OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ARNOLD F. HOHN, Petitioner v. UNITED STATES

CASE NO: 96-8986

PLACE: Washington, D.C.

DATE: Tuesday, March 3, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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ARNOLD F. HOHN, :

Petitioner :

v. : No. 96-8986

UNITED STATES :

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Washington, D.C.

Tuesday, March 3, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:19 a.m.

APPEARANCES:

EILEEN PENNER, ESQ., Washington, D.C.; on behalf of the Petitioner.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

JEFFREY S. SUTTON, ESQ., Columbus, Ohio; amicus curiae by invitation of the Court.

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P R O C E E D I N G S

(11:19 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-8986, Arnold Hohn v. the United States.

Ms. Penner, you may proceed whenever you're ready.

ORAL ARGUMENT OF EILEEN PENNER

ON BEHALF OF THE PETITIONER

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

For the last half-century this Court has been granting writs of certiorari to review erroneous refusals by the appellate courts to allow statutorily authorized and meritorious appeals. That historical practice is fully consonant with the broad jurisdictional power conferred on this Court under the statutory certiorari provision, section 1254, and residually under the All Writs Act.

The statutory certiorari provision vests this Court with the power to review all cases in the courts of appeals over which those courts have jurisdiction regardless of the condition of those cases and irrespective of any decision that the court of appeals may have made.

This Court confirmed in --

QUESTION: Well, I think in light of House v. Mayo, I think it's very hard to argue that there is statutory certiorari jurisdiction unless we want to overrule that case.

MS. PENNER: I submit that Nixon v. Fitzgerald has already called into very serious question the underpinnings of the statutory certiorari decision in House.

House suggested that no case could be in the court of appeals if the certificate had been denied merely because the statute prohibited an appeal from entering the court of appeals absent a certificate.

QUESTION: Did the Nixon case discuss the jurisdictional point at length?

MS. PENNER: It did not, but it --

QUESTION: Well then, our rule is that jurisdiction that has been assumed without any elaborate discussion is not really to be regarded as contradicting a prior case that did discuss jurisdiction. Isn't that correct?

MS. PENNER: Mr. Chief Justice, we do not claim that Nixon v. Fitzgerald has even sub silentio overruled House v. Mayo. Instead, we claim that it implicitly has rejected the underpinnings of House v. Mayo.

QUESTION: But our precedents say that if

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jurisdiction is assumed sub silentio, without a discussion of the jurisdiction, that simply doesn't count.

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

In Nixon v. Fitzgerald the Court made a decision about what section 1254 means, and that decision, its interpretation, is irreconcilable with the holding in House. Were the Court to reaffirm the statutory certiorari decision in House, it would have very serious implications for the scope of the section 1254 power which the Court had recognized in Nixon.

If a case is, in fact, not in the court of appeals when a court of appeals dismisses for lack of jurisdiction, what is left of Nixon? Nixon decided that a case is in the court of appeals when there is a jurisdictional --

QUESTION: Might have made a mistake. Might have made a mistake.

MS. PENNER: We should be --

QUESTION: Especially in a case entitled United States v. Nixon, or Nixon v. Fitzgerald, and that's why we have that rule, that where we haven't thought and spoken about jurisdiction you shouldn't draw any conclusions from our entertaining of the case.

MS. PENNER: The --

QUESTION: I thought that's the rule.

MS. PENNER: The Court thought very carefully about its jurisdiction in both Nixon v. Fitzgerald and the United States v. Nixon.

I -- the cases that we refer to --

QUESTION: In fact, there's much more discussion of jurisdiction in those opinions than in House v. Mayo.

MS. PENNER: That's --

QUESTION: House v. Mayo, they didn't even get a response from the State, as I remember it.

MS. PENNER: Indeed, that's so, and the petition for certiorari was written by House's mother.

(Laughter.)

MS. PENNER: I -- we submit that even if Nixon v. Fitzgerald and United States v. Nixon are not the best authority for this Court, if the Court is concerned that there was inadequate discussion in those cases, turning to the plain language of the statute alone should be sufficient. The language in section 1254 is as broad as it could possibly be, and we submit that Congress' choice of the language in section 1254 was intentional.

It conferred jurisdiction on the court in all cases, not just all appeals, but all cases, all matters, all judicial proceedings that could occur in the court of appeals and that, by its plain terms, would include proceedings of an original matter in the courts of appeals

such as an application for a certificate of appealability.

QUESTION: Well, what about a motion before the court of appeals to expedite a particular case for hearing before the court of appeals?

MS. PENNER: In our view that also would fall within the plain language.

The case in the court of appeals here is the jurisdictional question of whether the court of appeals had the power under section 2253 to decide the merits, to allow the appeal into the court of appeals.

That is exactly analogous to the decision that this Court made in Nixon v. Fitzgerald, that the predicate jurisdictional decision to dismiss an appeal for lack of jurisdiction was itself a case in the court of appeals over which this Court has certiorari power under section 1254.

QUESTION: But don't you run in there, Ms. Penner, to our cases that say that piecemeal appeals are frowned upon? You know, the final judgment rule and that sort of -- and here you're saying, we can carve out what one -- many people might think was simply one case into two cases. One is the certificate of probable cause application and the other is the merits.

But doesn't that just bifurcate things that we have said in other contexts should not be bifurcated?

MS. PENNER: I think there are two answers, Mr. Chief Justice.

The first is that, to the extent that there is any bifurcation it's created by Congress itself, which mandated the creation of a gate-keeping provision at the same time that it foreclosed --

QUESTION: Well --

MS. PENNER: -- review of an appeal unless a certain thing happened in that gate-keeping decision, which is a decision to allow the appeal to proceed, but the second --

QUESTION: Do you really think that Congress in -- having thought about this thing intended that we have jurisdiction to review a decision of the court of appeals not to grant a certificate of probable cause or a certificate of appealability?

MS. PENNER: In my view, the plain language of section 2253, particularly when compared with the plain language of 2244(b)(3)(E), leaves no doubt that Congress expressly intended this Court to retain the certiorari power it has been exercising for the past half-century.

In 2253, Congress prohibited only one thing from entering the court of appeals absent a certificate, and that is an appeal to the court of appeals from the final order in a proceeding under sections 2255 or section 2254.

It does not say anything about this Court's certiorari power and that silence is very significant when you consider that that provision was amended at the same time that Congress adopted section 2244(b)(3)(E), in which it expressly proscribed this Court from exercising its certiorari jurisdiction over an analogous gate-keeping provision in the successive petition context, and I suggest that Congress had a very good reason for doing that.

It would have been much more concerned about the accuracy of the gate-keeping decision in the first habeas petition context than it would have been in the successive petition context. In the successive petition context, it is guaranteed that a prisoner has gotten a full right of review through the Federal courts.

In this context, with Mr. Hohn, for example, no court has yet actually reviewed the merits of his claim. He was kicked out on an invalid waiver doctrine in the district court, and he was kicked out on an invalid ruling on the meaning of section 2253, as the Government has conceded in the court of appeals. He is a Federal prisoner who has never had any hearing on his collateral claim.

If the Court concludes that it lacks statutory certiorari power it has residual authority in the All

Writs Act to issue a common law writ of certiorari, as the Court held in House v. Mayo.

QUESTION: That has to -- those have to be an aid of jurisdiction, do they not?

MS. PENNER: They do, Your Honor.

QUESTION: And by hypothesis here we would not have jurisdiction under the statutory certiorari?

MS. PENNER: By hypothesis here, yes.

QUESTION: So wouldn't it be rather hard to say that that was an aid of our jurisdiction if it was -- if our jurisdiction depended on issuing that writ?

MS. PENNER: It is an aid of the appellate jurisdiction that this Court could exercise over the appeal that the court of appeals has pretermitted by denying the certificate of appealability.

This Court has often held that it has the power, even when there is yet no case in the court of appeals, to order a lower court to allow a case to proceed, for example, by ordering a lower court to issue a bench warrant or to decide the merits, or even to allow the record to be transferred to the circuit court of appeals.

Each of those things, if they were not corrected by this Court, would end the case, which would otherwise develop into one over which this Court would have statutory certiorari power.

In this case, for example, if the Court were to reverse through its use of common law certiorari power the holding of the court of appeals that no certificate should be issued, the case would proceed, a decision would be made in the court of appeals, and that case would be reviewable by this Court on statutory certiorari.

Were the Court not to have that power, it would basically be giving the lower courts the power to eliminate its own jurisdiction, which cannot be the case.

QUESTION: Well, but maybe that's what Congress wanted.

MS. PENNER: When the Court was interpreting the All Writs Act in -- I'm sorry, Mr. Chief Justice, are you speaking of section 2253?

QUESTION: Well, I'm speaking about -- of that and whatever else is applicable. I mean, to say that this particular result would obtain is not necessarily an argument against that result, it seems to me, if that's what Congress wanted.

MS. PENNER: In my view, it's a question of comparing the statutory intent in 1254, 1651, and 2253. 1254 and 1651 are extremely broad jurisdictional grounds of power which I believe cannot easily be read to restrict this Court's power in a way that it could not reach a particular judicial proceeding in the courts of appeals

like this one.

The second question is whether 2253 indicates any intent to take that power away, and I don't see, in 2253, any suggestion in the plain language, or even in the purpose, to take it away. The purpose of 2253 is to ensure that meritorious appeals proceed and that frivolous ones do not. That purpose of Congress cannot be accomplished if the courts of appeals are applying that standard erroneously.

The power of this Court on certiorari merely will permit the Court to ensure that Congress' intent about what appeals should be permitted through the gate are -- that those decisions that the courts of appeals made are correct, and --

QUESTION: But the issuance of a certificate of appealability by a justice of this Court could accomplish much the same purpose as you say that accomplishes, couldn't it?

MS. PENNER: In many cases, it will accomplish the same purpose for the question of individual justice for a single petitioner.

For example, Mr. Hohn would, indeed, be satisfied with issuance of a certificate by this Court, but the question under the All Writs Act is whether the issuance of a common law writ is necessary or appropriate

in aid of the Court's appellate jurisdiction, and I submit that that is not just the appellate jurisdiction that the Court exercises in a single case, but a broader institutional interest in its ability to perform its appellate functions. Here --

QUESTION: Well, you just lost me. I have always assumed that it meant in aid of the Court's jurisdiction in the particular case.

MS. PENNER: Here --

QUESTION: You're saying it means in aid of somehow the court's role in the society, or --

MS. PENNER: I believe that its purpose is to permit both. Here, it is in aid of the court's appellate jurisdiction in that it preserves a case that ultimately will come before the Court on statutory certiorari, as I mentioned earlier.

QUESTION: That's --

MS. PENNER: In addition, it is appropriate and --

QUESTION: But that one could be handled by -- by --

MS. PENNER: By a -- that's correct.

QUESTION: By the application to a justice, who could refer it to the whole Court.

MS. PENNER: That's correct, Your Honor, but the

application is an ineffectual and cumbersome tool for the Court to accomplish its appellate functions of ensuring uniformity among the circuit courts.

QUESTION: But its appellate functions are defined by Congress, are they not? There isn't some big appellate function up there in the sky that we can assume that -- it's just what Congress says it should be, subject to the exceptions that Congress may provide.

MS. PENNER: Had Congress indicated an intention to prevent this Court from exercising its common law certiorari power, a slightly different question might be presented, but here there simply is no indication of that in section 2253.

It was completely silent on the subject and in comparison with section 2244, in which it barred certiorari review, it's fairly clear that Congress intended for this Court to continue to police the decisions of the lower court about what appeals could be taken in a habeas case.

QUESTION: Ms. Penner, why wouldn't referral by the circuit justice to the full Court suffice to protect the appellate-jurisdiction-in-the-sky aspect of the whole thing? Why wouldn't that be sufficient?

MS. PENNER: I guess one question is, if I -- if Congress intended to eliminate the Court's certiorari

power it seems unclear why it would have intended the Court to perform what is essentially the same function as that which it performs on certiorari through use of the application process.

I -- the Court would be rendering binding decisions on the meaning of constitutional rights that were resolving circuit conflicts in highly developed opinions before the full Court through the application process, which is highly unusual.

I think the Court's practice strongly suggests that that is not its preferred method of practice in the application --

QUESTION: Well, maybe not, but it seems to me that the burden is on you if you want to have an -- you know, an original writ issued to show that it is necessary and that there's no other way to get this thing done.

MS. PENNER: The All Writs Act speaks of the -- a power being -- existing when it is either necessary or appropriate.

In this Court's decision in Alkali, it confirmed that that power is available not merely to curb excesses of jurisdiction by the lower courts, but also to force lower courts to exercise their jurisdiction when it is appropriate to do so.

This is a case in which it would be appropriate

for the Court to exercise its appellate jurisdiction through use of the All Writs Act.

It is certainly true that the Court could conceivably stretch the application process broad enough to make it so like the certiorari process that it can perform certiorari functions through the application process, but it is unclear why Congress would have intended that.

It also is extremely awkward, because it relegates to a single justice -- typically when an applicant submits their application for a certificate to a single justice, it relegates to that justice the responsibility for determining whether the issue raises matters of national importance or a circuit conflict that warrant the full Court's attention.

And in contrast, in the certiorari process, all members of the Court have the opportunity to consider that question of whether it is worthy of the full Court's attention.

QUESTION: So you think if we agree with you that you can get a -- you know, a certiorari writ when you do get an application to a single justice, and I probably get more of them than anybody else, I don't have to worry about all of these cosmic questions?

MS. PENNER: I'm sorry, Your Honor.

QUESTION: Well, you say that one of the disadvantages of not agreeing with you on the certiorari point is that each justice to whom an application is submitted would have to worry about such questions as establishing what the law ought to be in circuit conflicts and all of that.

Whereas I assume the consequence is, the unuttered consequence, if I agree with you, then I don't have to worry about that any more. When I get these individual applications, all I have to think about -- and I should never refer, never have to think about referring it to the Court.

MS. PENNER: Surely the burden on a single justice to consider those issues of whether a question of national importance is raised or whether there is a circuit conflict will be significantly less if the Court clearly establishes that the petition for certiorari remains an available route.

And, in fact, this Court has exercised its power to use certiorari repeatedly over the last 50 years, sometimes to resolve circuit conflicts, often to define the scope of constitutional rights, and to make very important statements about the availability of habeas relief, as an individual circuit justice acting in chambers would not have the responsibility for ferreting

out those questions if the petition for certiorari remained available and instead could focus on the questions of individual justice that an application raised.

Which actually goes to another issue, which is that typically an applicant for a certificate will be presenting to the Court only issues of their own individual entitlement and will not be highlighting for the Court circuit conflicts and the importance of the issues they're presenting.

QUESTION: Well, what do you see as the test of a certificate of appealability, Ms. Penner? If I'm a circuit justice for the Fourth Circuit, ought I to decide to grant a certificate of appealability only if there's some -- only if this Court would review it?

Or perhaps more broadly, if I think the thing is arguably one -- you know, you could make up your mind one of two ways, before the court of appeals.

MS. PENNER: I understand Your Honor to be -- are you questioning about the standard that the courts of appeals should be applying?

QUESTION: Yes, and I mean, would a justice of this Court apply the same standard that a judge of the court of appeals applies?

MS. PENNER: The Government has argued that a

higher standard should apply, that this Court should only issue certificates in the most extraordinary circumstances. They made that argument on the assumption that certiorari review would be available.

I -- that argument, that the Court should apply a different standard in deciding whether to grant applications for certificates, contravenes the plain language of section 2253 and this Court's own decisions.

Section 2253 expressly sets out a standard. It is a substantial showing of the denial of a constitutional right, and that standard applies equally both to circuit justices and to circuit judges. Had Congress intended for the court to apply a different standard, I expect that it would have said so.

In addition, the Court in Barefoot v. Estelle set out the standard which Congress subsequently codified, and it never indicated that, were a certificate application to be submitted to it, it would apply a different standard and, indeed, circuit justices in chambers appear to have been applying precisely that standard.

We do not argue that it would not be appropriate for the Court to require a petitioner to seek relief elsewhere before submitting an application for a certificate to this Court. It is a rule that the Court

has used in other circumstances, and it furthers the Court's appellate function by permitting it to review the decisions of lower courts rather than to be deciding questions in the first instance.

But that is different -- requiring applicants for a certificate to exhaust other remedies first is a different matter than raising the bar and saying that they must prove not merely a substantial showing of a denial of a constitutional right, but also a clear and indisputable substantial showing.

One other point is that -- Justice Scalia raised the question of the burden on justices in chambers. The availability of petition for certiorari will ease the burden on justices in chambers of deciding applications for certificates, because the Court will have the power to slice through to the single error, the legal error that a lower court got wrong, in this case the question whether Mr. Hohn's claim was the denial of a constitutional or a statutory right.

A justice in chambers or, in fact, even the full Court, were the justice to refer the matter to the full Court, would not have that power and, instead, would have to consider all of the secondary issues, for example, those that were raised in our separate application in this case, and question whether a petitioner has made a showing

of cause and prejudice for their procedural default, actual in the sense this is a burden that the justices in chambers will not have to bear if it holds to its 50-year practice of finding that -- of issuing writs of certiorari to review the decisions of lower courts on certificates.

QUESTION: Well, excuse me, could -- but how does that work? The Court would grant certiorari limited to that one issue, and the other issues could not be presented to the justice in chambers?

MS. PENNER: It's true that the Court could combine those two issues, but only if it affirms that it retains the certiorari power. Were the Court to hold that it lacks the certiorari power, the full Court could decide one legal issue and then refer the rest of the case back to a single justice to decide the rest of the issues, predicate to determining whether a certificate should be granted.

If the Court will permit, and no further questions are pending, I'd like to save time for rebuttal.

QUESTION: Very well, Ms. Penner.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES

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

The United States believes there are two reasons that this Court should adhere to House v. Mayo and hold that it may issue a common law writ of certiorari to review the action of the court of appeals in this case.

The first reason is stare decisis. The second reason is that a common law writ of certiorari is the most practical available way to correct important legal questions such as the proper standard for issuing certificates.

QUESTION: What if Congress had said that, you know, this Court is going to review cases by certiorari and define the terms and the time limits and so forth? Do you think that we could issue a common law writ of certiorari for a case where someone didn't comply with the requirements to seek statutory certiorari?

MR. ROBERTS: No. This Court in its discretion would decline to issue a writ of certiorari when there was a plain intent to preclude review, but in this case there isn't a plain intent to preclude review.

Section 2253 only discusses -- only precludes appeals as of right to the courts of appeals on the merits of a section 2255 motion. It doesn't discuss certiorari jurisdiction, it doesn't discuss this Court's jurisdiction, and it doesn't discuss review of the question --

QUESTION: But couldn't one infer from -- perhaps not even infer, but the -- part of the holding of House v. Mayo is that we don't have statutory certiorari jurisdiction here. Why shouldn't that be the end of it?

MR. ROBERTS: It is the Government's position that House was correct and the Court doesn't have statutory certiorari, but the codification of statutory certiorari did not repeal this Court's ability under the All Writs Act to exercise common law certiorari.

QUESTION: In aid of its jurisdiction.

MR. ROBERTS: In aid of its jurisdiction, and --

QUESTION: If we don't have statutory certiorari jurisdiction, why should we be able to use another writ to simply substitute for that to give us jurisdiction?

MR. ROBERTS: Well, it's not to substitute for that to give the Court jurisdiction. It's in aid of the jurisdiction that may have wrongfully precluded by an incorrect decision by the court of appeals, keeping the case out of the court of appeals.

QUESTION: Why isn't the case in the court of appeals for the purpose of deciding whether a certificate of appealability will be ordered?

MR. ROBERTS: Well, House v. Mayo held that the case was not in the court of appeals.

QUESTION: Then there's a lot of practice after

that that seems to go the other way, so if -- is that the only basis? But I mean, in logic, if the case isn't in the court of appeals for that purpose, then why is a case in which the court of appeals denies qualified immunity appeal? Why would that be in the court of appeals?

Why would a case in which the court of appeals says, we think that you've tried to appeal under a collateral order exception from Cohen, but we think you're wrong, why would that case be in the court of appeals?

Why would a case in which the court of appeals ever says we don't think you have jurisdiction to appeal, why would that be in the court of appeals?

In other words, if House v. Mayo is right, how can we take any of those cases?

MR. ROBERTS: Well, it's certainly a close question, Justice Breyer, as to whether an application for a certificate is a case in the court of appeals.

QUESTION: I mean, the Solicitor General -- my point is, the Solicitor General I would think believes that we're right in taking those cases that I've mentioned.

MR. ROBERTS: Yes. There's --

QUESTION: All right. Now, if you think we're right in taking those cases that I've mentioned, then you must either think there's a distinction from House v.

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Mayo, or you must think House v. Mayo is wrong, so which is it? Is it a distinction? If so, what is it, or is House v. Mayo wrong?

MR. ROBERTS: It's a distinction, and the distinction is that here Congress has set up a two-stage process with a screening mechanism to decide whether petitioner's case is in the court of appeals.

It would be odd to consider the application to that screening mechanism to be itself a case that brings the petitioner's case in the court of appeals, so that would be the reasoning in House and in the other cases that consider a leave to appeal not to be in the court of appeals.

QUESTION: Well, in your view, do we have common law certiorari jurisdiction to review the denial of a court of appeal -- a certificate of appealability and also jurisdiction to review the merits of the appeal?

MR. ROBERTS: House holds that the Court has jurisdiction to review the denial of the certificate and, if it determines that the certificate was improperly denied, to review the merits.

QUESTION: And that's your position here?

MR. ROBERTS: And that is our position here. The Government's position is that this issue was decided in House and that the Court should adhere to House,

because stare decisis is particularly strong in cases like this one, which turn on statutory interpretation.

And Congress has revisited all these statutes. It's revisited the All Writs Act, the certiorari statute, and section 2253 several times since House, yet Congress has made no changes to any of the statutes that indicate any disagreement with House.

QUESTION: Of course, all we have to do, I suppose, if we accept your view of House, is review the certificate of appealability determination and stop there. We don't have to go the further step, do we?

MR. ROBERTS: No. In fact, that's why we believe that a common law certiorari is the most efficient means to decide these questions, because in the context of acting on an original certificate, an original application for a certificate, the Court wouldn't be able to stop there.

The Court would have to review the entire case, the Court would have to decide all the legal issues that are necessary to determine whether there's a substantial constitutional issue, and the Court would have to apply those legal standards to the facts of the case and determine whether the petitioner is entitled to a certificate on the facts of the case, and that would be a very cumbersome method to achieve clarification of the

standard for issuing certificates.

There's no reason to believe that Congress intended that. Congress didn't say that in 2253 that that was the method of review that should be used and, in fact, in another provision of the AEDPA, Congress expressly revoked the Court's certiorari power to review orders by the court of appeals that authorize or deny the filing of successive habeas petitions.

So Congress was aware of how to limit this Court's certiorari power if it intended to do so, but it chose not to do so here.

QUESTION: Now, in this Court the petitioner applied to this Court for a certificate of appealability, or at least to a justice, did it not?

MR. ROBERTS: Yes.

QUESTION: And I think that the Government opposed that on the grounds that the petitioner didn't demonstrate exceptional circumstances.

MR. ROBERTS: Yes. The Government opposed that on two grounds. First, that adequate relief is available from another source and, second, the petitioner hasn't presented exceptional circumstances.

QUESTION: And yet to exercise common law certiorari jurisdiction we have to determine there are exceptional circumstances. Isn't that a little

inconsistent?

MR. ROBERTS: The exceptional circumstances are not met in the case of a certificate because the petitioner hasn't demonstrated an entitlement to a certificate.

I think that that just proves the point that I was making before, that the certificate context requires the Court to do more than the certiorari context. In the certiorari context there are exceptional circumstances because there's no other way to clarify the standard in 2253(c)(2) for when a certificate should issue.

But in the case of a certificate, what would be required to show exceptional -- exceptional circumstances, excuse me, is that the petitioner clearly merits the certificate and that it's been denied by the lower courts, and petitioner can't show that in this instance because petitioner hasn't proffered any evidence to show actual innocence and petitioner can't show cause to excuse petitioner's procedural default. That's the Government's position.

QUESTION: Mr. Roberts, may I ask you about an earlier piece of this somewhat confusing puzzle? At the circuit court level, Judge McMillian said, I would grant the certificate of appealability. Could he have done so?

MR. ROBERTS: It is an oddity of the way the

applications for a certificate work. An individual circuit judge could grant a certificate, but the practice in the Eighth Circuit is to refer the applications for a certificate to a panel of the court, and in this case it was referred to a panel of the court and two of the judges on the panel determined that a certificate should not issue, and so that was controlling.

QUESTION: So it's the circuit's practice, but the circuit's practice could be otherwise compatibly with the statute?

MR. ROBERTS: Yes. The circuit's practice could be otherwise -- this Court in In re Burwell held that it was up to the individual courts of appeals to determine whether a request for a certificate should be decided by an individual circuit judge, by a panel, or conceivably by the whole court.

QUESTION: Thank you.

QUESTION: What -- to go back for a second, what is it that makes this a screening mechanism? Is it that it goes to one judge? Is that the reason that it's -- you call it a screening mechanism?

I take it it's not the simple fact that the jurisdictional issue has to be decided first, or that the certificate of appealability issue has to be decided first. It must be that it's directed to one judge.

MR. ROBERTS: It's that Congress has set up a separate process to determine whether the case can go forward, and has explicitly mandated that unless the petitioner survives that hurdle, the case can't go forward.

In the Nixon case the jurisdiction question and the merits were one case, and so the jurisdiction question was in the court of appeals when the notice of appeal was filed.

QUESTION: Thank you, Mr. Roberts.

Mr. Sutton, we'll hear from you.

ORAL ARGUMENT OF JEFFREY S. SUTTON

AMICUS CURIAE BY INVITATION OF THE COURT

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

At the same time Congress in 1996 was most conspicuously streamlining habeas review, the Federal Government and petitioner having proposed an interpretation of that legislation that multiplies by a factor of two or three the avenues of appellate relief available to individual Federal prisoners or State prisoners.

The twin vehicles for this development are 1) a theory of statutory certiorari that has never received the vote of a single justice of this Court and has been

positively rejected by several decisions of this Court and, second, a theory of common law certiorari that has not been used meaningfully in an opinion by this Court since the end of World War II.

It would seem quite anomalous to resurrect the one theory and create the other in the one area of the Court's jurisdiction that is now most expressly regulated by Congress. I submit that that's not what happened.

I'd like, Justice Breyer, to address your question about -- and the Nixon cases. The key difference between the Nixon cases and this one is the gate-keeping decision is really not a jurisdiction decision. Yes, it ultimately may have jurisdictional consequences, but keep in mind, when a court of appeals judge denies the certificate, that does not mean no jurisdiction.

The inmate can go to this Court, obtain a certificate -- at that point there might be jurisdictional consequences, but of course at that point the review that is being sought is not just of what the circuit judge did, but also of what that circuit justice did. That's extremely odd.

I'm not aware of another jurisdictional statute where individuals, whether inmates or not, can argue that a court of appeals made a mistake in a court of appeals panel or a court of appeals judge where this Court has

already had an opportunity to look at the matter. That's quite unusual.

QUESTION: If you focus right on that decision, there is a decision that Congress is asking a circuit judge to make. Judge, decide if a certificate of appealability should issue.

MR. SUTTON: Yes.

QUESTION: That's the decision. Where is that decision made? When I was a circuit judge I used to sit in my office, which I felt was in the court of appeals.

(Laughter.)

QUESTION: But where, metaphysically speaking, is the decision being made to issue or not issue the certificate of appealability?

MR. SUTTON: Well, of course, it is being made by a circuit judge, but I would submit --

QUESTION: And where? Where is that circuit judge?

MR. SUTTON: The circuit judge is obviously in his chambers.

QUESTION: Yes, all right. So where would you say, metaphysically, with Congress not saying to the contrary, that decision was being made?

QUESTION: His chambers may not be at the court of appeals. I mean, many judges have their chambers back

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home in their States that they --

QUESTION: I'm not -- I'm speaking --

MR. SUTTON: But Your Honor, actually -- but actually, Your Honor, your question gets to a fundamental point. The AEDPA is not an exercise in metaphysics. The AEDPA requires a straight --

QUESTION: I'm not --

MR. SUTTON: -- consistent interpretation --

QUESTION: I'm trying to get -- what I'm focusing on is that particular decision, and I'm trying to think if there's some reason to say, no, no, that decision isn't being made in the court of appeals. I grant you it's being made by one judge rather than three, but is there any reason for saying that that decision by the one judge is not a decision that is being made in the court of appeals?

MR. SUTTON: I think for the same reason that this court would not review a 1292(b) decision by the court of appeals. For example, let's say that a trial court decided to issue a certificate saying that an issue of law ought to go up to the court of appeals.

The court of appeals has discretion to decide at that point whether to take the issue of law. They don't have to, and if that court of appeals does not take that issue, it's not in the court of appeals, and this Court

cannot review it, and there's no decision to the contrary.

But another critical point here, you know --

QUESTION: I thought that wasn't because of where it was located, whether in the court of appeals, except 22 -- in 1292(b) Congress has made it highly discretionary at two levels, and you've got to have them both. And it can't be in the court of appeals unless the district judge puts it there, and if the court of appeals says no, then it's out. But -- so I don't understand the analogy to 1292(b).

MR. SUTTON: Well, maybe I'm -- I may be misunderstanding the question, Your Honor, but it really seems quite similar. It seems to be another type of gate-keeping function that is pre-jurisdictional in nature, and then after all the whole function of 1292 and 2253 is utterly destroyed if one can review each of these decisions.

What ends up happening is, instead of narrowing and streamlining --

QUESTION: 1292(b) is a question of when, not whether. 1292(b) is a purely, should it be reviewed now. It can be reviewed later, so it's only a question of interrupting an ongoing proceeding. That's why I don't see these -- you are raising a now-or-never issue. Either you get the certificate and you can present your question,

or you don't, and you never can.

1292(b) is simply a timing question. It doesn't say in any way that you can't bring up the issue.

MR. SUTTON: Well, Your Honor, since I'm not getting very far on that analogy, let me try to make another point.

2253 creates another implication that I think undercuts the 1254 argument that has been made, and that's the implication created by the fact that when the inmate goes to a court of appeals judge the game is not over if the certificate is denied. 2253, after all, does say it can be brought to a circuit justice and, if necessary, referred to the whole Court.

I think that creates a very strong implication that when you're dissatisfied with what the court of appeals panel or judge does, that's how you resolve the matter. You don't -- you're not left with twin and possibly three routes of review.

QUESTION: One of the issues that's arisen is whether that presents any different situation from what the Court had in House. I'm sure you've seen the submission from the other side on that point. Do you have anything further to add on that?

MR. SUTTON: This is the question as to what the state of the law was in 1945?

QUESTION: Yes.

MR. SUTTON: Yes, Your Honor. I most definitely do. I would argue that the state of the law has changed quite significantly and, in fact, dispositively since 1945 and specifically since the changes in 1948. I filed a letter with Ms. Nelson, with the Clerk's office, that indicates that the 1911 act, that section 293 of the 1911 act makes clear that the very definition that the Solicitor General's Office is relying upon does not apply and did not apply to the habeas statutes.

What that section says is the term title only refers to this act, and the 1911 act did not deal with the habeas statutes and most specifically did not deal with the 1908 gate-keeping function that we're now dealing with and was first enacted in that year, so -- but I would submit that's not all.

One can read House alone, and I would submit that in 1945 there was no better discerner of the state of the law than this Court in 1945, and the beginning of the House decision at page 43 makes it quite clear that their understanding of the law is that the only place to go is the district court judge and the court of appeals. There's not a single mention of whether one can go to a circuit justice.

In fact, they quote the very statute, 28 U.S.C.

466, upon which I'm relying to make this argument, and I'd like to emphasize this point, because I think it offers --

QUESTION: But you will concede that House was a rather skimpy opinion. It was per curiam and there was no opposition, and it wasn't a very well-aired case, was it?

MR. SUTTON: Well, they all get respect from me anyway, Your Honor, and I --

(Laughter.)

MR. SUTTON: I would add -- I would add that there's been nothing to suggest in any decision since then that House was wrongly decided, and I think what's important about this matter is this --

QUESTION: Well, there has been one thing.

MR. SUTTON: Excuse me.

QUESTION: There has been one thing, and maybe you would comment on it. Congress in 22 -- which is it? I get the sections mixed up.

But anyway, there's a section in here that says there can be no appeal or review of a denial of a second or successive.

MR. SUTTON: Yes.

QUESTION: Which if I understand your position correctly, that -- Congress could have omitted that entirely and the law would have been exactly the same.

MR. SUTTON: Absolutely not, Your Honor, and I'm

glad I have a chance to deal with that issue.

The clear statement provision, 2244, was needed precisely because of the main case on which the Federal Government and petitioner rely, House. The statutory scheme in House was just like 2244 would have read without a clear statement.

2244 says, if you want permission for a second habeas, go to the court of appeals and get permission. It says -- would have said nothing about a justice, nothing about Supreme Court review. That's the House statute, and because House was on the books, Congress quite smartly said we're going to avoid all the --

QUESTION: Why didn't they do it as to the first habeas as well as the second, then --

MR. SUTTON: They didn't --

QUESTION: -- and make it perfectly clear.

MR. SUTTON: They didn't need to, because under statutory certiorari every single decision of this Court, every single decision of the Court that was on the books indicated that there was no statutory certiorari jurisdiction, so they didn't need a clear statement there and, precisely because, as I indicated in responding to Justice Souter's question, the law had changed since 19 --

QUESTION: Your view is they needed a clear statement for a second successive but they didn't need one

for a first habeas because that law was already very clear with respect to first?

MR. SUTTON: Sufficiently clear to not need a clear statement, yes, Your Honor.

QUESTION: I find that rather puzzling.

MR. SUTTON: But, Your Honor, let's -- well, I think the law was settled as to statutory certiorari. I don't think anyone's arguing that the law was settled on that point.

The harder question, I agree with you, is whether the law was settled as to common law certiorari in light of the House decision.

There's one body of Government that would have noted -- known whether they needed a clear statement in 1996. It would, after all, have been Congress, because Congress is the one that changed the law in 1948 and said quite clearly if you're unhappy with the court of appeals gate-keeping decision go to a circuit justice and, if necessary, the whole Court.

So I -- you know -- you're -- I'm not happy with the look you're giving me but I do think that --

(Laughter.)

QUESTION: Probably you can't, because I -- you still seem to think that it was absolutely necessary to spell out that there shall be no review of the denial of a

second, but there's no need to do it for the denial of a first because the law was -- I just find that mind-boggling.

MR. SUTTON: Well, maybe I'm not making clear why --

QUESTION: Maybe I'm just stupid.

MR. SUTTON: No, I'm sure that it's an opposite problem.

The thing I'm trying to emphasize is that, with House on the books, if you have a statute that just says go to the court of appeals and nothing else, that would have allowed common law certiorari. An inmate would have come --

QUESTION: Well, if that's true why can't --

MR. SUTTON: -- under settled law --

QUESTION: If that's true, why can't we review this case? If you're right about that, then we should review on common law certiorari.

MR. SUTTON: No, Your Honor, because the statutes changed. There's not a single All Writs precedent in over 210 years of this Court's jurisprudence in which they granted All Writs relief, whether common law certiorari or any other --

QUESTION: Well then, if that's true you don't need a special provision for the second habeas, either.

MR. SUTTON: I'm not sure I follow that.

QUESTION: I don't understand, under that argument, why it was necessary for Congress to enact a grant or a denial of an authorization by the court of appeals to file a second or a successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

MR. SUTTON: Because House was still on the books. I don't have to worry in 2253 because the statute had changed and had given the inmate another available route for relief. There's no All Writs Act precedent with which I'm aware, or that has been cited by petitioner or the Federal Government --

QUESTION: Well, are you saying -- let me just be sure I -- you're saying that if they had not enacted (E), they could have -- we could have accepted review in second habeas but not in first?

MR. SUTTON: Yes, absolutely. Absolutely.

QUESTION: That is remarkable.

MR. SUTTON: But, Your Honor, that's House. I mean, unless you're going to overrule House, that's exactly what House says.

QUESTION: In House, I take it that the Court issued All Writs review, is that right?

MR. SUTTON: Yes.

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QUESTION: All right, and so then the question was, well, why can't we do that in this decision about certificate of appealability, and I take it your answer to that was, well, the reason they issued All Writs review before is because there was no other way to get it.

MR. SUTTON: Yes.

QUESTION: But here, there was a way to get it now. The way to get it now is, a single justice can issue --

MR. SUTTON: Absolutely.

QUESTION: All right. Then the Solicitor General says in respect to your answer, well, that isn't really so, because at the time of House the word judge included single justice, so there was a way of reviewing then, just as there is now.

So now your response to the response to the response to the response is what?

MR. SUTTON: I think I've kept track of that. The --

QUESTION: That's the letter you filed.

MR. SUTTON: That is the letter I filed.

QUESTION: And the letter -- the answer to that -- I mean, you see, they've made it very parallel. I mean, they've made it absolutely parallel to House, and your response to that now is what?

MR. SUTTON: Their argument -- I want to make sure I've made their argument clear, because I don't think I did the first time through. Their argument is that the phrase, judge of the court of appeals --

QUESTION: Right.

MR. SUTTON: -- in 1945 included a justice of this Court.

QUESTION: Right.

MR. SUTTON: So that's their argument, and to make that argument they've looked to a definition they found in title 28 that says, judge of the court of appeals can include circuit justice, so at that point, that's a pretty good argument.

Now, the response to it is the letter I filed --

QUESTION: I thought it was very good when I read it. I was wondering what you were going to say in response.

(Laughter.)

MR. SUTTON: The response to it is that that definition comes from the 1911 act the Congress enacted that dealt with the judicial code.

Now, the 1911 act did not deal with habeas, did not modify the habeas statutes and, most notably, did not modify the gate-keeping provision, but the critical language here, and this is the filing that I provided, is

that definition says, when used in this title, all right. That sounds kind of broad. It sounds like all of title 28.

Well, it turns out in section 293 of that very act it says the word title only refers to this act. In other words, only the 1911 act, so that -- that argument's gone. That argument doesn't exist.

But Justice Breyer, I can confirm it by common sense. Since 1948 when the law was changed you've got, I think it's 17 different reported decisions by this Court concerning applications for certificate of probable cause that were denied or granted. Between 1925 and 1948 there's not a single one. There's not a single piece of evidence in that 23-year period that one could go to a justice.

And again, if one looks at House itself, page 43 of House, this Court was construing the state of the law at that point in time.

QUESTION: Is there any reason, by the way, since you brought common sense into it, which I think is very helpful, is there any reason why Congress, assuming that the statute language allows it, would have singled out, out of all the things this Court can review, which is virtually all kinds of things, is there any reason that anybody would have wanted to pick out this set of cases,

which would have let so -- an egregious, really controversial refusal to grant a certificate of appealability that's the kind of thing we might review?

You know, the court's really wrong, or it's really controversial, there's a big legal issue involved. Now, out of all the things we review, is there any reason why Congress would have wanted to say, that alone you cannot review?

MR. SUTTON: In other words, are you saying that they would have wanted to preserve the jurisdiction for the rare case, or why would they eliminate --

QUESTION: Yes. I mean, you're arguing, basically, that out of all the things -- we can review all sorts of things.

MR. SUTTON: Right.

QUESTION: And assuming the language allows it, the All Writs Act, or whatever, is there any reason, really, Congress would have wanted to take this set of cases and say no, those are the ones you can't review --

MR. SUTTON: Right.

QUESTION: -- even for what we would likely review, a rare instance where it was an absolutely wrong grant, refusal to grant the certificate, or there's a big legal issue involved, something like --

MR. SUTTON: Well, as the Powell commission

report indicated, direct review was not working and has not been working. One of the critical problems that the AEDPA tries to address is the fact that there are frivolous habeas petitions that are occupying the Court's time and Government time when, in fact, its time would be much better spent focusing on the petitions that have merit.

The second reason they would have wanted to single out this class of cases is that their whole objective -- that is, streamlining review -- doesn't work if you leave other avenues of review open.

QUESTION: The Congress wanted cases deemed frivolous by lower court judges to cease.

MR. SUTTON: Absolutely, and to be terminated. That's exactly right. It's not just streamlining review and making sure it's efficient and that the courts focus on the claims with merit, but those claims with merit are done after the inmate has had one fair opportunity before the district court juge. I think that makes sense.

But I think the other problem, I mean, if one doesn't adopt this interpretation, are some of the administrative problems that arise when you've got not just applications to the circuit justice available but common law and statutory certiorari available, so you've got two and three tracks of review, not about the merits

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but about this gate-keeping decision.

The whole -- the only reason --

QUESTION: Well, what if you just have All Writs Act common law jurisdiction?

MR. SUTTON: Well, we -- I don't --

QUESTION: This Court has rarely exercised it. It doesn't look like that's a big problem, does it?

MR. SUTTON: Well, Your Honor, if -- once the Court says there's power, that message will get to the inmates, and the inmates will say, if there's power, there's always a reason to file, and filings experience has shown are not always based on whether there's merit, so I think one of the fundamental goals of the act would be undermined.

But I'm not sure the Court could say just All Writs Act jurisdiction is available. The -- 2253 is on the books and 2253 does allow for applications to circuit justices and by referral to the Court.

QUESTION: Yes. That clearly is there by statute, I suppose. You concede that.

MR. SUTTON: No, I do, and I guess the point I'm making, and perhaps not very well, is that if you allow All Writs Act jurisdiction on top of that, you're left with two-track review. You're left --

QUESTION: Well, but maybe we have another

problem. I mean, we assume and we repetitiously say that we assume that Congress knows what we're deciding over here. There was a -- in several of the briefs there was a string cite to the cases in which we seem to have honored the limitation on House, i.e., no statutory cert, very much in the breach and why shouldn't we assume that Congress understood that and would therefore quite reasonably have assumed that we were going to exercise statutory cert jurisdiction?

Well, I know one answer to that is, you've still got House on the books. Well, maybe possibly the best answer in a totally unsatisfactory situation is to say, go on applying House even if you're right on the point that you have made that, in fact, there has been one change in the law since House and that is, a circuit justice can do what a circuit justice couldn't do then.

Maybe House is sort of the best way out of a messy situation for which there's ultimately no satisfactory answer unless we go back and reexamine House.

MR. SUTTON: When you say leave House on the books, you're including the All Writs Act interpretation --

QUESTION: That's right, and apply it here whether your distinction holds up or not, because that's the -- that's in effect the only alternative that would

honor what I suppose was a congressional expectation without taking a total reexamination of House itself.

MR. SUTTON: Well, Your Honor, a couple of things. I think one thing I want to make clear which I hope is responsive to this question, I'm not aware of a single issue that will escape review by the circuit justice route, so I can't imagine any reason, any customary reason for preserving All Writs Act power in this area.

I know of no precedent where this Court allows All Writs Act power where there's already another statutory mechanism either for preserving this Court's jurisdiction or resolving some drastic problem --

QUESTION: Let me suggest a way in which the circuit justice might -- you know, it takes four votes to grant certiorari. It's very often we grant cert on the basis of four votes, and when five justices think it -- cert should be denied.

Now, what if the application went to one of the five who just didn't think there was any merit to it, whereas the -- all eight of the others might think there was? I don't think you are suggesting the circuit justice must routinely refer everything to the whole Court.

MR. SUTTON: No. I think that would be left to the practices of the Court. The practice that I think the

Court would adopt is the one I think it's been using at least for the last 20 years without exception, is that circuit justices do not act on their own and say, great, I don't have to worry about the other eight. They act as surrogates --

QUESTION: I've acted on my own on many, many occasions where I've denied relief.

MR. SUTTON: Perhaps I'm wrong in this understanding, but I had always thought circuit justices act as surrogates for the whole Court, so that they did not take -- keep in mind just their own views of a particular matter but are sensitive to what other justices may -- how they may view the matter.

QUESTION: Oh, but I've voted to grant certiorari when I thought -- or I -- put it the other way. I voted to deny when I didn't think anybody would be interested in the case and I turned out to be wrong. It happens very often. My judgment just was incorrect. My colleagues thought it was a much more important issue than I did.

It seems to me that could happen here just as well, unless you routinely referred it.

MR. SUTTON: Well, again, I'm -- I don't want to suggest what the Court's practices should be, but --

QUESTION: But your argument is that there is no

loophole, that everything will be subject to review by the Court, and I just don't think it would be.

MR. SUTTON: Well, I think the view that there's no loophole is the trust in the Court both as an institution and as its body of nine individual justices.

QUESTION: You assume no one justice will make a mistake, is what you're saying.

MR. SUTTON: Not after a district --

QUESTION: And I've made a lot of them.

MR. SUTTON: Not after a district -- keep in mind, the Court only gets involved after a district court judge in most circuits has denied it and after a court of appeals has denied it. That's the only opportunity, and I -- but there's always a risk of mistake.

I suppose there's the risk of a mistake even of a precedent, but I think it's -- it was entirely appropriate for Congress to make the judgment that with respect to this problem of frivolous habeas claims clogging the courts, that we ought to expedite review of those that don't have merit.

QUESTION: At the court of appeals level does the court of appeals judge act as a surrogate for the court of appeals?

MR. SUTTON: As this Court indicated in Burrell in 1956, that is up to the court of appeals. They're

entitled to establish their own practice that says individual judges --

QUESTION: Well, what would you think under the statute if they're -- if a single circuit judge acts, is he acting as a surrogate for the court of appeals?

MR. SUTTON: It depends on that court of appeals' rules and practices. Not necessarily. I think it could quite plausibly be the case. I'm not aware of a circuit that has this practice, but it could be the case --

QUESTION: Would the practice be any different in the courts of appeals than under the old certificate of probable cause?

MR. SUTTON: No, Your Honor. I mean, it's something they've been doing for quite a while. In fact, longer than this Court has been doing it, since 1925. This has been something that they've had to manage.

Congress was aware, Justice Souter, to get back to your question, of how they managed it and I think the question of decisions by this Court, where there's no discussion of jurisdiction, can't plausibly create an implication that Congress knew about those decisions that the Court itself had not decided to address in terms of jurisdiction --

QUESTION: Well, they -- I wouldn't impute to

Congress any knowledge that we had somehow formally reexamined House, but I guess I do think we should impute to Congress the knowledge that we are, in fact, reviewing these decisions, that we are, in fact, acting as if we had statutory cert jurisdiction in certain of these cases and my imputation of knowledge doesn't go beyond that.

MR. SUTTON: Well --

QUESTION: But if it goes that far, then it's difficult, it seems to me, to argue, as I think you were suggesting, that there is a kind of overwhelming restrictive premise in AEDPA which goes so far as to assume, or as to include a congressional assumption that we could not review in these circumstances.

MR. SUTTON: Well, I think there clearly is when it comes to statutory certiorari, because there's not a single case that discusses that issue and says there is --

QUESTION: But there are single cases in which we apparently were doing it.

MR. SUTTON: But --

QUESTION: We didn't say so.

MR. SUTTON: But, Your Honor --

QUESTION: We didn't discuss it, but we did it, didn't we?

MR. SUTTON: I don't mean to quibble, but as

between decisions that discuss the issue and decisions that silently ignore it, I think the better rule is to assume Congress knows about the decisions that discuss the issue.

QUESTION: Mr. Sutton, shouldn't we just stick to the language of the statute? Will you be willing to wager that more than 2 percent of the Members of Congress ever heard of House?

(Laughter.)

MR. SUTTON: Your Honor, I've no idea, as you will agree, what they meant or what they knew, but that's exactly why we give them the benefit of the doubt.

Thank you, Your Honor.

QUESTION: Mr. Sutton, you were appointed as amicus curiae by this Court and we thank you for your performance in this case.

MR. SUTTON: Thank you.

QUESTION: Ms. Penner, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF EILEEN PENNER

ON BEHALF OF THE PETITIONER

MS. PENNER: Justice Ginsburg raised an issue which is precisely the sort of issue that this Court could not reach but for its certiorari power and that is the question whether, after In Re Burwell, a single dissenting

judge on a court of appeals panel, his vote in favor of a certificate is sufficient to mandate that a certificate be issued.

That is the sort of question, the procedural question about issuance of a certificate, that this Court would have no opportunity to review.

QUESTION: Do you think it's vitally important that that be the same Nation-wide, that one court of appeals follow one practice, it would be terrible if the other followed the other practice?

MS. PENNER: The question is whether Congress did. I cannot imagine all of the situations in which an important procedural issue might arise that this Court would need to resolve, but there may be questions that go to the heart of section 2253 that Congress would want this Court to have the authority to resolve.

There was a point about -- I -- about the state of the law at the time that House was decided, and I -- we have stated our position in the letter that we submitted, but I just want to clarify that the question -- the question that Mr. Sutton has raised and the question about the legislative history is whether the 1925 act retracted the power that the 1908 act had conferred on circuit justices to grant certificates of probable cause.

The language of section 13 strongly suggests

that the only part of the 1908 act that was retracted was the part that required direct appeal to the Supreme Court and that justices retained their power to grant certificates.

QUESTION: Do you have any explanation for the dearth of any applications in that period?

MS. PENNER: We don't -- I personally cannot say that there is a dearth, because there -- it's extremely difficult to search this Court's records from that period in applications that would have been decided in chambers, so I don't think --

QUESTION: Mr. Sutton said there was.

MS. PENNER: I think that -- I am uncertain that Mr. Sutton would be able to make a declaration that there were no applications. He can only say that Westlaw does not report any.

Many of these are simply not published and they're not available, and I think I can make a recommendation -- representation that I've asked the Clerk of the Court about -- or the Librarian about how to get this, and it's very difficult to find, so we don't know whether they occurred or didn't occur during that period.

It's certainly true that House didn't mention it, but House also did not mention another form of relief that was available, and that was an original petition for

habeas corpus to this Court, which House had indeed sought. The existence of that remedy did not deter the Court in holding that it had common law certiorari power.

In addition, the question about whether the 1911 act's definition of circuit judge applies, the fact is that the 1925 act did not even use the language, circuit judge, so the definition of circuit judge is sort of irrelevant. The only question is whether the 1925 act eliminated the power of the circuit justices that the 1908 act had created.

QUESTION: Could I ask you a quick question? If we accepted the SG's idea that a request to a single judge in a circuit is not in the circuit, in the court of appeals, would that also apply to first habeas petitions?

MS. PENNER: I'm sorry, could you --

QUESTION: If we accept the position that it's not in -- is it all right if I ask this, Chief --

All right. If we accept the position of the SG that the request for a certificate of appeal, you know, to go to the circuit justice -- they're saying that isn't in the court of appeals, right? Okay.

Does that mean for purposes of habeas corpus, a first habeas petition, you also have to get a certificate, don't you?

MS. PENNER: Yes.

QUESTION: All right. Would that mean that we would then be unable to hear denials of those certificates, too, in first habeas?

MS. PENNER: It may have the same implication.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Penner. The case is submitted.

(Whereupon, at 12:19 p.m., the case in the above-entitled matter was submitted.)

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