

The Burger Court Opinion Writing Database

Kuhlmann v. Wilson

477 U.S. 436 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

MAY 28 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May —, 1986]

CHIEF JUSTICE BURGER, concurring.

I agree fully with the Court's opinion and judgment. This case is clearly distinguishable from *United States v. Henry*, 447 U. S. 264 (1980). There is a vast difference between placing an "ear" in the suspect's cell and placing a voice in the cell to encourage conversation for the "ear" to record.

Furthermore, the abuse of the Great Writ needs to be curbed so as to limit, if not put a stop to the "sporting contest" theory of criminal justice so widely practiced today.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 27, 1986

No. 84-1479

LeFevre v. Wilson

Dear Thurgood and John,

We three are in dissent in the
above. I'm willing to try my hand at
it.

Sincerely,



Justice Marshall

Justice Stevens

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 3, 1986

No. 84-1479

Henderson v. Wilson

Dear Lewis,

I shall, of course, as soon as I
get around to it, circulate a dissent in
the above.

Sincerely,



Justice Powell

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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WSB
Please join me in
dissent
mf

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, dissenting.

Because I believe that the Court of Appeals correctly concluded that the “ends of justice” would be served by plenary consideration of respondent’s second federal habeas petition and that *United States v. Henry*, 447 U. S. 264 (1980), directly controls the merits of this case, I dissent.

I

In *Sanders v. United States*, 373 U. S. 1, 15 (1963), we held that a federal court may refuse to entertain a successive petition for habeas relief where “the ends of justice would not be served by reaching the merits of the subsequent application.” The decision whether to hear a successive petition, we stated, was committed “to the sound discretion of federal trial judges.” *Id.*, at 18. We declined to define precisely “the ends of justice,” observing that the phrase “cannot be too finely particularized.” *Id.*, at 17.

Today the Court rejects *Sanders*’ “sound discretion” standard and announces that the ends of justice are served by reconsideration of issues raised in previous federal habeas petitions *only* where the prisoner can make a colorable showing of factual innocence. *Ante*, at — (Slip Opinion 16-17). In support of this standard for consideration of successive petitions, the Court advances a revisionist theory of this Court’s

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

375

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, dissenting.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1-7, 10, 11

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, |
dissenting.

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and that *United States v. Henry*, 447 U. S. 264 (1980), di-
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cisely “the ends of justice,” observing that the phrase “cannot
be too finely particularized.” *Id.*, at 17.

Today four Members of the Court argue that we should re-
ject *Sanders*’ “sound discretion” standard and contend that
the ends of justice are served by reconsideration of issues
raised in previous federal habeas petitions *only* where the

pp 2 + 3

for renumbered

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
dissenting.

Because I believe that the Court of Appeals correctly concluded that the "ends of justice" would be served by plenary consideration of respondent's second federal habeas petition and that *United States v. Henry*, 447 U. S. 264 (1980), directly controls the merits of this case, I dissent.

I

In *Sanders v. United States*, 373 U. S. 1, 15 (1963), we held that a federal court may refuse to entertain a successive petition for habeas relief where "the ends of justice would not be served by reaching the merits of the subsequent application." The decision whether to hear a successive petition, we stated, was committed "to the sound discretion of the federal trial judges." *Id.*, at 18. We declined to define precisely "the ends of justice," observing that the phrase "cannot be too finely particularized." *Id.*, at 17.

Today four Members of the Court argue that we should reject *Sanders'* "sound discretion" standard and contend that the ends of justice are served by reconsideration of issues raised in previous federal habeas petitions *only* where the

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 4, 1986

84-1479 - Kuhlmann v. Wilson

Dear Lewis,

I agree with Parts I, IV and V but
reserve judgment on the rest.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'B. Powell', written in a cursive style.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1986

84-1479 - Kuhlmann v. Wilson

Dear Lewis,

I continue to agree with Parts I, IV and V of your circulating draft. Parts II and III are difficult for me in light of Sanders and the history of the 1966 amendments. They are also unnecessary to the judgment, and I do not join them.

Sincerely yours,



Justice Powell

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 3, 1986

Re: No. 84-1479-Kuhlmann v. Wilson

Dear Lewis:

I await the dissent.

Sincerely,

Jm.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1986

Re: No. 84-1479-Kuhlmann v. Wilson

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1986

Re: No. 84-1479, Kuhlmann v. Wilson

Dear Lewis:

I am where Byron is. I join parts I, IV and V of
your opinion. You will recall that I was in dissent in
Henry.

Sincerely,



Justice Powell

cc: The Conference

04/01

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner's petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

I

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the robbery or murder, claiming that he had fled because he was afraid of being blamed for the crimes.

After his arraignment, respondent was confined in the Bronx House of Detention, where he was placed in a cell with a prisoner named Benny Lee. Unknown to respondent, Lee

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Re 84-1479 Kuhlman

Supreme Court of the United States

Memorandum

5/25, 19 86

Byron.

Here is a copy of
my draft opinion
in this case. In your
April 4 note you
joined Parts I, IV & V,
and reserved judg.
on II & III.

Subject to an "ende
of justice exception, I
would bar "successive
habeas petition" on the
same issue. W.F.O.

04/01



To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER v.
JOSEPH ALLAN WILSON

*Byron -
See Parts
II & III
L*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1986]

JUSTICE POWELL delivered the opinion of the Court.

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After his arraignment, respondent was confined in the Bronx House of Detention, where he was placed in a cell with a prisoner named Benny Lee. Unknown to respondent, Lee

May 29, 1986

84-1479 Kuhlmann v. Wilson

Dear Byron:

I can, of course, understand your waiting to see the dissent before deciding whether to join Parts II and III of my opinion in this case. If you will forgive me for bothering you further at this time, I write this note.

It occurred to me after our brief and accidental talk on Saturday that it was your opinion in Barefoot, 463 U.S., at 895, that first brought to my attention the importance of the difference between "successive petitions" and "abuse of the writ" in habeas cases. See n. 6, p. 7, in my draft opinion in this case. Although the difference was identified clearly in Sanders v. U.S., 373 U.S., at 15-17, and we have relied on abuse of the writ several times in capital cases, I do not recall our having relied on the "successive petition" prong of Sanders, now incorporated in Rule 9(b) of the rules governing §2254 cases.

This case gives us an opportunity to do what you, Bill Rehnquist and I - in particular - have sought to do, namely, establish that a successive habeas petition will be rejected unless the defendant carries his burden of coming forward with a colorable showing of innocence.

Sincerely,

Justice White

lfp/ss

06/14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp. 1, 10-11, 17, 18

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 16 1986**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner's petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

I

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the rob-

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06/20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp. 1, 18

From: **Justice Powell**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner's petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

I

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the rob-

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July 1, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Kuhlmann v. Wilson, 8⁴/₅-1479

No. 85-567, Wainwright v. Songer

In 1974, resp was convicted of murder and sentenced to death. On direct appeal, we GVR'd for resentencing under Gardner v. Florida, 430 U.S. 349 (1977). Songer v. Florida, 430 U.S. 952 (1977). At resentencing, the TC refused to hear additional evidence and reimposed the death sentence for the same reasons originally relied upon. On direct appeal, Fla. Sup. Ct. affirmed, rejecting resp's contention that the Fla. death penalty scheme violated Lockett v. Ohio, 438 U.S. 586 (1978), by limiting admission and consideration of mitigating evidence to those categories of evidence listed in the statute, 365 So.2d 696 (1978), cert. denied, 441 U.S. 956 (1979).

Resp then unsuccessfully sought state habeas corpus relief by filing a Rule 3.850 motion. After a hearing, the trial court denied relief and the Florida Supreme Court affirmed. Songer v. State, 419 So.2d 1044 (Fla. 1982). Resp also was unsuccessful in his subsequent attempt to obtain federal habeas corpus relief. The federal DC considered resp's claim under Lockett as part of an ineffective assistance argument, concluding that counsel's failure to put on nonstatutory mitigating evidence was a reasonable mistake. The DC denied relief, CALL affirmed without discussing the Lockett issue, 733 F.2d 788, and we denied cert., No. 84-5690 (1985).

Resp again sought post-conviction relief in state court. In this proceeding, the original TJ stated that at the time of resp's trial, he had interpreted the Fla. statute as requiring him to consider only those categories of mitigating evidence listed in the statute. The judge also suggested that he had not considered any nonstatutory mitigating evidence. But the TJ denied relief, and Fla. Sup. Ct. affirmed, 463 So.2d 229 (1985).

Resp then filed his second petition for federal habeas corpus relief. The DC dismissed the application on the grounds that the ends of justice would not be served by reconsideration of the issues presented. Sitting en banc, CALL reversed and remanded, with instructions to the DC to

order the State to hold a new sentencing hearing. The court reasoned that the TJ's statements demonstrated new and different grounds for relief that resp could not have raised on his first federal habeas petition. The court concluded that the TJ's failure to consider any nonstatutory mitigating evidence constituted a clear violation of Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982).

We held this petition for Kuhlmann v. Wilson, No. 84-1479, because the cert. petition filed by the Fla. prison warden argues that CALL erred in concluding that the "ends of justice" would be served by reconsideration of the merits of this successive petition. A GVR in light of Wilson would not be appropriate since our judgment there did not rest on the standard that should govern successive review. Moreover, the standard adopted by the plurality in Wilson pertains to successive review of a conviction, while this case involves review of a death sentence.

I recommend that we hold this petition for Hitchcock v. Wainwright, No. 85-6756 (cert. granted June 9, 1986). In Hitchcock, we will consider Florida's pre-Lockett rule, which may have had the effect of limiting introduction of mitigating evidence to certain categories provided in the statute. CALL's decision here rested on its conclusion that such rule violated our holdings in Lockett and Eddings, and our disposition in Hitchcock will shed light on the question whether CALL's decision was correct.

My vote is to hold for Hitchcock v. Wainwright, No. 85-6756.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 1, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Kuhlmann v. Wilson, 85-1479

No. 85-276, Lockhart v. Walker

Resp was convicted for a murder that occurred in 1963, and sentenced to death. Ark. Sup. Ct. remanded for a new trial. Prior to retrial, resp unsuccessfully moved to recuse the TJ on the ground that the TJ was biased against him. Resp again was convicted and was sentenced to life imprisonment. The conviction was affirmed on direct appeal, Walker v. State, 241 Ark. 300 (1966), cert. denied, 386 U.S. 682 (1967).

Resp filed his first petition for federal habeas relief, alleging that the TJ was biased and that the prosecutor suppressed exculpatory evidence. The DC denied the writ, and CA8 affirmed. Walker v. Bishop, 408 F.2d 1378 (CA8 1969). In 1981, resp filed a second federal habeas petition. Applying the guidelines set out in Sanders v. United States, 373 U.S. 1 (1963), the DC refused to permit resp to relitigate his claims concerning the TJ's bias and the State's suppression of evidence. Sitting en banc, CA8 affirmed, over the dissent of four judges, on the ground that resp failed to establish that the "ends of justice" would be served by successive review. Walker v. Lockhart, 726 F.2d 1238 (CA8 1984).

Resp moved for recall of CA8's mandate on the basis of "newly discovered evidence." CA8 ordered the DC to hold a hearing to consider the new evidence. After the hearing, the DC again decided that the ends of justice did not require reconsideration of resp's claims. Among the items of evidence allegedly suppressed by the State was a transcript of a conversation that took place in 1963 between resp's confederate and the confederate's sister, in which the confederate made statements suggesting that it was he, and not resp, who had committed the murder. The en banc CA8 reversed, again over the dissent of four judges.

CA8's rested its decision on two separate grounds. First, the court considered "whether the new evidence sufficiently tips the balance of the ends of justice standard to permit us to reconsider" resp's claims. The appropriate standard for making this determination was "not whether the

district court or this court would find the new evidence credible, but whether the evidence possesses sufficient credibility that it should be heard by the real factfinder: the jury." CA8 assessed the new evidence under that standard and decided that the evidence created "sufficient additional doubt" about resp's guilt so that the ends of justice required successive review. The court held that resp was entitled to relief on the ground that the TJ's bias denied him a fair trial.

Second, the court determined that the suppressed transcript, which is described above, constituted a "separate and independent ground" for granting habeas relief. The court noted that "where the defendant has made general requests for all exculpatory material, the conviction will be set aside only if 'the omitted evidence creates a reasonable doubt that did not otherwise exist.'" Quoting United States v. Agurs, 427 U.S. 97, 108 (1976)). CA8 determined that the transcript was authentic, that it would be admissible in evidence at trial, that it had been suppressed by the State, and that it was both favorable to resp and material on the question of his guilt. With respect to the issue of materiality, CA8 concluded that the transcript itself was "sufficient to create a reasonable doubt" about resp's guilt. Therefore, suppression of the transcript violated resp's right to due process and constituted an independent ground for federal habeas relief.

The Arkansas prison warden has filed a cert. petition, challenging CA8's conclusion respecting the TJ's bias, its standard for deciding when new evidence justifies successive review, and its determination that the transcript was authentic. We held the petition for Kuhlmann v. Wilson, No. 84-1479. A GVR in light of Wilson would not be appropriate, since our judgment did not rest on the standard governing successive review.

Although CA8's "ends of justice" analysis was dubious, my vote is to deny this petition. The alternative ground for CA8's decision, i.e., its holding on the Brady violation, appears to be consistent with our cases. This case was decided prior to our decision in United States v. Bagley, 105 S.Ct. 3375 (1985), which sets out the standard of materiality to be applied in evaluating a Brady violation. But CA8's conclusion on this issue is not inconsistent with Bagley. Since CA8's judgment rests on this independent ground, and its conclusion on that ground appears correct, further review is not warranted.

My vote is to deny.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 4, 1986

Re: 84-1479 - Kuhlmann v. Wilson

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 3, 1986

Re: 84-1479 - Kuhlmann v. Wilson

Dear Lewis:

I await the dissent.

Respectfully,



Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: JUN 9 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE STEVENS, dissenting.

When a District Court is confronted with the question whether the “ends of justice” would be served by entertaining a state prisoner’s petition for habeas corpus raising a claim that has been rejected on a prior federal petition for the same relief, one of the facts that may properly be considered is whether the petitioner has advanced a “colorable claim of innocence.” But I agree with JUSTICE BRENNAN that this is not an essential element of every just disposition of a successive petition. More specifically, I believe that the District Court did not abuse its discretion in entertaining the petition in this case, although I would also conclude that this is one of those close cases in which the District Court could have properly decided that a second review of the same contention was not required despite the intervening decision in the *Henry* case.

If the merits are reached—and I must confess that I am puzzled by the Court’s eagerness to address the merits in Part IV of its opinion if it means what it says in Part III—I agree with the analysis in Part II of JUSTICE BRENNAN’s dissent. Accordingly, I also would affirm the judgment of the Court of Appeals.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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Recirculated: JUN 17 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1479

R. H. KUHLMANN, SUPERINTENDENT, SULLIVAN
CORRECTIONAL FACILITY, PETITIONER *v.*
JOSEPH ALLAN WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June —, 1986]

JUSTICE STEVENS, dissenting.

When a District Court is confronted with the question whether the "ends of justice" would be served by entertaining a state prisoner's petition for habeas corpus raising a claim that has been rejected on a prior federal petition for the same relief, one of the facts that may properly be considered is whether the petitioner has advanced a "colorable claim of innocence." But I agree with JUSTICE BRENNAN that this is not an essential element of every just disposition of a successive petition. More specifically, I believe that the District Court did not abuse its discretion in entertaining the petition in this case, although I would also conclude that this is one of those close cases in which the District Court could have properly decided that a second review of the same contention was not required despite the intervening decision in the *Henry* case.

On the merits, I agree with the analysis in Part II of JUSTICE BRENNAN's dissent. Accordingly, I also would affirm the judgment of the Court of Appeals.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 3, 1986

No. 84-1479 Kuhlmann v. Wilson

Dear Lewis,

Please join me.

Sincerely,

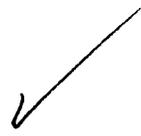


Justice Powell

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JUSTICE SANDRA DAY O'CONNOR



April 3, 1986

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P.S. This excellent opinion takes a significant step in the right direction in controlling successive petitions for habeas relief. I am delighted to join it.