

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ASHBEL T. WALL, II, DIRECTOR, :

4 RHODE ISLAND DEPARTMENT OF :

5 CORRECTIONS, : No. 09-868

6 Petitioner :

7 v. :

8 KHALIL KHOLI :

9 - - - - - x

10 Washington, D.C.

11 Monday, November 29, 2010

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:01 a.m.

16 APPEARANCES:

17 AARON L. WEISMAN, ESQ., Assistant Attorney General,

18 Providence, Rhode Island; on behalf of

19 Petitioner.

20 JUDITH H. MIZNER, ESQ., Federal Public Defender, Boston,

21 Massachusetts; appointed by this Court, on behalf of

22 Respondent.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-868, Wall v. Kholi.

5 Mr. Weisman.

6 ORAL ARGUMENT OF AARON L. WEISMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WEISMAN: Thank you. Mr. Chief Justice,
9 and may it please the Court:

10 The issue before the Court today is whether
11 a State court sentence reduction motion which is a pure
12 plea for leniency qualifies as, quote, "an application
13 for post-conviction or other collateral review" within
14 the meaning of 28 U.S.C. section 2244(d)(2). The State
15 respectfully argued there are at least three reasons why
16 such a term as "collateral review" refers only to a
17 legal challenge, refers to those recognized post-direct
18 appeal applications in which constitutional,
19 jurisdictional, and other such fundamental errors may be
20 raised.

21 First, as this Court has said, it is
22 presumed -- Congress is presumed to have known the
23 language that this Court used in its decisions, and the
24 term "collateral review" has been used by this Court,
25 certainly when referring to Federal 2255 applications,

1 as those type of independent civil inquiries testing the
2 validity of a conviction and/or sentence --

3 JUSTICE GINSBURG: But, Mr. Weisman, the
4 phrase is "post-conviction or other" -- "or other
5 collateral review." And certainly the Rule 25 -- 35
6 motion is postconviction.

7 So it's postconviction. It's not direct
8 review. Why isn't that responsive?

9 MR. WEISMAN: Well, I think both parties are
10 in agreement, Your Honor, that the postconviction review
11 is a part and parcel of the other collateral review.
12 That's not --

13 JUSTICE GINSBURG: "Or" usually means it's
14 something in addition.

15 MR. WEISMAN: Yes, but it's -- with respect,
16 Your Honor, it is "or other collateral review," and the
17 "or other" -- and I think both parties are in agreement
18 as to this -- "or other" embraces that State
19 postconviction review must also be, quote/unquote,
20 "collateral review."

21 Also, I think importantly, it would be
22 anomalous in a tolling provision, in which we are
23 talking about the direct appeal already having been
24 concluded, to embrace things that don't -- that don't --
25 that come prior to the direct appeal. This is a tolling

1 -- obviously, 2244(d)(1) speaks about the finality of a
2 State court judgment of conviction. At that point,
3 obviously --

4 JUSTICE GINSBURG: Can you go back to the --
5 you said -- you said "prior to." I thought the Rule 35
6 motion is made after the conviction.

7 MR. WEISMAN: Well, it can be made -- it can
8 be made prior to when the conviction becomes final. For
9 example, it can be made within 120 days of the
10 imposition of sentence. Or it can be made within
11 120 days after the affirmance of the conviction on
12 direct appeal of the Rhode Island Supreme Court. So it
13 can be made prior to when the conviction becomes,
14 quote/unquote, "final."

15 JUSTICE KAGAN: But isn't that true
16 regardless of whether the Rule 35 motion seeks legal
17 relief or discretionary relief alone? That both can be
18 made prior to the finality of the judgment?

19 MR. WEISMAN: That is true, Your Honor.

20 JUSTICE KAGAN: And -- and if I understand
21 your argument, your argument is that Rule 35 motions
22 that seek legal review do fall within the 2244(d)(2)
23 language. It's just that Rule 35 motions that seek
24 discretionary relief do not.

25 MR. WEISMAN: Well, I'm not sure we conceded

1 that point, Your Honor. I think clearly we're all in
2 agreement that postconviction vehicles and habeas
3 vehicles, which obviously all traditionally occur after
4 the direct appeal has been concluded, obviously qualify
5 as what this Court -- and everybody, we would suggest --
6 recognizes as, quote/unquote, "collateral review."

7 In terms of a Rule 35 motion that says, for
8 example, the sentence is outside of the -- outside of
9 the proper boundaries, it's unlawful as a matter of law,
10 I don't think we've actually conceded before this Court
11 that that would qualify. But certainly this Court --

12 JUSTICE SOTOMAYOR: Would Rule 35 permit a
13 challenge for a Federal violation? You've given an
14 example of an illegal sentence that you think is
15 discretionary; am I correct?

16 MR. WEISMAN: Not in --

17 JUSTICE SOTOMAYOR: But does Rule 35(a)
18 permit a legal challenge of the kind that Justice Kagan
19 was asking?

20 MR. WEISMAN: Correct. Our Rule 35 contains
21 within the same provision a challenge to the legality of
22 the sentence, to the manner in which it was imposed --

23 JUSTICE SOTOMAYOR: All right. Let's assume
24 a pure legal challenge.

25 MR. WEISMAN: A pure legal challenge,

1 correct.

2 JUSTICE SOTOMAYOR: Would Rule 35(a) be
3 other collateral relief --

4 MR. WEISMAN: We would --

5 JUSTICE SOTOMAYOR: -- as designated by the
6 statute?

7 MR. WEISMAN: We would suggest that this
8 Court doesn't have to answer that question here. There
9 are good arguments why it would not, again, because in a
10 tolling provision that speaks about collateral review
11 and, again, 2255 --

12 JUSTICE SOTOMAYOR: So explain again why you
13 don't think this is collateral?

14 MR. WEISMAN: Well, certainly when all
15 you're doing, as the First Circuit recognized, is making
16 a pure plea for leniency, sentence leniency, you're
17 not --

18 JUSTICE SOTOMAYOR: No, no, no. Why is
19 Rule 35, assuming it's a -- a challenge to an illegal
20 sentence on a legal ground --

21 MR. WEISMAN: Well, it could be argued --

22 JUSTICE SOTOMAYOR: Why would it not be
23 collateral review?

24 MR. WEISMAN: Well, it could be argued that
25 we're talking about vehicles that challenge the validity

1 of a judgment that has already survived scrutiny under
2 direct review. And a Rule 35 vehicle, even one that
3 raises a legal challenge -- and a tolling provision
4 simply would not begin to run at that point.

5 JUSTICE SCALIA: I don't -- I don't
6 understand your argument at all. It seems to me the
7 phrase "post-conviction or other collateral review"
8 means postconviction collateral review or preconviction
9 collateral review. Isn't that what is added?
10 "Post-conviction or other"; what's "other" from
11 "post-conviction"? I guess it would be preconviction,
12 wouldn't it?

13 MR. WEISMAN: Well, we would suggest, Your
14 Honor, that the "collateral review," as explained by
15 this Court, is referring to the difference between
16 collateral review and direct review. And the case in --

17 JUSTICE SCALIA: That's fine. And is this
18 direct review?

19 MR. WEISMAN: This would not -- this is
20 clearly not -- this is not in the direct review process.
21 No, it's not.

22 JUSTICE SCALIA: So it's collateral review?
23 So --

24 MR. WEISMAN: Well --

25 JUSTICE SCALIA: So you lose.

1 MR. WEISMAN: This -- this Court, though,
2 Your Honor, has said that, speaking about when Congress
3 enacted 2255, it simplified the procedure for making a
4 collateral attack on a final judgment entered in a
5 Federal criminal case, but it did not purport to modify
6 the distinction, again, between collateral review and
7 direct review.

8 JUSTICE SCALIA: I would think that if -- if
9 there's anything to the point you're making, it -- it
10 hinges not on the "post-conviction or other collateral"
11 phrase, but rather on the word "review."

12 I suppose it could be argued that you're not
13 reviewing the judgment if you're asking for mercy.
14 Whether a judgment was good or bad, you're -- you're
15 asking for mercy. And I would -- you know, perhaps it's
16 not review. Is that your point?

17 MR. WEISMAN: Well, we go forward and use
18 that -- even -- we would suggest, Your Honor, even more
19 strongly that the phrase "collateral review," as that
20 phrase has been used by this Court consistently,
21 recognizes that this is a procedure that occurs after
22 the completion of a direct review process.

23 JUSTICE SCALIA: Well, that's only because
24 all the cases we've had involved that. We've never had
25 a case like this before. So in all those other cases,

1 we've used the natural term "collateral review." That
2 doesn't mean it couldn't apply to this. It just means
3 we've never had occasion to inquire whether it applies
4 to this.

5 MR. WEISMAN: But, Your Honor, respectfully,
6 in State v. Addonizio itself, it contrasted the Rule 35
7 motion, for example. Many jurisdictions, including
8 obviously the Federal courts, had this very -- almost
9 exact Rule 35-type proceeding. It has never been
10 referred to, it has never been understood in thousands
11 of cases, as collateral review. It always had been
12 understood as a -- sort of a quasi-civil inquiry, after
13 the --

14 JUSTICE KAGAN: Mr. Weisman, I think that
15 that's not right, that the -- as you say, that the
16 Rule 35 motion that Rhode Island has is based on the
17 Federal Rule 35 motion that existed prior to 1987, and
18 that on a couple of occasions this Court talked about
19 that prior Federal Rule 35 as collateral review. Am I
20 wrong about that?

21 MR. WEISMAN: We don't believe so, Your
22 Honor.

23 JUSTICE KAGAN: U.S. v. Robinson,
24 Bartone v. United States. And I might be wrong about
25 it.

1 MR. WEISMAN: We don't believe it ever
2 referred to a sentence -- a plea for sentence leniency,
3 Your Honor, no, not -- not as a plea, a pure plea for
4 leniency under Rule 35.

5 JUSTICE GINSBURG: And the current Federal
6 rule --

7 MR. WEISMAN: Yes.

8 JUSTICE GINSBURG: -- provides for -- it's
9 Rule 35 also, but it doesn't have the pure leniency?
10 That's Rhode Island's?

11 MR. WEISMAN: That's correct -- correct,
12 Your Honor. We're just speaking about the pre-1987
13 guidelines rule, which is the same.

14 JUSTICE KENNEDY: Let's assume that we adopt
15 your formulation generally, that it has to be for legal
16 error, collateral review has to be for legal error, and
17 we could even add what the Ninth Circuit has found, it
18 has to be by a court in order to avoid clemency, parole
19 review boards, and so forth.

20 I don't see why you don't lose anyway,
21 because the allegation here, the complaint, the
22 argument, may be that there was an abuse of discretion,
23 and if there's an abuse of discretion, that is a legal
24 ground to set aside the -- the sentence.

25 MR. WEISMAN: I think, Your Honor, we have

1 to differentiate between a legal ground and the vehicle.
2 Again, the vehicle, the reduction, the plea for leniency
3 vehicle, is not a legal vehicle. It's simply, I think,
4 as the Kholi panel recognized --

5 JUSTICE KENNEDY: Well, it's a motion made
6 in a court, reviewable by the appellate courts of the
7 State.

8 MR. WEISMAN: Well, it -- but -- but --

9 JUSTICE KENNEDY: It's a little odd to say
10 that that's not legal. If -- an abuse of discretion
11 standard is something we're quite familiar with in the
12 law. We've never thought of that as being somehow
13 extra-legal.

14 MR. WEISMAN: Well, to the extent it's abuse
15 of discretion, it's really shorthand for the appellate
16 court takes a look; if the sentence is within the proper
17 bounds and if there was, quote, "some justification" for
18 the imposition of the sentence, then it's affirmed. And
19 just like on the --

20 JUSTICE SOTOMAYOR: And if there's no
21 justification, what do they do?

22 MR. WEISMAN: If there's no justification --
23 I mean, I can say it hasn't happened so far in our
24 State, and I think -- you know, I don't know what
25 happens in other States, but, essentially, that's all

1 the inquiry is. They take a look at the sentence; if
2 it's in the legal bounds, the filing of the motion
3 itself, as to pre-'87 guidelines, presumes the validity
4 of the conviction and sentence, and it simply says:
5 Give me a second chance; take a second look; look at the
6 offender, look at the characteristics, look at what --

7 CHIEF JUSTICE ROBERTS: Are those different
8 than the characteristics that the sentencing judge looks
9 at in the first instance?

10 MR. WEISMAN: They could be the same. They
11 could be other. There is a wide --

12 CHIEF JUSTICE ROBERTS: In other words, how
13 these -- you've obviously seen a lot of these, and I
14 haven't seen any, but I mean, do the Rule 35 motions
15 typically say -- do they typically concede the legal
16 validity of the sentence and then simply say -- what? I
17 mean, I assume the sentencing is -- is completely open
18 and you can put in anything at all, like the -- the
19 deprived childhood, the unique situation, the age,
20 whatever.

21 MR. WEISMAN: Correct.

22 CHIEF JUSTICE ROBERTS: In what sense is
23 Rule 35 different from the arguments that are made at
24 sentencing?

25 MR. WEISMAN: It's not much different at

1 all, Your Honor. It is essentially the same. It is --
2 it is simply --

3 CHIEF JUSTICE ROBERTS: But that's bad for
4 you, isn't it, I mean for the very point that Justice
5 Kennedy was raising? If it's the same sort of arguments
6 that you get to raise as a legal matter prior to the
7 imposition of sentencing, why should they not be
8 considered legal matters when they're raised under Rule
9 35?

10 MR. WEISMAN: Because we don't believe they
11 are legal matters, Your Honor. What they're asking for
12 is sentence leniency based on pure factual matters like,
13 as you indicated, Your Honor, Chief Justice, the history
14 of the individual, the various --

15 CHIEF JUSTICE ROBERTS: Are those issues
16 that can be -- that are typically raised on direct --
17 direct review?

18 MR. WEISMAN: No, they're not, Your Honor.
19 We have a procedure whereby generally sentence reduction
20 and sentencing issues must be raised pursuant to
21 Rule 35.

22 If I could --

23 JUSTICE SOTOMAYOR: Do you quarrel with a
24 statement in Mollicone, a Rhode Island 2000 decision
25 that says we will interfere with the trial court's

1 discretion, vis-à-vis sentencing, only in rare instances
2 where the trial justice has imposed a sentence that is
3 without justification and is grossly disparate from the
4 other sentences generally imposed for similar offenses?

5 MR. WEISMAN: No.

6 JUSTICE SOTOMAYOR: Is that the review
7 standard?

8 MR. WEISMAN: Correct, correct. What the --

9 JUSTICE SOTOMAYOR: That is the standard of
10 review, correct?

11 MR. WEISMAN: Yes.

12 JUSTICE SOTOMAYOR: So please explain to me
13 why that is not what Justice Kennedy described as a
14 review for abuse of discretion and why a review for
15 abuse of discretion is not a legal challenge?

16 MR. WEISMAN: Well, what we suggest is the
17 abuse of discretion that that is talking about is if
18 there's no justification. They look -- again, they look
19 at the sentence, and if there's no justification for it,
20 then it will be an abuse of discretion. If there's some
21 justification -- and, again, it hasn't happened. If
22 there's some -- if the sentence is within the legal
23 limits and there's some justification for it, it will be
24 affirmed. That's --

25 JUSTICE SOTOMAYOR: I'm sorry. Am I

1 misunderstanding you?

2 MR. WEISMAN: That's the shorthand.

3 JUSTICE SOTOMAYOR: Are you saying that the
4 Rhode Island appellate courts never change a sentence
5 under Rule 35?

6 MR. WEISMAN: We have not --

7 JUSTICE SOTOMAYOR: Or are you saying that
8 they do find some lack of justification in some
9 sentences?

10 MR. WEISMAN: No. What we're -- what we're
11 saying, Your Honor, is if there's some justification for
12 it and if it's within the legal sentencing bounds, the
13 denial of the Rule 35 motion is affirmed. And that
14 happens all the time.

15 JUSTICE SCALIA: Well, then -- then think
16 you're saying that it only gets reversed for abuse of
17 discretion, right?

18 MR. WEISMAN: Well, Your Honor --

19 JUSTICE SCALIA: And that's a legal ground,
20 it seems to me. And I don't know how you could say that
21 that's a plea for leniency. It's a plea that -- that
22 the sentencing court abused its discretion and should
23 have given a lesser sentence. How is that leniency?
24 It's abuse of discretion.

25 MR. WEISMAN: Because the inquiry is simply

1 -- I understand the words "abuse of discretion" are
2 used, but the "no justification and manifestly excessive
3 standard" simply, as the cases explicate, looks at the
4 sentence; if it's legal and if there's some
5 justification for it, the appeal is denied.

6 JUSTICE SCALIA: I don't want to have to
7 figure this out case by case, or even jurisdiction by
8 jurisdiction, as to whether it's an abuse of discretion
9 review or a leniency review or this or that. And
10 that -- that makes me inclined to say we should treat
11 your Rule 35 as coming within the tolling provision, so
12 we don't have to grapple with -- I mean, I'm not having
13 very much success understanding the distinction that
14 you're telling me. I don't want to have to do this for
15 50 States.

16 MR. WEISMAN: I understand. But certainly,
17 Your Honor, just -- just using the formulation that
18 everything that's filed in a State court post a judgment
19 of conviction qualifies would certainly be an odd way
20 for that Congress to have expressed that.

21 JUSTICE GINSBURG: Can you read the -- the
22 relevant provision of the Rule 35? I mean, there are
23 two categories, the ones about legal challenges, at
24 least as I read the rule, and --

25 MR. WEISMAN: Yes.

1 JUSTICE GINSBURG: Read the relevant part of
2 Rule 35.

3 MR. WEISMAN: Yes, certainly, Your Honor:
4 "The court may correct an illegal sentence at any time."
5 Period. "The court may correct a sentence imposed in an
6 illegal manner, and it may reduce any sentence when a
7 motion is filed within 120 days after sentence is
8 imposed or within 120 days after receipt by the court of
9 a mandate."

10 JUSTICE GINSBURG: So you're talking about
11 reducing --

12 MR. WEISMAN: We're talking -- this case
13 involves only a motion to reduce sentence. And
14 certainly the policy considerations for what Congress
15 would have intended --

16 JUSTICE KAGAN: Mr. Weisman, I'm sorry.
17 Before you talk about policy, so this motion to reduce
18 sentence is very short. It just says that the man
19 "prays that the sentence imposed with respect to the
20 above matter be reduced in accordance with the
21 provisions of Rule 35." Would it make a difference to
22 you if it said he prays that the sentence imposed -- he
23 prays that the illegal sentence imposed with respect to
24 the above matter be reduced in accordance with
25 provisions of Rule 35?

1 MR. WEISMAN: It might be.

2 JUSTICE KAGAN: If he had put in that word,
3 "illegal," would that have made the difference?

4 MR. WEISMAN: It might, Your Honor. And
5 under our system, it might -- that might have been
6 characterized, not as a sentence reduction provision or
7 sentence reduction vehicle, but as a legal motion to
8 correct an illegal sentence, or challenging the
9 sentence.

10 JUSTICE KAGAN: So -- but that does suggest
11 the difficulty that Justice Scalia raises, is that we're
12 going to have to look at the particular rule of the
13 State, we're going to have to look at the particular
14 motion, we're going to look at any -- we're going to
15 have to look at any State law regarding how motions are
16 construed.

17 MR. WEISMAN: Sure.

18 JUSTICE KAGAN: And this is going to be a
19 very difficult determination.

20 MR. WEISMAN: Sure. If I could just address
21 that, Your Honor. The problem is -- it's simply because
22 a statute of limitations is an affirmative defense,
23 these are matters that already are going to have been
24 concluded in the State court. Before anyone files for
25 2254, the State's court's going to have findings.

1 They're going to -- it's either going to be a motion for
2 sentence leniency or it's going to be a motion to
3 correct an illegal sentence.

4 These matters -- and they have to be pled by
5 the State as well. So when an applicant goes to Federal
6 court, district court, and files a 2254, if we want to
7 raise the affirmative defense of the time bar, which
8 will save the Federal court a lot of time, obviously,
9 because there is no case at all -- and if we can
10 contrast it with exhaustion, for example, which, as this
11 Court obviously is familiar with, presents very
12 complicated questions of whether, you know, State
13 procedures were exhausted and claims were exhausted,
14 this is very straightforward. If somebody raises a
15 motion which challenges the legality of the sentence, it
16 will be characterized in State court in the run of the
17 mine -- in the run of the mine cases, as an
18 illegal sentence.

19 JUSTICE SOTOMAYOR: So a petitioner in the
20 future in Rhode Island should file a petition that says:
21 I'm filing a motion pursuant to 35(a) for an illegal
22 sentence -- make something up --

23 MR. WEISMAN: Right.

24 JUSTICE SOTOMAYOR: -- or for leniency. And
25 then are district courts supposed to figure out whether

1 the legal challenge was frivolous or not or had a basis
2 in law or fact --

3 MR. WEISMAN: Well --

4 JUSTICE SOTOMAYOR: -- and then decide
5 whether they would toll or not toll based on that now
6 side trial on what's an illegal sentence and what's just
7 a plea for leniency? That's what you are proposing?

8 MR. WEISMAN: Well, what we suggest actually
9 is very straightforward, Your Honor. If somebody
10 captions their document, you know, "Motion for sentence"
11 -- "for sentence reduction and motion to correct an
12 illegal sentence," that's not this case, obviously,
13 because then the court --

14 JUSTICE SOTOMAYOR: So what if they say
15 "correct the illegal sentence because it was an abuse of
16 discretion"?

17 MR. WEISMAN: If it's --

18 JUSTICE SOTOMAYOR: So is the magic words
19 "illegal sentence" or is the magic words "abuse of" --
20 what are the magic words?

21 MR. WEISMAN: Well, it may not so much be
22 magic words, but it's what the -- as this Court has
23 said, it's what the substance of the motion seeks, and
24 that will already have been determined in State court.

25 JUSTICE SCALIA: Either -- either your

1 victory will give you absolutely nothing, or you have
2 truly stupid defendant lawyers in Rhode Island. I mean,
3 why would anybody not caption the 35 motion that way?

4 MR. WEISMAN: Because --

5 JUSTICE SCALIA: What's to lose? You say it
6 doesn't matter if your claim of an illegal sentence is
7 frivolous or not. What's to lose?

8 MR. WEISMAN: Because, Your Honor, they
9 actually want to reduce their sentence. It's not -- we
10 don't suggest it's not a matter of playing games. They
11 -- you know, they feel they were sentenced for 30 years
12 and maybe they want 20 years, and if they want to
13 challenge the legality of the sentence, they recognize
14 the established collateral attack vehicles.

15 JUSTICE ALITO: There is another argument
16 that you could make, other than the one you've been
17 pressing, which is that collateral review means
18 something other than a step in the criminal case. But
19 you've chosen not to make that; is that correct?

20 MR. WEISMAN: Well, we've spoken about the
21 words "collateral review" as embracing a case that's
22 already -- upon looking -- a proceeding that occurs
23 after the finality of the judgment, which obviously
24 includes this Court's denial of cert or the time --

25 JUSTICE SCALIA: But you've said that this

1 could be done before finality. I thought -- I --

2 MR. WEISMAN: No.

3 JUSTICE SCALIA: I'm sure you said that
4 earlier, that this motion can be made before the
5 judgment is final. Didn't you say that?

6 MR. WEISMAN: It can. It certainly can,
7 Your Honor. And we would suggest --

8 JUSTICE SCALIA: But that's not what you
9 just said.

10 MR. WEISMAN: No --

11 JUSTICE SCALIA: What you just said is after
12 the finality. Which is it?

13 MR. WEISMAN: We would suggest, Your Honor,
14 that that furthers our argument. A Rule 35 motion is
15 not collateral review because it is not a motion -- you
16 could say even in a legal sense, motion. It's not a
17 motion that occurs after the judgment becomes final.
18 And we're looking at a tolling provision, and the
19 congressional intent of the tolling provision was
20 finality and exhaustion of State remedies.

21 JUSTICE SOTOMAYOR: I'm sorry. I'm not sure
22 I understand that. There's nothing in this rule that
23 bars a litigant from filing after the conviction is
24 final. They have 120 days.

25 MR. WEISMAN: They have 120 days. It can be

1 filed after the sentence is imposed, 120 days of that
 2 date, or 120 days after the conviction becomes final.
 3 And we would suggest that the term "collateral review"
 4 embraces, as Justice Alito indicated, sort of that
 5 concept that, obviously in a tolling provision, it
 6 begins to run when the conviction becomes final.

7 JUSTICE GINSBURG: Justice Scalia's
 8 suggestion --

9 JUSTICE SCALIA: Except that it says --

10 JUSTICE GINSBURG: -- that perhaps the --
 11 the leniency review is -- is not review of the
 12 conviction or sentence. But you didn't -- you didn't do
 13 anything with that. You didn't argue that the kind of
 14 review that's involved with leniency is really not
 15 review of the sentence for legal error.

16 MR. WEISMAN: It's clearly not, Your Honor,
 17 correct. I think, as everybody here recognizes, the
 18 Kholi panel and the Respondents in this case as well
 19 characterized this Rule 35 proceeding as sort of apart,
 20 distinct, away from the underlying case. And that's
 21 undoubtedly true in the sense that it's not -- it's not
 22 part of the direct review process. It's -- it's clearly
 23 not. But that doesn't mean it's collateral review.
 24 It's not either/or. It could be --

25 JUSTICE GINSBURG: So what -- is it

1 something in between? It's not direct and it's not
2 collateral?

3 MR. WEISMAN: It's -- it's neither fish nor
4 fowl, Your Honor. I mean, simply because it's not part
5 of a direct review process doesn't mean that it's,
6 quote, our argument would be, "collateral review,"
7 because, again, "collateral review" has this sort of
8 meaning in the law, using this Court's decisions, using
9 this Court's cases, referring to a post-judgment vehicle
10 in which fundamental jurisdictional and other types of
11 errors can be raised.

12 JUSTICE ALITO: What about a motion --

13 JUSTICE SCALIA: I guess we need a new
14 adjective then, because I'd always thought that there
15 are two kinds of review, direct and collateral. You say
16 there's a -- a tertium quid. What do you want us to
17 call that?

18 MR. WEISMAN: Well, I don't know that it
19 needs to be called anything, Your Honor. I think the
20 only question with respect --

21 JUSTICE SCALIA: I think that maybe it
22 doesn't need to be called anything because it doesn't
23 exist. I -- I can't --

24 MR. WEISMAN: Well --

25 JUSTICE SCALIA: -- imagine anything that

1 isn't either direct or collateral.

2 MR. WEISMAN: -- it is certainly -- it is
3 certainly an interesting vehicle because, it can be
4 filed prior to the finality of the judgment and it can
5 be filed -- and it can be filed after the judgment
6 becomes final.

7 And, again, going -- going back to the
8 policies, the 2244(d)(2), very clearly, two big
9 policies, again, are finality, which obviously it
10 promotes -- these cases would not be in Federal court if
11 they were time-barred -- and exhaustion of State
12 remedies. To have a motion that seeks leniency only,
13 there's no purpose that could be accomplished by
14 bringing that motion into Federal court, and therefore
15 it doesn't serve that purpose.

16 JUSTICE KAGAN: But, Mr. Weisman, that's
17 true also of State habeas claims that are based only on
18 State law. But six circuits have said that 2244(d)(2)
19 applies to those claims. Are you contesting that?

20 MR. WEISMAN: We're not. But the -- but the
21 important element there, Your Honor, is that those
22 vehicles can be raised to bring -- those are the
23 vehicles, the collateral vehicles, through which the
24 States have channelled constitutional, jurisdictional,
25 and other fundamental claims.

1 The Rule 35 sentence reduction vehicle
2 doesn't -- can't do it, can't do that service. So,
3 sure, you could have -- you could have a habeas, and the
4 only issue, the only claim raised in habeas could be,
5 you know, it's in violation of -- of my State rights,
6 which couldn't be heard in 2254, but --

7 JUSTICE KAGAN: Where the exhaustion policy
8 does not come into effect.

9 MR. WEISMAN: Exactly. But Congress may
10 have well said we're not going to be in the business of
11 looking at the individual claims. Look, this is a
12 collateral review vehicle. This vehicle is a recognized
13 vehicle for bringing, for channeling in these claims.
14 So that's going to toll.

15 But this other vehicle, this Rule 35
16 sentence reduction vehicle -- it can never be used for a
17 claim that could go to Federal court. It's pointless.
18 I mean, it wouldn't serve the purpose, and of course it
19 would undermine the State's interest in getting the
20 State prisoners into Federal court within 1 year.

21 I'll reserve my time if that's okay, Your
22 Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. WEISMAN: Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Ms. Mizner.

1 ORAL ARGUMENT OF JUDITH H. MIZNER

2 ON BEHALF OF THE RESPONDENT

3 MS. MIZNER: Mr. Chief Justice, and may it
4 please the Court:

5 The First Circuit here correctly held that
6 Khalil Kholi's motion for a reduction of sentence under
7 Rhode Island Rule 35 was an application for State
8 postconviction or other collateral review with respect
9 to the pertinent judgment or claim. As such, it tolled
10 AEDPA's 1-year limitation period, and Mr. Kholi's
11 petition was timely filed.

12 We look to the common usage and ordinary
13 understanding of the words of the tolling provision in
14 the context of the statute. Collateral review is a
15 proceeding occurring after final judgment that could
16 affect that judgment.

17 JUSTICE ALITO: Am I correct that you think
18 "post-conviction or other collateral review" means
19 anything that occurs after the conclusion of direct
20 review?

21 MS. MIZNER: Yes, for purposes of the
22 tolling provision.

23 JUSTICE ALITO: Then what does the phrase
24 "or other collateral review" add? Why -- why wouldn't
25 Congress just say "post-conviction review"?

1 MS. MIZNER: In Duncan, this Court talked
2 about the possibility of civil commitment or contempt in
3 custody that could be part of the Rule 2254 proceeding
4 and that that would not be postconviction. So that
5 postconviction is a form of collateral review but is not
6 the only form.

7 In Duncan, the Court also discussed the fact
8 that many States may call what other States call
9 "post-conviction review" something else, and that that
10 would also then be collateral. The collateral is just
11 a -- an umbrella that encompasses postconviction and
12 other forms of review after a judgment.

13 CHIEF JUSTICE ROBERTS: Why don't you just
14 call your motion a motion to correct an illegal
15 sentence? Then we wouldn't have any dispute here, I
16 gather.

17 MS. MIZNER: Under the State's theory, there
18 would not be. I did not file this motion.

19 CHIEF JUSTICE ROBERTS: You're not one of
20 the stupid lawyers that we were worried about before.

21 (Laughter.)

22 MS. MIZNER: I may be in other respects,
23 Your Honor, but not this one.

24 CHIEF JUSTICE ROBERTS: I'm sure of that.
25 But you do think that if you had -- if you or whoever

1 files these motions had simply said that, there would be
2 no problem, right?

3 MS. MIZNER: From the State's perspective.
4 I don't think that there's a problem with omitting the
5 word "illegal," because --

6 CHIEF JUSTICE ROBERTS: Well, it's because
7 you want something other than legal review, right? You
8 want to throw yourself on the mercy of the court.
9 You've got plenty of avenues to correct the illegality
10 of the sentence, but this is something different, right?
11 This is to -- not correct -- you admit it's illegal, but
12 you say but it should still be reduced for a lot of
13 reasons.

14 MS. MIZNER: Yes. It is a request for the
15 court to -- to review, to take a second look, to
16 reexamine the sentence to determine whether or not it
17 was unduly severe at the time that it was imposed. You
18 are asking the court to -- to take a second look, either
19 based on factors that were submitted at sentencing or
20 additional information that --

21 CHIEF JUSTICE ROBERTS: You can raise all of
22 those -- all of those claims under the normal State
23 collateral postconviction, State habeas, all those other
24 things, right?

25 MS. MIZNER: You can raise those issues

1 under the postconviction review. You can also raise
2 them -- in Rhode Island, there is a provision of the
3 postconviction review statute that speaks of the -- any
4 facts that would require a new proceeding in the
5 interests of justice.

6 CHIEF JUSTICE ROBERTS: So I guess I'm
7 having trouble. You can -- the various grounds on which
8 the sentence should have been lower than it was,
9 including the fact that setting the sentence at that
10 level was an abuse of discretion, you obviously can
11 raise those at sentencing and you can raise those on
12 direct review, right?

13 MS. MIZNER: In Rhode Island, you cannot
14 challenge your sentence on direct review.

15 CHIEF JUSTICE ROBERTS: Can you challenge it
16 on -- in State habeas?

17 MS. MIZNER: You challenge it by way of the
18 Rule 35 motion.

19 CHIEF JUSTICE ROBERTS: That's the only
20 vehicle you have --

21 MS. MIZNER: It's the normal --

22 CHIEF JUSTICE ROBERTS: It's the only
23 vehicle you have for challenging the sentence.

24 MS. MIZNER: That's the normal vehicle that
25 is used for challenging the sentence. I believe that

1 you could also encompass it in a motion for
2 postconviction relief, which is the kind of umbrella
3 Rhode Island procedure for raising -- for a legal
4 challenge.

5 JUSTICE KENNEDY: So after a conviction in
6 the State, if there's an appeal with a number -- on
7 direct review, with a number of issues, improperly
8 admitted evidence and so forth, you -- the lawyer can't
9 add: And, in addition, he was sentenced under the wrong
10 provision; he was given 5 years too many because the
11 judge cited the wrong provision. You can't say that on
12 direct review?

13 MS. MIZNER: Under my understanding of the
14 Rhode Island Supreme Court decisions, the answer to that
15 is no.

16 JUSTICE GINSBURG: You can challenge only
17 the conviction, not the sentence, on direct review?

18 MS. MIZNER: I believe that that is the
19 holding of the Rhode Island Supreme Court.

20 JUSTICE GINSBURG: Do --

21 CHIEF JUSTICE: In what --

22 JUSTICE GINSBURG: Do you agree that Rule 35
23 is not something that the prisoner must exhaust before
24 seeking Federal habeas?

25 MS. MIZNER: Exhaustion for Federal habeas

1 is limited to exhaustion of the claims that are going to
2 be presented in the Federal habeas petition. And since
3 a -- the denial of a request for a sentence reduction on
4 the grounds of abuse of discretion is not going to be a
5 claim that is cognizable in Federal habeas corpus
6 jurisdiction, then you would not need to exhaust it.

7 JUSTICE GINSBURG: But this is the whole
8 purpose of allowing tolling of the 1-year Federal
9 statute, the purpose to give the petitioner an
10 opportunity to exhaust what he must exhaust?

11 MS. MIZNER: Exhaustion is one of the
12 purposes of the tolling provision, but this Court has
13 recognized that AEDPA's purpose was to further the
14 principles of comity and finality and federalism, and
15 had a clear purpose of encouraging litigants to pursue
16 claims in State court prior to seeking Federal review.

17 So, tying the tolling provision to State
18 applications shows congressional concern for comity,
19 which at its core is a -- is a respect for the State
20 processes that are used in reviewing the claims of State
21 prisoners.

22 CHIEF JUSTICE ROBERTS: I -- I may have
23 asked this already, but it seems unusual to me so I want
24 to make sure of the answer. Your -- you have a client
25 who is convicted of a particular offense that results in

1 a sentence of, what, zero to 5 years, okay? And the
2 judge, in imposing the sentence, engages in racial
3 discrimination. It turns out that he sentences
4 African-Americans to 5 years and Caucasian defendants to
5 2 years. That, you're telling me, is a claim that you
6 cannot raise on direct review or on -- in State habeas?

7 MS. MIZNER: It would be raised in the State
8 Rule 35, a motion to correct.

9 CHIEF JUSTICE ROBERTS: Well, you say it
10 "would be raised." Are you saying it can only be raised
11 under Rule 35?

12 MS. MIZNER: It could be raised under the
13 State postconviction review proceedings as well.

14 CHIEF JUSTICE ROBERTS: That's what I would
15 have thought. So Rule 35 is not the only vehicle for
16 challenging a sentence?

17 MS. MIZNER: No.

18 CHIEF JUSTICE ROBERTS: Okay.

19 JUSTICE SOTOMAYOR: I -- your adversary said
20 the contrary, and I was -- you're flip-flopping. Can
21 this be brought on a direct appeal or not?

22 MS. MIZNER: No, not --

23 JUSTICE SOTOMAYOR: A non-legal sentence?

24 MS. MIZNER: Not on direct appeal.

25 JUSTICE SOTOMAYOR: So what did you mean

1 when you answered the Chief Justice that it could be
2 brought in collateral proceedings?

3 MS. MIZNER: Well, rule 35 is a collateral
4 proceeding --

5 JUSTICE SOTOMAYOR: That's --

6 MS. MIZNER: The --

7 JUSTICE SOTOMAYOR: Just so your adversary,
8 when he gets up on rebuttal, can confirm or not this
9 point, any challenge to an illegal sentence has to be
10 brought first in a Rule 35(a) motion, regardless of what
11 the grounds of the illegality are?

12 MS. MIZNER: Yes, or perhaps in a motion for
13 postconviction relief under section 10-9.1.

14 JUSTICE ALITO: Can I return to the question
15 Justice Ginsburg asked a couple of minutes ago? We have
16 -- let's say we have a case in which a defendant
17 convicted in State court has some exhausted Federal
18 claims that this defendant wants to raise in a Federal
19 habeas; also files a motion seeking a reduction of
20 sentence based purely on a request for leniency, a
21 sentence within the range prescribed by the statute.
22 What purpose is served by tolling the time to file the
23 Federal habeas during the pendency of this request for
24 leniency in the State court? Now, you say comity, but
25 in concrete practical terms, what purpose is served?

1 MS. MIZNER: A prisoner who receives
2 adequate relief in the State court, through whatever
3 vehicle, may choose not to pursue a Federal habeas
4 corpus claim.

5 JUSTICE ALITO: In your experience, does
6 that happen a lot? You have somebody who is sentenced
7 to a 5-year sentence and that's within the range, also
8 has legal challenges that would result in no conviction,
9 no time whatsoever and no criminal conviction -- that
10 person decides to give up on the legal challenge because
11 the 5-year sentence might be reduced to 3 or 2 or 1?

12 MS. MIZNER: I would say that would be
13 unlikely, but there are many Federal habeas cases that
14 are -- raise questions of, for example, ineffective
15 assistance of counsel at sentencing. A State resolution
16 that reduces the sentence would obviate the need for a
17 Federal habeas petition in that context.

18 JUSTICE BREYER: Can you explain --

19 JUSTICE GINSBURG: If you look at 2255 --
20 that's the Federal postconviction review, and it also
21 has a 1-year statute of limitations. That limitation
22 would not be tolled for a Federal Rule 35 motion. So
23 why should it be tolled for State?

24 MS. MIZNER: 2255, Justice Ginsburg, has no
25 tolling provision at all, and the reason for that may

1 perhaps be the respect for comity that Congress
2 recognized when you are addressing a 2254 petition filed
3 by a State prisoner.

4 JUSTICE KAGAN: I think, Ms. Mizner, the
5 amicus brief in this case asserted that, in Rhode Island
6 or in other States with a rule like this, many judges
7 sit on these Rule 35 motions. They just let them stay
8 pending for a considerable period of time, in order to
9 retain some ability to modify the sentence if and when
10 they feel like doing so. Is that your understanding of
11 what happens to these motions, that they just sit, that
12 they are not denied?

13 MS. MIZNER: I don't practice in Rhode
14 Island, but in this case the Rule 35 did not sit. It
15 was resolved by the trial court within 3 months. The
16 issue, the potential for abuse from sitting on motions
17 is not limited to a Rhode Island Rule 35. It's not a
18 peculiar concern.

19 CHIEF JUSTICE ROBERTS: Well, I guess the
20 question -- and I'm sorry if I cut you off -- is not
21 that this is a question of abuse, that it may be a good
22 thing. The idea is you've got a motion for reduction of
23 sentence because of mercy, and the judge might say:
24 Well, I'm inclined to exercise mercy if you come out of
25 the rehab program in a good way, if it turns out after

1 the first several months that you're a model prisoner.
2 In other words, it's not a question of abuse, it's a
3 good thing; and if we start saying that the time for
4 Federal habeas is tolled, judges might be inclined not
5 to exercise such charity based on the prisoner's conduct
6 after conviction.

7 MS. MIZNER: Well, the Rule 35 also provides
8 that the decision must be made within a reasonable time.

9 CHIEF JUSTICE ROBERTS: 120 days, right?

10 MS. MIZNER: No, 120 days is the time
11 frame --

12 CHIEF JUSTICE ROBERTS: For filing?

13 MS. MIZNER: -- within which the motion must
14 be filed.

15 CHIEF JUSTICE ROBERTS: Right.

16 MS. MIZNER: The rule also provides that it
17 must be decided, resolved, within a reasonable time. So
18 there is a -- a limitation in that respect.

19 JUSTICE SCALIA: Do we have any indication
20 in the case law what a reasonable time consists of?

21 MS. MIZNER: I have not found any Rhode
22 Island cases discussing that particular question.

23 JUSTICE BREYER: Can you go back for a
24 second? Imagine a defendant is convicted of robbery and
25 he's sentenced to 10 years. He thinks there is an error

1 in my conviction of a legal nature, and he thinks there
2 is another error in my -- in my sentence of a legal
3 nature. Now, I take it in Rhode Island he files an
4 appeal to consider the first.

5 MS. MIZNER: Yes, Justice Breyer.

6 JUSTICE BREYER: And as to the second, he
7 files a Rule 35 motion.

8 MS. MIZNER: That's my understanding of
9 Rhode Island --

10 JUSTICE BREYER: And when does he file the
11 Rule 35 motion? Because it says at any time.

12 MS. MIZNER: No. A Rule 35 motion must be
13 filed within 120 days.

14 JUSTICE BREYER: No, it doesn't say that.
15 It says a court may correct an illegal sentence "at any
16 time." I'm talking --

17 MS. MIZNER: I'm sorry.

18 JUSTICE BREYER: It has nothing to do with
19 mercy. I want to know how it works. He says there's a
20 legal error in my sentence. When -- how does he get
21 that corrected?

22 MS. MIZNER: A defendant would have an
23 interest in getting it corrected as soon as possible.

24 JUSTICE BREYER: I have -- I'm not -- don't
25 take what I have as my view. I just want the fact. I'm

1 asking you a fact. When -- how and when does the person
2 correct the legal error in his sentence?

3 MS. MIZNER: He could correct it by filing
4 the motion at any time, and --

5 JUSTICE BREYER: Where?

6 MS. MIZNER: In the trial court.

7 JUSTICE BREYER: And if the trial court says
8 no, what does he do?

9 MS. MIZNER: He appeals that.

10 JUSTICE BREYER: Fine. Okay. So now we
11 have two appeals. One is from the judgment of
12 conviction; another is from the judgment imposing the
13 sentence. Now, the Federal statute says a 1-year period
14 of limitation shall apply from the date on which the
15 judgment became final. Correct?

16 MS. MIZNER: Yes.

17 JUSTICE BREYER: Okay. When is the date on
18 which the judgment of the sentence became final?

19 MS. MIZNER: If both appeals are pending at
20 the same time, the practice would be to consolidate
21 them, so you would have a ruling from the Rhode Island
22 Supreme Court --

23 JUSTICE BREYER: And if they are not
24 appealing -- they are not -- they are not at the same
25 time, then what?

1 MS. MIZNER: Then the judgment would become
2 final when the Rhode Island Supreme Court affirmed the
3 conviction and either this Court --

4 JUSTICE BREYER: Why not the sentence?

5 MS. MIZNER: You may have two time frames --

6 JUSTICE BREYER: In April, they affirm the
7 conviction. In June, they affirm the sentence. Do
8 those 2 months -- does the date on which the judgment
9 became final by conclusion of direct review, does that
10 run from April or from June?

11 MS. MIZNER: I would say June.

12 JUSTICE BREYER: June. Okay. Now, suppose
13 he doesn't -- suppose that there were no appeal from
14 the -- I see. Our problem is that there is no appeal
15 from the judgment -- from the sentence where he asks for
16 correction as a matter of mercy and not law.

17 MS. MIZNER: There may be an appeal --

18 JUSTICE BREYER: There may be?

19 MS. MIZNER: -- from such -- from the denial
20 of a Rule 35.

21 JUSTICE BREYER: What I'm trying to figure
22 out is why, if you're willing to call, for purposes of
23 one -- the 1-year statute begins to run from the time
24 the direct appeal becomes final. Why is it a direct
25 appeal of a sentence where you appeal the matter of law

1 and it isn't a direct appeal of a sentence where you ask
2 for mercy? It's the same rule. It's the same
3 procedure.

4 MS. MIZNER: It -- the Rule 35 --

5 JUSTICE BREYER: This would help you just as
6 much, I imagine. I'm just trying to get it straight in
7 my mind.

8 MS. MIZNER: Rhode Island's manner of
9 addressing the Rule 35 seems to be somewhat unusual in
10 terms of --

11 JUSTICE BREYER: I know. You see, my basic
12 question is: Why -- look, two appeals; one judgment,
13 one sentence. Okay? January, June. You're prepared to
14 say the 1-year statute does not begin to -- to run until
15 June. Fine. The Rule 35 motion, when you took an
16 appeal, became final for purposes of the Federal habeas
17 statute in June.

18 So why doesn't the Rule 35 motion become
19 final under (1)(a) of the habeas statute, whenever
20 that's decided finally? Why is it collateral at all?
21 Why isn't it direct, just as your first one was direct?

22 MS. MIZNER: If the Rule 35 motion is filed
23 after the Rhode Island Supreme Court affirms the
24 judgment with --

25 JUSTICE BREYER: Wait a minute. Judgment of

1 what? Judgment of conviction --

2 MS. MIZNER: The judgment of conviction.

3 JUSTICE BREYER: -- or judgment of sentence?

4 MS. MIZNER: Judgment of conviction. The
5 Rule --

6 JUSTICE BREYER: That's not the same reason
7 that it doesn't become final when you haven't appealed
8 your sentence yet, or when they haven't -- they didn't
9 consolidate.

10 I am quite confused, as you see, as to how
11 this all works in Rhode Island. I -- Rhode Island -- I
12 used to be on the First Circuit. I know it has some
13 special ways of doing things that are sometimes
14 different, and this is different.

15 MS. MIZNER: It is, Justice Breyer. And I
16 have not seen any Rhode Island cases addressing a
17 Rule 35 motion that was not filed after the judgment of
18 conviction had been affirmed in the context of looking
19 for a discretionary reduction of sentence.

20 JUSTICE BREYER: There must be in Rhode
21 Island some complaints about the sentence.

22 MS. MIZNER: In terms of a motion for
23 reduction for leniency --

24 JUSTICE BREYER: Both.

25 MS. MIZNER: I have not seen any --

1 prejudgment -- pre-Rhode Island Supreme Court
2 resolutions.

3 JUSTICE ALITO: What would happen if the
4 statutory maximum for an offense in Rhode Island is 5
5 years and the sentencing judge imposes a sentence of 10
6 years, and the defense attorney at that time says, well,
7 you can't do that, that's more than a statutory maximum;
8 and the judge goes ahead with it, and then an appeal is
9 taken?

10 You're saying that the appellate court in
11 Rhode Island would not entertain that argument? They
12 would say you have to go back and make a Rule 35 motion
13 in the trial court? Maybe that's the procedure.

14 MS. MIZNER: That is --

15 JUSTICE ALITO: It seems odd. Is that it?

16 MS. MIZNER: That is what the Rhode Island
17 Supreme Court has said.

18 JUSTICE KENNEDY: Is there a citation for
19 that, that you have? Is it your --

20 MS. MIZNER: I do not have that with me.

21 JUSTICE ALITO: Could I return you to
22 something more basic? Do you think the term "collateral
23 review" is a legal term of art, or is it a term that we
24 can -- we should interpret simply by looking up the word
25 "collateral" in a dictionary?

1 MS. MIZNER: Well, this Court has discussed
2 the -- has used the term "collateral review" in a -- a
3 number of different contexts, in civil cases, in habeas
4 cases, in the -- in the manner of distinguishing between
5 direct review and something that is outside direct
6 review.

7 JUSTICE ALITO: Isn't -- if I look up
8 "collateral attack" in Black's Law Dictionary, won't I
9 find a definition there? And won't it tell me that this
10 is something other than the proceeding? This is an
11 attack on a judgment outside of the proceeding that led
12 to the entry of that judgment. Isn't that what the term
13 generally means?

14 MS. MIZNER: "Collateral" generally means
15 supplementary, as defined in Black's, and "collateral
16 attack" in Black's is defined as an attack on a judgment
17 in a proceeding other than direct appeal.

18 JUSTICE ALITO: Right.

19 MS. MIZNER: But the Rule 35 motion in Rhode
20 Island is not part of a direct appeal. It is a
21 separate, specific --

22 JUSTICE ALITO: But it's part of the case.

23 MS. MIZNER: It is part of the case,
24 Justice Alito, but a -- a motion for a new trial based
25 on newly discovered evidence, which is viewed as

1 collateral, is also part of the original proceeding.

2 JUSTICE ALITO: Well, what about just a
3 regular motion for a new trial, not based on newly -- on
4 newly discovered evidence? Is that collateral, or is --
5 is that part of the -- the criminal proceeding?

6 MS. MIZNER: The motions for new trial -- a
7 motion for a new trial that has to be filed within 10 or
8 14 days of the conviction would be part of the direct
9 appeal and therefore would be -- would not be
10 collateral. But a motion for a new trial that is filed
11 after the judgment is affirmed by a court of appeals and
12 the time for cert has passed would be collateral.

13 JUSTICE ALITO: Well, what's wrong with the
14 argument that nothing that occurs in the criminal case
15 itself is collateral? What Congress had in mind when it
16 spoke about collateral review was something like habeas.

17 Let me give you an alternative
18 interpretation of this, and maybe it's completely wrong,
19 but you'll tell me why it's wrong.

20 "Post-conviction" is a term of art. Many
21 States, including Rhode Island, have postconviction
22 review statutes. So Congress wanted to have that time,
23 the time when those proceedings were tolled -- were
24 pending tolled. But not every State uses that phrase.
25 Not every State uses that term. They have other names

1 for the proceeding, and that's what's meant by "other
2 collateral review." "Collateral review" is a term of
3 art. It's not something that you understand by looking
4 up the word "collateral" in a dictionary.

5 What's wrong with that?

6 MS. MIZNER: There is no indication that
7 Congress was limiting the use of the term "collateral
8 review" to a postconviction legal challenge. Congress
9 could have said that if it had wished.

10 JUSTICE ALITO: I'm not saying it has to do
11 with whether it's legal or something else. It has to do
12 with whether it's in the criminal case or not in the
13 criminal case.

14 MS. MIZNER: Traditionally, motions that are
15 filed -- motions for a new trial are -- may be filed
16 after the judgment has been affirmed and have been
17 viewed by the courts as collateral, as collateral
18 review. So there is -- the tradition doesn't limit the
19 use of the term "collateral review" to a proceeding that
20 is completely separate and apart.

21 Indeed, a 2255, while it may be separately
22 filed, is then consolidated with the original
23 proceeding, and there's an entry in the docket -- you
24 shall not file any more pleadings in that separate case.
25 It all goes back to the original case. The 2255, which

1 is collateral, is heard by the trial court.

2 So there is a -- there is no reason to
3 assume that Congress was limiting collateral review to
4 something outside of the original proceeding.

5 JUSTICE KAGAN: Do you --

6 JUSTICE ALITO: 2255 is -- is in the
7 original case, but it's a habeas substitute. It was
8 adopted by Congress as a substitute for habeas; isn't
9 that right?

10 MS. MIZNER: Yes.

11 JUSTICE KAGAN: Do you think that a petition
12 for clemency that's presented to the governor would toll
13 the limitations period?

14 MS. MIZNER: No, I do not, Justice Kagan.

15 JUSTICE KAGAN: Why -- why is that
16 different?

17 MS. MIZNER: Because 2244(d)(2) is tolling
18 an application for review with respect to the pertinent
19 judgment or claim. And a -- an application for clemency
20 doesn't produce any change in the judgment that is
21 rendered by the court. It's not a request that is
22 related to the legal reasoning behind a judgment; it
23 doesn't challenge the basis for the judgment. And it's
24 an executive branch function, in some cases with advice
25 and consent of a legislative body. And there's no

1 judicial review. So it is --

2 JUSTICE SCALIA: Well, that may be right,
3 but I don't think that's the reason. I -- I thought we
4 had held that the word "filed" in the petition means
5 filed in a court, not filed with the governor. It's --
6 it's the word "filed" in -- in the tolling provision
7 that -- that does the work.

8 MS. MIZNER: I would agree.

9 JUSTICE GINSBURG: You think it doesn't
10 matter that -- I mean, a Rule 35 motion is a motion made
11 in the original criminal proceeding, not to the side of
12 it. So isn't a collateral attack a sort of -- another
13 proceeding to the side of the main proceeding, but the
14 Rule 35 motion is filed in the criminal proceeding
15 itself?

16 MS. MIZNER: Yes, it is, Justice Ginsburg,
17 as is a Rule 33 motion for a new trial based on newly
18 discovered evidence, which courts have held to be
19 collateral. It's a question of -- of when these motions
20 are filed that makes them collateral. They are not part
21 of the direct review process.

22 JUSTICE SCALIA: So if this was -- if this
23 motion had been filed before judgment, which can happen,
24 before the judgment is final, then there would be no
25 tolling?

1 MS. MIZNER: Tolling would not come into --
2 into play until after the judgment has become final. If
3 this has been addressed and --

4 JUSTICE SCALIA: So the question --

5 MS. MIZNER: -- resolved prior to, it would
6 have no impact on tolling.

7 JUSTICE SCALIA: So the answer is yes. This
8 motion which can be filed either before or after
9 judgment -- the time is tolled if it's made after the
10 judgment but not if it's made before.

11 MS. MIZNER: Yes.

12 JUSTICE SOTOMAYOR: There seems to be some
13 confusion. Judgment is rendered before this motion is
14 made. There's a conviction and there's a sentence,
15 right?

16 MS. MIZNER: Yes.

17 JUSTICE SOTOMAYOR: So there's a judgment
18 rendered. That's different from whether the judgment is
19 final in a Federal sense. It's final as far as the
20 State is concerned, because the judgment was rendered,
21 correct?

22 MS. MIZNER: Well, the judgment would become
23 final as far as the State is concerned, if on appeal, if
24 there is an appeal and the Rhode Island Supreme Court
25 has affirmed.

1 JUSTICE SOTOMAYOR: But if there's no
2 appeal, it was final the day it was rendered.

3 MS. MIZNER: Yes.

4 JUSTICE SOTOMAYOR: As far as the State is
5 concerned. If there is an appeal, then it may undo
6 that, correct?

7 MS. MIZNER: Yes.

8 JUSTICE SOTOMAYOR: So there is a judgment,
9 and this is always post-judgment.

10 MS. MIZNER: Yes.

11 JUSTICE SCALIA: Well -- well, that's not --
12 that's not what the State says, anyway. The State says,
13 and I think the way 35 reads, it doesn't have to be
14 filed after judgment.

15 MS. MIZNER: It has to be filed within
16 121 days after the entry -- after the sentence.

17 JUSTICE SCALIA: That's right. It can't be
18 filed any later than that. But it doesn't say that it
19 can't be filed before judgment.

20 MS. MIZNER: It would have to be filed after
21 the sentence is imposed.

22 JUSTICE SCALIA: That's right.

23 MS. MIZNER: And the sentence --

24 JUSTICE SCALIA: When does -- when does it
25 become final? When does the -- even at the trial court

1 level, when does it become final?

2 MS. MIZNER: I would say that the -- it
3 becomes final when it is imposed.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Weisman, you have 6 minutes remaining.

6 REBUTTAL ARGUMENT OF AARON L. WEISMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WEISMAN: Thank you, Mr. Chief Justice.

9 I'll begin -- if I could just clarify
10 regarding the scope of Rule 35. The reporter's notes to
11 Rule 35 do make it very clear that an illegal sentence
12 is one which has been imposed after a valid conviction
13 but is not authorized under law. It includes, e.g., a
14 sentence in excess of that provided by statute,
15 imposition of an unauthorized form of punishment, a
16 judgment that does not conform to the oral sentence.
17 And our supreme court has gone on to explain this
18 provision by saying: We have never -- we have never
19 countenanced a challenge to the constitutionality of a
20 penal statute in the context of a Rule 35 motion, nor
21 have we declared that a sentence imposed pursuant to an
22 unconstitutional statute is illegal as contemplated by
23 Rule 35.

24 JUSTICE SOTOMAYOR: I'm sorry, I -- you were
25 speaking so fast, I didn't follow you.

1 MR. WEISMAN: I'm sorry, Justice Sotomayor.

2 JUSTICE SOTOMAYOR: Perhaps we can go back
3 to the simple question, which is, can a defendant who
4 has been sentenced bring a challenge to a sentence in a
5 direct appeal or not? Or do they have to go by Rule
6 35(a)?

7 MR. WEISMAN: Although there is dicta and
8 some language where our supreme court says essentially
9 file challenges to your sentences pursuant to Rule 35,
10 it is clear that only certain types of challenges can be
11 brought in a Rule 35 motion. In the run of the mill
12 cases, they have to be brought if there is an appellate
13 record in direct appeal, or most commonly they're
14 brought pursuant to the State's postconviction relief.

15 JUSTICE SOTOMAYOR: All right. So now we
16 get to the point where some can go under 35(a) but some
17 can't.

18 MR. WEISMAN: Right.

19 JUSTICE SOTOMAYOR: So they should go on
20 direct appeal, correct?

21 MR. WEISMAN: The only ones that are correct
22 under 35(a) are, again, where the sentence is not
23 authorized by law or has imposed an unauthorized form of
24 punishment or a judgment that --

25 JUSTICE BREYER: That's called "it's

1 illegal."

2 MR. WEISMAN: Correct. Correct.

3 JUSTICE BREYER: So now it's illegal.

4 MR. WEISMAN: Correct, but --

5 JUSTICE BREYER: And the odd thing is that

6 -- that kind of appeal takes place either days or

7 possibly weeks after the defendant may already have

8 appealed his conviction to the higher court.

9 MR. WEISMAN: Well -- correct.

10 JUSTICE BREYER: Is that right?

11 MR. WEISMAN: That is correct.

12 JUSTICE BREYER: That normally happens?

13 MR. WEISMAN: Correct. .

14 JUSTICE BREYER: And what I'm curious about

15 is what happens if the court affirms that sentence,

16 let's say 2 months after it already affirmed the

17 conviction?

18 MR. WEISMAN: Right. And our --

19 JUSTICE BREYER: Which is the judgment

20 pursuant to which -- which is the judgment that became

21 final by conclusion of direct review?

22 MR. WEISMAN: And our position would be

23 that's not part of the direct review appellate process.

24 JUSTICE BREYER: Why?

25 MR. WEISMAN: That the --

1 JUSTICE BREYER: The person is not being
2 held in custody pursuant to a judgment of the State
3 court, or at least a relevant judgment, until the
4 sentence has been appealed. Then there's the conclusion
5 of direct review in respect to the judgment in respect
6 to which he is being held in custody. I'm just reading
7 the statute --

8 MR. WEISMAN: Yes.

9 JUSTICE BREYER: -- the Federal statute.

10 MR. WEISMAN: But, Your Honor, that could
11 occur at any time. That can occur 5 or 10 years or
12 20 years later.

13 JUSTICE BREYER: Exactly.

14 MR. WEISMAN: And we're not --

15 JUSTICE BREYER: And that's why I don't --
16 that's why I am confused. I look at the language of the
17 Federal statute and it seems to me that this individual
18 is not being held in custody pursuant to a judgment
19 until that sentence is final.

20 MR. WEISMAN: But we would suggest --

21 JUSTICE BREYER: And the sentence is final
22 in the lower court, but they say when the sentence is
23 final at the conclusion of direct review in respect to
24 that sentence, which hasn't even taken place yet.

25 MR. WEISMAN: Yes, but our point would be,

1 Your Honor, that it doesn't move the start of the 1-year
2 limitations period. The start of the 1-year limitations
3 period, as this Court said in *Jiminez v. Quarterman*,
4 begins when it begins. It begins when that judgment
5 becomes final, which is 90 days after our supreme court
6 affirms the judgment of conviction. It's final.

7 JUSTICE BREYER: Okay. Then you're going to
8 say --

9 MR. WEISMAN: It doesn't --

10 JUSTICE BREYER: -- all appeals in Rhode
11 Island from sentences -- all appeals on their lawfulness
12 or their mercy take place under Rule 35, and all of them
13 are collateral.

14 MR. WEISMAN: No. What we -- respectfully,
15 what we're going to say is collateral review refers to
16 those, as this Court said in *Duncan v. Walker*, habeas
17 postconviction relief vehicles that -- that occur after
18 the conviction has become final.

19 JUSTICE SOTOMAYOR: I'm totally confused.
20 If this is part of the criminal proceeding, which is
21 your position, that it's not collateral, but it's part
22 of the proceedings, when does this proceeding become
23 final?

24 MR. WEISMAN: It becomes final --

25 JUSTICE SOTOMAYOR: That -- that truly --

1 because -- you're -- you're --

2 MR. WEISMAN: Well, under Jiminez v. Walker,
3 it becomes final when -- 90 days from when the supreme
4 court affirms the conviction.

5 JUSTICE SOTOMAYOR: But if the Rhode Island
6 court has told litigants that they can't challenge some
7 portions of an illegal sentence except by way of Rule
8 35, how can we call the decision on the affirmance of
9 the conviction a final determination of the legality of
10 the sentence? That's contradictory.

11 MR. WEISMAN: Because Congress has decided
12 to pick the day on which the appeal becomes -- the
13 conviction becomes final, which always occurs 90 days
14 after the State's high court --

15 JUSTICE SOTOMAYOR: Well, but that's not --
16 that's not what the -- what it says. It talks about a
17 judgment. And a judgment in -- in other terms is
18 usually the conviction and the sentence. Rhode Island
19 for its own reasons has separated the two, but --

20 MR. WEISMAN: Yes, but Congress has set four
21 dates on which the conviction becomes final.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

24 (Whereupon, at 11:01 a.m., the case in the
25 above-entitled matter was submitted.)

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