

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY A. BEARD, SECRETARY, :

4 PENNSYLVANIA DEPARTMENT OF :

5 CORRECTIONS, ET AL., :

6 Petitioners :

7 v. : No. 08-992

8 JOSEPH J. KINDLER. :

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10 Washington, D.C.

11 Monday, November 2, 2009

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 1:00 p.m.

16 APPEARANCES:

17 RONALD EISENBERG, ESQ., Deputy District Attorney,

18 Philadelphia, Pa.; on behalf of the Petitioners.

19 MATTHEW C. LAWRY, ESQ., Philadelphia, Pa.; on behalf

20 of the Respondent.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this afternoon in Case 08-992,
5 Beard v. Kindler.

6 Mr. Eisenberg.

7 ORAL ARGUMENT OF RONALD EISENBERG

8 ON BEHALF OF THE PETITIONERS

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

11 Joseph Kindler, after attacking the judicial
12 process by murdering a witness against him, again
13 repudiated that process by breaking out of prison twice
14 and fleeing the country.

15 The court of appeals refused to honor the
16 resulting procedural default on the ground that it was
17 inadequate because discretionary. This Court should
18 clarify that the purpose of the adequate State grounds
19 doctrine isn't to strip State courts of their equitable
20 power to excuse procedural defaults, but simply to
21 ensure that they don't discriminate against Federal
22 claims under the guise of procedural ruling.

23 JUSTICE GINSBURG: I didn't understand the
24 Third Circuit rule to equate discretion with inadequacy.
25 I thought their position was -- the assertion was that

1 the rule was mandatory; that is, if you are fugitives,
2 you are out forever.

3 But in fact, at the time that Kindler fled,
4 the rule was discretionary, so the mandatory rule hadn't
5 been firmly established. That's what I thought the
6 Third Circuit held. It did not equate discretion with
7 inadequacy.

8 MR. EISENBERG: That was the -- the argument
9 presented, but I think what the Third Circuit held was
10 simply to equate discretion with inadequacy. But in any
11 case, Justice Ginsburg --

12 JUSTICE SCALIA: Where is that? I mean, why
13 do we have to guess about it? Where -- where do you
14 find that in its opinion? Because I have -- I have the
15 same -- the same problem.

16 MR. EISENBERG: I don't think we really have
17 to guess, Your Honor. I think, looking, for example, in
18 the third appendix at the top of page 22, where the
19 Third Circuit is characterizing its prior law in this
20 question:

21 "After surveying decisions of the
22 Pennsylvania courts, we concluded that the Pennsylvania
23 courts had discretion to hear an appeal filed by a
24 fugitive who had been returned to custody before an
25 appeal was initiated and dismissed. Accordingly, the

1 fugitive-forfeiture rule was not firmly established and,
2 therefore, is not an independent and adequate procedural
3 rule."

4 JUSTICE GINSBURG: But the fugitive-
5 forfeiture rule that they were talking about was the --
6 the mandatory rule wasn't firmly established.

7 MR. EISENBERG: Well, I don't think that's a
8 fair reading of this language, in and of itself, Your
9 Honor. But it really doesn't matter for our position,
10 and that's because the rule that was applied to this
11 defendant was a discretionary rule.

12 The Pennsylvania -- the trial court in this
13 case exercised his discretion not to reinstate
14 post-verdict motions. The opinion that was written by
15 the trial court and is in the joint appendix at page --
16 I believe it's 69, Your Honor -- states that the
17 question was whether the trial judge abused his
18 discretion in declining to reinstate post-trial motions.

19 When the case that Your Honor's --

20 JUSTICE KENNEDY: I -- I have a number of
21 problems with the Third Circuit's opinion, but the
22 question presented, it seems to me, is not really the
23 dispositive point of the opinion. I don't think the
24 question you presented is really that squarely before
25 us.

1 MR. EISENBERG: Well, Your Honor --

2 JUSTICE KENNEDY: And I don't see a split,
3 either. I mean, of course, there is going to be some
4 discretion. The question is -- the Third Circuit, as I
5 read the opinion, was concerned that it wasn't firmly
6 established at the time of the waiver.

7 I have real problems with whether the waiver
8 should even be -- whether the time of the waiver is
9 controlling, but that is not the question you asked us
10 to resolve.

11 MR. EISENBERG: Your Honor, I think the
12 problem here and the reason that we are at this point is
13 that, whether the test is stated directly as being a per
14 se ban on discretion or whether simply the standard is
15 so high under an interpretation of "firmly established"
16 that allows for virtually no deviation in results by the
17 State courts, the effect is the same. It's to drive out
18 the exercise of discretion by the State courts.

19 JUSTICE SOTOMAYOR: But this wasn't the
20 ruling by the court in analyzing your cases and
21 saying -- you know, in six out of the cases -- six out
22 of the ten cases, discretion was exercised, in four it
23 wasn't, and so it's not firmly established because the
24 numbers are skewed.

25 Justice Ginsburg -- you pointed Justice

1 Ginsburg to page 23, and the Court very directly there
2 says, look, we are rejecting the State's argument that
3 the waiver rule was mandatory.

4 MR. EISENBERG: Justice Sotomayor --

5 JUSTICE SOTOMAYOR: And so it characterized
6 your argument that way, that you were saying the
7 district court had no discretion.

8 MR. EISENBERG: Justice Sotomayor, the State
9 didn't argue in Federal court that the State rule was
10 mandatory. We were very explicit.

11 JUSTICE SOTOMAYOR: Well, whether you think
12 you did or didn't, that's how the court described it, so
13 it understood you to be taking a different position.

14 Are we going to correct it because it
15 misunderstood you? Or --

16 MR. EISENBERG: The problem is that the
17 Third Circuit did not engage in any inquiry about the
18 nature of the rule that was applied to this defendant,
19 so it was not in any position to say that a different
20 rule was applied to this defendant than the rule that
21 should have been applied.

22 That's the problem with the argument that a
23 new rule was sprung on this defendant. The rule that
24 was applied to this defendant was discretion, and the
25 Third Circuit never discusses anything other than that.

1 They reject our argument that the underlying
2 rule was mandatory in that language, but they never
3 discuss what rule was actually applied to this
4 defendant. We think it was clearly a discretionary
5 rule.

6 But the -- the real question is whether, at
7 the time of the default, the default that occurred by
8 the extraordinary act of escaping, the defendant was not
9 fairly apprised of the consequences of his action.

10 And, really, whether or not the rule --

11 JUSTICE GINSBURG: You mean that the
12 defendant might not have escaped if he knew that the
13 rule wasn't --

14 MR. EISENBERG: Well, I think that's the
15 irony of applying this sort of adequacy analysis to this
16 kind of default, but that, I think, is more of a problem
17 for Kindler than for the Commonwealth.

18 This Court has consistently held in its
19 adequacy cases that the litigant must have ample
20 opportunity to comply with the State's procedure.

21 JUSTICE KENNEDY: Well, I don't know why you
22 submit -- why you seem to concede that that applies
23 here. I can understand why we want to look at the time
24 of the waiver if it's an attorney arguing about jury
25 instructions and so forth, but the man escapes when the

1 door is open or when the window is open, and he doesn't
2 give consideration to these things; and if he does, I
3 think that's quite irrelevant.

4 It seems to me that the waiver point is --
5 is something that shouldn't be conceded. I think that
6 if ten years elapse between the time of the escape and
7 the time the State formulates its rules, that he is
8 bound by those rules when he gets there. But you don't
9 argue that. That's not what you presented to us.

10 MR. EISENBERG: Well, I think, Your Honor,
11 what we are presenting is that the nature of the State
12 rule here was -- was such that the defendant had
13 reasonable notice of what he was facing by escaping,
14 whether or not it would have affected his subjective
15 decision to escape, and therefore that the State ground
16 can't be thrown out in Federal court on the ground of
17 adequacy. And really, whether the rule was strictly
18 mandatory in 1984 or discretionary doesn't much matter
19 for purposes of putting the defendant on notice that if
20 he escaped, he was going to run into serious trouble
21 trying to appeal at the same time that he was trying to
22 stay in Canada for the rest of his life.

23 That's what this case is really all about.
24 And yet, the lower courts I think have so misconstrued
25 this Court's adequacy doctrine that they have come to

1 the point of saying that even in that situation, the
2 rule is inadequate and can be ignored in Federal court.

3 JUSTICE SOTOMAYOR: What court has said? As
4 I read the Third Circuit, it says: A procedural rule
5 that is consistently applied in the vast majority of
6 cases; even if State courts are willing to occasionally
7 overlook it and review the merits of a claim, that
8 that's okay.

9 MR. EISENBERG: Your Honor --

10 JUSTICE SOTOMAYOR: So what other circuit
11 has said that any measure of discretion or even a lot of
12 use of discretion bars deference to the State rule?

13 MR. EISENBERG: Justice Sotomayor, I think
14 if you look at the amicus brief filed on behalf of 25
15 States, you will see that that there are a great many
16 cases where that's exactly the analysis that the courts
17 have applied, and in many of those cases they have
18 required the parties to place before them dozens and
19 sometimes hundreds of other examples of the operation of
20 a State procedural rule so that the lower Federal court
21 can decide whether that --

22 JUSTICE SOTOMAYOR: How many of those cases
23 resulted in the overturning or the grant of habeas --

24 MR. EISENBERG: I think in California, for
25 example, it's been quite common. The State's rule for

1 timeliness of post-conviction communications is seldom
2 enforced in Federal court, as we learned from the amicus
3 brief. In fact, it virtually doesn't exist. And even
4 in those cases where the courts --

5 JUSTICE SOTOMAYOR: But do we -- what --
6 what does that tell us about us establishing the rule
7 that you propose?

8 MR. EISENBERG: I think what it tells us is
9 that the lower courts are applying a very different
10 adequacy rule than this Court has been applying. We are
11 not really asking for some kind of new rule from this
12 Court as compared to your prior line of cases on
13 adequacy.

14 JUSTICE SOTOMAYOR: But you are asking us to
15 take away a part of the inquiry.

16 MR. EISENBERG: Not at all, Your Honor.

17 JUSTICE SOTOMAYOR: Your notice -- your
18 notice and an opportunity to comply doesn't address a
19 repeated statement by us, which is that whatever test is
20 applied has to get to whether the State court is
21 attempting to evade Federal review of constitutional
22 questions.

23 MR. EISENBERG: Yes, it does, Your Honor.

24 JUSTICE SOTOMAYOR: All right. And so your
25 test does nothing to inform that question, for example,

1 the Flowers situation. There was a clear rule, there
2 was more than an adequate opportunity to comply, and yet
3 we said it didn't qualify for deference because it was
4 clearly, given the circumstances of the State
5 application of the rule at issue, an attempt to evade a
6 constitutional right.

7 MR. EISENBERG: The question is what those
8 circumstances are, Your Honor. And in virtually case
9 after case, the circumstances that have been identified
10 by this Court for actually finding a rule inadequate are
11 that the State rule was some kind of bait and switch,
12 that it was a -- to use Justice Holmes' classic
13 formulation, that it was a spring -- a trap that was
14 sprung on the defendant. One rule existed at the time
15 that the litigant was proceeding, another rule was
16 applied when the case reached appeal. And that is
17 characteristically what has made this Court, not the
18 lower Federal courts, but this Court, hold that rules
19 were actually inadequate.

20 So in Ford v. Georgia, for example, where
21 the defendant raised a Batson claim after the jury was
22 sworn, because that's what the law was at the time of
23 his trial, when the case reached appeal the appellate --
24 the State appellate court said: No, no; we have a new
25 rule now; you have to do it before the jury is sworn.

1 And they found his claim waived. That rule was
2 inadequate.

3 In James v. Kentucky, where the defendant
4 asked for an adverse inference charge and he asked for
5 an admonition rather than an instruction, and the State
6 court said, no, no, it was supposed to be an instruction
7 rather than an admonition, that was a reversal of prior
8 State law.

9 There are many cases very much like that
10 where there is a spring set by the State in the sense
11 that a different rule is applied on appeal than was
12 before the litigant at the time that he was trying to
13 comply with the rule.

14 Now, this case obviously is quite far from
15 that, and that's exactly why this case should have been
16 the last sort of case where a rule was found inadequate.
17 The higher the standard that the lower courts apply, the
18 stricter the standard that the lower Federal courts
19 apply to analyze the adequacy of State rules, the less
20 opportunity there will be for discretion on the part of
21 the States. And the loser in that equation, while it
22 might not be this defendant, will be the vast majority
23 of defendants who would have been more entitled, more
24 deserving of discretion, of leniency from the State
25 courts.

1 The State courts need to be allowed to apply
2 the kind of discretion in their procedural rulings that
3 this Court applies, that the Federal courts are allowed
4 in -- in Federal procedural rulings -- for example,
5 under the plain error rule, even under the Federal
6 fugitive-forfeiture rule.

7 In 1876 this Court said that it's within our
8 discretion to dismiss a case where the defendant is a
9 fugitive, and since then, while there have been a number
10 of decisions from this Court concerning fugitive
11 defendants, none of them have laid out the sort of menu,
12 the sort of standards and substandards and subrules that
13 the defendant is now arguing have to be present in a
14 rule for it to be adequate.

15 JUSTICE GINSBURG: But the question that you
16 present -- I mean, you state it forthrightly in your
17 brief, and I'm reading from page 7, you say: "The court
18 of appeals interpreted this Court's precedent to compel
19 a finding of inadequacy for any State procedural rule
20 that permits the State courts to exercise a degree of
21 discretion. Any discretion is inadequate." That's what
22 you say the court of appeals interpreted this Court's
23 precedent to say: Discretion, inadequate.

24 Well, I'm looking first at the petition
25 appendix page 62, which describes the district court's

1 understanding, which the Third Circuit affirmed. It
2 says: "An occasional act of grace by a State court in
3 excusing or disregarding a State procedural rule does
4 not render the rule inadequate to procedurally bar
5 advancing a habeas claim in district court."

6 Well, that's saying, yes, you can have a
7 rule with discretion, not to follow the rule woodenly,
8 and that doesn't make it inadequate.

9 MR. EISENBERG: Justice Ginsburg, an
10 occasional act of grace, that level of -- of leniency or
11 flexibility that would be allowed by the district
12 court's view of the law, or the Third Circuit's, is
13 simply not appropriate in judging the adequacy of State
14 grounds.

15 It's certainly not the kind of miserly,
16 crabbed review of the exercise of discretion that occurs
17 in Federal procedural rulings like the plain error rule.

18 JUSTICE GINSBURG: Well, do you want to
19 modify then what you said? You said that the court of
20 appeals said that any -- any degree of discretion means
21 that the rule is inadequate.

22 MR. EISENBERG: Justice Ginsburg, we say
23 that because there was no analysis here of what degree
24 of discretion or whether discretion was actually applied
25 by the State court in this case. That's why, in effect,

1 we say that the Third Circuit's ruling was about the per
2 se exercise of discretion.

3 But even if it wasn't automatically about
4 the exercise of discretion, even if it was merely
5 applying a rule which is so narrow and strict that in
6 practical effect the State courts have little actual
7 discretion to exercise, that's still a problem and it's
8 still inconsistent with the purpose of the adequate
9 State grounds doctrine, which was never intended to
10 allow Federal courts or to require lower Federal courts
11 to engage in the kind of analysis that many of the lower
12 Federal courts are now undertaking.

13 Basically, they -- they are taking out their
14 magnifying glasses and starting to split hairs by
15 looking at every single case, by looking at how those
16 cases compare to each other, by deciding whether there's
17 enough of a standard, is there enough of a precedent,
18 did you tell this little particular little fact to the
19 defendant before. That sort of analysis is not part of
20 this Court's adequacy doctrine.

21 JUSTICE GINSBURG: But what makes -- makes
22 this particularly puzzling is you are attributing a rule
23 to the Third Circuit that that very circuit in *Campbell*
24 *v. Burris* said was not a tool. In the -- in *Campbell v.*
25 *Burris*, the Third Circuit said a State procedural rule

1 can't be, cannot be rendered per se inadequate merely
2 because it allows for some exercise of discretion.

3 MR. EISENBERG: And I think if the Third
4 Circuit had applied that statement in this case, there
5 might have been a different result and at the very least
6 there would have been additional analysis, because that
7 calls for additional analysis beyond the absolute lack
8 of analysis in this opinion about the nature of the rule
9 that was actually applied to this defendant.

10 Without that sort of analysis, you can't say
11 that the Court is looking at whether this -- this
12 particular exercise of discretion came within the small
13 window that that court would allow to the States. That
14 -- that --

15 JUSTICE GINSBURG: Well, it would be really
16 odd, considering that one member of the panel was on
17 both cases, Stapleton, and these cases are in the same
18 year, for at least that judge not to think that what he
19 said in the one case was in no conflict with what he
20 said in the other.

21 MR. EISENBERG: And yet we have a result,
22 Your Honor, which is explainable only on the ground that
23 the State court rule maintains some power of discretion
24 by the State courts. There is nothing else in the
25 opinion that explains the result in this case.

1 But I emphasize again that, even if the
2 court had applied a different rule, the rule that it
3 said it was applying in some of the Third Circuit's
4 other panel opinions, we would still be left with a
5 standard which is far narrower than anything that this
6 Court has actually applied in its own decisions.

7 There have been a variety of phrases in the
8 Court's decisions, things like "firmly established,"
9 "strictly followed," "regularly applied."

10 JUSTICE KENNEDY: But it seems to me that
11 that's not what the Third -- Third Circuit was saying.
12 It was saying that adequacy of the rule is determined by
13 the law in effect at the time of the waiver, and it
14 wasn't well-established.

15 Now, I have real problems with that as an
16 opening premise, but that's not what you asked us to
17 resolve in your petition.

18 MR. EISENBERG: Well, I don't think that
19 there is an analysis of whether the law was -- was
20 established at the time of the waiver, Your Honor,
21 because what the court says, or at least what the
22 precedents it rely on say, is that at the time of the
23 waiver here, assuming for the moment that that's the
24 relevant inquiry, the rule was discretionary.

25 The question then has to be, was that rule

1 applied to the defendant? If a different rule is
2 applied to the defendant, if the difference --

3 JUSTICE SOTOMAYOR: Counsel, I don't know
4 how you say that. Yes, it was clearly established that
5 the district court had discretion -- none of the
6 justices below disagreed with this -- to dismiss
7 post-verdict motions on the basis of flight. The courts
8 below themselves said: What we don't have a rule about
9 is what we do with respect to a post-judgment motion to
10 reinstate or how we the appellate court will treat that
11 waiver once it comes before us. Will we apply it to the
12 appellate process as well?

13 I understood the Third Circuit to be saying
14 that it was those two latter components, which the
15 courts below themselves identified as new questions,
16 that it was resolving, that involve new rules.

17 MR. EISENBERG: Your Honor --

18 JUSTICE SOTOMAYOR: That's as simply as I
19 thought the issue was. Maybe your adversary will
20 dissuade me and concede your point that what the court
21 was saying, the discretionary application, is what was
22 at issue, but if as I've described things is correct,
23 how does your position continue to be sustained?

24 MR. EISENBERG: That wasn't State law in
25 fact, Your Honor. The State courts didn't make the kind

1 of decision that the Federal court, not actually in this
2 case, but in the case that it cited, Doctor, tried to
3 make. That is a distinction that Doctor invented from
4 State law. It is not a distinction that the State cases
5 announced themselves.

6 JUSTICE SOTOMAYOR: So what you are
7 disagreeing with is the Third Circuit's conclusion of
8 what the status of Pennsylvania law was?

9 MR. EISENBERG: Well, that would have been
10 clearer, I think, if we were appealing from the Doctor
11 decision here now rather than from this decision, but I
12 think that there is at the very least a great degree of
13 unclarity in exactly what the --

14 JUSTICE SOTOMAYOR: Well, Doctor dealt with
15 what will the court do with respect to, not post-verdict
16 motions, but with respect to appeals that are raised
17 before or after flight.

18 MR. EISENBERG: That is what Doctor said was
19 a distinction in State law.

20 JUSTICE SOTOMAYOR: And that's what Doctor
21 said?

22 MR. EISENBERG: Doctor said that. Only that
23 Federal court said that.

24 JUSTICE SOTOMAYOR: So now the only other --
25 Kindler now raises a new question: What are we going to

1 do -- according to the courts below, what are we going
2 to do with post-verdict motions to reinstate and to
3 appeals that result after flight and after waiver;
4 correct?

5 MR. EISENBERG: In fact, not a new question
6 at all under State law, Your Honor. And we have cited
7 several State court opinions --

8 JUSTICE SOTOMAYOR: That's where the
9 disagreement lies: Did the Third Circuit get
10 Pennsylvania law wrong on this issue.

11 MR. EISENBERG: I think that's at least
12 where the disagreement lie -- lay between the
13 Commonwealth and Kindler below. As I say, I think
14 there's a great --

15 JUSTICE SOTOMAYOR: All right. Let's assume
16 the Third Circuit, that we take the hypothetical that
17 they were right. How do you still win?

18 MR. EISENBERG: Then the question becomes,
19 Your Honor, whether the alleged discrepancy, difference
20 in the State law or -- or degree of unclarity is
21 sufficient to meet this Court's adequacy test.

22 And that's where I think we get back to
23 Federal analogies like the Federal fugitive flight rule.
24 And I'd like to address that -- that question, and then
25 reserve the remainder of my time for rebuttal.

1 Under the Federal fugitive flight rule, many
2 of these kinds of distinctions have never been spelled
3 out. The courts simply laid out a general rule starting
4 in the late 1800s that it was within our discretion to
5 dismiss.

6 But despite the fact that the Court hasn't
7 basically subdivided the rule with the nit-picking
8 analysis that the Doctor court tried to impose on the
9 Pennsylvania cases, that doesn't make the fugitive-
10 forfeiture rule inadequate and therefore inapplicable to
11 defendants. In fact, even after this Court's decision
12 in Ortega-Rodriguez, which overturned an automatic
13 forfeiture rule on -- applied by the Federal Court of
14 Appeals, the Court allowed the district court's
15 discretion to carry out the fugitive-forfeiture rule as
16 they saw fit under the circumstances. And the day after
17 Ortega-Rodriguez, despite the fact that no substandards
18 had yet been developed, there was still a Federal
19 fugitive-forfeiture rule --

20 JUSTICE STEVENS: May I ask one question
21 before your time is gone? Has there ever been a
22 precedent in Pennsylvania where they have applied the
23 procedural default rule against a capital defendant who
24 -- who was guilty of flight?

25 MR. EISENBERG: No, Your Honor, and I think

1 that that's an excellent example of what I was just
2 saying. The fact that the general rule of fugitive-
3 forfeiture hadn't yet addressed the subquestion of
4 whether there should be an exception for capital
5 defendants did not render the State rule inadequate.

6 JUSTICE STEVENS: But wasn't there -- wasn't
7 there a general rule that capital defendants always get
8 one shot at their constitutional issues?

9 MR. EISENBERG: No, Your Honor. At this
10 time, there was simply a rule that said that in capital
11 cases we will apply a limited form of relaxation of
12 our -- of our rules to address significant questions.
13 When you look at that language, it's almost exactly the
14 same as the Federal plain error rule.

15 JUSTICE STEVENS: But were there
16 Pennsylvania cases in which they had prevented a capital
17 defendant from raising a Federal constitutional issue
18 for the first time?

19 MR. EISENBERG: No, Your Honor. There had
20 only been a few capital cases even decided at the time
21 of the flight here.

22 The point is that the way that the --

23 JUSTICE STEVENS: How about other rules? In
24 capital cases, had they applied other procedural default
25 rules at -- for the first time a capital defendant

1 sought to raise a constitutional issue?

2 MR. EISENBERG: At that time, I think they
3 had not yet, but really, there are only a handful of --

4 JUSTICE STEVENS: So then how can you have a
5 firmly established rule?

6 MR. EISENBERG: I don't think you have a
7 firmly established rule, Your Honor, because you have --
8 the firmly established rule was the preexisting rule
9 requiring preservation of error claims, in the same way
10 that under the Federal plain error rule the rule is you
11 have to preserve your claims.

12 A defendant cannot come along and say: Hey,
13 in Rule 52(b) it says that if my claim is plain and
14 significant it's not waived, and therefore I have no
15 obligation to ever preserve my claims. The Federal
16 plain error rule is an exception that might apply to
17 you, but it doesn't do away with the underlying rule of
18 issue preservation.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Lawry.

22 ORAL ARGUMENT OF MATTHEW C. LAWRY

23 ON BEHALF OF THE RESPONDENT

24 MR. LAWRY: Mr. Chief Justice, and may it
25 please the Court:

1 I first want to address what is really at
2 stake here. The Commonwealth wants this Court to change
3 the adequate State ground doctrine so that Mr. Kindler
4 may be executed with no review by any court of his
5 meritorious claims that his death sentence was
6 unconstitutional.

7 CHIEF JUSTICE ROBERTS: Well, but that's
8 because he escaped. He avoided judicial process, and
9 you would have him be in the same position once he's
10 captured and returned and captured and returned as he
11 was before he escaped at all, right?

12 MR. LAWRY: Well, the question is, was there
13 a firmly established and consistently applied State rule
14 that would result in all of his claims being taken away.

15 CHIEF JUSTICE ROBERTS: And you think
16 that -- and you don't think -- you think you can argue
17 that a State rule saying, look, if you escape and flee
18 the jurisdiction, you bar -- your claims cannot be
19 adequate and independent?

20 MR. LAWRY: No, I don't think that, Your
21 Honor. What -- what -- what this Court has always
22 required and what we are arguing, this Court has always
23 required that a State procedural rule be firmly
24 established and consistently applied in order to take
25 away a litigant's claims.

1 And our position and what the Third Circuit
2 below held was that in numerous respects, the -- the
3 rules that the State court applied here were not firmly
4 established or consistently applied.

5 JUSTICE SOTOMAYOR: What rules -- I'm --

6 MR. LAWRY: Well, it's really --

7 JUSTICE SOTOMAYOR: What is -- what is your
8 position as to what the Third Circuit was saying or
9 holding? Are you saying, like your adversary, that they
10 were saying because it was discretionary and there were
11 a lot of exceptions to it, it wasn't firmly established?
12 Or were you -- or do you read it as saying, now that you
13 have made it mandatory, that's a new rule -- the waiver
14 mandatory, that's a new rule?

15 MR. LAWRY: Well -- well, to begin with,
16 what we're saying is that --

17 JUSTICE SOTOMAYOR: It's not what you are
18 saying. What do you think the Third Circuit said?

19 MR. LAWRY: What -- what I would suggest the
20 Third Circuit said is that this case is very like
21 Doctor. It said Doctor was controlling precedent, and
22 Doctor involved a defendant who fled pretrial or in the
23 middle of trial, and at that time there was a sort of
24 two-part rule in Pennsylvania for dealing with fugitive-
25 forfeiture.

1 One part was -- and this is in noncapital
2 cases. One part was if the defendant flees during the
3 appellate process, then the appeal could be dismissed.
4 The other part was if it's any time before that, there
5 is discretion.

6 And -- and so, when Doctor appealed, by the
7 time his appeal was heard, Pennsylvania had changed its
8 rule completely to one in which a flight at any time, at
9 any time at all, was considered a complete forfeiture.
10 And that was -- it was that change from a discretionary
11 rule to a forfeiture rule that the Third Circuit said in
12 Doctor was inadequate. And it said again in Kindler
13 that the same kind of change was inadequate.

14 JUSTICE SOTOMAYOR: What was the change --

15 MR. LAWRY: The change --

16 JUSTICE SOTOMAYOR: -- that you think the
17 Third Circuit was identifying?

18 MR. LAWRY: The change that the Third
19 Circuit identified was from a -- a situation where there
20 was complete discretion -- and really more often than
21 not, even in noncapital cases, the discretion was
22 exercised to hear the issues. It changed from that to
23 one where there is essentially a -- a presumption of --
24 of waiver or forfeiture and some potential way to --

25 JUSTICE SOTOMAYOR: Let's assume that a

1 lower court in this case had said: You know, we have
2 discretion, but we're not going to exercise it because
3 you escaped twice and were away much longer than most
4 fugitives. There is a presumption that witnesses'
5 memories fade, that it's harder for trials that are so
6 distant from the event, that distant from an event. We
7 are not going to exercise our discretion.

8 Is it your view -- because that's the
9 undertone I'm hearing -- that under firmly established
10 ground that the court would have still ruled that that
11 exercise of discretion was not adequate under --

12 MR. LAWRY: That the Third Circuit would
13 have said that?

14 JUSTICE SOTOMAYOR: Yeah.

15 MR. LAWRY: It's a very -- it's a very
16 different case. I think if --

17 JUSTICE SOTOMAYOR: Sure, it is. But what
18 you -- there is a tone to the way you presented this
19 case that says because they chose often to exercise
20 discretion in the past, if they choose not to in any
21 case, it's no longer an independent State ground.
22 That's what -- is that the point you are arguing?

23 MR. LAWRY: No.

24 JUSTICE SOTOMAYOR: Because that's the
25 question presented.

1 MR. LAWRY: That's not the point that we are
2 arguing. What we are arguing is that there needs to be
3 consistent application of the rules. And --

4 JUSTICE SOTOMAYOR: Well, that begs your
5 adversary's question, which is every case has one or
6 more differences in it. At what point does a lower
7 court have to -- can it say, you know, yes, because they
8 exercised discretion sometimes but not others it's still
9 an independent State ground to find forfeiture?

10 MR. LAWRY: There -- there are several
11 things that are important in this kind of situation.
12 One is how -- it's really how is the rule being applied.
13 And if -- if the rule is -- if there is a situation
14 where -- where in the vast majority of cases the rule is
15 being applied to deny review and there are occasional
16 acts of grace, that's one thing. It's very different
17 when almost every time the situation comes up review is
18 allowed and then in the occasional exception, without
19 explanation, it's taken away.

20 CHIEF JUSTICE ROBERTS: Counsel, following
21 up on that, I'd like your answer to this question: Is a
22 State procedural rule automatically inadequate and,
23 therefore, unenforceable when the State rule is
24 discretionary rather than mandatory? Automatically?

25 MR. LAWRY: No, it is not automatically

1 inadequate.

2 CHIEF JUSTICE ROBERTS: So you agree --

3 MR. LAWRY: It's not our position --

4 CHIEF JUSTICE ROBERTS: So you agree with
5 the Petitioner's response to that question? Their
6 point -- their question presented is, is it
7 automatically inadequate because there is discretion?
8 They say no, you say no.

9 MR. LAWRY: And we don't think that the --
10 that the Third Circuit said --

11 CHIEF JUSTICE ROBERTS: Well, but that was
12 the same -- that was the position you took in your
13 opposition to certiorari.

14 MR. LAWRY: Correct.

15 CHIEF JUSTICE ROBERTS: And yet we
16 nonetheless granted -- granted cert.

17 MR. LAWRY: Correct.

18 CHIEF JUSTICE ROBERTS: Well, if some of
19 us -- or I suppose if several of us -- think that that
20 may have been or was what the Third Circuit said, would
21 you have any objection to us vacating the opinion,
22 explaining since you both agree that the rule is not
23 automatically inadequate, make sure they understand
24 that, and then they can proceed however they see fit?

25 MR. LAWRY: I would have no objection to

1 that, Your Honor.

2 JUSTICE KENNEDY: Insofar as the ongoing
3 rule is concerned, let's assume that as of the time of
4 Doctor, which was a Third Circuit case, 1996, the
5 Pennsylvania rule was then clear, Pennsylvania for the
6 first time having made its rule clear. Would it be
7 improper to apply it to this defendant, because he
8 escaped before Doctor made it clear? I -- I just don't
9 understand why the general rules of -- of -- of waiver
10 apply in this case. It -- it doesn't affect rational
11 conduct. It doesn't trap an attorney. Why can't we
12 take the rule as it was when we heard his case after he
13 had been returned as a fugitive?

14 MR. LAWRY: Well, part of the problem here
15 is that -- that Pennsylvania law and what the
16 Pennsylvania rule is was a moving target throughout this
17 time period. There was the -- the discretionary sort of
18 regime under Galloway which -- which did hold as Doctor
19 describes it. Then there was a time period when there
20 was absolute forfeiture. Then there was another time
21 period where they backed away from that.

22 And so that -- that kind of shifting, of
23 turning procedural rules on and off, is the antithesis
24 of consistent application of rules.

25 JUSTICE SCALIA: Well, that may be, but

1 where -- where do you get that from the opinion of the
2 court of appeals here? I find it very easy to get from
3 the opinion of the court of appeals the proposition that
4 if there is discretion, it's not a firmly established
5 rule.

6 Where do you get your theory, that they had
7 changed it from a discretionary rule to a mandatory rule
8 at the time that the State court made this ruling?
9 Where do you find that in the opinion of the court of
10 appeals?

11 MR. LAWRY: Well, I -- I would -- I would
12 acknowledge that it's a bit cryptic, but I think because
13 the Third Circuit in Kindler said that Doctor is what's
14 controlling in its analysis, I think you really have to
15 read it in light of Doctor. And Doctor makes very clear
16 that what the Third Circuit was looking at there was a
17 change from a discretionary rule to a mandatory rule.

18 JUSTICE BREYER: So they are going to say, I
19 imagine below -- I'm not sure -- say: Look, that's
20 right, and Doctor talked about the shift from mandatory
21 to discretionary, and the district court -- the State,
22 in Doctor, said that it was a mandatory -- it's
23 mandatory.

24 But in this case, the district court said
25 it's discretionary. So insofar as there are two rules

1 -- or were at the time, your client got the benefit of
2 the most liberal, and, therefore, insofar as there is a
3 difference, it made no difference.

4 MR. LAWRY: Well, actually our client didn't
5 get the benefit of a number of things that were clearly
6 established law in Pennsylvania at the time.

7 First off, there was the policy of relaxed
8 waiver that applied to all capital cases and meant
9 merits review of all issues. And --

10 JUSTICE SCALIA: Well, that's -- that's a
11 different issue. Now, your -- your assertion is that
12 what the court of appeals was based on -- decision
13 was -- was not this that you are arguing now, but
14 rather, it was based on the fact that there had been a
15 change in the law from discretionary to mandatory.

16 I can't find that, frankly, in the opinion,
17 except in its reference to Doctor, so I have got to go
18 back and read Doctor and guess that that's what they
19 meant when they referred to Doctor.

20 But assuming it's true, Justice Breyer says,
21 even if it is true, what difference does it make?
22 Because, even if they had changed from a discretionary
23 to a mandatory, the trial court in the State had not
24 realized that they had changed and gave him the
25 discretionary.

1 So what -- what complaint do you have?

2 MR. LAWRY: Well, it's not even clear,
3 really, what -- what the trial court was applying, but I
4 think that there are -- there are a number of serious
5 problems with -- with the consistent application in this
6 case.

7 If you want to look for just the most
8 obvious ones, Reginald Lewis, a capital defendant, and
9 Mr. Kindler escaped together, at the same time, the same
10 day, together. Mr. Lewis got complete full review,
11 merits review, of all of his issues on direct appeal,
12 all of his issues in post-conviction. Mr. Kindler got
13 no review.

14 CHIEF JUSTICE ROBERTS: Right. And that
15 is -- your objection is that it wasn't fairly applied.
16 Discretion was abused in this case, to borrow from the
17 Federal law. They didn't treat them the same. They
18 should have treated them the same.

19 But the question is whether the rule is
20 automatically inadequate if there is discretion. You
21 are arguing about how it was applied, which I guess
22 means that it's not automatically inadequate because if
23 they apply it the way you think it should be then it
24 would be adequate.

25 MR. LAWRY: I -- I lost your train of

1 thought there. I apologize.

2 CHIEF JUSTICE ROBERTS: Maybe I did, too.

3 (Laughter.)

4 MR. LAWRY: No. I don't think --

5 CHIEF JUSTICE ROBERTS: But the point is you
6 are arguing about the application -- the exercise of
7 discretion. You say the one guy, Lewis, got the benefit
8 of the rule; your guy didn't get the benefit of the
9 rule; and that's unfair, right?

10 MR. LAWRY: That's -- that's part of what
11 I'm arguing. Yes.

12 CHIEF JUSTICE ROBERTS: So you are not
13 arguing -- which would be very odd to argue -- that the
14 discretion always makes the rule invalid because you --

15 MR. LAWRY: No. We are not -- we are not
16 arguing that.

17 CHIEF JUSTICE ROBERTS: Okay.

18 JUSTICE KENNEDY: Do I -- Do I take it
19 that -- that Justice -- Justice Breyer's question,
20 repeated by Justice Scalia -- just take that fact,
21 that's the only question before us. If it was
22 discretionary and it's now mandatory, just focus on that
23 only.

24 MR. LAWRY: Uh-huh.

25 JUSTICE KENNEDY: Then your client isn't

1 hurt? If you take --

2 MR. LAWRY: No, he is hurt if it is now
3 mandatory, yes, because -- because it's -- it's like --
4 it's like Ford or any of the other cases where -- where
5 the rules are being changed.

6 JUSTICE SCALIA: If -- if the new rule was
7 applied to him.

8 MR. LAWRY: Yes.

9 JUSTICE SCALIA: But the point is the new
10 rule wasn't applied to him. The trial court thought
11 that it had discretion.

12 MR. LAWRY: Well, yes --

13 JUSTICE SCALIA: That's clear from the trial
14 court's opinion, isn't it?

15 MR. LAWRY: Okay. But -- but what I'm
16 focusing on is what the Pennsylvania Supreme Court did,
17 and they did a number of things.

18 Another thing that the Pennsylvania Supreme
19 Court did was they said, in the direct appeal opinion,
20 Mr. Kindler's flight makes his case like somebody who
21 affirmatively goes and gives up his direct appeal
22 altogether. All right.

23 Now, the people that they mentioned who
24 affirmatively gave up their direct appeals altogether,
25 when those defendants went and sought post-conviction

1 relief, they got full post-conviction review in the
2 Pennsylvania courts. When Mr. Kindler went, he got no
3 review.

4 JUSTICE SOTOMAYOR: By whom?

5 MR. LAWRY: By any -- I'm sorry. By either
6 --

7 JUSTICE SOTOMAYOR: No, no. Stop.

8 Is the relaxed waiver rule one that applies
9 to district court consideration or appellate court
10 consideration or both?

11 MR. LAWRY: It applies at all levels.

12 JUSTICE SOTOMAYOR: At all levels. What is
13 your reading of what the new rule that the State was
14 announcing was announcing? That it was doing away with
15 the State court's relaxed waiver rule? Was it doing it
16 away with its own relaxed waiver rule? What's your
17 position in this case?

18 MR. LAWRY: The -- the State courts simply
19 did not apply relaxed waiver to Mr. Kindler.

20 JUSTICE SOTOMAYOR: None of them, including
21 the trial court?

22 MR. LAWRY: Including -- including the trial
23 court, yes. Mr. Kindler asked for relaxed -- in fact,
24 when the Commonwealth initially moved to dismiss his
25 post-verdict motions, the Commonwealth said: We know

1 there is this relaxed waiver out there, so if you -- if
2 you don't dismiss his post-verdict motions entirely, at
3 least dismiss the guilt phase and consider his issues
4 with regard to capital sentencing. The Commonwealth
5 said that.

6 So -- so the -- so there's -- there's no
7 question that -- that, on the PCRA appeal, what the
8 Pennsylvania Supreme Court applied was a mandatory rule.
9 They said it's forfeited, no review whatsoever, and --
10 and that would be the difference --

11 JUSTICE SOTOMAYOR: By the trial court and
12 by us, is that what you're --

13 MR. LAWRY: Yes, yes.

14 JUSTICE BREYER: How would you fill in this
15 sentence? I'm beginning where the Chief Justice did.
16 Say everybody said: Look, this opinion is at least
17 unclear. It's -- everybody agrees that the simple
18 existence of discretion does not make a State ground
19 inadequate, so we send it back for you now. And you
20 will have some good arguments, I guarantee each side
21 will have some good arguments, as to whether they were
22 being consistent or not, whether there was a consistent
23 rule or not.

24 MR. LAWRY: Right.

25 JUSTICE BREYER: Now, next sentence, which

1 maybe would never be written: This is not to say that
2 discretion automatically means it's adequate, for it
3 could be applied inconsistently.

4 Now, there could be another sentence,
5 because that other sentence would have to go on to the
6 fact that any discretionary rule will never be applied
7 with perfect consistency or anywhere near it. That
8 would be true if you give a trial judge the choice in
9 his discretion to waive a -- a time limit ruling.

10 Some will do it with one. Some will do it
11 in the other. You can't do it perfectly. So is there
12 any sentence we could put in there? So you hedged on
13 there, and probably they will, too, because it's very
14 hard to find the right sentence.

15 You don't want the simple application of
16 discretion, you say -- which inevitably means some
17 inconsistency, to make a State rule inadequate. On the
18 other hand, they can't go too far. So what is too far?

19 MR. LAWRY: Well, I would -- I would
20 actually direct you to Judge Harlan's opinion in
21 Sullivan, where he says: "A court has an obligation to
22 be reasonably consistent and to explain the decision,
23 including the reason for according different treatment
24 to the instant case." But that never happened --

25 JUSTICE BREYER: But, but, but, but, but, a

1 trial Supreme Court -- a Supreme Court in a State is
2 supervising lots of trial courts, and you will have
3 different human beings sitting there as judges, and they
4 will inevitably be inconsistent with each other to some
5 degree. Have you not noticed that?

6 MR. LAWRY: Certainly.

7 (Laughter.)

8 JUSTICE BREYER: So is there anything we can
9 say that will improve the situation? That's why I
10 started out by saying maybe the best thing is to say
11 nothing.

12 MR. LAWRY: Well, the -- the key is really
13 consistent application and -- and looking to see whether
14 the rules are being turned off and on.

15 Like I would -- I would point the Court to
16 Barr v. City of Columbia, which I think is a very good
17 example, where there is maybe five people who make the
18 same objection, and four of them get merits review, and
19 the other person doesn't get merits review. Now, maybe
20 there's some explanation somewhere for that, but this
21 Court said: You know, this is not what we call
22 adequacy; this is not consistent application.

23 CHIEF JUSTICE ROBERTS: Well, the problem --
24 Justice Stevens' question brought this up. I mean, how
25 do you address that question if you don't have very many

1 applications of the rule?

2 MR. LAWRY: Well, it's certainly --

3 CHIEF JUSTICE ROBERTS: Say it's the first
4 one that comes up.

5 MR. LAWRY: Well, it would certainly help to
6 give a -- a reasoned explanation of what's happening.
7 There -- you -- you're not --

8 CHIEF JUSTICE ROBERTS: Well, but your
9 reasoned explanation --

10 JUSTICE KENNEDY: But all -- all those books
11 on our wall are the first time it's ever come up. I
12 mean, that's how the law -- that's how the law is made.
13 So -- the whole point of the adequate independent State
14 ground, it seems to me, is part we don't want to affect
15 rational conduct retroactively -- not applicable here.
16 Two, we don't want to have the State court use this as a
17 subterfuge or a device to avoid a Federal right. I
18 don't think that's applicable here. You might want to
19 argue about that.

20 So it seems to me that the fact that it's a
21 completely new rule in the case of an escape may mean it
22 is still an adequate ground.

23 MR. LAWRY: Well, I would -- I certainly
24 would argue that there -- there is every reason to see a
25 potential for the State seeking to avoid Federal review.

1 Look at the relaxed waiver cases in the attachment to
2 the brief. There are 51 cases over a 20-year period
3 where the State courts reviewed every single issue on
4 the merits in a capital case, regardless of what
5 happened below.

6 JUSTICE SCALIA: And they concluded that was
7 ridiculous, so they stopped doing it.

8 MR. LAWRY: But -- but during the time
9 period, during the relevant time period in Mr. Kindler's
10 -- from his escape all the way through his PCRA
11 proceedings, that was the rule. And then they changed
12 it, which is similar to -- to some of the other things
13 that we see in this case.

14 JUSTICE KENNEDY: But those weren't escape
15 cases. Were they all escape cases?

16 MR. LAWRY: Oh, no. No.

17 JUSTICE KENNEDY: Well, that's the point.
18 Why isn't escape sui generis, and how can we ever say
19 that?

20 MR. LAWRY: Well, but -- but if you want to
21 look at what the Pennsylvania Supreme Court actually
22 said here, they said Mr. Kindler's case is in the
23 category like people who affirmatively waive. Okay,
24 that's what they said on direct appeal. Then you look
25 in PCRA, on the PCRA appeal, and they don't treat him

1 like the people who affirmatively waive. That's not
2 consistent application.

3 CHIEF JUSTICE ROBERTS: You don't doubt that
4 it would be an independent and adequate State rule to
5 say whenever anybody escapes they waive their claims?

6 MR. LAWRY: That -- certainly, going forward
7 that's -- that's an adequate rule, yes.

8 Another -- another aspect --

9 JUSTICE GINSBURG: Well, what's the interest
10 in not applying this in this case? As you say, that's a
11 fine rule. If you are a fugitive, you are out. You say
12 that wasn't the rule at the time he escaped. But you
13 are not asserting any reliance interest by the escapee,
14 that, gee, if I knew that the rule was going to be
15 mandatory, I wouldn't have a chance to appeal to the
16 discretion, I wouldn't have escaped.

17 There is no -- there is no absence of notice
18 that -- that matters. I mean, if he had notice he would
19 have still escaped, I assume.

20 MR. LAWRY: Yes, but the -- the issue here
21 is not solely about notice to Mr. Kindler. There is an
22 issue also about evasion of Federal review. That goes
23 right back to Ward, in like 1920, talking about State
24 courts seeking to take away this Court's jurisdiction by
25 --

1 JUSTICE GINSBURG: But you just said that it
2 would be okay to have a rule going forward that if you
3 are a fugitive, you are out.

4 MR. LAWRY: But that -- but that's if it's a
5 firmly established rule that is consistently. And
6 that's not what we see here. And let me give you
7 another example of that. Even in a noncapital case, the
8 Pennsylvania Supreme Court never held that a
9 presentencing flight meant that the defendant would get
10 no post-conviction review. They -- they affirmatively
11 rejected that idea in Commonwealth v. Huff. But for
12 Mr. Kindler they said a presentencing flight means no
13 post-conviction review. Put simply --

14 CHIEF JUSTICE ROBERTS: What is -- what is
15 the Federal fugitive rule?

16 MR. LAWRY: The Federal fugitive rule is --
17 that was set in Ortega-Rodriguez -- says that a flight
18 presentencing does not take away your appellate rights.
19 It says that the district court has discretion how it
20 would want to deal with that. It also --

21 CHIEF JUSTICE ROBERTS: Has discretion?

22 MR. LAWRY: It has discretion. It says, you
23 know, the blunderbuss of dismissal is not -- is not an
24 appropriate -- is not usually an appropriate device,
25 because there are a lot of other things the district

1 courts can do short of taking away all appellate rights,
2 no review by any court anywhere.

3 CHIEF JUSTICE ROBERTS: Does the discretion
4 that the Pennsylvania courts have here -- is that
5 similar? Can the Pennsylvania Supreme Courts exercise
6 that discretion in a calibrated way, not all or nothing?

7 MR. LAWRY: They -- they certainly could.

8 The -- one of the things that --

9 JUSTICE KENNEDY: Were you still answering
10 the Chief Justice's -- I had -- had one more.

11 MR. LAWRY: No.

12 JUSTICE KENNEDY: I didn't mean to
13 interrupt.

14 You said there was no post-conviction
15 review. I -- I thought they in this case went on to
16 ask -- to exercise a limited review. They didn't reach
17 the Mills v. Maryland point, but they did give a limited
18 review to determine the sufficiency of the evidence,
19 whether the death penalty was a product of passion or
20 prejudice, whether the evidence fails to support the
21 finding of the aggravating circumstance, whether the
22 sentence was extensive or proportional. They did give
23 post --

24 MR. LAWRY: -conviction review.

25 JUSTICE KENNEDY: -- -conviction review on

1 all those points.

2 MR. LAWRY: Well, those were -- those were
3 direct appeal things that they looked at, yes. The --
4 the -- those are part of the statutory appellate review
5 for capital cases in Pennsylvania.

6 As far as I am aware, nobody has ever gotten
7 relief from that statutorily mandated direct appeal
8 review. But in post-conviction, they -- they gave no
9 review at all to the post-conviction claims, including
10 the ineffective assistance of counsel claim.

11 JUSTICE GINSBURG: There is a certain irony
12 that the case you're relying on on the merits is Mills,
13 where if he hadn't escaped he would have gone through
14 the whole process before Mills was decided.

15 MR. LAWRY: Well, but he may well have
16 gotten relief anyway. He raised -- he actually raised
17 an objection, a Mills-type objection at trial. It was
18 raised in the post-verdict motions. It would presumably
19 have been raised on direct appeal. And -- and if it had
20 been so raised on direct appeal he could have -- and he
21 didn't win on direct appeal, he could have sought
22 post-conviction relief in Pennsylvania based on the fact
23 that Mills came down later, because the Pennsylvania
24 retroactivity rule is that you can get retroactive
25 application of a decision if you -- if you objected. If

1 you raised the issue earlier and a new decision comes
2 down that would help you, you can raise that later.

3 So the idea of a windfall that was raised in
4 the Commonwealth's brief doesn't -- he didn't get a
5 windfall. He didn't get any review in State court, and
6 there's also of course the ineffective assistance of
7 counsel claim. The law has not changed on the
8 ineffective assistance of counsel claim.

9 CHIEF JUSTICE ROBERTS: Well, he got the
10 windfall of being free for eight years, right? I guess
11 that gets back to the point of your friend, which is he
12 is in no worse position because he escaped and spent
13 eight years on the lam than if he had stayed in prison.

14 MR. LAWRY: He is in much worse position.
15 He -- he just -- he just had all -- all review taken
16 away in the State courts and --

17 CHIEF JUSTICE ROBERTS: No, no. Obviously
18 if the State prevails he's in a worse position. But
19 under your view, he's in this -- he's in no worse
20 position. He hasn't waived all his objections and
21 claims, procedures.

22 MR. LAWRY: Well, there are certainly other
23 things that the State can do. They can -- they can
24 prosecute him criminally for escape. There is
25 administrative confinement, those kinds of things. But

1 there is really --

2 JUSTICE SCALIA: Before or after his
3 execution?

4 (Laughter.)

5 MR. LAWRY: Well, there -- this -- this
6 Court said in Ortega-Rodriguez that -- that increasing
7 somebody's sentence by a number of years based on escape
8 would introduce an element of arbitrariness and
9 irrationality, and -- and certainly changing the
10 sentence from life to death based on disrespect to the
11 courts seems like a fairly -- a fairly serious
12 consequence.

13 CHIEF JUSTICE ROBERTS: Well, I'm sorry, if
14 I could just nail down the point. As far as his rights
15 and proceedings in this case, he is in no worse position
16 under your theory having escaped and been out for
17 eight years than if he had stayed put?

18 MR. LAWRY: In -- in Federal court if it's
19 held, as we argue, that the State court rulings were not
20 adequate, that's true. And their argument is he should
21 be executed with no review by any court.

22 I do want to return for a minute to relaxed
23 waiver because, you know, the primary argument that I
24 heard was that in 1984 at the time of the escape that
25 relaxed waiver wasn't that firmly established. That's

1 simply not true. There are four decisions applying
2 relaxed waiver prior to 1984, and those decisions held
3 that a person who affirmatively waived a constitutional
4 issue -- I see my time is up.

5 CHIEF JUSTICE ROBERTS: Finish your
6 sentence.

7 MR. LAWRY: There -- okay. There are four
8 cases and in every case the Pennsylvania Supreme Court
9 gave full merits review to all issues, even issues that
10 were only first raised at oral argument.

11 JUSTICE SCALIA: Can I please --

12 MR. LAWRY: Sure.

13 JUSTICE SCALIA: Why do you pick 1984 as the
14 time of the escape? Whether it's an adequate or
15 independent State ground, whether it's been consistently
16 applied, it seemed to me -- it seems to me you should
17 look to the time at which the State rule is applied.

18 Now, as of 1984 I suppose there are some
19 notice requirements that you can say due process
20 requires, but I don't know why the adequacy of the State
21 ground, whether it's consistently applied, should be
22 judged on the basis of what was the law in 1984, rather
23 than what was the State law at the time they applied the
24 rule.

25 MR. LAWRY: Well, there -- there is a

1 question about whether that is introducing a novel rule.
2 But -- but I was -- in the comments I was just making, I
3 was principally addressing the Commonwealth's argument
4 that relaxed waiver wasn't that well established in
5 1984.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Eisenberg, you have four minutes.

8 REBUTTAL ARGUMENT OF RONALD EISENBERG

9 ON BEHALF OF THE PETITIONERS

10 MR. EISENBERG: Mr. Lawry's answer to the
11 question about a mandatory forfeiture rule, Your Honors,
12 I think is the crucial one here. When asked whether an
13 automatic mandatory forfeiture rule would be adequate,
14 he said yes. And I think that's the problem with just
15 trying to remand this case without doing more, because
16 that's where you wind up.

17 If the lower Federal courts continue to
18 undertake the kind of consistency analysis that they
19 think consistency requires, it will drive that sort of
20 discretion out, and you will wind up with forfeiture
21 rules and other State procedural rules that are all
22 automatic, because that's the way the Federal courts
23 will be telling the State courts that their rules will
24 be found adequate State grounds and enforceable on
25 Federal habeas corpus review.

1 There was no subterfuge here the -- to avoid
2 or evade the Federal question. The argument in favor of
3 that position is: Look at all the other cases where the
4 State court did address Federal constitutional
5 questions. Well, exactly. Of course we did in many
6 other capital cases. And the -- the penalty for trying
7 to be lenient in those other cases is that now in the
8 worst case we can't apply any sort of forfeiture, any
9 sort of procedural bar, even for a guy who breaks out of
10 jail twice. The State court --

11 JUSTICE SCALIA: What -- what about his --
12 his colleague who broke out with him? How do you -- how
13 do you explain that.

14 MR. EISENBERG: That defendant was gone less
15 than two weeks. And, so, we withdrew our motion to
16 quash his appeal. It's not just that the State court
17 didn't grant it, we withdrew it because he was
18 recaptured in New York two weeks later.

19 This guy was out for seven years. After he
20 was captured the first time in Canada and started to
21 fight extradition, his post verdict motions were
22 dismissed. The motions that he had been -- and told him
23 that under state law at that time were absolutely
24 essential to preserving any claim for further review,
25 and his response to the dismissal of his post verdict

1 motions after the first escape was to break out of jail
2 again a second time.

3 During the second escape, somebody died,
4 another prisoner fell to his death. During the first
5 escape the plan, the diversion that allowed this
6 defendant to sneak out through the window he sought
7 through was to have a riot staged on the part of the
8 other prisoners, during which they tried to push one of
9 the prison guards off the third tier of the prison cells
10 to the floor below. That would -- that caused all the
11 other guards to rush up. During that time the defendant
12 slipped out the window.

13 That's why this was the case where the court
14 exercised its discretion to impose a procedural bar.
15 Mr. Lawry says, well, the Commonwealth just wants to
16 execute him without any sort of review.

17 He did have limited review, as Justice
18 Kennedy pointed out, but really you are left with only
19 the two choices of imposing a procedural bar, a bar that
20 this Court said was longstanding and well established in
21 American law in *Estelle v. Dorrough* --

22 JUSTICE STEVENS: May I ask --

23 MR. EISENBERG: -- or else leaving the
24 defendant better off than he would otherwise have been.

25 JUSTICE STEVENS: May I ask this question?

1 We have all been somewhat trouble because some ambiguity
2 in the opinion below. What if we -- I think your
3 opponent answered this question. What if we were to say
4 that the answer to the question presented, in italics in
5 your brief is no? And send it back to the court of
6 appeals and tell them whether they -- that would change
7 their decision or not.

8 Would you agree that were a proper
9 disposition.

10 MR. EISENBERG: No, Justice Stevens. I
11 think the reason the case is worth being here is to
12 provide greater guidance than to that provide to the
13 lower courts. I think the reason so many States have
14 weighed in on this question --

15 JUSTICE STEVENS: The guidance you have
16 asked us to give is whether there is this automatic
17 rule. And if you say there isn't, doesn't that give
18 guidance? And the answer -- wouldn't that -- that
19 answer the question on which there is a conflict among
20 the circuits?

21 MR. EISENBERG: I'm afraid it doesn't -- it
22 doesn't help resolve the -- the path to which the Third
23 Circuit got to that point. And that's really the
24 underlying problem.

25 There has been a lot of confusion about this

1 Court's adequate State grounds doctrine. Not, I would
2 suggest, so much in the results that this case -- that
3 this Court has reached, not in the kind of inadequacies
4 that this Court has found, which by and large deals with
5 retroactivity or civil rights era cases where the courts
6 -- the State courts were clearly discriminating against
7 Blacks defendants in favor of White defendants.

8 We don't have anything like that here.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 2:01 p.m., the case in the
12 above-entitled was submitted.)

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<p>A</p> <p>above-entitled 1:13 54:12</p> <p>absence 43:17</p> <p>absolute 17:7 31:20</p> <p>absolutely 51:23</p> <p>abused 5:17 34:16</p> <p>acknowledge 32:12</p> <p>act 8:8 15:2,10</p> <p>action 8:9</p> <p>acts 29:16</p> <p>actual 16:6</p> <p>additional 17:6 17:7</p> <p>address 11:18 21:24 23:12 25:1 40:25 51:4</p> <p>addressed 23:3</p> <p>addressing 50:3</p> <p>adequacy 8:15 8:19 9:17,25 11:10,13 13:19 15:13 16:20 18:12 21:21 40:22 49:20</p> <p>adequate 3:18 5:2 12:2 14:14 16:8 25:3,19 28:11 34:24 39:2 41:13,22 43:4,7 48:20 49:14 50:13,24 54:1</p> <p>administrative 47:25</p> <p>admonition 13:5 13:7</p> <p>advancing 15:5</p> <p>adversary 19:19 26:9</p> <p>adversary's 29:5</p> <p>adverse 13:4</p>	<p>affect 31:10 41:14</p> <p>affirmatively 36:21,24 42:23 43:1 44:10 49:3</p> <p>affirmed 15:1</p> <p>afraid 53:21</p> <p>afternoon 3:4</p> <p>aggravating 45:21</p> <p>agree 30:2,4,22 53:8</p> <p>agrees 38:17</p> <p>AL 1:5</p> <p>alleged 21:19</p> <p>allow 16:10 17:13</p> <p>allowed 14:1,3 15:11 22:14 29:18 52:5</p> <p>allows 6:16 17:2</p> <p>altogether 36:22 36:24</p> <p>ambiguity 53:1</p> <p>American 52:21</p> <p>amicus 10:14 11:2</p> <p>ample 8:19</p> <p>analogies 21:23</p> <p>analysis 8:15 10:16 15:23 16:11,19 17:6 17:7,8,10 18:19 22:8 32:14 50:18</p> <p>analyze 13:19</p> <p>analyzing 6:20</p> <p>announced 20:5</p> <p>announcing 37:14,14</p> <p>answer 29:21 50:10 53:4,18 53:19</p> <p>answered 53:3</p> <p>answering 45:9</p> <p>antithesis 31:23</p>	<p>anybody 43:5</p> <p>anyway 46:16</p> <p>apologize 35:1</p> <p>appeal 4:23,25 9:21 12:16,23 13:11 27:3,7 34:11 36:19,21 38:7 42:24,25 43:15 46:3,7 46:19,20,21 51:16</p> <p>appealed 27:6</p> <p>appealing 20:10</p> <p>appeals 3:15 14:18,22 15:20 20:16 21:3 22:14 32:2,3 32:10 33:12 36:24 53:6</p> <p>APPEARAN... 1:16</p> <p>appellate 12:23 12:24 19:10,12 27:3 37:9 44:18 45:1 46:4</p> <p>appendix 4:18 5:15 14:25</p> <p>applicable 41:15 41:18</p> <p>application 12:5 19:21 29:3 31:24 34:5 35:6 39:15 40:13,22 43:2 46:25</p> <p>applications 41:1</p> <p>applied 5:10 7:18,20,21,24 8:3 10:5,17 11:20 12:16 13:11 15:24 17:4,9 18:2,6,9 19:1,2 22:13 22:22 23:24 25:13,24 26:3</p>	<p>26:4 29:12,15 33:8 34:15,21 36:7,10 38:8 39:3,6 49:16 49:17,21,23</p> <p>applies 8:22 14:3 37:8,11</p> <p>apply 13:17,19 14:1 19:11 23:11 24:16 31:7,10 34:23 37:19 51:8</p> <p>applying 8:15 11:9,10 16:5 18:3 34:3 43:10 49:1</p> <p>apprised 8:9</p> <p>appropriate 15:13 44:24,24</p> <p>arbitrariness 48:8</p> <p>argue 7:9 9:9 25:16 35:13 41:19,24 48:19</p> <p>arguing 8:24 14:13 25:22 28:22 29:2,2 33:13 34:21 35:6,11,13,16</p> <p>argument 1:14 2:2,7 3:4,7 4:8 7:2,6,22 8:1 24:22 48:20,23 49:10 50:3,8 51:2</p> <p>arguments 38:20,21</p> <p>asked 6:9 13:4,4 18:16 37:23 50:12 53:16</p> <p>asking 11:11,14</p> <p>aspect 43:8</p> <p>asserting 43:13</p> <p>assertion 3:25 33:11</p> <p>assistance 46:10 47:6,8</p>	<p>assume 21:15 27:25 31:3 43:19</p> <p>assuming 18:23 33:20</p> <p>attachment 42:1</p> <p>attacking 3:11</p> <p>attempt 12:5</p> <p>attempting 11:21</p> <p>attorney 1:17 8:24 31:11</p> <p>attributing 16:22</p> <p>automatic 22:12 50:13,22 53:16</p> <p>automatically 16:3 29:22,24 29:25 30:7,23 34:20,22 39:2</p> <p>avoid 41:17,25 51:1</p> <p>avoided 25:8</p> <p>aware 46:6</p> <p>B</p> <p>back 21:22 33:18 38:19 43:23 47:11 53:5</p> <p>backed 31:21</p> <p>bait 12:11</p> <p>ban 6:14</p> <p>bar 15:4 25:18 51:9 52:14,19 52:19</p> <p>Barr 40:16</p> <p>bars 10:12</p> <p>based 33:12,14 46:22 48:7,10</p> <p>basically 16:13 22:7</p> <p>basis 19:7 49:22</p> <p>Batson 12:21</p> <p>Beard 1:3 3:5</p> <p>beginning 38:15</p> <p>begs 29:4</p>
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