

In the

Supreme Court of the United States

JIM ROSE, WARDEN,

Petitioner

v.

NOAH HARRISON LUNDY


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No. 80-846

Washington, D. C.

October 14, 1981

Pages 1 thru 42

ALDERSON  **REPORTING**

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

2 CHIEF JUSTICE BURGER: We will hear arguments next
3 in Rose against Lundy.

4 ORAL ARGUMENT OF JOHN C. ZIMMERMANN, ESQ.,
5 ON BEHALF OF THE PETITIONER

6 MR. ZIMMERMANN: May it please the Court, the
7 State of Tennessee seeks review in this case of a judgment
8 of the Court of Appeals from the Sixth Circuit affirming the
9 judgment of the lower court which granted a writ of habeas
10 corpus to Noah Lundy, ordering that he be released from his
11 sentence unless he was retried within 90 days.

12 Following his direct appeal in which his
13 convictions for rape and crime against nature were affirmed,
14 Mr. Lundy sought state petition for post-conviction relief,
15 and it was denied in the state court. No appeal was taken.
16 Then, later, he petitioned for Federal habeas corpus review
17 of four constitutional claims.

18 The first two claims had been presented to the
19 state courts. The second two claims had never been
20 presented to any state court.

21 In our answer, the State of Tennessee objected to
22 the review of the petition in the District Court on the
23 ground that Mr. Lundy had not exhausted all his claims in
24 available state remedies, he had not presented all his
25 claims to the state courts, and therefore, the court, in

1 accordance with the exhaustion requirement, should dismiss
2 his habeas petition until such time as the state conviction
3 and all the Federal constitutional claims which Mr. Lundy
4 sought to raise were adjudicated finally and completely in
5 the state courts.

6 QUESTION: Mr. Zimmermann, what do you make of the
7 paragraph in Judge Morton's opinion in the Joint Appendix on
8 Page 88, where he says, "Since Grounds 3 and 4 have not been
9 presented to the state court, there has been no exhaustion
10 of remedies as to those two. Thus this court will not
11 consider them in the constitutional framework. However, in
12 assessing the atmosphere of the cause taken as a whole,
13 these items may be referred to collaterally"?

14 MR. ZIMMERMANN: Your Honor, his statement there,
15 I think, presents to this Court and illustrates to this
16 Court how it is difficult for a Federal court to separate
17 the exhaustive and unexhaustive claims from habeas review,
18 which frustrates the exhaustion requirement. In this case,
19 Your Honor, he correctly noted, in accordance with our
20 contention, that Claims 3 and 4 had never been presented to
21 the state court.

22 And here he said that he would not consider them
23 in the constitutional framework. However, he later says in
24 his opinion that the four claims were -- constituted such a
25 mixture of constitutional violations that they could not be

1 separated one from another. He relied not only upon Claim
2 Number 4, which was the instruction issue, but also the
3 statement of the prosecutor set forth in Claim Number 3,
4 which had never been presented to the state courts.

5 He used those to illustrate how Mr. Lundy had been
6 denied his right to due process of law, together with the
7 first two claims. Not only did he do that, but he saw
8 numerous others, a litany, actually, of statements by the
9 prosecuting attorney that had never been presented in the
10 petition, many of which had never been presented to the
11 state courts.

12 He took this litany of remarks by the state
13 prosecutor and said, look at all these remarks. I find
14 possible misconduct, and I find because of all this, because
15 of all these remarks, he is entitled to habeas relief.

16 What we are asking this Court to do is to require
17 that in cases like this, that a state prisoner proceed first
18 all through the state courts, take all his Federal
19 constitutional claims before he goes to the Federal courts,
20 because, you see, in this case many of the constitutional
21 claims, or many of the remarks which Judge Morton, the
22 District Judge, found to be constitutionally defective, we
23 submit, have been waived under state law.

24 No objection had been made as required by state
25 evidentiary rules, procedural rules, and therefore, if the

1 whole case and all the constitutional claims had been given
2 to the state courts, our courts could have conducted
3 whatever evidentiary hearings were necessary, they could
4 have made --

5 QUESTION: You suggest they might have granted
6 relief on the claims which were not made then but are made
7 now?

8 MR. ZIMMERMANN: Precisely, Your Honor. The
9 problem here is, the claims of prosecutorial misconduct --
10 it was a different claim in the Federal court from what it
11 was in the state court. The identity of the claim, if you
12 please, of prosecutorial misconduct was twofold in the state
13 courts: Number One, whether or not this remark of Mr.
14 Lundy's violent character was constitutionally defedtive,
15 and Number Two, in the state court, Mr. Lundy alleged, that
16 the prosecutors had made disparaging remarks about his
17 lawyer.

18 Now, those were the only two acts of prosecutorial
19 misconduct presented to the state courts.

20 QUESTION: How does one go about separating out
21 separate claims of prosecutorial misconduct? What is it in
22 the Federal Constitution that forbids prosecutorial
23 misconduct?

24 MR. ZIMMERMANN: Well, it is a due process claim,
25 essentially. It could be other claims, such as a Fifth

1 Amendment violation, where a prosecutor comments upon a
2 defendant's failure to take the stand, or it could trigger
3 other constitutional rights, but under Donnelly it is a due
4 process analysis.

5 QUESTION: Do you think that a claim in the
6 Federal court, Federal habeas court, that my rights under
7 the Fourteenth Amendment to the United States Constitution
8 were violated would raise every single conceivable Federal
9 constitutional right that a person had in a criminal trial?

10 MR. ZIMMERMANN: No, Your Honor. I think the
11 teaching under Picard v. Connor is this. Give the state
12 courts fair notice of what your constitutional complaint is,
13 your Federal constitutional complaint is. Tell them what
14 your complaint is. And that claim itself can be brought
15 over to the Federal Courts, because then you have identified
16 a specific constitutional violation, not requiring, of
17 course, to cite book, chapter, and verse, but you have given
18 the courts, state courts fair notice of what your complaint
19 is.

20 Now, the lower Federal courts, for example, have
21 found such claims as ineffective assistance of counsel to
22 constitute different identity of claims, such as, there
23 might be a conflict of interest in effective assistance of
24 counsel, where a lawyer represented two defendants.

25 Yes, Your Honor?

1 QUESTION: Mr. Zimmermann, would you make the same
2 argument if the two claims that -- if there were two claims
3 presented in a petition for habeas and they were wholly
4 independent? Say one was a Fifth Amendment claim, another a
5 Sixth Amendment claim; one a compulsory incrimination claim
6 and another a denial of jury trial or something, or denial
7 of counsel, wholly independent. One of them has been
8 exhausted and the other hasn't.

9 Would you say that the Federal judge should
10 dismiss the entire case, or just say, sorry, but there is
11 one thing here that isn't exhausted, I will adjudicate the
12 other?

13 MR. ZIMMERMANN: Yes, Your Honor, he should
14 dismiss it and send it --

15 QUESTION: What, the whole thing?

16 MR. ZIMMERMANN: The prisoner -- exactly. Remand
17 the entire case back to the --

18 QUESTION: Well, what good would it do to remand
19 the claim that has already been exhausted?

20 MR. ZIMMERMANN: Well, you are remanding a case.
21 You have to understand, Your Honor, that we are submitting
22 you are looking at a case on collateral review, and many
23 claims, many constitutional claims --

24 QUESTION: I am not sure about that. I think
25 judges still look at habeas corpus petitions in terms of the

1 claims they present, and if, for example, a claim is
2 repeated that he has just ruled on, he doesn't pay any
3 attention to it.

4 MR. ZIMMERMANN: Well, what we are trying to --
5 what we are asking the Court to say is this. If he brings
6 the two claims, one is exhausted and one is not, he is
7 stillgoing to get prompt review of his Federal
8 constitutional claims, if he is asked or sent to go back to
9 the state courts, because the --

10 QUESTION: Well, he is not going to get prompt
11 Federal review on one of them that he has already had heard
12 in the state courts.

13 MR. ZIMMERMANN: Well, he is going to get prompt
14 review on the second one, and the state courts could grant
15 relief, could discharge him from custody, give him a new
16 trial.

17 But even more so, Your Honor, many times
18 constitutional claims can be deemed harmless --

19 QUESTION: Why would you dismiss it? Why don't
20 you just say he holds it?

21 MR. ZIMMERMANN: Well, I would only say dismiss it
22 because that is what the precedents of this Court say, when
23 there has been non-compliance with the exhaustion
24 requirements.

25 QUESTION: Well, we have never -- this case

1 wouldn't be here if we had ruled on your claim before.

2 MR. ZIMMERMANN: Exactly, Your Honor. Exactly.

3 But he is not prejudiced. Whether you call it dismissal or
4 whether you say we are just going to defer ruling on the
5 whole case, what we are trying to ask the Court to do is
6 say, look, in Federal courts you review a state conviction
7 one time. Bring all your Federal claims to Federal court
8 one time. Of course, there is protection --

9 QUESTION: Mr. Zimmermann, supposing as in this
10 case he asserts four claims, the judge looks at it and
11 thinks there is some substance to one or two of them, and
12 appoints counsel for the prisoner, because these pleadings
13 are drafted in a kind of crude way most of the time, and the
14 lawyer looks at them and says, well, the two exhausted
15 claims have merit, but I don't think there is any merit to
16 Claims 3 and 4, I would like leave to amend by dismissing
17 those, 3 and 4, should the judge let him do it?

18 MR. ZIMMERMANN: I think the judge ought to let
19 him do it, if what has happened --

20 QUESTION: Well, in your view, I thought he would
21 have to dismiss, because there are unexhausted claims.

22 MR. ZIMMERMANN: Well, in the Fifth Circuit, where
23 they have this rule requiring complete exhaustion, the
24 District Judges take careful -- take careful pains, extra
25 pains to make sure the prisoner knows that you might be

1 barred from subsequent habeas litigation in Federal courts.
2 If the state prisoner says, no, these are frivolous claims,
3 or no, these don't have any merit whatsoever, for one reason
4 or another, if he takes his chances with his exhausted
5 claims, he is in effect saying, this is it.

6 QUESTION: Well, nobody would be hurt much by your
7 rule. If that is the rule, he will never put an exhausted
8 claim in his first petition.

9 MR. ZIMMERMANN: That's correct. And then the
10 Federal courts would have to, if there was a second
11 petition --

12 QUESTION: Well, yes, exactly. Well, they are
13 still permitted.

14 MR. ZIMMERMANN: That's correct.

15 QUESTION: Mr. Zimmermann --

16 QUESTION: They still are permitted, separate and
17 independent --

18 QUESTION: I gather the rule that you suggest
19 Picard, perhaps, suggests, that is, that you ought not let
20 the state prisoner inside the Federal courthouse door if he
21 has Federal constitutional claims until he has tendered
22 every one of them to the state courts --

23 MR. ZIMMERMANN: That's correct.

24 QUESTION: -- first to decide. Isn't that it?

25 MR. ZIMMERMANN: That's correct, Your Honor.

1 QUESTION: That's the rule you want.

2 MR. ZIMMERMANN: That's correct, Your Honor. We
3 are not saying that the Federal door of habeas review ought
4 to be shut. Not at all. We defend the writ. We support
5 it. What we want is that the state courts have the first
6 opportunity to finally decide his criminal conviction under
7 Federal --

8 QUESTION: Well, you would say then if he presents
9 one claim to the Federal court after having exhausted it,
10 and then later comes back with a wholly separate claim,
11 which he has now exhausted, that the Federal court should
12 not entertain his second petition at all, because he should
13 have raised it in the first place.

14 MR. ZIMMERMANN: Well, that would be a different
15 situation. That would be governed by Rule 9.

16 QUESTION: That situation is covered by the
17 statement you just made. Either present them all at once or
18 that is all.

19 MR. ZIMMERMANN: A Federal District Judge could
20 find there had been abuse of the writ by successive
21 petition, or he could find --

22 QUESTION: The statutes as they presently are do
23 not require --

24 MR. ZIMMERMANN: That's correct, Your Honor.
25 That's correct.

1 QUESTION: And our cases don't support your
2 suggested rule.

3 MR. ZIMMERMANN: But here in this case --

4 QUESTION: But you are suggesting that we ought to
5 decide a case to that effect so that they can't parlay this
6 one after another.

7 MR. ZIMMERMANN: Exactly, Your Honor. What we are
8 having now is that under the present situation where the
9 Circuit Courts of Appeals have decided, the state courts in
10 particular in this case, should Lundy -- the granting of the
11 writ be reversed, what we are being called upon to do is to
12 litigate and relitigate, and a Federal judge many times
13 having to look at the same transcript not once or twice, but
14 three times, and this is particularly aggravated or made
15 acute following the decision in Jackson v. Virginia, a very
16 common -- a very common claim for relief is sufficiency of
17 evidence in the state courts, and now it is being more
18 commonly made in the Federal courts.

19 And you take a claim of ineffective assistance of
20 counsel, let's say, and a claim of sufficiency of the
21 evidence, and assuming the ineffective assistance of counsel
22 has never been raised, and the Federal judge has to look at
23 this multi-volume transcript to determine all these issues
24 of sufficiency of the evidence. Then --

25 QUESTION: Mr. Assistant Attorney General, when I

1 practiced in Maryland a few years ago, there was this very
2 simple way of handling this. Any state judge who refused to
3 entertain a writ of habeas corpus went to the penitentiary,
4 and we got along fine. No problem.

5 MR. ZIMMERMANN: Your Honor, I think Tennessee's
6 record, the state courts in Tennessee's record clearly
7 establishes that we are very receptive and attentive to
8 Federal constitutional claims. In fact, after Fay v. Noia --

9 QUESTION: Well, on the other hand, what about the
10 theory that you give each prisoner the right to file a piece
11 of paper, which says, I want out for the following reasons,
12 and put them all down, and anything that he doesn't put
13 down, they are gone. Isn't that what you are saying?

14 MR. ZIMMERMANN: No, Your Honor. It is different.

15 QUESTION: That is what I --

16 MR. ZIMMERMANN: Because that is a Rule 9
17 problem. What we are saying is, if he puts down on that
18 piece of paper five claims, and he thinks, I've got five
19 complaints about the way my trial was run, and he has
20 identified them --

21 QUESTION: Right.

22 MR. ZIMMERMANN: -- but he has only taken one to
23 the state courts, what we are saying is, go back to the
24 state --

25 QUESTION: I am talking about this paper in the

1 state court. That that is the end. You file one piece of
2 paper, and that is it --

3 MR. ZIMMERMANN: In the state.

4 QUESTION: -- so far as habeas corpus is concerned.

5 MR. ZIMMERMANN: If he files one piece of paper in
6 the state courts and takes that one --

7 QUESTION: He can't file any more. Is that your
8 position?

9 MR. ZIMMERMANN: Not in Tennessee. In Tennessee,
10 he can file petitions for post-conviction or leave --

11 QUESTION: Right.

12 MR. ZIMMERMANN: -- one after another. They have
13 no Rule 9 bar.

14 QUESTION: That is what I was wondering about.

15 QUESTION: Well, I understood your answer to me,
16 Mr. Zimmermann, to apply only to a situation where he comes
17 into the Federal court and he has, as you say, five Federal
18 claims raised, and he has exhausted only one of them, that
19 the Federal judge, even though that one had been exhausted
20 in the state court, you are suggesting the Federal judge
21 should turn him away until he goes back to the state courts
22 for the other four and gets those determined by the state.

23 MR. ZIMMERMANN: That is correct, Your Honor.

24 QUESTION: That is your position.

25 MR. ZIMMERMANN: That is our position, and the

1 reason for that is --

2 QUESTION: That doesn't prevent his coming back
3 with 6, 7, 8, and 9, if he has 6, 7, 8, and 9 later.

4 MR. ZIMMERMANN: That's correct. What we are just
5 saying is, if he knows on the front end that he has got five
6 complaints, some of which are not exhausted, send him back
7 to Federal court -- rather, send him back to the state
8 court. If a hearing is required, we will conduct a
9 hearing. The record of Tennessee speaks for itself. We
10 have reversed numerous cases on Federal constitutional
11 grounds, and our post-conviction procedure is more liberal,
12 grants more rights to a prisoner than Federal collateral
13 review, for this reason. Not only do we review Federal
14 constitutional claims, but also state constitutional claims,
15 at a time when our Supreme Court is considering some rights
16 for criminal defendants more broadly than the Federal
17 counterpart.

18 So, you see, sending him back to the state courts
19 is not taking anything away from him. It is telling him,
20 look, let the state finally review your conviction. There
21 has got to be some finality. And when a Federal court looks
22 at a criminal conviction, a state criminal proceeding, we
23 have got to know the states have looked at it all and said
24 their last word, and in this case the claim of prosecutorial
25 misconduct, I believe the record could have been more

1 certain as to which claims could have been reviewed, which
2 remarks could have been reviewed by the Federal court,
3 particularly after Wainwright v. Sykes.

4 If our court had only had the opportunity to look
5 at some of these claims, some of these remarks that Judge
6 Morton relied upon in granting habeas relief, if our state
7 courts could have looked at it, we could have either said,
8 this is bad, we are going to grant this man a new trial, or
9 if they could have said, these remarks and claims concerning
10 these remarks are barred because of procedural default, and
11 absent a showing of cause and prejudice, there would have
12 been no Federal habeas review whatsoever.

13 Not only would a rule as we espouse today cut down
14 the work load, I say, or make the haystack smaller when
15 searching for the needle of the meritorius habeas
16 petitioner, but asking the man, the prisoner to go back to
17 state courts for his Federal constitutional claims also
18 gives us the opportunity to write definitive state rulings,
19 controlling state rulings to our lower court judges because,
20 you see, decisions of Federal District Courts in Tennessee,
21 and Courts of Appeals are not binding on our state trial
22 courts. They are persuasive authority, but they are not
23 binding, but the decisions of our Tennessee Court of
24 Criminal Appeals, if they decided the constitutional claims,
25 our own state trial courts would be instructed by them, and

1 guided by their decisions.

2 So, you see, the ultimate relief, the ultimate
3 remedy to bring state trial courts and cause them to
4 correctly decide Federal constitutional claims would be --

5 QUESTION: Is review of right in your Court of
6 Criminal Appeals?

7 MR. ZIMMERMANN: Yes, Your Honor. There is an
8 appeal of right in our Tennessee Court of Criminal Appeals,
9 permissive review in the Tennessee Supreme Court.

10 QUESTION: Do your Federal judges in Tennessee
11 follow the practice recently developed that in a criminal
12 case the judge instructs counsel, both counsel that if there
13 are any pretrial motions, they will all be made by a given
14 date, and none will be entertained after that date in order
15 to avoid parlaying them and delaying the trial? Do they
16 follow that rule?

17 MR. ZIMMERMANN: Yes, Your Honor.

18 QUESTION: In principle, is what you are arguing
19 for essentially the same general kind of thing?

20 MR. ZIMMERMANN: Yes, Your Honor. Yes, Your
21 Honor. I suppose the kind of rule we are asking for is,
22 there ought to be a stage of habeas analysis before we even
23 look at the merits of each claim, and first, has he
24 exhausted all his claims, and if he has, are any of them
25 barred, and if he --

1 QUESTION: You mean, all of his claims that he
2 presents in his petition.

3 MR. ZIMMERMANN: That's correct.

4 It is up to the prisoner which claims he puts in
5 his petition, and we have no control over that. But the
6 point, the point is this, that the Federal courts, at this
7 point, anyway, are looking at each individual claim,
8 deciding these sometimes complex exhaustion questions on
9 each individual claim before they start looking at the
10 merits, and what is happening is this, and the scholars have
11 pointed this out. The Federal judges would rather jump over
12 to the merits, look at the merits, particularly if it is
13 rather cut and dry, and say, deny relief on the merits.

14 QUESTION: Mr. Zimmermann, let me ask you again on
15 this case, assume the Federal judge, as apparently this
16 judge did, thought there was substance to the two exhausted
17 claims. Then he looked at the other two claims, as they are
18 here, and he looks at those and says, there is not a chance
19 in the world any judge is going to find merit to the claim
20 that this instruction is bad, that witnesses are generally
21 presumed to tell the truth, that that somehow is a
22 constitutional error. He nevertheless under your rule has
23 to send it back to have it exhausted even though he thinks
24 it is a perfectly frivolous claim?

25 MR. ZIMMERMANN: Well, not precisely, Your Honor,

1 and this is the reason why. If a Federal District judge
2 looked at a habeas petition, pro se litigants filed it, and
3 he sees 1 and 2 have been exhausted, but 3 and 4 are so
4 frivolous, they don't even state habeas claims for relief --

5 QUESTION: Right.

6 MR. ZIMMERMANN: -- the rules require him to
7 dismiss those outright, strike those, and only consider the
8 claims -- what I am saying is this. On the front end,
9 before we even look at exhaustion, the rules of procedure
10 contemplate that the Federal District judge will say, does
11 any of this state a cognizable habeas claim before I order
12 the state, before I order the state to answer? Now, that is
13 what a Federal judge --

14 QUESTION: So he could have in this case, under
15 your approach, dismissed Claims 3 and 4 as being on their
16 face without merit --

17 MR. ZIMMERMANN: Yes, Your Honor, under --

18 QUESTION: -- and then gone ahead on 1 and 2, but
19 I suppose when he goes ahead on 1 and 2, part of the review
20 is the harmless error notion in your appellate court's
21 opinion, and in reviewing harmless error, I guess he would
22 have to look at the whole record, wouldn't he?

23 MR. ZIMMERMANN: Yes, Your Honor.

24 QUESTION: In fact, one of your complaints is, he
25 didn't look at the whole record.

1 MR. ZIMMERMANN: Well, that was a matter that we
2 were concerned about, that's true, but we submitted under
3 the record that he had, he didn't need the entire record in
4 order to deny habeas relief, but if the Federal -- if Judge
5 Morton saw -- I think there may be something there, I want
6 to see the whole record, he could have ordered it to be
7 expanded, but under this case, because of the many remarks
8 relied upon by Judge Morton to grant habeas relief, and
9 because of the fact that he said himself, these claims are
10 so inseparable, they are such a mixture, I can't separate
11 them, this case should have been sent back to the state
12 courts for them to look at these unexhausted claims,
13 because, you see, our own state courts are going to have to
14 look at the same record again, and if -- and if, under the
15 present analysis by most of the Federal Circuits, if Lundy
16 loses -- let's say he lost in the District Court on the two
17 exhausted claims, but he appealed, and while at the same
18 time he appealed he comes over to our state courts and said,
19 here is my unexhausted claims, look at them, well, I would
20 submit that perhaps our state courts would probably abstain
21 from ruling on the unexhausted claims until there is a final
22 decision on the exhausted claims.

23 QUESTION: It seemed to me after reading the state
24 court opinions that his chances of success on those two
25 unexhausted claims were about one in nine million.

1 QUESTION: Isn't that all the more reason why the
2 state courts should be allowed to deal with it first?

3 MR. ZIMMERMANN: Yes, Your Honor. I agree with
4 the Chief Justice on that.

5 QUESTION: Don't you agree with me, too, on his
6 possibilities?

7 (General laughter.)

8 QUESTION: Those odds are pretty heavy.

9 MR. ZIMMERMANN: Well, Your Honor, let me be --
10 let me say this. There is no question that not all the
11 claims were given at the state courts. Secondly, there is
12 no question that the proof in this case was undisputed.
13 Lundy never took the stand. He never offered any defense.
14 And the state courts said, this overwhelming evidence --
15 here you had a rape case where there was an eye witness
16 present, not only the rape victim, but an eye witness, and
17 all this evidence, including the defendant's own post-arrest
18 statement, all this evidence, they said, this is
19 overwhelming, and for this reason we find these two little
20 -- two remarks of the prosecuting attorney to be harmless.

21 They weren't given the opportunity to look at
22 pervasive prosecutorial misconduct as the Tennessee Court of
23 Criminal Appeals did in State v. Hicks this year, where they
24 struck down and overruled a defendant's conviction because
25 of pervasive prosecutorial misconduct, on Federal

1 constitutional grounds. That case merely illustrates to the
2 Court how they conduct their analysis under state law in
3 applying Federal constitutional rights of due process with
4 regard to prosecutorial misconduct.

5 Whether or not he has any chance at all, I don't
6 know. I do know this, that if he goes to the state court,
7 and the state court says he has waived all these things, he
8 is barred from raising them, then I would submit to the
9 court that those rulings by the state courts would be
10 definitive and determinative on whether or not habeas review
11 could even occur later in Federal court.

12 QUESTION: Mr. Zimmermann?

13 MR. ZIMMERMANN: Yes, sir.

14 QUESTION: You mentioned the Fifth Circuit
15 opinion, Court of Appeals of the Fifth Circuit.

16 MR. ZIMMERMANN: Yes, Your Honor.

17 QUESTION: Do you recall the dissent in that case
18 by Judge Roney?

19 MR. ZIMMERMANN: Yes, Your Honor.

20 QUESTION: What do you think of the rule that he
21 would adopt?

22 In essence, as I recall, he would leave it to the
23 discretion of the District Court to decide whether to send
24 the case back to the state courts when in his opinion the
25 interests of justice required that or made it desirable, but

1 if the District Court went ahead and decided two of the four
2 claims that you have been talking about, then the Court of
3 Appeals would be duty-bound to review those, too.

4 MR. ZIMMERMANN: Well, I believe his opinion is
5 based upon a notion that the exhaustion requirement is
6 nothing more than a discretion to be applied at the
7 discretion, if you please, of the District Court, and that
8 is simply not the case.

9 The exhaustion requirement, we submit, operates as
10 a prerequisite to habeas review, a precondition to habeas
11 review. It has never been, since 1948, anyway, a
12 discretionary tool.

13 QUESTION: Well, didn't Picard say that? Didn't
14 Picard hold that?

15 MR. ZIMMERMANN: I don't recall --

16 QUESTION: That it was not a discretionary rule?
17 I thought Picard held that. No?

18 MR. ZIMMERMANN: That it was not a discretionary --

19 QUESTION: Yes, that the exhaustion requirement is
20 a requirement, period.

21 MR. ZIMMERMANN: That is correct, and so did
22 Pitches v. Davies, said it was a prerequisite to habeas --

23 QUESTION: But it doesn't follow from that that
24 you have to -- that you can't review the exhausted claims.
25 All that follows from that is that the claims that are

1 unexhausted, you cannot adjudicate.

2 MR. ZIMMERMANN: That is correct, but you see --

3 QUESTION: I mean, if the rule were otherwise, the
4 case wouldn't be here.

5 MR. ZIMMERMANN: Well --

6 QUESTION: At least six or seven Courts of Appeals
7 are against you.

8 MR. ZIMMERMANN: That is correct.

9 QUESTION: And it may be just one or two that are
10 on your side.

11 MR. ZIMMERMANN: Well, they are on our side
12 partially.

13 QUESTION: Well, do you have any Court of Appeals
14 on your side completely?

15 MR. ZIMMERMANN: Well, I think, Your Honor, what
16 the Circuit Courts are laboring under is a misunderstanding
17 that habeas review, that there is somehow something that
18 requires immediate and prompt habeas review of a prisoner's
19 claim, and what we are saying is that you can't just break a
20 conviction off in little bits and pieces, and say, have a
21 little bit now and a little bit later and come back through
22 the revolving door again two years later, and a little bit
23 more.

24 QUESTION: You want a rule. If there are any
25 unexhausted claims, it all goes back.

1 MR. ZIMMERMANN: That's correct. That could be
2 easily applied not only by the District judges and
3 magistrates, but also by Courts of Appeals.

4 QUESTION: The Sixth Circuit says, in its opinion
5 which you are seeking to overturn here, says that the Fifth
6 and the Ninth agree with you.

7 MR. ZIMMERMANN: That's correct. The Fifth and
8 the Ninth agree with us with regard to how a District Court
9 ought to apply it, but in the Fifth and Ninth Circuits, they
10 say on appeal if the District Judge erroneously looks at the
11 exhaustion claims, we will look at the exhaustion claims,
12 too, and we don't believe that a Court of Appeals should do
13 that, any more than this Court has looked at, for judicial
14 economy purposes, an unexhausted claim.

15 This Court has consistently and repeatedly said it
16 doesn't matter if everyone is granted relief, it doesn't
17 matter if this issue is of great national importance, if it
18 hasn't been exhausted, as in Minnesota v. Brundage, if it
19 hasn't been exhausted, you go back to the state courts.

20 QUESTION: Does any Court of Appeals, if a habeas
21 petition presents one exhausted claim and one unexhausted
22 claim, does any Court of Appeals say that the District Court
23 may hear them both, on the theory of some sort of a pendant
24 claim?

25 MR. ZIMMERMANN: I am not aware of that, Your

1 Honor.

2 QUESTION: All right.

3 MR. ZIMMERMANN: I am not aware of that.

4 Thank you.

5 CHIEF JUSTICE BURGER: Very well.

6 Mr. Smith?

7 ORAL ARGUMENT OF D. SHANNON SMITH, ESQ.,

8 ON BEHALF OF THE RESPONDENT

9 MR. SMITH: Mr. Chief Justice -- excuse me -- may
10 it please the Court -- excuse me -- first let me make it
11 perfectly clear that we have no argument with the exhaustion
12 requirement. We feel that Mr. Lundy properly exhausted the
13 two claims upon which relief was granted in the District
14 Court. In fact, in the state's answer to Mr. Lundy's
15 petition for writ of habeas corpus, the state admitted the
16 exhaustion of the first two claims, and asked for dismissal
17 of the latter two claims for failure of exhaustion of
18 remedies.

19 QUESTION: You don't agree with him on the flat
20 rule he wants, though, do you?

21 MR. SMITH: I disagree very strongly on the flat
22 rule which he wants.

23 QUESTION: Well, what --then, at some point, I
24 take it you will deal with it.

25 What is a Federal court doing with a case, with an

1 issue which has not been exhausted, no matter how many other
2 points have been exhausted? Why should a Federal court be
3 in that at all?

4 MR. SMITH: In the case or in the unexhausted
5 issue?

6 QUESTION: In his corpus case in the District
7 Court.

8 MR. SMITH: If the --

9 QUESTION: What is the reason for having a Federal
10 district judge deal with an issue which has -- on which no
11 relief has been sought in the state courts?

12 MR. SMITH: Under the exhaustion requirement, the
13 Federal District Courts should not deal with that issue, but
14 if the petition presents along with that issue issues that
15 have been presented to the state courts --

16 QUESTION: Well, you are overlooking the
17 possibility that if the state court had been asked to deal
18 with the unexhausted claim, the claim that was never
19 presented, there might be no case in the Federal court.

20 MR. SMITH: That's a possibility.

21 QUESTION: A very real possibility, isn't it?

22 MR. SMITH: And it is a possibility that we have
23 to face. However, in this particular case, the two
24 exhausted -- or the two unexhausted claims, which were not
25 related to the exhausted claims were improper jury

1 instruction and the prosecution's comment on the defendant
2 not taking the witness stand.

3 QUESTION: Well, Mr. Smith, let me ask you the
4 same question I asked your opponent, and that is, what do
5 you make of Judge Morton's comment on Page 88 of the
6 appendix that "Since Grounds 3 and 4 have not been presented
7 to the state court there has been no exhaustion of remedies
8 to these two. Thus this court will not consider them in the
9 constitutional framework. However, in assessing the
10 atmosphere of the cause taken as a whole, these items may be
11 referred to collaterally"?

12 MR. SMITH: Your Honor, I believe he is saying
13 that because these two, the latter two claims have not been
14 exhausted, that the court cannot grant relief on those two
15 claims. However, in assessing the merits of the first two
16 claims, and the State Court of Criminal Appeals of Tennessee
17 also found merit in those claims, but found it harmless
18 error, but the Federal court, in assessing those first two
19 claims, had to look at the atmosphere of the trial as a
20 whole, and that involved looking at the errors that were
21 raised in the two unexhausted claims. However, I don't
22 believe relief was granted on those two errors. It was
23 granted on the first two claims which were exhausted,
24 prosecutorial misconduct and the limitation of cross
25 examination.

1 QUESTION: But he did consider, certainly in his
2 findings of fact and conclusions of law, a great deal of
3 matter that would be subsumed under the unexhausted claims,
4 did he not?

5 MR. SMITH: That's correct, but I believe he
6 reviewed those and mentioned those to show their impact on
7 the exhausted claims, making -- substantiating his decision
8 that this was not harmless error, but was prejudicial error.

9 QUESTION: Well, without them, then he may not
10 have granted relief.

11 MR. SMITH: Taking those -- taking those two
12 claims, the two exhausted claims on their own, isolated,
13 perhaps not. I don't think he can isolate them. He has got
14 to look at them in the context of the trial in order to find
15 whether they are harmless error.

16 QUESTION: That really means that they are
17 inseparable, and that the whole thing should have been
18 exhausted.

19 MR. SMITH: No, Your Honor, I don't believe that
20 these claims are related.

21 QUESTION: Well, that means we throw away Picard
22 then.

23 MR. SMITH: I believe he has got to look at the
24 exhausted claims in the context in which they occur, in
25 order to decide whether it is harmless error or prejudicial

1 error, and in looking at that context, he has to look at the
2 whole trial, including those errors which were unexhausted,
3 but nowhere does he say that he is granting relief. In
4 fact, he states just the opposite, that he will not consider
5 the unexhausted claims in the constitutional framework.

6 QUESTION: But don't his findings and conclusions
7 strike you a little bit like the line that, "Julia, saying
8 she'd ne'er consent, consented"?

9 MR. SMITH: Your Honor, if I had to write the
10 opinion, I think it would have been written in somewhat
11 different language. I realize that it is difficult in
12 reading the opinion to separate the claims.

13 QUESTION: Sometimes busy District judges don't
14 have time to write opinions as carefully as possible, and
15 your friend wants to give them more time by taking these
16 cases away.

17 MR. SMITH: Your Honor, I think the court
18 considered what was put in front of it by Lundy and by the
19 Petitioner in this matter. I think it took the time, it
20 reviewed the record that was placed in front of it. He
21 states in his opinion, the District Court judge, that he
22 reviewed the record, and I think he wrote the opinion, and I
23 think basically he granted relief on the two exhausted
24 claims.

25 As I pointed out before, the Criminal Court of

1 Appeals of Tennessee also found --

2 QUESTION: Do we know, Mr. Smith, when the state
3 courts considered and decided the two exhausted claims, did
4 they consider them in the context of the gloss put on by the
5 other two claims? Do we know that or not?

6 MR. SMITH: In the opinion written by the Criminal
7 Court of Appeals of Tennessee, it does not appear that they
8 did. It appears that they were --

9 QUESTION: Were you in the case then, Mr. Smith?

10 MR. SMITH: No, Your Honor. It appears that the
11 two exhausted claims were considered together by the Court
12 of Criminal Appeals of Tennessee.

13 QUESTION: But we don't know whether they
14 considered them with the gloss of the other two?

15 MR. SMITH: I don't believe they did.

16 Petitioner argues that if a petition for a writ of
17 habeas corpus contains a mixture of exhausted and
18 unexhausted claims, the entire petition must be dismissed
19 without regard to the merits of the exhausted claims. The
20 prisoner must then leave his exhausted claims, which may be
21 meritorious, sitting on the District courthouse steps and go
22 back to the state courts with his unexhausted claims.

23 Now, the basis of the proposition put forth by
24 Petitioner, at least in his brief filed in this Court, was
25 comity. In the reply brief filed in this Court, he stated

1 that the basis of this proposition was jurisdictional, that
2 the District Court did not have jurisdiction to hear
3 petitions which contained exhausted and unexhausted claims.

4 I don't believe that this is the case. If the
5 Court wishes to pursue that matter, this is the case in
6 which it is to be raised. If it is the case, and if the
7 Court feels so, I feel that both sides should be permitted
8 to brief that jurisdictional issue.

9 As to the argument based on comity, again, we are
10 in agreement with the exhaustion requirement. 28 USC 2254,
11 Subsection C, requires exhaustion of state remedies as to
12 the question presented before the Court can grant a writ of
13 habeas corpus. It does not require exhaustion of every
14 question presented in a petition before a writ can be
15 granted on the basis of an exhausted question contained in
16 the petition.

17 When the rule was codified in 1948, it was
18 designed to recognize the law as it existed at that time.
19 As it existed at that time, it referred to a question, a
20 claim, individual. There are no cases since then from this
21 Court which apply that requirement in the manner requested
22 by the Petitioner. The Gooding case in 1972 and the
23 Francisco case in 1974, in both those cases, this Court
24 considered petitions which included mixed claims.

25 In this case, the state of Tennessee has had a

1 full opportunity to review the two exhausted claims. The
2 policy served by the exhaustion requirement would not be
3 furthered by requiring submission of the unexhausted claims
4 to the state courts of Tennessee. The conflict is already
5 there between the state court and the Federal court. The
6 conflict is there on the two exhausted claims.

7 Sending the case back to the state court would
8 produce one of two results. Either the state court reaches
9 the same result as the Federal court for a different reason,
10 that being the unexhausted claim instead of an exhausted
11 claim, or the state court goes through the futility of
12 considering the two unexhausted claims, knowing full well
13 that the District Court has already found -- and the Circuit
14 Court both have already found merit in the exhausted claims,
15 and no matter what their ruling, the petition is going to be
16 granted at some date in the future.

17 QUESTION: Inescapably, you've got two different
18 courts, two different jurisdictions dealing with the same
19 general set of complaints.

20 MR. SMITH: Correct.

21 QUESTION: Not in a hierarchy of review court, but
22 in effect the District Court becomes a reviewing court --

23 MR. SMITH: That is correct.

24 QUESTION: -- of the Supreme Court of the state.

25 MR. SMITH: It is our position that neither result

1 which may come about from sending this case back to the
2 state court would promote comity, and in the meantime, Lundy
3 remains in prison while he pursues his claims through the
4 state court, claims in which he now has no interest, because
5 he has had two claims which a District Court and a Circuit
6 Court have found merit in. He sits in jail and pursues his
7 claims.

8 Comity does not demand the state court to go
9 through the futile or the academic exercise of considering a
10 case when the results of that case are already known. As to
11 the state itself, it suffers a disadvantage in the passage
12 of time because it makes retrial more difficult at the time
13 the writ is finally granted and a retrial ordered.

14 In his brief, the Petitioner states that the state
15 courts would have applied a contemporaneous objection rule
16 and refused to consider claims that could have been but were
17 not presented on direct review of conviction. The two
18 unexhausted claims in this case were not presented on direct
19 review of his conviction.

20 QUESTION: Were they preserved at the trial,
21 objections, appropriate objections?

22 MR. SMITH: No.

23 QUESTION: So there are two faults.

24 MR. SMITH: Correct, and the state court, I am
25 sure, would see those two faults immediately upon

1 considering it. Perhaps the District Court thought that
2 through and realized the futility of sending those two
3 unexhausted claims back to the state courts, to have them
4 merely invoke a contemporaneous objection rule, meanwhile
5 with the Petitioner sitting in jail.

6 QUESTION: Well, I take it you do recognize that
7 the District judge relied to some extent on the unexhausted
8 matters, to some extent anyway.

9 MR. SMITH: He considered them.

10 QUESTION: Yes.

11 MR. SMITH: He considered everything in front of
12 him, and those --

13 QUESTION: Well, and you said in answer to my
14 question that perhaps without them he might not have granted
15 relief, and if that is true, if he presents the whole ball
16 of wax to the state court again, perhaps the state court
17 would grant him relief now that they wouldn't have on his
18 exhausted claims alone.

19 MR. SMITH: The state court had the entire trial
20 transcript in front of it.

21 QUESTION: I know, but he wasn't making these
22 particular claims.

23 MR. SMITH: He did not make those particular
24 claims at that point.

25 QUESTION: Which he did in the Federal court.

1 MR. SMITH: Okay. When I say that perhaps without
2 these unexhausted claims the District Court judge would not
3 have granted relief, I perhaps did not explain myself very
4 well. In fact, I am quite sure I didn't. Had these --

5 QUESTION: At least you didn't mean it.

6 MR. SMITH: Had these -- not now, I didn't. Had
7 these unexhausted claims not been presented to the District
8 Court, and the District Court had only these two exhausted
9 claims to consider, I believe that in reviewing the record,
10 the District Court would have considered those two exhausted
11 claims in the light of what else went on, including these
12 two unexhausted claims, even if they weren't presented to
13 it. That is where I think the unexhausted claims come in.
14 It considers the exhausted claims in the light of the
15 erroneous jury instruction, whether or not it was a claim,
16 and in the light of the Attorney General's comment on the
17 defendant's failure to testify.

18 I hope I have made myself a little clearer.

19 I feel that the effect of the adoption of
20 Petitioner's view would be to overwhelm the state courts
21 with consideration of afterthought or frivolous claims,
22 while the Federal court would be sitting on meritorious
23 claims or else the meritorious claims would be sitting on
24 the courthouse steps.

25 Meanwhile, the prisoner remains --

1 QUESTION: Well, isn't that a rather persuasive
2 reason to require them to be put all in one bag and
3 delivered to one court at one time?

4 MR. SMITH: Your Honor, that would be a nice way
5 to have it.

6 QUESTION: Well, is there any logical reason why
7 we shouldn't have that "nice way"?

8 MR. SMITH: We are dealing, and we have to
9 remember, the majority of these petitions are filed pro se
10 by men who are uneducated in the law, and possibly
11 uneducated, period. The idea has been put forth that these
12 uneducated men can use the law in order to orchestrate their
13 claims so as to always have a couple sitting back here in
14 case these get turned down, and they can keep coming back
15 and coming back.

16 This Court in 1976 adopted a form for use in these
17 cases. It was the form that Lundy used in this case. It is
18 a pre-printed form.

19 QUESTION: When you say "this Court", you mean the
20 District Court?

21 MR. SMITH: No, Your Honor, this Court, the
22 Supreme Court.

23 QUESTION: And in connection with the Rules of
24 Civil Procedure.

25 MR. SMITH: Correct. It contains in that form

1 instructions. Number 6 of that instruction reads, and I
2 quote -- this is in the Appendix at Page 66 -- "Your
3 attention is directed to the fact that you must include all
4 grounds for relief and all facts supporting such grounds for
5 relief in the petition you file seeking relief from any
6 judgment of conviction".

7 To an uneducated man, who has probably never heard
8 of the exhaustion requirement, let alone mixed claims
9 presented in a petition, who is trying to follow directions,
10 when he sees that, he is going to put down every claim he
11 can think of. He is not a man who has gone through trial
12 with the benefit of legal experience, able to pick out an
13 error here and an error there. Sometimes it may be years
14 after that somebody, a cellmate tells him about what
15 happened at his trial that was error, or something --

16 QUESTION: Right, or he read something in the
17 newspaper.

18 MR. SMITH: Yes, it comes to light to him.

19 QUESTION: So the form is a trap.

20 MR. SMITH: If the Court --

21 QUESTION: It doesn't say present every claim that
22 you have already presented to a state court.

23 MR. SMITH: No, it goes into a caution later in
24 the form about having exhausted claims, but if the Court
25 adopts the rule saying that mixed petitions must be

1 dismissed, then this form is a trap. That is correct.

2 QUESTION: You are aware, I am sure, that there
3 are districts in which there are litigants of this category
4 who have filed 50, 75, 100, or several hundred petitions
5 seriatim over a period of time.

6 MR. SMITH: I am aware of that.

7 QUESTION: Each one of which had to be separately
8 dealt with by a Federal District judge.

9 MR. SMITH: I am aware. Your Honor, I think that
10 Rule 9(B) and the Code Section 2244 give the District Courts
11 ammunition to deal with something like that, and I don't
12 feel that because some people have abused the writ, that we
13 should take the man who has a meritorious claim and say,
14 you've only got one shot at this, and you are going to sit
15 in jail until you put everything through the state courts,
16 all these possible claims, before you can come to the
17 Federal District Court. I feel that is denying him access
18 to the courts.

19 As to the restriction of cross examination of the
20 complainant witness, that one error in itself I feel would
21 call for granting of the writ. Everything else set aside,
22 the right of cross examination is so vital, especially in a
23 case like this, to the guarantee of a free trial, that the
24 denial of that restriction is prejudicial error. This Court
25 has found so in the Alford case.

1 There is reference made in the Petitioner's brief
2 to a jury-out hearing.

3 QUESTION: And that claim was exhausted.

4 MR. SMITH: That claim was exhausted, and it was
5 so admitted in the state's answer. There was reference to a
6 jury-out hearing where some of these questions were posed to
7 the complainant witness, but a jury -- or a hearing -- a
8 cross examination outside the trier of the fact is of
9 absolutely no value. The jury has a right to see that
10 witness when she is asked that question and when she answers
11 that question. Can she look them in the eye? Does she
12 hesitate? Does she -- they have a right to observe her
13 demeanor. And that issue alone, I think, calls for the
14 granting of the writ.

15 In closing, the writ of habeas corpus is designed
16 to give relief to those unjustly imprisoned. It is a fact,
17 I stated before, that most of these petitioners file these
18 pro se, and most petitioners are uneducated, at least in the
19 law. The exhaustion rule as treated by the courts is a rule
20 of timing. It is not a rule of jurisdiction. It is not --
21 and neither is it meant to be an obstacle to be put in the
22 path of a prisoner who is imprisoned unjustly, and merely to
23 say that because there are those who file frivolous claims,
24 we must deal more harshly with those who have meritorious
25 claims. I don't feel that is the correct way to interpret

1 the law.

2 There are two courts now that have found merit in
3 Lundy's petition. We ask this Court to affirm the decision
4 below.

5 Thank you very much.

6 CHIEF JUSTICE BURGER: Do you have anything
7 further? There is only one minute remaining.

8 MR. ZIMMERMANN: No, Your Honor.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 2:55 o'clock p.m., the case in the
12 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Jim Rose, Warden, Petitioner v. Noah Harrison Lundy - 80-846

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