ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: ELLIS WAYNE FELKER, Petitioner v.

TONY TURPIN, WARDEN

CASE NO: 95-8836

PLACE: Washington, D.C.

DATE: Monday, June 3, 1996

PAGES: 1-54

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IN THE SUPREME COURT OF THE UNITED STATES

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ELLIS WAYNE FELKER, :

Petitioner :

v. : No. 95-8836

TONY TURPIN, WARDEN :

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Washington, D.C.

Monday, June 3, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:28 a.m.

APPEARANCES:

HENRY P. MONAGHAN, ESQ., New York, New York; on behalf of the Petitioner.

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

DREW S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.



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C O N T E N T S





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P R O C E E D I N G S

(10:28 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 95-8836, Ellis Wayne Felker v. Tony Turpin.

Mr. Monaghan.

ORAL ARGUMENT OF HENRY P. MONAGHAN

ON BEHALF OF THE PETITIONER

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

On April 24 the Antiterrorism and Effective Death Penalty Act became legally operative. This act made several modifications in the habeas corpus practice of the Federal courts. The provisions of pertinence here are contained in section 106(b), which governs second and successive petitions. These provisions are set out at pages 2 and 3 of our brief.

Section 106(b) has three subdivisions. The first two, (b)(1) and (b)(2), provide substantive standards. (b)(1) applies to claims previously adjudicated. (b)(2) applies to new claims both of law and of fact.

The last section, (b)(3), governs the procedures on second and successive petitions, and it clearly alters the prior practice. Essentially it requires that, before the district court can entertain a petition, a second

petition, the petitioner must obtain an authorization order from an appropriate panel of judges in the court of appeals.

Subsection (C), to which we will have more reference, provides -- and that is set out on page 3 -- the court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the applicant satisfies the relevant substantive criteria.

Subsection -- finally, we turn to section 103(E), which is at the bottom of page 3, and that provides the grant or denial of any authorization by the court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

On May 1, a petition was filed in this Court styled a writ of habeas -- on May 2, a petition was filed in this Court styled as a petition for a writ of habeas corpus for appellate or certiorari review, and among other things the petition invoked this Court's jurisdiction under 2241(a), the so-called original habeas jurisdiction of this Court, which from time out of mind has existed as an appellate remedy.

QUESTION: Has what, Mr. Monaghan?

MR. MONAGHAN: From time out of mind has existed as an appellate remedy, Your Honor. It couldn't exist as an original writ because of Marbury v. Madison. It would be an attempt to expand the original jurisdiction of the Supreme Court.

On May 3, this court granted a stay of execution, granted a petition for certiorari, and ordered briefing limited to three questions. I will, of course, address the questions that the Court posed. To the extent that time permits and the Court feels it helpful, I would be prepared to offer our preliminary views as to the standards that should be applied if the Court concludes, as we hope it will and believe that it should, that section 106 of the new legislation does not impair this Court's jurisdiction under 2241(a).

The three questions framed by this Court ask whether, when Mr. Felker's attorneys presented their petition to the Clerk of the Court, he was obliged, by virtue of the new legislation, particularly section 106(3)(E), to reject it for want of jurisdiction, and second, if he was, whether section 106 is unconstitutional.

Until we receive Georgia's reply brief, we believed that both parties and the Solicitor General, who represents the views of the United States, agreed upon the

appropriate response. While the petition for a writ of certiorari must be dismissed, section 106(3)(E) did not restrict this Court's jurisdiction under 2241(a).

With the sole exception of Senator Hatch, the amici took the same position. Perhaps I am mistaken, but in its reply brief, Georgia now seems to have moved from a position that sparing review under section 2241(a) is permitted, and to a position in which it now seems to argue no review at all is possible under 2241(a), that this was the congressional intention.

To the extent that Georgia does so in its reply brief, it does so without addressing any of the arguments that we advanced in our initial brief based upon plain meaning, nor does it discuss the relevance of this Court's citations going back at least to Martin v. Hunter's Lessee and Cohens v. Virginia, which postulate the need for uniformity in the administration of Federal law, and in Cohens a reluctance to interpret congressional statutes to foreclose appellate jurisdiction.

Nor does it even refer to McCardle and Yerger, despite our heavy reliance upon those cases for the proposition that the rule laid down in Cohens v. Virginia, which is that you do not construe congressional legislation to impair your jurisdiction unless it's clear it has a special stringent effect when claims involving

constitutional right involving the deprivation of liberty are at stake.

The Georgia reply brief does make one substantive argument. It asserts that it would be unfair if habeas were available, since the warden would have no opportunity to get review of a decision.

On its face, this is a very curious argument, because habeas corpus has always been asymmetrical in that respect. No one has ever thought it was unfair to the State that the writ might be available to the prisoner on appropriate circumstances.

QUESTION: Well, but if it is, indeed, an appellate -- if the original writ of habeas corpus, as you say, is appellate in this case, then it does seem that the prisoner could obtain relief, but certainly it does not seem, under cases like Yerger, that the warden could.

MR. MONAGHAN: That's exactly right, Your Honor, but I think that that -- I think first of all, two things. I think that asymmetry is built into the nature of habeas corpus. The prisoner always can sue for the writ, but the warden can't bring a declaratory judgment suit against the prisoner.

QUESTION: Well, but in an appellate situation, supposing the district court grants a writ of habeas corpus, the State or the Government can appeal from the

grant.

MR. MONAGHAN: Yes, Your Honor. Well, the -- let me put it -- maybe a different response. The warden will always get review. What they're trying to introduce is a new asymmetry into the statute. The warden will always get review. If the writ is granted by the court, it will go down to the district court. However it rules, the case will come back up to the court of appeals and go on cert to this Court.

QUESTION: You say the court of appeals is just really screening --

MR. MONAGHAN: The court of appeals is supposed to engage in a gatekeeping function here, but one of the points we want to make is that the court of appeals decided the merits of this case, and that's a point which I'm going to address, which is the -- and it decided it in an egregious manner, if you actually study what it did. But it did not perform a gatekeeping function here, but that's a -- that goes to a somewhat different point.

QUESTION: Yes. Certainly, if you're correct in your position and the Solicitor General that certiorari doesn't lie here, there's no way of directly reviewing that, is there?

MR. MONAGHAN: No, Your Honor.

QUESTION: But I take it your theory of -- that



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sort of neutralizes the warden's complaint is not merely that there is an asymmetry in the very structure of habeas practice, but that the result of the probable cause determination when it goes against the warden ultimately is merged in what happens in the district court, and it's like many preliminary orders that are merged before any ultimate review takes place.

MR. MONAGHAN: That's -- yes, Your Honor, and if there is an asymmetry, if there were, it would hardly strike me as a point of great substance, given the tradition of the writ of habeas corpus.

Now, Senator Hatch's brief devotes a scant two pages, pages that are tacked on at the very end of his brief, to the argument that section 106 bars original habeas. Like Georgia's reply brief, he addresses none of the arguments we make or the authorities we invoke. Senator Hatch's brief is, however, very interesting for what it does not state.

Despite the brief's copious references to the number and comprehensive character of the Senate and House debates, Senator Hatch cites not a single sentence of legislative history that indicates that Congress gave the slightest thought to this Court's original jurisdiction. Senator Hatch's brief constitutes a form of postenactment legislative history.



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QUESTION: It suggests, though, does it not, that it was -- Mr. Monaghan, that it was omitted inadvertently, because what does come across from that brief was the intention to foreclose any review if the appellate panel refused to certify.

MR. MONAGHAN: Well, if the argument is that it was inadvertently omitted, I might say that this Court is not authorized to write legislation that Congress might have written but didn't write.

If it was inadvertently omitted, then Congress will presumably get a chance to do it, but it's not the function of this Court to rewrite the statute, and I think adherence to that principle is especially important, because it would curtail the historic jurisdiction of this Court, a curtailment that, as we have suggested, would raise some constitutional problems.

Finally, we have no idea whether Congress would or would not have enacted legislation that in terms directly sought to impair the appellate jurisdiction of this Court, so --

QUESTION: Mr. Monaghan, what about jurisdiction in this Court under the All Writs Act by way of writ of mandamus, or something of that sort?

MR. MONAGHAN: On behalf of the warden, or on behalf of --

QUESTION: Either. Either. How does the act affect that, do you suppose?

MR. MONAGHAN: That's a hard question, Your Honor, because it doesn't impair jurisdiction under the All Writs Act, either, and there is at least one case, House v. Mayo, in which effectively habeas corpus relief was given under section 1651, but there is a body of case law in your Court, last invoked in an opinion by Justice Scalia last year, or early this year, which says that section 106 is inoperative if there's a specific provision that deals with the proposed remedy, and so that brings you back to 2241(a), and for that reason I was unwilling to brief that point.

QUESTION: How would 2241(a) work on your interpretation? Does this Court have authority only after the court of appeals has failed to certify? Can a petitioner apply to both places simultaneously, or is there some sequence, or can the appellate panel be bypassed altogether and come directly here?

MR. MONAGHAN: Well, the various briefs, if you look at them carefully, sharply divide on what happens if you have authority to entertain the writ and, given the limited time constraints and the lack of developments in the brief, we can only give you our initial thoughts about this.



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I will point out that there's a wide difference between the United States and us on the very issue that you ask. Most of the briefs seem to assume, amici briefs seem to assume that you must go to the court of appeals first. One of the briefs suggested if you go -- that's a precondition to coming here. One of the briefs suggest that if you come to the court of appeals first, you can never come here. It leaves unclear what that amici thinks is being reviewed.

It's also quite unclear from the United States' brief what is being reviewed on the original writ of habeas corpus.

QUESTION: Well, our Rule 20 says you have to have sought relief everywhere else before coming here for an original writ, doesn't it?

MR. MONAGHAN: And that's our position. Our position is that you must go to the panel first, and then you seek review here, and the question then becomes, what does this Court do once it gets the case, and on that point, we take as a baseline what was said in the Schlup case. Successive petitions should rarely be granted by any Federal court, and certainly they should be rarely entertained on the merits in this Court. That's the baseline against which we start.

But given this Court's role in the

constitutional system, we do not believe that the original jurisdiction could be invoked to decide routine factual questions or resolve routine questions of the application of law to fact.

But having said all that, it seems to me that there are essentially two kinds of questions that are going to arise. The first set concerns the meaning of section 106. What does it mean? We think that's open on an original writ, and we think that this petition raises important questions about what 106 really does mean.

The second set, and here's where the Solicitor General and us seem to depart, concerns the role of this Court apart from simply interpreting section 2241.

QUESTION: Before you go on to the second point, that first point is the only way in which we could get into that interpretation of what 106 really means?

MR. MONAGHAN: No. It's possible that you would get -- it was possible you would get some of these questions in the grant context.

Now, but as Justice Souter points out, in the grant context you're using -- if the writ is rejected or sustained in the lower Federal courts you're really on the merits of the claim. You're not likely to see as many questions under section 106 if you rely solely -- if denial cases are excluded from your jurisdiction.



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QUESTION: Question Number 2 --

QUESTION: Well, do we --

QUESTION: Question Number 2 in this case is -- asks us to construe the provisions of 106.

MR. MONAGHAN: Yes. We --

QUESTION: To what extent do the provisions of 106 apply to this Court in its exercise of our jurisdiction.

MR. MONAGHAN: Yes, and that is a -- that's a question which we may have flubbed. We understood that largely, I think, Your Honor, in terms of -- although we're prepared to discuss it, we understood it largely in terms of the problem of foreclosure of review in this Court, and not with respect to briefing on the question of standards. Given the time constraints, and given the way the questions were framed --

QUESTION: You agree that the provisions of 106 do apply to this Court when we are exercising our original habeas jurisdiction?

MR. MONAGHAN: Well, the only provisions that could apply to this Court --

QUESTION: That's what I mean.

MR. MONAGHAN: Yes, the only provisions that could apply are the substantive standards of 106(b), and --



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QUESTION: Do you mean (b)(1) and (b)(2)?

MR. MONAGHAN: (b)(2). Those standards are the only ones we're really talking about. We haven't taken a position on that in this case.

We can -- and in large part, and I do think that that's a point that needs thought, and it also needs thought from our point of view, given the fact that we have a client to represent.

I do think a great deal depends on what section 106(b)(2) means. There are severe construction problems, here. To name one, what is the role -- what 106(b)(2) is, if you take a look at it, this is really a congressional attempt to define cause and prejudice.

(b)(2) applies to new facts and new law. It has a prejudice component built into it, and it also has a cause proponent built into it, but it doesn't exhaust the universe of claims, and it doesn't exhaust the problems that this Court would have to address. Specifically, what is the role of miscarriage of justice claims under the newly reformulated congressional standards?

In this case, the essential claims being made on the petition are three in nature. They are all directed to a single inquiry, miscarriage of justice.

QUESTION: What would the role of miscarriage of justice have been in the days when we had no criminal



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Federal jurisdiction at all?

MR. MONAGHAN: You had it under the All Writs Act. You exercised it routinely in the 19th Century. There never has been a point in time in which -- to the best of my knowledge, in which you couldn't review a criminal conviction of either a State or Federal court on the ground that there was a violation of a Federal right.

QUESTION: Well, there was certainly a lot of criminal convictions in the 19th Century, you could not appeal them and they were not reviewed here.

MR. MONAGHAN: They were not reviewed, and the difference was in the 19th Century what the -- if you look -- there's a nice discussion by Dallin Oaks in his article. It was quite comprehensive. But you look at what happened in the 19th Century, starting with Ex parte Bollman, going back before Ex parte Bollman, going back to 1795, this Court used the appellate writ to hit at fundamental errors --

QUESTION: But not --

MR. MONAGHAN: Not routinely.

QUESTION: Not challenging final judgments of conviction.

MR. MONAGHAN: We -- the first -- the challenges to the final judgments conviction really don't emerge until 1873.



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QUESTION: Siebold, yes.

MR. MONAGHAN: Siebold, Ex parte Lang, but they come, incidentally, Your Honor, from a Court that also said that the privilege of the writ of habeas corpus is a privilege of immunity of national citizenship. That's said in the slaughterhouse cases, 83 U.S. at page 82, and so one of the questions that would have to be faced is, if this -- is what that phrase means in the 20th Century, in 1996.

It is interesting also, Your Honor, that while the Government -- the United States, I mean -- spends a great deal of time defending the position that the writ of habeas corpus could not reach anything in 1789 other than executive detention, it distanced itself from embracing that view in the footnote, a very lengthy footnote. The Government is not prepared to say that it will defend that position today, because -- and rightly so. It can't ignore 200 years of history.

QUESTION: Well, we got into this when you indicated that under -- I think this was your -- the purport of your remarks, that under 2241 we will be construing what (b)(2) means. Does that not assume that (b)(2) provides a baseline for what is an extraordinary writ?

MR. MONAGHAN: The Government argues that it



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does. The Government argues that it does, and the Government makes an argument that we would have to address if we disagreed with it. It would provide a baseline, but the question is, is it exhaustive?

Take the -- and there are two kinds of cases which the statute doesn't remotely address. One is the role of miscarriage of justice.

QUESTION: I don't understand why the -- the question arises, is it exhaustive. It's utterly useless if it's not exhaustive, isn't it?

MR. MONAGHAN: No.

QUESTION: Well --

MR. MONAGHAN: No. It depends on what it means.

QUESTION: Well, maybe -- maybe --

MR. MONAGHAN: Let me give you an -- oh, sorry.

QUESTION: Maybe Congress thought this was as much of a miscarriage of justice as they wanted the courts to look into.

MR. MONAGHAN: That may be, Your Honor, and if that's the construction which you put on it, then it raises substantial questions whether or not -- not necessarily in the Federal court, but in the State court broader postconviction relief must be available.

The -- let me put a case. If our case falls outside the statute, we have a claim of miscarriage of

justice. We have a claim in this case despite what Judge Carne said in the lower court in which a Cage instruction was given 14 times. Twelve times they were personalized. Each juror got his own personal Cage instruction.

Now, if that claim -- and we also now have substantial other evidence of innocence. If that claim falls outside of section 2244(b) as it now stands, then a State court must entertain it.

QUESTION: Why?

MR. MONAGHAN: Because the Due Process Clause would require postconviction relief in those circumstances in our view, so long as Palko v. Connecticut and Rochin v. California are the law of the land.

QUESTION: Well, you know, Rochin is a fact-specific case if there ever was one. I don't see how you can bring it --

MR. MONAGHAN: The standard is not fact-specific. Conduct which shocks the conscience, or in your opinion in the Brecht case, Your Honor, you were very much concerned in analyzing harmless error cases to discuss questions of fundamental fairness.

I would stand basically on Justice O'Connor's footnote. Justice O'Connor's -- the quote from Justice O'Connor at the bottom of 25, the historic function of habeas corpus is to prevent the execution of an innocent

person, and if the claim is strong enough and there is other constitutional error, some court must consider it.

QUESTION: What do you think of the suggestion in one of the amicus briefs that the statute really means that you can get relief if you present new evidence that ought to substantially undermine the reviewing court's faith in the fundamental justice of the verdict?

MR. MONAGHAN: We certainly --

QUESTION: There was a suggestion that that's

MR. MONAGHAN: Yes, we could certainly --

QUESTION: -- what the statute means.

MR. MONAGHAN: And what we would do is to argue that the statute does mean that, and if it doesn't --

QUESTION: And is there a way of getting to there with the words of the statute as they are?

MR. MONAGHAN: Well, I don't know how to respond to that. Yes, I think it really -- if you take a look at the statute --

QUESTION: Why should we try to get there?

MR. MONAGHAN: You should try to get there, absolutely.

QUESTION: Why?

MR. MONAGHAN: Because you don't want to have a -- because the historic --

QUESTION: Why shouldn't we just try to apply



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the statute as written? I mean, rather than trying to torture some meaning out of it --

MR. MONAGHAN: I don't think it's a torture, Your Honor.

QUESTION: -- that's not there.

MR. MONAGHAN: I don't think it's a torture, and to say you're going to apply the statute as written presupposes that this statute is quite plain.

But suppose that it were quite plain, then you'd have another question, are the criteria exhausted, and it doesn't follow, Justice Scalia, that the statute would be meaningless. It would open a wedge for cases in which the fundamental claim was miscarriage of justice.

QUESTION: Mr. Monaghan, if we were to agree with the panel when it said, old law, no law -- new law, we would come out the same way on this petition, if we were to agree with that --

MR. MONAGHAN: Uh-huh.

QUESTION: -- position, then there would be no occasion for us to determine whether our current Rule 20.4(a), sets the standard --

MR. MONAGHAN: Yes, I --

QUESTION: It just says rarely granted, or this new statute. It would be kind of an academic question for us to engage in.

MR. MONAGHAN: No, there would be another question you would have to face, and let me say, Your Honor, the panel says that the instruction is given twice, and then it applies harmless error analysis.

This is what the judge does, and says, it's given twice and it's really sort of harmless, it was offset. The most important document that we've filed in this Court is the original writ, and on page 18 in a footnote you will see that the prosecutor gave each juror his own personal Cage instruction. When that was called to the attention of Judge Carnes, his response was, oh, well, right after that he instructed the jury that it was not to consider counsel's argument as evidence.

This occurred not when counsel was opening, this occurred at the voir dire. The second thing Judge -- the judge says is that we defaulted our claim in any event. That's what he -- he -- we had to exhaust our claim in the State court. If we were right as to when our Cage claim arose, our Cage claim was not exhausted in the State court till about May 1. So before you jump and conclude that you could decide the case in accordance with the panel's opinion, we would like to be heard on that.

But if -- but it raises another question under the statute. The court of appeal -- and that's the construction of 3(C). The court of appeals may authorize

the filing of a second or successive application only if it determines that the application makes a prima facie case. Judge Carnes, in one day, turned around a 24-page opinion on the merits.

Now, he did not play the role of the gatekeeper in this case, and that's all he was supposed to do. That's all the panel was supposed to do.

This statute passed by Congress with respect to second petitions is not the work of Attila the Hun. I mean, this is an attempt, as runs throughout the entire statutory scheme, to make sense out of habeas. The testimony in the House -- I mean, in the Senate over and over, mainly by Senator Hatch was, I want to do two things. We believe in habeas corpus, and we want to prevent abuses of the writ.

Second petition cases do raise a problem about abuse of the writ, but --

QUESTION: Mr. Monaghan, can I ask you a question I want to be sure I have your view on? If our jurisdiction to entertain an original habeas writ under 2241 is an exercise of our appellate jurisdiction, rather than original jurisdiction, what is the thing that is being appealed from?

MR. MONAGHAN: I'm glad that you asked that, Your Honor, because I have opened the Government's brief,

and you -- the -- what is being appealed from in this case is the denial of the certificate to go forward to the district --

QUESTION: So you think we have appellate jurisdiction over the action of the court of appeals?

MR. MONAGHAN: Yes, Your Honor, and I would like to read to you from the Government's brief. That's what -- and -- because the traditional jurisdiction in habeas corpus originally was always to revise a judgment of a lower court. The -- Ex parte Yerger is a wonderful example.

Now, the Government's position, I don't know what the Government thinks you're reviewing in this case. The Government's position at the bottom of page 23 first argues that section 106 applies to this Court, and then it says, it is true that the courts will have no opportunity to announce except in dicta the requirements for a prima facie showing that the application satisfies the requirements of section 106(b)(3)(C), because the court of appeals' determination that the habeas petitioner has or has not made out a prima facie showing is not subject to review on certiorari.

It's a non sequitur. Under our view, it's reviewable on the original writ.

But what is apparent if you look at the

Government's brief, it is not clear what the Government thinks you're reviewing. You must be reviewing some court.

QUESTION: Well, I thought the Government was taking this position, that our review is appellate in the sense that it is not within the meaning of Article III original, but that it is an original proceeding in the sense that it's a proceeding before us in the first instance, and I would suppose that if it is treated in that way, we could consider as an evidentiary matter what may be on the record below, even though we are not, in the conventional sense, reviewing that record on an appellate process.

MR. MONAGHAN: That would be completely contrary to the whole practice in the 19th Century. Every case we cite -- Yerger, Marbury v. Madison -- must be revising the decision of the lower court.

QUESTION: And yet you read Ex parte Grossman, you don't seem to have had that in mind. That's admittedly a 20th Century case.

MR. MONAGHAN: The 19th Century -- Dallin Oaks' article sets this out quite clearly, and we have many cases which we could provide.

QUESTION: Well, there is a judgment. There's a judgment of the State court.

MR. MONAGHAN: That's right -- no, you're not -- that is not the practice. You're reviewing not the judgment of the detaining court, you're reviewing the judgment of the court that refuses authorization.

In Ex parte Young, the circuit court had refused to grant a writ of habeas corpus. A person was being held by a military court. The Supreme Court made it very clear that you were reviewing the denial of relief.

I might save a minute or two, if I -- thank you.

QUESTION: Very well, Mr. Monaghan.

Ms. Boleyn. Is that the correct pronunciation of your name?

MS. BOLEYN: Yes, Chief Justice.

ORAL ARGUMENT OF SUSAN V. BOLEYN

ON BEHALF OF THE RESPONDENT

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

In various decisions of this Court in the area of Federal habeas corpus for State prisoners, concern has been expressed on the previous statutory parameters governing the well recognized problem of successive habeas corpus litigants. Now, Congress has acted, we submit, within its authority to regulate the consideration of successive petitions while we contend not impermissibly interfering with this Court's jurisdiction or having the

effect of suspending the writ of habeas corpus.

While it might appear at first, from a review of the briefs, that the parties are not very far apart on their views as to the statute, there's one thing that the respondent in this case wishes to make adamantly clear, and that is that we are very far apart on the essential issue underlying the resolution by this court of the three issues that it has posed.

First, the respondent opposes any interpretation of the act and its impact on 2241 which would engender further delay, whereas the petitioner --

QUESTION: That's not a very specific position, Ms. Boleyn.

MS. BOLEYN: Mr. Chief Justice.

QUESTION: What is your position with respect to the existence of the original habeas jurisdiction in this Court after this act of Congress was passed?

MS. BOLEYN: With specific reference to that, Mr. Chief Justice, our position is that, while the original writ exists on paper, because the new act does not mention 2241, that there was no intent of Congress to allow the applicability of 2241 to successive habeas corpus petitions, so it does not exist for that purpose.

Alternatively, we say --

QUESTION: Yes, well, how do you distinguish ex

parte Yerger?

MS. BOLEYN: Well, I think, Your Honor, again I believe what earlier has been said by other justices, that there -- our position is that this is a permissible restriction.

QUESTION: How do you distinguish Ex parte Yerger from this case on the jurisdictional point?

MS. BOLEYN: Well, I think that this Court has recognized exceptions to its jurisdiction both in the constitutional venue under Article III --

QUESTION: Are you familiar with the Yerger case?

MS. BOLEYN: Yes, Your Honor, but I'm not familiar with what exactly you're asking me to respond to.

QUESTION: Well, in Yerger, as I understand it, the Court said that the repeal effected in the statute considered in the McCardle case, which had repealed the jurisdiction of the Court to hear an appeal from a lower court decision denying certiorari, in Yerger they said, well, that's true, Congress took away that appellate jurisdiction, but it didn't take away our original jurisdiction.

MS. BOLEYN: Your Honor, I don't think that original jurisdiction is affected, if that's what you're saying. It's original in the sense, as Justice Souter

said, that it's directly filed with the Court, but it doesn't interfere with the Court's original jurisdiction because essentially, as has been said earlier, we're asking the Court to look at it as an appellate -- part of its appellate jurisdiction, so in response to that question, it's not interfering with the original jurisdiction, it's just interfering with -- permissibly, we think, with the direct attempt to file a habeas corpus petition with this Court.

QUESTION: I'm sorry, I don't understand. If, in fact, a person files a writ of original jurisdiction and he says, read my papers, new section 106 totally applies, I satisfy everything, I have some brand new evidence that shows I'm completely innocent, a prima facie case is made out and the court of appeals clearly erred in denying me the right to go to the district court, file that in our Court. Do we have jurisdiction to hear it? Yes or no.

MS. BOLEYN: You do not --

QUESTION: I thought from your brief the answer was yes.

MS. BOLEYN: You have the right under your -- under writ -- under 2241 to look at extraordinary cases for extraordinary relief. Our view is that in the context of successive petitions --

QUESTION: So you're answer's yes.

MS. BOLEYN: You have the right -- that right still exists. We're asking that the Court use the backdrop of its rules and its jurisprudence to find it has no applicability in the context of successive habeas corpus petitions, and the reason that we're saying that is because, if this Court has the right to guarantee a direct access of the petitioner to this Court, then essentially this Court becomes a lower court who is doing nothing but relitigating what Congress has delegated to the lower court as being their task.

It makes this Court a factfinder. It makes this Court determine such issues as cause and prejudice --

QUESTION: But Ms. Boleyn, part of the Yerger decision was to clarify that although it's an original writ, the jurisdiction that this Court exercises is appellate, because apart from the original jurisdiction that Article III gives to this Court, there can be no other authority other than appellate in this Court.

So under Yerger, the basic writ was preserved, and it was described and explained as an exercise of appellate jurisdiction. An original writ, but appellate jurisdiction. So why isn't this precisely the same?

MS. BOLEYN: Because, Your Honor, I believe that what's being done in this case is attempting to

substitute, and under petitioner's view this Court would be substituted for the lower court.

It's -- they're saying that it's exercising appellate jurisdiction, but what the lower court -- you would be actually acting as a factfinder determining the prima facie case, because our position is that this Court would be bound by the substantive provisions of the act, so in that sense this Court would become a factfinder. That is not within its jurisdiction on the appellate level.

QUESTION: Well, it --

MS. BOLEYN: The appellate court jurisdiction doesn't encompass factfinders. I'm sorry, Justice Souter.

QUESTION: I didn't mean to interrupt you. Isn't it the case that we might well be bound by the substance of the act in (b)(1) and (b)(2), but we are not, in terms, bound by the prima facie case showing, which applies only in courts of appeals and district courts? That's a possible reading of the act, isn't it?

MS. BOLEYN: That's a possible reading. Our interpretation is that you would be bound by the necessity of having the petitioner make a prima facie case showing to --

QUESTION: But that's not what the act says. I mean, the act -- that portion of the act applies by its



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own terms --

MS. BOLEYN: Yes.

QUESTION: -- only to the relationship between district and courts of appeals, isn't that correct?

MS. BOLEYN: Yes. By the terms of the act, yes. It's our position that insofar as 2241 exists for successive State habeas, that the Court should find itself to be bound by those issues just the same way that the Court found in its rules that it was bound by exhaustion requirements and, of course, that the petitioner under this Court's rule has to establish why it hasn't sought the relief from the lower court.

QUESTION: But then wouldn't we be making the same sort of factual, fact-specific determinations on the prima facie case issue? It would just be removed in degree.

MS. BOLEYN: Yes, and I think that's exactly what we're asking the Court not to do, not to denigrate the Court's Article III jurisdiction by going and becoming a factfinder. Congress has tried to delegate that factfinding screening process, as the petitioner said, to the lower courts, so we're asking the Court to reserve the direct writ, as we choose to call it, for those rare and extraordinary circumstances where there is not another avenue of relief.

He had another avenue of relief. He was simply found to have been foreclosed by the lower court, so by its terms we do not think that where the other avenues of relief terminology --

QUESTION: So your position basically is if the court of appeals under this act turns down the petitioner, that there's no occasion for the exercise of our original jurisdiction even though it exists, because he had another avenue of relief but he was found to not meet the standards for it?

MS. BOLEYN: That's our position, except perhaps in those cases where, as Mr. Felker did, the jurisdiction of the Court as a whole has been challenged.

Our position is another option that the petitioner had was, he could have filed a writ of mandamus against the Eleventh Circuit asking that they interpret the act.

So the only exceptional relief that he could have sought was not just simply try to file an original habeas corpus petition --

QUESTION: Well, mandamus is no more readily granted here than original habeas corpus, I think. I don't know that that's a way around the difficulty.

MS. BOLEYN: Well, I think, Your Honor, what I'm trying to say when I'm saying that is that exceptional

relief such as the type that the petitioner is seeking in this case, for example, that there's no jurisdiction of the Court, or that the act is unconstitutional, is exactly the type of situation that the Court might want to exercise its jurisdiction.

QUESTION: Well, why would the mandamus petition be in order to protect our jurisdiction, because I thought we had no jurisdiction. You seek mandamus -- we grant mandamus under the All Writs Act to protect our -- in aid of our jurisdiction, but that's circular. There is no jurisdiction in your view.

MS. BOLEYN: Your Honor, I think --

QUESTION: So how does mandamus work?

MS. BOLEYN: Your Honor, I think that perhaps I was not clear about what I was saying. I think that there always remains an avenue of relief for a Federal habeas corpus petition to try to challenge the jurisdiction of the Court, but the petitioner in this case, his only avenue perhaps may have been to try to challenge the constitutionality of the new act by means of some sort of extraordinary relief.

Maybe he would have chosen the mandamus or declaratory judgment, or some other extraordinary relief, but insofar as he's trying to invoke the jurisdiction of this Court to review the fact that the Eleventh Circuit

said he hadn't made a prima facie case and he wasn't entitled to relief under the old act, our position is he should not be able to invoke the original extraordinary jurisdiction of the Court for that purpose.

QUESTION: Then he shouldn't be able -- I take it it's your position he should not be able to invoke that original extraordinary jurisdiction, as you put it, for any purpose that would result in his getting substantive relief.

MS. BOLEYN: Correct.

QUESTION: You are saying the only thing he can litigate under that jurisdiction is jurisdiction itself.

MS. BOLEYN: That's correct, Your Honor.

QUESTION: So that if you win on that point, in fact there will never be again an extraordinary case in which this Court might invoke its original jurisdiction to review the particularities of the case.

MS. BOLEYN: Not for the particularities of the case, but only if there's something overriding. Now, perhaps --

QUESTION: So that means -- I mean, the practical effect of that, them, is that our original jurisdiction is, in fact, gone.

MS. BOLEYN: Yes.

QUESTION: I don't understand, then. I didn't

perhaps understand you.

What do you say happens in the very unusual case where a person comes in with totally convincing evidence at the eleventh hour that all the State's witnesses are not telling the truth, or something -- that could happen -- and thus meets the standards of 106, meets all those standards, the certificate, though, is denied, and he comes to us and asks us to issue a writ of habeas corpus under our original jurisdiction on the ground that this is a very unusual case where all the evidence was no good, and all the standards are met?

I ask you, do we have jurisdiction to do that, and is your answer yes, or is it no?

MS. BOLEYN: My answer's no.

QUESTION: Well, your brief suggested yes.

MS. BOLEYN: Let me see if I can explain myself more fully, Justice --

QUESTION: And the reason that we don't have jurisdiction to do that, given you're here and everything is -- I'm just asking you to explain, just want you wanted to --

MS. BOLEYN: I've been trying to do -- Justice, I think what we're saying is, if someone brought a claim of innocence, Congress has already spoken and said that primarily claims of innocence in the first instance under

Georgia law ought to be to the State courts, anything from a motion for new trial, an extraordinary motion for a new trial, or a petition for clemency.

Insofar as innocence is relevant to a Federal habeas corpus proceeding, Congress has chosen to narrow the views in which innocence is germane to a reviewing court's consideration, and under the new provisions of 106, they have informed us exactly how innocence will be viewed, and they have left out, deliberately it appears to me --

QUESTION: I'm sorry, the case I'm quoting is 106 is met. The petitioner proves in his view that under 106 he's entitled to the writ. His claim is, under 106 I should get the writ, the court of appeals wouldn't give it to me, he asks us to review it.

MS. BOLEYN: You should not review it.

QUESTION: Because --

MS. BOLEYN: You should not review it because he petitioner is seeking to obtain habeas corpus relief from this Court as prohibited by the statute, and the only thing that they could be trying to do is get you to review the prima facie decision not to go forward.

QUESTION: Then I don't understand your position that 2241 exists. You say it exists on paper.

MS. BOLEYN: Because --



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QUESTION: But now you seem to be saying it is effectively repealed. Which is it?

MS. BOLEYN: Effectively repealed, Your Honor. I think that the fact that there is no -- under the plain meaning rule there is no reference, direct reference in the act to 2241, but we are saying in our position, in light of successive petition concerns, that it has effectively been --

QUESTION: So now your position is, it was repealed by implication.

MS. BOLEYN: Yes, Your Honor.

QUESTION: And it's a dead letter, so it's not -- it doesn't exist.

MS. BOLEYN: And, of course, alternatively, if the Court finds it does exist, what we're asking this Court to do is to make it rare and extraordinary in a situation where, perhaps, jurisdiction or some other unusual situation might be envisioned.

The only one I could think of that might possibly do is if you could talk about there was some sort of last minute claim of conpetency to be be executed, for example, which is a separate proceeding that wouldn't come up in the regular courts of Federal habeas corpus --

QUESTION: Well, if it is preserved, if 2241 continues, not just on paper --

MS. BOLEYN: Right.

QUESTION: -- what more would you propose than what our rule already says, which is exceptional circumstances rarely granted?

MS. BOLEYN: I think, Your Honor, what we have proposed is that the Court interpreted -- there's another portion of that rule that talks about that the petitioner has to establish that he has no other forum available to litigate his claim and no other avenues of relief.

We're saying that the petitioner seems to interpret that as saying that he has nothing left now, not that he never had anything.

And what we're trying to get this Court is to interpret its own rules as saying that, having had cert jurisdiction in this case three times already, and he still has remaining a petition for cert available if he wishes to review the judgment of the State habeas corpus court dismissing the second petition, that that's not the same thing as never having a forum in which to litigate your claim, that that particular forum is not meant for repetitive litigation of the same issues that have already been adjudicated adversely to a petitioner.

So an original writ, under our view and what we would hope you would interpret the rules further, not to allow repetitious litigation of the same claims,

especially in the face of a congressional delineation in the lower court.

QUESTION: But that doesn't answer the new claim. That doesn't answer the case where he says he's got a new claim. Your argument doesn't address that situation.

MS. BOLEYN: Where he has a new and different claim?

QUESTION: He alleges a new claim, yes.

MS. BOLEYN: Well --

QUESTION: Why doesn't he just say, I presented it to the court of appeals, they denied it, there's no other avenue available? Why doesn't that satisfy the text of the rule?

MS. BOLEYN: I think because in a new claim situation, the Court bars new claims for lots of reasons. It's no more egregious to bar him from consideration of a new claim as it is to use procedural default or a Teague retroactivity bar. That's no different.

There's always lots of hurdles that they need to overcome, and this is just an additional hurdle, or a specific hurdle they have to overcome, the successive petition bar as it exists in 106.

QUESTION: Ms. Boleyn, your interpretation of the new law, and your position that 2241 is effectively

repealed, differs from that of the Solicitor General, I take it.

MS. BOLEYN: I believe that's true. I think where we're together is that if it applies, the second two provisions apply, but I believe that we say it's effectively been repealed by implication. So that's where we would --

QUESTION: May I ask also, you referred earlier to mandamus. Is it your view that there is mandamus review available, notwith -- apart from the common law writ of certiorari, and petition for -- common law writ of habeas corpus, I mean. Is there mandamus review available to either party, do you think?

MS. BOLEYN: I think this Court in its rules refers to exceptional relief. How much more --

QUESTION: Assume we've got an exceptional case. In your view, is mandamus -- and let me supplement the question by saying with regard to House v. Mayo, which was cited to us today, that was common law writ of certiorari review pursuant to the All Writs Act. Do you think either common law certiorari or common law mandamus is available pursuant to the All Writs Act?

MS. BOLEYN: Probably so. Probably 1651 still exists as some sort of exercise of this Court's discretionary powers. Of course, we would hope that that

would be a very limited view of that, but I think it would exist.

QUESTION: Well, but if you're allowing that, what happens to your argument that we ought to construe or ought to find an implication? It cuts our 2241 power even more narrowly. I mean, by its terms, the act doesn't do that, and you're saying, well, you ought to do it because, in effect, it would give effect to the act. You don't want to make end runs around what Congress intended.

MS. BOLEYN: Right.

QUESTION: But in fact, on your view, something like that is allowed if we exercise a mandamus jurisdiction, so why shouldn't we construe, even on your view, our 2241 jurisdiction at least that broadly?

MS. BOLEYN: I think the short answer to your question is, we want extraordinary relief to even be more extraordinary in the context of the success of the petition.

QUESTION: 2241 doesn't sound extraordinary enough. That's --

MS. BOLEYN: I guess that's what we're saying that it -- by your own definition of it in Rule 20, it's supposed to be rare, extraordinary, drastic remedy. That's --

QUESTION: Well, I mean, that sounds like

mandamus, too, doesn't it?

MS. BOLEYN: Well, I think that what the petitioner is trying to do is make an extraordinary remedy an ordinary remedy. It isn't that we're trying to make it --

QUESTION: No, but you're saying even as an extraordinary remedy, your answers to Justice Breyer, Justice Ginsburg and me made it very clear that under 2241, save for in the narrow sense, jurisdictional litigation, 2241 no longer, on your view, gives us power to do anything.

MS. BOLEYN: I think you have limited exceptional power. All I can say is, our position --

QUESTION: Even under 2241?

MS. BOLEYN: Not under 2241.

QUESTION: But under mandamus.

MS. BOLEYN: Right, and perhaps under the All Writs Act as well, in some sense.

Usually of course, in a death penalty case, when you're dealing with the All Writs Act, the All Writs Act is in virtue -- goes -- accompanies a motion for stay of execution which, of course, usually is accompanied by some other form of proceeding, usually a successive Federal habeas.

QUESTION: But why don't you take the position

that we should construe those avenues as equally barred in the spirit of this new act?

MS. BOLEYN: I think I am, or perhaps I'm just not being clear. I think ordinary relief --

QUESTION: No, but you said -- I thought you left a place for mandamus, and you left a place for the exercise of the All Writs Act, which I guess --

MS. BOLEYN: I guess my position is that all extraordinary relief has not been eliminated by virtue of the act, but that extraordinary relief should remain extraordinary. That's the only way I can answer your question in a brief way.

QUESTION: Well then, why not call it what is the most accurate fit for what's sought here? What's sought here is a writ of habeas corpus, and you're saying, just recharacterize it as a writ of mandamus. I don't follow that argument.

I can understand the argument that 2241 is out of the picture, there is nothing once you're finished with the court of appeals, but I don't understand this label that maybe mandamus but not habeas.

MS. BOLEYN: I'm not asking the Court, Your Honor, to recharacterize it as mandamus. I'm simply saying I think mandamus still exists for examining jurisdictional defects. It does not exist, and we would

not urge that it be applied, to traditional habeas corpus cases.

I mean, I do not think that we can urge that on all exceptional relief, and our position is not eliminated by the act.

QUESTION: Thank you, Ms. Boleyn.

General Days, we'll hear from you.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

Section 106 of title I of the 1996 act does not unconstitutionally restrict the jurisdiction of this Court, at least where Congress does not divest this Court of jurisdiction to entertain original petitions for writs of habeas corpus. Both McCardle and Yerger establish that no constitutional problem is presented.

Unlike the State of Georgia, we believe that this Court's jurisdiction over original habeas and section 106 are capable of coexistence. The text of section 106 in terms does not address itself to this Court's original -- this Court's jurisdiction over original habeas under 2241, and there's no reason why this Court should read the statute with that intent in mind. Therefore, we

do not view the continuation of this Court's jurisdiction over original habeas as in some way representing an invasion or a circumvention.

QUESTION: What exactly is it that the Court would be reviewing under its original habeas jurisdiction? Is it, in fact, some kind of appellate review, and --

GENERAL DAYS: Yes, it is.

QUESTION: -- would we be reviewing the denial by the court of appeals of the permission to file a successive petition?

GENERAL DAYS: No, not under these circumstances.

Mr. Monaghan referred to our brief at page 23. I think our footnote, footnote 9, makes very clear that we're talking about the Court's appellate jurisdiction over the decision that committed the person to jail.

QUESTION: You mean a State court decision?

GENERAL DAYS: Whatever decision is holding the person in detention.

QUESTION: Well, this is a very kind of confused point in our cases, I think.

GENERAL DAYS: Yes.

QUESTION: But we have to have some -- if it is indeed appellate jurisdiction, we have to have somewhere where the prisoner has been ordered confined. Your



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thought is, it is the judgment of the State court that confined him?

GENERAL DAYS: Yes, Mr. Chief Justice. I think the law is somewhat complicated in this regard, because if one looks at McCardle and Yerger, those were Federal cases. They were detained ultimately by Federal circuit courts. They were in military custody, and then the circuit courts made a determination with respect to that custody, so the whole question of the Supreme Court's having appellate jurisdiction over a Federal court was very clear.

QUESTION: Yes. They said there that you -- it's a review of the decision refusing the writ. I mean, there were --

GENERAL DAYS: That's correct.

QUESTION: -- those decisions in -- but wouldn't -- it seems to me the most logical analysis to -- analogy to that is to say it is the court of appeals which has refused to allow the --

GENERAL DAYS: Yes.

QUESTION: -- issuance of the writ --

GENERAL DAYS: Yes.

QUESTION: -- of habeas corpus.

GENERAL DAYS: Yes.

QUESTION: But in Yerger what was -- why I'm



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confused about it is that Yerger says that the 1868 act, that was the act at issue there, repeals so much of the act as authorizes an appeal from the judgment of the circuit court to the Supreme Court, so there they seem to repeal the section that would authorize an appeal, and yet it was still in our appellate jurisdiction. That was what was confusing me. So I thought perhaps what we're reviewing is where you started out. It's in our appellate jurisdiction because --

GENERAL DAYS: Oh, I -- as I was indicating to the Chief Justice, it's complicated by the fact that by McCardle and Yerger were cases having to do with the Federal court system, and had nothing to do with State detention, which is presented by this particular case.

QUESTION: Well, so are you changing your answer to my question? What is --

GENERAL DAYS: The Court would not, on original habeas, be reviewing a determination by the court of appeals. It would be with respect to why, in this case Felker, is still being detained by the State of Georgia.

QUESTION: It would be the same as if the district court under prior practice had been asked to issue a writ against the warden.

GENERAL DAYS: After all, the warden is here as the respondent.



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QUESTION: So what it means is, it is appellate in the Article III sense because it can't be original.

GENERAL DAYS: That's correct.

QUESTION: But it is original in the sense that it is going to the merits of the habeas claim rather than to the specific determination by the court of appeals that no prima facie case was made.

GENERAL DAYS: That's right. The person is saying, I'm being detained --

QUESTION: Yes.

GENERAL DAYS: -- in violation of the constitutional laws or treaties of the United States.

QUESTION: And I would suppose that in making that determination we would be free to look, on your view, at whatever had been presented in the court of appeals simply as a convenient place where evidence was reposing.

GENERAL DAYS: That's correct.

QUESTION: May I also ask if it's your view that, assuming -- we're all very doubtful of some of these things -- that there is such an original, quote, appellate habeas in this Court, would 2241(b) nevertheless apply and authorize this Court to transfer for a hearing the case to a district court, in your view?

GENERAL DAYS: I'm not very clear about that. Certainly the statute has not been changed. It's not

clear exactly what that transfer would mean. This Court in dealing with original petitions in recent times has not used that transfer power.

QUESTION: But it's on the books.

GENERAL DAYS: It's simply dismissed these cases and sent them to whatever court is competent to resolve those issues.

But I think that in order not to evade the statutory scheme that Congress set up and in most circumstances the transfer to the district court would be for purposes of the district court's exercising whatever jurisdiction it had available, and under this statutory scheme that would mean that the court of appeals would have to authorize the applicant to go forward in the district court before the district court could go forward.

This is not something that we would obviously agree, but it seems to us that that makes some sense in terms of reconciling 2241(b) and section 106, the gatekeeper provisions.

QUESTION: But we might take the position that the gatekeeper determination having been made, the district court could have no jurisdiction, so we couldn't send it to the district court, and if we needed evidence taken in a really extraordinary case, I suppose we could use a master, isn't that true?



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GENERAL DAYS: Yes, that is also possible.

One of the things that I wanted to point out that I think is contrary to the State of Georgia. Georgia's position with respect to this circumvention and evasion is that Congress apparently did not see the continuation of this Court's jurisdiction over original habeas as being a circumvention. If one looks at section 103 of the act, that was a decision by Congress to amend Rule 22 of the Federal Rules of Appellate Procedure.

QUESTION: Where do we find 10 -- that portion.

GENERAL DAYS: That's at point 4 and 5a of the appendix to our brief, Mr. Chief Justice.

What Congress did there is amend the jurisdiction of Federal circuit judges to grant original habeas, and basically said that that was no longer possible. It seems to us that Congress knows how to address original habeas jurisdiction when it wants to, and it concluded that it did not wish to do so insofar as the Supreme Court was concerned.

And to us, this makes great sense, because after all Congress was legislating against a backdrop of this Court's decisions and its policies, and there are two things to note about those particular decisions and policies.

One is that for over 70 years this Court has



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attempted to impose reasonable restrictions over the abuse of the writ, particularly second or successive petitions, and secondly, in dealing with original habeas petitions this Court has, as several of you on the bench, Mr. Chief Justice and others, have pointed out, this Court has imposed very stringent requirements before granting original habeas. There hasn't been one granted since Ex parte Grossman in 1925.

Not only that, the statute 2241(b) that Mr. Justice Stevens just mentioned, 2242, which requires that there be some showing of why the applicant hadn't gone to another court, and 2254(b), the old 2254(b), essentially indicated that no petition would be granted unless it could be shown that relief was not available any place else. So --

QUESTION: Well, but why aren't those two readily met by simply saying, I can't go some place else because the court of appeals said I couldn't?

GENERAL DAYS: Well, I think it is. That is, the applicant can go to the Court, having met those requirements, if that applicant has gone through the gatekeeper process, but that does not dictate that the Court should actually entertain and grant an original writ under those circumstances.

QUESTION: But the fact that relief is available



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elsewhere is no longer an obstacle to that relief, you say.

GENERAL DAYS: Well, certainly it's been exhausted, but I think that what the Court would do is say that the fact that the person has been denied, the applicant has been denied through the gatekeeper process, does not represent an exceptional circumstance that would warrant this Court's consideration of that application.

QUESTION: In the case of an extraordinary error by a circuit court, would we have mandamus jurisdiction?

GENERAL DAYS: Justice Kennedy, I think mandamus probably is used the way it's been used, to deal with ministerial acts, the failure of lower courts to perform ministerial acts. I don't think that that would be available, but certainly the original petition would be available to deal with miscarriages of justice, or what might be viewed by this Court as a malfunction of the gatekeeper process.

QUESTION: Well, following up on Justice Kennedy's thought, what about the common law writ of certiorari that was used in House v. Mayo?

GENERAL DAYS: I think that since the statutory original certiorari jurisdiction was available, there would be no need for this Court to use that particular common law writ.



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QUESTION: Thank you, General Days.

The case is submitted.

(Whereupon, at 11:29 a.m., the case in the above-entitled matter was submitted.)



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BY Ann Marie Federico

(REPORTER)