition and allow Mr. Larkin to defend the Solicitor General's definition.

This Court has said that actual innocence does not translate easily into the penalty phase of a capital trial, and in reality the Eighth and Ninth Circuit's definition and Mr. Sawyer's proposed definition do not translate at all into the penalty phase of a capital trial, because their definitions concentrate on discretionary factors. In the penalty phase of a capital trial that is the wrong question to ask of any sentencing hearing.

A sentencing is a societal response to what the sentencer heard. The sentencer not only heard what went on at the penalty phase of the trial, but the sentencer heard the gruesome details of the trial, of the crime at trial, and his evaluation is the discretionary process, and he brings a certain set of values and a certain background to that evaluation, and the resulting sentence is his societal response. You cannot be innocent of a

societal response, you can only be innocent of objective factors such as the guilt or innocence of a crime.

QUESTION: Your view of the State's obligation is just to prove the elements of the crime.

MS. PENDERGAST: In the guilt phase, and then when we come to the penalty phase we have certain objective factors which are aggravating factors.

QUESTION: Well, I know, but when does one in Louisiana become eligible for the death penalty?

MS. PENDERGAST: Actually, you are tried --

QUESTION: When you're proven guilty of a capital offense?

MS. PENDERGAST: Of the first degree murder. A first degree murder is -- at the definitional stage defines those crimes and even -- you go on trial for first degree murder and you have death or life as a possible penalty.

QUESTION: So you eliminate the necessity to --in defining eligibility you just don't think about whether there's an aggravating circumstance.

MS. PENDERGAST: Then when we go to the --

QUESTION: Is that right? Is that right?

MS. PENDERGAST: In Louisiana?

QUESTION: Yes.

MS. PENDERGAST: We have to have an aggravating

circumstance.

QUESTION: Before there's eligibility for the death sentence?

MS. PENDERGAST: But that's built into the definition of first degree murder, the aggravating circumstance.

QUESTION: I see. All right.

MS. PENDERGAST: And then when you go to the penalty phase the jury is told that they have to find at least one aggravating circumstance beyond a reasonable doubt and then they are to consider the mitigating circumstances to determine whether death is the appropriate sentence.

QUESTION: But they're eligible for the -- eligible for the death penalty before you ever get to the sentencing stage.

MS. PENDERGAST: Yes, by the definitional stage, actually.

The State of Louisiana clearly supports the Fifth Circuit view because the Fifth Circuit is concerned with the eligibility which are at the death penalty phase, and those are objective standards to which we can measure something. Where Sawyer's proposed definition is unclear, the standard is unclear and it does not go to any objective factors which can be measured. What he actually

is asking this Court to do is to bypass the cause prong of cause and prejudice and have a mere prejudice test, because he does not implicate the objective factors at the penalty phase of the trial. If we --

QUESTION: May I just ask you, do you think under the normal cause and prejudice jurisprudence that the prejudice cause -- prejudice prong of the test is not satisfied unless the defendant shows it was more probable than not that the verdict would have been different?

MS. PENDERGAST: The prejudice prong of a cause -- and we're talking about the guilt phase?

QUESTION: Yes. How much prejudice -- in other words, how much prejudice is -- what is the standard for prejudice under the cause and prejudice -- normal cause and prejudice law under review? Does it require the defendant to convince the trier of fact that it would be more probable than not that he would not have been convicted?

MS. PENDERGAST: I could not be certain of the precise language, Your Honor.

QUESTION: Because if you don't say that's the same, then you are -- then there's a difference between the prejudice standard and the standard your opponent is advocating. Maybe it's not sufficient to justify it, but at least there is some difference.

MS. PENDERGAST: In my opinion, the difference is merely a matter of semantics, that it's a nebulous position, because we can't ever judge -- it would produce so much -- and also we're talking about --

QUESTION: Well, of course --

MS. PENDERGAST: -- second Federal habeas -- the cause and prejudice jurisprudence has to do with procedural default and --

QUESTION: Right.

MS. PENDERGAST: -- abuse of the writ on first Federal habeas, but now we're talking about second Federal habeas. Shouldn't we make the standard even more strict --

QUESTION: Yes, you --

MS. PENDERGAST: -- than on first Federal habeas?

QUESTION: I think everybody agrees -- I think your opponent agrees with that, and the question is whether the standard he proposes is more stringent than the normal prejudice standard, and I did not understand until this argument that normally the prejudice prong cannot be satisfied unless the defendant proves that it's more probable than not that he would have been acquitted. I thought there could be prejudice that's significant but not quite that significant. Maybe I'm wrong, I don't

know.

MS. PENDERGAST: Your Honor, I would have to check myself on the precise language of more probable than not.

QUESTION: But your position is not, or is it, that cause and prejudice inquiry is irrelevant in determining whether or not a habeas petition should be filed when it attacks a ruling in the sentencing phase?

MS. PENDERGAST: My position is that the attacking a ruling in a sentencing phase on a second Federal habeas should only go to the objective factors that go to the actual innocence of the person to the objective factors found that make this person eligible for the death penalty. If we go beyond that we are getting into the discretionary nature of the sentencing phase.

QUESTION: So we don't even have a cause and prejudice inquiry initially, in your view, if sentencing is what is involved?

MS. PENDERGAST: Well, yes, that's right. He's already admitted that there is no -- if we don't -- if he satisfies cause and prejudice we don't even get to the actual innocence. We only get there because he cannot satisfy cause and prejudice.

QUESTION: Well, but -- but I'm -- it seems to me that what you're saying is that even in the cause and

prejudice phase, this initial threshold determination that prejudice is somehow unworkable as a standard when you're talking about a sentencing hearing.

MS. PENDERGAST: That's what I am saying. I'm saying it is unworkable unless you look at only objective factors that make him eligible for the death penalty, because what we will be doing is looking at the discretionary area. We don't even do that at the guilt phase under a Jackson v. Virginia analysis. When we review a guilt phase for sufficiency of evidence, we only look at the elements of the crime in the light most favorable to the prosecution, so we go to the penalty phase, how can we then -- it's a lesser standard to look at anything beyond the eligibility factors at the penalty phase.

QUESTION: Is the position of the Fifth Circuit?

MS. PENDERGAST: As a matter of fact, the Fifth Circuit did talk about Jackson v. Virginia, and the core concern of Jackson that we not invade the discretionary area of the jury.

QUESTION: Is it the Fifth Circuit rule that unless you show the ineligibility for the death penalty that the successive petition should be denied?

MS. PENDERGAST: Yes, that's the position of the -- that the error must go to the eligibility --

QUESTION: Yes.

MS. PENDERGAST: -- of the defendant for the death penalty.

QUESTION: What it boils down to I suppose is the error must relate to an aggravating circumstance. Errors relating to exclusion of mitigating circumstances could never justify a second habeas. I think that's what --

MS. PENDERGAST: I think that's what the Fifth Circuit proposes.

QUESTION: Even if it were clear -- even if the trial judge were willing to say I am convinced beyond a reasonable doubt that if the jury had had this mitigating evidence they never would have returned the death penalty, your position would still be that's just too bad.

MS. PENDERGAST: Yes, I agree. Yes, and I think this is clearly supported by Dugger v. Adams where this Court said that a Caldwell error is no cause for procedural default, and a Caldwell error goes to the accuracy of the sentencing determination.

Also, a definition as Sawyer proposes would play havoc with Sawyer v. Smith, which said that a Caldwell error could not be applied retroactively, and I think by adopting a type of definition, that the Eighth and Ninth Circuit propose or that Sawyer proposes, would create

confusion in the jurisprudence of Federal habeas in the retroactivity cases under Teague v. Lane.

QUESTION: I take it you -- Louisiana is not a balancing State, or is it?

MS. PENDERGAST: No, it is not a balancing State. We do not weigh the aggravating and mitigating circumstances.

QUESTION: Do you think -- do you think it would come out differently in a balancing stage where the jury's instructed, say, that unless there are mitigating factors that overpower the aggravating --

MS. PENDERGAST: No. I think that -- we are -- that -- if it comes out on first Federal habeas, that's one thing, but when we come to the second Federal habeas we must narrow that review and that application of actual innocence even more to objective factors and just eliminate the discretionary factors.

QUESTION: Oh, you think -- you're arguing for a position that you think would apply in a balancing State, too?

MS. PENDERGAST: Yes, I do, and I think we have to look to the fact that Sawyer's definition, he tries to eliminate and narrow it by saying that prophylactic rules not bearing on culpability would not qualify, but perhaps we would have an increased litigation to define what

prophylactic rules would bear on culpability. His ineffective assistance of counsel would be eliminated except in rare cases. I can see that there would be further litigation in successive petitions to define what are the rare cases that would qualify for ineffective assistance of counsel.

His miscarriage of justice standard includes only those errors where the jury heard false evidence or were precluded from hearing true mitigating facts. His standard overrules McCleskey insofar as McCleskey set the standard for a miscarriage of justice by saying that a miscarriage of justice is not promoted by just mere error, not mere constitutional error, and not mere prejudicial constitutional error, but prejudicial, constitutional error that goes to guilt or innocence.

And when we translate that into the penalty phase, it can only be done with any kind of reasoning if we adopt a test like the Fifth Circuit that goes to the eligibility of the defendant for the death penalty which implicates only objective factors. Any other definition -- any broader definition will violate the concerns of finality, of State court convictions because there -- it will be only increased litigation in the Federal habeas area, and it will violate the concerns of comity between the State and Federal courts.

I think it's important to remember that what we're talking about is that this is a second Federal habeas petition, that the standard of review should be more strict than on the first Federal habeas petition, and that actual innocence should be limited to only those extraordinary cases where the defendant would be actually innocent or not eligible to have the death penalty imposed. And I think it's important to remember that we are talking about a sentencing hearing where there's no correct outcome, and that this is a discretionary area and we cannot allow a Federal court to reweigh mitigating evidence and substitute its judgment and its reweighing for the State sentencer or the State -- the highest court in a State. This violates the core concerns of comity between State and Federal courts.

Sawyer mistakenly has claimed that the State must prove that death is the appropriate penalty in his brief, and I want to remind -- point out to this Court that Louisiana does not require the State to prove that death is an appropriate penalty, that Louisiana only requires after a conviction of first degree murder that the State prove an aggravating circumstance beyond a reasonable doubt, and then the jury is charged to consider the mitigating evidence, or mitigating circumstances, and to determine whether death is appropriate.

So the only thing the State has to prove is one aggravating circumstance beyond a reasonable doubt. Louisiana is not a weighing State, and additional facts in mitigation would not be a substantial consequence for the reviewing court in Louisiana.

Let's look at the facts that Sawyer proposes here to support his miscarriage of justice claim. He has the mental defect, the abusive childhood -- the jury heard in skeletal form most of the information that Sawyer now proposes.

We have to remember that Sawyer testified at the penalty phase of the trial. He testified to the murder of the 4-year-old child in Arkansas, he testified to his childhood and his upbringing, and he testified to the crime that he was intoxicated and could only remember bits and pieces. The jury did have an opportunity to see him, to evaluate him, and decide for themselves what sort of mental defect or slow learner he might have been.

QUESTION: But your position would be the same even if the jury had not heard that evidence.

MS. PENDERGAST: Yes, it would. My position is the same.

QUESTION: And if the State deliberately conceals some mitigating evidence that the defendant didn't know about?

MS. PENDERGAST: If the mitigating evidence does not go to the objective factors on second Federal habeas, I think his big --

QUESTION: Well, I would think it would be on first Federal habeas, too.

MS. PENDERGAST: I think there's a burden there that they do it on first Federal habeas.

QUESTION: Yes, and also on -- I would think you would say that the State court was -- in first or second State habeas would come out with the same ruling you would, even if the State deliberately concealed some mitigating evidence.

MS. PENDERGAST: If the mitigating evidence didn't go to the actual innocence.

QUESTION: Yes, well, the mitigating evidence was mitigating evidence, though, that the jury would have been entitled to listen to and the State deliberately conceals it. I would think you would say you'd have to come out the same way.

MS. PENDERGAST: Excuse me, Your Honor, I don't understand. You're asking me a question?

QUESTION: Yes, I am. That the State deliberately conceals some mitigating evidence that surely if the defendant had known about it would have put before the jury.

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MS. PENDERGAST: I think the question is does that mitigating evidence go to, you know, his early childhood --

QUESTION: It doesn't go to any -- it doesn't go to the proof of an aggravating circumstance.

MS. PENDERGAST: Then I don't think that should necessarily trigger a review or a remand.

QUESTION: Okay.

QUESTION: But now that rule would be different in first Federal habeas --

MS. PENDERGAST: Yes.

QUESTION: -- wouldn't it?

MS. PENDERGAST: Yes, it would.

QUESTION: There you could show something that went to --

MS. PENDERGAST: Right.

QUESTION: -- went to the sentence, and if it was material you would probably get some relief.

MS. PENDERGAST: We have to be conscious that the Brady claim that petitioner puts forth here is not supported by admissible evidence, it's based on double and triple hearsay, and that the time that he has waited to put forth this evidence in front of the court cast doubt on its credibility.

QUESTION: Yes, but again, even if that weren't

true, if it were direct, not hearsay evidence, if it was totally credible, it would still be tough luck.

MS. PENDERGAST: On second Federal habeas, yes, otherwise you have no distinction between first and second Federal habeas.

We have to remember also that the -- that Sawyer could be charged and convicted as a principal in Louisiana, that he admitted to hitting Fran Arwood and admitted to hitting her twice, causing her to bleed from her mouth, he had the key to the door, the deadbolt, in his pocket, he ordered Cindy and the two boys to the bedroom, he had admitted being in the bathroom where she hit her head on the bathroom -- on the tub and lost consciousness.

He admitted to being there when detergent and scalding water was poured over her, he never denied participation in this crime. He never denied that his fingerprints were found on the lighter fluid can. He only said that he was intoxicated and could only remember bits and pieces, and I urge this Court to adopt the Fifth Circuit definition because any broader definition would overrule McCleskey, lend credibility to last-minute hearsay affidavits, lend credibility to physical and mental examinations done today and applied to yesterday, and buy into a distortion of the record and sanction said

sandbagging.

Thank you.

QUESTION: Thank you Ms. Pendergast. Mr. Larkin, we'll hear from you.

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING THE RESPONDENT

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

I would like first to answer Justice Stevens' question. Your Honor asked whether the more likely than not standard applied to the prejudice prong of the Sykes cause and prejudice test, and in our view the answer is yes. That's our understanding of it.

At page 14 of our amicus brief, we cite and excerpt some of the relevant portions of this Court's discussion in Frady which was later reiterated again in Carrier, and what the Court said there was, in order to show prejudice you have to show not merely the possibility of an error, but that something worked to the actual and substantial disadvantage of the defendant, and as we've read that, it seems to indicate that the defendant has to show it's more likely than not that he was prejudiced by it.

QUESTION: But you would agree, though, that

something could be to the actual and substantial disadvantage of a defendant without it also necessarily being true that the verdict would more likely than not have been different.

MR. LARKIN: That could, but then you also have to keep in mind the other part of the court's discussion in these cases, which is the cause and prejudice test is stricter than the plain error test. Now, you could have a plain error that doesn't prejudice the jury's verdict, but it seems to us that if you're having something stronger than the plain error test in the prejudice component, in light of also the discussion of the way you've described it in cases of Frady and Carrier, we've always thought that it really requires a more-likely-than-not showing by someone.

QUESTION: More likely than not of a substantial disadvantage, or more likely than not that the result would have been different?

MR. LARKIN: The latter, Your Honor -- more likely than not that the result would have been different.

QUESTION: Do you see any problem with applying that analysis when the challenge is to something in the sentencing phase, to an error in the sentencing phase?

MR. LARKIN: Not on the first Federal habeas petition, Your Honor, but here we think where the second

petition is involved that is a wholly inadequate basis. For example, the Eighth and Ninth Circuits made no effort in their opinions in the cases we've cited in our brief to reconcile how they described the actual innocence doctrine with the way this Court has described the actual prejudice element of the Wainwright v. Sykes test, and we think they really can't be reconciled. In fact, petitioner by essentially abandoning the Eighth and Ninth Circuit's approach has virtually conceded that point.

What petitioner has tried to do is limit, by limiting the types of claims that supposedly can be raised, the effect there would be on the operation of habeas corpus if you adopted the Eighth and Ninth Circuit tests. In essence, he has said you should limit that test to Brady claims and mitigating evidence claims, and we think the only virtue of that limitation is that it fits the facts of his case. In effect, any claim --

QUESTION: But doesn't succeed in making second Federal habeas any different from first Federal habeas with respect to those particular claims.

MR. LARKIN: You betcha, that's absolutely right, and we think this Court's decision in Dugger v. Adams is inconsistent with that type of approach, so we think the standard petitioner has adopted clearly is inconsistent with what this Court has already decided in

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Dugger, and with the approach this Court has followed, and with the policy concerns that have led this Court to adopt the ruling last term in McCleskey.

We agree with the Fifth and Eleventh Circuits that there should be an eligibility approach. We just differ --

QUESTION: Well, you suggested, I thought, a still different test, one that goes to actual innocence of the substantive offense.

MR. LARKIN: That's right. We just focused the eligibility a little differently, Your Honor, in that sense.

QUESTION: And I'm not sure your test would take into account in any event the differences among the States in capital sentencing structure. Louisiana is one type of State which has narrowed the eligibility in a certain way, but there are different types of schemes. Has any court adopted the tests that you suggest?

MR. LARKIN: No, Your Honor, the Fifth Circuit and the Eleventh Circuit didn't, and neither the Eighth and Ninth, so it is in fact our proposal that we are putting forward to you today, because this will affect Federal cases as well as State ones. But the approach we've put forward can be applied across the board, whether you're in a State like Louisiana, which does the narrowing

at the guilt stage, or whether you're in a State like Georgia, for example, that does it later at the sentencing stage.

Our position is this --

QUESTION: Whether there's a balancing requirement or not?

MR. LARKIN: Absolutely, which is in a case like Mississippi. Our position is very simple. If a defendant is convicted of a crime for which the death penalty constitutionally may be imposed, he is not actually innocent of that sentence. In other words, if a court has before it findings that are adequate under this Court's decision in Tison to allow the death penalty to be imposed, the defendant is not actually innocent of the death penalty, and that approach is one that can be applied by district courts across the board in Georgia, in Louisiana, or in Mississippi. It doesn't matter.

QUESTION: Basically it removes the distinction between capital and noncapital cases.

MR. LARKIN: It does it by making sure that what you have is a proportionality test. In a noncapital case if a defendant were convicted of a crime for which the type of sentence he's challenging could not be imposed under this Court's decision in Harmolin, then he can bring that type of actual innocence claim. We are, if you will,

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obliterating that distinction.

We don't think that's inconsistent with the way this Court has approached it, because after all in Smith and Murray the Court said it refused to adopt special cause and prejudice rules simply because there was a capital case at issue. In fact, we think what we've got here is a system that will adequately work and solve the problems that some people from the bench have mentioned of how to dispose of these cases on the day an execution is scheduled to go forward.

QUESTION: Well, you say if the Court has before it findings that the defendant was guilty of a capital eligible offense. Do you mean by that a jury verdict?

MR. LARKIN: If the jury verdict is going to contain with it under the statute the elements of the offense, and in virtually every state, murder, for example, is going to be the capital crime. There are a few states that have other types --

QUESTION: Well, supposing a defendant comes in on second Federal habeas with some rather convincing showing that a witness was prevented from appearing at the trial and that the witness would have testified that he was 10,000 miles away.

MR. LARKIN: Well, if he can show he didn't do it, then he's actually innocent of the crime, not just the

sentence.

QUESTION: Well then, so the jury verdict could be upset on that sort of a showing, I take it?

MR. LARKIN: Absolutely. My earlier comment, Your Honor, was when he comes in challenging only the sentence. If someone can come in and show that he didn't do it, then he is actually innocent in the sense that everyone, I think, universally agrees, and in that sense, of course, he's entitled to relief, too, but that is how you should narrow --

QUESTION: He's not eligible to the death penalty or any other penalty.

MR. LARKIN: He's not eligible for a fine, for a sentence of imprisonment for any --

QUESTION: But he would have to tie the evidence he's relying on to some sort of a constitutional violation.

MR. LARKIN: Correct. In this sort of context, unless you can show something like that, you can't come into Federal court. If he has other claims that he can raise, a State law claim, he can go back to the State courts, because this Court has made clear in Estelle v. McGuire only earlier this term that you can't raise State law claims in the Federal courts, so he has to tie it to a Federal constitutional claim.

Now, as we said, we think there are several principals that support this. First, the Court has made clear in Gregg, in Tison, in McCLeskey, one, that the death penalty can be imposed for the crime of intentional homicide. Second, the Court has made clear that aggravating factors serve a valuable function at sentencing but they do not define the elements of capital murder.

Third, the Court has made clear in a case involving this very State's capital sentencing laws, Lowenfield v. Phelps, that whatever essential predicates are necessary under Tison or the other cases for the imposition of the death penalty to be lawful, those predicates can be established at the guilt stage, they don't need to be established at sentencing.

Finally, we think that given the fact that at this stage the State's judgment should not only be presumed to be correct, but given the fact that Federal habeas has once gone through and completed without finding any material errors that the presumption should be virtually irrebuttable at this point, we think it's appropriate to focus on the question whether the prisoner has committed an offense for which the death penalty can be imposed.

After all, aggravating factors are that -- they

aggravate the crime. If the crime of murder can be punished by death, and this Court has repeatedly held that it can be, we think at this stage of the case it is unnecessary to expand the limited actual innocence exception to take into account these other types of factors.

Unless the Court --

QUESTION: I don't know why it has to be extended to take into account the penalty phase at all.

MR. LARKIN: Well, it could, Your Honor. That would even be a narrower position than we had urged. You could just drop it out, and that's consistent with every holding in this Court.

Smith and Murray and McCleskey and Dugger never granted relief on this exception, and so there is no holding of this Court that would apply the actual innocence exception to a sentence at all, but we haven't gone quite that far. If it is disproportionate under the Eighth Amendment, we would say that you are therefore not eligible for that sentence and it should not be imposed.

QUESTION: Well, what should be the standard for applying the actual innocence exception in the guilt phase? There's a sense that there has to be something new and dramatic or you have the wrong man, or something, but what do you think the test ought to be there?

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MR. LARKIN: Your Honor, you could in essence flip around what happens at trial. There there's a presumption of innocence and the State has to prove beyond a reasonable doubt that the defendant did it. To show actual innocence you could flip it around to the habeas stage, put the presumption on the prisoner and require him to show that he didn't do it.

Now, you could require it by a preponderance, by clear and convincing which is close to beyond a reasonable doubt, or beyond a reasonable doubt. The latter, of course, would be the stiffest, but in this context it wouldn't be an irrational way to proceed.

QUESTION: Well, what is the Government's position on the proper standard?

MR. LARKIN: Well, we have not in our brief laid out which of those three approaches to take.

QUESTION: A rather important point, isn't it?

MR. LARKIN: It is, but it has not yet in our view ever been dispositive in any case.

Thank you.

QUESTION: Thank you, Mr. Larkin. Mr. Walker, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF R. NEAL WALKER

ON BEHALF OF THE PETITIONER

MR. WALKER: First, for Justice O'Connor's

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benefit, the more-likely-than-not standard which we endorse is located on page 3 of our reply brief in Note 1, and also the amicus brief filed on our behalf by the Legal Defense Fund discusses that test extensively beginning on page 40.

Secondly, this jury heard no evidence whatsoever about Sawyer's mental retardation, or even his low intelligence, and certainly heard nothing about organic brain damage.

Third, I believe that we've heard here a concession that Wainwright v. Sykes prejudice is a lesser showing than the prejudice inquiry that we're advocating here. The Sykes prejudice is that the error works to the petitioner's actual and substantial disadvantage. Justice Stevens, I disagree that you may not have to show that the outcome would have been different in that situation, in our situation you do.

But primarily what I want to address for the minutes remaining is Smith v. Murray, and I simply disagree that Smith v. Murray does not categorically hold that the actual innocence exception applies in capital sentencing proceedings. What Smith said was, it may not be easy to translate, but it does.

Now, the Court found no reason to do it in that case, because Mr. Smith had a claim of legal innocence,

not actual innocence. In terms of the holding, the holding in that case is purely expressed in this sentence: in short, the error neither precluded the development of true facts nor resulted in the admission of false ones.

We have an error that did preclude the development of true facts. Constitutional ineffective assistance of counsel meant that the jury never heard Robert Sawyer was mentally retarded and brain damaged. It also resulted in the admission of false facts. That evidence was that Robert Sawyer's a sociopath.

We think we squarely fit within Smith v. Murray, and it would be a gross fundamental miscarriage of justice to not give Robert Sawyer a hearing on the claims he's presenting in the successive habeas corpus petition.

If there are no further questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walker. The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

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NO. 91-6382 - ROBERT WAYNE SAWYER, Petitioner V. JOHN WHITLEY, WARDEN

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BY Ann-Marie Federico

(REPORTER)