OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LLOYD SCHLUP, Petitioner v. PAUL K. DELO, SUPERINTENDENT POTOSI CORRECTIONAL CENTER

CASE NO: No. 93-7901

PLACE: Washington, D.C.

DATE: Monday, October 3, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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LLOYD SCHLUP, :

Petitioner :

v. : No. 93-7901

PAUL K. DELO, SUPERINTENDENT :

POTOSI CORRECTIONAL CENTER :

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Washington, D.C.

Monday, October 3, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:52 a.m.

APPEARANCES:

SEAN D. O'BRIEN ESQ., Kansas City, Missouri; on behalf of the Petitioner.

JEREMIAH W. NIXON, ESQ., Attorney General of Missouri, Jefferson City, Missouri; on behalf of the Respondent.

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P R O C E E D I N G S

(10:52 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-7901, Lloyd Schlup v. Paul Delo.

Mr. O'Brien.

ORAL ARGUMENT OF SEAN D. O'BRIEN

ON BEHALF OF THE PETITIONER

MR. O'BRIEN: Mr. Chief Justice, may it please the Court:

The issues in this case involve the standard for determining a colorable claim that the wrong person has been convicted of a crime. Mr. Schlup's case is an extraordinary case in which the system of justice broke down and produced a fundamental miscarriage of justice.

The facts of this case reveal the need for the miscarriage of justice safety valve. It is our position that a standard that does not reach Mr. Schlup's case is incapable of protecting the innocent. There are certain facts, objective facts, in this case that both sides must accept, have accepted since the beginning.

The victim in this case, Arthur Dade, was stabbed in the Missouri State Penitentiary in a housing unit shortly after all of the prisoners were released to lunch. A surveillance video shows that Mr. Schlup was the first inmate to enter the dining room, which is 150 yards,

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three floors, and at least one security checkpoint away from the scene of the crime, and a minute and 5 seconds after Mr. Schlup enters the dining room, the guards are seen responding to a radio distress call.

Now, at trial, in order to prove Mr. Schlup's guilt, the State had to do two things. First, it had to show a substantial delay between the homicide and the radio distress call, and the second thing it had to show was that Mr. Schlup raced past everyone else to cut in line, the head of the line for lunch, and there is now strong, uncontradicted evidence that now rebuts both of those propositions, and this evidence is also corroborated by other direct, circumstantial, and scientific evidence that Mr. Schlup was not involved in the crime.

QUESTION: What evidence was introduced at trial against Mr. Schlup?

MR. O'BRIEN: The evidence at trial was two identification witnesses, a officer who was the one opening the cell block for lunch, and another one on the uppermost tier in the housing unit. That was the only direct evidence, and they both said that Mr. Schlup committed the crime.

QUESTION: Well, what was the other -- on the basis of their observations?

MR. O'BRIEN: Yes. Yes.

QUESTION: They said that they had seen him stab the person?

MR. O'BRIEN: Correct. They said that they saw Mr. Schlup hold the victim while another inmate, Robert O'Neal, stabbed him in the chest, and we have eye witnesses to the crime who say that that person was Randy Jordan who held the victim, while Robert O'Neal stabbed him in the chest.

QUESTION: Well, wasn't there some evidence that, I think it was, Eberle called the guards out of the cafeteria, or at least told Peoples to do that, some 10 to 15 minutes after the disturbance? At least, can't you make that inference from the evidence?

MR. O'BRIEN: You can make that inference from the evidence, but it would be a false assumption. The false assumption is that Eberle was the only person who could have made that call because the radio was the only way out of the housing unit, and in fact there was a telephone that has a speed dial number keyed in right to the control center within 15 feet of where the victim collapsed.

QUESTION: Well, the fact that someone else could have made the call doesn't mean that Eberle didn't.

MR. O'BRIEN: That's true, but the question here, Your Honor, is who made the first call? Was

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Eberle's call transmitted before Mr. Schlup, you know, or after Mr. Schlup got into the dining room, and actually in this case they built a delay into Eberle even getting into the housing unit to make that call, but my point, Your Honor, is there was ample evidence to show several sources of the guards being notified that --

QUESTION: This sounds very much like the kind of questions juries resolve every day. You introduce this evidence at a trial, the defense introduces evidence showing perhaps a mistake, and you submit it to a jury.

MR. O'BRIEN: Your Honor, in this case there was key evidence withheld from the jury that completely stripped the videotape of its probative value, and that was the evidence of a witness who said that he picked up the telephone and called base within 30 seconds of Arthur Dade hitting the ground, and if that's so, then Mr. Schlup was in the dining room at the time.

QUESTION: You say this was withheld from the jury?

MR. O'BRIEN: It was not presented to the jury.

QUESTION: Oh. Why not?

MR. O'BRIEN: Pardon me?

QUESTION: Why not?

MR. O'BRIEN: The defense lawyer could have, had he done a reasonable investigation, found this evidence,

and I think there's a question of whether or not that fact was disclosed to the defense attorney. That's a question of fact that exists in this case that has not been resolved.

QUESTION: Well, are you saying defense counsel was incompetent, that he didn't have proper assistance of counsel?

MR. O'BRIEN: That is one of the constitutional claims that underlies the showing of innocence. This is a -- excuse me.

QUESTION: Was that claim made earlier?

MR. O'BRIEN: Yes, Your Honor.

QUESTION: It was made in a prior habeas?

MR. O'BRIEN: It was made in a prior habeas with absolutely --

QUESTION: And you want to make it again?

MR. O'BRIEN: Yes, this time --

QUESTION: And if rejected this time, you would be able to make it again, if you come up with new evidence of incompetence, still. I assume that's your position, right?

MR. O'BRIEN: Your Honor, our position is that we can now prove that Mr. Schlup is innocent under --

QUESTION: But if you fail this time, as Justice Scalia says, if you come up with some more new statements

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or newly discovered witnesses, you say you could make the claim again?

MR. O'BRIEN: Your Honor --

QUESTION: Do you or do you not?

MR. O'BRIEN: I would make -- I would continue to make the claim because that's my role as an advocate for the client, but as a practical matter, Your Honor, at this point I think we have as much probative evidence of Mr. Schlup's innocence as we need to meet the standard that this Court --

QUESTION: Well, what is -- do you want to show ineffective assistance of counsel? Is that the constitutional issue you want to argue if you meet the threshold of the exception that you're arguing about?

MR. O'BRIEN: That is one, Your Honor. The other is Brady v. Maryland.

QUESTION: Well, so far as ineffective assistance, that would almost put us in the position of advisory, wouldn't it, because the circuit has already said, we have looked at this issue and we are not going to change our mind; we have found that there was effective assistance of counsel.

MR. O'BRIEN: Your Honor, I believe that -- to me, that statement in the court below seems to be dicta, because the court said in another case in its opinion that

we might get a different result under a different standard. The underlying facts have never been resolved in the district court because there was never any evidence introduced in the first habeas corpus, and in the Eighth Circuit --

QUESTION: May I interrupt you, because there's another point I think we should be clear on. The Brady claim was not determined below, isn't that correct?

MR. O'BRIEN: That's correct, Your Honor.

QUESTION: Even if we assume Strickland was, Brady was not.

MR. O'BRIEN: Correct, Your Honor.

QUESTION: Okay.

MR. O'BRIEN: Correct. But it was --

QUESTION: It was --

QUESTION: -- very question, and that is, are you recognizing that the actual innocence claim is a door-opener so that you must have behind it some constitutional claim, the Brady claim ineffective, or are you making the argument that newly discovered evidence of innocence of the crime is enough, without any more, to make that a constitutional violation?

MR. O'BRIEN: Your Honor, in this case, Mr. Schlup's innocence functions as a door opener to get into court.

QUESTION: Fine. I just wanted to know what your position is.

QUESTION: Well, on that point, then, for a successive habeas claim, normally we require the petitioner to show cause and prejudice, do we not, to make a successive habeas claim?

MR. O'BRIEN: Normally, the Court does require that, Your Honor.

QUESTION: All right, and you are saying that this is a successive claim, but shouldn't the standard employed be something greater than the cause-and-prejudice requirement, otherwise the two just are subsumed together?

MR. O'BRIEN: That's correct. We're not asking the Court to do away with cause under the cause prejudice test and, in fact, every time this Court refers to the cause prejudice standard, it also reserves the possibility of the fundamental miscarriage of justice exception as a recognition that there will be occasional cases that the cause prejudice test does not reach, but --

QUESTION: And as to that, it ought to be something, some standard higher than merely cause and prejudice, I would think.

MR. O'BRIEN: That's correct, Your Honor, and the standard that we are asking to apply, the standard that this Court applies, is Kuhlmann v. Wilson. We are --

QUESTION: Well, that's part of the problem, because the Kuhlmann standard may actually be even a lesser standard than cause and prejudice. I think that's not clear at all.

MR. O'BRIEN: Your Honor, I believe it's clear from the Court's jurisprudence that the Kuhlmann standard is greater than the cause-and-prejudice standard, and I think McCleskey is a good example of that. The Kuhlmann standard is really a truth-oriented standard. We are trying to determine the equity of innocence and whether or not it exists in the case.

The cause-and-prejudice standard is oriented to the adversarial system and whether it's produced an appropriate result, but McCleskey is a good example of a person who could probably show prejudice had he been able to show cause, but he could definitely not meet the Kuhlmann standard.

QUESTION: What we're trying to find out here is which of two or perhaps three standards apply to this door-opener, as you refer to it and as Justice Ginsburg, the Kuhlmann standard, perhaps Murray v. Carrier, or perhaps Sawyer, all of which have stated the thing in somewhat different words. Isn't that correct?

MR. O'BRIEN: That's correct, Your Honor, except that when the Sawyer standard stated -- when the Sawyer

decision stated the miscarriage-of-justice standard for death-penalty people, guilty people who were challenging a sentence, it specifically stated that that situation is distinctly different than an innocent person coming before the court asking for access to a court's enforcement of the Constitution. In that case, the Kuhlmann standard was praised as a standard that is easy to apply, and indeed --

QUESTION: The Eighth Circuit held here that the Sawyer standard applied where the challenge was to guilt as well as where the challenge is to sentence, and that's the question you brought before us for review.

MR. O'BRIEN: Correct.

QUESTION: We should have two different standards, one for guilt and one for sentence, or whether Sawyer should be applied across the board.

MR. O'BRIEN: That's correct, Your Honor, and I believe there are two different standards because there are two different situations.

QUESTION: Well, Mr. O'Brien, didn't Sawyer apply its standard to both guilt and penalty phase challenges in that case?

MR. O'BRIEN: Your Honor --

QUESTION: At least, the court's opinion said it did.

MR. O'BRIEN: It did apply it to a guilt phase

standard, but not an innocence argument. I believe there's a fundamental distinction, because Sawyer's innocence, even if he was -- even if it was true, as the Court observed, still left him guilty of a capital crime, and so he was not innocent in the Sawyer sense of the word. He was not innocent of the death penalty, he was not innocent of the crime.

I believe there's also a world of difference between innocence where you've got the wrong person, and innocence where you have the right person but the wrong crime, and this is innocence where we have the wrong person convicted of this crime, and we have introduced ample evidence --

QUESTION: But you're not making a so-called Herrera-type challenge here. You're just trying to use this as a door-opener to make some other constitutional challenge.

MR. O'BRIEN: That's correct, Your Honor, because there is ample evidence that a reasonable attorney could have found -- there were four or five people who were interviewed by corrections officers who said that they saw the murder, and this is not based on what counsel --

QUESTION: Of course, if we disagree with you that it's dictum in the circuit court's opinion, the

ineffective assistance of counsel claim has been litigated and resolved, is that not correct?

MR. O'BRIEN: If you disagree with me, Your Honor, I believe that's probably correct. I believe that --

QUESTION: Incidentally, and was your Brady claim presented to the circuit court?

MR. O'BRIEN: Your Honor, the Brady claim was not presented in the district court. The briefing in the circuit court focused mainly on the procedural gateway argument, and --

QUESTION: My question is, was the Brady claim presented to the circuit court?

MR. O'BRIEN: No, Your Honor, and I don't recall if the ineffective counsel claim was presented. The majority opinion was responding more to the dissenting opinion, and that was kind of a process of the expedited nature of the proceedings. This case was decided in the Eighth Circuit under execution warrant with simultaneous briefs filed, and then the major bases for the Eighth Circuit's ruling on the merits, or discussion of the merits, were depositions that were filed at oral argument just a few days before the execution warrant was scheduled to be carried out.

QUESTION: Well, I don't see -- I suppose your

argument also is that you wouldn't have to present the Brady claim in order, so long as it's still alive, to challenge the prior question of the district court's using the wrong gateway?

MR. O'BRIEN: That's correct. This is -- the issues in this case involve the gateway.

QUESTION: If it used the wrong gateway, then it would be sent back down for proper consideration of the Brady claim.

MR. O'BRIEN: That's exactly correct, Your Honor, yes.

QUESTION: So the Brady claim was still alive, but you didn't have to argue it in the court of appeals.

MR. O'BRIEN: Exactly. Exactly, and we were --

QUESTION: Mr. O'Brien, going to the gateway standard, do you read Kuhlmann and Carrier as establishing or affirming equivalent tests? Kuhlmann speaks of fair probability of reasonable doubt, Carrier speaks of probability of innocence. Are those two cases referring to the same standard?

MR. O'BRIEN: I believe those are equivalent standards. I think that is the same standard, Your Honor, and in --

QUESTION: Is there a difference, at least as -- taking the Carrier formulation, is there a

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difference between that and what might rise to the level of a Herrera claim?

MR. O'BRIEN: Herrera is -- yes. I'm not sure. I mean, I hope, as Justice O'Connor said in Herrera, hopefully the Court will never have to address the Herrera claim, because I think if the case gets this far and there is still compelling evidence of innocence, such as in this case, then it's likely that something, that these constitutional rights that exist to ensure the reliability of the result probably were violated somewhere down the line.

There's --

QUESTION: But in any case, you'll settle for the Carrier formulation?

MR. O'BRIEN: I would settle for the Carrier formulation, Your Honor.

QUESTION: Isn't there going to be some awkwardness if we have two different standards, one for guilt and one for sentence? In Sawyer, I think arson was both an aggravating circumstance and an element of the crime, so would you say that, so far as there was an aggravating circumstance, you would analyze it under the Sawyer standard but, in so far as an element of the crime, you would analyze the same facts under the Kuhlmann standard?

MR. O'BRIEN: Mr. Chief Justice, there is a phrase in your opinion in Sawyer that indicates that may be so, but I disagree.

I believe the fundamental distinction between an innocent person and a person who is convicted of the wrong crime, or a lesser crime, and the first question in that second situation you hypothesized is whether or not that is a fundamental miscarriage of justice at all.

The circuits below are split on that issue of whether or not a sentencing claim in a noncapital case or a lesser included offense innocence claim is a miscarriage of justice.

QUESTION: But no matter how you come out, it seems to me, there is going to be an unavoidable complication if you have two standards, one for guilt and one for sentence, in a case like Sawyer, where the proof of arson was both an aggravating circumstance and an element of a crime.

MR. O'BRIEN: As I said, Your Honor, I believe that for Mr. Schlup's situation I think that it would not be too confusing, or too difficult, and there's always a cost involved in the exercise of habeas corpus jurisdiction. The question is whether the cost is worth it, and this Court has said consistently that in the context of an innocent person, and whenever it has said

that, it's been talking about someone convicted of the wrong crime, then innocence becomes the ultimate equity.

QUESTION: Yes, but here we're talking about what standard are we going to require to prove innocence. We're not talking about whether innocence shall be provable, but what standard, and what I'm suggesting is that your insistence on two different standards is going to complicate things.

MR. O'BRIEN: Your Honor, I believe innocence of the crime and innocence of the sentence are two situations that require two standards, and this Court does not apply one uniform standard across the board whenever it devises a standard for harmless error, or prejudice, or in some other context. It looks at the interests involved and the equities involved in exercising habeas corpus jurisprudence -- or jurisdiction, rather, and so it is not inappropriate to have two standards for this, because many --

QUESTION: Mr. O'Brien, whichever standard we use of the two, effectively there is no finality. We're saying whatever standard you must use you must always, even if it's the 150th habeas -- you're saying the district court must always conduct a merits inquiry to determine whether there's a probability of innocence or whatever other standard you want to use, right?

MR. O'BRIEN: Your Honor --

QUESTION: That's contrary to what the common law used to be. I mean, we used to have a thing called finality. You've had your shot at proving your innocence. You've been found guilty. Of course you come in and say you're innocent, but we've had a trial.

MR. O'BRIEN: Your Honor, I disagree that having a miscarriage-of-justice standard will always frustrate finality. In this case -- and this Court applies many standards, and I believe that's where in Kuhlmann the term "colorable claim" comes in.

QUESTION: I don't understand how you can tell whether the standard is met without having a hearing on the facts of guilt or innocence. Then you decide whether it's been proved properly or not. But you're reopening the whole merits thing.

Now, I can see that, in the first habeas, but you're saying, thereafter, as many times as it comes forward, the judge has to go through the process of having a hearing to decide whether, indeed, whatever standard you pick has been met.

MR. O'BRIEN: Your Honor, claims of innocence this strong are very rare, and I believe the circumstances that you describe would be very rare.

QUESTION: Regardless of how strong it is, you

can't tell how strong it is until you have the hearing.

MR. O'BRIEN: There's a pleading standard, that I believe that the courts are capable of looking at pleadings and attachments and affidavits, as we did below, attached to the pleadings, that would allow the court to determine, on the basis of the pleading standard, whether or not this was a colorable claim that should be allowed to go forward.

QUESTION: They do it in motions, courts do it in motions for a new trial all the time.

MR. O'BRIEN: Yes, they do and, Your Honor, in this case, I believe in your observation in Sawyer you stated that in order to satisfy the Kuhlmann test a prisoner, in addition to the habeas, would have to tender to the court reliable, noncumulative, and admissible evidence, which we did with our petition for habeas corpus.

And also, as this Court observed in Blackledge v. Allison, that the court need not move forward with the hearing unless there are factual assertions and not just allegations, there's specific evidence, the evidence is --

QUESTION: Mr. O'Brien, can I ask you a factual question that I don't quite understand --

MR. O'BRIEN: Yes, Your Honor

QUESTION: -- in the record? On page 33 of the

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Joint Appendix, there's a quote that's referred to in the briefs and so forth, where John Green states that he stepped out of the office and he heard Flowers calling for officers, "couldn't get nobody so he told me to call base to notify them of the fight and that's what I did." You're familiar with that quote, I suppose?

MR. O'BRIEN: Yes, Your Honor.

QUESTION: Is that quote from his present affidavit, or is that from the interview with, the pretrial interview by the correction officials?

MR. O'BRIEN: That quote is from a pretrial interview by the corrections officials about 3 days after the crime.

QUESTION: And was that quote -- he did not testify at the trial?

MR. O'BRIEN: Correct.

QUESTION: So that quote was not made a part of the record?

MR. O'BRIEN: Exactly.

QUESTION: Now, was that quote made available to his counsel? That's -- I can't quite figure it out.

MR. O'BRIEN: The record is open to that, and the counsel -- outside the record, the counsel cannot recall that quote being made available. It surfaced in the habeas litigation below, and the prosecution, or

Mr. Nixon's office, submitted a response to our petition and attached Exhibit T. This is response Exhibit T, where the statement comes from.

The existence of Green was known prior to the second petition, but no one had interviewed him or introduced this statement.

QUESTION: No one except the corrections officers?

MR. O'BRIEN: Except the corrections officer, that's correct.

QUESTION: And then one other factual question. Is there any dispute about the fact that there was indeed a telephone accessible as he describes it?

MR. O'BRIEN: None whatsoever, and in fact control center officers say that it is not unusual at all that inmates would use that phone and make calls, and there's a speed dial process that is wired into one of two different control centers.

QUESTION: And one other question, then I'll be through. Was Green in some different status from most inmates? Did he have some kind of responsibilities?

MR. O'BRIEN: Yes, Your Honor. He was a clerk, which is like a trustee position, and so he had the run of the housing unit and worked in the office, did not have to spend all of his time locked down in his cell.

QUESTION: And your opponent contends in effect that he's lying in this particular statement.

MR. O'BRIEN: Correct, Your Honor. It is necessary that, in order for Mr. Schlup to be guilty, that you say that Mr. Green is lying.

Mr. Green made this statement before anybody knew of the existence of a videotape, or knew of the -- knew the impact of that call and, as a matter of fact, in the brief we point out that Mr. Green has in fact passed a polygraph test when asked whether or not he saw the crime and whether he saw whether Schlup was involved, and whether or not he made the call, as he was ordered to do so.

It's also consistent --

QUESTION: Who was Mr. Green?

MR. O'BRIEN: Mr. Green is the unit clerk in the housing unit who is the one who picked up the telephone and called the base when Roger Flowers ordered him to do so, and Mr. Flowers in a couple of points in this --

QUESTION: You say that. They disagree with that fact. They say he did not, because if he called them, obviously this fellow couldn't have been at the head of the line.

MR. O'BRIEN: That's correct, and I believe -- they have not introduced any evidence to show that

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Mr. Green did not make that call.

QUESTION: Have you introduced evidence as to who received that call and what that person says?

MR. O'BRIEN: We have in the court below filed a Rule 60(b) motion with evidence that we discovered during executive clemency proceedings, and there is a corrections officer named Kerrs who received a call. She does not recall the identity of the person who made the call, but she could hear the sounds of the confusion and the shouting going on in the background, and she believes that call came in contemporaneously with the homicide, but she does not recall the identity of the caller.

But that, plus Roger Flowers' testimony that before he went in to break up the fight, he turned to someone and said, call base, or get help, or words to that effect, and Mr. Green was the person whose obligation it was, whose job it was to respond to that call.

QUESTION: Do you agree that it was Peoples that sent out the alarm that resulted in the police leaving the cafeteria?

MR. O'BRIEN: No, Your Honor, I do not.

QUESTION: That's the State's position?

MR. O'BRIEN: That is the State's position, and there is an affi -- I believe, is a deposition to that effect, but their --

QUESTION: Well, what is your theory as to who could call the police from the cafeteria? Did Green have that authority?

MR. O'BRIEN: Anyone with a telephone or a radio could make that call.

QUESTION: Direct the police to leave?

MR. O'BRIEN: Yes. I mean, actually it would have to be someone from the control center, but there are two control centers. There's a housing unit control center, and there's the main penitentiary control center, and Officer Peoples was operating the housing unit control center, and Officer Kerr was operating the main penitentiary control center. She received a call, and I have no doubt that Peoples also received a call, or I assume that he did. I don't know why he would not be telling the truth.

But the point is, was that the first call to be broadcast, and there's another fact that --

QUESTION: No, it doesn't seem to me that that's the point. The point is, what is the first call to the police in the cafeteria?

MR. O'BRIEN: Correct, and was it Kerr or was it People?

But the other fact that came up in the depositions that were filed after the opinion below is,

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when Officer Flowers in his deposition was asked when it was that he met Captain Eberle, who is the source of the radio call the prosecution relies upon, he said it was after Arthur Dade had been carried out of the housing unit on a stretcher --

QUESTION: You say that you were relying on depositions that were not available to the Eighth Circuit?

MR. O'BRIEN: No, Your Honor. These depositions were filed in the Eighth Circuit after the oral argument, and they're the depositions that the Eighth Circuit relied upon in its discussion.

QUESTION: So it had them at the time it prepared its opinion?

MR. O'BRIEN: Yes, it did. Yes, it did, but the salient point that I believe was overlooked was Captain Eberle, according to Sergeant Flowers, arrived in the housing unit after Arthur Dade had been carried out on a stretcher, and the videotape shows that event took place 30 seconds after the guards ran out in response to the radio call.

QUESTION: Is this the sort of arguments that Federal courts all over the country are supposed to hear, you know, recapitulating the sort of evidence that is ordinarily submitted to the jury on guilt or innocence in every one of these claims of actual innocence?

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MR. O'BRIEN: Your Honor --

QUESTION: Who called who from the control tower? This is the kind of thing that is supposed to be brought out at trial.

MR. O'BRIEN: It should have been, and the trial should be the main event, and in this case there were constitutional violations that we're trying to prove that prevented the trial from being the main event.

And as Justice O'Connor pointed out in Strickland v. Washington, where you have that situation where the trial is not the main event because of a constitutional violation, then there is far less reason to defer to the findings of the jury.

Because we're not just talking about -- the videotape-eye view was collaboration of ample other evidence, including the fact that one of the eye witnesses, it was unknown at trial, is a three-time convicted felon. It was assumed, I think wrongly, by everyone in the case that just because a person is a corrections officer, that they're a police officer and they have no felony record, but in this case that was not a correct assumption.

QUESTION: The ambivalence in the theory of your case, it seems to me, or the tension, is that you tell us that this is a most unusual case with compelling evidence

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of innocence, and yet you want us to adopt the lowest possible, or one of the lowest possible standards, colorable showing of innocence, and it seems to me if we adopt colorable showing of innocence then, as the Chief Justice indicates, this kind of inquiry, the most intrusive of all inquiries, relitigating the facts, is going to have to be done in every case.

MR. O'BRIEN: Your Honor, the probability of innocence, I believe, is what the law is and what it should be, because a standard higher than that will not reach other innocent people, but Mr. Schlup's position is that we could prevail under any standard that is less demanding than Jackson v. Virginia.

QUESTION: You didn't prevail under clear and convincing in the circuit.

MR. O'BRIEN: Your Honor, the circuit -- the circuit court looked only at Mr. Schlup's evidence and really did not consider -- there's -- the discussion regarding the State's evidence in this case is simply that it's --

QUESTION: Well, you didn't prevail in the circuit under the clear-and-convincing standard, did you?

MR. O'BRIEN: Not as applied in the circuit, Your Honor.

QUESTION: Aren't you claiming that they didn't

apply it, that in fact they applied Jackson?

MR. O'BRIEN: Correct.

QUESTION: Thank you, Mr. O'Brien.

General Nixon, we'll hear from you.

ORAL ARGUMENT OF JEREMIAH W. NIXON

ON BEHALF OF THE RESPONDENT

GENERAL NIXON: Mr. Chief Justice, and may it please the Court:

Lloyd Schlup is not innocent of this murder by any standard, but the standard that this Court should apply is the Sawyer standard. The clear-and-convincing standard is appropriate, especially in cases such as this, where you have repackaged and redeveloped evidence that comes at the eleventh hour, continues to flow in as the process moves through the appellate courts, 8, 9, 10 years later, new evidence, people changing their testimony, repackaged evidence. This is the type of case that screams out --

QUESTION: When did this crime take place, General Nixon?

GENERAL NIXON: This crime took place in February of 1984.

QUESTION: More than 10 years ago.

GENERAL NIXON: Yes.

QUESTION: You would agree, wouldn't you, that

if Green is telling the truth, and if the officer -- the new officer is telling the truth, then he is innocent?

GENERAL NIXON: No, Your Honor, I would not.

QUESTION: You would not?

GENERAL NIXON: If Green is -- if Green --

QUESTION: The officer who stopped him and frisked Schlup on the way to the dining hall, if he's telling the truth the guy has to be innocent.

GENERAL NIXON: No, Your Honor, I would not. If Green -- Your Honor, if we believe Green's new story, which is in direct contravention to what he testified in trial at Stewart's trial, as well as his earlier statements, if you believe that he radioed in immediately upon the time of the body falling --

QUESTION: Right.

GENERAL NIXON: -- then you look at the videotape, and there is only 26 seconds between the time that that call was supposedly made by Green and the time that O'Neal comes into the cafeteria downstairs, and all of the evidence in this case shows it's impossible for O'Neal, the admitted murderer, who claims self-defense, to have stabbed, to have run down, as the uncontroverted evidence says, broken a window, thrown the knife out the window, come back, washed his hands, with other witnesses, including other corrections officers seeing him wash the

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hands, and go down to the cafeteria, if you hold Green's present statement as controlling, the murder never occurred.

QUESTION: I'm saying as to when he made the phone call, not when the alarm went out.

GENERAL NIXON: They are claiming, Your Honor, that it is contemporaneous, that somehow this phone call --

QUESTION: You're saying it has to be --

GENERAL NIXON: -- is equivalent to a -- excuse me, I'm sorry.

QUESTION: You're saying it has to be more than 26 seconds. It could not be contemporaneous. If it was within a minute, say, rather than either contemporaneous or 5 minutes later, then the man has to be innocent.

GENERAL NIXON: Your Honor, in no situation does this man have to be innocent, because the facts in this case are overwhelming.

QUESTION: What about Officer Flaherty's testimony?

GENERAL NIXON: Officer Faherty --

QUESTION: Faherty, whatever his name is.

GENERAL NIXON: Excuse me. Officer Faherty's changed and redeveloped testimony --

QUESTION: No, but supposing what he's saying

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now is true. Wouldn't the man have to be innocent?

GENERAL NIXON: No. Because Officer Faherty's time -- first of all, Officer Faherty is not a witness to the murder.

QUESTION: Well, I understand.

GENERAL NIXON: Maylee and Flowers were. Faherty is merely testifying as to the amount of time spent near what's called the T-3 gate.

QUESTION: Right.

GENERAL NIXON: He has broadened that time from 10 to 15 seconds, which he testified at trial, to now 4 to 5 minutes total for a period of time down there. Regardless of what his testimony is, that doesn't tie to anything else. It sits there by itself, and so in and of itself does not provide clear-and-convincing evidence. Obviously, it's probative and interesting, but no, it does not provide clear-and-convincing evidence in any shape or form in this particular case.

QUESTION: But in Green's case, I take it your argument is not that the petitioner must be innocent if Green is telling the truth, but that Green couldn't be telling the truth because what he says is inconsistent with other evidence, isn't that your argument?

GENERAL NIXON: Yes --

QUESTION: Okay.

GENERAL NIXON: -- Justice Souter.

QUESTION: So if the evidence is going to be evaluated, and it were accepted, if Green were accepted and your argument for impossibility fails in the mind of the fact-finder, then the conclusion would follow that the petitioner was innocent?

GENERAL NIXON: Yes, Your Honor, that is a possible analysis of it. However, it is important to note that, as I indicated before, if you believe Green's present third version testimony, the murder by O'Neal could not even have occurred, and Green has testified in front of a jury.

QUESTION: Oh, no, I think I understand your argument. I wanted to make sure that I did understand it.

GENERAL NIXON: Yes.

QUESTION: Is it your theory of the case that time may have elapsed between the first notice to the base of a disturbance and the time that Peoples called for help? What is your theory as to what prompted the guards to leave the cafeteria?

GENERAL NIXON: The guards were prompted to leave the cafeteria by a call.

QUESTION: What caused that?

GENERAL NIXON: The radio call. They received a radio call.

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QUESTION: From whom?

GENERAL NIXON: We would --

QUESTION: I mean, your theory of the case?

GENERAL NIXON: Peoples, from the base.

QUESTION: All right.

GENERAL NIXON: Under our theory --

QUESTION: And had he in turn received calls from, say, perhaps Green? Is that possible, or not?

GENERAL NIXON: Certainly it's possible. He may or may not have received calls -- this -- this -- the new evidence that's just been raised in a 60(b) motion about somebody else and some other base getting a call, too, may have happened.

QUESTION: Was Green on a frequency that was different from the one that Peoples used to communicate to the guards in the cafeteria?

GENERAL NIXON: There's no evidence as to what frequency. The evidence subsequent would show that the method of communication by Green was a phone, and not a radio, and I think that is an important and essential point to what is going on here, is that even under Green's new testimony, he went back to this little office on top and made a phone call --

QUESTION: To the base.

GENERAL NIXON: -- to base. He's not sure what

base. Earlier, it was the base where Peoples was. Now, they say it's the base, some other base where somebody else may have heard that call. The 60(b) motion talks about a different person receiving that call.

QUESTION: And there may have been a substantial delay between the time that call was made and the time the alert went out from base to the guards in the cafeteria? That's your theory?

GENERAL NIXON: No, Your Honor. I would say that our theory is that the delay occurred when -- in the time prior to that, that what happened in this situation as the two eye witnesses see it --

QUESTION: Well, pardon me, is it your theory that the first time the base received any notice of an incident, that they called the guards in the cafeteria?

GENERAL NIXON: That was the deposition testimony of Peoples, who is very clear in saying that he received the radio call from Eberle, who had come up the steps, and that was the basis of his call.

That was the time that Peoples made the call that went out, the 1050, that caused the reaction that was seen down in the cafeteria, that it was Peoples' call some minutes after Dade was actually stabbed, and not, if it even occurred, the Green call, which went down to -- I should note, Justice Kennedy, another matter of import in

this is that at the PCR hearing prior to this, the defense counsel was -- an affidavit of the defense counsel was presented.

He admitted having access to all of the investigation materials, all 100 interviews that we're talking about here, the original statements of Green, the statements that talk about this. Trial counsel had all of those, and made the decisions at trial not to bring that evidence forward in the fashion that he thought was appropriate.

He had -- and I think it's an essential part of this when you talk about moving through a gateway to an ineffective claim here. This is a counsel that had 100 interviews that they admit that they reviewed. They took 38 depositions. Defense counsel is the one who discovered the so-called videotape that's out there, and effectively, aggressively defended this case. They brought inmates into the courtroom to testify about how the timing of Mr. Schlup --

QUESTION: Did he explain why he didn't put in this statement by Green if he had access to it?

GENERAL NIXON: No, he did not.

QUESTION: Do we know that he read that statement, one way or another?

GENERAL NIXON: The PCR motion and the statement

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by the counsel at that PCR motion would indicate that he had in his possession and "reviewed" all --

QUESTION: Well, you say there are hundreds of depositions, a large volume of material. I don't know, maybe not hundreds, but they interviewed a large number of inmates, right?

GENERAL NIXON: One hundred.

QUESTION: And they wrote down what they said in those interviews?

GENERAL NIXON: One hundred individuals. It was taped.

QUESTION: I see.

GENERAL NIXON: They were all taped. Those transcripts were then turned over.

QUESTION: And he saw all that material, but you don't know whether he particularly focused on this statement by Green, do you?

GENERAL NIXON: No, I do not know whether he did.

QUESTION: He didn't comment one way or another?

GENERAL NIXON: No, he did indicate, and the trial court found --

QUESTION: That he had everything available.

GENERAL NIXON: -- that he had it all.

QUESTION: Yes.

GENERAL NIXON: That it was all there, and it

should be noted also that this was the third of the cases to be tried in a trilogy, and they had access to the trial transcripts of the first two trials.

This is not a case in which there was not a great deal of discovery done prior to trial. Defense counsel had all of this evidence and information in his hands.

QUESTION: Let me ask your advice on one, or your help on one other word that I don't understand in the record. When Schlup was interviewed before he knew there was a videotape and so forth, he said he was the first one in the dining room, and Officer Basinger said -- Hemeyer said, whoa, be careful. Then the other officer said, don't be parachuting on us.

Do you remember that in the record? What does the word parachuting mean? That's a new one on me.

GENERAL NIXON: I'm not familiar with all the different jargon of the correctional officers in prison, Your Honor. I just don't know what parachuting us means.

QUESTION: He just, apparently -- what I infer from it, I hope you'll correct me if I'm wrong, is that Basinger thought that was so improbable that he could have been at the head of the line, that he said, don't be parachuting on us. That's the inference I draw. Do you think I'm wrong?

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GENERAL NIXON: Your Honor, I don't know what the term means, and you're entitled to draw the inference you think is most appropriate.

QUESTION: General Nixon, what is the status of the Missouri clemency proceeding?

GENERAL NIXON: In this situation, Justice Ginsburg, a board of inquiry has been appointed, taken evidence, and is in the process of taking more evidence to present to the Governor of the State of Missouri.

QUESTION: So that's ongoing right now? It's the same status it was in when we granted cert?

GENERAL NIXON: Same status, yes, Justice. Whether -- they may have taken more information in since certiorari was granted by this Court, but the panel, it's a three-judge panel, three retired judges from -- State court judges, taking information to make a recommendation to the Governor.

QUESTION: That hasn't been stayed in any way because of this grant of cert?

GENERAL NIXON: There has been no stay in that whatsoever. That's a nonjudicial proceeding. It is the Governor reaching out to attempt to get more information in this situation, and asking three retired judges to review this type of things, evidence, affidavits and other matters that are coming forward daily.

QUESTION: And then my other question is, is it your position that the discussion of how strong this new evidence is is essentially academic because there's nothing behind the gate, and I'd like you to address that.

Assuming that you lose on the standard, is it your position that there's nothing there, so that if there's nothing there, there's no reason to find out -- if there's nothing behind the door, it doesn't matter whether the door is open or closed?

GENERAL NIXON: Yes, Your Honor, we agree wholeheartedly that it is a gate that's tough to get through. It is a big gate, but behind the gate there are no claims.

For example, the question was asked earlier by Justice Souter concerning the claim at the district court, and I would like to read just one sentence from the district court's finding where, contrary to appellant's counsel, the district court -- and I quote, "Thus, nothing in the record supports petitioner's contention that the exculpatory evidence petitioner relies on even exists. Careful review of the interview transcript submitted by petitioner does not alter this conclusion."

The Brady claim --

QUESTION: Well, that may be right or it may be wrong, but that isn't what the appeal was concerned with,

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was it? I mean, that issue was never litigated on appeal. The appeal turned on the gate question, the door question.

GENERAL NIXON: Yes, Your Honor, I would agree that the appeal dealt with the gateway issue, but the underlying claim of Brady was dealt with by that --

QUESTION: He's entitled to have an appeal on it if he gets through the door.

GENERAL NIXON: Yes, if he gets through the door, Your Honor, he's entitled -- that's what the door gets him. Once he gets there, I think -- if I'm proper in understanding the question of Justice Ginsburg, it would be that there's not much behind the gate on --

QUESTION: But your position is that that has been reserved in the court of appeals?

GENERAL NIXON: Your Honor, I think --

QUESTION: Your position is the petitioner has reserved the Brady claim in the court of appeals, in the event he wins on the standard point?

GENERAL NIXON: Yes, Your Honor, I believe that's what's behind the gateway, the Brady as well as the ineffective --

QUESTION: And it's been preserved adequately in the court of appeals, in your view?

GENERAL NIXON: No, Your Honor, I'm not confident it's been preserved adequately in this

particular matter. I think that the theory has evolved into ineffective being the more primary of those particular two gateway claims, although one could argue from the Eighth opinion that there is a hook regarding a Brady claim in there.

QUESTION: General Nixon, do you, especially if we adopt the standard that you propose, do you really seriously think we're talking about a gateway here?

I mean, do you expect that line to hold, that Federal courts will be able to say, yes, there is an overwhelming probability of innocence here, but, as it happens, there was no constitutional violation, and therefore this person will have to serve out the rest of his 100-year sentence, or be put to death? Unfortunately, in all likelihood he's innocent, but the technical requirement of a constitutional violation has not been --

Will that line hold?

GENERAL NIXON: Your Honor --

QUESTION: It seems to me we either have to stop talking about gateways or stop talking about the high standard that you propose, one or the other.

GENERAL NIXON: Your Honor, I think that you can talk about both. It certainly would be easier if there weren't both. It would help in demystifying this entire area.

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But I don't think that, especially in what we're dealing with here, which is, you know, a successive or abusive, having a high standard to get through the gateway, having a higher standard than what is necessary to meet, for example, you know, Strickland prejudice and all the other things that are underneath that, it's not improper, especially if one's reading of Herrera is that they may be the truly extraordinary case out there that can run around the gateway.

QUESTION: I would be astounded if that line held, really be astounded.

GENERAL NIXON: I think another important point to make here in this case is that petitioner is arguing for two separate standards, and it doesn't make good sense from a policy or a precedent standpoint.

A uniform standard for guilt and penalty phases, and guilt and penalty regardless of whether it's a capital case, is much easier for the lower courts, especially in situations where we get eleventh-hour situations such as the one that's presented here, and also issues of guilt and penalty aren't always different, as was mentioned in prior questions.

Penalty claims could be repackaged and relitigated as guilt claims in the process. Run it up the flag pole the first time and try it again under the lower,

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colorable standard.

QUESTION: But isn't it also the case that in any ultimate resolution of the penalty phase there is a kind of value judgment goes with it, that is made by the sentencer, which is different from the kind of factual discretion, or a discretion to find fact, which is the essence of the guilt phase determination?

I mean, there are different kinds of judgments, depending on whether we're dealing with guilt or whether we're dealing with penalty.

GENERAL NIXON: Justice Souter, I would admit that there is a subjective element to a jury making a determination between life in prison or death. However, on --

QUESTION: It's not merely subjective. It involves the imposition of values.

GENERAL NIXON: Certainly.

QUESTION: I mean, at some point a determination must be made as to whether, for example, the aggravating circumstances and all the other evidence in the case merits a certain penalty or whether it doesn't, and that is a different kind of determination from the guilt determination, which in essence is what happened?

GENERAL NIXON: That portion of it is, Your Honor, but the determination made under Sawyer of

aggravating circumstance, of the objective proof necessary to prove an objective factor making someone eligible for the death penalty, is not, in your estimation, different from what's necessary to prove their guilt.

QUESTION: That is in some cases going to be true, but the ultimate determination that has to be made in a Sawyer kind of case is a determination which must take into consideration the ultimate discretion to make a value judgment as distinct from the discretion to make a factual judgment.

GENERAL NIXON: Yes, Your Honor.

QUESTION: And that's going to be true in every Sawyer case regardless of how the Sawyer case, particularly, is presented.

GENERAL NIXON: Yes, Your Honor, unless you find that so narrow a holding of the Sawyer is that it just deals with capital cases just on the issue of death, but I think if you bring it to the context of penalty and guilt, and intermesh it into a system, that those same arguments are not strong.

QUESTION: General Nixon, you really, you don't want to quibble about the principle, you're just concerned about the standard, but you concede that, on a successive habeas claim, no matter how far down it may be, there has to be at least some possibility, under some standard, of

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reraising the claim of innocence?

GENERAL NIXON: Yes, Your Honor, there would be some standard. We think the Sawyer --

QUESTION: What case of ours holds that?

GENERAL NIXON: One could argue the Sawyer standard, in dealing with successive and abusive, and setting a standard of clear and convincing, a case for that.

QUESTION: Well, what standard reaches a result that would not have been reached but for that possibility of being able to raise claims of innocence in subsequent habeas petitions?

Or, to put it more precisely, what case of ours holds that the prior common law rule that a successive habeas petition may be -- need not be -- if the district court wants to entertain it, it may, but that a successive habeas petition may always be dismissed by the district judge simply on the ground it is successive, period? What case of ours holds to the contrary of that?

GENERAL NIXON: None that I'm aware of, Your Honor.

It is also important to note, as was raised by Justice O'Connor earlier in the argument, that the Strickland reasonable probability test is eerily close to the fair probability test of the Kuhlmann standard here,

and I think we would all argue that it is important to have a tougher test for the probable actual-innocence, miscarriage-of-justice exception than it is for the cause-and-prejudice end of this, and the difference -- we have struggled trying to figure out the difference between reasonable probability and fair probability, and have unsuccessfully done that, and I believe that the lower courts have unsuccessfully also been able to grapple with the distinction between those two.

Kuhlmann is just way too close to reasonable probability and, for that matter, too close to the new trial standard, the probably --

QUESTION: Excuse me, General. May the answer to that be the difference between the Kuhlmann formulation and the Carrier formulation, because the Kuhlmann formulation goes to, I guess, fair probability of reasonable doubt, whereas Carrier talks about probability of innocence, and one could see, and I'm not saying that under our cases one should, but one could see the distinction as being the distinction between legal innocence and factual innocence, and if Carrier were read in the latter sense, then the Carrier formulation would provide the distinction that you're arguing for, and your opposing counsel says he would accept that as being appropriate.

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GENERAL NIXON: One could read it that way, Your Honor. That is an extremely difficult read at the trial bench.

QUESTION: Why is it --

GENERAL NIXON: I don't mean hard to do, I just mean because -- excuse me.

QUESTION: Why is it difficult? I mean, most trial judges can tell the difference between somebody who committed the act but has not been shown to have done so beyond a reasonable doubt, and somebody who in the classic case wasn't there. That's not hard. That distinction isn't hard to draw.

GENERAL NIXON: I was relying -- I was referring to the standard, Your Honor, not to the ultimate decision, which obviously they're fully capable of making, but the standard being so eerily close.

QUESTION: Well, I was talking, one standard talks about reasonable doubt, one standard talks about innocence. Why are they hard to separate, if we make it clear that there is this distinction between legal and factual innocence?

GENERAL NIXON: If you draw that distinction, Your Honor, then it is much easier to come to the conclusion you did, but I would submit that the fair probability standard of Kuhlmann is difficult to

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ascertain, regardless of what words you put behind it.

Fair probability, fair -- they say there was a fair probability of rain today. I didn't know whether to bring a raincoat or not, you know, and that's the standard that the petitioner says that we should make decisions about life and death on.

QUESTION: Well, the petitioner said that he would take the Carrier formulation.

GENERAL NIXON: I appreciate that, Your Honor.

QUESTION: So your view on why that is not the one we should adopt is -- why Carrier is not the standard we should adopt?

GENERAL NIXON: It's that the Sawyer standard is better, Your Honor, and this Court upheld the Sawyer standard in Sawyer, and we argue that Sawyer applies already. The Eighth Circuit held that, and we are here arguing for the clear-and-convincing standard.

It is important to note that the States do have a legitimate interest in finality in these particular cases. As was quoted in Engle, deterrence depends on the expectation of punishment. The trial evidence, the main event, should be the point where we balance and look and scrutinize evidence, more than 10 years later, looking at types of evidence that jumps in. We shouldn't reward sand-bagging, holding back of information and using that

at later proceedings.

I -- we clearly believe that victims, juries, and communities have legitimate punitive interests in these cases coming to an end, and to have a --

QUESTION: You think we should reward sand-bagging only when there's, what, compelling evidence of innocence? You're wanting to reward it then, right?

GENERAL NIXON: No, Your Honor, I don't ever want to reward sand-bagging, and I think we should never reward sand-bagging.

QUESTION: -- draw that objection to the other standard. I mean, we're just talking about when to reward it, not whether, I suppose.

GENERAL NIXON: Well, Justice Scalia, I mean, we're arguing for the clear-and-convincing standard in this particular case. That is a standard that allows --

QUESTION: Can you cite me to a case in which a lawyer ever said -- I can't imagine a defense lawyer in a capital case withholding evidence of innocence because he might want to use it later. Does that really happen?

(Laughter.)

GENERAL NIXON: In this case, Your Honor, the trial court, the district court, has held that the defendant themselves, himself, didn't present all evidence to his counsel, and therein the sand-bagging also --

QUESTION: Is that what you mean by sand-bagging?

GENERAL NIXON: Well, either one.

QUESTION: I thought it was a tactical -- sand-bagging referred to a tactical decision by a lawyer not to use evidence of innocence because he wants to use it later, and I just don't think it happens. Maybe I'm wrong, but ethical counsel doing that, I just can't believe it.

GENERAL NIXON: I think the tactic does occur out there, justice.

QUESTION: Can you cite me a case in which any appellate court describes that having happened?

GENERAL NIXON: No, Your Honor, I cannot.

QUESTION: I certainly am not aware of any.

QUESTION: -- that you're about to make, so just the -- my understanding of this, and correct me if I'm wrong -- I may well be wrong, but my understanding of this is that we're talking about a person in general who has some kind of a claim that his trial was unconstitutional or held in violation of the laws of the United States.

He's already had one habeas proceeding. Now he comes to a second, a third, or a fourth, and normally it involves a claim that wasn't made at the first. It could involve a claim that was, in which case it would be a

successor, but it involves a claim that wasn't made at the first proceeding, and so the obvious question is, why didn't you make it before?

And he has to have a very good answer to that, really a very good answer, or we won't even listen to it. But there's an exception. The exception to his having a very good answer, maybe it's only a fairly good answer, but not a --

The exception is if you really think there was a miscarriage of justice. Now, what's that? And my reading of it is what Henry Friendly said is -- well, what that is, is if the trier of fact -- I'm the habeas judge, imagine -- if the trier of fact would have entertained a reasonable doubt of guilt. That's what Henry Friendly once said the judge should ask himself, and I take it Kuhlmann basically picked that up, not using exactly those words.

And then, if you're going to use that standard, I'll tell you one variety of miscarriage of justice, if you, judge, sitting there, think that the trier of fact at the trial had seen all this evidence he would have found a reasonable doubt.

Now, that's basically the Kuhlmann standard, and they say they've met it in this very unusual case. Henry Friendly said, believe me, those cases are few and far

between. Having sat in a court of appeals, I would agree, and I hope they're very far between, but they say they've got one.

All right, my question is, we're talking about an exception that comes up rarely, why do you need a tougher standard than that, that the judge should sit there, ask himself conscientiously, with all this stuff in here, all the evidence, would that trier of fact have had a reasonable doubt, would have, not some theoretical speculation?

If I believe the answer to that question is yes, I should at least listen to the constitutional claim, and my statement of it may be wrong, in which case, correct me, but if not, then what is the answer to that?

GENERAL NIXON: You're close, Your Honor.

(Laughter.)

GENERAL NIXON: Judge Friendly's standard, we would say, is a good standard for habeases, and would argue that that's what Kuhlmann said. If you're going to get -- make it through there, that you've got to have a colorable showing, and that's where it fits in the process.

QUESTION: And he was applying it to first habeas actually, wasn't he, in his article --

GENERAL NIXON: I believe so --

QUESTION: -- Friendly?

GENERAL NIXON: -- Your Honor, yes. He said, to all habeas, assuming first. He talked about the explosion of habeas in that University of Chicago Law Review article talking about as many as 400 or 500 cases Nationwide in a year at that time.

And in this case, it's not, it's a successive, or we're later on in the process, and plus, Your Honor, I just deeply believe that the fair probability standard that has been written in Kuhlmann, as the interpretation of what Friendly's colorable showing, an entertaining, is far too imprecise.

It mirrors the Strickland test, it mirrors the new trial test, it doesn't penalize later claims, and it doesn't set a line for trial courts and appellate courts to make these decisions, and thus, I think it makes problems, and I believe that it doesn't do what it's designed to do.

Maybe if it's the first one, it makes more sense.

QUESTION: Though Kuhlmann doesn't apply to a first one, I take it Kuhlmann applies to the second, third, et cetera?

GENERAL NIXON: Yes. Therein lies the issue of why we're, in essence, here today before this Court, is to

finish the job.

Sawyer did it for the penalty phase, and this presents the opportunity to provide that same standard, that clear and convincing for abusive and successive, in the guilt phase of these cases also, to draw the single standard across the line, to draw one that provides safeguards, provides, as I indicated to Justice Scalia, some opportunities --

QUESTION: Across the line, or were you conceding that the Friendly position is okay for the first habeas, but after that it's not?

GENERAL NIXON: Generally yes, Justice Ginsburg.

So this Court is faced with the opportunity to draw that line at the point, and I would argue that it did it already in Sawyer, dealing with objective, specific evidence.

QUESTION: But your concern, then, is not with the difficulty of the standard. I mean, if the standard is not too imprecise in round 1, it's not too imprecise for round 2. You want a higher standard for round 2 because there's been a round 1. That's your argument?

GENERAL NIXON: That is one of the strong arguments for a high standard.

QUESTION: It's true, I mean, if the standard is too imprecise for round 2, it's too imprecise for round 1,

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and if it's okay for round 1, why isn't it okay for round 2?

GENERAL NIXON: It's not precise enough, it's not high enough, and it's too close to the Strickland standard. It is too close to the other myriad of standards. It would swallow up the cause-and-prejudice wing of the miscarriage -- of this particular habeas.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Nixon. The case is submitted.

(Whereupon, at 11:52 a.m., the case in the above-entitled matter was submitted.)

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CASE NO.:93-7901

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BY Ann Marie Federico

(REPORTER)