ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROGER KEITH COLEMAN, Petitioner

v. CHARLES E. THOMPSON, WARDEN

CASE NO: 89-7662

PLACE: Washington, D.C.

DATE: February 25, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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ROGER KEITH COLEMAN, :

Petitioner :

v. : No. 89-7662

CHARLES E. THOMPSON, WARDEN :

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Washington, D.C.

Monday, February 25, 1991

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

APPEARANCES:

JOHN H. HALL, ESQ., New York, New York; on behalf of the Petitioner.

DONALD R. CURRY, ESQ., Senior Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the Respondent.

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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. 89-7662, Roger Keith Coleman v. Charles E. Thompson.

Mr. Hall.

ORAL ARGUMENT OF JOHN H. HALL

ON BEHALF OF THE PETITIONER

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

On May 19, 1987, the Supreme Court of Virginia, in an order that appears at page 25 and 26 of the Joint Appendix, issued a decision dismissing the appeal of Roger Keith Coleman on the ground that it had been filed 1 day late. When one examines the face of this order, one immediately sees that it is an ambiguous order.

The issues of Federal law that Mr. Coleman had asserted in the circuit court below were the subject of extensive briefing before the Virginia Supreme Court. And in fact in response to a motion to dismiss the appeal as untimely, Mr. Coleman's opposition motion adverted to the merits below, the merits that were covered below and were to be the subject of later briefing, and informed the court of its authority under existing Virginia case law to consider the merits to inform its judgment as to whether

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the appeal could be -- the lateness of the appeal could be excused.

It is on this basis that we submit one must apply the Harris -- Reed against Harris -- or excuse me, Harris against Reed test to determine whether the decision of the Virginia Supreme Court rested on an independent state procedural ground.

QUESTION: Mr. Hall, in the practice in the Supreme Court of Virginia does that court ordinarily dismiss a petition, as they did here, when they are deciding the merits of a case?

MR. HALL: The use of the word dismissal alone is unusual based upon our examination of Virginia cases. There are several cases cited in the party's briefs in which the court has stated appeal dismissed, Federal -- the merits of the claim are therefore not reached. That articulation is a clear and express statement of reliance on State law and would meet the Harris test. But that further statement was not made.

In addition in this case, I think unlike, certainly unlike any of the other reported cases we have seen, the reference in the order itself to the party's submissions with respect to the merits and then the closing language of the order which states "upon consideration whereof," thereby it seems to me

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unambiguously referring to all of the papers submitted.

QUESTION: Well, Mr. Hall, the court --

MR. HALL: Yes, Justice O'Connor.

QUESTION: -- unambiguously, as you have put it, granted the State's motion to dismiss. And that motion of the State was based solely on State procedural grounds. Now this Court in Harris adopted in essence the Michigan against Long approach to determining whether it fairly appears that the State court judgment rests on Federal grounds. And looking at this order it's difficult for me to see how it fairly appears that that State's order rests on Federal grounds rather than the State procedural bar.

MR. HALL: Well, it strikes me, Justice O'Connor, that there are, in any kind of order like this, particularly a procedural bar in a summary, basically summary order, there are a number of possibilities. There are at least two where the court's decision could be informed by a reference to Federal law. One is the Ake kind of situation, where the court in effect makes a determination, in fact does make a determination of Federal law, determines the Federal claims to be without merit, and therefore dismisses on the State grounds.

There is nothing in this order that tells us that did not happen in this case, and in fact the case of O'Brien against Socony Mobil, decided by the Virginia

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Supreme Court in 1967, involved an analysis of precisely that kind. The court, there examining constitutional property rights, reviewed the record and made a determination which it described as a holding, the court said held that there was no deprivation of constitutional property rights, therefore this Court need not meet, reach the question of whether the late filing default should be excused.

QUESTION: Well, I don't read O'Brien as being a late filing case. And the other cases --

MR. HALL: It's not a late filing. It's a failure to perfect.

QUESTION: Well -- but that's different under Virginia law. And in this case what we have is a failure to file a timely notice of appeal, as I understand it.

MR. HALL: That's correct.

QUESTION: And the notice of appeal precedes by some 60 days the date when the petition for the appeal is due. And those -- the cases you cite in your brief refer to petitions. But the notice is jurisdictional.

MR. HALL: I don't believe, Justice Kennedy, that that notion, that distinction between jurisdiction and a mandatory rule is sustainable under Virginia practice. As I understand the practice, there is a statutory requirement that petitions be filed within 4

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months of the date that triggers the need to perfect an appeal. There is a court rule without a statutory basis, a court rule which is deemed mandatory, which is called mandatory, but nonetheless it is a court rule which sets the time for the filing of the notice of appeal, and that's Rule 5.9, which is referred to in the party's cases.

So although I would agree generally with the proposition that one thinks of a notice of appeal as a jurisdictional event and the timely filing of briefs or doing other things to perfect the appeal as being different in character and perhaps things which courts more typically will extend the time on, I don't believe that the Virginia practice supports that specifically.

QUESTION: Do you have any Virginia Supreme Court case that says that the deadline for filing a notice of appeal is not a procedural bar?

MR. HALL: The closest I come to that is Socony, and the analysis of Socony. Now, there are other Virginia Supreme Court cases in which the Virginia Supreme Court indicates that it has authority to at least modify the perfection portion of the rules so that it would be in a position to allow a petitioner to file a late brief or petition on appeal. But there is not a case that specifically holds that the court has authority with

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respect to a late notice, but it is a court-made rule. This is not a statutory requirement.

The best evidence, I submit, is the actual practice of the Virginia Supreme Court in this case, because what we have here is the State taking the position that the appeal is late, therefore there is nothing to do but dismiss the appeal. And they make that motion to the court.

In opposition, in opposition the petitioner makes out the case that there is room. Instead of deciding that motion to dismiss on a preliminary basis, the court takes merits briefs and takes 4 months with the merits briefs, and then enters an order which refers to all the papers and doesn't clarify the basis for the ruling.

QUESTION: Mr. Hall, do you have any case from the Supreme Court of Virginia where that court has dismissed a petition for appeal but nonetheless decided the merits? My point is, ordinarily --

MR. HALL: This case, Your Honor.

QUESTION: Well, yeah, but you -- you have to get your strength from some other case, it seems to me, because what we're looking at here is something that one thinks of as being peculiar to procedural motions to dismiss an appeal rather than to simply affirm, which is

what you would do if you found -- considered the merits things and found them to be insubstantial.

MR. HALL: Mr. Chief Justice, I submit, though, that Ake is a kind of case that presents exactly that issue, and the practice of the Virginia Supreme Court, as revealed in the Tharp case, which is a case in which the court recognized that it had been perhaps too lenient in excusing its mandatory rules, and the Socony Mobil case, O'Brien against Socony Mobil, is precisely that kind of case where the court recognizes that it can look through to the merits and inform its procedural decision on that basis.

That is what happened in Ake, although Ake is not a summary order case so that one could go to State law and one could find a clearer answer. One can't do that here. I agree with that, but this order on its face does advert to the Federal merits, to the briefs dealing with the Federal merits, and the practice of the Virginia Supreme Court has been to, in some cases, not in all cases -- this is not something that happens in every case and we cannot sustain that argument -- but in some cases it has done this. It has recognized its jurisdiction to do it. And under Harris, given this record, the court, to make clear that Federal jurisdiction is going to, not going to obtain, is required to give a clear and express statement

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of reliance on State law, which it doesn't.

QUESTION: You're relying here essentially on Harris, and not on an argument that this was a ground that was applied -- a procedural ground that was unevenly applied, that was applied in this case but perhaps --

MR. HALL: We are not making an adequacy argument in that sense.

QUESTION: Yes, yes. Okay.

MR. HALL: That is correct. If I might just expand slightly on this point, the -- there is another area where this kind of issue comes up, and that is in plain error assessments that State supreme courts often do in connection with the review of decisions that involve procedural bars of various kinds. That plain error analysis is a harder case than the kind of case that is set out in O'Brien against Socony, because often the plain error, and typically the plain error analysis involves an assumption that the Federal grounds have validity, and then an inquiry is made into State law, on a State law basis to determine whether there is prejudice.

We don't argue, and don't believe that the Virginia practice shows that that kind of inquiry was made here. Rather, it was an Ake kind of inquiry that informed the procedural decision.

QUESTION: When you say Ake, you're talking

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about Ake against Oklahoma?

MR. HALL: Yes, I am, Your Honor.

I'd like to close on the Harris point by just emphasizing again how easy it would have been for the Virginia Supreme Court to state what the Commonwealth now says the Virginia Supreme Court intended to say. All it had to say was that we have -- we do not reach the Federal merits because this claim is barred by the appellant's 1-day late filing. Any number of articulations around that point would have been adequate to meet Harris.

QUESTION: They didn't know about Harris at the time, did they?

MR. HALL: Well, that's true, and --

QUESTION: It makes a difference, don't you think?

MR. HALL: I don't think so. I really don't, because the question here is not being fair, if you will, to the Virginia Supreme Court, but rather trying to figure out what it meant. And to say that they would have used the precise Harris articulation is to assume the answer to the question that's before us.

QUESTION: No, I think you would have a much stronger case if we had said that you have to have an, you know, express indication, and after we said that the Virginia court came down with this, which as you say is

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arguably not express. You could make the argument, to follow Harris all they had to do was say expressly. But Harris hadn't been issued yet --

MR. HALL: But Long had been issued, and the general notion of the requirement for a plain statement was in existence. So that it doesn't come as a total surprise -- I'm sorry.

QUESTION: In quite a different context. I mean, Michigan against Long was our jurisdiction to review a State decision.

MR. HALL: That's correct. So -- and there are different values implicated in that exercise of jurisdiction to establish uniformity of Federal law and questions like that than there are in the procedural default area where what you're doing is you're cutting off access to the Federal courts to a petitioner who has lost his rights in a situation where there is some indication that the Federal merits were reached.

And in Harris the Court considered whether those differences should lead to a different rule. In fact an opposite presumption which Justice Kennedy suggested was the appropriate presumption. The Court rejected that idea of having a presumption, which I think is the effect of what the State is asking or the Commonwealth is asking to be done here, that is a presumption when the order is

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unclear, you assume that State law does provide an adequate and independent ground.

QUESTION: Mr. Hall, do you take it that our cases absolutely prohibit us from saying that a State can sometimes look at the merits and exceptionally decide to receive a pleading even though it's late because the merits look so bad, even though in other cases it simply follows its normal procedures and dismisses for lateness?

MR. HALL: I think there is a basis for a distinction in following a plain error kind of analysis, where a State establishes a rule of State law that is based on the concepts of prejudice or harmless error under State law that would permit it to do that. If, on the other hand, the court is actually looking at Federal law and doesn't do that in all the cases, or does that in a crazy fashion, then I think there's an adequacy problem that could be raised by the application, and in particular -- in any particular case.

QUESTION: Well, what if, what if you just have a rule that we'll always look at the merits, but ordinarily, almost invariably we'll follow the time limit set forth in our statute. However, if in looking at the merits we see a case that is really -- it's clear that an injustice is being done, we then will reach the merits despite our normal procedural rules. Do you think that a

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State could not adopt that?

MR. HALL: Lots of States do have that rule, and I think it's a plain error rule, and I believe that there is a good basis for saying that the Federal merits were not decided in a case like that. In any of those cases, except in the one in which it was actually decided.

QUESTION: Right.

MR. HALL: But it wasn't decided in the others because there is a State -- what basically it does is it assumes the validity of the Federal claim and then inquires into prejudice or extraordinary circumstances or something that at least intellectually is separate from the Federal merits.

QUESTION: Is it clear to you that that is not what Virginia is doing here?

MR. HALL: Yes.

QUESTION: Why?

MR. HALL: O'Brien against Socony doesn't follow that kind of analysis. Now, that's my best information. I don't see a case that follows what I would call the plain error kind of approach that this Court has seen in other -- in other cases. In O'Brien the Court says we hold that there has not been no deprivation of Federal constitutional property rights, therefore we have no reason to consider whether there should be an -- whether

we should have a rule that would permit excuses. That's a ruling on Federal law.

QUESTION: It's an odd calculus that you're suggesting, that is to say if there is a well-established Federal right under the -- your plain error discussion, you assume the State relied on a procedural ground. But if it's not a well established procedural right, you're assuming that it, that it looked at that issue. It seems to me that as if you had it exactly upside down.

MR. HALL: I don't think that that would be the circumstance which would cause the State court to limit itself in terms of its harmless error. We're talking about a situation where there is a default which under the State rules bars hearing of the Federal claim, whether this be a speculative Federal claim or one that is well established. And if the State court says if we assume this is a violation we will then look at whether there is prejudice, whether the essential fairness of the proceeding has been so infected that we should, in spite of our procedural rule, look at this, that's a -- that can fairly, I think, be characterized as a State law inquiry.

QUESTION: Mr. Hall, you raised three questions in your petition for certiorari, and so far I think you have just been discussing with us the first one. Perhaps you'll want to proceed to the second and third ones.

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MR. HALL: Let me do that. I'd like to proceed, because I think there's some logic to do it, to the third one before the second one. And that is the question of a continued viability of Fay against Noia in connection with surrenders of rights to an entire line of proceeding. There's a difference between this case and the Fay against Noia kind of surrender, in that the Fay, that Noia's surrender was of direct appeal rights which barred him from collateral review, which barred him from Federal court, absent the decision of this Court to allow him to enter Federal court because that was not a procedural by-pass.

But we submit that this distinction is not one -- first it's not one that has yet been resolved by the Court. It was expressly left open in Wainwright against Sykes, referred to again as open in Murray against Carrier, and the logic of Sykes for determining the areas where Noia presented problems and therefore was leading to various kinds of mischief with respect to defaults, but that doesn't apply in this kind of situation.

And there are basically four factors that one looks at in looking at that. First is comity, and the question is whether State rules ought to be given their just desserts. And there's no question here that this is a State -- if there is a default, this is a State rule.

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It's, the State is entitled to have rules, and one really can't quarrel with that. But when you look down to questions of finality accuracy and the integrity of the trial itself, the concerns that led to Sykes are quite attenuated, if indeed they exist.

On the question of finality, the finality that we're upsetting here, that we're worried about, is not really the trial court finality. It's the finality of a decision to bar State collateral review.

The State has already permitted an extended period for the review of its criminal convictions. The fact that a Federal court can look through that default does not really extend the period insofar as it relates to the finality of the trial.

Now it does, at least potentially, and maybe this case attests to it, stretch out the time between the final decision in the Federal courts and the date on which the trial was commenced. But the finality determination of the State court on State habeas is really the thing that ought to be the focus of inquiry.

QUESTION: Well, Mr. Hall --

MR. HALL: Yes, Justice O'Connor.

QUESTION: It seems to me that our cases in Wainwright against Sykes and in Murray against Carrier, and even in Harris itself, indicates that we have moved

toward a general recognition of the legitimately -- legitimacy of adequate and independent State procedural bars in Federal habeas proceedings.

MR. HALL: I don't --

QUESTION: And I'm wondering whether we aren't -- it wouldn't be proper here to apply the cause and prejudice standard of Wainwright against Sykes?

MR. HALL: The argument for doing that, I think, Justice O'Connor, requires an evaluation of these, of the characteristics that led to a departure of the deliberate by-pass standard that was in place before Wainwright against Sykes.

The question of whether Noia is abandoned entirely is before the Court at least in part in this case, this is one step from overruling Noia, but it is a reserved area because this is a surrender of all rights. It's not picking and choosing claims. It's not contemporaneous objection. It's not an abandonment of individual issues on appeal, or for that matter on habeas corpus. It's the whole thing as a result of a colossal error.

And that, it seems to me, is a sound basis for distinction just in terms of ease of decision making, in terms of fairness, in terms of avoiding the problems that I think created the legitimate cause and prejudice rule

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which, which deals with the kinds of things that are usually committed to counsel which counsel's discretion and tactical judgments, et cetera, are applied to, and which are very hard to look at after the fact, and certainly very hard to look at after the fact through the eyes of, of the defendant.

I asked to reserve 5 minutes, and I see I have already encroached on that. Let me -- let me stop at this point, Your Honor.

QUESTION: Thank you, Mr. Hall.

Mr. Curry, we'll hear now from you.

ORAL ARGUMENT OF DONALD R. CURRY

ON BEHALF OF THE RESPONDENT

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

We're asking the Court to affirm in this case because essentially what you have here is a case where there is no question as to the petitioner's guilt, there is no question that his offense is one that amply supports his death sentence, and there is no colorable argument here that refusing him further Federal review of his defaulted claims would constitute a miscarriage of justice.

We're asking the Court to keep faith with the reasoning of its previous procedural default cases. The

Court has always struck the proper balance. The Court has always expressed confidence in the ability of the cause and prejudice standard to avoid miscarriages of justice. And in our view the confidence has been fully warranted.

But the Court has also established a safety valve exception, a miscarriage of justice exception to the cause requirement, for the extraordinary case where the defaulted claim is accompanied by a substantial showing of actual innocence. But an important point needs to be made about what the Court has said a miscarriage of justice is. A miscarriage of justice doesn't occur merely because a prisoner defaults a claim that he could have received relief on if he had preserved it. A miscarriage of justice occurs only when an actually innocent prisoner finds himself in that position.

Now in this case there are very good reasons why the Court should not be concerned about Coleman's inability to establish cause for his default.

But you don't have to take my word for it, you can look at and listen to what the lower Federal courts in this case have said and done. The Fourth Circuit in this case has already conducted the safety valve exception review, has determined that he has not made a showing of actual innocence, and has determined that the miscarriage of justice exception doesn't apply. And in view of the

DNA testing which Coleman himself has conducted, at his insistence by his own expert, that --

QUESTION: Was that part of the record in this case?

MR. CURRY: No, it was not part of the record.

QUESTION: Well, I think that it's inappropriate for you to proceed on that basis.

MR. CURRY: Well, my only point in bringing it up is that it only corroborates what the Fourth Circuit had done. And it's not a question where we insisted on the test --

QUESTION: Lots of things outside the record corroborate something courts have done.

MR. CURRY: Right. I understand your concern, Justice Kennedy, but the reason that we lodged the test in this case was because it was -- this was not something that we did. This is not a test that we insisted on, and this was not out expert. But the fact remains that the Fourth Circuit --

QUESTION: General Curry, can I interrupt with another question?

MR. CURRY: Yes, sir.

QUESTION: I didn't understand your opponent to be arguing that this was a miscarriage of justice case. I thought he argued there was no procedural default, and if

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there was it was excused by cause.

MR. CURRY: Well, he argued the miscarriage of justice exception all the way through the Fourth Circuit.

QUESTION: But I don't think he has here.

MR. CURRY: Well, he put --

QUESTION: Am I not correct?

MR. CURRY: He put in his brief that he was innocent. Certiorari was granted --

QUESTION: Well, I know, but he has not argued that as a separate ground for reversing the court of appeals. His argument is that the cause and prejudice test doesn't apply because there was no procedural -- the order was ambiguous, and secondly, if it was there was cause because the counsel goofed.

MR. CURRY: Well, his position was that the miscarriage of justice did apply. He put in the certiorari papers that he was innocent of the offense --

QUESTION: Yeah, but he also pleaded not guilty, but we're not going to argue again the original facts, are we? I mean, I just don't see how that bears on the issues he has brought here and we have agreed to review. That's all I'm saying.

MR. CURRY: Well, the point I was trying to make was that the Fourth Circuit has conducted the review of the actual innocence, and it does not apply. Whether he

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is relying on it at all, the Court would still have to conduct the review, as I understand the analysis.

The district court in this case --

QUESTION: Well, we wouldn't if he won on one of the other grounds which we reach first.

MR. CURRY: That's certainly true. The district court has already, despite his default, has looked at the merits of all of his claims, including all of his ineffective assistance of counsel claims, and has determined that they are all without merit. It's the same view reached by the State habeas judge.

QUESTION: Well, now your -- are you going to address the first argument made by the petition?

MR. CURRY: About Harris v. Reed?

QUESTION: Whether there is here a State procedural bar that is independent of Federal law.

MR. CURRY: Yes, Justice O'Connor, I'll address that now. I was going to address it last, but I can address it now.

The fundamental flaw in his argument is that the plain statement rule just simply doesn't apply unless it can reasonably be determined that the State court judgment rested on Federal law. The Court has always applied the rule in that manner and should continue to apply it. And that just simply didn't occur here.

QUESTION: Well, what's the situation in Virginia? In the Tharp case the Virginia Supreme Court said it wouldn't waive time requirements unless to do so would abridge a constitutional right.

MR. CURRY: What that is referring to, Justice O'Connor, is the -- the practice of when a petitioner in subsequent habeas corpus proceedings comes back and alleges that he was denied his right to appeal through the ineffective assistance of counsel. In that situation delayed appeals are granted usually upon our confession of error, when the constitutional right to effective assistance applies. Those are all direct appeal cases.

But in this case the time limit for a notice of appeal under Virginia law is clearly jurisdictional. And as Justice --

QUESTION: Is that a court-made rule?

MR. CURRY: Yes, it is a court-made rule.

QUESTION: And why is it jurisdictional? Has the supreme court said that it is?

MR. CURRY: Yes, they have repeatedly said that it is. And there is a distinction between notices of appeal and petitions for appeal. For petitions for appeal there, in criminal cases there is a possibility of up to a 30-day extension. But there is no extension for notices of appeal.

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QUESTION: And what's your best authority for that --

MR. CURRY: The rule --

QUESTION: -- in light of Tharp and O'Brien?

MR. CURRY: The rule itself says that it's -- Rule 55 says that the rule is mandatory. And the cases that I cited in the brief have, both before and after Coleman's case, Vaughn v. Vaughn, Mears v. Mears, and the School Board of Lynchburg v. Caudill Rowlett Scott, says that if you violate one of these jurisdictional rules and the result every time is dismissal.

No matter what he argued in State court, the fact of the matter remains that the motion to dismiss was based solely on his violation of that jurisdictional rule, and the court granted the motion to dismiss. They expressly granted the motion to dismiss without so much as discussing, let alone deciding, his Federal claims.

And it's clear under Virginia law that the order would have been different if the court had reached and decided the Federal merits. The practice under Virginia law is to say that the petition for appeal is refused when it's an affirmance of the lower court's decision. But a motion to dismiss, when the motion to dismiss is based solely on a violation of procedural rule, there is no other reasonable conclusion than that that is for the

procedural reason.

It was these facts that led -- compelled Coleman when he was last before this Court in 1987, the certiorari proceeding after the Virginia Supreme Court dismissal, he told this Court at that time that the dismissal was solely for procedural reasons. It would be very strange indeed, having cited the O'Brien case to the Virginia Supreme Court, to come up here and he asks this Court to order the Virginia Supreme Court to decide the merits of the very same claims that he is now telling the Court today that the Court had already decided.

I think it comes down to whether -- as to what the practice in Virginia is, Mr. Hall hasn't cited any cases where they have ever excused a late notice of appeal, as opposed to what the Fourth Circuit and the district court, who are experts in Virginia law, said happened in this case. And they both said that it was solely for the procedural reason.

QUESTION: Did they ask for -- I thought that they asked for the briefing on the merits. Did they ask for the briefing on the merits?

MR. CURRY: No, that is not correct. The case --

QUESTION: It was not asked for.

MR. CURRY: The case just went in due course.

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He had already filed his brief on the merits before I filed the motion to dismiss, because there is nothing pending before the Supreme Court of Virginia until the petition for appeal is filed.

QUESTION: I see.

MR. CURRY: I filed the motion to dismiss. The pleadings went back and forth on the motion to dismiss. I filed my brief on the merits in due course, but they never asked for it.

QUESTION: If the law is as clear as you say it is, why did you bother to file a brief?

MR. CURRY: Because I had no -- I had no choice but to file -- if you're going to file a brief on the merits --

QUESTION: What do you mean you had no choice? The case was -- you had an absolute right to have the case dismissed, as I understand you.

MR. CURRY: Well, that's certainly true. But if I was ever going to address the merits I had to do it before the time limit set by the rule expired.

QUESTION: But you didn't have to. It's perfectly clear you didn't have to.

MR. CURRY: I don't see anything --

QUESTION: Actions sometimes speak louder than words.

MR. CURRY: Well, I don't see anything unreasonable about --

QUESTION: There's nothing unreasonable it, but apparently you were not confident that the case would be dismissed as untimely, and therefore, as a good lawyer should, you protected yourself by filing a brief on the merits.

MR. CURRY: That is certainly true, Justice Stevens. I filed a brief on the merits.

But the length of time that they took, I mean, you have to realize what he was arguing in the Virginia Supreme Court. What he was arguing primarily was that the State's interpretation of when judgment is entered was wrong, and that his notice of appeal was not timely. That's what the court was sorting out.

But the point that I want to make is that no matter what was argued, the fact remains that it was the motion to dismiss that was granted. And the motion to dismiss was based solely on procedural law.

But, as I said, the district court and the Fourth Circuit --

QUESTION: The other thing that's puzzling is why would it take the supreme court 4 months to decide such a simple motion?

MR. CURRY: Well, as I said, I don't think you

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can read much into it other than they just got to it in due course. But the primary -- primary issue they had to sort through was his contention that judgment had been entered under --

QUESTION: Oh, I see.

MR. CURRY: -- Virginia law at a later date.

QUESTION: Yeah, right.

MR. CURRY: And that his notice of appeal was timely. But as I said, the district court and the Fourth Circuit had no difficulty -- if it comes to understanding what Virginia law is and what the practice is, they had no difficulty realizing that under these circumstances the dismissal was solely for procedural reasons.

QUESTION: I don't suppose there would be any question in this case if the court in dismissing had said expressly we dismiss for late filing.

MR. CURRY: That's true. There would be no question, but --

QUESTION: Even if they had spent months looking at the merits to see if they ought to waive the rule.

MR. CURRY: That's right. The time they considered it would have made no difference at all.

I do want to address the issue of whether cause for a procedural default based on habeas attorney error can be cause, and in our view the discussion should really

begin and end with this Court's decisions in Finley and in Giarratano, and with Coleman's concession that he is not challenging the rule in those cases that there is no constitutional right to counsel in collateral proceedings. Because what he is asking for in this case is nothing short of the practical equivalent of exactly what Finley and Giarratano say is not required, the effective assistance of habeas counsel.

And while he pays lip service to those precedents, what he is actually trying to do is make an end run around them by arguing that well, yes, I don't have a constitutional right to counsel, but if the States want to enforce their default rules in those proceedings, which he concedes are legitimate, if they want to enforce the default rules and if they want to have them respected by the Federal courts, then they must provide the effective assistance of counsel. And if there was ever any doubt that that's what his position is, his reply brief dispelled it, because that's exactly what he says he is looking for.

And if that argument were correct, then in practical terms the decisions in Finley and Giarratano would be very hollow. But it's not correct, because what the Constitution doesn't require of the States at the front door can't be required of the States by going

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through the back door.

Not only would accepting his definition of cause overrule Finley and Giarratano for all practical purposes, but it would also produce adverse consequences which our system just couldn't bear. And in practical terms, the very real question in this case is whether the Court is going to authorize an entirely -- another layer of review on top of everything we now have, a layer of review devoted to litigating the effectiveness of habeas counsel.

If the Court were to recognize that an error by a habeas attorney could constitute cause, then no doubt what you would end up with is a system of collateral review where each layer of habeas counsel would say that the last habeas counsel had been ineffective. And I think you can see that finality, any reasonable concept of finality, would quickly become a farce, because --

QUESTION: General Curry, I don't really understand that argument, because the facts are rather clear -- I mean, there isn't a dispute about the fact that it was an attorney error that caused the failure to make a timely appeal. Isn't that undisputed?

MR. CURRY: That's right.

QUESTION: Well, I don't know why -- you either decide that's a sufficient cause or it isn't. I don't know why that requires an additional layer of review.

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MR. CURRY: Well --

QUESTION: I guess your position it is not sufficient cause unless the counsel was unconstitutionally ineffective, that's what you --

MR. CURRY: That's right.

QUESTION: Yeah.

MR. CURRY: But, you know, what you're assuming is that you would have different counsel between State and Federal habeas, like you have in this case. And you certainly wouldn't have that normally, and nor should you want it.

QUESTION: I don't understand why you'd have to have different counsel. Why couldn't the same counsel say I made the mistake. I'm not -- I don't think I was constitutionally ineffective, but it was an innocent error that caused me to be a day late on the appeal, and that should be a sufficient cause for waiving this procedural argument?

MR. CURRY: Justice Stevens, I have just never heard of a situation where counsel can go into a proceeding and attempt to excuse a default based on his own alleged ineffectiveness. The State has virtually no way to combat that.

QUESTION: Well, it happens all the time in late appeal situations. You come in and you argue excusable

neglect of some kind or another. It's, you're not saying you're constitutionally ineffective, you're saying there is a reason that should not bar review of the merits of the claim. That's all.

MR. CURRY: But as a practical matter that's not going to happen. What's going to happen is -- in the context of habeas corpus proceedings you're going to have the same counsel all the way through State and Federal proceedings.

QUESTION: Right.

MR. CURRY: And then it's going to take new counsel and a new petition to say that the original habeas attorneys were ineffective in not raising specified claims. That's, that's exactly what his rule would require.

QUESTION: Well, if you go to a failure to raise specified claims, I would agree with you. But I'm talking about something as mechanical as this, the lawyer missed the filing date by 1 day. I don't know why the lawyer who missed it couldn't also argue that that should not be a sufficient ground for denying review of an otherwise meritorious constitutional claim.

MR. CURRY: Well, even, even under Coleman's rule there would be nothing in his case to prevent subsequent counsel from coming back -- under the rule as

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he has formulated it -- from coming back and in another proceeding alleging that first and second habeas counsel were ineffective in not raising ineffective counsel claims that we haven't heard of yet.

QUESTION: No, I agree with you. There's a vast difference in my judgment between ineffectiveness in the sense of trial strategy and deciding what claims to raise, and so forth. I think your argument has great force in that context. But when we've got an obvious error, maybe the secretary lost the -- it isn't true in this case, but something mechanical of that kind, then it's quite a different case. There's no question of judgment involved, it's just a mechanical error.

MR. CURRY: Well, Justice Stevens, I think that Carrier decided that in terms of the costs to the interest that we're concerned about, finality, comity, and federalism, the costs are the same regardless of whether the error is based on a tactical decision, inadvertence, negligence, whatever. The result to the State's interest are the same. The State has avowed interest in enforcing its default rules, in defining its appellate jurisdiction with some certainly as to time. It has an interest in taking seriously its responsibility to being the court in the first instance to deal with constitutional error. And it has an interest in, if a retrial is to be granted in

the case, to have it occur as proximate to the offense as possible.

All three of those interests apply here, and they would, none of them would be protected under the test that Mr. Coleman is advocating. The only way to protect those interests is the balancing of those interests in the context of the cause and prejudice standard.

The -- if the Court were ever to say that habeas attorney error was cause, something that the Court would also have to consider and would almost certainly have to grant would be a similar form of cause for pro se habeas petitioners, who make up the great bulk of habeas corpus litigants, some similar form of cause based on their alleged ineffectiveness.

And I don't think it takes a whole lot of imagination to foresee all the endless variation of that type of claim, or a lot of foresight to realize that that's a can of worms that the Court should do everything possible to avoid opening.

In Harris v. Reed I came across the statistics for the number of Federal habeas petitions filed by State prisoners, and if you update the statistics you see that the numbers are still growing. Just in the year that ended in June of '90, 11,000 habeas petitions were --

QUESTION: Tell us about it.

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MR. CURRY: Well, I'm sure the Court's aware of it.

But the point I'm making is if the Court endorses Coleman's definition of cause, whether you relate it to the appeal, or individual claims, or at the habeas trial level, or what, you can just imagine how those figures are going to explode if every habeas petitioner whose case is now at an end could go back and file another petition based upon his own alleged ineffectiveness or the alleged ineffectiveness of himself, of his writ writer, or whatever.

In conclusion, again we ask the Court to affirm the Fourth Circuit's decision in this case because there is no question as to the petitioner's guilt, there is no question as to the sufficiency of his offense to support a death sentence, and because in this case there is no danger that denying him further Federal review would result in a miscarriage of justice.

Thank you.

QUESTION: Thank you, Mr. Curry.

Mr. Hall, do you have rebuttal? You have 4 minutes remaining.

REBUTTAL ARGUMENT OF JOHN H. HALL

ON BEHALF OF THE PETITIONER

MR. HALL: Yes, briefly. Let me first address

just for a moment the Virginia law issue, because I think it's important. In the case of Mears against Mears, 143 S.E.2d 889, the Court stated, "In dismissing an appeal, we do not reach the merits of this appeal. The motion to dismiss must be sustained." That works under Harris. It could have been done here. That's what the Virginia Supreme Court --

QUESTION: Was that a post-Harris order?

MR. HALL: That is a pre-Harris order. It's a 1965 case.

In the case of Vaughn against Vaughn, the Court states on this jurisdictional mandatory point something directly opposite from what Mr. Curry said. It states petitions for appeal must be presented within 4 months following final judgment. That rule is jurisdictional. It refers to the filing of a notice of appeal within 30 days after the entry of final judgment. It says that rule, like its predecessor, is mandatory -- a significant distinction, it appears, under Virginia law. The 4 month is jurisdictional, the shorter period for the notice, mandatory, made by a court rule, can be extended.

On the question of cause and whether we are attempting to set up an apparatus which requires the full panoply of due process rights within the State system, that is not the rule we propose. The only rule we propose

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is that access to Federal court not be barred by a procedural default in circumstances where the petitioner has not had a fair opportunity to get his claims through the State system. And that's what happened here. There was a gross error by counsel that denied Roger Coleman the opportunity to get his case through the Federal system --

QUESTION: Where you say that petitioner hasn't had a fair opportunity, your definition of fair opportunity is such that the fact that the State accorded a fair opportunity if its rules were complied with isn't enough if counsel missed the boat.

MR. HALL: In the circumstances of this case, missing the boat, where your client wants you to file and you make a mistake of this kind, that's right. This error, which swept away the opportunity to get into Federal court, if indeed that's what it did, is that kind of error, and it is within the discretion under the cause and prejudice standard or another standard where the Court could try to adopt one that was narrower to allow that court into Federal court. We're talking here about the exercise of discretion on habeas corpus. It's not a question of jurisdiction of the Federal courts, but whether the Federal courts will allow those cases to be heard.

QUESTION: Mr. Hall, what's your response to the

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fact that the last time this case was up here you argued that in fact the Virginia Supreme Court's dismissal was a procedural dismissal?

MR. HALL: The argument there was --

QUESTION: Do you feel bad about switching on us like that?

MR. HALL: I don't think that -- I didn't argue that particular --

QUESTION: Well, all right.

MR. HALL: -- point, but that's neither here nor there. The point is that when this case was dismissed you couldn't tell from the order what was intended by the State court. Therefore, for counsel, in -- as a precautionary matter to go back to the State court and say please give me an explicit ruling on the Federal merits is just good lawyering. It's not an admission of a ruling that didn't touch Federal merits in the way we say that occurred in this case.

QUESTION: Thank you, Mr. Hall.

MR. HALL: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:50 p.m., the case in the above-entitled matter was submitted.)

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