OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: ROBERT O'NEAL Petitioner v. FRED McANINCH, WARDEN

CASE NO: No. 93-7407

PLACE: Washington, D.C.

DATE: Monday, October 31, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT O'NEAL :

Petitioner :

v. : No. 93-7407

FRED McANINCH, WARDEN :

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Washington, D.C.

Monday, October 31, 1994

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

APPEARANCES:

THOMAS R. WETTERER, JR., ESQ., Columbus, Ohio; on behalf of the Petitioner.

RICHARD A. CORDRAY, State Solicitor, Columbus, Ohio; on behalf of the Respondent.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae, supporting the Respondent.



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PROCEEDINGS

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-7407, Robert O'Neal v. Fred McAninch, Warden.

Mr. Wetterer.

ORAL ARGUMENT OF THOMAS R. WETTERER, JR.

ON BEHALF OF THE PETITIONER

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

The issue in Robert O'Neal's case is that once a habeas corpus petitioner has proven a constitutional violation, does the State then have the burden to prove the constitutional violation harmless beyond a reasonable doubt under Kotteakos?

It used to be beyond a reasonable doubt under Chapman. This Court adopted the Kotteakos standard, which reduced the burden that the State must maintain, and with the reduction of the burden also came the allocation of the burden, so yes, the State must maintain the burden of proving the error harmless.

With Kotteakos came the Kotteakos case law. As in Justice Stevens' case, Justice Stevens' concurrence indicated that placed the burden of proving harmless error on the State for constitutional claims. This was



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consistent with all the Court's precedent in this area of harmless error determination.

Under Chapman, the burden was placed upon the State to prove beyond a reasonable doubt, and now the Court has placed the burden upon the State to prove the error harmless, with no substantial and injurious effect upon the verdict.

QUESTION: Well, Chapman, Mr. Wetterer, was on direct appeal. Why shouldn't the result be different on habeas?

MR. WETTERER: And that was the issue that this Court resolved in the Brecht case, and didn't make a different result by reducing the burden on the State to accommodate the interest of the State in finality, comity, and federalism.

QUESTION: Well, why shouldn't it also accommodate those interests by saying that the burden is on the petitioner rather than on the State as to, when the thing is equally divided, I guess?

MR. WETTERER: Because the writ would no longer be able to serve the purposes that this Court has placed upon it. In order to protect the factually innocent and ensure the accurate determination of guilt and innocence in the trial process, and to protect the constitutional rights, the burden must remain with the State.

In those cases in which there is an equal inference on whether or not the petitioner has met his claim or not, traditionally the State has borne that risk of error and the risk that the constitutional right was not violated.

QUESTION: Do you think a lot of cases will be affected by how we decide this question?

MR. WETTERER: Under the current case law it indicates that not as many as would under other cases that this Court has decided in habeas corpus, because under habeas corpus law, under Fretwell, the Court is supposed to first determine whether a constitutional violation has been made.

If this Court were to place the burden upon the petitioner, then this case would affect every case, every habeas corpus case in the United States, because then the Court would then have to determine prejudice as part of the determination on the merits.

If this Court remains the burden on the State to prove harmless error once the petitioner has proven a constitutional violation, then this will affect a few cases, because under the Chapman standard it was estimated that only 1 in 1,000 cases warranted any review under the Chapman standard.

It's assumed that not that many petitioners will



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make the -- will find relief under the lower standard of Kotteakos, and therefore it depends upon the decision of this Court whether this impact has a -- has an impact in every Federal case that ever comes before any court or magistrate, or whether this decision only applies in those situations that once the Court has found that there has been a violation of the constitutional rights.

If there's been a violation of constitutional rights proven by the petitioner, that has met the interest that this Court has set for a meeting of comity, finality, and federalism under McCleskey. At that point, the State has no interest in a constitutionally defective judgment.

Under the Kotteakos standard, this Court has said that when there is grave doubt as to the impact of the error, then relief is to be granted, and that is those cases in which the State has been unable to demonstrate that the error did not affect the rights of the case.

In a lot of cases, it will be very clear for the Court that the error did or did not affect, but in those few cases, in those cases in which the courts have reviewed the record, found a constitutional violation, and then have been unable to really determine whether there has been a violation but they have grave doubt, and those cases clearly were granted relief under Chapman and should still remain to be granted relief under Kotteakos and



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Brecht.

QUESTION: So if you do not prevail in this case, and a court looks at all the evidence and concludes, we're not sure what would have happened, but this had a significant influence on the jury's determination, it was a close case, it was -- we just don't know, what result under the standard that you are proposing?

MR. WETTERER: Under this standard, the Kotteakos standard, the new trial would be granted, because every --

QUESTION: All right, and what result under the standard that the State and the Government are proposing?

MR. WETTERER: That that petitioner would remain with loss of life or liberty.

QUESTION: In other words, as you interpret the burden of proof that the Government and the State are arguing for, the petitioner has to show what, that there likely would have been a different result?

MR. WETTERER: The petitioner must demonstrate that there has been a constitutional violation, and that is a huge hurdle to overcome in Federal habeas.

QUESTION: We know that. What about the effect on the verdict? What does the petitioner have to show under the State's proposal, as you understand it?

MR. WETTERER: Under the State's proposal, the



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petitioner has to prove that it actually had a substantial and injurious effect upon the verdict, and then besides --

QUESTION: Does that mean it's more likely than not that the verdict would have been different?

MR. WETTERER: It depends upon whether the -- it would appear that there would be a conflict with Kotteakos, because Kotteakos says if there's grave doubt as to the outcome, then you're supposed to grant relief.

The State's saying that we have to prove actual prejudice.

QUESTION: Is there grave doubt, in your view, if the judge looks at the case and he or she says, I just can't tell?

MR. WETTERER: That's grave doubt under the Kotteakos standard. If the judge can say, I have grave doubts, or I have doubts that this verdict was obtained in a constitutional manner, and then we have found a constitutional violation.

QUESTION: And you think that a grant of the writ would be consistent with the Government's position as to the standard in the case that we've just put? Grave doubt, even under the Government's standard --

MR. WETTERER: The Government standard does not --

QUESTION: -- the writ is granted?

MR. WETTERER: Excuse me, Your Honor.

QUESTION: Even under the Government's standard the writ is granted if there's grave doubt?

MR. WETTERER: No, Your Honor. The Government wants us to prove actual prejudice. They are going away from the Kotteakos standard and saying that besides proving that we have a constitutional claim, we have to prove that it had an actual impact upon the jury. Not that there is grave doubt, or surely doubt, but that there was an actual prejudice. They're relying on the actual prejudice language in the Court's earlier decision.

QUESTION: When you use the term, grave doubt, though, you're not talking about the constitutional violation, but grave doubt as to whether there was any prejudice.

MR. WETTERER: Grave doubt as to prejudice, yes, Your Honor.

This Court, when it adopted the Kotteakos standard, the grave doubt standard is in that case and in the lower case law, so those case law would provide guidance to the lower courts which they can use in determining the constitutional -- the determination of whether to grant a writ.

In order to -- this Court has relied upon Federal habeas to provide guidance to the States and other

courts as to what the Constitution means. That has always meant that the courts must first determine a constitutional error, then determine whether impact.

If there was a merger, as the State is asserting, between the two concepts, then habeas would no longer be able to provide any guidance to the courts, because every time, the court would have to look at prejudice as part of the constitutional claim.

It is consistent to find cases in which there is a constitutional violation and a person may be entitled to relief under Chapman but may not be entitled to relief under the Kotteakos-Brecht standard. The State courts would then still know that they have a constitutional violation that they should then review in their making their decisions. This Court grants so few cert petitions on direct review that it remains necessary for this Court to maintain that difference.

QUESTION: Mr. Wetterer, I guess habeas corpus is a civil action, is it not?

MR. WETTERER: This Court has traditionally relied on it as a quasi-civil action.

QUESTION: I thought we had indicated that it is civil, and certainly the longstanding rule is that the plaintiff in a civil case has the burden of proof of all elements.

MR. WETTERER: Yes, Your Honor. However, in this habeas corpus action it is considered by most a quasi-criminal and civil proceeding because it protects the life or liberty of an individual. It's not the same as when someone is suing over whether or not a contract has been breached and the standard is beyond a preponderance of the evidence.

QUESTION: But presumably the prisoner in a habeas action still has to prove that the prisoner is being held in custody in violation of the Constitution.

MR. WETTERER: This Court has set the Kotteakos standard for the determination of whether custody is the -- whether or not a violation has occurred. That's a standard for the court to decide, and the petitioner just demonstrates his claim, and then the court makes a decision on whether -- what the effect of that is.

If there's been a finding that there has been substantial injurious effect, then he is held in violation of his custody, but traditionally the Court has never found that custody -- custody has always equaled whether the person has been held and whether the Court can grant relief. It is never held that -- in recent habeas law that custody means that the petitioner must prove prejudice for noncon -- for constitutional claims in Federal habeas.



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It's always separated out, the two concepts, because by merging of the two concepts, we don't protect the people that habeas is supposed to protect.

QUESTION: Well, the habeas petitioner has to satisfy the court that there was a constitutional violation, doesn't he?

MR. WETTERER: Yes, Your Honor.

QUESTION: So that certainly accords with the normal civil presumption, that he's the plaintiff, and he's got to carry the burden of proof.

MR. WETTERER: But in a non -- but you're never going to have, in a civil case, Your Honor, a situation where you have a plaintiff proving that the State has violated his constitutional rights. Mr. O'Neal has demonstrated that the --

QUESTION: Well, how about a 1983 action? All the time you have plaintiffs trying to prove that the State has violated their constitutional rights, and yet the burden of proof remains on them.

MR. WETTERER: In those civil actions, because they're going for monetary damage, they're not deprived of their life or liberty as a result of State action.

QUESTION: Well, that may be true, but in most, in a civil case, once it's over, it's over. Federal habeas gives people in your client's position really a



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second bite of the apple. They've already been found guilty beyond a reasonable doubt, and now they're getting a second try, so why isn't it reasonable to say the burden of proof should be on them right across the board?

MR. WETTERER: Because, Your Honor, Mr. O'Neal didn't -- isn't -- Mr. O'Neal was found to have a constitutional violation at his trial. He did not receive any relief on that in State court. He's now come into Federal court and said his case should have been granted relief, and under Chapman he would have been granted relief by the district court finding.

Now, he's wanting to get his chance at having a constitutionally fair trial, and consistently this Court has said that the habeas is to protect people like Mr. O'Neal, people whose constitutional rights have been violated, and ensure the accuracy and determination of the guilty and innocent in the State proceedings.

QUESTION: Is it your position that the substantive standard that you get out of Kotteakos makes the linkage question a matter of affirmative defense, if we take the civil case model, that your burden is to show the constitutional violation? Once you show that, there's some kind of presumption operating in your favor?

MR. WETTERER: No, Your Honor. Once we have shown a constitutional violation, we have overcome a

presumption. The presumption is that if we go into Federal habeas corpus and we do not prove a constitutional violation, we lose, and at that point, this process stops. The State is presumed to have obtained a constitutionally valid judgment.

QUESTION: But if showing substantial likelihood of contributing to the conviction -- my question is, if you take the civil case model, is that showing an element of your case, or is it more properly regarded as an affirmative defense on the part of the State?

MR. WETTERER: Yes, Your Honor, it's more of an affirmative defense on the State to avoid the actions of the -- for the prior conduct.

QUESTION: Do I understand you, I guess going back to your answer to the question by Justice Kennedy, that you regard the issue in this case as being both about the burden of proof and the quantum of proof, or do you, on the other hand, say the only thing that is before us is the question of who has the burden, and the quantum of what would be necessary to carry that burden is a separate issue for a separate case?

MR. WETTERER: This Court has already determined the quantum of proof under Kotteakos, by --

QUESTION: In other words, the substantial contribution is in fact --

MR. WETTERER: Yes, Your Honor --

QUESTION: -- a statement of quantum of proof.

MR. WETTERER: We are not here to attack that position. What we are saying is that the State's position of placing the burden on the petitioner attacks that petition --

QUESTION: Okay.

MR. WETTERER: -- and is inconsistent with the Kotteakos standard and the lower case standards, and that the court has already accommodated the interests of the State by reducing the standard for collateral review, and that is not being challenged by Mr. O'Neal.

What Mr. O'Neal is saying at this point is, he's proven his constitutional violation. The State should then have to prove that they did not deprive him of his liberty in an unconstitutional manner by demonstrating it had no effect on the outcome of the case, and we believe that that meets the Kotteakos standard.

When there's an allocation of the burden upon the petitioner, it demonstrate -- it places upon the petitioner the risk that the lower court will make an error in that judgment on whether or not he's met his burden. Traditionally, that has been placed with the State in the -- for the protection of liberty.

However, with placing the burden upon the

petitioner, we also run the risk that in those close cases in which there -- you cannot say that there has been obtaining of a verdict in an unconstitutional manner, that the petitioner would not obtain relief with the burden being placed on him.

If the burden is placed on the State, then those petitioners will obtain relief under the Kotteakos standard, and that will meet all the interests of the State and meet the interests of the petitioner.

General Barr in the oral argument before this Court in Brecht said, on page 43, "Now the core purpose of habeas is to protect against the kind of serious constitutional defect that gives rise to a substantial risk" --

QUESTION: Where are you reading from, Mr. Wetterer?

MR. WETTERER: Page 43 in the Brecht oral argument, which we submitted as additional authority earlier.

QUESTION: Is that in the appendix, or --

MR. WETTERER: No, Your Honor. We did not obtain it in time to place it in the appendix. But General Barr -- I'll start over -- said, "Now the core purpose of the habeas is to protect against the kind of serious constitutional defect that gives rise to the



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substantial risk that an innocent person has been convicted, and Kotteakos is fully sufficient to meet that standard."

The Court had before it in the Brecht case whether or not to adopt the Kotteakos standard, the Chapman standard, or some other standard, and decided to go with the Kotteakos standard. At that point, the Kotteakos standard was known to include the burden of proof being placed upon the State.

QUESTION: But the Kotteakos standard also applied at that time just on direct appeal, didn't it?

MR. WETTERER: Yes, Your Honor, but this Court said it wanted the lower courts to use the case law in Kotteakos as guidance to determining habeas cases. That case law is only available if the court adopts the same standard, and that's what this Court was saying. It did not say that the Kotteakos standard is okay, but place the burden upon the State. It needed to do that.

QUESTION: Well, the question really wasn't before us in Kotteakos, was it?

MR. WETTERER: Yes, it was, Your Honor.

QUESTION: The burden of proof?

MR. WETTERER: The determination of harmless error. The determination of harmless error --

QUESTION: Well, the test for harmless error was

certainly before us, but nobody directly presented the question of who should have the -- run the risk of -- bear the burden of persuasion.

MR. WETTERER: Justice Stevens in his concurrence opinion addressed the issue directly. It was not addressed directly by the other opinions.

However, in the majority opinion, when the Court indicated that the Kotteakos case law was to be applied and then issued the Olano decision, indicating in Olano the -- affirming that the State would bear the burden under Kotteakos, the Court should have given guidance to the lower courts that the burden was placed upon the State under the Kotteakos-Brecht standard.

In this case, Mr. O'Neal was deprived of his liberty as a result of a defective jury instruction that transferred intent from the codef -- from codefendants to him in such a manner that the State did not have to prove intent upon him to find him guilty.

In fact, as the magistrate indicated in his reports, the jury could have believed Mr. O'Neal's story when he testified, and the evidence that supported him, finding him to be factually innocent, but have to convict him under this theory, because he did innocent acts which aided a conspiracy, and therefore this jury instruction did have a substantial and egregious effect upon the

outcome of the case and the lower court should have granted relief in this case.

At this time I would like to reserve the rest of my time.

QUESTION: Very well, Mr. Wetterer.

Mr. Cordray, we'll hear from you.

ORAL ARGUMENT OF RICHARD A. CORDRAY

ON BEHALF OF THE RESPONDENT

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

To reframe, the single issue on which the Court granted certiorari in this case is whether the habeas petitioner or the habeas respondent bears the burden of showing that any error identified at trial was of such magnitude that it actually had a substantial and injurious effect in determining the jury's verdict.

It is our position that the habeas petitioner properly bears this burden, as stated in Brecht, for two reasons: First, this is consistent with the nature of habeas proceedings as civil actions.

Second, this is consistent with the longstanding tenor of this Court's habeas jurisprudence, which recognizes that a collateral challenge to a separate and distinct State court judgment requires the party initiating the collateral challenge to make all the

showings necessary to justify setting aside that State court judgment.

And Justice O'Connor, I think you are correct to note that a habeas action, this Court has long held, is a civil action. That means that the petitioner, who, in essence, is the plaintiff in the case, must make all the showings necessary to justify relief, and this is, in essence, an element of the claim necessary to show a custody in violation of the Constitution. There must be a causal link, as the Solicitor General submitted in the brief for the United States, between the error and the verdict to justify relief here.

QUESTION: May I ask you if this was your view prior to the decision in Brecht, because it was a civil proceeding the harmless error inquiry burden was on the petitioner?

MR. CORDRAY: Your Honor, I think that prior to Brecht the general understanding, and I guess the Court said in Brecht it had not yet confronted it specifically, was that the Chapman standard would be applied in these cases.

QUESTION: But under the Chapman standard, who had the burden, in a habeas corpus civil proceeding?

MR. CORDRAY: Well, the Chapman standard, I believe, Your Honor, was a criminal law formulation, which

said that the State must show beyond a reasonable doubt. That is appropriate in --

QUESTION: I understand. The Chapman standard, of course, arose on direct review cases and so forth.

MR. CORDRAY: Yes, sir.

QUESTION: But it had been applied by a number of courts in the habeas context before Brecht.

MR. CORDRAY: I believe --

QUESTION: At that time, when that standard was being applied in the civil proceeding, under your view, who had the burden?

MR. CORDRAY: Because this Court specifically stated under the Chapman standard that the State had the burden, the State did have the burden at that time.

QUESTION: Even though it was a civil proceeding.

MR. CORDRAY: Yes, although that's not consistent with the general tenor of civil proceedings. It was án exception to the historical rule, and that's -- when the petitioner points to the traditional body of case law, they're really only pointing to the Chapman case and the Chapman approach, otherwise the consistent tenor of this Court's case law in a habeas proceeding is that the petitioner, the one bringing a collateral challenge to a separate and distinct State court judgment, must make all



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the showings necessary to justify relief, which includes --

QUESTION: But yet when Chapman was carried over to a civil proceeding, a habeas proceeding, it was assumed that the distribution of the persuasion burden would be the same.

MR. CORDRAY: Yes, but Your Honor, I think when this Court in Brecht specifically confronted the issue and said that the Chapman approach is not appropriate on collateral review, it was setting aside the Chapman approach, which was a criminal law formulation that the State must show beyond a reasonable doubt, and instead was returning to this Court's traditional habeas principles as stated in cases like Adams, where Justice Frankfurter for the Court said that it is not asking for too much if the --

QUESTION: It was also picking up a standard from the criminal context -- just as Chapman came from the criminal context, so did Kotteakos.

MR. CORDRAY: Yes, but --

QUESTION: So why wouldn't it follow that then you take the standard from the criminal context, and you also take the allocation of burdens? It was just a substitution of one for the other. Why, when Chapman didn't shift the burden to kind of a civil format, would



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the Kotteakos formula do it?

MR. CORDRAY: Because I think that with Chapman the Court carried in a criminal law formulation, and I think that the Court's application of Kotteakos both before and since, Palmer v. Hoffman, McDonough Power, is that in a civil proceeding the party seeking to set aside the judgment must bear the burden of showing that the error actually affected the result in the case such as to influence its substantial rights, and that's the appropriate formulation, we believe, in this case.

In particular, Justice Ginsburg, to return to the question you asked of the petitioner, we do not understand that the analysis here on this issue would be an affirmative defense that the State must raise. That would not be consistent with the Court's habeas jurisprudence.

Instead, what would be consistent is to treat it as the Court has treated procedural default in McCleskey, in Coleman, exhaustion in Granberry v. Greer, as a matter that the State must raise, or it may waive it, but once raised, the burden is on the petitioner to make the showings necessary to justify relief, and we think that that's what's consistent with the Court habeas jurisprudence.

And we think that that's true because the

fundamental nature of these proceedings again is they are collateral challenges to separate and distinct State court judgments.

This Court has held in all such collateral proceedings such as in Park v. Raley, two terms ago, that the burden is on the parties seeking to challenge that judgment, which is now presumed to be final, and the presumption of finality has attached when it's been upheld on direct appeal, to make the showings necessary to justify setting aside that judgment, and it is also consistent with this Court's touchstone principles of its habeas jurisprudence, which stress that there are interests that the State and its citizens share here that are felt in very human terms by the State and its citizens.

This goes directly, if we have endless relitigation in these issues, to the return effect of the criminal laws which is felt in all of our communities and neighborhoods. It goes directly to public confidence in the judicial system. It erodes that confidence which is necessary if we're going to secure the voluntary cooperation of citizens who are victims of crime, witnesses to events.

As this Court said in Engle v. Isaac, quoting an article, famous article by the late Professor Bator on



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habeas and finality, it also goes to the rehabilitation of the offender, because one who doesn't yet recognize that they stand fully and finally convicted is not prepared to undertake rehabilitation, and these are very important interests that the State and its citizens feel, I would stress, in very human terms.

And the presumption of finality, if it means anything, means that when a petitioner has not succeeded in showing that error identified at trial actually had an effect on the jury's verdict, a substantial injurious effect, it is not appropriate to presume, then, that the State court judgment should be set aside.

QUESTION: Well, why shouldn't we --

QUESTION: So your test is that there has to be a showing that it actually affected the verdict?

MR. CORDRAY: Yes, it is, Your Honor. That is the test that --

QUESTION: So that, in the hypothetical I put to petitioner's counsel, where the judge is just in doubt, we assume a constitutional error, let's say an un-Mirandized statement is introduced, it's a very close case, I just don't know, petitioner loses, correct?

MR. CORDRAY: I think that that is -- yes, and I think that that is the only posture that's consistent with the presumption of finality that this Court has stressed

attaches in habeas cases.

There is a presumption that the State court judgment should be upheld, rather than set aside, where the petitioner has not succeeded in making all the showings necessary to justify relief, and that is what the presumption of finality must mean, that we don't presume, in a close case, that the State court judgment be set aside. Instead, we presume that it should be upheld.

QUESTION: How do you go about making that determination in a really close case? I mean, I don't know how the jury's going to come out. I just don't know. That means petitioner has to lose. How does he go about overcoming this burden?

MR. CORDRAY: I think that in these cases, in every case, the petitioner attempts to show constitutional error. The State, of course, attempts to show that there was not constitutional error. The petitioner also --

QUESTION: Well, we're assuming they show a constitutional error.

MR. CORDRAY: I understand. And petitioner will also attempt to show substantial injurious effect on the jury's verdict, and the State will attempt to show, no, that's not the case, but there are substantial safeguards that are built into this process for a habeas petitioner.

This Court has stressed that it is a plenary



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Federal review of the issue, it is a de novo review undertaken on the entire record in the case, and third, and maybe most important, it is a matter of judgment that involves a qualitative assessment of the effect of the error on the jury's verdict, and not simply a simplistic assessment of guilt, and it's those safeguards that the lower courts have applied consistent with this Court's Brecht decision.

And I think that petitioner's claim before this Court is that if the burden of proof is placed here, as the Court has consistently historically placed it in habeas cases, excepting only the Chapman approach, that there will somehow be an end to this Court's habeas jurisprudence safeguarding the liberty rights of offenders. That is simply not the case.

The lower courts have faithfully applied Brecht in the spirit of that decision, they have made this full, de novo review on the record, they have granted writs under this standard, in the Cumbie case out of the Eleventh Circuit, the Jeffries case out of the Ninth Circuit, cited in our brief, and we think that there are those substantial safeguards built in for the petitioner, the offender.

QUESTION: Mr. Cordray, let me ask you the same question that I asked petitioner's counsel. The court has

found a constitutional violation. Now it must apply the Kotteakos standard, and I can't rephrase it exactly, but by hypothesis, the only cases in which the outcome on this particular case is going to make any difference is where the court is going to say, yes, there's been a constitutional violation, and I just can't say whether there's a grave likelihood that it substantially affected his rights. How often does that come up, do you think?

MR. CORDRAY: We would agree with the Solicitor General, though we don't have any statistical analysis, this would be a narrow class of cases. But in this narrow class of cases, we think this raises a very fundamental point about the philosophy of this Court's jurisprudence, which is, in the close case, are we going to, in the end, presume that the State court judgment, separate and distinct judgment, should be set aside, or are we going to presume that it's going to be upheld, and the petitioner, this Court has always held, is the one who must make those showings.

QUESTION: We have -- let me just cut you off for just a second there. What is your best authority for the proposition that in a trial which has admittedly been affected by constitutional error, the presumption nevertheless remains that the judgment should be respected?



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MR. CORDRAY: Your Honor, I think our authority for that is the tenor of this Court's habeas jurisprudence dating back to Adams.

QUESTION: Well, do you have a specific case on the point?

MR. CORDRAY: Dating back to Adams v. United States, and also the Court's Brecht decision itself, that where you have error, you don't know what effect it has on the jury's verdict until a showing is made, and the Court said it must be a substantial injurious effect, and petitioner must make that showing to show that --

QUESTION: You don't have a case that says, in effect, what you've been saying, that even though there's been constitutional error in arriving at a judgment, the presumption nevertheless remains that the judgment should stand?

MR. CORDRAY: We think that all of the cases this Court has decided on habeas -- Granberry v. Greer, which is an exhaustion case, procedural default cases, abuse of the writ cases, and all of those cases, there are allegations and perhaps identification of error, but to the point is that the petitioner must make the showings necessary to justify relief, to show a causal link between the error and the jury's verdict, such that we now can know with some assurance that the custody here is actually

in violation of the Constitution of the United States.

QUESTION: Does this apply even to what we have called in some of our cases structural error?

MR. CORDRAY: No, it does not. There are some errors, Your Honor, that the Court has recognized are reversible per se.

However, what we're talking about here is the class of errors that are constitutional trial errors where the Court has said there must be a further showing that the error actually affected the jury's verdict, and if there's no such showing, if there is no such link drawn by the petitioner in the case, then the State court judgment should not be presumed to be set aside.

We think that that is consistent with the longstanding tenor of this Court's habeas jurisprudence. It's also consistent, again, with the nature of a habeas proceeding as a civil action.

QUESTION: On direct review the standard would remain Chapman, right?

MR. CORDRAY: Yes, it would.

QUESTION: And there was no such application of Chapman here in the State court, right?

MR. CORDRAY: That is correct, Your Honor.

QUESTION: Does that make no difference at all? Does it make a difference that when you come over to



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collateral review you either have had in the State courts a Chapman-style review or --

MR. CORDRAY: I think it raises, Your Honor, a separate question, and this question was raised in the petition for certiorari here as question 1, and it's a question that some of the courts have wrestled with.

If there was no Chapman standard applied on direct review, should it be Chapman, then, that is applied on collateral review, and thus far the Court has declined to take up that issue, and I think correctly, because the Court laid down a single, consistent standard in Brecht that should apply on all collateral review cases, but that's -- I would stress here that that's a separate question.

There was a question 1 in the petition for certiorari which was denied review here, and so I don't think that question is present in the case at this point. At least, we've not briefed it or presented it to the Court.

QUESTION: That would remain an open question however we decide this allocation of the burden of persuasion?

MR. CORDRAY: I think that's right, because the Court denied review on that question.

We think that Brecht answers it pretty clearly,



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that that is the Brecht standard that will apply on collateral review, not the Chapman standard.

QUESTION: If we rule your way, could a sound argument be made in direct review Chapman cases that the burden should, in fact, be in that case on the appellant, because although you -- I mean, you have de novo review of the strictly legal issue, the question of prejudice is not that kind of an issue, and why shouldn't, if we go your way here, why shouldn't the appellants likewise have the burden to prove that in fact there was actual prejudice?

MR. CORDRAY: I think here are two reasons, Your Honor. The first is that on a direct review you have an appeal that is a continuation, a direct continuation of the underlying criminal proceeding, and so the criminal law formulation of Chapman --

QUESTION: Well, except that it -- you say it's a direct continuation, but the parties don't stand in the same relation to each other in terms of their obligations to go forward.

There is at least an intellectual burden that has to be satisfied by the appellant to prove that there was legal error, so they're not in the same spot they're in at the moment the jury's empaneled.

MR. CORDRAY: I think those observations are correct, Your Honor.



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There might be some argument made, but I think that neither of the arguments would really apply with much force in that setting because the appeal there is a continuation of the underlying criminal proceeding.

It also is not a collateral challenge.

QUESTION: That's kind of -- isn't that sort of begging the question? The question is, should it be, and we don't -- why should we have a rule that assumes prejudice?

MR. CORDRAY: I think that, as Your Honor indicates, that is a separate question as to whether Chapman is an appropriate standard on direct review.

The State does not challenge that, and neither do we think that either of the arguments we are resting so heavily on here really would apply to suggest that Chapman is inappropriate on direct review, because that is still a criminal proceeding, and it also doesn't involve a collateral challenge to a separate and distinct judgment.

And I think that in particular the Court here has indicated that on a 2254 proceeding, the rules this Court has adopted implementing 2254, Rule 11 specifically points the courts to draw upon the Federal civil rules in these kinds of cases, and the Federal civil rules, as I indicated, have always been applied going back to Palmer v. Hoffman, 1943, reaffirmed in McDonough Power --

QUESTION: So you really think that probably the strongest answer, then, to my question is one of statutory interpretation.

MR. CORDRAY: I think that the Court -- my sense would be the Court would consider that it has directly considered the Chapman standard on direct review of criminal cases, and considers that to be the correct approach.

QUESTION: I thought your answer to that was that in direct review the question is whether the conviction was proper, whereas on collateral review the question is whether the individual is being held in violation of the Federal Constitution, and if the latter is true, only where he makes a showing not only that there was a mistake in the conviction, but also when he makes a showing that that mistake led to his incarceration.

It's really a different question on direct review, isn't it?

MR. CORDRAY: I agree, and those are the things I'm trying to say, Your Honor.

QUESTION: It's the habeas statute that makes the difference.

MR. CORDRAY: Yes, I agree, and I'm trying to articulate that.

QUESTION: Well, are you then saying

it's -- basically it's a question of statutory construction, that so far as the so-called policy arguments might go, you could make just as strong an argument for placing the burden on the appellant under Chapman as you can for placing the burden on the petitioner here under Kotteakos?

MR. CORDRAY: I don't believe so, Your Honor, because the policy arguments, or the fundamental touchstone interest this Court has stressed applying collateral review of on habeas proceedings are distinct.

The presumption of finality only attaches once a conviction has been upheld all the way on direct appeal, and only then do the interests that I attempted to articulate of the deterrent effect of the criminal laws, the public confidence in the judicial system that this Court stressed in Brecht and has stressed in a number of cases, really do begin to apply, as this Court has said, once the case goes over to collateral review in a distinct proceeding, and so I think that is a distinct matter.

QUESTION: Mr. Cordray, you don't have much time left, and I wanted to ask a different sort of question.

As this case comes to us from the Sixth Circuit, do you think the Sixth Circuit found there was a constitutional error in the instruction?

MR. CORDRAY: No, Your Honor. I think it's very

clear from the Sixth Circuit's decision that first of all they found that there was no error in the jury instruction.

It was a proper -- perhaps not ideal, but a proper statement of Ohio law and complicity and conspiracy that intent to kill can be presumed from circumstances, including a common design to enter into a crime that is reasonably likely to cause the death of the victim.

However, more than that, the Court only assumed arguendo that there was error, perhaps, in a combination of jury instruction with prosecutorial comment, and so if the Court were to disagree with us as to the allocation of burden of proof, we think both sides would agree that remand would be appropriate first for the Sixth Circuit to actually determine if there was error, and second, whether, under a different allocation of burden of proof, that the verdict should be upheld nonetheless.

But again, we think that it is very clear that in a collateral challenge, a civil action habeas proceeding, the burden should be allocated here to the habeas petitioner to make the showing necessary to justify relief, to show that the presumption of finality should be set aside, and that that's consistent with the Court's view of habeas proceedings as only correcting extreme malfunctions in the State court process that have

grievously wronged an offender.

If the habeas petitioner is unable to show that error actually had effect on the jury's verdict, actually had a substantial injurious effect, we would submit that the State court system has not extremely malfunctioned, it has not grievously wronged the habeas petitioner.

QUESTION: Mr. Cordray, if the petitioner were to prevail here, would there be a significant practical effect on the work load of the State prosecutors in defending against habeas applications?

MR. CORDRAY: I don't think that the allocation of the burden would affect the work load one way or the other, because both parties always have every incentive to present their best arguments as to whether there is error, and as to whether that error actually had an effect on the jury's verdict.

What it will affect is the approach that State courts -- that Federal courts take philosophically whether they should set aside State judgments merely based on a presumption or instead should accord them the presumption of finality that this Court has stressed so long and so consistently.

QUESTION: I assume --

QUESTION: Thank you, Mr. Cordray.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

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

Our position is that the habeas petitioner should bear the burden of proof as to harmless error. That's not based on an analysis of section 2111, the harmless error statute, or the Federal Rules of Civil or Criminal Procedure, because in our view those rules were primarily designed to deal with errors that occur in a Federal proceeding from the time the proceeding was started until the time the court is asked to assess the effect of some error that's occurred.

Instead, it's based on the fact -- this case does not involve that kind of a situation. The error that occurred here occurred in a State court proceeding that was finished and came to final judgment before the Federal proceeding was instituted.

In those circumstances, in our view the crucial point is that there has been a final judgment in the prior proceeding, and that that is what is being attacked. The habeas petitioner bears the burden of proving that an error was committed in that proceeding, and for essentially the same reasons, we think the habeas

petitioner bears the burden also of showing that that error was not harmless, that it had some effect on the outcome.

QUESTION: Do you agree that the practical consequences of a decision one way or another are slight? That is, that there are not many cases where the trier is in equipoise about the linkage between the constitutional violation and the impact on the conviction?

MR. FELDMAN: Yes, I would agree with that, if what you're talking about is the number of cases that are likely to be affected.

I can't give you an empirical survey, or empirical results, but if you look through F.2d, and look through appellate decisions, there are dozens of appellate decisions that have addressed harmless error after having found error on habeas. Most of them don't even mention the concept of burden of proof, and at least my sense of looking at them is that it's not ordinarily the decisive question, so I don't think it would affect a very large number of cases.

On the other hand, in cases where it will affect things, it can have -- it can be a very extremely important issue. In this case, for instance, the petitioner was originally tried 14 years ago. The possibilities of retrying him at this time, it would be

very difficult, and the confidence in the outcome of that proceeding that would result in a just conviction if he turned out to be -- if he was guilty would be severe.

It's for those reasons that the habeas corpus statute specifically speaks in terms of the -- what the petitioner must show is that he's in custody in violation of the Constitution, not that he's in custody pursuant to a judgment rendered at a trial at which a constitutional error occurred.

In our view, because he must be shown to be in custody in violation of the Constitution, that imports a notion of causation which is essentially what --

QUESTION: But isn't it odd to extract a burden of proof rule from a statute that doesn't even tell us what the substantive standard is in this?

MR. FELDMAN: I wouldn't -- what I would extract from that is simply that the claim that the habeas petitioner must make out is that he's in custody in violation of the Constitution, and that it is an element of that claim.

His custody isn't a violation of the Constitution unless there was an error that occurred and that error had some relationship to his custody. That is, the error caused his custody in some sense, and that, in that sense, is what the harmless error rules are about.

It is because that is one element of his claim that he must show that it's up to the -- it's because it's an element of his claim that he must make that he must make the -- carry the burden of proof as to harmless error.

QUESTION: Of course, you could really run the same argument on direct appeal, too, I suppose. You could say that it's the burden of the convicted defendant to show that the conviction was a result of the error of law, not merely that there was an error, but that the conviction was improper, and the conviction, you could say, was not improper unless you show that the error of law produced the conviction, and yet we don't say that. I mean, you could run the same argument.

MR. FELDMAN: I suppose you could. I mean, I think, first, all of the policies that this Court has referred to time and time again about the very great cost imposed by habeas relief would not apply in a situation of direct review.

I think also the Court's repeatedly said habeas is not supposed to serve the function of a direct appeal. And I would finally point out that Rule 52(a) of the Rules of Criminal Procedure has been interpreted by this Court to put the burden of proof on the Government of showing harmless error once there's been an error that's been

shown by the defendant.

So I think that's squarely governed by those rules. It may be reasonable on direct review for a court, when the court is in equipoise as to whether or not an error had a substantial and injurious effect on the verdict, it may be reasonable for that court to overturn the conviction and send it back for a new trial.

But on habeas, where the court is not able positively to state that the error did have such a substantial injurious effect on the verdict, I think that the petitioner hasn't made out his claim and that the habeas petition should be denied.

Petitioner has argued that the result in this case will affect the procedures, and that there's -- I disagree with the petitioner that there is a procedural rule that a court has to determine either harmless error or whether the error occurred, in what order the court has to determine those two questions.

A court can reasonably act by assuming that an error has occurred and asking itself whether it's harmless, or they can find out whether the error occurred and then conduct a harmless error review. I don't think that the order of proof will be affected by the result in this case, nor do I think that the introduction of evidence, or the burdens of showing what facts might be



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relevant, is going to be --

QUESTION: Well, wouldn't it be affected to this extent, that if you take seriously the language about looking at the entire record and weighing it against the entire record, that somebody has to decide whether it's worth the judge's time to say, let's look at the whole record in this case?

If you go with the petitioner, the Government has to make up its mind that it thinks its worth the effort. If they don't, neither side decides it's worth the effort, then the judge just goes ahead and grants relief.

MR. FELDMAN: Well, as I understand the question, if you're referring to a burden of production, it's not really the question that we've addressed.

I'm not sure that I would agree that that's vital, because I think the issue will inevitably surface, but what we're really -- the issue that I'm more interested in in this case is, who bears the risk of nonpersuasion? That is, where the court as a substantive matter --

QUESTION: Well, that's right. If the Government doesn't bear the risk, or if the Government does bear the risk, presumably it won't raise -- make a serious argument on it unless it thinks it has a pretty

good basis for asking the judge to read this whole record.

MR. FELDMAN: Well, I don't -- I think if the Government approaches the case and finds that an error has been committed, I don't think it should ask the court to conduct a harmless error analysis unless it can conclude that that analysis --

QUESTION: But you're saying the plaintiff in every case should ask the judge to conduct a harmless error -- to be sure he is -- that it's not harmless.

MR. FELDMAN: I think --

QUESTION: Your view would require the judge in every case to read the record and conduct harmless error review.

MR. FELDMAN: I think if the petitioner -- I think if the petitioner views -- thinks that that's a sound claim that he ought to be making, that I think -- yeah, I think --

QUESTION: Well, but I mean, he's going to have to do it in every case.

MR. FELDMAN: I think that's right. Well, I think petitioner -- I think that is because there has been already a final judgment in the case.

QUESTION: I understand why, but I think there is a very significant difference in work load on the court on which view one takes, because if the Government doesn't

think it's -- thinks it's close enough so they're probably not going to prevail on harmless error, they just don't ask the judge to read the record, but the petitioner would always have to ask him to do it.

MR. FELDMAN: I think ordinarily, once there's been a final conviction that's been affirmed and you're on habeas, ordinarily the Government will take the position that that conviction is valid and will litigate the harmless error issue if there's a good reason to litigate it.

QUESTION: Well, of course, no -- I take it that the trial court also has the option to say -- to address the constitutional issue first and say there's no constitutional violation, in which case he doesn't have to read the record at all.

MR. FELDMAN: Right, I agree. Of course, that would be the -- I think that is certainly the ordinary way of proceeding, but I just wanted to make the point before that I don't think it's the exclusive or required way for the court to proceed.

QUESTION: And I should think if there is a constitutional violation, then he's going to have to read the record, and one party or the other has the burden to persuade.

MR. FELDMAN: That's right. I agree.

In this Court's decision in Brecht v. Abrahamson, the Court did say that it adopted -- in adopting the Kotteakos standard that lower Federal courts will have a substantial -- will have an understanding of what that standard means, because there's been a lot of case law that's developed around it, but I think that when the Court said that, it certainly did not say that that was compelled by the harmless error statute or by the Federal rules, certainly not by the Federal Rules of Criminal Procedure.

Nor was it addressing the burden of proof issue. Indeed, as to that point, the experience of the lower Federal courts, Chapman and Kotteakos were equal. The lower Federal courts had had very substantial experience at that time in dealing with both standards.

It was a necessary condition, perhaps, for the Court to adopt the Kotteakos standard, that this Court would have had confidence that what it was adopting would be understood by the lower Federal courts, but I don't think it was a sufficient condition, and I certainly wouldn't read into that any statement about the allocation of the burden of proof on the issue.

It was just that this standard, substantial and injurious effect on the verdict, was something that the lower Federal courts would be able to understand what it

means, because there's been a lot of case law developed about that in a number of circumstances.

If there's no further questions, thank you.

QUESTION: Thank you, Mr. Feldman.

Mr. Wetterer, you have 12 minutes remaining.

REBUTTAL ARGUMENT OF THOMAS R. WETTERER

ON BEHALF OF THE PETITIONER

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

There was a constitutional violation found by the Sixth Circuit. The court -- the Sixth Circuit traditionally, when it's reviewing the record and determines there's no constitutional violations, gives short shrift and says, there's no constitutional violation here, and then dismisses the case in its opinion.

The court of appeals in this particular case in the last two pages of the opinion found that some of the errors the petitioner raised did not raise to a constitutional level, and therefore they indicated they weren't going to even analyze them.

Under the Boyde standard adopted by this Court for determination of a jury instruction, the court does not look only at the jury instruction, but has to look at how the jury instruction is used by the court, by the parties in this particular case, and Boyde, even though in this case the jury instruction alone was not a violation,

it became a constitutional violation when it was used by the court in this manner, and in response to the prosecutor's comments.

In the record below, there will be a demonstration that there was three instances in the closing argument of the prosecutor in which he made references to transferred intent arguments to the jury, and that the court, in its original charge, made at least six references to the ability to transfer intent, and at least three references in a supplemental charge which was given after the jury was given -- asked a question about reasonable doubt.

In Mr. O'Neal's case, the prosecution made a very gruesome argument to the jury, and asked them to go back in the room, put the clothes on, walk around and think about what it would be like to hit at someone in the head with a crowbar, and that they should find these parties guilty.

If the jury really believed at that point the best evidence of guilt, Toney's, then there would have been no reason to come back and ask for any further instructions, because under the State's theory, the best theory the State had was that Mr. O'Neal killed Mr. Podborny with the help of his assistant, and that Mrs. Podborny had paid for that to be done, and that there

were other people that verified Mrs. O'Neal's -- Mrs. Podborny's story, but there was no one to tie -- O'Neal's issue was very substantially in doubt.

But the jury came back, and they asked for more instructions, and at that point they got this defective jury instruction again which basically, if the jury found that Mr. O'Neal was factually innocent, they had to find him guilty based on the intent of others that had been convicted in an earlier proceeding.

This case, if the burden is placed upon the State, would not affect that many cases. It would only affect the cases in an equipoise, and those are the cases that this Court has traditionally said are entitled to relief.

The person that has been deprived of his liberty has that liberty taken away in a trial, and we're saying that as a result of that constitutional violation that has occurred, and that there's grave doubts as to whether or not he should be in prison at all, or he should have obtained a new trial.

In the administration of criminal justice, the society has always borne that risk, and in these cases, society should still remain to bear that risk.

When we're dealing with the administration of justice, sometimes justice should go before the easy



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administration of justice, and in this case, it goes hand-in-hand, because if the Court were to place the burden upon this petitioner and other petitioners, it would extremely complicate the process and would make it a burden upon the district courts at all levels to determine what constitutes the Constitution.

Every individual should know what constitutes a constitutional violation, whether on direct review or collateral review. This Court --

QUESTION: Why would ruling in favor of the State here complicate the task of the district courts?

MR. WETTERER: Because every petitioner after this case would have to plead fact specifics in the record to demonstrate why this error had an impact, how it was substantially egregious, besides alleging his constitutional violation.

At that point, the court would then have to decide whether he sufficiently raised facts to warrant the issue of a show-cause order.

QUESTION: But isn't the Government going to be doing that on the other side if the burden of proof is placed otherwise?

MR. WETTERER: No, Your Honor. When the -- under the -- or under current practice in Federal courts, petitioner files a petition which just states the reasons



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for a constitutional violation. At that point, the court has to determine whether or not there is a substantial constitutional violation. If there is, he grants a show cause order, and the process starts. If he's --

QUESTION: There was some -- before Brecht, there was some form of harmless error applied in habeas corpus, but you say -- but that was never taken into consideration in the drafting of the petition.

MR. WETTERER: Unless it was an issue in which it was overwhelmingly a stupid issue raised by the petitioner and a claim that wouldn't affect the case, then the courts would not issue a show cause order.

But once a show cause order is issued, then they have to file a return of writ, and then the court looks at the record, and at that point, even before determining the merits of the claim, if the court has to look at the whole record, as Justice Stevens indicates, that's going to complicate the process to determine whether or not there's a constitutional error.

QUESTION: Why wouldn't the court first look at the merits of the constitutional claim, particularly if it's as difficult as you say to look into the harmless error aspect?

MR. WETTERER: Your Honor, it should, and that's what this Court said under Lockhart v. Fretwell, that

those are two separate issues, constitutional claim, and whether or not there's --

QUESTION: Yes, but you're trying to show that the district court's task will be tremendously complicated if we don't rule in your favor, and you're saying, because they're going to have to immediately look to see whether there was any effect of the alleged constitutional error. You're suggesting they would decide the harmless error question before the constitutional question. I just don't see why.

MR. WETTERER: It would become part and parcel of the constitutional claim.

QUESTION: It's still -- however we decide this, it's part and parcel of the constitutional question. Whether the burden of proving the Kotteakos standard was met is on your client or on the State, it's still part of the constitutional question.

MR. WETTERER: It's part of the determination of whether to grant relief, but if the court does not find a constitutional violation, regardless of reviewing the record, if he looks at the violation and says, this does not violate the Constitution, then he doesn't have to get to the constitutional issue.

QUESTION: He can do that under, however we rule in this case, it seems to me, the judge.

MR. WETTERER: We would respectfully disagree on that point, Your Honor.

QUESTION: Well, your point is that he has to make it as part of his petition, and they may not even call for a rule to show -- they may not issue a rule to show cause.

MR. WETTERER: Correct, Your Honor.

QUESTION: Whereas, if you take the other view, at least he can issue the rule to show cause, and then they bring in the harmless error inquiry.

MR. WETTERER: The Court can focus on just whether or not a constitutional claim has arisen at that point, and that makes it a lot simpler process.

QUESTION: And therefore whether it calls for a response from the other --

MR. WETTERER: Yes, Your Honor.

QUESTION: I suppose all you're saying is that the petitions will be bigger. I don't think the work of the court's any different.

MR. WETTERER: The work of the courts will be -- will have to deal with harmless error at all levels, and the work of the lower courts would be --

QUESTION: We're back where we're started. That's not true if the judge says there's no constitutional violation here, I'm not going to read this



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record, I don't have to.

MR. WETTERER: That's what we would like this Court to say. By placing the burden on the State if the court finds there's no constitutional violation, they don't have to address that issue at all. Only at the finding of a constitutional violation would they have to.

Under McCleskey and Stone, the Court has said the State has no final interest in a case in which there's been a constitutional violation, and therefore this burden is a necessary burden to be placed upon the State.

In those closed cases in which there are grave doubts, the Court is only looking at this particular constitutional violation. It may have other constitutional violations that it can't look at, and we're saying in those cases in which there's a grave doubt, the petitioner should be granted a new trial.

In this particular case, the prosecutor has informed me he's going to try Mr. O'Neal again, and Mr. O'Neal wants to be tried again. He wants to clear his name, and that's one of the things that habeas corpus does. It allows the petitioner, if he's able to pursue his claim, to get a new trial if the State grants him that new trial. It's up to the State at that point, Your Honor.

QUESTION: You mean your client affirmatively



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wants to be tried again as opposed to having the charges against him simply dismissed for failure to produce witnesses?

MR. WETTERER: That's what he's told me. He wants to have his name cleared by a trial.

QUESTION: I hope you --

(Laughter.)

MR. WETTERER: We were granted -- Your Honor, I was granted a writ by the district court. I asked my client at that point what he wanted to do. He wanted a new trial. He did not want to offer any deal to the State.

The State in this case has run three trials. There are three transcripts out there dealing with all the witnesses. In the third trial that arose 2 years after the original one, there was a conviction, too, on other charges, but the State has not indicated they're unable to try this man again.

In fact, they have the exhibits, except for the exhibits that were ruled unconstitutional by the district court. Some of those have been lost, but all the other -- the main witnesses in this case are still available for trial, and the State has indicated --

QUESTION: Do I understand that your main complaint is that the courts will say, never mind there



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was a constitutional violation, we won't bother with that, we'll see if you've proved a connection, if you haven't proved a connection, we'll never get to the constitutional violation, instead of the other way around? Is that in essence what your problem is?

MR. WETTERER: Basically, Your Honor, because the petitioner always shows a nexus by his constitutional claim with the case in order to grant the show cause order.

But now, what the court are saying is, well, how do I know there wasn't 10 other witnesses that came in, or how do I know this wasn't in the record, and petitioner has to plead the negative. He has to demonstrate that somehow this had some overwhelming effect, so he has to explain what the State's arguments would be, and that's a burden that the petitioner shouldn't have to bear.

And in this particular case, we're talking about a small class of individuals, if the Court decides the burden remains on the State, and those individuals traditionally have been granted relief by this Court, because this Court has determined that the final -- that there is a premium to be paid by the State when there's been no fair trial and the finality and determination of guilt or innocence is undermined by a constitutional violation that's been proven, and in Mr. O'Neal's case, he

should have that opportunity for a new trial.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wetterer.

The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)



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# *CERTIFICATION*

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

*ROBERT O'NEAL Petitioner v. FRED McANINCH, WARDEN*

*CASE NO.:93-7407*

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

BY Ann Marie Federico

(REPORTER)