We read the reference in Sanders to "ends of justice" to be consistent with the view that in limited circumstances a successive petition may be entertained. In considering when it may be appropriate to exercise this discretion, we bear in mind that the basic function of federal habeas corpus is to provide relief from unjust incarceration.
Thus, this peremptory holding would leave District Court judges without guidance in disposing of successive application for a writ of habeas corpus. See Brown v. Allen, 344 U.S. 443, 497 (1953) (opinion of Frankfurter, J.).
MEMORANDUM

TO: Anne

DATE: March 24, 1986

FROM: Lewis F. Powell, Jr.

84-1479 Khulman v. Wilson

Your second draft of March 22, incorporating my suggestions and other changes, is excellent in every respect. It was a joy to read both in terms of good writing and sound reasoning.

I am even beginning to have a glimmer of hope that our main argument may attract a Court. But do not set your heart on this - at least since our reasoning will be new to most of the Justices.

Apart from usual editing, I make the following comments and suggestions:

1. With respect to society's interest in deterring crime, we might show in a footnote how few persons who commit felonies are ever arrested, charged and brought to trial, and how many of those are convicted and sentenced. Ask the Library to examine FBI reports that contain these statistics, and give you the latest report on these statistics. Professional criminals - and even the more casual type of criminals who support their drug
addictions by robbing and mugging - count on the fact that our system of justice is so slow and cumbersome that even when arrested and charged, final convictions and sentencing occur in a relatively small number of cases.

It is probable that Congress, in enacting §2254(b) had these facts in mind. When I served on the Crime Commission appointed by President Johnson in the late 60s, our studies revealed that a high percentage of the crimes are never solved and that the public also is reluctant to cooperate with police because of retaliation. I would not make a "big deal" of this, Anne, as you have more important things to do. I merely suggest that we see what the FBI turns up after you have made clear what we want.

2. Perhaps the most critical paragraph in Part III of the opinion is the concluding one that purports to state the basic standard. I have suggested substantial revision in this paragraph. My objective was to make it consistent with the clear intention of Congress, and also with the statement that successive review should "rarely" be permitted. Take a close look at my revisions. No doubt you can improve the language, but we should make very clear that successive review is "rarely" to be
allowed, and that there is a heavy burden on the defendant who claims this right.

3. I think you Part IV is excellent, and have made few suggested changes. It does seem to be longer than necessary. If you find opportunities to omit a few lines here and there without weakening our argument, please do so. But I am happy with the present draft.

* * *

As we agreed in our talk on Saturday, it is highly desirable to move your superb opinion in this important case forward as rapidly as possible, consistent with the care we customarily take. I suppose Cabell will be the editor. Please say to him that I have reviewed your draft twice, and think that basically the language needs little or no editing except where Cabell may think a statement is erroneous or could be framed more artfully. I do not wish to retreat from our basic positions in both of the major sections of the opinion.

L.F.P., Jr.
The dissenting opinion mischaracterizes the plurality opinion in several respects. The dissent states that the plurality "implies that federal habeas review is not available as a matter of right to a prisoner who alleges in his first federal petition a properly preserved constitutional claim." (italics added). This case involves, and our opinion addresses, only the standard applicable to successive petitions. The dissent further states that we "reject[] Sanders' 'sound discretion' standard." Of course, a district court must exercise discretion when deciding whether to entertain a successive petition. Sanders left open, however, the critical question as to the standard or considerations to be
applied in determining whether "the ends of justice" would be served by considering such a petition. Moreover, Sanders affords no guidance as to the meaning— in the context of a successive petition— of the "ends of justice".

Having criticized the plurality for not leaving district courts free merely to exercise "sound discretion", the dissent goes on to propose its own new standard: district courts should refuse to entertain "abusive, meritless petitions", but should entertain successive petitions advancing a "potentially meritorious claim" for which the petitioner offers a "good justification" for seeking relitigation. Post, at 9. This twin-standard, in practical effect, would provide no guidance to district courts. If a petition is "meritless"
there is a duty to deny habeas relief. Many claims, however, will fall into the dissent's category of the "potentially meritorious". It is as to those claims that the standard governing successive petitions will make a critical difference.

In this case, for example, respondent's federal habeas petition relied on Henry, a case decided subsequently to the first denial of habeas relief. On its face, respondent's claim properly required the District Court to review the record to determine whether in fact there was a "successive petition" that presented the same question previously resolved both by the District Court and the Court of Appeals. In sum, although recognizing that Sanders had provided no guidance, the dissent's proposed standard would leave district courts and courts
of appeals with meaningless "guidance" from this Court. This is evident from the fact that the dissent would affirm the decision of the Court of Appeals. That court simply ignored the relevant finding of facts that had been made by the state trial court, and accepted by both the District Court and the Court of Appeals on the first federal habeas petition. In addition, the Court of Appeals concluded, wholly without reasoning or analysis, that the "ends of justice" required its decision. See infra, this opinion, at p. ___, et seq.
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
New footnote to come at the end of Part III:

The dissenting opinion mischaracterizes our opinion in several respects. The dissent states that the plurality "implies that federal habeas review is not available as a matter of right to a prisoner who alleges in his first federal petition a properly preserved [constitutional claim]." Post, at 2 (emphasis added). This case involves, and our opinion considers, only the standard applicable to successive petitions for federal habeas corpus relief. The dissent further mistakenly asserts that the plurality "rejects Sanders' 'sound discretion' standard." Post, at 1. As we have stated, the permissive language of §2244(b) of course gives the federal courts discretion to decide whether to entertain a successive petition, and since Sanders those courts have relied on the phrase "ends of justice" as a general standard for identifying cases in which successive review may be appropriate. What Sanders left open--and the dissent today ignores--is the critical question of what considerations should inform a court's decision that
successive review of an issue previously decided will serve the "ends of justice."

Having criticized our decision for refusing to leave district judges at large to exercise "sound discretion," the dissent goes on to propose its own new standard: district courts should refuse to entertain "abusive, meritless petitions," but should entertain successive petitions advancing a "potentially meritorious claim" for which the petitioner offers a "good justification" for seeking relitigation. Post, at 9. The dissent's dual standard would in fact provide no guidance to district courts. Informing district courts to decline successive review of meritless petitions is superfluous. District courts already are under a duty to deny relief on meritless claims. More fundamentally, that standard ignores the threshold issue presented in this case, that requires us to identify the circumstances under which federal courts, once they properly have decided that a petition is successive, should go on to consider the merits.

Moreover, many claims will fall into the dissent's category of the "potentially meritorious." It is with respect to those claims that the standard adopted by the
Court today (ante, at ____, ____ ) provides guidance - not found in Sanders - as to the meaning in this context of "ends of justice." In contrast, in this case where the identical issue had been resolved in the first federal habeas corpus case, the dissent would affirm the Court of Appeals' decision approving repetitive review, giving no reason other than its conclusory statement that "the ends of justice" so required. (Anne: Am I right that this was the only basis?) What the dissent proposes would leave courts in second federal habeas corpus cases - in which serious issues of successive review of identical questions were raised - free to make standardless judgments. Sanders and habeas corpus rule 9(b) would be meaningless.

Contrary to the dissent's suggestion, our cases deciding that federal habeas review ordinarily does not extend to procedurally defaulted claims plainly concern the "general scope of the writ." Post, at 3. The point of those decisions is that, on balancing the competing interests implicated by affording federal collateral
relief to persons in state custody, federal courts should not exercise habeas corpus jurisdiction over a certain category of constitutional claims, whether or not those claims are meritorious. Whether one characterizes those decisions as carving out an "exception" to federal habeas jurisdiction, as the dissent apparently prefers to do, post, at 3, n. 1, or as concerning the scope of that jurisdiction, the result is the same, and was reached under a framework of analysis that weighed the pertinent interests. Similarly, in *Fay v. Noia*, JUSTICE BRENNAN'S opinion for the Court expressly made a "practical appraisal of the state interest" in a system of procedural forfeitures, weighing that interest against the other interests implicated by federal collateral review of procedurally defaulted claims. 372 U.S., at 433. Of course, that the Court in *Noia* adopted an expansive reading of the scope of the writ does not undercut the fact that it did so by balancing competing interests.