

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RONALD D. CASTILLE, ETC. ET AL., Petitioners V.
MICHAEL PEOPLES

CASE NO: 87-1602

PLACE: WASHINGTON, D.C.

DATE: December 6, 1988

PAGES: 1 - 51

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300
(800) 367-3376

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x
RONALD D. CASTILLE, etc., et al. :
 Petitioners :
 v. : No. 87-1602
MICHAEL PEOPLES :
-----x

Washington, D.C.
Tuesday, December 6, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 o'clock p.m.

APPEARANCES:

GAELE M. BARTHOLD, ESQ., Deputy District Attorney of
Philadelphia County, Philadelphia, Pennsylvania; on
behalf of the Petitioners.
ROBERT E. WELSH, JR., ESQ., Philadelphia, Pennsylvania;
on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	PAGE
GAELE M. BARTHOLD, ESQ.	
On behalf of the Petitioners	3
ROBERT E. WELSH, JR., ESQ.	
On behalf of the Respondent	26
<u>REBUTIAL ARGUMENT OF</u>	
GAELE M. BARTHOLD, ESQ.	49

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-1602, Ronald D. Castille v. Michael Peoples.

Ms. Barthold, you may proceed whenever you're ready.

ORAL ARGUMENT OF GAELE M. BARTHOLD

ON BEHALF OF THE PETITIONERS

MS. BARTHOLD: Thank you. Mr. Chief Justice, and may it please the Court.

State court prisoners seeking federal habeas corpus relief are generally required first to exhaust state court remedies. Instantly, the Third Circuit found that Prisoner Peoples' mere presentation of his claims to the highest state court was sufficient. It did so although those claims were presented in violation of state court practices and procedures with the result that there was no reasonable likelihood that they would or could have been considered on their merits.

This Court should reverse that decision and make clear that such token presentation does not comport with the comity-based requirement of 28 U.S.C. 2254. Prisoners like Prisoner Peoples should be required instead to pursue the state collateral review remedies

1 which here exist.

2 Prisoner Peoples is now serving a 15 to 30
3 year sentence as a consequence of his participation in a
4 particularly vicious robbery in which the victim was set
5 on fire. Post-verdict, he unsuccessfully filed trial
6 level post-verdict motions, an intermediate superior
7 court appellate court appeal, a pro se pleading
8 requesting the appointment of counsel and the grant of
9 discretionary Supreme Court review, and finally after
10 counsel was appointed in accordance with his request, a
11 counsel petitioned for discretionary Pennsylvania
12 Supreme Court review.

13 He then filed the instant habeas corpus
14 raising five separate claims. This was dismissed on
15 exhaustion grounds because it was determined that his
16 claims had not been presented to the highest state court
17 in a posture reasonably permitting their consideration.

18 On appeal, Prisoner Peoples claimed that the
19 mere presentation of his claims to the highest state
20 court was sufficient. In so doing, he ignored prior
21 procedural defaults and the fact that as a matter of
22 state court practice, Pennsylvania Supreme Court
23 practice, his pro se petition would not be considered on
24 the merits once counsel was appointed in accordance with
25 his request.

1 He also erroneously assumed that
2 ineffectiveness claims raised for the first time in a
3 discretionary review petition with no underlying state
4 court fact-finding or substantiating record could be
5 considered on their merits.

6 The Third Circuit, based upon its prior panel
7 decision in *Chaussard v. Fulcomer*, found exhaustion
8 because defendant's claims, Petitioner Prisoner Peoples'
9 claims, had all been presented to the State Supreme
10 Court in some form or fashion. In so doing, the Third
11 Circuit did not show deference to state court practices
12 and procedures and what I believe should be the
13 essential presumption that state courts follow those
14 practices and procedures.

15 QUESTION: Ms. Barthold, may I inquire of you?
16 If a claim had been preserved at trial and was properly
17 raised before the Superior Court and so forth, and then
18 raised in a pro se petition in Pennsylvania for
19 allocatur, which asked for substantive relief and the
20 appointment of counsel, and if the Supreme Court in
21 Pennsylvania simply denied that petition, would the
22 claim be exhausted in your view?

23 MS. BARTHOLD: Yes, I believe it would be
24 because I think that is unlikely to happen in
25 Pennsylvania because it's Pennsylvania practice, as this

1 Court recalls from Pennsylvania v. Finley, to liberally
2 appoint counsel when counsel is requested. So, here
3 once the prisoner filed a pro se petition raising
4 substantive claims and requesting counsel, the State
5 Supreme Court granted the request for counsel and the
6 order which they filed, which is found at page 61 of the
7 appendix, is I think very clear --

8 QUESTION: Well, I think what troubles me is
9 if your answer to my question is yes, is that because
10 the court had the opportunity to address the claim?

11 MS. BARTHOLD: Yes, if they chose not to
12 appoint counsel. I mean, the point I think is that
13 state courts have practices and procedures which, if not
14 always explicit or formalized, nevertheless control the
15 way in which they do business. And under the
16 hypothetical you have given me which is, as I say,
17 unlikely to happen in Pennsylvania, everything is
18 properly preserved. There is no prior procedural
19 default, and it comes before the court in a form and
20 fashion so that it can come in in the pro se petition.
21 I mean, I think you're assuming we're not having any
22 belatedly raised ineffectiveness claims that don't --

23 QUESTION: Right.

24 MS. BARTHOLD: -- have substantiating records.
25 We don't have any of those sorts of problems.

1 So, in that circumstance, if they simply
2 denied the pro se petition, yes, I would have to say
3 there was a fair opportunity. But I must also say that
4 will not happen in Pennsylvania because you have here a
5 pro se petition saying I've got substantive claims and I
6 want the appointment of counsel, and the court liberally
7 grants counsel, makes clear that all substantive claims
8 have to be raised in the subsequent counsel's allocatur,
9 and that is precisely what happened here.

10 QUESTION: So, if -- If the Supreme Court of
11 Pennsylvania denies the request for appointment of
12 counsel in that case, that means, in effect, they say
13 you can get no relief on the merits.

14 MS. BARTHOLD: Yes. I -- I think I would have
15 to concede that although, as I say, that's not what
16 happened here, and I think it's not what is likely to
17 happen. And it also assumes that everything is properly
18 raised below.

19 QUESTION: Are there any Pennsylvania cases or
20 rules or statutes that outline the procedure you say the
21 Pennsylvania Supreme Court follows in these cases?

22 MS. BARTHOLD: There is not any statute or
23 rule of procedure with respect to the appointment of
24 counsel other than practice. And when one looks at the
25 record --

1 QUESTION: Are there reported cases describing
2 the procedure?

3 MS. BARTHOLD: No, not that I am aware of.
4 But there is, as I say, an order which was entered in
5 this case at page 61 of the Joint Appendix in which it
6 is very clear that in appointing counsel, the court is
7 permitting the filing of an allocatur at that point and
8 that all claims have to be raised in that counsel's
9 allocatur. I believe that is quite clear.

10 And, of course, the issue of whether the pro
11 se pleadings should be considered is only one of the
12 issues in this case. When the Third Circuit granted
13 relief and ordered a hearing on the merits, they ignored
14 the fact that as a matter of state court practice and
15 procedure, pro se pleadings are not considered in the
16 posture this one was in because counsel was appointed.
17 They also ignored prior procedural default with respect
18 to many of the claims, and they also I think erroneously
19 assumed that belatedly raised ineffectiveness claims
20 without any sort of fact-finding or substantiating
21 record can magically be decided on their merits on -- in
22 a petition for discretionary review.

23 The Third Circuit I think has adopted an
24 extreme minority view. There is one case in the Ninth
25 Circuit, Turner v. Compoy, in which certiorari is now

1 pending, in which the Ninth Circuit acted similarly in
2 an ineffectiveness context. But the -- most of the
3 circuits that have spoken on this issue either presume
4 that state courts follow their practices and procedures
5 or at the very least will look at the state law, will
6 look at the history of the case and make an
7 individualized determination as to whether there was a
8 fair opportunity to consider and correct the alleged
9 violation.

10 There are I think some very unfortunate
11 effects from the Third Circuit's approach. You have an
12 approach which condones forum shopping which invites
13 criminal defendants to hold back on their claims as they
14 proceed through the state court system, and then when
15 they get to discretionary review in the state court
16 system to magically raise this claim for the first time
17 when it cannot be considered because of prior procedural
18 defaults and other defects and then assure that they can
19 get into federal court, I think this is unwise.

20 I think this breeds disrespect for state court
21 practices and procedures.

22 I think it permits cases to come prematurely
23 into the federal system without state court
24 fact-finding, without state court evidentiary hearings.
25 And that is precisely what will happen in this case if

1 the Third Circuit is not reversed.

2 This increases the federal caseload.

3 It's I think destructive to the principles of
4 comity and, in fact, carves out an exception to the
5 comity-based exhaustion requirement. In Duckworth v.
6 Serrano, this Court made clear that you would not carve
7 out exceptions to the exhaustion requirement even in
8 cases of clear constitutional violations.

9 And I think the case here is in many ways most
10 analogous to the situations which this Court considered
11 in Ex parte Hawk and In Pitchess v. Davis. In those
12 cases, the Court made clear that the mere presentation
13 of claims to a high state court, either as an original
14 action or as in the form of an extraordinary writ, was
15 not sufficient to comply with the exhaustion doctrine.
16 And the Court did so because such token, irregular
17 presentation did not constitute a fair opportunity to
18 consider the claims on the merits as a matter of state
19 law.

20 QUESTION: May I -- may I interrupt? I may
21 have missed something, but I just want to be sure I have
22 it correct in my mind.

23 In this case the -- after the lawyer was
24 appointed, he or she asserted some claims but not others.

25 MS. BARTHOLD: Yes.

1 QUESTION: And the Supreme Court just entered
2 a one-line order denying everything. Is that right?

3 MS. BARTHOLD: That is correct.

4 QUESTION: Now, supposing the Petitioner just
5 wanted to pursue the claims that the lawyer had put in
6 the -- In his or her petition, would those claims have
7 been exhausted?

8 MS. BARTHOLD: Oh, yes.

9 QUESTION: They would have been.

10 MS. BARTHOLD: Oh, yes, assuming they were
11 otherwise properly before the court --

12 QUESTION: Right.

13 MS. BARTHOLD: -- and that we don't have any
14 prior procedural defaults or any problems with a lack of
15 substantiating records.

16 QUESTION: So, is it -- is it correct that the
17 practical effect of the rule that you ask us to adopt is
18 that the lawyer in this situation should always include
19 every claim in the petition of the Supreme Court to be
20 sure there will be complete exhaustion?

21 It seemed to me here there might be merit in
22 the lawyer just selecting those that seem to have the
23 most merit and almost saying, well, I'm pretty sure the
24 others are going to be denied, so I didn't include those.

25 MS. BARTHOLD: Well, of course, and that's

1 part of counsel's job to make reasoned determinations as
2 to what claims should be raised in an appellate forum.

3 QUESTION: But the -- but the lawyer has to
4 pay a price for doing that because having done that, it
5 means that -- that the -- the case won't go over to
6 federal court until the prisoner refiles with respect to
7 those claims. Is that right?

8 MS. BARTHOLD: Well, presumably -- I'm not
9 sure it's that the lawyer pays a price.

10 QUESTION: Well, the prisoner.

11 MS. BARTHOLD: Presumably the litigant
12 consults with his attorney and discusses what claims
13 should be raised.

14 QUESTION: And then the lawyer decides, well,
15 I don't think those three claims have any merit at all.
16 I think it will hurt your case for me to put them. So,
17 I just want to put in two, which I suppose the lawyer
18 could do. But -- but that would mean that there would
19 have to be another round of proceedings on those other
20 three claims.

21 MS. BARTHOLD: It could happen. Of course,
22 this Court has made very clear that lawyers should
23 exercise their professional skills in determining what
24 claims to raise after they consult with their clients.
25 And there is a value in requiring these claims then to

1 go through state collateral review procedures.

2 QUESTION: Well, is there if -- say you
3 presume the lawyer knows what -- he's a good lawyer. If
4 the lawyer thinks there is absolutely no merit to those
5 three claims, wouldn't it maybe expedite things to just
6 say, well, we'll presume that -- that there was
7 exhaustion in the sense that the lawyer thought they
8 were not worthwhile and the Petitioner had an
9 opportunity to put them before the court, and we'll get
10 the whole matter disposed of more promptly by just going
11 ahead with them.

12 MS. BARTHOLD: Well, with all due respect, I
13 think a question of simply expediting things is -- is
14 not what is crucial and critical here.

15 QUESTION: As long as the state has a fair
16 opportunity. But part -- what I'm suggesting is that
17 part of the protection of the state is the lawyer's own
18 judgment that there's really no merit to these three.
19 And I guess in this case they're fairly weak claims,
20 aren't they?

21 MS. BARTHOLD: Oh, they absolutely are fairly
22 weak claims, but the point is --

23 QUESTION: So, we're going through a lot of
24 extra procedure. It's just going to spin a lot of
25 wheels is what I'm wondering about.

1 MS. BARTHOLD: Well, the point is, though, I
2 think, Justice Stevens, that state courts promulgate
3 procedures in terms of how they are going to do business
4 for good reason. I mean, the entire purpose of
5 appointing counsel was to allow the claims, this
6 prisoner's claims, to work their way through the state
7 court system in an orderly and clear manner. And this
8 prisoner was the party who said I do not want to proceed
9 pro se. I want the advantage of a lawyer. And
10 Pennsylvania is liberal in appointing counsel when
11 criminal defendants ask for it.

12 I mean, it simply seems to me he cannot have
13 it both ways. He can proceed pro se if he wants to, but
14 if he wants to get counsel, he has got to get counsel
15 under the terms and conditions in which the Pennsylvania
16 Supreme Court will give him counsel, which is to say if
17 you want counsel, we're going to proceed in an orderly
18 way. And the order at page 61a of the appendix makes
19 that very clear I think.

20 I mean, I'm fearful of the devastating effects
21 you have in terms of damage to the comity requirement,
22 damage to state court practices and procedures and an
23 increase in the federal caseload and cases prematurely
24 coming in if you accept this sort of helter-skelter
25 approach.

1 Now, we have specified in our brief at very
2 great length the defects which we see with respect to
3 each of the prisoner's five claims. I am not going to
4 belabor them now. I anticipate that what the prisoner's
5 counsel is going to attempt to do is to turn this into a
6 simple state law question and try to persuade this Court
7 that each and every one of his claims were properly
8 raised to the Pennsylvania Supreme Court. So, what are
9 we all doing here today?

10 I think it's very clear what we're all doing
11 here today. We are looking at cases coming out of the
12 Third Circuit and the Ninth Circuit that have mere
13 presentation rules, token presentation rules, which in
14 fact encourage criminal defendants not to proceed in an
15 orderly fashion in the state courts. And here the
16 difficulties -- the deficiencies include, as I've
17 indicated, prior procedural defaults, the fact that
18 ineffectiveness claims were raised late in the game and
19 could not be considered on their merits by the
20 Pennsylvania Supreme Court in the form and fashion in
21 which they arrived there --

22 QUESTION: Let me ask you one other question.
23 If you concede that the two claims that were in the
24 counsel's petition would be considered exhaustion, what
25 if the petition that counsel had added in his petition

1 or brief, or whatever it was called, a paragraph at the
2 end saying petitioner has also raised these three other
3 claims which are not being discussed in this paper?

4 MS. BARTHOLD: Let me just backtrack a minute.
5 What I conceded is that any claims in the counsel's
6 petition which were otherwise properly --

7 QUESTION: Yes.

8 MS. BARTHOLD: -- preserved, et cetera, et
9 cetera --

10 QUESTION: Of course, yes.

11 MS. BARTHOLD: -- would have been exhausted.
12 And I'm not conceding that any claims in the counsel's
13 petition here were, in fact, exhausted because there
14 were other difficulties with those claims. Either they
15 were different claims or they rested on a different
16 constitutional analysis.

17 But if he referenced those claims and made
18 clear that he was not putting them in front of the
19 Supreme Court, then I think they were not -- would not
20 be exhausted.

21 QUESTION: But he did tell the court that the
22 petitioner had filed a pro se document trying to put
23 them before the Supreme Court. So, just by reading the
24 counsel's submission, the court would know those claims
25 had all been -- at least been raised.

1 MS. BARTHOLD: The --

2 QUESTION: That would not be enough either.

3 MS. BARTHOLD: The -- no, absolutely not,
4 because the court -- it is very clear -- treated that
5 pro se pleading as a request for counsel, granted
6 counsel and said we are appointing counsel for you and
7 counsel must file within 30 days of that appointment his
8 allocatur petition. They didn't say another allocatur
9 petition that we'll also consider. They made it very
10 clear that if you want counsel, you're going to proceed
11 in an orderly fashion like every other litigant in that
12 court.

13 QUESTION: Then what would have been counsel's
14 next step or petitioner -- the petitioner's next step
15 under Pennsylvania law? To file a petition with the
16 Supreme Court of Pennsylvania? The Supreme Court has
17 now appointed -- the Supreme Court of Pennsylvania has
18 now appointed counsel for him when he -- because of what
19 he filed there. What -- what does counsel now do under
20 your view of Pennsylvania law?

21 MS. BARTHOLD: Counsel, after being appointed,
22 filed a counsel discretionary review petition in the
23 State Supreme Court, and that was denied on a naked
24 order. And now his remedy is to proceed under the state
25 collateral review statute which will permit him to raise

1 and litigate in the state forum all of the various
2 arguments that he has not properly put before the state
3 courts already.

4 QUESTION: And he has the same counsel on that
5 collateral review?

6 MS. BARTHOLD: No. He would file a pro se
7 PCHA, actually now a PCRA, and as the Court recalls from
8 Pennsylvania v. Finley, Pennsylvania practice is quite
9 liberal with regard to the appointment of counsel for
10 first state collateral review petitions. So, he will
11 have new counsel appointed for him if he wishes it.

12 QUESTION: Well, this wouldn't be a new
13 petition. It would be a second state petition
14 presumably to raise these claims.

15 MS. BARTHOLD: This would be the first state
16 collateral review petition.

17 QUESTION: I'm not quite certain about the
18 procedural posture of the allocatur. This was an
19 application to the Supreme Court of Pennsylvania. Was
20 it in the course of direct review of the convict?

21 MS. BARTHOLD: Yes. Yes. And allocatur in
22 Pennsylvania, Pennsylvania discretionary review, is
23 almost identical to the grant of certiorari by this
24 Court. It is only for cases of exceptional importance
25 and to resolve conflicts and so on and so forth. It is

1 in many ways an extraordinary exercise of jurisdiction.

2 I -- I think one thing I should point out --

3 QUESTION: You know, given that, I'm surprised
4 that you concede there would be exhaustion as to the
5 --even the claims that the lawyer raised because I
6 should think the Pennsylvania Supreme Court might well
7 say, well, there might be merit in it, but let's let it
8 go to collateral review where a trial judge can take a
9 first look at it.

10 MS. BARTHOLD: Well, of course, the entire
11 premise underlying the exhaustion doctrine in comity is
12 that the state courts have a fair opportunity to
13 consider and correct alleged violations. So if, for
14 example, a claim was properly preserved in the trial
15 court and in the Pennsylvania Superior Court, he then
16 has to go forward to the State Supreme Court to give the
17 state courts a fair opportunity.

18 QUESTION: Yes, but if they have the --

19 MS. BARTHOLD: But they don't have to decide
20 it on the merits.

21 QUESTION: Well, that's the same kind of
22 authority we have on our certiorari docket. We often
23 deny cert on something we think can be better presented
24 in collateral review. And I would think -- I would
25 think at least arguably that claim isn't even

1 exhausted. I suppose the lawyer could on collateral
2 review reassert the claims that had been presented to
3 the Supreme Court and say I'm afraid they just denied it
4 for discretionary reasons. I'd like to have the trial
5 judge look at it.

6 MS. BARTHOLD: Yes, he can because those
7 claims are not under Pennsylvania law, Commonwealth v.
8 Tarver, finally litigated claims. So, they can go back
9 in state collateral review if they wish to.

10 QUESTION: See, I'm -- I'm puzzled that you
11 concede those are exhausted.

12 MS. BARTHOLD: Well, I'm conceding they're
13 exhausted if they're otherwise properly before the State
14 Supreme Court. If they're properly preserved, if they
15 have substantiating records, then all that the prisoner
16 has to do is give the state court a fair opportunity to
17 pass upon those claims. But the problem here is the
18 claims don't give the State Supreme Court a fair
19 opportunity because there are prior procedural defaults.
20 There are ineffectiveness claims that can't have
21 substantiating record, and also because as a matter of
22 state court practice and procedure, the Supreme Court
23 would not consider the pro se pleading once it granted
24 counsel.

25 Now, I should note I think that this case

1 raises in the exhaustion context an issue similar to
2 that already before the Court this term in the
3 procedural default, adequate and independent state basis
4 context in Harris v. Reed which was argued in October.
5 And in Harris v. Reed, of course, this Court is being
6 asked to apply a plain statement rule of Michigan v.
7 Long and, in fact, conclude that unless the state
8 appellate court specifically says it's denying something
9 on procedural or default grounds, then you've got to
10 assume it's a decision on the merits.

11 I would point out that while there was an
12 opinion filed in Harris, that is not always the case in
13 all intermediate courts in all states in all cases.
14 Here we go one step further. I mean, we're in the
15 exhaustion context, so we're only talking about the
16 deferral of access to the federal courts. But you have
17 claims being raised for the first time in a petition for
18 discretionary review which there is no reasonable
19 opportunity for the Pennsylvania Supreme Court to make
20 clear the basis of its reasoning.

21 QUESTION: If you follow the logic of our
22 Pitchess decision, it seems to me you probably would
23 respond differently to Justice Stevens' earlier question
24 where we said there that the denial of a -- of an
25 original writ in the appellate court, a writ of

1 prohibition, was not to be considered an exhaustion of
2 the claim. But then isn't he right that even if the --
3 the denial of review by the Supreme Court of
4 Pennsylvania, no matter what the status of the claim,
5 can't be regarded as exhaustion if there's collateral
6 review available?

7 MS. BARTHOLD: Well, I -- I think that is
8 perhaps going too far. I mean, I -- I am willing to
9 concede -- perhaps it's unwisely. But I am willing to
10 concede if the claim is otherwise properly before the
11 state courts and it has gone through the system in an
12 orderly way -- I mean, we're not trying to make life
13 unbearable for criminal defendants. That is not our --

14 QUESTION: Well, of course, it's not up to you
15 really. I mean, it's up to the federal law regarding
16 habeas corpus. And our case of Pitchess interpreted the
17 federal habeas statute and its requirement of exhaustion.

18 MS. BARTHOLD: It did, and as I understand
19 that decision -- and perhaps I -- I misunderstand it --
20 what you said is there was not a fair opportunity as a
21 matter of state law for the Court to consider the claim
22 because it came before it in such an unusual posture
23 although discretionary review in Pennsylvania is
24 extraordinary in the sense that it's like this Court's
25 exercise of extraordinary jurisdiction. If the claim

1 otherwise comes before it in a -- in a proper fashion, I
2 had not until this point -- perhaps I could change my
3 mind -- thought that I should argue that criminal
4 defendants should go back and proceed under PCA under
5 collateral review.

6 I mean, we just simply want to be sure that
7 the state courts have a full and fair opportunity to
8 consider claims.

9 QUESTION: Well, I -- I thought you -- I
10 thought you were pretty strongly indicating that the
11 State Supreme Court, when the lawyer filed the petition,
12 actually passed on the merits.

13 MS. BARTHOLD: They have the opportunity to
14 pass on the merits.

15 QUESTION: Well, I know but they -- they
16 appointed counsel to present these claims to it.

17 MS. BARTHOLD: Yes.

18 QUESTION: And it seems like a sort of a
19 useless procedure if they weren't going to pass on the
20 merits of those claims. It just wasn't a discretionary
21 denial, was it?

22 MS. BARTHOLD: We do not know why they denied.
23 It -- probably they denied because of the fact that
24 there were defaults, there were ineffectiveness claims
25 that didn't have substantiating records. They --

1 QUESTION: Well, what about passing -- Just
2 passing on the merits of the --

3 MS. BARTHOLD: If the claim is properly
4 preserved, we are willing to say that the State Supreme
5 Court and therefore the state courts had a fair
6 opportunity to pass on the merits.

7 QUESTION: Well, and not only a fair
8 opportunity but they passed on the merits.

9 MS. BARTHOLD: Yes, but --

10 QUESTION: Is that the -- is that the law in
11 Pennsylvania that if a Pennsylvania Supreme Court denies
12 discretionary review, which is what I understand
13 happened here, that the Supreme Court of Pennsylvania
14 has passed on the merits?

15 MS. BARTHOLD: No. It is not a finally
16 litigated claim. It's a matter of state law. In other
17 words, if they simply deny it -- deny discretionary
18 review, it then can be litigated in the state collateral
19 review forum. It's not a finally litigated claim.

20 QUESTION: Well, to make an analogy to our
21 practice, it's as though we appointed counsel to file a
22 certiorari petition, and the counsel does it and files
23 two or three claims but not some others his client would
24 like him to file, and we deny certiorari. We may or may
25 not have thought there was merit to the claims. Isn't

1 that the same analogy?

2 MS. BARTHOLD: You may or may not, but --

3 QUESTION: We had a fair opportunity to take
4 the case and decide it, but we just said cert denied.

5 MS. BARTHOLD: But the position we suggest to
6 the Court is that --

7 QUESTION: You --

8 MS. BARTHOLD: -- if it's unclear, you must
9 presume that the state court followed its practices and
10 procedures including prior procedural defaults. In
11 other words, you don't assume something is on the
12 merits. If there is something defective about the claim
13 or claims, you assume to the contrary. And the reason
14 for that is to the extent that there is any confusion
15 that exists in cases such as this case, it exists
16 because of the mismanagement of the litigants in
17 bringing their claims before the state courts in an
18 orderly fashion.

19 QUESTION: Justice Stevens is suggesting that
20 it's unreasonable to assume that it's on the merits even
21 when they have been presented in an orderly fashion,
22 just as it's unreasonable to assume that our denial of
23 certiorari has anything to say about the claims.

24 MS. BARTHOLD: Well, as I say -- and you may
25 be right -- I had not thought of that aspect of saying

1 that you should go through state collateral review even
2 where you go to the -- the State Supreme Court. I mean,
3 perhaps I have conceded too much.

4 If I might, I would like to reserve the bulk
5 of my time -- what's left for rebuttal, and I would ask
6 the Court to reverse the Third Circuit.

7 QUESTION: It's not the bulk of your time, but
8 you may reserve whatever is left.

9 (Laughter.)

10 MS. BARTHOLD: Thank you.

11 QUESTION: Mr. Welsh?

12 ORAL ARGUMENT OF ROBERT E. WELSH, JR.

13 ON BEHALF OF THE RESPONDENT

14 MR. WELSH: Mr. Chief Justice, and may it
15 please the Court.

16 I wonder if I might propose the following
17 outline for my presentation. First I'd like to make
18 clear what I think is before this Court and what is not
19 before this Court and make clear that I'm not urging
20 this Court to adopt any sort of mere presentation rule.

21 I'd next like to address Pennsylvania law and
22 where I think reported decisions support my
23 interpretation as opposed to what Ms. Barthold relies
24 upon which is her expertise which, though extraordinary,
25 I don't think carries the day.

1 Then I'd like to address federal law in very
2 brief terms with specific reference to Justice Stevens'
3 point.

4 The Third Circuit in *Chaussard* may be read to
5 create a mere presentation rule. I must say that I
6 cited *Chaussard* in my initial brief in the Third Circuit
7 without reading it to establish such a rule because I
8 think such a rule is not in keeping with any of the
9 precedent of this Court. In fact, I don't even think
10 the Third Circuit, with the possible exception of this
11 unreported panel decision in this case, reads *Chaussard*
12 to create --

13 QUESTION: You're not defending the panel
14 decision in this case.

15 MR. WELSH: I am not defending it as read by
16 Ms. Barthold. There is a way I can defend it, Justice
17 White, if you'll bear with me.

18 I think that in *O'Halloran v. Ryan*, the Third
19 Circuit made fairly clear in a published opinion that
20 they do not recognize a "mere presentation rule."

21 I think that what this case comes down to are
22 some very unusual idiosyncracies of Pennsylvania
23 procedure which are unlike anything you have seen both
24 in your careers as federal judges, and those of you who
25 have served on the state bench probably have not seen it

1 either. And unlike Ms. Barthold's position, I do not
2 agree that the untidy record here is due to the
3 "mismanagement" of the litigants because I believe that
4 this untidy record flows directly from what Pennsylvania
5 requires litigants to do in these cases.

6 Now, if this were a criminal case and -- and a
7 criminal defendant failed to raise a claim in the court
8 of appeals, it would be unlikely that it could be raised
9 here. There may be an escape hatch by way of the plain
10 error rule.

11 Pennsylvania is one of the most vigorous
12 states in the use of waiver rules. I will not bore this
13 Court with some examples, but they're staggering, and
14 they give lawyers nightmares. But one of the waiver
15 rules, which should not surprise you, is that if you
16 fail to raise something in the Court of Common Pleas,
17 the trial level court, or the Superior Court, and if you
18 later do not raise it in the Supreme Court, if you go
19 back again to the collateral attack route suggested by
20 Ms. Barthold, if you did not raise it on direct appeal,
21 you waived it. So, born of this rule is the implication
22 that if you have a claim of ineffectiveness of counsel
23 and if it was not raised at all prior levels, you must
24 raise it on direct appeal.

25 In fact, there are a number of cases --

1 QUESTION: When you -- when you say direct
2 appeal, Mr. Welsh, you mean direct appeal to the Supreme
3 Court of Pennsylvania?

4 MR. WELSH: That's correct, Mr. Chief Justice.
5 I think that if you look at the cases I cited, none of
6 those cases support Ms. Barthold's assertions. In fact,
7 if you look at those cases -- and I'm referring to
8 Turner, Hubbard and Morin -- in each case there was a
9 significant and conceded default of a claim at some
10 lower level. The claim is, in effect, rejuvenated
11 because it was alleged that the failure to raise it in
12 the lower level was due to the ineffectiveness of
13 counsel.

14 QUESTION: When I asked you about the appeal,
15 it is not an appeal as a matter of right, is it, from
16 the -- is it the Superior Court or the commonwealth
17 court to the Supreme Court?

18 MR. WELSH: It depends on the type of case.

19 QUESTION: In a -- in a case like this.

20 MR. WELSH: It depends on whether it's a
21 homicide case versus a non-homicide case and when it
22 happened, in essence.

23 QUESTION: Well --

24 MR. WELSH: In this case it would not be an
25 appeal as of right.

1 QUESTION: So, it's something like our
2 certiorari jurisdiction?

3 MR. WELSH: I think that's a very good analogy.
4 My point, though, is this, Your Honor.

5 QUESTION: Excuse me. Before you go on, when
6 it is raised collaterally, what is the issue that is
7 allowed to be raised collaterally, that counsel was
8 ineffective with the burden that that requires, or
9 simply that the issue is a valid issue?

10 MR. WELSH: It is precisely the same issue
11 that would be raised on direct appeal. That is, you
12 must demonstrate that the failure to maintain the claim
13 constituted the ineffectiveness of counsel and, number
14 two, that you are correct on the merits.

15 And this is where my record in this case is
16 different than *Pitchess v. Davis* and *Ex parte Hawk*. In
17 those cases, which I think should not be analogized to
18 certiorari review or allocatur review, it was more akin
19 to a petition for a writ of mandamus, absolutely
20 extraordinary review. Here in Pennsylvania allocatur
21 review is virtually the same as certiorari review. I
22 see no significant differences or no differences helpful
23 to this analysis.

24 But the important thing is is that in cited,
25 reported cases, Pennsylvania courts look at the merits

1 of otherwise defaulted claims when the default is
2 alleged to constitute the ineffectiveness of counsel.

3 QUESTION: Is it -- is it your position, Mr.
4 Welsh, that for purpose of -- purposes of exhaustion,
5 taking a criminal conviction up through the direct
6 appeal process and allocatur, if that's the word, to the
7 Supreme Court of Pennsylvania on direct appeal suffices?

8 MR. WELSH: No, certainly, Your Honor. Let me
9 explain why. This goes back to I think Justice Stevens'
10 position or query.

11 This Court has not expressly articulated an
12 analysis of the comity implications of -- of whether
13 that constitutes exhaustion. I think there is much to
14 be gleaned from this Court's cases to suggest that
15 discretionary review by a state court does constitute
16 exhaustion. Moreover, I think it is the universal
17 position of all the federal courts, the lower courts
18 that I know of, that the denial of discretionary review
19 does constitute exhaustion. And I have a couple of
20 reasons to suggest.

21 Number one, they had an opportunity. It just
22 so happens that discretionary review is the way they
23 exercised that opportunity.

24 Secondly, if discretionary review does not
25 constitute exhaustion, even if you send Mr. Peoples back

1 down to Common Pleas Court in a collateral attack, his
2 -- his -- his last stop on the train is going to be the
3 denial or grant of discretionary review. That's the way
4 state courts are more and more exercising their
5 jurisdiction.

6 I'd like to point out that I don't think the
7 parties have really addressed this because I believe
8 that it is the universal -- and I must -- I must
9 hesitate only somewhat, but it is the universal practice
10 in the lower courts to treat that discretionary review
11 unless there is a default as constituting exhaustion.

12 QUESTION: Why should we treat it for the
13 federal rule as an unexhausted claim where Pennsylvania
14 affords the collateral review process?

15 MR. WELSH: I -- I see at least three reasons,
16 Justice O'Connor. Number one, it is -- it is a very
17 common mode of managing cases in the states now to have
18 discretionary review. That's the way it gets done. And
19 I think that this Court cannot read in any inference
20 about whether they wanted to address the merits, whether
21 they didn't want to address the merits, whether it was a
22 bad day. Who knows why?

23 But I think secondly -- and this is the most
24 important thing and is a matter that I believe you have
25 written on more than any other Justice in recent days

1 --the underlying comity interests are advanced when you
2 grant or find exhaustion on discretionary review. There
3 is simply no reason to send back someone like Mr.
4 Peoples to the Court of Common Pleas when in fact the
5 Supreme Court of Pennsylvania had every opportunity --
6 and I'll get to the alleged defaults in a minute. But
7 the Supreme Court of Pennsylvania can address the
8 merits. They may not think it's quite as important as
9 some other cases. They may limit their exercise of
10 jurisdiction for reasons dealing with caseload and the
11 like, but it seems to me that it will invite this Court
12 to get too much into the minutia of state court practice
13 to try to --

14 QUESTION: But at least -- at least in most
15 cases, if the supreme court of a state denies
16 discretionary review, the issues presented there will
17 have been passed on by lower courts.

18 MR. WELSH: That will be -- that will be often
19 the case, but Pennsylvania --

20 QUESTION: Well, now what about that? I would
21 think -- I would think that probably there's exhaustion
22 there.

23 But are you just talking now in your
24 presentation about some issue that was not presented
25 below but then is presented at the State Supreme Court?

1 MR. WELSH: I believe that with Justice
2 O'Connor I was addressing the general proposition of
3 whether discretionary review in a state court
4 constitutes exhaustion.

5 QUESTION: But at least the -- the -- a lower
6 court has passed on it.

7 MR. WELSH: That's true, but there's an irony
8 to the point you're making. Ms. Barthold argues
9 vehemently that if you find exhaustion here, it will
10 constitute the throwing of a monkey wrench into the
11 --the Judiciary of Pennsylvania. I contend that if you
12 don't find exhaustion here, you will require
13 Pennsylvania to change it's rules, and here's why.

14 As a matter of judicial economy, Pennsylvania
15 has said that you must raise otherwise defaulted claims
16 on direct appeal. And if you don't, you waive them.
17 Ms. Barthold now asks this Court to hold that those --
18 that those claims are not exhausted so that even though
19 the Pennsylvania Supreme Court believes that those
20 claims, as a matter of judicial review, are justiciable,
21 she asks you to send them back to PCHA court. That is
22 the irony that I think lies here.

23 And I suggest to this Court that here the
24 cases I cite show that despite how untidy the record may
25 be --and make no mistake about it. This record is

1 untidy. I realize that. But in the cases that I've
2 cited, the Pennsylvania Supreme Court on discretionary
3 review at times, other times under appeal as of right in
4 homicide cases, can address the merits of a claim and,
5 one, affirm finding no arguable merit. Two, they can
6 reverse convictions on claims otherwise defaulted. Or
7 three --and this is the important point that I think
8 relates to this case -- the Pennsylvania Supreme Court
9 can look at the claim, find it to be of merit on its
10 face, not unlike the way a 12(b)(6) motion might be
11 dealt with in the federal civil rules, and if there's
12 not a record, remand it, not necessarily send it around
13 for a collateral attack, but remand it for further
14 hearings.

15 Now, Ms. Barthold argues vehemently that
16 Pennsylvania has some standard practice by way of
17 denying review and sending the matter to a PCHA court.
18 I know of no reported decisions on that.

19 QUESTION: Are you in a position to say
20 whether it happens with any frequency that after a
21 proceeding like this on direct review, a PCHA court, if
22 that's what you call it, would grant some sort of relief?

23 MR. WELSH: I am in a position to say -- I'm a
24 little reluctant to answer based on my understanding of
25 the question. Let me make sure I understand the

1 question. Is there a remedy of PCHA -- in the PCHA
2 court available to me?

3 QUESTION: Yes.

4 MR. WELSH: I don't concede that.

5 QUESTION: Well, but I was just asking for
6 information. You say then that it's either impossible
7 or very unlikely after proceedings like this on direct
8 review that any PCHA court would -- would consider your
9 claims on the merits?

10 MR. WELSH: I don't believe I said that, Chief
11 Justice Rehnquist.

12 QUESTION: Well, okay. Well, tell me what you
13 did say.

14 MR. WELSH: The PCHA statute does provide for
15 a means of collateral attack. It has now been
16 substantially tightened up, which I find also ironic, to
17 limit the class of cases that can go into the state
18 collateral attack route. What I'm saying to you is --

19 QUESTION: Well, can you file such a petition
20 and could it ever be granted for collateral review at
21 the state level following one of these discretionary
22 denials by the Supreme Court?

23 MR. WELSH: I understand. The answer is, yes,
24 it can in general. Ms. Barthold is correct in that that
25 would be available in -- in general.

1 My point to this Court, though, is -- is --
2 QUESTION: I thought you said but -- but not
3 for issues that had not been presented to the Supreme
4 Court. Is that -- is that --

5 MR. WELSH: No. My point on that is this,
6 Justice Scalia. If Mr. Peoples had new counsel or did
7 not have the burden of former counsel, counsel who
8 dropped the ball, if in the Supreme Court of
9 Pennsylvania he did not allege that the failure to
10 maintain the viability of all claims constituted the
11 ineffectiveness of counsel, they would be waived on
12 collateral attack.

13 That is, Pennsylvania -- when Mr. Peoples lost
14 his lawyer for whatever reason -- and that's not in the
15 record why it happened, but Superior Court counsel on
16 the -- on an issue that I'll use as an example -- denial
17 of a non-jury trial. That was not raised in the
18 Superior Court. If Mr. Peoples proceeded to file a
19 petition for allocatur in the Supreme Court of
20 Pennsylvania without that new -- without that lawyer --
21 that is, with a new lawyer or by himself -- and if he
22 did not allege that the failure to raise that claim in
23 the intermediate court was due to that lawyer's
24 ineffectiveness, that claim is deemed waived forever.

25 As a natural and logical consequence of that,

1 Pennsylvania, when claims are raised, otherwise
2 defaulted claims are raised, they're justiciable.

3 Ms. Barthold would seem to concede this, but
4 claims somehow that there must be a "record." That is,
5 that if there's no record, cases cannot be within this
6 ineffectiveness of counsel exception to the waiver rule.

7 And make no mistake. That rule is -- I -- I
8 know of no other court that has that. And I have -- I
9 have looked into it. It is -- it is --

10 QUESTION: That has what? The ineffectiveness
11 or the waiver rule?

12 MR. WELSH: The ineffectiveness exception to
13 the waiver rule.

14 QUESTION: On the ineffectiveness exception to
15 the waiver rule, it sounds like the court never inquires
16 into whether there was, in fact, ineffectiveness of
17 counsel by some objective standard. You bypass that by
18 a mere allegation to reach the substance of whatever the
19 other claim --

20 MR. WELSH: That has changed, Justice
21 O'Connor. Let me explain how.

22 Before this Court's decisions -- decision in
23 Strickland, there was simply an examination under
24 Pennsylvania law of whether there was merit to the
25 underlying claim allegedly waived due to the

1 ineffectiveness of counsel. And if the claim was found
2 meritorious, the inference was drawn that counsel was
3 ineffective.

4 Post Strickland and the Pennsylvania case on
5 that, which is Commonwealth v. Pierce, they've added
6 somewhat more of an analysis. That is, they've looked
7 to see whether there was a strategic element to that
8 decision, et cetera. And I won't burden the record with
9 that.

10 But even post strickland, the Pennsylvania
11 appellate courts continue to use this exception. And
12 there's a case from 1987, Commonwealth v. Glaze, 531
13 A.2d 796 where they simply looked at whether or not
14 there was merit to the claim, whether there was possibly
15 any strategic purpose in counsel's decision to waive a
16 claim and prejudice.

17 But my point is this -- and this is why this
18 case is different than Pitchess v. Davis and Ex parte
19 versus Hawk. My client, should he be in PCHA court,
20 would have exactly the same burden; that is, he would
21 have to show a Strickland or a Pierce violation.

22 QUESTION: But isn't there a difference that
23 the PCH -- PCHA courts -- court must address the merits
24 of any claim that hasn't been waived or defaulted,
25 whereas the Supreme Court of Pennsylvania doesn't have

1 to?

2 MR. WELSH: You are correct, Chief Justice
3 Rehnquist, but I think there's something that should be
4 borne in mind here.

5 Pennsylvania's court system in the
6 interpretation of its rules holds that those claims are
7 justiciable. It's not a federal matter. That's why,
8 for example, I do not rely upon the ineffectiveness
9 exception to the preclusive -- preclusion rule of Sykes
10 v. Wainwright which, as I believe Justice O'Connor wrote
11 in Carrier, I have to go to state court for. My simple
12 position is this. State law says it's justiciable, and
13 that's all I think this Court needs to get involved in
14 because I think it would be a morass that would be
15 difficult to get out of if you try to federalize the
16 law, which I think is what you're -- you're going to
17 find yourself doing.

18 If this Court wants to address the question of
19 whether as a general matter discretionary review
20 constitutes exhaustion, that's another question. That
21 goes back to Justice Stevens' point.

22 QUESTION: But surely we're not going to take
23 one case from each of the 50 States.

24 MR. WELSH: I sure hope not.

25 QUESTION: We're going to have to come down

1 with some --

2 MR. WELSH: You could appoint me again in
3 those cases, but I think it would be a waste of all of
4 our time.

5 QUESTION: May I ask another question about
6 your PCHA remedy? Is it correct that that remedy is
7 available for some claims in which the petitioner does
8 not allege ineffective assistance of counsel? Are there
9 any claims covered by your collateral review procedure
10 that are not based on an allegation of ineffective
11 assistance of counsel?

12 MR. WELSH: I can't answer that yes or no. I
13 can say this. You -- it -- when you're on collateral
14 attack, you must rely upon ineffectiveness to explain
15 away waiver. So, for virtually all class of cases
16 --classes of cases that I can think of standing before
17 you, ineffectiveness is going to have to be argued.

18 QUESTION: Well supposing, for example, a
19 prisoner had a Batson claim in which he claimed that the
20 jurors were -- that the prosecutor was motivated by
21 racial prejudice and makes the prima facie case, and the
22 Superior Court says, no, there's no prima facie case,
23 and the Supreme Court denies discretionary review. And
24 the petitioner then says I want a hearing on the claim,
25 and the only place I can get it is on post-conviction

1 relief under your PCHA. Could he get a hearing in the
2 PCHA, or would he have waived it? I mean, is it res
3 judicata because he raised it before?

4 MR. WELSH: He raised it on direct appeal?

5 QUESTION: He raised it on direct appeal and
6 lost.

7 MR. WELSH: That could be a final adjudication
8 that would bar PCHA review.

9 QUESTION: So, if he raises it, he's barred by
10 res judicata, and if he doesn't raise it, he has waived
11 it. He -- it's --

12 MR. WELSH: Correct.

13 QUESTION: It's a trap no matter which way he
14 goes.

15 QUESTION: (Inaudible).

16 QUESTION: It's a totally useless procedure
17 unless he alleges ineffective assistance of counsel.

18 MR. WELSH: Correct.

19 QUESTION: In response to my question on the
20 same point, you said, no, he can get review, collateral
21 review, of that question. Now, which is it?

22 MR. WELSH: Maybe I -- It wasn't parsed quite
23 as closely when I answered Justice Stevens.

24 QUESTION: Well, I didn't have specific -- a
25 specific example there, but I said could a substantive

1 claim which had not been waived below and on which the
2 Supreme Court of Pennsylvania simply denied review
3 --could review be obtained in state collateral
4 proceedings. And you said yes.

5 MR. WELSH: And I mean yes.

6 QUESTION: Well?

7 MR. WELSH: Let me explain --

8 QUESTION: Then --

9 MR. WELSH: -- why I said yes to his question.
10 He said -- Justice Stevens simply said when it's raised
11 on appeal. I interpreted that to mean that it had been
12 addressed on appeal, either on appeal as of right to the
13 Superior Court or on a review of the merits by the
14 Supreme Court. I do not back off from my answer to you.

15 QUESTION: If the Supreme Court simply had
16 denied discretionary review of the Batson claim, you
17 could go get collateral review of it.

18 MR. WELSH: Yes, under the law that existed at
19 the time this petition was filed. Pennsylvania has
20 --has as of I believe May of 1988 radically changed that
21 by tightening up on what cases -- or what claims may be
22 brought before it. And there is no binding case law on
23 that.

24 QUESTION: Why wouldn't -- I still don't
25 understand why you didn't -- you gave me one answer and

1 said, well, it would have been decided on the merits and
2 the appeal to the Superior Court and, therefore, it
3 couldn't be raised. When I ask you, I get one answer,
4 and when my --

5 MR. WELSH: Justice O'Connor is referring to
6 the denial of allocatur as constituting review.

7 QUESTION: No, but -- but presumably -- I
8 think you've got to assume that the question was raised
9 in the intermediate court of appeals. That would be
10 where the merits would be.

11 MR. WELSH: Not necessarily. Some cases go
12 directly to the Supreme Court, at least at the time that
13 this was done.

14 QUESTION: What about this case? This one
15 went through the Superior Court, didn't it?

16 MR. WELSH: That is correct. That is correct.

17 QUESTION: So, if it was addressed to the
18 Superior Court, that's the end of the ball game.

19 MR. WELSH: That is correct. (Inaudible).

20 QUESTION: And if he didn't raise it in the
21 Superior Court, that's also the end of the ball game
22 unless he alleges ineffective assistance of counsel.

23 MR. WELSH: Yes.

24 QUESTION: If -- if the constitutional claim
25 is raised in the trial court, denied, and it goes to the

1 Superior Court -- is that where it goes next?

2 MR. WELSH: Yes, sir.

3 QUESTION: Goes to Superior Court and it's
4 denied there, and then discretionary review is denied,
5 you say that you cannot then get into collateral?

6 MR. WELSH: I'm saying --

7 QUESTION: Because it has been passed on on
8 direct appeal. Is that what you're saying?

9 MR. WELSH: I'm saying that the denial of
10 allocatur does not constitute finality so as to preclude

11 QUESTION: Collateral relief.

12 MR. WELSH: -- collateral relief.

13 QUESTION: That's what -- that's the answer
14 you gave Justice O'Connor.

15 MR. WELSH: And I hope it's the same one.

16 QUESTION: That isn't the answer you give
17 Justice Stevens.

18 QUESTION: Well, but now supposing that in
19 Justice Stevens' hypothesis, the Superior Court passes
20 on the Batson claim and says it has no merit. There is
21 nothing to it. The Supreme Court of Pennsylvania denies
22 allocatur. Your answer to Justice Stevens was you
23 cannot go into state habeas on that?

24 MR. WELSH: In that situation it depends on
25 why the Superior Court did what it did, bearing in mind

1 that they are a court with appellate jurisdiction as of
2 right. They will presumably have addressed why it was.
3 That's the reason so that if they said that there was an
4 insufficient record, then you may be able to go make a
5 record in the Superior Court.

6 QUESTION: May I -- I'm sorry, but may I ask
7 you ask you one other? You say some cases go direct to
8 the Supreme Court and some go by way of the Superior
9 Court. Are they more serious cases or the less serious
10 cases that bypass the Superior Court?

11 MR. WELSH: Historically there was
12 jurisdiction in homicide cases for the -- directly to
13 the Supreme Court.

14 QUESTION: And -- and there the review is just
15 discretionary though.

16 MR. WELSH: No, it's as of right I believe.

17 QUESTION: Oh, there it's as of right. I see.

18 MR. WELSH: If I may, I'd like to address the
19 individual claims in -- in very brief detail focusing on
20 --

21 QUESTION: May I -- I -- I really hate to
22 think that we're going to have to get into this kind of
23 an inquiry state by state because I don't even
24 understand it in Pennsylvania, to tell you the truth.
25 And I --

1 (Laughter.)

2 QUESTION: Can we not fob this off on the
3 courts of appeals by adopting some -- some rule that
4 --that simply says if -- If -- If one follows Justice
5 Stevens' analysis that if there is still available under
6 the state law a state habeas remedy, there has not been
7 finality within the state and let the -- let the -- let
8 the courts of appeals, who are more familiar with the
9 state procedures, figure out what -- what you've been
10 telling us about?

11 MR. WELSH: I believe that that rule of law,
12 if adopted, would constitute a very radical change in
13 the way the federal courts, the lower federal courts,
14 administer justice.

15 QUESTION: For better or worse?

16 MR. WELSH: For worse because it would kick
17 more cases back to duplicative review on state
18 collateral attack.

19 Here's the rule I suggest that this Court
20 adopt. I suggest that this Court simply instruct the
21 lower federal courts that where claims were presented to
22 the state court of last resort, even if on discretionary
23 review, in a manner in which they were justiciable.
24 That is, could the state court reach them in accordance
25 with the state court procedures? They are exhausted.

1 That rule simply stated will permit the -- the courts of
2 appeals and the district courts and, probably more than
3 anyone else, the magistrates to sit down and address
4 records such as this.

5 QUESTION: Even though -- even though there
6 may be cases where in spite of all that procedure you
7 talked about, you could go into state collateral, even
8 though state collateral relief was still available.

9 MR. WELSH: That's correct because -- because
10 -- and here's -- I'm going to remind the Court of this,
11 as I finish my presentation. As a matter of judicial
12 economy, Pennsylvania appellate courts look at or hold
13 to be justiciable otherwise defaulted claims.

14 QUESTION: But the problem with your view of
15 the rule is that Pennsylvania Supreme Court has made a
16 considered judgment here that the defendant seeking the
17 discretionary **review would be better served by the
18 appointment of counsel. And so, they've appointed
19 counsel for him, and you want us to ignore that and say
20 everything the pro se litigant raised has been finally
21 reviewed. And that seems to me not to serve the best
22 interests of the state or the litigant.

23 MR. WELSH: I think that that's probably the
24 most important point that I'd like to leave with, and my
25 response to it is this. My client, Mr. Peoples, filed a

1 facially complete and valid petition. It complied with
2 the rules. In fact, it was probably better, except for
3 its typographical errors, than what his lawyer filed.

4 I agree that I must prove that the claims in
5 both petitions are justiciable in order to prove
6 exhaustion here. But here I think that if you look at
7 these two petitions, they will be viewed as one petition
8 which is, indeed, what the Pennsylvania Supreme Court
9 did. They didn't enter an order saying we deny the pro
10 se petition, we deny the counsel petition. An order was
11 simply entered saying petition denied. And I think that
12 by virtue of counsel's cross-reference or invocation or
13 incorporation of the pro se petition, I think you can
14 hold that to be exhausted.

15 I just have one more point that I will leave
16 with, and that deals with the identification of claims.
17 There is -- has been a vigorous attack here on whether
18 the due process through the impeachment use of
19 convictions claim has been sufficiently identified. I
20 think that's an important claim. There has been some
21 talk about the lack of merit of the claims. I will only
22 say I think this is an extremely important claim where
23 he's on trial for robbery and the jury hears that he has
24 two robberies and theft conviction.

25 In Pennsylvania, when you cite Bigham, the

1 Pennsylvania case on impeachment, everybody calls it a
2 Bigham hearing. It's a Bigham issue. Bigham undertook
3 a due process analysis looking at this Court's decision
4 in Spencer v. Texas. An invocation of Bigham is
5 tantamount to an express invocation of the Due Process
6 Clause.

7 Unless the Court has any further questions, I
8 thank you for your attention.

9 QUESTION: Thank you, Mr. Welsh.

10 Ms. Barthold, you have two minutes remaining.

11 REBUTTAL ARGUMENT OF GAELE M. BARTHOLD

12 MS. BARTHOLD: Thank you, Mr. Chief Justice.

13 I think there is no question that there is a
14 mere presentation rule which has been adopted by the
15 Third Circuit and to some extent by the Ninth Circuit,
16 that those circuits have held that if there is any
17 conceivable way that a state supreme court could look at
18 an issue, even by violating their own rules, they have
19 to assume that there is exhaustion. I think that that
20 is absolutely wrong, and I would urge this Court not to
21 adopt or to condone such a rule for all of the reasons
22 I've suggested.

23 I would point the Court to footnote 7 of our
24 brief in which we go through in great detail what is
25 cognizable under the state PCRA, which is the collateral

1 review statute, in Pennsylvania. There is absolutely no
2 question that this prisoner has an available avenue of
3 review in the Pennsylvania state courts in collateral
4 review. And there is absolutely no doubt that the
5 claims which he tried to put belatedly and in the most
6 helter-skelter fashion before the Pennsylvania Supreme
7 Court were not properly before that court.

8 And with respect to the ineffectiveness
9 claims, I would point the Court to Commonwealth v. Drake
10 which is cited in our principal brief in which the State
11 Supreme Court explicitly said that when you have an
12 ineffectiveness claim being belatedly raised on
13 discretionary review, that is better dealt with in state
14 collateral review procedures. So, I would cite the
15 Court to Drake.

16 I would also tell the Court that the direct
17 appeal jurisdiction of the Pennsylvania Supreme Court is
18 limited now in criminal cases to merely death cases.

19 QUESTION: Thank you, Ms. Barthold.

20 MS. BARTHOLD: Thank you so much.

21 CHIEF JUSTICE REHNQUIST: The case is
22 submitted.

23 (Whereupon, at 1:57 o'clock p.m., the case in
24 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:

NO. 87-1602 - RONALD D. CASTILLE, ETC. ET AL., Petitioners V.

MICHAEL PEOPLES

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

BY alan friedman

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'89 JAN -4 P1:57