IN THE SUPREME COURT OF THE UNITED STATES

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RICKY BELL, WARDEN, :

Petitioner :

v. : No. 04-514

GREGORY THOMPSON. :

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Washington, D.C.

Tuesday, April 26, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

JENNIFER L. SMITH, ESQ., Associate Deputy Attorney General, Nashville, Tennessee; on behalf of the Petitioner.

MATTHEW SHORS, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Ricky Bell v. Gregory Thompson.

Ms. Smith.

ORAL ARGUMENT OF JENNIFER L. SMITH

ON BEHALF OF THE PETITIONER

MS. SMITH: Mr. Chief Justice, and may it please the Court:

When the Sixth Circuit withdrew its judgment affirming the denial of habeas corpus relief 6 months after this Court denied certiorari review, it exceeded its authority to act under both the rules of appellate procedure and this Court's decision in Calderon v. Thompson.

As to the rules, rule 41(d)(2)(D) requires, without exception, that the court issue a mandate immediately upon the filing of an order of this Court denying certiorari. That did not happen in this case. But because the court had no discretion under the rule to do anything other than to issue that mandate, its subsequent action withdrawing its judgment was tantamount to a recall of the mandate, which, under this Court's precedent in Calderon, cannot be justified in this case because the evidence simply does not support a miscarriage

of justice, which under Calderon means actual innocence of the offense or actual innocence of the death penalty.

JUSTICE BREYER: If you're -- if you're going to -- if you're going to consider something that wasn't a recall of a mandate as if it was, why don't you consider it as a rule 41(b) action?

MS. SMITH: Your Honor, we don't read rule 41(b) as allowing any sort of recall authority. Rule 41

JUSTICE BREYER: They didn't recall it, didn't -- did they? Did they recall it? They issued it and then recalled it?

MS. SMITH: The mandate was not recalled --

JUSTICE BREYER: Fine.

MS. SMITH: -- because it was never issued.

JUSTICE BREYER: Correct. So we did -- they didn't recall it. So, of course, 41(b) does not have to do with recalls. 41(b) has to do with issuances, and 41(b) says the court may shorten or extend the time for issuing. Now, why wouldn't that be the obvious rule to apply to what occurred here?

MS. SMITH: Your Honor, that is not -- not the rule applicable here because that rule applies in a different context. That applies at an earlier stage of the post-judgment proceeding.

JUSTICE SOUTER: Where does it say earlier?

MS. SMITH: Rule 41(b) specifically deals with the 7-day period of -- of time for issuance following the expiration of the time for a petition for rehearing or the disposition of that petition for rehearing.

JUSTICE SOUTER: And the court can -- can extend it or -- or in fact truncate it, can't it?

MS. SMITH: It can, Your Honor, at that point.

JUSTICE SOUTER: What -- what if the court then -- I'm -- let me just get to -- and I think this is consistent with Justice Breyer's question. What if the court, at the -- at the point cert was denied and rehearing was denied, simply said, I -- we're now operating under (b) and we're extending the time?

MS. SMITH: Because the more specific provision -- what the court had actually done was to stay the mandate pending a petition for writ of certiorari. The -- the --

JUSTICE SOUTER: Oh. That's -- that's what it did, but what if the court had -- had been more articulate about what -- what it -- it was doing or may have been doing and -- and simply said -- at the moment at which the -- the rehearing period expired for cert, said, all right, we're still not issuing the mandate and we're operating under subsection (b), we're extending the time. Would -- is -- is there anything in the rule that, at least in

terms, would have precluded the court from doing that if it had said that?

MS. SMITH: I think that simply a plain reading of the rule and looking at the rule as a whole would preclude that result. And the reason is that the -- the specific language that -- that Your Honor is referring to speaks in terms of shortening or extending the time, the time being the 7-day period for issuance. That 7-day period is simply a period to allow the clerk a window of time to get the mandate out after the rehearing period has expired or after the rehearing has been disposed of. But it does not give the court carte blanche to simply withhold the mandate.

JUSTICE KENNEDY: Well, there are -- are they any --

JUSTICE SCALIA: Well, you -- you would make the same argument to that that -- that you were making earlier, I assume, that to read it that way would -- would be to nullify Calderon.

MS. SMITH: That -- that's exactly right, Your Honor.

JUSTICE KENNEDY: Well, are there any circumstances in which the court can -- and let's again, as Justice Souter said, say that it put it on the record what it was going to do, that we hereby, after the Supreme

Court has ruled in the case, will withhold -- order that the mandate shall be withheld for a period of 30 days because there is a -- a new case coming out on a different issue that may affect our -- our holdings?

MS. SMITH: The court --

JUSTICE KENNEDY: Or that a new case has been -- has been released and we think that bears on -- on the outcome.

MS. SMITH: After the --

JUSTICE KENNEDY: And we want to consider that.

MS. SMITH: After the denial of cert, Your Honor?

JUSTICE KENNEDY: Yes, or after disposition by this Court on it --

MS. SMITH: The --

JUSTICE KENNEDY: -- when cert is granted.

MS. SMITH: The rule does not allow for that withholding of the mandate.

JUSTICE KENNEDY: No -- so no circumstances can the issuance of the mandate be extended after this Court has denied the petition for writ of certiorari?

MS. SMITH: If the --

JUSTICE KENNEDY: Under no circumstances?

MS. SMITH: If the mandate has been stayed pending the petition for writ of certiorari and that

petition has been denied, the rule requires the immediate issuance. Now, there -- there may be and -- and --

JUSTICE GINSBURG: But -- but you accepted the petition for rehearing in this Court would also count, although the rule doesn't say that.

MS. SMITH: I'm sorry, Your Honor?

JUSTICE GINSBURG: The rule speaks about the mandate should issue when cert is denied, but in this case, there was a further extension while this Court was considering a petition for rehearing. Do you say that that was also outside the rules so that the mandate would have to issue when cert is denied even if there is a petition for rehearing and a request to continue the stay during the pendency of that rehearing petition?

MS. SMITH: Yes, Your Honor. The mandate should have issued --

JUSTICE GINSBURG: So you say that that was wrong in this case too.

MS. SMITH: That was in excess of the court's authority under the rules.

JUSTICE BREYER: So -- so your view --

JUSTICE KENNEDY: I just want to get -- if I may just get -- you say there are no circumstances in which -- where (d) is otherwise applicable, the mandate can -- can be -- the issuance of the mandate can be extended.

MS. SMITH: In our view the rule does not allow any other circumstances. Rule 41 does not allow any other circumstances. If that authority --

JUSTICE GINSBURG: Did the prosecutor -- did the prosecutor object when there was a further extension given for the pendency of the petition for rehearing?

MS. SMITH: The State did not object to the -- to the extension, Your Honor, because the -- the mandate was of no consequence to the State in terms of the State's actual -- a State court proceedings. The State did not need the mandate to go forward with its proceedings, and in fact, the State was not authorized under State law to even seek an -- an execution date until the time had expired for rehearing. So --

JUSTICE SCALIA: I -- I guess I'm -- I'm not clear about the facts here. Did -- did the court -- did the court comply with (b)? Did it shorten or extend the time? Was there any issuance of a -- of a -- of an order shortening or extending the time, or did the court just ignore the deadline and -- and act later?

MS. SMITH: The court simply ignored the -- the -- the process of -- of the case -- the extension ability in subsection (b) was never invoked by the court. There was a timely petition for rehearing filed, which automatically stayed the mandate under subsection (d)(1).

JUSTICE SCALIA: So there -- there is nothing from the court that -- that says we -- we shorten or extend the time.

MS. SMITH: That's absolutely correct, Your Honor. The court never invoked subsection (b) as authority for exaction. After -- when the petition for -- for rehearing was denied, the 7-day period in subsection (b) then came into play. The petitioner, or the -- the petitioner below, Mr. Thompson, filed a motion to withhold the matter, stay the mandate pending a petition for writ of certiorari, and that was --

JUSTICE BREYER: Is that --

JUSTICE SCALIA: Then I guess that the -- that the conclusion would be, if you read 41(b), that if the court has not shortened the time, the court's mandate must issue 7 calendar days after.

MS. SMITH: That is our reading of the rule, yes, sir.

JUSTICE BREYER: But isn't that the reading of circuit?

JUSTICE STEVENS: Does that reading of the rule require that a decision to extend the time be set forth in any particular form of order or any written document?

MS. SMITH: It's our -- it's our reading of the rule that -- that the language employed in subsection (b)

implies some affirmative action of -- of the court.

JUSTICE STEVENS: Maybe they internally did affirmatively decide to extend the time, but they just didn't enter an order. Would that count?

MS. SMITH: I don't think so, Your Honor. A court in -- in our view --

JUSTICE STEVENS: What if they called counsel and said, we've decided to delay extending the time? Would that -- but we're -- we're going to extend the time, but we're not going to bother to enter an order. Would that constitute an extension?

MS. SMITH: I don't think that would constitute an extension. I think the language in subsection (b) requires some --

JUSTICE STEVENS: It requires a written document --

MS. SMITH: -- some affirmative order --

JUSTICE STEVENS: -- saying for how long it's going to be extended?

MS. SMITH: Some affirmative order of the court not only saying we're going to extend the -- the time, but to give an alternative time. That -- subsection (b) does not allow for -- for an indefinite withholding of a mandate.

JUSTICE STEVENS: Well, they apparently did

decide to extend the time for whatever time it took them necessary to review the files that this particular judge became aware of during this period. They did, in fact, extend the time because they didn't issue it.

MS. SMITH: All this record shows, Your Honor, is that the mandate did not issue. So the reason for that is -- is not clear.

CHIEF JUSTICE REHNQUIST: Did the court give any explanatory reason for what it did?

MS. SMITH: No, Your Honor. There is no order in this record explaining why the mandate did not issue.

JUSTICE STEVENS: No, but the opinion of Judge Suhrheinrich -- I forget his name -- explains in great detail why he thought they needed more time before the mandate issued. I don't know why that isn't explaining why he extended the mandate.

CHIEF JUSTICE REHNQUIST: But a single judge doesn't have the authority, does he?

MS. SMITH: Your Honor, I believe that a single judge would have the authority to extend the mandate, but a single judge would not have the authority to grant rehearing because that would be a determination of -- of the case.

JUSTICE GINSBURG: Ms. Smith, this -- unlike the Calderon, which is a -- was a -- a court has authority to

recall a mandate that has already issued, this seemed to be a really idiosyncratic case. I mean, this was an extraordinary situation where a judge said, my goodness, I wrote an opinion that assumed this person was mentally okay, and now I discovered in the file things I never saw before. This is a death case. I have reason to suspect that this person may not have been competent when he committed the crime, may not have been competent when he -- when he stood trial, may not be competent at this very moment.

A judge in that situation -- he finds something that looks like it's the -- it's -- it's the key piece of evidence in favor of the defendant. Somehow it never got submitted. A judge, knowing that he has written an opinion saying this man, as far as the Federal courts are concerned, goes to the State and they can set their date of execution and all that -- that was an -- this case is so idiosyncratic that I'm concerned about dealing with 41(b) and mandates for this really unusual situation.

MS. SMITH: It is an unusual situation, Your Honor, but the court did more than simply write an opinion. The court entered a judgment on that opinion, and that judgment became final and became the final word of the court upon entry --

JUSTICE SCALIA: He couldn't have recalled the

opinion because of the extraordinary circumstance. My God, I made a mistake. He couldn't recall the opinion, could he?

MS. SMITH: The court always have the -- the safety valve of -- of its recall power under extraordinary circumstances. Now, in a habeas case, that extraordinary circumstance has to be more than just this -- for some reason, I overlooked this.

And -- and bear in mind as well that this evidence was in front of the court. Judge Suhrheinrich had this deposition for 21 months before that first opinion was entered and that first judgment was entered. So this was not something --

JUSTICE KENNEDY: Let -- let me ask you this. Your -- I think you say that you -- you cannot extend the period for issuance of a mandate after the Supreme Court has denied the petition. Could the court then issue the mandate and then recall it under Calderon?

MS. SMITH: That's precisely what the court should have done in this case, Your Honor, in -- in our view. The mandate was required to issue and then the court should have looked at this extraordinary circumstance, this -- this unusual circumstance, and made the determination under Calderon whether that met the standard for a miscarriage of justice under the habeas

decisions of this Court, specifically Calderon.

JUSTICE BREYER: Have you surveyed the circuits? I know this -- what -- what you describe as the practice certainly wouldn't have been in the First Circuit. Maybe in the D.C. it was, but I mean, we would have thought that we have the power over our own mandate. And of course, if it hasn't issued and some extraordinary thing comes along requiring a revision, we would have revised it.

So when you read the rules and you say that's what we argue, you're not arguing it about any court that I'm familiar with as an appeals court. So -- so have you looked up the appeals courts and found that in fact there is at least one court or two or maybe more that follow the interpretation that you're arguing for?

MS. SMITH: Your Honor, we have not done that type of -- of inventory.

JUSTICE BREYER: Well, if you have not, then my experience would be you're arguing for a rule that no appeals court follows, that -- that all think they have power over the mandate, and that the question becomes one of whether or not there was a good reason for delaying the mandate.

MS. SMITH: Your Honor --

JUSTICE BREYER: If there was a good reason, they could, and if there wasn't, maybe they couldn't.

But Justice Ginsburg has set forth what sounds to me like an excellent reason, that the judge discovered he had made an error that could mean life or death or jail or innocence, and before that opinion issues, I want to be sure it's correct.

Now -- now, that's how I'm thinking, that the general practice is contrary to what you say, that the question is a good reason, and that here there could hardly be a better one. So what is your response?

MS. SMITH: Your Honor, our response to that is -- is twofold. Number one, I don't think that -- that the Rules of -- of Appellate Procedure can be abrogated by the consensus of the circuits.

JUSTICE BREYER: And all the circuits have just been wrong in their interpretation.

MS. SMITH: If the circuits are not complying with the plain language of the rule, then -- then, yes, they have.

JUSTICE SCALIA: We don't know that all the circuits have that interpretation.

JUSTICE BREYER: I don't either.

JUSTICE SCALIA: Has Justice Breyer conducted the kind of investigation he asked you about?

(Laughter.)

CHIEF JUSTICE REHNQUIST: Well, how many cases

very similar to that -- this exists? It struck me as just procedurally bizarre.

MS. SMITH: This is an unusual case in the way that it's set out in Judge Suhrheinrich's opinion, Your Honor. But if you look at it and -- and look at it in the way that -- that it should have played out -- and the way it should have played out was that the mandate should have issued after this Court denied cert. This Court then went on after that to deny rehearing and the State moved forward. If at that point Judge Suhrheinrich looked at this deposition and believed that it established or showed an extraordinary circumstance, than a recall would -- would have occurred, and then that would have been an issue.

But if you look at the evidence itself, it simply does not rise to the level of -- of extraordinary circumstances. It does not show actual innocence of the offense. Gregory Thompson has all along admitted that he committed this offense. There was no defense of it at trial.

JUSTICE KENNEDY: Let's -- let's take the hypothetical where there is an extraordinary -- where it -- it does rise to the very high level. And then you have these facts. They just don't say anything and -- and they keep the case. If they could have issued the mandate and

then recalled it, what difference does it really make, assuming there is an extraordinary circumstance? I know you deny that.

MS. SMITH: Assuming there is an extraordinary circumstance, I think to prevent the result of having to issue and then immediately recall, I think the court in that circumstance, assuming there was actually an extraordinary circumstance, actual innocence of the offense or actual innocence of the death penalty, which we don't think was shown in this case -- what the court could do in our view is to invoke its authority under rule 2 to suspend the rules for good cause. And in that circumstance, given the finality of the judgment, the good cause must rise to the level of a miscarriage of justice under Calderon.

JUSTICE SCALIA: Well, it wouldn't have to suspend the rules for good cause since it has authority to extend the time for issuing the mandate. It can comply with 41(b). So I think the most you can say is that the court, when it's faced with extraordinary circumstances of -- of the sort that could overcome Calderon, should issue and order extending the mandate because, and explaining why, because there's this evidence which, if true, would, you know, produce a miscarriage of justice in this case.

MS. SMITH: I think that's one interpretation of

the rule, Your Honor. We read that -- the rule a little bit stricter than that, and we limit that extension in our reading to the 7-day period after the expiration of the time to seek rehearing or the denial. But I think that that is a -- that is a reading --

JUSTICE SCALIA: Tell me again. How do you -- you read the rule to say?

MS. SMITH: We read the rule (b), the extension period --

JUSTICE SCALIA: Yes.

MS. SMITH: -- to be limited to the 7-day period after the expiration of the time to seek rehearing or the disposition of the petition for rehearing en banc or by panel or the disposition of a motion to stay the mandate. We limit that to -- that interpretation to a different phase of the proceeding.

JUSTICE O'CONNOR: Well, it doesn't expressly say that in that last sentence.

MS. SMITH: It -- it doesn't, Your Honor.

JUSTICE O'CONNOR: Are you going to address the seriousness with which this evidence should be viewed? Because it is disturbing. It certainly would go to whether a death penalty should be given.

MS. SMITH: I would like to address that, Your Honor, because I think that -- that the seriousness of

this evidence has been vastly overstated in the concurring opinion of the Sixth Circuit.

The evidence itself was -- was quite simply a deposition of a clinical psychologist who opined based on her -- some additional -- some additional meetings with family members and a review of the transcripts and other evidence that the petitioner suffered from a mental illness at the time of the offense.

JUSTICE STEVENS: Didn't she interview the -- the petitioner herself? Did she not interview the -- the defendant himself?

MS. SMITH: She did.

JUSTICE STEVENS: Yes.

MS. SMITH: She conducted some -- some --

JUSTICE GINSBURG: At two different points in time, wasn't it?

MS. SMITH: Yes, she did, Your Honor, but her ultimate opinion was couched in the language of Tennessee's statutory mitigating circumstance, that -- that Mr. Thompson at the time of the offense suffered from a mental illness or defect that -- that impaired his ability to -- to conform his conduct to the requirements of the law, but that was not sufficient to meet the legal definition of insanity. That is the -- that is the -- exactly the language under Tennessee's mitigator that --

that Dr. Sultan's opinion was specifically limited to.

JUSTICE STEVENS: Do you disagree with the factual point that I think one of the opinions made, that this study was not, in fact, known to exist by the members of the court of appeals panel who decided the merits of the case before the petition for cert was filed?

MS. SMITH: Your Honor, there is a disagreement in the opinion itself that --

JUSTICE STEVENS: As to how serious it was. I understand. But do you -- do you disagree with what I understood to be a representation of Judge Suhrheinrich that he did not know about this study, did not know -- it had not gotten into the record, and neither did anybody else on the panel, even though, it seems to me, sort of strange that nobody did know it? I have to confess that. But do you dispute the factual predicate or the fact that -- that they did not know that this study was available?

MS. SMITH: Judge Suhrheinrich represented that he was unaware of the deposition, and I have no way to dispute that except to say -- I have no way to dispute his own personal representation. But Judge Moore pointed out in the majority opinion that the deposition was, in fact, before the court and had been presented for -- 21 months earlier than the initial opinion was entered.

JUSTICE GINSBURG: How would it have been

presented? Because it wasn't -- it wasn't even in the record in the district court. I mean, that was what Suhrheinrich was so bewildered about, that here was what seemed to be the strongest evidence for the defendant, and at the end of the proceeding in the district court, it's not even made formally a part of the record. It was a deposition. Right?

MS. SMITH: It was a deposition. It was attached to a motion to hold the appeal in abeyance pending the disposition of a rule 60 motion in the district court. That's how it came before the -- before the court of appeals.

JUSTICE GINSBURG: So it wasn't -- it wasn't in the district court record. It wasn't in the record that went from the district court to the court of appeals. It wasn't in the record on appeal.

MS. SMITH: It was -- it was before the court by way of that motion. It was not properly in the record. But then again, it was not any more proper to consider after its opinion than it was to consider before it --

JUSTICE KENNEDY: Was -- was it before the --

JUSTICE SOUTER: But wasn't the --

JUSTICE KENNEDY: -- court of appeals in the petition for rehearing after the court of appeals made its decision?

MS. SMITH: It was quoted in the petition for rehearing.

JUSTICE KENNEDY: So -- so it was referenced in the petition for rehearing.

MS. SMITH: It was directly quoted. The ultimate opinion, with regard to the mitigator, was directly quoted.

But the -- the point that I was making earlier, this deposition in no way renders the -- the defendant ineligible for the death penalty because it does not undermine any of the three aggravating circumstances. It does not even make a prima facie showing of insanity under Tennessee law, as I've stated earlier. It simply tracked the mitigating circumstance under the statute, and as this court held in Sawyer v. Whitley, simply additional mitigating circumstances does not rise to the level of innocence of the death penalty. So it neither -- it demonstrates neither innocence of the -- the offense or of the death penalty. And even more so than that, it would not have even defeated --

JUSTICE O'CONNOR: You -- you think it could not have been considered in mitigation in the decision whether to give a death sentence?

MS. SMITH: Your Honor, I think it would have been one element of -- that -- that may have been

considered. But in terms of the extraordinary circumstance, innocent of the death penalty or innocence of the offense, it would not rise to that level.

JUSTICE SCALIA: Calderon requires not just that it might have been additional mitigation, but that the defendant would have been ineligible for the death penalty.

MS. SMITH: That's -- that's exactly right, Your Honor.

JUSTICE SCALIA: That's how I read the case.

MS. SMITH: In Sawyer v. Whitley, this Court specifically said that and rejected the -- the contention that additional mitigation -- mitigating evidence would render a defendant ineligible of the death penalty. So this does not satisfy the actual innocence extraordinary circumstances. Nor would it have --

JUSTICE SOUTER: Well, that -- that may be but the -- the fact that this sort of evidence would ultimately be kept out from the court of appeals and ultimately from the district court may be a very good reason for us not to adopt your analysis that what happened here is the equivalent of a mandate issuing and a mandate being recalled. It may be a very good reason to prefer a different analysis.

MS. SMITH: Your Honor, we -- we -- it would be

mere speculation to -- for -- for this Court or any court to -- to conclude why this evidence was not presented to the district court. There are any number of reasons.

JUSTICE SOUTER: We -- we don't have to conclude why it was not presented. All we have to be concerned with or what, I think, we have to be concerned with is this. Is this very important evidence? The answer is yes. It may not go to eligibility, but it's very significant.

Number two, if we accept your Calderon analysis, this evidence will be kept out forever. If it's that important, that may be a good reason not to accept your Calderon analysis and say if the mandate hasn't issued, it hasn't issued.

MS. SMITH: Your Honor --

JUSTICE SOUTER: That's -- that's my point and -- and you may want to respond to that.

MS. SMITH: Your Honor, my response to that is it is not that important, and when I say that, it is not that important because it would not even have defeated summary judgment. The --

JUSTICE SCALIA: I -- I presume your -- your answer would also be that if it's a good reason for -- for not issuing the mandate, as you're supposed to, it would equivalently be a good reason to recall the mandate. We

-- we crossed that bridge in Calderon.

MS. SMITH: That is precisely the argument that we are making, Your Honor.

JUSTICE SOUTER: And I take it you also recognize that the bridge that we did not cross in Calderon was -- was in answering the question whether -- in a case in which a court does not issue the mandate, we are going to construe the court's authority, its -- its discretion narrowly or broadly. And that is the issue before us here, isn't it?

MS. SMITH: It is, Your Honor. The issue here is -- is whether Calderon extends to this situation. We think it does.

JUSTICE GINSBURG: What you're saying is -- essentially is we should regard this as though what wasn't done had been done because it was supposed to have been done. In other words, you're saying treat this just as if the mandate issued and was being recalled. That's what I get to be the gist of your argument.

MS. SMITH: That is what we're saying, Your Honor, because the effect on the State of Tennessee is precisely the same. The finality is the same. The judgment was -- was entered and final at the point that the court entered it the first time in January of 2003.

JUSTICE STEVENS: But let me ask you this. Why

should not the proper standard of being -- deciding -- the court of appeals panel has decided a case. They -- they learn something that would have caused them to come to a different conclusion had they not -- had they known it in time. Should not that be a sufficient reason to extend the 7-day period?

MS. SMITH: I do not think that that would be a sufficient reason, Your Honor, because --

JUSTICE STEVENS: Why not?

MS. SMITH: -- the extension period --

JUSTICE STEVENS: Why does it have to be miscarriage of justice? They just say we goofed for an inexcusable reason. We now realize there's something very important we failed to -- failed to find out. We now know it, and we would decide the case differently had we known it a week ago. Is that not a sufficient reason to say let's postpone the 7 days?

MS. SMITH: If the court felt -- the 7-day period is not to allow the court to rehear the case. If the court wishes to invoke --

JUSTICE STEVENS: I understand that.

MS. SMITH: -- a rehearing --

JUSTICE STEVENS: I'm just asking whether if you were on the -- on the court of appeals, wouldn't you think that would be a sufficient reason to say, hey, don't issue

the mandate? Hold it for a week so we can look at this. You don't think that would be permissible for an appellate judge to do that?

MS. SMITH: That would not be permissible. That is not the purpose of the extension. It is not to allow a court to continue to mull over a case once a final judgment has been entered. The mandate is not the judgment. The judgment is the decision of the court, and once the -- the court has affirmed that judgment, the judgment dismissing, denying habeas relief, the State's interests become paramount. Particularly at the point when this Court has denied cert, all avenues of review have been exhausted, the State at that point ought to be able to rely on the finality and ought to be able to rely on a court to comply with the plain language of the rules that governed it.

If any -- if any body should be -- should be bound by the rules, it should be a court, and they should not be able to be abrogated by some consensus or just the fact that courts don't ordinarily follow them or -- or may or may not think that -- that it's appropriate under a particular circumstance.

Mr. Chief Justice, may I reserve the remainder of my time?

CHIEF JUSTICE REHNQUIST: Very well, Ms. Smith.

Mr. Shors.

ORAL ARGUMENT OF MATTHEW SHORS

ON BEHALF OF THE RESPONDENT

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

Before it relinquished jurisdiction over this case, the court of appeals engaged in sua sponte reconsideration to correct a clear error in its prior decision which called into question the reliability of Mr. Thompson's death sentence. That --

CHIEF JUSTICE REHNQUIST: For how long after the judgment becomes final can a court engage in sua sponte consideration of whether to grant a rehearing?

MR. SHORS: Your Honor, if the court is acting pursuant to 41(b), which we believe can occur without a formal stay order, it -- it can do that at any time before it issues the mandate. We're unaware of circumstances in which that's extended for indefinite periods of time, and I think this case is a perfect illustration as to why. This is a --

JUSTICE SCALIA: What do you do about -- about the provision not of 41(b) but of 41(d)(2)? There had been a petition for certiorari here, which was denied.

MR. SHORS: That's correct.

JUSTICE SCALIA: Correct?

MR. SHORS: That's correct, Justice Scalia.

JUSTICE SCALIA: And -- and (d)(2)(D) says the court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. That didn't happen.

MR. SHORS: That's correct, Justice Scalia. (d)(2)(D) sets forth the endpoint of a stay entered pending a petition for certiorari in this Court. That is not the only reason a court of appeals may stay or delay issuance of its mandate. In fact, if you look at other sections of the rule, (d)(1) affirmatively sets forth a separate basis for staying issuance of the mandate if there is a petition for rehearing filed. And the mere fact that you could have competing stays in a case we think illustrates the incorrectness of the State's view that (d)(2)(D) eclipses everything else and requires issuance of the mandate under all circumstances.

The ultimate power at issue in this case is rule 41(b) which gives the court the power to shorten or extend the time for which to issue its mandate. As we've set forth in the brief, there are all kinds of reasons why a court of appeals may occasionally continue to do that beyond the denial of certiorari review by this Court.

JUSTICE SCALIA: Don't you think it has to issue an order? The State here, having received a judgment and

-- and seemingly a mandate has to issue after the judgment unless there's an order extending the time -- went ahead with proceedings to -- to set the execution, to have the -- the person examined to be sure that he was competent to be executed, going through many stages, and was it proper for this court without -- without ever issuing an order extending the time for the mandate, simply to come back -- what -- 18 months later and say, oh, by the way?

MR. SHORS: Justice Scalia, it was proper for several reasons.

First, rule 41(b) does not require a court order. Unlike other provisions of the Federal Rules of Appellate Procedure, including rule 40, it simply says, may extend or shorten the time.

If you look at the history of the rule, one of the reasons the advisory committee specifically rejected a reading of rule 41(c) that would have made the mandate effective when it should have issued is that you can never know from looking at the docket alone whether the non-issuance of the mandate was because of a clerical error or because of a judge's intervention in the case.

JUSTICE KENNEDY: You're on -- you're on the court of appeals. They're proceeding for execution. The families of the victims know. The -- the accused, the condemned man, is being -- you tell your colleagues, let's

just say nothing about this. You think that's good practice?

MR. SHORS: I don't think it's necessarily good practice, Justice Kennedy, but it is consistent with the rule. And their attack on -- on rule 41 in this case is an attack on the general authority of courts of appeals.

JUSTICE KENNEDY: It's consistent with the rule not to enter an order that you're extending the time?

MR. SHORS: Absolutely it is, Justice Kennedy, because as I noted, the rule doesn't say by order. The practice --

JUSTICE KENNEDY: That's a very strange reading of the rule.

JUSTICE GINSBURG: Do you know any precedent, any case, in which rule 41(b) has been invoked after there has been a petition for cert and petition for cert has been denied? In practice, is there any other case in the world like this? I don't know of any.

MR. SHORS: Your Honor, there are cases we've cited and rules where the question comes up, does there have to be a formal order entered. We've cited the Sparks case, the Alphin case, and the First Gibraltar case. And -- and there are some cases in which, following the denial of certiorari, courts of appeal continue to engage in reconsideration of the matter. We think that's what

happened in the Fairchild case cited in the -- in the red brief, and to a lesser extent, it's what happened in the Muntaqim case coming out of the Second Circuit. And the reason is --

JUSTICE SOUTER: Were -- were those cases in which they issued an order saying what they were doing? I.e., we extend under (b)?

MR. SHORS: Justice Souter, in the Sparks case, as well as in the Rivera case, no, there was no such order. And what the Sparks court said, reading rule (b) correctly we believe, is there's no provision in rule 41(b) that requires a formal order. That's what's set forth in (d) in response to motions. And the reason is a case is not final until the court of appeals issues its mandate. And so the burden is on the litigant --

JUSTICE GINSBURG: Is that -- is that really true? Is -- you have a judgment, and it doesn't have preclusive effect from the time it issues? It -- it's just sort of suspended there with no effect until the mandate issues?

MR. SHORS: Justice Ginsburg, it has some effects, but the -- the critical point for this case is the power to reconsider is not eclipsed until the mandate issues. That's what this Court held in Forman v. United States, and we think it's what the advisory committee

notes of rule 35 and 40 indicate.

CHIEF JUSTICE REHNQUIST: Shouldn't the State at least be notified of the pendency of this sort of thing?

MR. SHORS: Mr. Chief Justice, the -- the State was effectively notified when the mandate did not issue.

CHIEF JUSTICE REHNQUIST: Well, now, that -- that really doesn't add up.

MR. SHORS: Well, Mr. Chief Justice --

CHIEF JUSTICE REHNQUIST: That might be a clerical error all by itself.

MR. SHORS: It -- it could be a clerical error, Mr. Chief Justice, and we -- we think that's exactly why the advisory committee note -- notes indicate that an attorney who believes that a mandate should have issued should confirm that he or she has secured a final judgment before assuming that the court of appeals jurisdiction over a case is completed. That didn't happen in this case.

CHIEF JUSTICE REHNQUIST: But there was no doubt that there was a final judgment here in the death sentence.

MR. SHORS: For -- for purposes of appeal, that -- that would be true, but in -- in this case, as we think the advisory committee notes made clear, the -- the burden is on the party, seeking to secure a final judgment, to

confirm that a mandate has issued. In fact, in --

JUSTICE O'CONNOR: But it's so remarkable, isn't it, that the court did not notify the State and -- and the defendant about what it was considering? It didn't enable them to address the issues by briefs, memos, or argument. I mean, this -- this -- it's just an amazing sequence, don't you think?

MR. SHORS: Justice O'Connor --

JUSTICE O'CONNOR: And how -- how could they possibly do the best job they could on the opinion without letting the parties know what they were trying to do and to address the issue?

MR. SHORS: Justice O'Connor, the -- the panel did get the decision right in the second case, and it did so in response to a thorough review of the entire record. Courts of appeal frequently engage in reconsideration without requiring additional briefing and --

CHIEF JUSTICE REHNQUIST: This was -- this was how long after cert had been denied?

MR. SHORS: Cert was denied on December 1st and the second opinion was June 23rd. So it was a period of about 6 and a half months. It's less than that if you consider that there was a second petition to stay the mandate filed and granted, which didn't expire until January 23rd when the court of appeals received word that

this Court had also denied a petition for rehearing.

We think that in any case the burden is on a litigant seeking to secure a final judgment and to ensure that the court of appeals jurisdiction over a case has ended.

JUSTICE BREYER: But that's why I'm quite curious, but I only have experience in one circuit. And -- and I have an impression, but I need to know what is the general practice. I would have thought -- but this is highly impressionistic -- that probably the mandates didn't always issue within 7 days, that it wasn't totally uncommon to have them 10 days or 12, and it was fairly informal. Certainly there were no notice, but maybe other circuits do it differently. It's an area that's obscure to me, and I'd like to know how do people actually handle it. Is it something that is generally within the -- up to the individual court of appeals to provide notice or not or whatever as it wishes? Is it that some delays, 6 months, might be really much too late? Is it -- how does it work in the circuits?

MR. SHORS: Justice Breyer, our understanding is that the Fourth, Fifth, and Sixth Circuits, including the decision below, have all come to the conclusion that the ultimate decision of when to issue the mandate lies within the broad discretion of the court of appeals.

JUSTICE BREYER: And they don't normally give notice or -- or something like that? They say, it will be here in 7 days, but we'll tell you we've delayed it. They just do it.

MR. SHORS: That's correct, Justice Breyer.

JUSTICE BREYER: I think they might have handled it that way, but I don't know if that's the right way.

MR. SHORS: That -- that occasionally happens, and -- and there are some cases clearly where there is a formal stay order in place if the court is acting pursuant to (d), which we --

JUSTICE SCALIA: They -- they just do it even when they're delaying it for 18 months in order to reconsider the case? I can understand they're just doing it when -- you know, for clerical or other reasons, it -- it comes out in 10 days or even 2 weeks instead of -- if that's what you're talking about, that I can understand. But here we're talking about a decision for a lengthy delay in order that the court may reconsider the case. I would be astonished if it were regular practice for a court to do something like that without notifying the parties.

MR. SHORS: Justice Scalia, it -- we're not -- it's not regular practice. It does happen, and the reason it happens, as we've set forth in the brief, have nothing

to do with this Court's decision to deny review. There are instances, which Justice Kennedy pointed out, in which following the denial of certiorari review, a court of appeals recognizes the clear error of its prior decision. The question in this case is does it have to send out that decision even though it realizes it's in clear error.

And the other reason it sometimes happens over a period of time is that reconsideration, much like the initial decision-making process, is a fluid process. Rules 35 and 40 give the court sua sponte the power to engage in reconsideration, and that's exactly the power the court exercised in this case.

There are particular reasons in this case, as the panel noted, that there was no unfair surprise to the State in this case, Justice O'Connor. First, the State took Dr. Sultan's deposition in July of 1999. The briefing on that subject was -- was a matter of days following that deposition, and as the panel correctly noted, there was no unfair surprise to the State. The critical, factual issue in this case was as the result of egregious attorney malfeasance not included in the district court record.

In addition, the court of appeals --

CHIEF JUSTICE REHNQUIST: Well, to say there's no surprise to the State, that may be the State probably

knew as much as the defendant about what was in the record, but certainly it was a surprise to the State to know that the court of appeals, after cert was denied, was pondering all this for that long a time.

MR. SHORS: Mr. Chief Justice, I don't believe that was unfair surprise. The court of appeals called for the record back from the district court after it had otherwise finished with the case and while cert was pending. That was reflected in the docket sheet, and we've cited that in the joint appendix at page 8. There was --

CHIEF JUSTICE REHNQUIST: So the counsel should go to the -- see the docket sheet regularly to see whether the court of appeals might be doing something?

MR. SHORS: Mr. Chief Justice, at a minimum, an attorney seeking to secure a final judgment should check the docket sheet to ensure that a mandate has issued in accordance with when the practitioner believes the mandate should have issued. That's exactly what the advisory committee --

CHIEF JUSTICE REHNQUIST: And you say the State should have known what the court of appeals -- before cert was ever considered because it was on a docket sheet. But the case was over, so far as the parties were concerned, in the court of appeals and in the district court.

MR. SHORS: Mr. Chief Justice, I don't believe so. It's not that one reason. It's a combination of reasons. If you consider the fact that the State was aware it had benefited from a clear factual error with the fact that the docket was returned to the court of appeals reflected on the docket sheet, with the fact that the State itself initiated collateral litigation in the fall of 2003 to preclude the Federal Public Defenders Office from representing Mr. Thompson in the State court competency proceedings. And even their brief, the Wolfel case that they cite says that alone might be a reason a court of appeals might want to hold onto its mandate because it was an issue that was immediately relevant on -- on remand in the State court proceedings.

JUSTICE SCALIA: What I don't understand is how your argument fits in with -- with the rule that you can't recall the mandate. I mean, you have the same horrific situation. My God, we made a mistake. And we've held you can't recall the mandate unless these very high standards are met. Now, are we going to hang on that technical distinction between not issuing the mandate forever and ever and recalling the mandate?

The court -- a court has inherent power to recall a mandate, but we said you will not do it unless these very serious obstacles are -- are eliminated. And

it seems to me, just as a court does have power to extend the time for issuance of the mandate, it makes sense to say the same thing. You shouldn't do it unless these very serious obstacles are eliminated.

MR. SHORS: Justice Scalia, I don't believe it's a technical difference. This Court has always drawn a sharp distinction between a court's ability to grab back a case from another court after that case has passed beyond its authority to -- as opposed to reconsidering it before ever relinquishing jurisdiction over a case.

JUSTICE SCALIA: Yes, but they did grab it back from us. I mean, if what you say is true, we should deny cert in all cases where the mandate hasn't issued or where the only stay for the mandate is pending disposition of -- of cert. We should -- we should put that in our rules. They did snatch it back from us, didn't they? What if we had granted cert?

MR. SHORS: Justice Scalia, I don't think that even the State's view would affect this Court's doctrine about what happens to the mandate if the Court grants cert because they're only talking here about cases in which cert is denied.

The denial of cert is not a final decision on the merits, and there are reasons, as we've cited in the brief, for reconsideration sometimes continued after that.

JUSTICE SCALIA: What if we had granted cert? You -- you say they then could not -- what -- what would happen then?

MR. SHORS: I think it would depend on whether the mandate was stayed by the court of appeals. If -- if -- I think it's pretty --

JUSTICE SCALIA: It wasn't stayed. It just wasn't issued.

MR. SHORS: If the mandate hadn't been issued, then I think no matter how the Court decides this case, that depending on the circumstances, the court of appeals might be able to alert this Court to a -- a change in the facts that might lead this Court to dismiss the petition as improvidently granted. These are not things that happen all the time. They are things that sometimes happened.

And I did want to get back to the final reason I think that the State was not the victim of unfair surprise in this case, and that is there was a Federal court stay of execution in this case. The State was perfectly well aware of the importance of securing a final judgment in the court of appeals before returning to State court. And as this Court held in Calderon, this Court rejected the State's view that a Federal habeas appeal is final when cert is denied. That was the view of the State of

California in that case.

This Court instead specifically tied the State's interest in finality to issuance of the appellate court mandate. That's consistent with the unbroken history, we think, of drawing a sharp distinction between the moment at which the court of appeals relinquishes jurisdiction over a case and permitting the court to correct errors before then.

In fact, this Court also in Calderon specifically noted that it was not a case where the mandate had been stayed pursuant to a (d)(1) motion. There is no reason to distinguish a case involving the non-issuance of a mandate under rule 41(b) from a case involving a stay of the mandate under rule (d)(1). Those are both circumstances in which the court of appeals still has the case, and if the court of appeals still has the case and recognizes a clear error in its prior decision or wishes to apply a new precedent to its decision or discovers that new evidence bears on a question, it has wide discretion to reconsider that judgment before relinquishing jurisdiction over the case.

CHIEF JUSTICE REHNQUIST: What if the court of appeals were talking about a point of law and the court of appeals issued an opinion saying we agree with three circuits and disagree with four others? The losing party

brings it here and we deny certiorari. It goes back. And then one of the judges on the panel says, gee, I think we should have gone with the other circuits. Can they do that at that point?

MR. SHORS: Mr. Chief Justice, we're not saying that this power is plenary. It is an abuse of discretion standard. There would have to be a reason for doing so. If the court sua sponte decided it had reached the wrong result and wished to reconsider it, I don't think there's anything in rule 41(b) that would forbid it.

That does occasionally happen in en banc cases, and those are salutary appellate practices. If, for an example, there's a national security case or some other case and the court of appeals resolves it and denies an en banc petition without prejudice, thinking that it's an important enough case that it should come immediately to this Court, there's absolutely nothing wrong with the court of appeals reconsidering en banc the decision if this Court denies review. Those are the kinds of circumstances that -- that happen that are good appellate practices --

CHIEF JUSTICE REHNQUIST: But that's an intervening circumstance. It's not a single judge changing his mind.

MR. SHORS: That's true, Mr. Chief Justice, but

-- but we think that the fact that this is a single judge changing his mind is exactly why there is no abuse and why this isn't a case like Calderon where the full court stepped in 2 days before the execution. This is a case where the same three judges who denied all habeas relief and denied rehearing came back later and said, you know what? We made a serious mistake. Mr. Thompson deserves an evidentiary hearing to test the reliability of his death sentence. Those are not circumstances unlike recall of the mandate by a full court of appeals --

JUSTICE KENNEDY: Well, we might address the -- the issue of whether this is that extraordinary. Number one, the court of appeals did have reference to this deposition in the petition for rehearing that was filed with it. Number two, the -- the testimony of -- of the psychiatrist bears on the issue but the -- there was a hearing on that point and another psychiatrist disagreed.

MR. SHORS: Justice Kennedy, I don't think that's a reason that it is an abuse of discretion to fix that error. The State makes a -- a lot of an issue in their reply brief of a fact that the court of appeals should have gotten this right the first time. That is exactly why we have reconsideration. That is a quintessential illustration of why reconsideration is a

good idea. The court should have gotten something right the first time, didn't, recognizes its error, and while it still has jurisdiction over the case, fixes that error. I think far from showing it's an abuse of discretion

JUSTICE KENNEDY: Well, but let's -- let's assume for the moment -- you may disagree. Let's assume for the moment that the Calderon standard applies. There has to be an extraordinary showing. And the State has made an argument here that this isn't that extraordinary. We see these cases all the time.

MR. SHORS: Justice Kennedy, I think that the Calderon standard should not be applied for several reasons. First, that this is a -- a challenge to a rule of general application, rule 41. There is no explanation in the State's brief, and indeed their amicus concedes that -- that our reading of rule 41(b) is consistent with AEDPA. It is basically -- reconsideration is permitted by Federal law, and the only question is whether the State's interest in finality becomes somehow more significant the moment this Court denies certiorari.

JUSTICE SCALIA: So is recall permitted. I mean, courts have inherent right to recall too. I mean, the same --

MR. SHORS: Justice Scalia, that's --

JUSTICE SCALIA: -- the same situation existed

in -- in Calderon.

MR. SHORS: Justice Scalia, I think it's a little different only because in Calderon it was only an inherent power question, and this Court read the exercise of that inherent power in light of AEDPA. This case involves a rule of general application that authorizes a practice. And the -- the proper standard of review for -- for that practice is the abuse of discretion standard.

JUSTICE SCALIA: Why wouldn't -- but why wouldn't that be read in light of AEDPA as well? I mean, whether it's a common law rule or a rule that -- that's written down, why equally shouldn't they be read in light of AEDPA?

MR. SHORS: The abuse of discretion standard absolutely would vary depending on the facts and circumstances of a case. And if it appeared that a particular exercise of rule 41(b) power was contrary to AEDPA, it would surely be an abuse of the court's discretion.

JUSTICE STEVENS: Of course, isn't it also true that in Calderon the Court didn't merely hold that it was an abuse of discretion, they held it was a grave abuse of discretion, but even -- even more serious in that case?

MR. SHORS: Absolutely, Justice Stevens, and -- and the Court's opinion suggests that even if it hadn't

applied the miscarriage of justice standard, it would have had grave doubts about the exercise of that power precisely because it involved the extraordinary circumstance of reaching out and taking the case back from the State court system.

The -- the fact that the Federal stay of execution was in place I think is especially important to -- in addressing the State's argument, that there was nothing preventing the State from going back and --

JUSTICE KENNEDY: Well, of course, this court -- this -- in this case the State court thought it was in the system. It -- it set an execution date.

MR. SHORS: Justice Kennedy, it did set an execution date but it was not informed either that the mandate hadn't issued or that there was a Federal court stay in place. In a decision in which both of those two facts were brought to its attention, the Alley case, which we cite in the red brief, the Tennessee Supreme Court refused to set an execution date, ruling that it was premature. And that's consistent with 28 U.S.C., section 2251, which says that if there's a Federal court stay of execution in place, any execution date set by the State court is null and void.

CHIEF JUSTICE REHNQUIST: What was the -- what court had granted the stay?

MR. SHORS: The district court on February 17th of 2000 had -- had granted the stay.

CHIEF JUSTICE REHNQUIST: And it remained in effect all that time?

MR. SHORS: It remained in effect. The -- the Fifth Circuit has come to that conclusion that -- that if -- unless the court of appeals takes a contrary action or this Court takes a contrary action vacating the stay, that stay remains in place until the case is out of the Federal court system.

Because this case never became final, as the advisory committee notes made clear -- and we think that the cases that we've cited in the brief are largely undisputed on this point -- a court of appeals decision is not final until it issues its mandate. Even the State in the blue brief concedes that's true. And so the question in this case really is, if you still have jurisdiction over a case, under what circumstances can you correct an error?

And I think the miscarriage of justice standard is just way too harsh of a test under the circumstances because this case is a perfect illustration. There are overwhelmingly persuasive reasons for the court of appeals to have fixed its mistake in this case.

JUSTICE SCALIA: Well, we don't -- we don't have

to be that harsh. We can -- I don't think that's the question. I think the question is under what circumstances can you correct the error without having formally acted to extend the time for issuance of the mandate. I think one can draw a distinction between the court just sitting there and doing nothing for a year and a half and -- and then, you know, during which it's reconsidering the case without notice to anybody, and a situation in which a court takes formal action. We're extending the time. We could have a much lower standard for the latter than -- than for the former.

MR. SHORS: Justice Scalia, that's true, but that imposes a burden under rule 41(b) that simply does not exist in the text of the rule. The rule does not say by order. Previous versions of the rule did. Other rules in the Federal Rules of Appellate Procedure do, and to graft that onto it, despite the absence of that language and an understanding that that's how courts given the ministerial function of -- of issuing mandates do their practice would be unfair.

JUSTICE SCALIA: Well, this is -- it's an abuse of discretion standard, and -- and it is certainly reasonable to apply one standard for abuse of discretion where the court has entered an order notifying all parties that it's reconsidering the case and a different standard

when it hasn't done that. I don't -- I don't think it has to be spelled out in the rule.

MR. SHORS: Well, Justice Scalia, I think that the rule does permit this practice, and if you look at the history of the rule, it makes it even more clear. The -- the advisory committee rejected a rule, akin to what the State is arguing today, that a mandate should be effective when it should have issued. And the reason they denied that rule was because you can't tell from looking at the docket whether the reason is a clerical error or the act of a judge delaying issuance in the mandate. That alone makes clear that the committee had in mind circumstances in which judges would delay issuing their mandates without issuing formal orders to that effect.

Numerous courts of appeals have come to that conclusion, and we think that's entirely consistent with the rules, in addition to the reasons I -- I stated earlier, that I think in this case particularly, there were reasons that the State was aware of the fact that the court was engaged in sua sponte reconsideration of its decision.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shors.

MR. SHORS: Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Ms. Smith.

REBUTTAL ARGUMENT OF JENNIFER L. SMITH

ON BEHALF OF THE PETITIONER

MS. SMITH: Just briefly responding to the question of the stay of execution under section 2251, there was a stay of execution extended by the district court pending the disposition of appeal -- of the appeal, but appeals are disposed of by judgments, and that judgment was entered in January of 2003. The State had a judgment which was final. The court of appeals denied rehearing both by the panel and en banc. At that point, the State, particularly after this Court denied cert, was entitled to rely on the finality of that judgment.

The State did not need the mandate in order to proceed. A mandate simply directs the district court what to do next. It was not necessary. It is not -- it is completely independent and -- and separate from the disposition of the case on the merits.

JUSTICE KENNEDY: Did -- did the stay remain in effect in the district court, in your view?

MS. SMITH: The stay of execution?

JUSTICE KENNEDY: Yes. Respondent represents that the stay of execution was entered in the district court and it stayed in effect.

MS. SMITH: The stay of --

JUSTICE KENNEDY: At what point in your view did

that stay become dissolved?

MS. SMITH: The stay of execution dissolved upon the disposition of the appeal. The stay was pending the appeal. The appeal in our view was disposed of upon the affirmance of the denial of rehearing. That judgment was final when entered. Finality was suspended only during the timely filed petition for rehearing. So once the court of appeals declined to exercise its error-correcting authority to -- to rehear a case -- rehear the case either en banc or by panel --

JUSTICE STEVENS: I know that's your position, but has any judge so ruled in this case?

MS. SMITH: Your Honor, we have cited two cases on page 13 of -- of our reply brief.

JUSTICE STEVENS: You may be right. In this case did any -- either the court of appeals or the district court terminate the stay?

MS. SMITH: No. There was no formal dissolution of the stay. In our view it dissolved as an -- by operation of law.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Smith.

The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)

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