REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-6790

TITLE WALDO E. GRANBERRY, Petitioner V.
JIM W. GREER, WARDEN

PLACE Washington, D. C.

DATE February 24, 1987

PAGES 1 thru 56

ALDERSON REPORTING

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

WALDO E. GRANBERRY, :

Petitioner, :

V. : No. 85-6790

JIM W. GREER, WARDEN :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Tuesday, February 24, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

HOWARD B. EISENBERG, ESQ., Carbondale, Illinois; on behalf of the petitioner, appointed by this Court.

MARCIA L. FRIEDL, ESQ., Assistant Attorney General of Illinois, Chicago, Illinois; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-6790, Walco E. Granberry versus Jim W. Greer, Warden.

Mr. Eisenberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF HOWARD B. EISENBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. EISENBERG: Thank you, Your Honor. Mr. Chief Justice, Your Honors, may it please the Court, I have been appointed by this Court to prosecute this writ of certiorari directed to the United States Court of Appeals for the Seventh Circuit. That court determined that Granberry had not exhausted his state court remedies prior to filing this federal habeas corpus application pursuant to 28 USC Section 2254.

The Court of Appeals read this Court's decision in Rose versus Lundy to require it to sua sponte determine whether the petitioner had exhausted. The Court undertook that determination and determined no exhaustion, and therefore remanded this case to the United States District Court for the Southern District of Illinois with directions to dismiss without prejudice for the purpose of allowing Granberry to exhaust his state court remedies.

In this petition we raise two issues. The primary one is whether the Court of Appeals was foreclosed from determining the issue of exhaustion of state court remedies by virtue of the fact that the state failed to raise that claim in the District Court.

If you agree with us that the Court of Appeals could not properly reach that issue, that is all you need determine. You should reverse the judgment of the Court of Appeals and remand so that that court can determine the merits of the petition. If you agree with the Seventh Circuit you must then consider the second issue, which is whether Granberry had in fact exhausted his state court remedies or in any event whether it would be futile to require him to return to the state courts of Illinois.

The facts briefly stated are these, Your Honors. Granberry was convicted in 1960 in Chicago of murder, rape, and armed robbery. For the past 27 years he has been confined in various state correctional institutions in Illinois. He is now confined in the Vayenna Correctional Center, which is a minimum security institution located in the deep southern part of Illinois, midway between Carbondale and Paducah, Kentucky.

He has an exemplary record, and yet since he

became eligible for parole in 1971 he has been consistently denied parole. The issue of whether parole criteria adopted by the Illinois legislature in 1973 can apply to persons convicted prior to that date has been litigated fairly extensively in the federal courts in southern Illinois and Illinois generally and before the Seventh Circuit.

The Seventh Circuit first held that there was an ex post facto violation. In 1984 in the Heirens case that same court overruled its earlier decision and found no ex post facto violation. Heirens, after the second Seventh Circuit decision, has filed two applications to the Illinois Supreme Court for leave to commence an original action for mandamus which would attack the denial of his parole.

Mandamus in Illinois is the proper remedy by which to seek review of a parole denial. In the first case the Illinois Supreme Court denied leave to proceed without prejudice to Granberry filing an action in the Circuit Court. In the second case, the Illinois Supreme Court simply denied relief.

Granberry then began this 2254 action in the United States District Court for the Southern District of Illinois. The magistrate ordered the state to file an answer. Rather than file an answer as contemplated

by the rules for 2254, the state filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil procedure, asserting that Granberry's petition failed to state a claim upon which relief can be granted. There was absolutely no mention of the exhaustion issue in the state's answer. There was no mention of exhaustion in the magistrate's recommendation. There was no discussion of exhaustion in the chief judge's order denying relief.

On appeal the Seventh Circuit appointed me. I filed a brief on the merits, and in their reply brief the state in a final concluding section of that brief said, "And in addition Granberry hasn't exhausted state court remedies." In my response I said the latest law from the Seventh Circuit said if you don't raise it in the District Court the issued is waived.

The panel, however, following what they thought the rule was in Rose versus Lundy, found not only did the state not waive the issue, but that the state could not raise the issue and that it was obligated to reach the exhaustion question sua sponte. They found that Granberry had not exhausted, and they remanded the case with directions to dismiss to allow him to do so.

In beginning our exploration of the first

issue, that is, whether the issue is foreclosed once the state does not raise the issue of exhaustion in the District Court, we must begin, it seems to me, at the reasonable point, is exhaustion is a jurisdictional bar, because if it is a jurisdictional bar, then there is no question but that it can be reached even though it wasn't raised. It can be reached sua sponte.

The problem with that analysis, however, is that since 1886 up to Strickland versus Washington three years ago, this Court has uniformly said exhaustion is not jurisdictional. Indeed it was originally a Court-made rule. This Court made the rule in the Royall case in 1886, and when Congress codified exhaustion in 1948, it said explicitly that it was simply accepting the law as shown by this Court. It is not a jurisdictional bar.

It is, however, a rule of comity, and the real question that this case raises is what does comity mean. The circuits are split on this question. Those courts that agree with the Seventh Circuit say comity means that you look to the relationship between the federal judiciary and the state judiciary only, and it doesn't matter what the state attorney general thinks. That is irrelevant to the inquiry, and thus those circuits which have held that you cannot waive or

forfeit exhaustion have said only the courts can determine when the state's interest has been properly vindicated and the attorney general cannot.

Those courts that have held that the issue can be waived or forfeited have said that the interests of comity are met when the representative of the state, the state's attorney general, makes a determination that it is not in the state's interest to pursue the claim through state court, and that the federal judiciary has no place intervening in that decision, that that is a matter for the attorney general of the state to decide.

It is our submission here that the courts which have held that the states' interests are properly vindicated when the attorney general does not waive the issue of comity -- of exhaustion, rather, is the proper rule for several reasons. Initially the state's position converts the nonjurisdictional requirement of exhaustion into a jurisdictional bar by another name, because if you follow their argument, and it is not even an extension of their argument, but the face of their argument is, we cannot waive it, only the courts of the state, which I assume means the state's highest court can determine when exhaustion is not necessary, which means they have to decide the merits of the case.

So, adopting the argument of the state here

really converts it into a jurisdictional argument even though they disavow that and acknowledge that the 101 years of decisions in this Court --

QUESTION: The Court of Appeals could never itself raise an issue that wasn't raised in the District Court?

MR. EISENBERG: No, I am certainly not saying that. There would be many situations --

QUESTION: Why can't the Court of Appeals raise the exhaustion issue sua sponte?

MR. EISENBERG: Because it is not the federal court's business to determine --

QUESTION: Where did you hear that? I mean, where did you read that?

MR. EISENBERG: Well, a number of circuits have held that, and I think the rule of comity teaches that, Justice White.

QUESTION: Well, a number of circuits have held to the contrary, too.

MR. EISENBERG: Yes, but I think the better law is that the federal court should not intervene because the representative of the state has made that decision.

QUESTION: Yes, but the state has said to the court, why don't you raise it? We want to raise it

now.

MR. EISENBERG: They were too late.

QUESTION: Well, why?

MR. EISENBERG: Because exhaustion is basically a determination of when it is in the state's interest to have a federal court --

QUESTION: Well, they have now decided it is in the state interest to have exhaustion.

MR. EISENBERG: It converts it into a jurisdictional --

QUESTION: Why? Why?

QUESTION: The court can always claim error.

MR. EISENBERG: It can claim error except that the issue wasn't raised.

QUESTION: I know, but I just asked you whether -- can't a Court of Appeals raise issues that were not raised in the District Court?

MR. EISENBERG: Because the notion of comity means the relationship between the state and federal judiciary. Here the state made a determination at the proper time, which is the District Court, not to raise the issue.

QUESTION: Well, Mr. Eisenberg, it may involve federal interests as well, and I can imagine a case in which the Federal Court of Appeals would determine that

it was in the federal interest to have the state consider the issue first.

MR. EISENBERG: I think if they were to put --

QUESTION: And I can also consider or imagine cases where the Court of Appeals does not want to permit a mistake made by a state's attorney in failing to raise it to defeat what the court perceives to be a valid comity interest in sending it back.

I just don't see why the federal court would be deprived of the opportunity to send it back for failure to exhaust on its own motion or otherwise.

MR. EISENBERG: Surely there would be situations, Justice O'Connor, where the federal court might well want to defer to the state court for a determination of what the state law is. That is not the case here. Here, however, my submission is that comity really says to the state, decide whether you want this issue litigated and where, and if you want it litigated in the state court you have the power to send it back.

QUESTION: Mr. Eisenberg, let me ask you a propos of what Justice O'Connor said, would you treat differently the presentation by the state and the District Court in the Southern District of Illinois saying we expressly waive our right to exhaust, and compare that, if you will, with a state's simple failure

to mention exhaustion in the Southern District, it goes up to the Seventh Circuit, and the state now says, we urge the doctrine of exhaustion, we realize we didn't urge it in the District Court, it was just an oversight? Are those different cases for purposes of this question?

MR. EISENBERG: No, I think for the purpose of this case that is the same situation. Those are identical. By filing the 12(b)(6) motion I view that as an explicit waiver going to the merits.

QUESTION: And that is comity?

MR. EISENBERG: Yes, it is.

QUESTION: Even though the state comes kicking and screaming into federal court and says we just made a mistake, we really don't want to raise this --

MR. EISENBERG: They have never said that.

QUESTION: -- and you say to the state, the doctrine of comity requires us to say that you have waived it irrevocably in the District -- that is not comity, that is some federal rule you are applying, but there is no way you can consider that comity when the state continues, even the attorney general continues to want to raise the case in the federal courts. How can you possibly call that comity?

MR. EISENBERG: I think there is also a point

at which they have to raise the issue, Justice Scalia. I think --

QUESTION: Well, may be. That is a good argument. But it is not comity.

MR. EISENBERG: I think it is comity. You say to the state, listen, you want to raise this issue, you want this case kicked back to the federal -- to the state court, you raise it where you should raise it, in the District Court.

QUESTION: That may be a good federal rule, but it is not a good federal rule that has anything to do with acceding to the wishes of the state.

MR. EISENBERG: I respectfully disagree. You have the attorney general. We are not talking about some maverick state's attorney. We are talking about the constitutional officer coming into a federal court having the power to say whether they want that case heard in that court. That is comity. That is the Federal District Court considering the views of the state as represented by its constitutional officer.

QUESTION: Can a state change its mind?

MR. EISENBERG: Not on this issue it can't. No, Justice Marshall.

QUESTION: Can a state normally change its mind?

MR. EISENBERG: Excuse me?

QUESTION: Can a state normally charge its mine? Normally.

MR. EISENBERG: It can normally charge its mine, but not in the course of litigation.

QUESTION: But in this case solely because you say so it can't.

MR. EISENBERG: No, because I think the usual rules of practice --

QUESTION: All you want us to do is send it back for them to make a statement, right?

MR. EISENBERG: I want this case remanded to reach the merits of the issue.

QUESTION: You want the state to say, we don't want this, we waive it.

MR. EISENBERG: No, I think they have already said that. My submission is, they have said that.

QUESTION: Did they waive it?

MR. EISENBERG: Yes, Your Honor, they have.

QUESTION: Well, what are we here talking about.

MR. EISENBERG: We are talking about whether the Court of Appeals could then reach out and decide the issue.

QUESTION: Well, they waived it.

MR. EISENBERG: That is my argument precisely, that this is the kind of issue that needs to be raised in the District Court.

QUESTION: I just don't understand why we are all tied up with a man that has been convicted in 1860.

MR. EISENBERG: 1960, Your Honor.

QUESTION: Well, there is not much difference.

(General laughter.)

MR. EISENBERG: It is a long time. It is a long time.

QUESTION: I mean, aren't we really talking about technicalities?

MR. EISENBERG: I think we are talking about who represents the state's interest. Is it the attorney general, or do you, in order --

QUESTION: Are we better able to decide that or is Illinois better able to decide it?

MR. EISENBERG: I think the Illinois --

QUESTION: Is Illinois better able to decide who represents Illinois?

MR. EISENBERG: The Illinois attorney general made that decision in the District Court, Your Honor, and they decided that it was the state's interest to reach the merits of the petition.

QUESTION: Do you want us to change that?

MR. EISENBERG: Well, in the appellate court when there was --

QUESTION: Do you want us to change that?

MR. EISENBERG: They want to. I don't.

QUESTION: You want us to leave it that way.

MR. EISENBERG: I think what you should say is, it was too late, it was too late to raise the issue in the Seventh Circuit.

QUESTION: You are going right back where you were before.

MR. EISENBERG: That is where I want to be. I want to be at the point where you say --

QUESTION: I think the other side wants you there, too.

MR. EISENBERG: Well, I think the position I assert is that they should be precluded from raising the issue because it is essentially an issue which they can decide but they also must decice at the proper time.

QUESTION: Mr. Eisenberg, can I ask you a question?

MR. EISENBERG: Certainly.

QUESTION: Isn't there an intermediate position? You seem to say that if they fail to raise it in the District Court then the Court of Appeals must address the merits. That is your position, as I

understand it.

MR. EISENBERG: Yes, Your Honor.

QUESTION: Why couldn't the Court of Appeals say, well, since they didn't raise it we are not -- we may treat it as waived or we may decide in the interest of orderly processing this litigation we would be better off to have the views of the Illinois courts or how the new parole rules work, and so forth and so on. I know this is not what the Court of Appeals did but, say, given all those factors, we have decided to require exhaustion.

MR. EISENBERG: Yes, and in response to Justice O'Connor's question I said on those facts it might well be appropriate where the state of the law is uncertain. Here that isn't the case, because not only is the State of Illinois law not uncertain, the governing law is from the Seventh Circuit altogether.

QUESTION: There is another intermediate position, too, that wouldn't be quite yours, but we could say that where right up until the federal court stage the Illinois attorney general is saying we want you to reach the issue, we have waived it below, we want you to get it now, we would not require the federal courts to abstain, but in the exercise of comity they will entertain the case. However, where the Illinois

attorney general simply neglected to raise the issue below and comes to the federal courts and says, you know, I want to raise it now, then in the interest of comity we will let him raise it now.

MR. EISENBERG: I think that is right if there is a showing of negligence by the state. For example, if they had complied with Rule 5 of the rules governing 2254 and had said the man had exhausted, and it turns out that is flat out erroneous, I think an argument can be made that there the interests of comity are not well served by requiring a waiver, but here that isn't what they did. They said to the District Court, take the merits of the case. They filed a 12(b)(6) motion which as far as I can determine admits the validity of all facts well pleaded, including exhaustion, and says, decide the merits.

The court decided the merits, and it is not until counsel was appointed in the Seventh Circuit that they say as an afterthought, this guy didn't exhaust, kick it back for that reason. So these are not -- the facts that you suggest I think might lead a court to say we are going to send it back to the state court, these aren't the facts here.

QUESTION: It seems to me that your agreeing with Justice Scalia on this point is inconsistent with

your argument in your brief that they should be bound by the same strict rules that defendants are on cause and prejudice and all. There you said that both sides ought to have the same procecural duties --

MR. EISENBERG: Surely, in terms --

QUESTION: -- but now you are saying you would give the attorney general a more relaxed standard.

MR. EISENBERG: I think in terms of the issue of preclusion they should be required to raise the issue at the same point as a criminal defendant would, which is usually in the trial court. I think that is right. However, I think to this extent comity is different.

If it appears that there has been a genuine error so that the rights of the state have not been vindicated, not because of the strategic decision we have here, but because of an error in reading the record, or because the State of Illinois law is not clear, I think that may be an exception to my assertion in the brief that it is a stage preclusion. If you don't raise it at the right stage you are out of -- you can't raise it on the appellate level.

QUESTION: Well, exhaustion is the ultimate nondispositive issue in a case like this, too, isn't it? I mean, a petitioner, a habeas petitioner may be delayed by resort to exhaustion, but he will never waive

his federal claim by having to exhaust the state claim.

MR. EISENBERG: Yes, that is right. That is right, although on the facts here requiring this man to go back to state court, I think, is not only futile but is not a good way to conserve judicial resources, which is the other consideration talked about in Rose versus Lundy regarding exhaustion under 2254. One is comity. The other is conservation of resources.

And it is my submission that if this issue is going to be decided in Granberry's favor, the only court short of this Court that can do that is the United States Court of Appeals for the Seventh Circuit. And so on that basis applying both the comity prong and the judicial resources prong of Rose versus Lundy, I just think the Seventh Circuit was flatly wrong.

Finally, this case raises another slightly different situation. This is not a habeas corpus to review a state court conviction. It is a habeas corpus action to review a parole denial, and while this Court has said that that still comes under 2254, I think the equities are somewhat different. The state asserts that the judiciary acquires some interest in the overall litigation, the criminal conviction.

That is not the case here. It is particularly not the case here where the governing law is not from

the Illinois courts at all, but from the two cases decided in the Seventh Circuit, so my initial submission is that the court should say that because the attorney general did not raise this issue in the District Court, the issue is foreclosed, and remand the case to the Court of Appeals with directions to reach the merits.

If you, however, disagree with me and find that the Court of Appeals properly reached the exhaustion issue, we next submit that Granberry did exhaust the issue in state court by twice requesting the Illinois Supreme Court to consider this issue as a matter of its original jurisdiction.

QUESTION: Is there indication in the cases that exhaustion is just not waivable?

MR. EISENBERG: No -- there are some circuits that would say that.

QUESTION: Yes, circuit courts.

MR. EISENBERG: Yes, there are some circuits --

QUESTION: One or two?

MR. EISENBERG: I think the division is five to four or four to three. I can tell you --

QUESTION: On whether it is waivable at all or not?

MR. EISENBERG: Yes, the First, Third, Sixth, Ninth, and Tenth have said it is not waivable.

QUESTION: At all?

MR. EISENBERG: At all.

QUESTION: And so the Court of Appeals not only can't accept a waiver --

MR. EISENBERG: They are required sua sponte to look at the question.

QUESTION: Exactly.

MR. EISENBERG: Yes. And the Fourth, Fifth, Eighth, and Eleventh have held the contrary. The Second, and Seventh have decided both ways. So there is a genuine split of authority.

My submission is that by twice presenting this issue to the Illinois Supreme Court Granberry has provided the only court in Illinois which can decide this issue an opportunity, a fair opportunity to resolve the issue, and while it is probably true that under some circumstances an application to the Illinois Supreme Court to decide an issue by writ of mandamus as a matter of original jurisdiction is not a decision on the merits, clearly in order for Granberry to exhaust he need not have a decision on the merits. All he need do is present the Illinois Supreme Court with a fair opportunity to resolve the issue.

QUESTION: I thought that court gave him leave to file in Circuit Court, and obviously indicated it

thought that was the place to have it heard initially.

MR. EISENBERG: That was -- the first application they said that. That's correct.

QUESTION: But Granberry didn't choose to do that.

MR. EISENBERG: He did not. A year or two later he filed a second application in the Illinois Supreme Court. If he had gone back to the Circuit Court, the Illinois law is quite clear the Circuit Court was bound by the appellate court's decision in Harris versus Irving. The Circuit Court could not have granted relief. Since Granberry is confined in the southern part of Illinois, his case would have been heard by the Fifth District of the Illinois Appellate Court which decided Harris versus Irving.

The personnel on the court today is the same as then, and unlike the Seventh Circuit, the Illinois Appellate Court decided that a statute which changed parole release criteria could not under any circumstances raise an ex post facto issue because parole was a matter of grace and a gift from the legislature, and therefore the legislature could do whatever they wanted.

The Seventh Circuit, on the other hand, made a factual determination based on a bar magazine written

bya member of the parole board that was not or the parole board prior to 1973 that the criteria after '73 were the same as those applied before '73, so my assertion is that he could not have raised it in the state trial court. It was absolutely barred. There was no reason to believe the appellate court would have decided it any differently, so he is back in the Illinois Supreme Court as a matter of discretionary jurisdiction on leave to appeal from the denial of his case in the appellate court.

As a matter of conserving judicial resources, what Granberry did, he went right to the Supreme Court, and under these unique facts that seems to me to be a rather reasonable thing for a pro se inmate to do.

QUESTION: Mr. Eisenberg, could you tell me something about predictable responses of state attorneys general? If we held that it was -- that it was waivable, would it be in the interest of state attorneys general to waive it, to get the matter into federal court and get it resolved as quickly as possible?

MR. EISENBERG: Oh, certainly. Sometimes it would. I can imagine that --

QUESTION: I mean, that is one of the things that concerns me. I am not sure that the doctrine is totally a comity doctrine in the sense that we want to

accommocate the states. I think to some extent it is a doctrine that is meant to protect the federal courts against volumes of litigation that could more readily be disposed of by, or as far as we are concerned, more readily by state courts.

MR. EISENBERG: But you are not disposing of it, you are delaying it.

QUESTION: Well, we are delaying it but reviewing it after it has already been done by the state courts is a little different from doing it initially yourself, isn't it?

MR. EISENBERG: Yes, it is, but there is obviously no showing that there has been a floodgate into the Federal District Court, but again the jurisdiction is such that the Federal District Court has to hear the claim, and if the --

QUESTION: Well, not if the state court grants relief.

MR. EISENBERG: That's true.

QUESTION: You have got to assume some of these cases have merit. I know not too many of, but --

MR. EISENBERG: Surely. I mean, that is possible, but I think ultimately that is a matter that the state decides. I don't think that is a matter that the federal judiciary should be deciding.

Finally, as the second part of my exhaustion issue, it is that it would be futile for Granberry to go back into state court. Indeed, the Seventh Circuit in the Welch case decided it would be futile to require an Illinois inmate to raise this precise issue in the state court and thereby took jurisdiction of the first case. So that I think that even if you find that the original petitions to the Illinois Supreme Court did not actually exhaust, I think you should then say it is futile for Granberry to --

QUESTION: Did you argue that at the Court of Appeals.

MR. EISENBERG: I argued it on rehearing, which is the only time really the issue came up.

QUESTION: Well, that may be, but if that was the first time then you must assume the Court of Appeals disagreed with you.

MR. EISENBERG: Yes, I assume they did. I think they --

QUESTION: Well, they ought to know more than we do about futility.

MR. EISENBERG: Well, this panel said it wasn't futile. The earlier panel said it was futile. Nothing has changed in Illinois. You have a split between the two panels on the Seventh Circuit.

QUESTION: Well, what did the court decide from which this petition is --

MR. EISENBERG: The court denied my motion for rehearing without opinion, Justice White.

QUESTION: Yes. Yes.

QUESTION: I thought that that Harris against Irving decision in the Illinois Court of Appeals just addressed the ex post facto claim but not the due process claim that your client is urging.

MR. EISENBERG: That is right. That is right.

QUESTION: So in fact at least as to that it was open for review in the state court.

MR. EISENBERG: It was, although I --

QUESTION: Sure, and normally in Illinois the Supreme Court doesn't take these things on mandamus to review it in the first instance, and the court had indicated to Mr. Granberry that he ought to file in the Circuit Court, and he never did, so it looks to me like you certainly have an uphill battle to persuade us of futility.

MR. EISENBERG: Well, my submission is, Number One, that the due process issue is really a rearticulation of the ex post facto issue. However, my submission is that that was the same way the case was

presented in Welch versus Mizell when the Seventh Circuit said there was waiver and that futility should be found here. The relief we seek is a reversal of the Seventh Circuit and a remand with directions to reach the merits of the claim.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Eisenberg.

We will hear now from you, Ms. Friedl.

ORAL ARGUMENT OF MARCIA L. FRIEDL, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. FRIEDL: Mr. Chief Justice, and may it please the Court, whenever a colorable constitutional claim is presented to the District Court on federal habeas corpus by a prisoner in state custody, it is a duty of the attorney general to assess and evaluate and inform the District Court whether the petitioner has exhausted available state court remedies.

The very narrow question presented in this case is what role the concept of forfeiture plays when the assistant attorney general fails in his duty and the error is brought to the attention of the appellate court because the --

QUESTION: Was this just an error on the part of the lawyer representing the state in the District

Court?

MS. FRIEDL: I must assume so, Your Honor. This court has held that a 12(B)(6) motion is not an appropriate responsive pleading in habeas cases. The assistant didn't address the issue of exhaustion at all.

QUESTION: What about that requirement of rule 5 that a form be filled out and completed by the state.

MS. FRIEDL: That is what I am suggesting, Your Honor, that this was a mistake on the part of the assistants, or the part of the assistant attorney general. The question that we have to address here is not whether there is an express -- the state has expressly waived anything in the District Court. This was -- this was a situation where the assistant didn't even address the issue of exhaustion. Now, the assistant failed to perform this duty. The error was brought to the attention of the appellate court because the substantive claim that the Seventh Circuit was asked to resolve in this case was -- the substantive issue that it was asked to resolve depended on the construction of unclear state law.

It is respondent's position that the mistake of the assistant attorney general cannot defeat the strong comity interests in federalism that are served by

strict acherence to the exhaustion requirement of Section 2254, especially where the error is one of omission and it is pressed on appeal.

QUESTION: May I ask, you mentioned two or three times the fact it was just a mistake on the part of the lawyer for the state. Would the case be different in your view if the state accpted a policy of what we sometimes refer to in the cases of sandbagging and of always filing a motion to dismiss without raising exhaustion and then raising exhaustion for the first time in the Court of Appeals.

MS. FRIEDL: No, Your Honor, it --

QUESTION: Does that present a different issue?

MS. FRIEDL: It is in the attorney general's interest to request that a case be dismissed on exhaustion grounds in 99 percent of the cases.

QUESTION: Well, not necessarily, because if he thinks he can win on the merits, and that will end it, he will save all the litigation in state court.

MS. FRIEDL: That is assuming, Your Honor, that the state, that the state -- that comity runs to the state as an ertity. It is our submission that the comity underlying the exhaustion requirement of Section 2254 primarily runs to the state judiciary, and the

state judiciary is not a party to the proceeding in --

QUESTION: Well, be that as it may, if it is possible to dispose of a patently frivolous habeas corpus claim, say he alleges something that you know would never and up on the merits in the federal court and that is the end of it, you may never have any litigation and not burden your state courts.

MS. FRIEDL: I agree, Your Honor. I don't believe the federal court has jurisdiction over a patently frivolous claims.

QUESTION: Well, say one that you are pretty darn sure you are going to win. Don't make it patently frivolous, at least one the court has jurisdiction. The way the law appeared at the time this particular petition was filed, as I understand it, at the time this one was filed it was pretty darn clear that under existing law, that it was without merit, and then there was an intervening case that seemed to give more merit.

MS. FRIEDL: Well, Your Honor, at the time that the petition was filed in this case, the Seventh Circuit had held in the petitioner's favor on a similar -- on a similar claim, and it was after that decision, the Welch decision was subsequently overruled in Heirens, so at the time that the petition was filed this was a colorable claim and --

QUESTION: Well, I don't want to lose my real question. Maybe I have my facts wrong on this, but assume for the moment that you have a case that is a strong candidate for dismissal on its face, that is not totally frivolous, but one that the state in its judgment or the state attorney general thinks we can save everybody a lot of time by just going right to the merits and asking the court to dismiss it on the merits.

And so they adopt a policy in a case of that kind to file such a motion to just save everybody time and then they lose such a motion, or they say it is granted and the petitioner appeals, and then they raise the exhaustion argument for the first time. They decide as a matter of policy in cases in this category, let's not raise exhaustion until the Court of Appeals. Would that present a different issue than the one that we have got here where you make a big point of the fact that they acted negligently?

MS. FRIEDL: Yes, Your Honor, because I would consider that almost an abuse of the system. In Engel versus Isaac, this Court made it clear that state courts must be presumed -- in the context of analyzing cause for state procedural default this Court made it clear that state courts hold an interest in entertaining all

colorable constitutional claims presented -- they hold an interest in at least having those claims presented to them on one occasion by a particular prisoner.

If the state -- if comity interests run primarily to the state judiciary, which is what we submit --

QUESTION: Then I think you are saying that case would be just like this one. You are saying that always the Court of Appeals should make sure that the state has one shot at the case, the state tribunal.

MS. FRIEDL: Yes.

QUESTION: So that in you view the fact that he was negligent in this case doesn't separate it from a case in which an attorney general, say, for some other state might accept a policy of sandbagging, just never filing a motion in the District Court and always raising it in the first issue in the Court of Appeals. You would treat that exactly the same, I think.

MS. FRIEDL: No, Your Honor. If you are suggesting that the attorney general's office could properly --

QUESTION: Well, no, but logically you would say we shouldn't punish the state courts for the abuse of process of the state attorney general. Your argument is that the beneficiary of this rule is the state

courts, not the state as a whole, so why do you punish the state attorney general by depriving the state courts of their right? I think your answer to Justice Stevens' question would have to be it is the same situation, I think.

MS. FRIEDL: Yes, Your Honor.

QUESTION: Well, don't let yourself be persuaded that easily.

(General laughter.)

MS. FRIEDL: I was -- my understanding of Justice Stevens' question was whether it would be appropriate for the state, for the attorney general's office to intentionally -- to sandbag the system, and I don't think that that is the case that is presented here. We don't have a situation at all where --

QUESTION: I understand. You don't think it would be -- perhaps you don't think it would be good practice, and that is not this case, but the only question I am really asking you is, legally, as far as the issue that would be presented to the Court of Appeals in such a case I don't see why that would be any different from the case in which the attorney general just goofed, as you suggest happened here. I don't know why they are any different. That is all.

QUESTION: Well, what if the attorney general

expressly waives the right of exhaustion at the appellate court level? Can the appellate court ignore that waiver and nevertheless send it back?

MS. FRIEDL: The appellate court should never ignore -- first of all, if it is a waiver of the exhaustion requirement --

QUESTION: Let's say it's an express waiver. May the federal court of Appeals disregard that and nevertheless send it back for exhaustion?

MS. FRIEDL: No, I don't believe so, Your Honor --

QUESTION: No?

MS. FRIEDL: -- because I believe that the representations of the attorney general's office are entitled to great deference. However, in a waiver situation --

QUESTION: Do you think that is binding on the federal court and the federal court cannot consider the federal interest in exhaustion?

MS. FRIEDL: The federal interests in exhaustion in this case are particularly strong. The existence of the federal claim depends on the construction of unclear state law in this case. The litigation history of the substantive issue presented here is a perfect example of how the federal interests

are sacrificed when the exhaustion requirement is bypassed.

For years, the grant of parole in Illinois was characterized as solely a matter of grace. After this Court's decisions in Greenholz and Lebier versus Graham, the Federal District Courts in Illinois became inundated with federal habeas petitions attacking parole denials on due process and ex post facto grounds. Because the petitions were not dismissed for exhaustion in the Illinois courts, the Illinois courts were not given much more of an opportunity to consider the issue, yet both the ex poste facto claim and the due process claims have been presented here dependent upon the construction of extensive state parole regulations and the state parole statute.

Now, as a consequence the Seventh Circuit found itself forced to construe unclear state law in decision such as Welch and Scott. This in itself is a problem in light of the Pullman abstention doctrine and in light of the mandate of Section 2254. But the problem became truly manifest when two years after the Welch decision the Seventh Circuit determined that it had misconstrued Illinois law in the Welch decision and was required to overrule that case in Heirens. In the meantime the flood of petitions continued to the

attractive the federal forum and the state courts remained unable to construe their own state laws in an orderly fashion in the state courts.

Because the petitioners claims here depended on the construction of state law, the District Court should have dismissed this case sua sponte based solely on federal interests.

QUESTION: It is hard to fault the District Court for not dismissing and requiring exhaustion when the state made no point of exhaustion in the District Court.

MS. FRIEDL: Your Honor, I think the mistake here was with the assistant attorney general's failure to represent his position on exhaustion to the District Court. I do believe that the District Court should always ensure that the position, that the state's position on exhaustion has been expressed.

QUESTION: Kind of like a guilty plea. You have to have an examination of the state to see if they fully understand the consequences of waiving exhaustion?

MS. FRIEDL: No, Your Honor, but I do think that particularly in a case such as this where there was no responsive pleading no answer filed at all, it --

QUESTION: There was a form to fill out,

wasn't there, the state, for the state to fill out a form, or the petitioner to fill out a form?

MS. FRIEDL: The petitioner fills out a form, and --

QUESTION: And talks about exhaustion?

MS. FRIEDL: The attorney general's office is responsible.

QUESTION: What mistake did the attorney general make?

MS. FRIEDL: Apparently the assistant was not even aware of the exhaustion requirement.

QUESTION: But there is a space on the form that the attorney general is supposed to fill out in response that requires them to note whether there is exhaustion or not.

MS. FRIEDL: In the answer, yes, and this assistant just came in with the 12(b)(6) motion.

VOICE: He didn't file them in --

MS. FRIEDL: Correct. So there has never been any representation at all made to the -- there was never any representation made to the Federal District Court on the issue of exhaustion, and under those circumstances I do believe the District Court should have --

QUESTION: Why didn't the judge ask for it? Don't tell me that this is normal practice for the

attorney --

MS. FRIEDL: It is not a normal practice. This is a --

QUESTION: Well, why didn't the judge, if the attorney general didn't ask, I mean, why didn't the judge ask the attorney general why didn't you file this piece of paper?

MS. FRIEDL: Your Honor, because it was apparent, it should have been apparent at that time that a mistake was being made.

QUESTION: Well, why didn't you -- if a mistake has been made why didn't you ask that it be corrected?

MS. FRIEDL: We did at the --

QUESTION: I mean, the judge.

MS. FRIEDL: -- at the time when this case moved from the District Court level to the Circuit Court of Appeals, at that point --

QUESTION: Isn't that a little late?

MS. FRIEDL: Your Honor, it is when --

QUESTION: Isn't that a little late?

MS. FRIEDL: It is late and the error was brought to the attention of the appellate court as soon as the assistant handling the case on appeal recognized that there was a problem.

QUESTION: What is the responsive pleading that a state should file? What is it called?

MS. FRIEDL: An answer.

QUESTION: -- an answer, and is there any provision for a motion to dismiss --

MS. FRIEDL: Well, Your Honor, I --

QUESTION: Or is it just the answer, and you say, dismiss it because failure to exhaust?

MS. FRIEDL: I think that a generic motion to dismiss might be appropriate under the habeas -- in habeas cases so long as the generic motion to dismiss is considered to be something in the form of a motion to reconsider the trial, the federal judge's failure to summarily dismiss the claim as -- under Rule 4.

QUESTION: What did you say about Rule 12(b)(6) a while ago?

MS. FRIEDL: I am am sorry, Your Honor?

QUESTION: Didn't you mention 12(b)(6) a while ago?

MS. FRIEDL: Yes, Your Honor.

QUESTION: What did you say? Is a 12(b)(6) motion appropriate in a habeas case?

MS. FRIEDL: This Court has held that it is not an appropriate motion, and I believe the reason --

QUESTION: I guess I should know that, but I

didn't.

MS. FRIEDL: Only if it can be consicered a motion to reconsicer the failure to summarily cismiss under Rule 4 do I think that any type of generic motion to cismiss would be proper, because once you have got a cclorable claim at that point because the state courts are presumed to hcld an interest in adjudicating cclorable claims I do believe at that point the exhaustion issue must be addressed. Once it goes beyond the rule for summary dismissal stage.

QUESTION: Ms. Friedl, in order for you to win your case, you really don't have to get us to accept the proposition that a lower federal court cannot accept a waiver? Really all you need to establish is that a federal court need not.

MS. FRIEDL: Yes, Your Honor.

QUESTION: Now, in light of the fact that the system could be abused either way, you can have prosecutors intentionally waiving, and you can have -- it is very hard to tell how it is going to play out. Why wouldn't it be appropriate to simply adopt a rule that it can be waived. We're not saying that it cannot, but it is up to the lower courts to decide whether to apply a waiver rule or not.

MS. FRIEDL: Because I don't think that that

would serve state comity interests when it is understood that the comity concerns underlying the exhaustion requirement go to the state judiciary.

QUESTION: It depends on what you think goes into the rule. If I think that part of the basis for the current rule is to prevent litigation from being dumped on the federal courts which would better be resolved initially in the the courts, then in order to protect against that it would be enough for me to leave it to the good judgment of the lower courts to figure out whether that is what is happening, and where they think that that is what is going on they can simply enforce the waiver. Otherwise, they may accept it in some cases. What would be wrong with a regime like that? Is it an area where you need certainty?

MS. FRIEDL: Yes. In the interest of overall state comity and federalism I submit that the best and easily followed rule would be for the District Court to elicit a position from the -- ensure that the respondent has taken a position on exhaustion, and if the respondent is attempting to waive the exhaustion requirement, automatically require dismissal on exhaustion grounds to ensure that no mistakes are made.

Now, in the Strickland case this Court suggested that it is not required to sua sponte make a

determination of the state's interest in waiver, but the clear legislative mandate of Section 2254 most assuredly played a part in this court's decisions wherein the exhaustion issued was raised sua sponte despite the fact that the state did not raise the issue below, despite the fact that the state expressly conceded the issue below. Now, if the comity concerns underlying the requirement are so significant that this Court has chosen to sua sponte deal with the issue in this Court, then certainly I would think that the considerations are strong enough to require that the Federal District Court --

QUESTION: May I just -- I want to be sure I understand what you are saying about Strickland. In Strickland, as I recall the case, there has no been complete exhaustion, and this Court nevertheless entertained the claim and specifically said that exhaustion was not jurisdictional.

MS. FRIEDL: Yes, Your Honor.

QUESTION: That is correct.

MS. FRIEDL: Now, in a similar fashion, even though this Court has not in the Younger abstention cases this Court in Hoogery declined to review the propriety of Younger abstention only after specifically eliciting from the state representative his position on

abstention, and in no case to respondent's knowledge has this Court declined to review the propriety of abstention where the issue was pressed here.

Petitioner himself has sought to analogize this case with the cases of Eleventh Amendment immunity. This Court has made it clear that even if it need not be raised sua sponte the issue could not be forfeited by the state.

QUESTION: Well, more particularly, more precisely on the Eleventh Amendment point in the Ford case and the Department of the Treasury case that the state may raise the Eleventh Amendment in the Court of Appeals even though it did not raise it in the District Court.

MS. FRIEDL: It is my understanding that in the Eleventh Amendment cases the state may raise it in the -- at any time even after having expressly conceded it.

QUESTION: Well, when you say at any time, you don't mean after final judgment, do you?

MS. FRIEDL: Well, not after final judgment, no.

QUESTION: So you can raise it in any court in which the case is being heard.

MS. FRIEDL: In the Patsy case, for example,

this Court noted that even though the state was not pressing immunity for this Court that the state would be free to raise the issue on remand.

QUESTION: Under the habeas rules doesn't the petition go to a judge first?

MS. FRIEDL: Yes, Your Honor.

QUESTION: And doesn't the judge have to decide whether it should be summarily dismissed or an order entered ordering the attorney general to answer?

MS. FRIEDL: Yes, Your Honor.

QUESTION: Was there an order issued?

MS. FRIEDL: There was an order issued here. The judge did order the respondent to answer.

QUESTION: And just ignored?

MS. FRIEDL: The assistant did not answer. He responded with a 12(b)(6) motion.

QUESTION: To dismiss?

MS. FRIEDL: Excuse me?

QUESTION: To dismiss?

MS. FRIEDL: A 12(b)(6) motion to dismiss on the merits.

QUESTION: Of course, the judge could have permitted that.

MS. FRIEDL: Well, Your Honor, I --

QUESTION: The rules say -- the rules say that

he can either order a -- either dismiss summarily, or order an answer, or take some other course, including, the committee notes say, a motion to ask the state to move to dismiss.

MS. FRIEDL: To the extent that a 12(b)(6) motion would address the merits of the claim, a colorable claim, I don't think the motion is appropriate in the habeas context unless within the motion the state's position on exhaustion is stated. I think the exhaustion issue has to be determined once you go beyond colorable constitutional claims.

QUESTION: In this particular case -- as I remember, it was Judge Foreman in the Southern District of Illinois, had the case. He probably gets more habeas corpus petitions than anybody in the country because Marion is right nearby, and to suggest he didn't know that the 12(b)(6) motion was appropriate is kind of surprising.

MS. FRIEDL: Well, Your Honor, 12(b)(6) motions have been used in the District Courts in Illinois.

QUESTION: In fact, he referred this to a magistrate first, I think, didn't he, and then he decided it himself.

MS. FRIEDL: Yes.

QUESTION: If a judge could ask the state to file a motion to dismiss rather than an answer, and the state files a -- gets an order to answer but happens to file a motion, I suppose the judge could permit it.

MS. FRIEDL: Well, regardless of whether the 12(b)(6) motion was appropriate, we are saying that the exhaustion issue must be determined. It must be determined whether a petitioner has exhausted his state court remedies before you turn to the merits of his claim.

QUESTION: I agree with you.

MS. FRIEDL: To the extent that this motion addressed a colorable constitutional claim as opposed to one that is merely frivolous, the motion -- it was incorrect for the motion to be filed, for the motion to be entertained absent a determination on the exhaustion question.

The Illinois Supreme Court specifically invited the petitioner in 1981 to present his claim to the state Circuit Courts. The order in that case specifically cites to the Harris versus Irving Fifth District case, which went against the petitioner, and it is unusual if you look at that that order, because the Supreme Court states precisely when it denied leave to appeal.

It denied leave to appeal before this Court's decision in Weaver versus Graham. That was a specific, as far as I could tell, invitation to the petitioner to return to the state courts with his claim.

QUESTION: Ms. Friedl, I am troubled with one other aspect of what you are proposing. You are asserting that we have to protect the state courts from the state attorney general, so that even if the attorney general makes an explicit waiver, we shouldn't accept that. It is easy enough to protect the state courts in this case when the state attorney general comes in and says, you know, I am arguing on behalf of the state courts.

What do we do about the case where the attorney general really does want to waive the issue and we never know that there hasn't been exhaustion. Or are the lower federal courts supposed to conduct in each case their own investigation sua sponte when the attorney general doesn't come in and say, hey, there hasn't been exhaustion?

MS. FRIEDL: At a minimum I believe that the Federal District Court judge should ensure that the state's position on exhaustion is stated.

QUESTION: Yes, but the attorney general says, you know, we don't care.

MS. FRIEDL: Well, under -- if the attorney general is attempting to waive the exhaustion requirement, I don't see --

QUESTION: He just says, I don't know, Your Honor. Frankly, we don't care. We would like to get it here.

MS. FRIEDL: Then the assistant is not performing his duty.

QUESTION: So then somehow the judge has to inquire on his own or direct --

MS. FRIEDL: Ordinarily.

QUESTION: What I am suggesting is that there is no way you are really going to get the federal courts to protect the state courts from the state attorney general.

MS. FRIEDL: That is not what we are --

QUESTION: That ultimately the state attorney general is going to be the one that applies the protection.

MS. FRIEDL: That is not what we are asking. The only time that the federal courts should be involved in assessing -- if the court -- something comes to the court's attention that the attorney general's representation is incorrect, then I think the matter should be pursued but on a normal -- in a normal

circumstance the District Court is entitled to rely on the attorney general's representations on the issue of concession, of exhaustion, whether exhaustion has been accomplished at all.

Now, in the waiver situation I can't conceive of -- I can conceive of only a very few cases where the assistant attorney general, wearing the hat of the judiciary, can come into federal court and represent correctly that the state courts do not have an interest in litigating a colorable constitutional claim that has never been presented to the state courts.

So, because those circumstances will occur so rarely where the assistant is properly waiving the judiciary's interests, I think in the interests of overall comity that the District Court should not accept any waivers of exhaustion from assistant attorneys general and particularly because this issue can be raised on appeal I would think that it would be in this Court's best interests to have the Federal District Court be aware of situations of -- it would be in the interest of this Court to have the Federal District Court automatically dismiss on exhaustion grounds cases because there has probably been a mistake and that issue can be raised by the state on appeal.

QUESTION: I take it you are really arguing,

or you are very close to saying that the issue is just not waivable.

MS. FRIEDL: At the District Court level I believe that the issue is not waivable.

QUESTION: Or any place else. Why not any place else?

MS. FRIEDL: Well, Your Honor, again because the strong comity concerns underlying the exhaustion requirement are those which have -- this Court itself has raised the exhaustion issue sua sponte on numerous occasions.

QUESTION: Exactly. Exactly. Well, but your argument sounds as though that no matter what the attorney general says he wants to do, since comity runs to the courts, the federal courts should say, no, you can't waive.

MS. FRIEDL: Well, the attorney general is capable of assessing the interests of the state judiciary to an extent. He is capable of giving --

QUESTION: He can waive in the Court of Appeals or here but not on the District Court? Is that it?

MS. FRIEDL: Well, it would be a different situation, I think. The automatic exhaustion rule when the attorney general attempts to waive at the District

Court level is really just to give the Federal District Courts a clear, easily understood rule to follow. And once the case gets to the appellate level, I believe that at that time the issue must be, if a mistake has been made, the issue must be addressed by this Court if it is raised by the state.

QUESTION: Realistically, how many assistants does the attorney general have, how many hundred?

MS. FRIEDL: Well, Your Honor -- 300?

QUESTION: I am talking about his responsibility. He certainly can't be responsible for what each one of them does.

MS. FRIEDL: That is very difficult, and we do attempt to -- we do have a uniform policy in the office that this attorney just didn't follow.

For these reasons, the respondent respectfully requests that the Court of Appeals for the Second Circuit's decision below be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Friedl.

Mr. Eisenberg, you have three minutes remaining.

ORAL ARGUMENT OF HOWARD B. EISENBERG, ESQ.,
ON BEHALF OF THE PETITIONER

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

I don't know what the attorney general of Illinois' policy is I do know this is the fourth case this year in which exactly this same thing happened, fourth reported case, Granberry, Russo, Mosely, Crump. In each of those cases the Illinois attorney general did exactly the same thing, did not raise exhaustion in the District Court, raised it in the Seventh Circuit with varying results. In this case and Crump the court said, you are out of the box. In Mosely and Russo the court said, well, we really didn't mean what we said in Granberry, we are going to look at the merits anyway.

My submission is, this is not some negligence of some young assistant attorney general. This is the attorney general trying to have the best of both possible worlds. They want to win on the merits below and still have the ability to --

QUESTION: Do you have anything in the record to back you up on this?

MR. EISENBERG: There are four reported cases, Justice Marshall. They are all -- the cases are all in the briefs.

QUESTION: And they all say that the attorney general did what you said?

MR. EISENBERG: That is exactly right.

QUESTION: They said that he did what you

said?

MR. EISENBERG: Granberry, Russo, Mosely, and Crump exhaustion was raised for the first time on appeal in the Seventh Circuit, all within the last year, four cases.

QUESTION: So?

QUESTION: Did they win? In all four cases the attorney general --

MR. EISENBERG: Yes.

QUESTION: -- had won in the District Court?

MR. EISENBERG: They have won in the District Court. I am counsel in Mosely and Granberry. I know there was no counsel in the District Court in either of those cases. One in the District Court -- in this case, for example, no certificate of probable cause was issued. The Court of Appeals issued a certificate of probable cause, then appointed me.

My -- I don't want to accuse them of sandbagging because I don't think that is what they are doing. They know that without counsel inmates are going to lose most cases, certificates of probable cause are not routinely granted, and they want literally to have the door open so that they can argue whatever they want. So I don't think we can just write off this as a negligent assistant who didn't know what the policy is

in the office.

This is a 12(b)(6) motion going to the merits, asking the Court to reach the merits, and I think that is conclusive. In this case, factually, certainly. The general rule, other cases, the law may be different, but here my --

QUESTION: They didn't get the best of both worlds. You say they won two and lost two, so --

MR. EISENBERG: No, they won all four. In two cases the court reached the merits and they won on the merits. In two cases they kicked the case for failure to exhaust, they won for failure to exhaust.

QUESTION: I see.

MR. EISENBERG: So that is what I mean. They are not winning these cases -- they are not losing these cases. The inmates lose all of them. And it is just a question of when they have to raise it, and my submission is, they have to raise it at the same point the capital defendant had to raise it before his trial which led to his execution, and last term this Court --

QUESTION: Why can't you leave it to the federal court to figure out whether they were sandbagging or not?

MR. EISENBERG: I don't think that is --

QUESTION: That would be enough to take away

the incentive that you are --

MR. EISENBERG: I don't think that is necessary. I think what this Court should say these attorneys are attorneys like everyone else. They have to raise it at the proper time or they are out. And if the attorney general of Illinois doesn't like what his assistants are doing, he can deal with that, and if the voters of Illinois don't like what the attorney general of Illinois is doing they can vote him out of office. That is the remedy.

QUESTION: You could vote him out of office too, couldn't you?

MR. EISENBERG: I only have one vote, Justice Marshall.

(General laughter.)

MR. EISENBERG: Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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

CERTIFICATION

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

#85-6790 - WALDO E. GRANBERRY, Petitioner V. JIM W. GREER, WARDEN

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)