OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MICHAEL WAYNE WILLIAMS, Petitioner, v. JOHN TAYLOR, WARDEN

CASE NO: 99-6615 0.2

PLACE: Washington, D.C.

DATE: Monday, February 28, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL WAYNE WILLIAMS, :

Petitioner, :

v. : No. 99-6615

JOHN TAYLOR, WARDEN :

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Washington, D.C.

Monday, February 28, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JOHN H. BLUME, ESQ., Columbia, South Carolina; on behalf of the Petitioner.

DONALD R. CURRY, ESQ., Senior Assistant Attorney General, Richmond, Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-6615, Michael Wayne Williams v. John Taylor.

Mr. Blume.

ORAL ARGUMENT OF JOHN R. BLUME

ON BEHALF OF THE PETITIONER

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

My client, Michael Wayne Williams, was convicted of capital murder and sentenced to death in the Commonwealth of Virginia. In Mr. Williams' case, this Court is confronted with the meaning of the phrase, the applicant failed to develop, in section 2254(e)(2) of the Antiterrorism & Effective Death Penalty Act of 1996, or AEDPA.

This morning, I intend to first discuss why the strict liability interpretation of (e)(2) offered by the Attorney General of Virginia is wrong, second, offer a more plausible interpretation of (e)(2) which is consistent with the statutory language, the decision of this Court from which the language was borrowed, other provisions in AEDPA and the incentive structures underlying AEDPA and, third, demonstrate why my client is

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entitled to an evidentiary hearing under the appropriate standard.

In any case of statutory construction, this Court has repeatedly said that this inquiry should begin with an examination of the language itself, and the relevant part of 2254(e)(2) for our case reads, if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on either -- and now I'm paraphrasing -- a new rule of constitutional law, a factual predicate that could not have been previously discovered through the exercise of due diligence, accompanied by a showing of innocence, or a clear and convincing demonstration that no rational fact-finder would have found the applicant guilty of the underlying offense.

QUESTION: As I understand it, Mr. Blume, you agree that your client could not meet the very last of those specifications in the event that the Court found that that was necessary for you to prevail.

MR. BLUME: That's correct, Your Honor.

It seems that if Congress were drafting a strict liability statute it would not likely have chosen the language of (e)(2), if the applicant has failed to develop

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the facts. A strict liability statute, or a statute which did not care whose fault it was, would say something like, if the facts were not developed in a State court proceedings.

QUESTION: Well, who else would develop the facts, other than the applicant, in a State collateral proceeding?

MR. BLUME: Well, I mean, facts conceivably could be developed by either side, depending on the nature of the claim, or whether there's an evidentiary --

QUESTION: Yes, but typically if you're the petitioner in a State collateral review, you're seeking to develop the facts, are you not?

MR. BLUME: Yes. I mean, often that is the case. Depending on the nature of the claims, the applicant will, but the phrase, if the applicant has failed to develop the facts, seems to indicate, clearly to me to indicate that the applicant must somehow be at fault. A strict liability --

QUESTION: I don't know that the word fail -- I concede that that's certainly a plausible argument, but you know, you say that someone in a golf tournament failed to make the cut. That doesn't mean that they didn't play as well as they should have. Maybe they did the best they could and they still failed to make the cut. It's just a

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factual statement.

MR. BLUME: Well, I mean, in some situations it is. In many usages, and I think the most common usage, failed denotes some type of fault, some expectation left undone, and it seems if you tether failed with the applicant, if the applicant failed to develop, that certainly seems to encompass, I think, some type of fault.

A strict liability statute is often worded much differently. I mean, a strict liability statute you would think most plausibly say, if the facts were not developed, which was a usage which was in play in habeas before this under the old Townsend five.

QUESTION: If you're correct in your interpretation, what function, other than surplusage, does (2)(A)(ii) have, which says that a factual predicate could not have been previously discovered through the exercise of due diligence?

MR. BLUME: I -- Justice Kennedy, that really --

QUESTION: Do we just kind of write that out of the statute as surplusage?

MR. BLUME: No, I don't think so at all. I think if you look at the statutory language itself, if the applicant has failed to develop, that looks at the conduct of counsel, what did counsel do? The exception, the factual predicate that could not have previously been

discovered through the exercise of due diligence, looks at the character of the evidence.

In other words, I think the rule and the exception envisions a situation in which the applicant did fail, did leave something left undone, didn't reasonably develop the facts, but nevertheless is able to demonstrate that even if he or she had acted with due diligence they would not have discovered the evidence.

QUESTION: Why do you put the choices between a strict liability matter and the word fail, connoting fault? Aren't there a lot of intermediate positions? I mean, for example, this provision might not apply at all where there is no State proceeding. Suppose a State has a rule, we don't have a State proceeding, all right. This isn't a matter of them failing anything.

On the other hand, there are a lot of State proceedings where -- State situations where the State gives you the possibility of an evidentiary hearing and there, if the thing isn't in the record, and he may have failed to produce it, and the next part, due diligence says, but wait a minute, if it wasn't his fault, the defendant, of course he's excused. I mean, that's the due diligence.

So the failure part takes out some situations, like the situation where the State doesn't even have a

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proceeding, and it talks about the thing, you know, the possibility is there for him to develop it, and then the next part, the due diligence part says, by the way, he has to have been at fault here, otherwise he's excused.

I mean, that's how I read the natural flow of this. Now, is that wrong?

MR. BLUME: Well, I think it is, because -- for several reasons. One, that would for all practical purpose eliminate hearings in most cases even when the applicant did absolutely nothing wrong, because the due diligence under this language has to be accompanied by a clear and convincing demonstration of innocence.

QUESTION: Well, that itself I thought, and read in other briefs in earlier cases, presents quite a difficult question of interpretation, and that's why I was rather sorry to hear you concede that point, since I think lots of interpretation can go into that particular provision as to just what it means, and that is an issue that I don't think this Court has considered.

MR. BLUME: But I think logically to fail to develop would envision, both in its language and in its usage -- I mean, Keeney v. Tamayas-Reyes is where this came from, I think most logically.

It's hard to say it just did not come out of Keeney, where Keeney used this exact formulation, did the

person fail to develop, and Keeney was clearly talking about situations in which the applicant failed, was negligent, in which the applicant did not take advantage of opportunities to develop the facts in the State court proceedings, and this is the language that Congress chose. To some --

QUESTION: Well, Mr. Blume, I wondered if the language directs us to some kind of an exhaustion requirement, trying to make sure that State -- people convicted in State proceedings try to raise their claims first in State court and get the facts developed. It could possibly, I think, have that meaning. Has your client attempted to raise this juror problem in the Virginia courts and develop it there?

MR. BLUME: No. The claim would be barred under Virginia law at the time it was discovered. I think --

QUESTION: Do we know that? Is there no post conviction proceeding in Virginia for newly discovered evidence?

MR. BLUME: Virginia has a strictly applied harsh 21-day rule, that any newly discovered evidence not presented within 21 days of conviction is not cognizable.

QUESTION: Even if it's discovered after that time?

MR. BLUME: That's correct. That's my

understanding of the law. It's one of the harshest newly discovered evidence rules in the country, so there is no -- but that does raise the question. I mean, I think certainly the AEDPA wants people to, as did this Court's decisions prior to that, to exhaust their claims in state court, to encourage --

QUESTION: Yes. It's very helpful to have the facts developed in the State courts, and I wondered whether that wasn't what Congress was trying to impose here, some kind of exhaustion requirement.

I don't know how that should play out in a circumstance as you allege, that a State won't permit any development, so it would be futile.

MR. BLUME: Well, not only will they not permit, but if you look at the character and the nature of the claims in this case, they are withholding claims, evidence where the petitioner alleges the facts were within the possession and control of the State and were not disclosed, despite a pretrial motion which requested this type of information.

They were required to respond. They did not produce the report. They did not -- and there were discussions about the deal.

QUESTION: Are you talking about the juror now, and the relationship with the deputy sheriff?

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MR. BLUME: There are actually three claims, Justice O'Connor. One has to do with the psychiatric report of the testifying witness, Mr. Cruse, which was inconsistent, completely inconsistent with the trial testimony. The second claim has to do with --

QUESTION: But presumably that report was in the file some place.

MR. BLUME: It was in a file some place. I mean, that is a question of dispute which would probably have to be resolved at a hearing. When was it put in the file? Was it taken out of the file?

QUESTION: I frankly was more concerned with evidence that was newly discovered, and no basis for discovery before.

MR. BLUME: Well, I mean -- okay, no basis for discovery before. On the juror question, what happened there, I mean, that was a question in which the jury was asked a question, are you related to anyone. The chief investigating officer in the case was her ex-husband.

Now, she was also asked if she had ever been represented by any of the attorneys in the case, including the prosecutor in the case, Mr. Woodson, and she answered no.

QUESTION: Well, on the question of just, with respect to her ex-husband, you know, if she had been

asked, do you know any of these people, obviously had she said no with respect to him it would have been a misstatement, but it seems to me that the question asked was a fairly limited one. Maybe you wished later you'd say did she know, but she was no longer related to the person. She was not presently related to him. I just don't see you have much there.

MR. BLUME: Well, I mean, first of all, to answer the -- to go back, there were requests for more specific questions which were denied. This is the only question the trial court would allow in this particular case, but I just think it's a very hypertechnical view of the term, related. Now -- as it is represented.

I mean, I try cases, and I was trying to think about it. If I were sitting in a case, a trial, my defense investigator had used to have been married to a juror, and I didn't say anything when the judge said, is somebody related, and I had represented them in a divorce and I didn't say anything, I'd venture to say if that came out, I would probably go to jail at the end of that trial. I'd certainly be fined.

QUESTION: Well, I -- you know, you can say the witness should have been more forthcoming, but you're alleging a constitutional violation here, and it seems to me it's just very blurry.

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MR. BLUME: Well, part of that, of course, Your Honor, is because we've never had a hearing. The facts have been alleged. The facts are true that she was asked the question and she didn't answer it. The prosecutor was in the courtroom, presumably would have known the answers were false and said nothing.

QUESTION: Even on your allegations, though, it's a very weak claim, it seems to me, even assuming you can prove it.

MR. BLUME: Well, assuming that we can not only prove that, but as I understand this Court's decisions dealing with juror bias, actual juror bias and implied bias, the remedy has always been a hearing, and a hearing at which a judge makes a determination of whether this juror is biased or not, looking at the witness' credibility, what they say --

QUESTION: Well, what are you going to have the hearing about there?

MR. BLUME: It would be on these answers, on whether --

QUESTION: No, the specific question was, are you related to any of the witnesses? The true answer is, no. It is also true that she was married to one of the secondary witnesses 14 years earlier, all right? Those are the facts, as I understand them. What fact further do

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you want to develop?

MR. BLUME: There -- presumably I would think on cross-examination both of the prosecutor and the --

QUESTION: What are you going to cross-examine him about?

MR. BLUME: You would ask questions about, you know, what was your relationship, what did you know --

QUESTION: We know what the relationship was. She was married 14 years before to one of the secondary witnesses.

QUESTION: And the question wasn't, what was your relationship with, it's are you related to.

MR. BLUME: And -- well, the question is one ultimately of bias.

QUESTION: No, it isn't of bias. It's whether she misrepresented in a response to the question, and you have to support the position that if you married someone and divorced them you're still related to them. I mean, what if she had gone out with the man 14 years ago, and hadn't married him. Would you still say, well, you know, she's related to him? I guess in some sense she is related to him. She went out with him 14 years ago. But how can you possibly say --

QUESTION: Wasn't she also asked whether she'd been represented by anybody?

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MR. BLUME: Yes. There were two questions, have you ever been represented by any --

QUESTION: And the prosecutor represented her in the divorce, didn't he?

MR. BLUME: And she had been represented in the divorce by the prosecutor, and the questions of relationship. The two together certainly raise an inference this juror is potentially biased.

QUESTION: Mr. Blume, can we just back up a bit before we get to the specifics of the prosecutor and the witness? Are you suggesting that when you made a request of the State trial court, that you would have a right to quiz every juror? You had no clue about any of this until an investigator happened to go to the various jurors and one of them said, yeah, that Ms. Stinnett was once married to the sheriff.

But your -- you seem to be attributing some fault to the State court for the failure of your client to get at this information earlier, but are you taking the position that a defendant in a criminal case has a right at State expense to quiz all the jurors to see if there's something that was wrong in the answers?

MR. BLUME: I think it would depend on the particular case. In this case, what makes this an unusual situation, sort of not your typical juror misconduct

claim, is that the questions were asked in the presence of the prosecutor and he sat silent when he knew that the answers weren't true.

QUESTION: Yes, but you never would have --

MR. BLUME: And that makes this different.

QUESTION: You're simply wrong in saying that the answer wasn't true about related to. She was not related to. It's you who have to kind of fuzz over the thing to even get a plausible case.

MR. BLUME: Well, it certainly is true that she had been represented by the prosecutor. There's no dispute about that. He was the lawyer in their divorce. I mean, that is true.

QUESTION: How long ago had that been at the time of trial?

MR. BLUME: It had been about 10 years, I think, before the trial, that she was married to this man --

QUESTION: And it was an uncontested divorce?

MR. BLUME: Yes, but I don't see how, under -- anyone could say that he had not represented her.

QUESTION: Well --

MR. BLUME: He had been the lawyer in the divorce.

QUESTION: And her -- wasn't her answer she simply didn't recall it?

MR. BLUME: No. His answer was he didn't recall it. She said, well, I didn't really consider that being represented, but those are the types of questions I think you would ask, and more, on a hearing on juror bias. It's the allegations themselves, but what they might give rise to, and the questions at the end of the day, is the untruthful answer, or the inaccurate answer, or the misleading answer some evidence of bias in the case.

QUESTION: Mr. Blume, can I come back to the text of the statute we were talking about?

MR. BLUME: Yes.

QUESTION: I don't -- I'm not sure what your answer is to the hypothetical that Justice Breyer posed. That is to say, suppose there simply has not been a State proceeding at all. Does that mean that this whole subsection does not apply?

MR. BLUME: I think it depends on what State court proceeding means. If you interpret State court proceeding to mean an evidentiary hearing, I mean, that is a question. If you interpret --

QUESTION: No.

MR. BLUME: -- State court proceedings -- if a State does not have, for example, post conviction, if they do away with post conviction --

QUESTION: That's right. That's right.

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MR. BLUME: -- then I would think this wouldn't apply.

QUESTION: Then this wouldn't apply?

MR. BLUME: Unless you just say -- you could. Now, it depends. If you take the absolute strictest of the strict liability interpretations, which may be something the Attorney General's advancing, then it would still be your fault, even though there weren't State court proceedings, the facts aren't developed, and you're in Federal court.

QUESTION: I thought anther possibility would be if the -- they had a full hearing, and there's a finding, but the finding is clearly not supported by the evidence.

That's a classic situation under Townsend, where the Federal court will grant a hearing, and I thought possibly in such a circumstance this whole section doesn't apply, because it is a reason for giving a hearing, but it has nothing to do with the failure of someone, the plaintiff, so I thought there were a number of Townsend-type situations where this whole section didn't apply, but not yours.

MR. BLUME: Well, (e)(1) might conceivably cover that situation. I just --

QUESTION: Yeah.

MR. BLUME: It just seems if you read the

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language, fail to develop, it doesn't make sense, I don't think, in the context as a whole to say that this applies even where the petitioner did absolutely nothing wrong, even where the petitioner tried to develop the facts, took advantage of every opportunity, and it would also lead to absurd results.

It would mean, if that's true, that it's easier to have the merits of a claim in a second petition under what -- the successor would have been easier -- than it is to get an evidentiary hearing in Federal court in the first petition if that -- that makes absolutely no sense.

QUESTION: Why? Why?

MR. BLUME: Because under the successor provision you only have to show either a new rule of law to have your claim heard, or you have to show due diligence and innocence in a case. That's what it says. So it means it would be easier to have a second petition merits heard than an evidentiary hearing on the first petition. What sense does that make?

It also means that if -- what happens in a case where the claims are procedurally defaulted, they are held to be procedurally defaulted by the State court? The person comes into Federal court, is able to establish cause in prejudice for the default. If this is a strict liability statute, then a Federal court can't hold a

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hearing.

The person has -- they failed to develop the facts in State court. They're able to show that's what it would mean. If it -- it would mean they could show -- they could overcome the statute of limitations on the State interference, the State impediment. The statute of limitations says you toll from there.

They would be able to overcome procedural default, even if they can show it's not an adequate and independent State ground, or they can establish cause in prejudice, but yet they cannot have a Federal hearing because they failed to develop the facts.

QUESTION: What is wrong with that? I mean, the rule is, the only time we're going to give Federal evidentiary hearings is if there's either a new rule of constitutional law asserted, or a factual predicate that could not have been previously discovered exists, and there's evidence that no reasonable fact-finder could have found this defendant guilty.

MR. BLUME: Well, it would mean, Justice Scalia, that in many cases claims would be properly before the court on the merits --

QUESTION: Right.

MR. BLUME: -- and the court could not obtain the facts necessary to decide it, but this Court has

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always said that if you look at a State's comity and federalism interests, they are much more potentially damaged or in play by a court entertaining the merits of the claim.

Once the court decided to reach the merits, their interest in comity and federalism are significantly less advanced by a Federal court hearing the facts necessary to accurately decide the issue, and it would mean, if this is true, that in many cases courts before the court -- issues before a Federal court, properly on the merits, the court's hands would be tied, and that just -- it seems to make no -- it just wouldn't make any sense.

QUESTION: I agree with you that -- maybe I'm being repetitive here, but I -- you've now -- I agree with you that these words, if the appellant has failed to develop a factual record, don't simply mean there are no facts somewhere in the State. There are a lot of situations, I think at least several I can think of, where the absence of a factual record in the State doesn't mean he failed to develop it.

Now, you agree with that, I take it?

MR. BLUME: Yes.

QUESTION: All right. Now, if I've said that, but then rely upon the later thing, due diligence, to

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bring in the question of who's at fault for there not being a factual record, where fault is relevant, which is in a subset of the total absence cases, now does that produce bizarre results?

MR. BLUME: I think it --

QUESTION: Can you give me an example, because that's what would be very helpful.

MR. BLUME: It would still be a very -- well, a situation, for example, in this case, in which there is a report, a psychiatric report, it contradicts a witness, they filed a Brady motion, they've asked for it --

QUESTION: Well, I don't see why you're not entitled to a hearing on that one.

MR. BLUME: They didn't get it. They asked again in State court --

QUESTION: But, so how does it produce an odd result there?

MR. BLUME: Well, I don't see --

QUESTION: If you've really showed, you know, if there's a factual issue as to whether that report was in the record or not in the record, I guess you'd get a hearing on that.

MR. BLUME: Well, I guess it's --

QUESTION: If it's not in the record it's not the fault of the plaintiff, and if it is in the record, it

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is the fault of the plaintiff -- of the defendant.

MR. BLUME: Well, I think the problem with the hypothetical that I have, Justice Breyer, is, I'm still unclear what you mean by failed to develop. I think that the natural reading of it, especially in light of Keeney, is, it has to have -- some component of the inadequate record has to be fairly attributable to the petitioner.

I just think this exception is thinking about something else, a case where you tried, but nevertheless were -- or you failed, you didn't try but you were able to establish that you couldn't have discovered it. You didn't take advantage of the opportunities, but nevertheless you're able to show the witness was out of the country, beyond the subpoena power, whatever. Even if you had acted with due diligence you couldn't have found the evidence. The facts were --

QUESTION: Mr. Blume, just go back to the -- you're now focusing on the psychiatric report, but if I remember correctly Judge Merhige turned that one -- ruled against you on that one, didn't he?

MR. BLUME: Yes. He did it on the basis, Justice Ginsburg, of an inaccurate review of the facts, and before he had the affidavit of State habeas counsel. The question really was, what happened with -- I know this is a confusing case because you have three claims where

things came in and out at different times, but the short version on the psychiatric report is that it was eventually discovered in Federal habeas. It was brought as a Brady claim because the Commonwealth would have had possession of this 4 months prior to trial. It was done 4 months prior to trial.

Judge Merhige said -- they said they found it in the State -- in Cruse's file, and Judge Merhige said, well, since you found it in the file, you haven't shown why it wasn't found previously. They came back with an affidavit from State habeas counsel which said, look, I went, I looked in the file. When I -- I don't remember seeing this report when I looked in the file. However, given its contents, I am confident that I would have seen it had it been there, and I think that's clearly supported by everything else.

This was the type of information he was looking for. He made a specific request to Mr. Curry for psychiatric reports, which they were told they had complied with Brady at trial and they didn't have any obligation to give them anything.

QUESTION: Why couldn't he just say, it was not there? It's a very guarded affidavit. He could have written an affidavit that said, I looked in the file. It was not there. He didn't say that, did he?

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MR. BLUME: Of course -- well, nobody can ever say that --

QUESTION: Well, sure you can.

MR. BLUME: -- definitively, Justice Scalia.

QUESTION: You say, I looked it in and it was not there. Why can't you say that?

MR. BLUME: Well, I -- I mean, maybe it is sort of lawyer talk and all that. I think what he's -- but his language is, I am confident that had it been there, I would have seen it. That's the language. If there are unresolved questions about that, then those are the types of issues you resolve at a hearing. I mean, the very nature of files is things come in, things go out.

QUESTION: But did he also say, I am confident that I would remember having seen it?

MR. BLUME: Well, rather than me --

QUESTION: I mean, in order to get to your ultimate conclusion you have to --

MR. BLUME: Yes. He said, I'm confident that I would remember it.

QUESTION: I would remember it?

MR. BLUME: It's on -- it's J.A. 625-626, when he says, I have no recollection of seeing this report in Mr. Cruse's court file when I examined the file. Given the contents of the report, I am confident that I would

remember it.

QUESTION: That I would remember it.

MR. BLUME: And that -- I mean, that certainly seems supported by everything. This is precisely the type of information he was trying to get. Trial counsel was trying to get. He'd made requests to get it, and these are the type -- if there are unresolved questions about that, then those are the types of things that are resolved at a Federal hearing, which is where we were, and that's where this case got off-track.

The district court had ordered a hearing. It was getting ready to happen. The Commonwealth took an emergency appeal to the Fourth Circuit. They sent it -- they said no, the district court applied the wrong standard.

All we want, and what I think my client is absolutely entitled to, is for this Court to say that (e)(2) is not a strict liability interpretation, to recognize I think on the plain language that it is not a no-fault, that it has to be somehow attributable to petitioner, then send us back to the district court and let us start over, where we should have been before, with an appropriate view of what this statute means.

If there are no further questions, I'll save my time for rebuttal.

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QUESTION: Very well, Mr. Blume.

Mr. Curry, we'll hear from you.

ORAL ARGUMENT OF DONALD R. CURRY

ON BEHALF OF THE RESPONDENT

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

I'd like to start out to try to clear up a matter of Virginia law on a couple of points. Mr. Blume has reiterated that Williams is conceding he cannot make out this innocence requirement under 2254(e)(2)(B). In his reply brief, though, he does make some contentions about Virginia law and capital murder law that are flat wrong, and I suppose he does this in the context of trying to show materiality for his Brady claims.

But it is important that the Court be clear about this. There is no doubt under Virginia law that someone who does what Williams got on the stand and admitted at trial that he did is guilty of capital murder under Virginia law. He admitted that he acted in concert with his codefendant. He admitted that he intended to kill Mr. Keller. He admitted that he intended for his codefendant to kill Mrs. Keller. He admitted that he was a full participant in the armed robbery of the Kellers. He admitted that he was an accomplice to the rape of Mrs. Keller and, most important, he admitted that he shot

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Mr. Keller in the head with the intent to kill.

Now, in the reply brief he comes back and tries to say, well, we don't really know where he shot him. He could have shot him in the leg. I would just refer the Court back to his opening brief --

QUESTION: Could I ask about Virginia law, whether if there is newly discovered evidence that could potentially be exculpatory, that is discovered more than 21 days after the conviction, does Virginia bar any proceeding in Virginia courts to determine the fact?

MR. CURRY: Not if it is raised in a State collateral proceeding as evidence in support of a claim. For instance, the juror claims. He certainly could have raised the juror claims. It's done all the time. He can raise Brady claims.

QUESTION: What was the 21-day point that counsel was making?

MR. CURRY: 21 days has -- the 21-day rule in Virginia has nothing to do with this case, but the 21-day rule in Virginia is that you have to file a motion for a new trial in the jurisdiction of the trial court based on newly discovered evidence within 21 days.

QUESTION: But if there is newly discovered evidence that comes -- is discovered after that initial 21-day period, are State collateral proceedings available

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to establish the facts?

MR. CURRY: Yes, Justice O'Connor, if it's in connection with a claim. You can't be just plain evidence of innocence, on a strict matter of guilt or innocence, unrelated to a claim, but with respect to --

QUESTION: Well, what do you mean, a claim? The claim is, I'm entitled to have this evidence brought out so that I can have a new trial.

MR. CURRY: Right. You cannot do it in that abstract context. He can do it in the context of a claim that this juror was biased, that I have a Brady claim because evidence --

QUESTION: So he --

QUESTION: The trial procedure was unconstitutional, in other words, in the context of a claim --

MR. CURRY: Yes.

QUESTION: Which is what the claim is here.

MR. CURRY: Yes, just like any other of his habeas claims.

QUESTION: Okay, but he claims the conviction was obtained unconstitutionally because of juror bias.

MR. CURRY: That's right. He --

QUESTION: Now, can he establish that in Virginia --

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MR. CURRY: He --

QUESTION: -- after the 21 days?

MR. CURRY: Oh, certainly. He doesn't even have to file his -- in a capital case, he doesn't have to file his habeas petition until 60 days after this Court denies cert. It's done all the time.

Now, on the point that you --

QUESTION: And it's filed with the Virginia supreme court, is it? That's the way he does it?

MR. CURRY: Yes, Your Honor.

QUESTION: And then they're the ones who order discovery, if it's appropriate?

MR. CURRY: That's right.

QUESTION: Is there --

MR. CURRY: And they're the ones who decide whether it goes back for a hearing.

QUESTION: Is there a 60-day rule on cut-off for filing constitutional claims?

MR. CURRY: A 60-day --

QUESTION: You just -- you mentioned that he does not have to file his claim for 60 days. Is there a cut-off after 60 days?

MR. CURRY: Yes. There's -- it would be -- his claims that he did not raise in State court would be cut off for two reasons in this case.

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QUESTION: Excuse me. 60 days after denial of cert.

MR. CURRY: That's right.

QUESTION: Yes.

MR. CURRY: 60 days after denial of cert he has to file his State habeas petition. He can raise any constitutional claim he wants.

QUESTION: Right, but in this particular case there's no rule of Virginia law that barred him from producing that psychiatric report within 60 days.

MR. CURRY: Absolutely.

QUESTION: But he failed to do it.

MR. CURRY: Absolutely.

QUESTION: All right. He failed to do it, so the statute applies, and now the question is, did he exercise due diligence, and you say, of course you failed to exercise due diligence. The report was right in the record. All you had to do was look at the file.

And he says, my lawyer signed an affidavit which says he looked through the file, and if it had been there he would have seen it. Okay. That sounds like a pure factual dispute, so why don't we have to send it back to the trial court to resolve what happened with the document that one side says was in the file, and the other side says wasn't, okay, so the judge believes one side or the

other side? Why doesn't that require a hearing?

MR. CURRY: Because that's not what Congress intended. Congress intended to cut through all that in most cases by requiring a strong showing of innocence --

QUESTION: No, no, wait. I'm sorry. Didn't we grant cert not on the meaning of this last phrase, which is a kind of harmless error phrase, but rather, I didn't see anywhere where we are supposed to interpret this section about the people, the facts would be sufficient to establish by clear and convincing evidence, but for constitutional error no reasonable fact-finder would have found the applicant guilty.

Now, if, in fact, we're supposed to interpret that, I'd like to get briefs on what that means, but I thought what we granted cert on was the meaning of the first part, failed to develop, et cetera.

MR. CURRY: Well, I would certainly have to defer to the Court as to the reasons it granted cert, but this case is --

QUESTION: I'm just reading the question presented. The question presented talks about the failed to develop, and the State suppressed relevant facts, and does that require an evidentiary hearing, and I see nothing in that question about the meaning of the third part.

MR. CURRY: Justice Breyer, the one thing we know about this statute is that Congress linked the due diligence requirement and the innocence requirement. It's connected with the word, and. That is indisputable.

QUESTION: We received in the case that Justice Souter wrote many briefs, and in those briefs I found considerable disagreement as to the meaning of this last phrase. That's why I don't know that we should decide it here.

MR. CURRY: I see the petitioner has taken that issue away from the Court.

QUESTION: Yes.

MR. CURRY: He concedes he can't meet it, and the statute clearly requires both.

QUESTION: If you get to the due diligence part of the section, then surely you can get to the same part that's joined by and.

MR. CURRY: That's right.

QUESTION: Mr. Curry, as I read --

MR. CURRY: You have to get to both.

QUESTION: As I the question, it's whether 2254(e)(2) governs petitioner's claims.

MR. CURRY: That's right. He says it doesn't, we say it does.

QUESTION: And it doesn't govern petitioner's

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claims, the claims made here, if, indeed, that last portion of (e)(2) requires that he show a probability of innocence.

MR. CURRY: That's right. That's -- his whole case is, he's got to get out from under the statute entirely because of what he admitted in the first 15 seconds today. He cannot show the innocence requirement, and so his tactic throughout this has been to try to break that link that Congress made, and I don't see how it can be disputed that Congress made that link, due diligence and innocence. Now --

QUESTION: Well -- well, look --

QUESTION: He also has another way of getting out from under it, and that is to say that the word fail is importing a fault requirement as against, as he characterizes it, your position, a kind of strict liability requirement.

MR. CURRY: Right.

QUESTION: What is -- to what extent are you advancing a strict liability requirement?

MR. CURRY: That's his term, and I don't know what he means by strict liability. It does mean this. You can't have a hearing unless you show both requirements.

QUESTION: Well, let me ask you this, and I'm

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not -- and I am, in fact, not suggesting that we've got this case before us, but I want to take an extreme case for the sake of argument.

Let's assume that we've got a case in which by any standards, including those of State law, there should have been discovery allowed at the State post conviction proceeding, but the State opposed discovery and the trial court didn't order it and, as a result of that, there were, in fact, all sorts of evidentiary materials that never got into the record. What did get into the record did not entitle the individual to any State post conviction relief, so he now comes into Federal court.

Do you say that in that situation his record fails within the meaning of the statute to develop the facts?

MR. CURRY: Absolutely. That goes to attribution of fault --

QUESTION: Then what you are saying --

MR. CURRY: -- for the failure.

QUESTION: -- it seems to me is that in any State -- the way you want us to read the statute means that in any State post conviction case if the prosecution, let's say with bad faith succeeds in opposing discovery and therefore thwarts the development of the record, there never can be Federal relief even when it's appropriate on

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Federal law, except for a prisoner who can prove the innocence that is required under the last subsection, which as a practical matter means we would be construing AEDPA to read Federal habeas right out of the law in any bad faith case except for an innocent prisoner.

MR. CURRY: Well, I certainly think that's what Congress intended.

QUESTION: You think Congress intended what I just laid out?

MR. CURRY: Because of what they said in --

QUESTION: In other words, no Federal habeas, even when Federal law would grant relief and even when the State is at fault for thwarting discovery, unless the prisoner is innocent?

MR. CURRY: All of the concerns that you're talking about, Justice Souter, are the concerns which this Court, when it was up to this Court in making the policy judgments, channeled into the cause requirement. Not any kind of threshold test as to whether the cause and prejudice test applied, but into the cause requirement.

QUESTION: You're in effect assuming that our cause requirement for the override of a default was a cause requirement which would ignore the fact that a prisoner in this case, in my hypothetical, was wrongfully denied an opportunity to make a factual record.

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MR. CURRY: Well --

QUESTION: You're saying that wouldn't have been cause, and you're saying it's not cause -- it's not fault here.

MR. CURRY: No. I'm saying you might be able to satisfy the (a)(2) requirement could not have been discovered through the exercise of due diligence. That is Congress' equivalent --

QUESTION: No, but this is a case in which it could have been satisfied with the exercise of due diligence, and due diligence in fact was expended. The reason it wasn't is not that it couldn't have been, but because it was wrongfully opposed by the State, or at least wrongfully thwarted by discovery rules.

MR. CURRY: Justice Souter, I hope I have the time to get to that, because we certainly dispute that these claims could have been raised -- could not have been raised with due diligence in State court.

But let me tell you why I don't think that Congress intended the meaning of fault that Mr. Blume is suggesting. There's certainly nothing about using the word applicant to start off the statute, which is unusual, because every statute, every subsection of 2254(b) either says application or applicant. But the failure, there is no reason, if you look at 2254 as a whole, or other

sections, or any other habeas statute in AEDPA, why you would give it a connotation of fault.

For instance, 2254(b) --

QUESTION: Well, but -- you know, I recognize that fault can be read either way. If we were simply faced with the word fault, I would not find that word dispositive.

MR. CURRY: Well --

QUESTION: One of my concerns, though, is that if we read fault your way, we are in fact going to be providing that in a class of cases there can be no Federal habeas, despite entitlement under Federal constitutional law, except for innocent prisoners, and that is -- that would be a good reason for reading it the petitioner's way.

MR. CURRY: Well, I do think that that was Congress' intent, that they did not intend to unleash the power of the Federal judiciary in the form of a Federal evidentiary hearing in the case of a State prisoner absent a strong showing of innocence.

QUESTION: Then why didn't they simply provide that there would be no Federal habeas except for innocent prisoners?

MR. CURRY: Because they also want the prisoner to be diligent. They require both --

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QUESTION: What difference does it make, if only innocent prisoners get habeas? Who cares whether they're diligent on your theory?

MR. CURRY: Well --

QUESTION: If they're innocent, fine. If they're not innocent, we don't care --

QUESTION: I take it we're talking here not about whether they get ultimate habeas relief, but whether they get discovery or not. I mean, I take it a prisoner who could not make this claim of innocence could nonetheless claim that wrong constitutional rulings were made throughout his trial, have a perfect right to raise those.

MR. CURRY: Sure, absolutely, and you know, it seems to me --

QUESTION: Well, but now, Mr. Curry, I thought that a majority of the Federal circuits to have interpreted this very section, (e)(2), have articulated some kind of a fault requirement, if you will, on the part of the defendant.

MR. CURRY: Oh, there's no question they have, and I think they're dead wrong. Basically what they said is --

QUESTION: Well, let me ask you, if we think they're right, and if we were to opt for what the majority

of the courts of appeals have held, then could this applicant have developed a factual basis in State proceedings in Virginia?

MR. CURRY: Absolutely, and I'll go to the individual claims if the Court likes at this point.

On the juror claims, let me -- first of all, the deputy sheriff was not the chief investigating officer, and everybody should know that from reading the record. He was a minor witness. He had nothing to do with guilt or innocence. The defense didn't even cross-examine him.

But Williams had a State-appointed habeas attorney. He had the resource center working with him in the State habeas petition, and that is shown in State habeas counsel's letter to me at page 344 of the appendix. The resource center has their own investigator.

Now, they say they can't be faulted for not going out and interviewing the jurors. They can't say they had no reason to, at least subjectively, because they say they made a motion. They did make a motion.

QUESTION: No, but it isn't interviewing the juror, it's interviewing the prosecutor, who was the trial -- who was counsel for this woman during the divorce. Isn't that right?

MR. CURRY: Well, they could have interviewed the prosecutor, too, but the claim wouldn't --

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QUESTION: And asked him -- when in an open court there's a question raised as to whether anybody on the jury has been represented by one of the lawyers and there's no answer, they are supposed to go ask the prosecutor, did you or did you not represent any juror?

MR. CURRY: No.

QUESTION: Is that what you say they had a duty to do?

MR. CURRY: No, I'm not. The -- first of all, the prosecutor's affidavit is in the record.

QUESTION: Well, what was the failure on their part to find out about this representation before? You say --

MR. CURRY: Because they -- Justice Stevens, they told the Virginia supreme court that they wanted an investigator to go interview the jurors.

QUESTION: No, no, no. No. It's the lawyer, the prosecutor who had represented her and was silent in response to that question in open court.

MR. CURRY: But Justice Stevens --

QUESTION: Doesn't that trouble you at all?

MR. CURRY: Justice Stevens, the claim doesn't arise without talking to the jurors.

QUESTION: But I thought here it was alleged this morning that the juror in question was asked if

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anyone had represented her and she said no.

MR. CURRY: Right.

QUESTION: And she was under oath at that time, I assume, to tell the truth.

MR. CURRY: She was asked, have you been represented by any parties, and she didn't respond to the question because she didn't think -- look, this was an uncontested divorce, and hopefully some other --

QUESTION: Well, in any event it looks like there might be some factual concern here. Was there a proceeding available in Virginia whereby this defendant, post conviction, could have determined -- had the facts determined?

MR. CURRY: Absolutely. During the State collateral proceeding they could have gone and interviewed the jurors just like they did for the Federal habeas --

QUESTION: Okay, but the question -- I mean, I think what started all of this line of questioning off was the assumption that fault in the statute does refer to some failing rather than kind of a strict -- a failure of diligence rather than a strict, mere failing, and the question that I think Justice Stevens raised is, given the fact that the voir dire question was raised in open court, the juror did not respond, and the prosecutor did not respond, could defense counsel have been at fault for

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failing to investigate further into the counsel relationship? Is your answer yes or no?

MR. CURRY: Defense counsel, or State habeas counsel?

QUESTION: Well, at this stage we can say State habeas counsel.

MR. CURRY: Absolutely.

QUESTION: Was State habeas counsel entitled to rely on that statement in the record?

MR. CURRY: Absolutely not. They told the Virginia supreme court that they were -- they alleged it in conclusory fashion --

QUESTION: No, they may have asked for investigators --

MR. CURRY: No.

QUESTION: -- because they wanted to go further --

MR. CURRY: No, Justice Souter --

QUESTION: But are you saying that they were not entitled to rely upon the silence of the record --

MR. CURRY: No, they weren't.

QUESTION: -- for purposes of -- okay.

MR. CURRY: They alleged in the Virginia supreme court that there were irregularities with respect to the jury, and that's why they wanted to go interview them.

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QUESTION: But they didn't have a clue what they were until the Federal habeas, when an investigator quizzed five jurors and a couple of them said, oh yeah, she was married to --

MR. CURRY: There's absolutely no reason why State habeas counsel could not have done that.

QUESTION: Counsel, I looked at -- this case arose in what, Cumberland County, Virginia?

MR. CURRY: Yes, Your Honor.

QUESTION: And I saw from the atlas Cumberland County has a population of 7,500.

MR. CURRY: I'm not sure of the exact number, but it is small.

QUESTION: Is that the right order of -- and are jurors for a trial like this drawn from anywhere outside of Cumberland County?

MR. CURRY: No, Your Honor.

QUESTION: What about the other one?

MR. CURRY: The other what?

QUESTION: Well, I mean, I understand your point. The point is that why didn't the State counsel, or the State habeas counsel go and ask two jurors? If he'd asked two jurors he would have found out the same thing. All right.

But what about the other one where you have the

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State habeas counsel saying the psychiatric report was not in the record, in effect. I know the exact words. And the other side says yes, it is in the record.

MR. CURRY: Let me tell you two reasons why it doesn't matter. There's no reason to believe it wasn't there and that he just missed it. This is really a claim of ineffective habeas counsel. Let me tell you why. Because the trial record of -- or the State habeas exhibit that they submitted was a transcript of the codefendant's sentencing proceeding in which a psychiatric report was specifically mentioned.

Now, it's either one or the other. It was either in Cruse's file when he went, and he missed it, or didn't know the significance of it, or just doesn't recollect seeing it, or it wasn't there, for whatever reason they want to dream up, and he's on inquiry notice. He goes to the court and he says, well, wait a minute now, I produced a transcript of Cruse's sentencing that shows that a psychiatric report was gathered as a bit of his presentence report. I've looked at the file. It's not there. I want it. He can't have it both ways. He's not diligent either way.

QUESTION: Is he supposed to look at the -- I don't know, is he familiar with the different persons, who's a codefendant, sentencing, transcript -- I mean --

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MR. CURRY: He made it an exhibit with his State habeas petition. He submitted it to the Virginia supreme court as his exhibit. It specifically says in there there was a psychiatric report.

Now, that brings up another point as to why this really isn't even Brady material, because the record makes it clear that this psychiatric report was done as part of his pretrial and cross -- it was not part of the prosecution. It wasn't even gathered until a presentence investigation was done on Cruse after Williams' trial.

QUESTION: Well, it may -- you know, it may or may not ultimately be helpful on Brady if he gets to it, but I just wanted to follow Justice Breyer's question with this, and I may be wrong on this. Just correct me if I am.

I thought the reason we were -- or there was an argument over whether the report was in the file or not was this: that he had said, I should have gotten the report, and the response was, not that you were on inquiry notice to do whatever was necessary to find it. I thought the response was, the report was in the file, and if it was in the file, quite obviously you were at fault.

Is that the reason we're arguing over whether it is or is not in the file?

MR. CURRY: I'm not sure I understand the

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question, but I --

QUESTION: The question is, I thought the State's response was --

MR. CURRY: When he asked about a psychiatric --

QUESTION: -- ultimately to the Brady request, it was in the file --

MR. CURRY: No.

QUESTION: -- so that the Brady issue turned down to a dispute as to whether it was or was not in the file.

MR. CURRY: No.

QUESTION: Is that wrong?

MR. CURRY: No, that's not right.

He -- they sent me a letter making just an informal request for discovery, but it was -- you know, it was everything but the kitchen sink. It was your typical omnibus discovery request that you'd file in the trial court.

Now, they have tried to characterize that as somehow that I gave a response similar to the response that was given in the Strickler case, where this Court found as part of the reason or cause that he could have relied on that, that there was some sort of assurance that everything he had been given he had been given at trial.

I said absolutely nothing like that. I said,

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we're not going to agree to informal discovery. You have to file a motion with the Virginia supreme court, which they didn't do, so I misled them not at all, and they have never characterized what I said to them as any kind of misleading or assurance until after Strickler was decided.

Before that, it was just, you know, Mr. Curry gave us the brush-off, which is basically, I guess you could characterize -- I didn't agree to anything, and I certainly made no representations that they had been given everything they were entitled to at trial.

QUESTION: Can you -- let me tell you exactly what's bothering me about the third part, the part about the standard of clear and convincing evidence, et cetera, and that I take it is what's putting the pressure on the word fail, on his side of it.

Suppose a case has some evidence against the defendant, but much of the evidence consists of his own confession, and suppose it turns out later, through no fault of his own, much later, too late for a State hearing, we suddenly get a videotape and the confession was beaten out of him, all right. What's supposed to happen? Now, that's what's bothering me. Do you see the problem? I mean, would it even be --

MR. CURRY: Well, I --

QUESTION: Is -- because now, you read the

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literal words of that third part, and those literal words seem to say that the defendant loses in that circumstance, and that's why I say I'm not sure they mean what they say.

MR. CURRY: I --

QUESTION: Would there be a constitutional problem, and that same problem I guess is here, but with the word failure.

MR. CURRY: With all due respect, Justice Breyer, I don't think it's permissible to say that Congress didn't mean what it said. I mean, clear and convincing evidence is a perfectly familiar standard, and this, unlike --

QUESTION: Well, is there a constitutional problem in the case I put?

MR. CURRY: I don't think so. I think that Congress could say there is no statutory habeas relief except in the absence of clear and convincing evidence of innocence.

QUESTION: Mr. Curry, we're now moving from the argument -- there was a concession that if you get to (e)(2) the petitioner loses, and they're talking about only whether fault is required in that first part.

MR. CURRY: Right.

QUESTION: And you address the jury, and you address the claimant, where Merhige held in your favor.

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MR. CURRY: That's right.

QUESTION: But not one word has been said about the claim where Merhige ruled against you, and so could you address that?

MR. CURRY: He ruled against me on what point?

QUESTION: On the third objection that was made.

MR. CURRY: About this alleged secret deal?

QUESTION: On the deal between the prosecutor and Cruse.

MR. CURRY: Well, this to me is the weakest of all claims. First of all, it's a 2254(d) claim. This is a claim that was adjudicated on the merits in State court, so you never get to 2254(e)(2), unless it gets passed 2254(d), and the State court clearly was reasonable in rejecting this claim, because there is no evidence to support it. There was no evidence in State court.

QUESTION: But there would be evidence --

MR. CURRY: There was no evidence in Federal court.

QUESTION: There would be evidence to support it if the psychiatric report had been available, would there not?

MR. CURRY: It's two different claims.

QUESTION: Well, I know, but if it were clear from that report that the -- Cruse could not have

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intelligently given the testimony he did based on his own recollection, it would raise a strong inference that he did so pursuant to an agreement with the prosecutor.

MR. CURRY: I don't see that at all.

QUESTION: You don't?

MR. CURRY: I don't see the inference, the connection between those two things. I mean, look --

QUESTION: Well, as I understand the psychiatric report, it was that he was not in condition to have remembered everything he testified to. Isn't that the --

MR. CURRY: Right. He made a statement that because of the drugs and -- marijuana and alcohol --

QUESTION: Which is flatly inconsistent with the clear recollection he displayed at the trial.

MR. CURRY: Justice Stevens, I don't think --

QUESTION: Is it not?

MR. CURRY: I don't think defense counsel would have even used that if they'd known about it.

QUESTION: Well, don't you think there's some tensions between the two, between the --

MR. CURRY: I don't think it has any connection to whether or not he has a deal. He testified that he had a written deal --

QUESTION: No, no, no. Doesn't it have some -- isn't there some inconsistency between the substance of

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that report and the nature of his testimony?

MR. CURRY: Oh, certainly.

QUESTION: And does that then not give rise to an inference that perhaps there was some understanding with the prosecutor?

MR. CURRY: Absolutely not. I don't see any connection at all. Williams' whole defense was based on his testimony. To the extent that they drank and smoked marijuana, his credibility would have been equally suspect.

The defense wouldn't have even used this, and this report would have reinforced some basic points that the prosecutor was trying to make, and that is that Cruse was the remorseful one, that Williams, who got on the stand and in the words of his own trial attorneys was cold as a stone -- of course, Williams also told an obvious lie when he said he didn't rape Mrs. Keller, because the forensic evidence proved that he did.

QUESTION: Just one other question about your opening remarks. You recited all the things that he acknowledged. Am I correct in understanding that, as a matter of Virginia law, if he fired just one shot, which he admitted, and that shot was not fatal, would he have been eligible for the death penalty?

MR. CURRY: Was not fatal?

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QUESTION: Yes, if that one shot did not cause the death.

MR. CURRY: Well, this shot did cause the death, but no --

QUESTION: Well, no --

MR. CURRY: No. I think if he fires -- if he fires a shot and hits the person, and the other person, the codefendant shoots too, they're both guilty of capital murder.

QUESTION: No, I'm not sure you've answered me directly. If the evidence showed that he fired one shot that hit the person, but that shot did not cause the death, would he have been eligible for the death penalty?

MR. CURRY: The jury would have to find that they were what we call joint participants, that they each played a part, an active part in inflicting the fatal injuries. I don't think that that requires that they pinpoint to the bullet that he fired through Mr. Keller's face, that that -- if that had been the only shot, it would have killed him. The medical examiner said, all three head shots contributed to his death.

QUESTION: The thing that troubles me, if that's right, the whole case is a tempest in a teapot, because no matter what happens, you win, if that's right.

MR. CURRY: Well, that's right. I agree.

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(Laughter.)

QUESTION: It's amazing, because the understanding I had of the Virginia law aspect of the case through all the judges that reviewed it up to now was that if he's right that he just fired one shot and that shot was not fatal, he's not eligible for the death penalty.

MR. CURRY: You can look at --

QUESTION: And if that predicate is wrong, you certainly --

MR. CURRY: You can look at Judge Merhige's statement at page 645, that they all three definitely contributed to Mr. Keller's death, all three of the head shots.

QUESTION: Thank you, Mr. Curry.

Mr. Blume, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JOHN H. BLUME

ON BEHALF OF THE PETITIONER

MR. BLUME: A lot of ground. That's -- under Virginia law, on Michael Williams' own testimony, he is not guilty of capital murder. That is clear. The medical examiner's testimony could not clearly resolve the issue of whether this was a fatal wound or not. You can look at it, they can describe it all they want, but just look at it. Was this lethal? I can't say.

QUESTION: Wait a minute. I hold up a grocery

store with a cohort and we both shoot, and unless the State can show that it was my shot that caused the death, I can't be convicted of capital murder?

MR. BLUME: That's my understanding of the law, and in this case the shot that most recently Mr. Williams fired was not -- the medical examiner could not say --

QUESTION: You should always go in with a cohort, then.

MR. BLUME: Could not say --

(Laughter.)

MR. BLUME: -- that was a lethal wound, so he's not guilty of capital murder on his testimony, on its own face, that's the point.

QUESTION: Is the legal point of Virginia law covered in the briefs?

MR. BLUME: Yes. Just --

QUESTION: According to what he just read, it says according to medical evidence presented, any of the three gunshot wounds -- any -- could have been potentially lethal, and all three definitely contributed to his death, with a lot of citations, so what is the issue?

MR. BLUME: Well, the answer is, the medical examiner had sort of an unusual view of contributory, and she said any wound is contributory. She was asked specifically about the -- there were two headwounds

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through the brain, one into the face. She said the two brains were definitely potentially lethal in and of themselves. They went through the brain.

On this one she said -- or she said, I can't tell. That was the answer. Was this a lethal wound? She said, I cannot tell, and that creates at a minimum a jury issue on the question, based upon the jury instructions that they were given, and certainly means -- and the important thing, the answer to that is, when -- there was a sufficiency of the evidence claim brought, just capital murder conviction on direct appeal. The Virginia supreme court didn't say, Mr. Williams is guilty on his own testimony. They went straight to Cruse's testimony, and that's what they relied upon.

On the deal claim, I mean, one of the things to say that, well, on State court they decided and you lose, I mean, that's preposterous. Why was that true? Because they hid Cruse out. They wouldn't even tell State habeas counsel where he was. They wouldn't let him interview him. He filed a motion for discovery, he filed a motion for an expert, he filed a motion for a hearing. They said no.

The question about representation, Mr. Curry said -- they asked him about the psych reports and the other things and he said, Michael Williams filed a lengthy

request for exculpatory evidence prior to trial, and the Commonwealth responded to the request at that time. What else did that mean to you but, you asked for this type of information at trial, we gave it to you, you got everything you were supposed to get. It's in the J.A. at 353.

But the deal and the psych report together, and that's the way I understand you look at Brady claims, cumulatively, would have dramatically undermined Cruse's testimony. At the end of the day, this case was about who do you believe. Do you believe Cruse, or do you believe Williams?

QUESTION: No, no --

MR. BLUME: The medical evidence didn't answer it, the ballistics evidence didn't answer it, and that was why this was --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Blume.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 99-6615

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BY Ann Marie Fedigo

(REPORTER)