IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY A. BEARD, SECRETARY, :

PENNSYLVANIA DEPARTMENT OF :

CORRECTIONS, ET AL., :

Petitioners :

v. : No. 08-992

JOSEPH J. KINDLER. :

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Washington, D.C.

Monday, November 2, 2009

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

APPEARANCES:

RONALD EISENBERG, ESQ., Deputy District Attorney, Philadelphia, Pa.; on behalf of the Petitioners.

MATTHEW C. LAWRY, ESQ., Philadelphia, Pa.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

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

Mr. Eisenberg.

ORAL ARGUMENT OF RONALD EISENBERG

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When the case that Your Honor's --

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

MR. EISENBERG: Well, Your Honor --

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

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

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

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

Justice Ginsburg -- you pointed Justice

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

MR. EISENBERG: Justice Sotomayor --

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

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

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

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

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

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

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

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

And, really, whether or not the rule --

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

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

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

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

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

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

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

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

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

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

MR. EISENBERG: Your Honor --

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

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

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

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

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

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

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

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

MR. EISENBERG: Not at all, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The question then has to be, was that rule

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

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

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

MR. EISENBERG: Your Honor --

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: And that's what Doctor said?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The point is that the way that the --

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

sought to raise a constitutional issue?

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Lawry.

ORAL ARGUMENT OF MATTHEW C. LAWRY

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: What was the change --

MR. LAWRY: The change --

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

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

JUSTICE SOTOMAYOR: Let's assume that a

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

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

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

JUSTICE SOTOMAYOR: Yeah.

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

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

MR. LAWRY: No.

JUSTICE SOTOMAYOR: Because that's the question presented.

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

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

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

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

MR. LAWRY: No, it is not automatically

inadequate.

CHIEF JUSTICE ROBERTS: So you agree --

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

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

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

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

MR. LAWRY: Correct.

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

MR. LAWRY: Correct.

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

MR. LAWRY: I would have no objection to

that, Your Honor.

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

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

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

JUSTICE SCALIA: Well, that may be, but

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

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

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

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

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

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

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

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

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

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

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

So what -- what complaint do you have?

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

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

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

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

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

thought there. I apologize.

CHIEF JUSTICE ROBERTS: Maybe I did, too.

(Laughter.)

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Okay.

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

MR. LAWRY: Uh-huh.

JUSTICE KENNEDY: Then your client isn't

hurt? If you take --

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

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

MR. LAWRY: Yes.

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

MR. LAWRY: Well, yes --

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

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

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

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

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

JUSTICE SOTOMAYOR: By whom?

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

JUSTICE SOTOMAYOR: No, no. Stop.

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

MR. LAWRY: It applies at all levels.

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

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

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

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

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

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

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

MR. LAWRY: Yes, yes.

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

MR. LAWRY: Right.

JUSTICE BREYER: Now, next sentence, which

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

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

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

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

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

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

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

MR. LAWRY: Certainly.

(Laughter.)

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

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

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

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

applications of the rule?

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

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

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

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

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

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

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

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

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

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

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

MR. LAWRY: Oh, no. No.

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

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

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

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

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

Another -- another aspect --

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Has discretion?

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

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

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

MR. LAWRY: They -- they certainly could.

The -- one of the things that --

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

MR. LAWRY: No.

JUSTICE KENNEDY: I didn't mean to interrupt.

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

MR. LAWRY: -conviction review.

JUSTICE KENNEDY: -- -conviction review on

all those points.

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

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

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

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

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

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

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

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

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

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

there is really --

JUSTICE SCALIA: Before or after his execution?

(Laughter.)

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Finish your sentence.

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

JUSTICE SCALIA: Can I please --

MR. LAWRY: Sure.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Eisenberg, you have four minutes.

REBUTTAL ARGUMENT OF RONALD EISENBERG

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: May I ask --

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

JUSTICE STEVENS: May I ask this question?

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

Would you agree that were a proper disposition.

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

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

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

There has been a lot of confusion about this

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

We don't have anything like that here.

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

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