

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: WILLIAM BRACY, Petitioner v. RICHARD B.  
GRAMLEY, WARDEN  
CASE NO: 96-6133  
PLACE: Washington, D.C.  
DATE: Monday, April 14, 1997  
PAGES: 1-44

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM BRACY, :

Petitioner :

ORAL v. ARGUMENT OF : No. 96-6133

RICHARD B. GRAMLEY, WARDEN :

- - - - -X

Washington, D.C.

Monday, April 14, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

GILBERT H. LEVY, ESQ., Seattle, Washington; on behalf of the Petitioner.

BARBARA A. PREINER, ESQ., Solicitor General of Illinois, Chicago, Illinois; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-6133, William Bracy v. Richard B.  
5 Gramley.

6 Mr. Levy.

7 ORAL ARGUMENT OF GILBERT H. LEVY

8 ON BEHALF OF THE PETITIONER

9 MR. LEVY: Mr. Chief Justice, and may it please  
10 the Court:

11 In support of our discovery request in the  
12 district court, we presented evidence that former Judge  
13 Thomas Maloney systematically disregarded his oath of  
14 office in favor of his self-interest. He accepted bribes  
15 to fix murder cases. He had a prior history before he  
16 ascended to the bench as an attorney who fixed cases, and  
17 who had ties to organized crime.

18 QUESTION: Well, would your case be any weaker  
19 if he had never accepted -- never given bribes when he was  
20 an attorney and simply had accepted them when he was a  
21 judge?

22 MR. LEVY: It would not be any weaker, Mr. Chief  
23 Justice.

24 QUESTION: Then why do you mention the attorney  
25 business?

1           MR. LEVY: It seems to me, Mr. Chief Justice,  
2 that it's relative to the character of the person who is  
3 assumed to regard his oath and office and be fair in my  
4 client's case, a factor, I think, that the district court  
5 would want to take into consideration in determining  
6 whether or not there was a due process violation.

7           QUESTION: Well --

8           QUESTION: What standard are you arguing for  
9 here as a matter of constitutional law? Do you think it's  
10 necessary to show that the -- Judge Maloney made some  
11 request, either by inference or expressly, in this case,  
12 or do you think it's only necessary to show that he made  
13 it in other cases?

14          MR. LEVY: I think the standard, Mr. Chief  
15 Justice, as this Court indicated in Murchison, is  
16 probability of unfairness in this case. We believe that  
17 the presentation that we made to the district court was  
18 sufficient to demonstrate that, but if this Court decides  
19 that that's not sufficient, or a district -- or a court  
20 decides that's not sufficient, we're certainly in a  
21 position to go forward and demonstrate more.

22          QUESTION: Well, when you say probability of  
23 unfairness, you're saying that if you can show in some  
24 other cases that he asked for a bribe, or that perhaps he  
25 suggested if you didn't give him a bribe he would be very

1 tough on you, that would be enough, without showing  
2 anything in this particular case? You can answer that yes  
3 or no, I think.

4 MR. LEVY: No, Your Honor, if I may explain,  
5 please.

6 QUESTION: Yes, certainly.

7 MR. LEVY: I think all of this Court's analysis  
8 of this issue has always looked to the biasing influence  
9 itself, and whether it was sufficiently strong.

10 If the biasing influence, which in this case was  
11 corruption, has been deemed to be sufficiently severe,  
12 this Court has always presumed prejudice and has not  
13 looked to the question of whether or not the judge in a  
14 particular case was actually biased towards the particular  
15 defendant.

16 However, if actual bias were the standard, which  
17 we maintain it isn't, we believe that we may be able to  
18 show that if we're given access to the evidence.

19 QUESTION: You -- I suppose you would show that  
20 by something said to one of your client's lawyers by the  
21 judge during his trial. I would think you'd be able to  
22 get that now.

23 MR. LEVY: We may -- we think that we could show  
24 that for what -- for example as to what Judge Maloney may  
25 have said to the accomplices, who were Government

1 witnesses, at the time, who were involved in the bribe-  
2 taking process at the same time that my client's case was  
3 tried.

4 We may be able to explore the possibility that  
5 there was a corrupt relationship between Judge Maloney and  
6 the person that he appointed to be my client's attorney.  
7 We believe that we may be able to show examples of  
8 instances where Judge Maloney was corrupt in other cases  
9 in which he didn't receive bribes.

10 We believe that, as the Government sensing  
11 memorandum in the Maloney case indicated, we believe that  
12 we may be able to show a lot of corruption going on right  
13 at the same time as Mr. Bracy's trial, so that Judge  
14 Maloney would have had to have leaned in favor of the  
15 State just to be generally impartial.

16 QUESTION: Mr. Levy, I'm not sure what the scope  
17 of your concession was. Did you, in response to the Chief  
18 Justice, acknowledge that before you can proceed with  
19 further discovery you must establish a probability of  
20 unfairness?

21 MR. LEVY: No, I don't -- I'm sorry, I misspoke,  
22 Justice Scalia. Thank you. I think that we -- before I  
23 can proceed with discovery we have to show something more  
24 than bare allegations, as I understand this Court's  
25 interpretation of Habeas Rule 6(e). Certainly in this



1 case I maintain that we did show something more than bare  
2 allegations. We showed quite a bit. We think the showing  
3 was sufficient to allow us to proceed forward.

4 The judicial corruption, at least in my  
5 estimation, is worse than the type of situations that this  
6 Court has previously held to be a sufficient biasing  
7 influence. It's worse than direct pecuniary interest.  
8 It's worse than a judge who may be the subject of personal  
9 insults. It's worse than a judge who's somehow receiving  
10 income from the process, or is part of the process which  
11 is benefiting from a conviction. At least in those --

12 QUESTION: Well, Mr. Levy, I think we need to  
13 focus on two things here. One, what is the substantive  
14 standard that would entitle you to relief at the end of  
15 the day, and secondly, and most importantly for your case,  
16 what is the standard for showing good cause under the rule  
17 to get discovery? You have to deal with both those things  
18 and I think distinguish between them, and I'm not sure you  
19 are. I'm just hearing a lot of generalizations about  
20 corruption.

21 MR. LEVY: Thank you, Justice O'Connor. The  
22 substantive standard is well-established in the Murchison  
23 case. It's probability of unfairness. The good cause --

24 QUESTION: Substantive standard for what?

25 MR. LEVY: For judicial bias.

1 QUESTION: For ultimate relief.

2 MR. LEVY: Ultimate relief.

3 QUESTION: Ultimate relief.

4 MR. LEVY: The standard under 6(a) is, if -- may  
5 be -- it demonstrated sufficient facts to indicate that  
6 the petitioner may be entitled to relief under the  
7 substantive standard, we maintain that we've already got  
8 enough to satisfy the substantive standard, but certainly  
9 at least we've shown good cause that we may be able --  
10 entitled to relief.

11 There's no exact formulation, Justice O'Connor,  
12 but presumably it -- we have -- in order to get discovery  
13 we would have to show something less than what we would be  
14 required to show in order to be able to obtain ultimate  
15 relief.

16 QUESTION: Well, in assessing the probability of  
17 bias, am I supposed to make some judgment as to whether  
18 it's likely that a judge who has committed himself to a  
19 course of bribery is -- in a case where no bribe has been  
20 offered or requested, is going to be pro-Government? Am I  
21 supposed to assume that that is a likelihood, based on  
22 human nature or something? How might I make this  
23 determination of probability of bias?

24 MR. LEVY: There -- based upon this Court's past  
25 decisions, those types of assumptions have been made. For

1 example, in the contempt cases, where the defendant or a  
2 party is insulting the judge, this Court in the past has  
3 made an assumption that that type of direct personal on  
4 attack -- personal attack on the judge will be so  
5 disquieting to the judicial person that he or she will be  
6 unfair, so I think at a certain threshold that type of  
7 assumption is drawn. However, I don't --

8 QUESTION: I think can -- we have some  
9 experience with that that justifies that conclusion, but  
10 in this case you're saying once on the take the judge can  
11 never be trusted to be unbiased.

12 MR. LEVY: It certainly would seem that somebody  
13 has so little concern for the oath that he's going to take  
14 bribes to fix murder cases is probably less of a reliable  
15 person to be deemed to be a good judge than somebody  
16 who's --

17 QUESTION: Well, not a good judge. He's a  
18 biased judge.

19 MR. LEVY: Or a fair judge. Somebody who's got  
20 a past track record of unfairness, I think it's fair to  
21 make an assumption that that person isn't going to be  
22 fair, and that seems to me to be a much more compelling  
23 assumption than somebody who may simply have had his or  
24 her feelings hurt by a party.

25 QUESTION: Well, then your position is that

1 you've got enough evidence really right now, I suppose.  
2 The man did take bribes, and -- in other cases, and  
3 therefore you say the permissible inference is that he's  
4 unfair in all cases.

5 It doesn't -- that doesn't seem logical to me,  
6 but it seems to me that's your position.

7 MR. LEVY: My position, Mr. Chief Justice, is  
8 that we do have enough evidence right now, but if the  
9 Court decides that we need to show more, I think there's a  
10 whole wealth of information out there, and we can show  
11 more.

12 Answering Justice Kennedy's question, I think that  
13 it's more than an inference about the -- how the person  
14 will behave. It's a -- if you will, it's a structural  
15 defect. The judge is the captain of the ship in any  
16 judicial proceeding. He or she is the rudder. If the  
17 person is --

18 QUESTION: So any time a judge has taken one  
19 bribe, all his decisions have to be set aside?

20 MR. LEVY: That is the inference. It seems to  
21 me this is the type of -- certainly the magnitude of  
22 bribery that's involved with Judge Maloney is pretty much,  
23 in my estimation at least, analogous to a rudderless ship.  
24 You simply --

25 QUESTION: But what about Justice Kennedy's

1 particular question? What if a judge has taken one bribe,  
2 and has sat there for 15 years? All of his cases go down  
3 the drain under due process?

4 MR. LEVY: As I understand the --

5 QUESTION: Can you answer the question yes or  
6 no?

7 MR. LEVY: Yes.

8 QUESTION: But Mr. Levy, I thought you were  
9 saying --

10 QUESTION: This judge has handled -- this judge  
11 has handled 6,000-some criminal cases, as I understand it,  
12 and by your standard they're all out the window, and I  
13 guess there are a number of other judges that were also  
14 convicted in this Chicago area who had had similar  
15 experiences, so we're talking about a lot of cases. Do  
16 you have a fallback position from that in --

17 (Laughter.)

18 MR. LEVY: My fallback position is the dissent  
19 in the Murchis -- or in Ward v. Monroeville, which is that  
20 it's a fact-specific analysis. You have to look at the  
21 particular circumstances. Certainly, this case may be  
22 different than the case where the judge took a single  
23 bribe in his or her career years ago and you take it on a  
24 case-by-case basis.

25 We submit that the facts of this case are so

1     egregious and so aggravated, there was a whole lot --

2             QUESTION: Mr. Levy, could you clarify for us,  
3     of the 6,000 figure, does that include all guilty pleas,  
4     for example, the 6,000 cases? Do you know?

5             MR. LEVY: I'm sure that some of them involved  
6     guilty pleas. Some of them were minor matters. I think  
7     in numerous instances there's nothing pending --

8             QUESTION: Well, would your position require  
9     that the guilty plea convictions be set aside?

10            MR. LEVY: Any situation -- no, not the guilty  
11    plea. That's non -- predominantly nondiscretionary, but  
12    in any situation where a court --

13            QUESTION: So maybe in most of the jurisdictions  
14    the guilty pleas represent 90 or 95 percent of the  
15    convictions, so maybe a lot of these were not trial.

16            MR. LEVY: That's correct.

17            QUESTION: Yes.

18            QUESTION: Well, are there other -- I mean,  
19    obviously what was concerning the lower court is that  
20    there are quite a few judges in Greylord who were  
21    dishonest, and there are tens of thousands, perhaps, of  
22    cases of criminals who are convicted, and they're worried  
23    about releasing them and saying they're all going to have  
24    new trials, since the evidence will have disappeared, and  
25    so suddenly they will go free. All right, that's what was

1 concerning the lower court.

2 Now, what we're looking for to consider is, are there  
3 lines short of releasing all those people that make some  
4 sense in terms of the fairness of the situation? You say  
5 case by case, but what are we looking for case by case?  
6 Are there characteristics? One might be whether they  
7 pleaded guilty or not. Are there others?

8 MR. LEVY: This Court's cases on judicial bias  
9 have never discussed a per se rule. What they've talked  
10 about is degrees of bias and whether or not the biasing  
11 influence is sufficient so that the appellate court can  
12 say --

13 QUESTION: I'm not thinking of what the cases  
14 have held. I'm thinking of what, in your experience,  
15 would make sense as a line. Is there anything short of  
16 releasing, let's say, all those who didn't plead guilty,  
17 or are there other considerations that would segregate  
18 those which are the most likely to be unfair from every  
19 criminal case, at least every one without a guilty plea?

20 MR. LEVY: Well, certainly one consideration  
21 would be the imposition of the death penalty. Another  
22 consideration would be the extent to which the judicial  
23 officer made discretionary rulings which potentially  
24 affected the outcome of the case.

25 Another consideration would simply be the nature

1 of the biasing influence, a fact-specific determination of  
2 whether or not in a particular case the biasing influence  
3 was so severe that the appellate court can say with  
4 some -- or the reviewing court can say with some  
5 confidence that there was a probability of unfairness.

6 QUESTION: Mr. Levy, you're --

7 QUESTION: You know, I can imagine -- I can  
8 imagine cases where it -- the case has gone to a jury  
9 trial, and there's no provable fault in the instructions  
10 given to the jury, and there was no single evidentiary  
11 ruling that could be said to be improper in any way, and  
12 why should that case be upset, even though the judge turns  
13 out to have been a very bad actor?

14 MR. LEVY: With all due respect, Justice  
15 O'Connor, it seems difficult to me to imagine a situation  
16 in a serious criminal matter where the judge is not making  
17 discretionary rulings all along the way which might in  
18 some fashion have an impact on the outcome of the case, or  
19 even if there's --

20 QUESTION: But suppose we assume that those were  
21 correct, and that they were within the discretion of an  
22 honest judge of absolute probity.

23 MR. LEVY: Even if we assume that they're  
24 correct, Justice Kennedy, we cannot assume, particularly  
25 under these circumstances, that the judge did not take his



1 or her self-interest into consideration in deciding how  
2 she -- how he or she might make these discretionary  
3 rulings, and that's really the problem.

4 If you simply look at the correctness of the  
5 rulings that the judge made, then you insulate a whole  
6 category of judicial bias from appellate court scrutiny,  
7 because surely judges can influence or impact the outcome  
8 of cases without appearing to abuse their discretion.

9 QUESTION: Mr. -- I'm sorry. I didn't mean to  
10 cut off your sentence.

11 MR. LEVY: That's fine, Justice Souter.

12 QUESTION: There's one answer that you are not  
13 giving to Justice Breyer's questions that I thought you  
14 were going to give, and I had intended, actually, to raise  
15 this with opposing counsel, but let me raise it with you.

16 MR. LEVY: Okay.

17 QUESTION: I would have thought that you would  
18 have argued that one way to narrow the category down was  
19 to look for evidence that raised a particular inference of  
20 bias at the time of the trial in question, at the time  
21 of -- your client was tried, as opposed simply to a  
22 general shotgun corruption approach pervasive throughout  
23 the judge's entire tenure.

24 And I thought that you had such an argument  
25 here, because I -- and this is where I want you to correct

1 me if I'm wrong.

2 I thought the record indicated that in a case  
3 that was tried after yours a bribe had been solicited  
4 and -- or agreed upon prior to the trial of your case, so  
5 that it would be a very good reason for supposing that the  
6 judge would say, I'm going to dump the case that follows  
7 this one, and therefore it's important to me, if I'm not  
8 getting a bribe here, to come down hard on the State's  
9 side so that I will look good here and hence not appear  
10 too peculiar there.

11 Do you -- is -- are the facts such that you  
12 could make that argument?

13 MR. LEVY: Justice Souter, I think that the  
14 facts are even more compelling. I think the evidence  
15 would show that the bribe negotiations for the Lenny Chow  
16 case, which was a \$100,000 fix to acquit three murder  
17 defendants, was going on at the same time as my client's  
18 trial.

19 QUESTION: But you don't need any discovery to  
20 find that out, and that's -- I'm very confused by your  
21 presentation, because you seem to be dealing with an  
22 absolute here, and yet the only question presented is  
23 whether you've shown enough to be entitled to discovery,  
24 so what would you discover that isn't on the public  
25 record?

1 I mean, now we have -- the transcript of  
2 Maloney's trial is a public record. What -- if you're  
3 successful here, what discovery would you pursue?

4 MR. LEVY: On the assumption that we have to  
5 show more than what we've already shown, and that we have  
6 to point to specific instances which may raise inferences  
7 of bias, I believe that we may be able to show that there  
8 was more than simply a temporal connection between my  
9 client's case and the Lenny Chow case, the murder bribe  
10 case --

11 QUESTION: Well, can you be concrete? Whose  
12 depositions would you take? What evidence -- because the  
13 only question before us is whether you're entitled to  
14 discovery or not.

15 MR. LEVY: It appears, Justice Ginsburg, in this  
16 case -- and I'm not saying that the record shows it now,  
17 but I think there's at least some suggestion of this in  
18 the record, that Judge Maloney appointed an attorney who  
19 was a former associate of his with the understanding that  
20 this attorney would not object to the timing of the Bracy  
21 case -- in other words, would announce that he would agree  
22 to go to trial in a month on a triple homicide case,  
23 followed by another triple homicide case -- just so that  
24 the Bracy case could take place before the Chow case and  
25 the Bracy case would then be camouflage for the bribe

1 negotiations in the Chow case.

2 I believe that if we're given an opportunity for  
3 discovery we can show that. I think that that would  
4 simply -- that would do more than simply raise an  
5 inference of bias. I think that would show actual bias in  
6 this particular case. If that's what we're required to  
7 show if given the fair opportunity, we're prepared to do  
8 that.

9 QUESTION: So you would take the deposition of  
10 the attorney that had been appointed?

11 MR. LEVY: I would take the deposition of the  
12 attorney, I would take the deposition of Judge Maloney, I  
13 would take the deposition of the gentleman who assisted  
14 Judge Maloney with the bribe, the persons who were  
15 accomplices, who were Government witnesses at the time of  
16 the Maloney criminal trial, persons who are not likely to  
17 be available to us or cooperate with us, or give us  
18 meaningful answers, unless they're given a subpoena and  
19 forced to sit down and answer questions under oath in a  
20 formal discovery process.

21 QUESTION: Mr. Levy, let's get back to the  
22 precise issue that you have to establish. You have to  
23 show that you may be able to prove a probability of bias.

24 MR. LEVY: That's correct.

25 QUESTION: You may be able to prove probability.

1           It seems to me that your case rests upon several  
2 assumptions that I don't think are necessarily self-  
3 evident, number 1 that a judge who takes bribes in order  
4 to provide lenient treatment to some criminal defendants  
5 will provide harsher treatment to those from whom he does  
6 not take bribes. That doesn't strike me as self-evident.

7           MR. LEVY: Justice Scalia --

8           QUESTION: In fact, I -- you know, it seems to  
9 me just the opposite, that a judge who is on the take in  
10 some cases would look worse and would perhaps seem to be  
11 taking bribes if he were, you know, a hanging judge in  
12 most cases but in some cases all of a sudden comes out  
13 with, you know, real bleeding heart rulings. I don't know  
14 why that isn't a more plausible assumption of human  
15 behavior than the one you want us to believe.

16           MR. LEVY: The assumption that I'm asking this  
17 Court to draw, Justice Scalia, is not so much that as the  
18 assumption that persons who are dishonest on numerous  
19 occasions are likely to be dishonest and self-interested  
20 and disregard their oath of office in other occasions --  
21 it's difficult for me to tell the Court without --

22           QUESTION: So you should get discovery if this  
23 man were cheating on his wife, for example? Doesn't there  
24 have to be a close connection between the dishonesty in  
25 question and the dishonesty that you claim disfavored your

1 client?

2 MR. LEVY: The close connection is that in  
3 judicial proceedings, when Judge Maloney took an oath to  
4 be fair, he wasn't, and I think it's certainly a fair and  
5 logical inference to draw from that that he would be  
6 dishonest or self-interested --

7 QUESTION: I don't think so.

8 QUESTION: Mr. Levy, isn't your answer --

9 QUESTION: It seems to me that he's likely to --  
10 the fact that he is dishonest when he's given money does  
11 not seem to me to render it self-evident that he's going  
12 to be dishonest when he's not given money.

13 QUESTION: Mr. Levy, isn't your -- a point  
14 you're overlooking is, he has to get himself reelected,  
15 and if he's a bleeding heart in every case he's not going  
16 to be reelected in Cook County.

17 (Laughter.)

18 QUESTION: Wasn't it part of this record that  
19 this judge did have a reputation for being tough on crime?

20 MR. LEVY: He had a reputation as a law-and-  
21 order judge.

22 My other, I think fair assumption from what we  
23 know about Judge Maloney, Justice Scalia, is that somebody  
24 in that situation is going to be paranoid or concerned  
25 that he or she might be discovered.

1 QUESTION: Mr. Levy, is there any doubt about  
2 Judge Maloney's sex? You keep saying he or she, but I  
3 think he --

4 MR. LEVY: I'm -- excuse me.

5 (Laughter.)

6 MR. LEVY: I was speaking in general terms.  
7 Thank you, Mr. Chief Justice.

8 Judge Maloney is going to be paranoid or  
9 concerned that he's going to be under investigation by the  
10 State's Attorney's Office or the U.S. Attorney's Office,  
11 and I think a reasonable and fair assumption is that he's  
12 going to do things in other cases to take the heat off.

13 QUESTION: Whatever the --

14 QUESTION: I, my point is exact -- if I were  
15 taking a bribe, I would be very careful not to be a  
16 hanging judge in 90 percent of the cases and all of a  
17 sudden come up with this utterly inexplicable bleeding  
18 heart ruling. It seems to me that would call more  
19 attention to me than the opposite. I --

20 QUESTION: Is that what you're going to do  
21 discovery to find out?

22 MR. LEVY: The purpose of the discovery is to  
23 find out whether or not he -- there is a likelihood in  
24 Mr. Bracy's case that he, Judge Maloney, made decisions on  
25 the basis of things other than --

1 QUESTION: Well --

2 MR. LEVY: -- facts of the law.

3 QUESTION: -- I mean, are you intending -- you  
4 have a proposed discovery. You have proposed discovery.  
5 Do you intend to ask people who know the judge, or perhaps  
6 the judge himself, whether he either said or thought one  
7 theory or the opposite theory, whether he either said or  
8 thought, I think I'll be a little tougher in some of these  
9 criminal cases. It's important to me to get a reputation  
10 for being tough, because I get more money that way, or  
11 some words that could give rise to that inference, or the  
12 opposite, which Justice Scalia suggests could well be the  
13 case.

14 Do you plan discovery to find out?

15 MR. LEVY: Certainly, Justice Breyer, in keeping  
16 with the idea that this is a fact-specific determination,  
17 what we would do is, we would ask the witnesses what was  
18 his attitude, what was his demeanor, what was his --

19 QUESTION: Now, is one of those witnesses Swano,  
20 Mr. Swano?

21 MR. LEVY: Mr. Swano --

22 QUESTION: Do I have his name correctly?

23 MR. LEVY: Justice Kennedy, it's Mr. Swano, who  
24 is the attorney who gave the bribes in most of these  
25 cases, including --



1 QUESTION: Is he one of the key witnesses?

2 MR. LEVY: He is, Justice Kennedy.

3 QUESTION: Well now, you had his testimony, and  
4 as I recall the timing, Judge Hart had made his ruling,  
5 but you had Swano's testimony immediately thereafter, or  
6 the evidence about Swano?

7 MR. LEVY: Swano's testimony in the Maloney  
8 case, which focused more narrowly on the issues in the  
9 criminal trial, would have been available to us after the  
10 proceedings were concluded, Justice Kennedy.

11 QUESTION: Did you move to reopen, or more to  
12 reconsider before Judge Hart?

13 MR. LEVY: Did not.

14 QUESTION: Why did you not do that?

15 MR. LEVY: We felt we'd made a sufficient  
16 showing. At the time, we felt that --

17 QUESTION: Well then, why are you asking us for  
18 extraordinary relief so that you can bring to Judge Hart's  
19 attention something you didn't bring to his attention  
20 during the time period when you were permitted to do so?

21 MR. LEVY: The relief that we're asking is not  
22 access to the material, Justice Kennedy, that was publicly  
23 available, which may or may not have bearing on the  
24 precise question that the judge --

25 QUESTION: Well, but if his testimony is so

1 critical that you want us to reverse Judge Hart, it's a  
2 little difficult for you to ask us to do that when you  
3 didn't bring it to his attention when you could have.

4 MR. LEVY: That which we could have brought to  
5 Justice Hart's attention, Justice Kennedy, is not the same  
6 thing as what we're asking for.

7 What we're asking for this Court to do is  
8 precisely what we asked Judge Hart to do and he said he  
9 wouldn't, which was an opportunity to depose these people  
10 to ask them the precise questions that Justice Breyer  
11 posed and Justice Scalia posed, which is, how did Judge  
12 Maloney feel about the cases where he wasn't bribed, and  
13 was there a relationship in terms of Judge Maloney's  
14 attitude between the cases where he was bribed and the  
15 cases where he wasn't bribed, and that information wasn't  
16 publicly available then, isn't publicly available now, and  
17 the only way that we're going to be able to get at it is  
18 through the discovery process, formal discovery process.

19 QUESTION: Mr. Levy, may I just ask you a fact  
20 about Bracy? At some place in the record it says he's  
21 also under a death sentence in Arizona. Is that being  
22 challenged? I'm just wondering how --

23 MR. LEVY: That's being challenged, Justice  
24 Ginsburg. There are proceedings now pending in the United  
25 States District Court for the District of Arizona.

1           If I may, I'd like to reserve the rest of my  
2 time.

3           QUESTION: Very well, Mr. Levy.

4           Ms. Preiner, we'll hear from you.

5           ORAL ARGUMENT OF BARBARA A. PREINER

6           ON BEHALF OF THE RESPONDENT

7           MS. PREINER: Mr. Chief Justice, and may it  
8 please the Court:

9           The Due Process Clause entitles a defendant to a  
10 fair trial. In the context of the issues of this case,  
11 that question comes down to whether or not this defendant  
12 was tried by a judge who had a direct interest in the  
13 outcome of his case.

14           It is our contention that this petitioner received a  
15 fair trial from a judge and a jury. The evidence against  
16 him was strong, and is not challenged here. The judge's  
17 legal rulings have been reviewed twice by the Illinois  
18 supreme court --

19           QUESTION: May I ask kind of a basic question,  
20 Ms. Preiner? Supposing instead of a judge who's accused  
21 of bribery and so forth, this man had been tried by an  
22 accountant or a law clerk or somebody else who was not  
23 properly elected to office and was not a lawyer, and so  
24 forth, but you look at the record and he got a fair trial.  
25 Would that be subject to setting aside?

1 MS. PREINER: I believe it would be, Your Honor.  
2 I believe that that at minimum you are entitled to a trial  
3 by a judge and a jury. If we have an imposter as the  
4 judge, I believe that that --

5 QUESTION: And so the question is whether he had  
6 a judge here?

7 MS. PREINER: Whether he had -- yes, a duly  
8 elected judge, and he was tried by the judge and a jury.

9 QUESTION: Do you think it's better to be tried  
10 by a corrupt judge then by an accountant, for example?

11 MS. PREINER: I suppose it depends on the  
12 accountant, but --

13 (Laughter.)

14 QUESTION: No, but under your answer --

15 MS. PREINER: But we would assume --

16 QUESTION: -- all accountants, we'd set it  
17 aside, even the most brilliant, fair-minded, honest --

18 MS. PREINER: Well, I -- certainly no slur meant  
19 on accountants, or judges, but yes, we would assume that  
20 since the people have elected a certain person to sit in  
21 judgment on his fellows, that it would be his obligation,  
22 and we haven't done that for any accountants, so they  
23 would not be within that category that we trust with these  
24 decisions.

25 QUESTION: Well, I suppose you haven't had a

1 trial, in the ordinary sense, if it's been done before a  
2 kangaroo court. There's just been no trial in the  
3 accepted sense, and the question of whether you had a fair  
4 trial is different from the question of whether you had a  
5 trial.

6 MS. PREINER: Yes.

7 QUESTION: And of course, that's the issue here.  
8 When the judge is corrupt, have you had a trial?

9 MS. PREINER: Well, I believe -- yes, and I  
10 think that he has had a trial here, and he hasn't shown  
11 that the judge was corrupt in his case. I think that's  
12 the distinguishing factor here.

13 What counsel would have you assume is, all he  
14 has to show is that this judge once took a bribe, or took  
15 a bribe in another case, and that any case that he ever  
16 ruled on from that point on can no longer stand because --

17 QUESTION: But there's more in this record.  
18 There is evidence, as I remember it, according to the  
19 court of appeals opinion, that there was a case where he  
20 convicted in a case where the evidence indicated he  
21 normally would have acquitted, and did so in order to  
22 enhance his reputation as a tough judge. Isn't there  
23 evidence of that kind in the record?

24 MS. PREINER: I believe that that's reading that  
25 evidence too broadly. You do have statements from another

1 convicted lawyer who said that he had a case in front of  
2 this judge that he believed should have been a not guilty  
3 verdict, and that the judge in fact convicted his client,  
4 and he took that as a message to him that he needed to pay  
5 the judge money in order to get an acquittal. Now, that's  
6 one --

7 QUESTION: Hadn't a bribe been invited or  
8 solicited in that case? I thought that was part of the  
9 scenario.

10 MS. PREINER: I don't know -- I don't know that  
11 a bribe had been solicited in particularly that case, but  
12 clearly this lawyer --

13 QUESTION: But this lawyer had previously come  
14 up with bribes.

15 MS. PREINER: He had a history of engaging in  
16 that business practice with this judge, and furthermore,  
17 we only have this lawyer's word for it, that it would have  
18 been an acquittal.

19 QUESTION: Was it a bench trial or a jury trial?

20 MS. PREINER: That was a bench trial.

21 What the petitioner here is asking you to do,  
22 essentially, is to grant him the writ. I mean, his  
23 request -- as he has just admitted here in oral argument,  
24 his request for discovery --

25 QUESTION: Well, I think you, like the

1 petitioner, need to be careful about what we're being  
2 asked to do here.

3 I thought this issue was whether the petitioner  
4 was entitled to discovery under the rule.

5 MS. PREINER: That --

6 QUESTION: There was good cause for discovery to  
7 take depositions of the judge and the attorney that was  
8 appointed.

9 MS. PREINER: And that is my understanding of  
10 the issue that the Court framed, and that is certainly the  
11 issue that we briefed, but --

12 QUESTION: So what we have to decide is what  
13 would amount to good cause, and what would be an abuse of  
14 discretion for denying discovery.

15 MS. PREINER: Clearly, I agree with that, Your  
16 Honor. I was just commenting that counsel this morning  
17 was saying he believes he's actually proven enough to get  
18 the writ. He believes not only has he shown good cause  
19 for discovery, he believes that he has shown that he  
20 should be granted the writ for his client here. It's our  
21 position --

22 QUESTION: What should be our ruling on the  
23 substantive basis for relief in a case where it is shown  
24 that the judge did have the modus operandi of being very  
25 tough in those cases where there was no bribe in order to

1 facilitate taking bribes in the other cases?

2 What should be the ruling there in a challenge  
3 by someone who's been convicted in a case where there's no  
4 bribe?

5 MS. PREINER: I believe that if he could show  
6 that there was a modus operandi whereby the judge was  
7 ruling more harshly against defendants in order to cover  
8 his bribe-taking, or in order to balance his win-loss  
9 statistics, then I believe that he would be able to show  
10 actual bias in his case. He hasn't been able to do that  
11 here.

12 QUESTION: But he wants discovery for that very  
13 purpose.

14 MS. PREINER: But Your Honor, in order to even  
15 bring the habeas petition to the Court and ask for  
16 discovery, he has to show that there is at least some  
17 basis for his claim.

18 QUESTION: Well, he has Swano's testimony.

19 MS. PREINER: He -- actually, he doesn't have  
20 Swano's testimony. He didn't really support this request  
21 or this petition for writ with anything to the Court. As  
22 you pointed --

23 QUESTION: You're not claiming that the -- or  
24 maybe you are claiming that the writ is subject to  
25 dismissal right now?



1 MS. PREINER: I believe that if what --

2 QUESTION: That the petition for writ is subject  
3 to dismissal right now. Is that your position?

4 MS. PREINER: I believe that it was properly --  
5 it was subject to dismissal by the court below.

6 QUESTION: Maloney was on trial. There was  
7 no -- one of the problems was, he couldn't get anything  
8 out while the judge was on trial. As I understand it,  
9 that trial was over after the hearing on the habeas in the  
10 district court, is that right?

11 MS. PREINER: I believe that the transcript was  
12 unavailable. I believe that the judge's trial was --

13 QUESTION: Well, the transcript was what he  
14 needed to say, look at this testimony that we have from  
15 Swano in this record. If I can get a chance to depose  
16 him, I can get even more. Wasn't that the idea? That's  
17 what I thought the question presented was.

18 MS. PREINER: I think that that is certainly  
19 something that he could have argued. What he did argue,  
20 though was, what I'd like to do is conduct a survey of the  
21 judge's win-loss record, and the court said, you could  
22 have done that without any kind of discovery, and he said,  
23 and then what I'd like to do is look at Judge Maloney's  
24 trial and try to get some idea of what evidence there  
25 might be against him, and the court said, well now at this

1 point you could have done that, too, without discovery.

2 So all you're left with is that he wants to  
3 depose some people. He didn't bring to the court that he  
4 had talked to the defendant's lawyer at trial. He hasn't  
5 talked to any other witnesses. He hasn't -- he hasn't  
6 done anything to show that there might be some basis that  
7 will ultimately disclose that there was bias in this case.

8 QUESTION: Well, what about the argument which  
9 has at least been brooded about here this morning that if  
10 a trial in which there was no known bribery is sandwiched  
11 between trials in which there was bribery, or was  
12 conducted at a time when bribes were being solicited and  
13 arranged in other cases, there is good reason to believe,  
14 certainly in the elected system that Justice Stevens  
15 alluded to, that it would be in a judge's interest to look  
16 tough in a case in which he could be tough at no cost to  
17 himself without losing a bribe, and that that would be a  
18 reasonable basis for saying that discovery may uncover  
19 evidence that would substantiate the claim here.

20 Would that not be a reasonable basis for at  
21 least taking discovery to some step? I don't know how far  
22 it might go, but discovery is structured. Wouldn't that  
23 be a reasonable basis for making a start under the rule?

24 MS. PREINER: With all due respect, Your Honor,  
25 that's nothing more than speculation. That's nothing more

1 than --

2 QUESTION: Well, it's not speculation. I mean,  
3 it seems to me that it's a statement of one reasonable  
4 possibility. Another reasonable possibility is the one  
5 that Justice Scalia referred to, and that is, this fellow  
6 wouldn't want to call attention to the oddity of his  
7 rulings. He would want to look a little soft if he could.  
8 That would be a reasonable basis, too.

9 But you start discovery not by deciding between  
10 one or the other of those theories. You start discovery  
11 by determining whether there is a reasonable basis for  
12 saying that discovery may lead to evidence that would tend  
13 to prove the probability that this particular petitioner  
14 would have to prove. Why hasn't he made that showing on  
15 the kind of argument that I've made?

16 MS. PREINER: Because I believe that what we  
17 have here then is just a range of speculation. You can  
18 speculate that the judge was more harsh in these cases.  
19 You can speculate that he was more lenient in these cases.  
20 You could speculate that if he was being unfair in one  
21 case, he balances that off by being extremely fair in  
22 another case.

23 QUESTION: So you're saying that neither Justice  
24 Scalia's view nor the view that I've been suggesting is  
25 even reasonable. Each is mere speculation, and could

1 never be the basis for taking even a first step in  
2 discovery. Is that your position?

3 MS. PREINER: I believe they're all reasonable.  
4 They're all reasonable speculation.

5 QUESTION: Well, if they're reasonable, then  
6 we're beyond the point of mere speculation.

7 QUESTION: Yes. You can't define speculation as  
8 being a choice between one of two probabilities. Or do  
9 you?

10 MS. PREINER: I suppose speculation would be  
11 among a range of probabilities. I think that --

12 QUESTION: Of course, this isn't like a lot of  
13 requests for discovery where it's totally a fishing  
14 expedition. You don't have anything to go on. You just  
15 want to prowl around and find something. We at least  
16 start with established facts that this judge took bribes  
17 in a significant number of cases at roughly the same time  
18 as he tried this case, so you're starting off with some  
19 factual basis for saying we ought to take a little harder  
20 look at the whole situation.

21 MS. PREINER: Actually, with all due respect,  
22 Your Honor, I disagree. I think this is a fishing  
23 expedition. It's nothing more than that. He can't show  
24 any bias by this judge against him in his case.

25 QUESTION: Well, what about the allegation that

1 the trial was set to precede the trial where the bribe was  
2 taking place?

3 MS. PREINER: Frankly, Judge, this is the first  
4 time I've heard that claim made.

5 QUESTION: That's the first time you've heard  
6 that?

7 QUESTION: Is Judge Maloney -- by the way, has  
8 Judge Maloney conceded that he took bribes?

9 MS. PREINER: He never has. He has never  
10 admitted any guilt.

11 QUESTION: Has he -- was he tried, or did he --  
12 he didn't plead guilty?

13 MS. PREINER: He did not plead guilty.

14 QUESTION: And he has been convicted?

15 MS. PREINER: He has been.

16 QUESTION: So it wouldn't do any good to ask him  
17 any of these questions.

18 (Laughter.)

19 QUESTION: The allegation that this trial was  
20 set before the other one, this is the -- it's not  
21 contained in any of the arguments in the briefs, or --

22 MS. PREINER: I believe that the record will  
23 reflect on what date this trial occurred, and beyond that  
24 I don't think anyone has ever suggested that there was a  
25 specific reason for timing with respect to the trial date

1 here.

2 QUESTION: If this case, if Bracy's trial was  
3 set before the other trial, would -- for that purpose,  
4 would that automatically show bias that would entitle the  
5 petitioner to relief here?

6 MS. PREINER: I don't believe that that would be  
7 sufficient to show that there was bias in this case.

8 QUESTION: You do believe that it would?

9 MS. PREINER: I do not.

10 QUESTION: If you were to go as far as -- your  
11 opposing counsel says that an attorney was appointed for  
12 this person who would agree to a triple capital trial  
13 within a month, when in fact he should have wanted a much  
14 longer time to prepare.

15 I mean, you say that's raised for the first time  
16 now, and you may well be right, but if that were somehow  
17 made out at the appropriate point, that would surely be a  
18 basis of discovery for that attorney, would it not?

19 MS. PREINER: I don't believe that he has -- I  
20 don't believe that there's ever been any suggestion that  
21 this attorney was engaged in that -- that he didn't  
22 properly prepare for this case, or that he agreed to some  
23 short time period for the setting of this trial.

24 QUESTION: Yes, but that would be a ruling in  
25 this case that was made on grounds of bias and prejudice

1 and for corruption. You say it's a harmless -- a harmless  
2 ruling?

3 MS. PREINER: No. I don't believe that it would  
4 have been made for that purpose, and --

5 QUESTION: But let's assume that the trial is  
6 set in order to advance a conspiracy to take bribes.

7 MS. PREINER: Then, absolutely that would be  
8 evidence of bias in this case. If we are assuming --

9 QUESTION: And that would be grounds for --

10 MS. PREINER: -- that there's a conspiracy.

11 QUESTION: -- upsetting the conviction, would it  
12 not?

13 MS. PREINER: I believe that would be.

14 I would like to emphasize again that the  
15 evidence in this case was extremely strong against this  
16 defendant, and it was tried to a jury, and there has been  
17 no showing before the Illinois supreme court or in front  
18 of the District Court of the Seventh Circuit that the  
19 judge --

20 QUESTION: Yes, but you're not going to argue  
21 that we apply harmless error -- if there's proof of this  
22 guy was corrupt in this very case and made some rulings  
23 because he was bribed, you wouldn't say that there's  
24 harmless error there.

25 MS. PREINER: I would never say that, Your

1 Honor.

2 QUESTION: No.

3 QUESTION: And no matter how strong the evidence  
4 of guilt may have been, didn't this jury also make the  
5 death determination?

6 MS. PREINER: They did.

7 Under the circumstances of this case and the  
8 competing interest in balancing the finality of the  
9 judgment and the defendant or the petitioner's interest in  
10 not being improperly confined, we submit that he had to  
11 show more in order to require the court -- in order to  
12 show good cause why he should be allowed to explore all of  
13 these actions that he suggests here today he would have  
14 liked to explore.

15 And with all due respect, we believe that he  
16 could have -- he could have done some of these things that  
17 he is asking the Court for permission to do, and I believe  
18 the court thought that, too. They thought simply that he  
19 hadn't done his homework before he came to the Court with  
20 this request for discovery.

21 QUESTION: Counsel, before you finish, would you  
22 comment at all on whether you think there's any  
23 significance to the amicus brief filed by not only some  
24 distinguished Illinois lawyers, but former prosecutors and  
25 former U.S. attorneys, suggesting discovery is appropriate



1 in this case?

2 MS. PREINER: I sympathize, and certainly the  
3 Attorney General sympathizes also with those lawyers and  
4 their perception that there is a taint on the judicial  
5 system in Illinois because of the scandal, of the Greylord  
6 scandal.

7 However, that is not a sufficient basis to upset  
8 a valid legal conviction in this case involving a  
9 defendant who was clearly guilty --

10 QUESTION: No, but just to bring back the point  
11 Justice O'Connor raised, we're really not -- we don't  
12 really have to decide that.

13 We just have to decide whether the situation is  
14 sufficiently serious that it demands the fullest possible  
15 investigation before we decide what kind of rule should be  
16 adopted in a case like this, because there -- it's  
17 perfectly obvious that something might be learned by  
18 discovery that sheds light on the whole problem.

19 MS. PREINER: Well --

20 QUESTION: Because the problem goes beyond this  
21 one case.

22 MS. PREINER: I'm not entirely sure that  
23 anything will be learned by discovery in this case. I  
24 don't believe that there's been any showing that there is  
25 anything out there to be learned by these various methods

1 that he asks to employ.

2 We believe that he has to show some basis, some  
3 evidence on each one of the essential elements of his  
4 claim before he can get discovery, and we don't believe  
5 that he has done that here.

6 QUESTION: What would be enough, in your view?  
7 What would be enough? You -- he did show some things.  
8 You said they weren't enough.

9 MS. PREINER: For example, Your Honor, if he  
10 could say, I did an inventory of all the trial court's  
11 rulings in this case, and out of 187 rulings that he made,  
12 180 of them went in favor of the State, and here's why  
13 they were wrong.

14 If he could have said, for example, this was a  
15 bench trial, and all the rulings went against my client.

16 If he could have said something like, I have  
17 talked to Mr. McDonald, the lawyer who represented  
18 Mr. Bracy, and he tells me that, you know, this really  
19 wasn't a fair trial. He really thought something was  
20 going on here.

21 If he could have brought something like that to  
22 the court to provide some basis for believing that there  
23 would be proof of actual bias in this case, but there is  
24 nothing like that here.

25 QUESTION: Ms. Preiner, I'm -- the brief that

1 was referred to signed by former prosecutors, these people  
2 are former prosecutors?

3 MS. PREINER: Former prosecutors, yes.

4 QUESTION: They practice criminal law now?

5 MS. PREINER: Some of them do, yes.

6 QUESTION: Usually on behalf of defendants.

7 MS. PREINER: Almost exclusively on behalf of  
8 defendants.

9 Your Honors, our point -- and Justice O'Connor,  
10 as you've pointed out, the question here is a discovery  
11 issue. We believe that counsel has not made a sufficient  
12 showing for good cause for discovery.

13 QUESTION: Going back to the amicus brief, it  
14 does include a fair number of lawyers who do not practice  
15 on behalf of criminal defendants, such as former Governor  
16 Thompson --

17 (Laughter.)

18 MS. PREINER: It includes --

19 QUESTION: Former Justice Seymour Simon -- there  
20 are quite a few in there who are not representing  
21 defendants now, is that not right?

22 MS. PREINER: And many law school professors and  
23 people from all --

24 QUESTION: So it's not almost exclusively. You  
25 really want to modify that statement.

1 MS. PREINER: Well, the lawyers who are criminal  
2 defense lawyers on there are lawyers who represent  
3 criminal defendants.

4 (Laughter.)

5 QUESTION: Thank you.

6 MS. PREINER: Many of those lawyers have a  
7 varied practice, and I'm sure that they represent many  
8 noncriminal defendants, too, but there are a fair number  
9 of defense lawyers on there.

10 Your Honors, we simply believe that he has not  
11 made the showing that he needed to make to show good cause  
12 for discovery in this case.

13 We believe that the district court did not abuse  
14 its discretion in denying that request.

15 We believe that the Seventh Circuit  
16 appropriately affirmed that.

17 We would ask this Court to uphold that decision.

18 QUESTION: Thank you, Ms. Preiner.

19 Mr. Levy, you have 2 minutes remaining.

20 QUESTION: Mr. Levy, could you comment on the  
21 observation that the timing of the trial, the early  
22 setting, is the first time, and your description of that,  
23 the first time that this has come up is in -- here in this  
24 argument?

25 REBUTTAL ARGUMENT OF GILBERT H. LEVY

1 ON BEHALF OF THE PETITIONER

2 MR. LEVY: This is a -- it's a permutation on a  
3 previous argument, Justice Kennedy. This is based upon  
4 the record. It's not based upon anything that counsel  
5 didn't have available, or if I might simply indicate what  
6 the argument -- but no, I've not -- to answer the Court's  
7 question squarely, I have not made this exact same  
8 argument on a previous occasion, but it is supported by  
9 the record.

10 And the basis in the record is that Robert  
11 McDonald was appointed in the middle of June 1981.  
12 Several weeks after he was appointed, he announced that he  
13 was ready to go to trial in July of 1981 --

14 QUESTION: But all of this was before Judge  
15 Hart, was it not?

16 MR. LEVY: It was. He announced that he was  
17 ready to go to trial in July of 1981. On July 20, which  
18 is the first day of Mr. Bracy's trial, the State announced  
19 that it intended to introduce the evidence of the Arizona  
20 murder case as aggravation evidence in the event that  
21 there was a conviction on the homicide charge, and  
22 although another attorney who represented a codefendant  
23 Mr. Hooper asked for a continuance because he needed more  
24 opportunity to prepare, Mr. McDonald didn't say a thing.

25 And the additional fact that I would throw into

1 the equation there is simply there is some suggestion in  
2 the record that was before Judge Hart that there was a  
3 professional -- a previous professional connection  
4 sometime between Mr. McDonald and former Judge Maloney,  
5 and that, to me at least, raises questions as to whether  
6 or not there was some kind of fix as to the timing of the  
7 trial.

8 If I may conclude, Chief Judge Posner in his  
9 majority opinion in the Seventh Circuit -- and I would  
10 respectfully call the Court's attention to the top of page  
11 82 of the joint appendix -- said, we are, it is true,  
12 speculating about the likely impact of Mr. Maloney's  
13 corruption on the rulings that he made at the trial of  
14 these petitioners.

15 We also -- may I finish?

16 CHIEF JUSTICE REHNQUIST: No. Your time has  
17 expired. The case is submitted.

18 MR. LEVY: Thank you.

19 (Whereupon, at 11:54 a.m., the case in the  
20 above-entitled matter was submitted.)  
21  
22  
23  
24  
25

## CERTIFICATION

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

WILLIAM BRACY Petitioner V RICHARD B. GRAMLEY, WARDEN  
CASE NO: 96-6133

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

BY Don Nanni Federico

(REPORTER)