OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIAM D. O'SULLIVAN, Petitioner v. DARREN BOERCKEL.

CASE NO: 97-2048 C.2

PLACE: Washington, D.C.

DATE: Tuesday, March 30, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM D. O'SULLIVAN, :

Petitioner :

v. : No. 97-2048

DARREN BOERCKEL. :

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Washington, D.C.

Tuesday, March 30, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

WILLIAM L. BROWERS, ESQ., Assistant Attorney General, Chicago, Illinois; on behalf of the Petitioner.

DAVID B. MOTE, ESQ., Deputy Chief Federal Public Defender, Springfield, Illinois; on behalf of the Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 97-2048, William O'Sullivan v. Darren Boerckel.

Mr. Browers.

ORAL ARGUMENT OF WILLIAM L. BROWERS

ON BEHALF OF THE PETITIONER

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

Discretionary review by a State's highest court should be recognized as an available remedy to vindicate Federal constitutional interests before one comes to Federal habeas court. The recognition of this as an available remedy would foster concerns of comity and federalism which have been the driving forces of this Court's habeas jurisprudence for many years.

The defendant, Darren Boerckel, brought three claims to Federal habeas court which he had raised on review to the Illinois appellate court, but failed to raise in his petition for leave to the Illinois Supreme Court, which he filed. His failure to avail himself of the remedy of a petition for leave to appeal as to these issues should preclude his bringing them in Federal habeas --

QUESTION: Now, in Illinois, does the petitioner appear pro se? Counsel is not provided or is provided?

MR. BROWERS: In Mr. Boerckel's case, Mr. Boerckel had counsel. Counsel is typically not provided.

QUESTION: Generally speaking, counsel would not be provided --

MR. BROWERS: There's no --

QUESTION: -- for a prisoner who would be filing for discretionary review in the Illinois Supreme Court?

MR. BROWERS: I have to give you a mixed response to that. There's no constitutional right or even statutory right to counsel. The reality, though, is the appellate public defender system opts sometimes to file petitions for leave on their behalf. In Mr. Boerckel's case, he was represented by a private counsel, but I acknowledge there are many pro se petitions filed.

QUESTION: And that would be true nationwide I suppose.

MR. BROWERS: I would assume.

QUESTION: You would find a lot of places where there would not be counsel.

MR. BROWERS: I would assume.

QUESTION: Do you feel you can speak for the practice outside of Illinois, Mr. Browers? Did you --

MR. BROWERS: To some extent.

QUESTION: Have you practiced other places?

MR. BROWERS: No, I haven't.

QUESTION: Is there some research that is available?

MR. BROWERS: If it's available, I neglected to include that.

I am not asking necessarily for a uniform rule here. The States are entitled to give whatever remedies they will.

QUESTION: The Seventh Circuit opinion, as I read it, put great stress on the fact that the Supreme Court of Illinois did not wish to get involved in a lot of these things. It reserved it for itself questions that it regarded probably more path-breaking than typical error correction.

But we really -- we can't have a State-by-State breakdown on this thing if the Supreme Court of Minnesota felt differently that the rule would be differently -- different in the Eighth Circuit than the Seventh Circuit. I think we have to have some sort of a national -- national rule.

MR. BROWERS: I beg to differ, Your Honor. I think the driving force here is 28 U.S.C. 2254(c), and it speaks to the right under this law of the State to raise, by any available procedure, the question presented. The

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full provision is quoted at pages 16 and 17 of our brief.

The question is one for the Federal courts to determine whether any one State court provides such a remedy. So, the question here is, in terms of Mr. Boerckel's case, does Illinois Supreme Court rule 315 provide such a remedy? We disagree with the Seventh Circuit as to what that rule provides.

QUESTION: I thought you were speaking across the board that as long as there is an avenue, even if it's discretionary. So, I don't understand your response to the Chief Justice. I thought you were taking the position that you must exhaust discretionary, as well as mandatory remedies and that you weren't taking a State-by-State approach. But am I incorrect in that understanding?

MR. BROWERS: No. I'm taking a global approach, but I could theoretically -- I could theorize a State in which, for example, a State might say we will not hear Federal constitutional claims. For Federal habeas purposes, whether that would be a legitimate rule or not --

QUESTION: Well, let's stick in -- with your own State and -- and what is the picture with respect to State habeas? For a prisoner to avail himself of State habeas, must he exhaust not only his appeal of right, but also his petition to the Illinois Supreme Court?

MR. BROWERS: No, he must not -- he need not. But State habeas is very different from Federal habeas. And that analogy breaks down in prior Seventh Circuit decisions, one of which is cited in this decision, called Hogan V. McBride, which is an Indiana case, and Gomoz v. DiTello, which is an Illinois case. That's what the Seventh Circuit tried to do, to see whether there would be a default under Illinois law for failure to take a petition for leave to appeal.

The analogy would run that State habeas, which is called post-conviction in Illinois, is somehow analogous to Federal habeas. Nothing could be further than the truth. In State post-conviction law, you can only bring extra-record claims that could not have been brought on direct appeal or were not brought on direct appeal. Whereas, in Federal habeas, you can only --

QUESTION: May I ask, you couldn't get State habeas if you had let your appeal of right pass by, could you?

MR. BROWERS: It would be an irrelevancy under State law.

QUESTION: It would be --

MR. BROWERS: If you had a record claim, regardless of whether you did a petition for leave to appeal or not, it wouldn't be a claim that could be

brought.

QUESTION: Not a petition for leave to appeal. Do you have to exhaust anything to raise whatever you can raise on State habeas? I thought that you had to take -- pursue your appeal of right.

MR. BROWERS: No, you don't. You don't.

QUESTION: You don't.

MR. BROWERS: But you would be limited in what you -- you're always limited in what you can raise on what we'll call State habeas, which is --

QUESTION: Well, I understood you to say that on State habeas, you couldn't raise anything that you could have raised in your direct appeal.

MR. BROWERS: Exactly.

QUESTION: Okay. So, there -- I see.

MR. BROWERS: They're completely unrelated, and the analogy to Federal habeas completely breaks down. One cannot bring in Federal habeas that which they haven't brought in the State courts. So, any attempt to look at what Illinois does internally has no relevance in the Federal picture at all.

QUESTION: Mr. Browers, I think I -- I would not have difficulty in accepting your -- your general proposition that if there is discretionary -- that if there is an avenue of discretionary relief available under

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the State, a -- a defendant must pursue it and exhaust.

But here there seems to be a further feature. The feature here is that the -- that the statute providing -- I'm sorry -- that the rules of the court that implement this discretionary avenue of appeal to the State supreme court give some examples of the sorts of things that they are interested in in exercising their discretion. And as the -- as the I think the Chief justice alluded to a moment ago, they -- they sound like -- they sound like sort of, for lack of a better term, broad policy questions, path-breaking kinds of questions, rather than fact or case-specific questions.

This particular petitioner had what sounded to me like the most case-specific questions in the world, you know, was -- was my -- was my confession truly voluntary and so on.

When a State gives signals, as I think the Illinois Supreme Court has given signals, about what it is interested in, why then shouldn't the rule be that if your case does not fall within the kinds of examples that the State supreme court says it's interested in, you don't have to exhaust because it would be futile to do it, or almost always futile? I realize there may be exceptions, but it would almost always be futile.

MR. BROWERS: Well, we would take issue with

that -- with the supposed signals that the Illinois Supreme Court gives. The initial wording of their rule 315 is, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which would be considered. And then they follow with the list.

QUESTION: And they -- I don't have a -- the list is pretty much path-breaking kind of questions rather than the fact -- case fact-specific questions, is it not?

MR. BROWERS: The list may be, but it doesn't list -- it does not limit their --

QUESTION: You're quite right. It says these are not controlling. These are not exclusive. But this is -- this is in principle what we're interested in. Isn't that what it says?

MR. BROWERS: Assume it's that limited. Let's just assume it's that limited. We have to look at the nature of habeas relief itself. First of all, in terms of fact-specific --

QUESTION: Before you get into that, I don't want to assume that it's that limited.

MR. BROWERS: Well, I don't assume so --

QUESTION: We -- we are indeed -- I mean, we do try to take up here path-breaking cases, and -- and have not been a court of errors for many years, or at least

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primarily a court of errors. Is that true of the Illinois Supreme Court? My impression is that however it reads, that State supreme courts in general and the Illinois Supreme Court in particular does often take a case just to correct a mistake.

MR. BROWERS: Sure, they do. Sure, they do. I have three cases cited in the reply brief --

QUESTION: You see, I think we're tending to look at this from the standpoint of -- of -- we have a rule that is not -- not very dissimilar from the Illinois Supreme Court's rule.

MR. BROWERS: I understand.

QUESTION: And the way we apply it, we -- we don't purport to be a court of errors. Now, is that a fair characterization of the Illinois Supreme Court?

MR. BROWERS: I don't think their jurisprudence is quite like this Court's, however much the rules may read the same. They do error correction.

QUESTION: Well, you gave -- let's see if we can get down to specifics. You gave two or three examples, as I recall, in the yellow brief. That's would have -- two or three examples out of how many cases over what period of time? I mean, what are we really talking about?

MR. BROWERS: I gave those two or three examples because they raise the precise issues that Darren Boerckel

failed to raise.

QUESTION: Yes.

MR. BROWERS: And I limited myself to the discretionary docket of that court. I eliminated all the capital cases. Did I do a statistical survey? I don't have statistics. I'm sorry.

QUESTION: Well, tell me, you know -- and your -- your best good faith is okay with me.

MR. BROWERS: This is not atypical at all for that court.

QUESTION: It's -- so that there are -- there are lots of these cases.

MR. BROWERS: There's another aspect I can tell you -- and I can only tell you in a sort of anecdotal sense. The supreme court's rule discusses the need for exercise of the supreme court's supervisory authority. The Illinois Supreme Court as the supervising court over all other courts in Illinois frequently, from its discretionary docket, will deny leave and simultaneously issue a supervisory order directing the lower court to reconsider a decision in light of an intervening precedent.

Sometimes the court does it because the very issue has been raised in a petition for leave to appeal. Sometimes the court does it because it sees -- it reads

the appellate court decision, sees that issue lingering there, knows they've spoken in that area of jurisprudence, and still remands for reconsideration. I've had this happen a number of times in our office and at my former employer where I did prosecution appeals for many years. They -- their jurisprudence is not like this Court's. They do error correction.

But even if they didn't, the opportunity is there and I think it's insulting to freeze a State supreme court out of the equation when somebody is coming on habeas review.

QUESTION: May I ask on that point? It seemed to me there's a conceivably kind of a conflict of interest within the -- within the State of Illinois. I can see why your office would want complete exhaustion right down the line. But it seemed to me if I were a judge of that court, I might not welcome a rule that would require that there be a great many more petitions for leave to appeal filed if in fact -- I don't know if this is true -- about 95 percent of them are denied anyway. And your rule will require the Supreme Court of Illinois to do more work than your opponent's rule.

MR. BROWERS: I'm not sure that's the case. I don't think Darren Boerckel has given empirical evidence that would show that --

QUESTION: Well, surely if everybody has to file -- go to the Supreme Court of Illinois, more -- more people would go than if they don't have to file. Isn't that fairly clear?

MR. BROWERS: I'm not sure that the State's rules were designed looking toward Federal habeas.

QUESTION: No, no. I'm sure they weren't.

MR. BROWERS: They're giving evidence of relief within the State system to petitioners. Darren Boerckel is a perfect example. He didn't avoid going to the Illinois Supreme Court. He just didn't bring these three issues. But then again, the ones he did bring were fairly fact-specific and --

QUESTION: But that almost makes the point even more clear. It would mean that in every petition they've got to cover -- file, you know, all 17 issues they can think of to be sure they don't miss one. Whereas, often an advocate thinks he's better off to limit a petition for review to this Court, for example, to 1 or 2 questions instead of 19 errors. But I think your rule would result in petitions including more issues and also in more petitions, which I wonder if the Illinois Supreme Court would welcome as much as you -- you would. I understand the reason the -- that your office would.

MR. BROWERS: I'm not -- I'm not sure the

Illinois Supreme Court would object to that, and I'm not sure that it would lead to either.

I think the inquiry really needs to be here to look at the nature of Federal habeas. In Brecht v. Abramson, this Court described it as an extraordinary remedy for those who are grievously wronged and something qualitatively different than reversible error on a direct appeal.

Now, if claims are so extraordinary, like Darren Boerckel's, that they're to be brought into Federal court, why are they too extraordinary for a State supreme court? The -- the notion that a claim is merely fact-specific or generic and not of general importance, there really aren't that many cases of a constitutional type that aren't going to be fact-specific. It would generally be facial challenges to the constitutionality of a statute and --

QUESTION: Would you say that there -- there's no evidence that the Illinois Supreme Court affirmatively discourages prisoners from seeking discretionary review?

MR. BROWERS: I would say that. I don't think there's any discouragement there. Does the prisoner look at his chances and look at this rule and say my chances are minimal, it's not worth going? Perhaps, although the data don't bear that out.

QUESTION: I take it -- I take it most attorneys

prefer two bites at the apple.

MR. BROWERS: What?

QUESTION: I take it most attorneys prefer two bites at the apple.

MR. BROWERS: I think so, and I think habeas petitioners -- this one in particular is going for four. He's been to this Court before on certiorari with, I might add, a fact-specific question right on the heels of Dunway v. New York. He's been through three levels of -- he's been through various levels of review in the State court, and now he's in Federal habeas court.

QUESTION: Mr. Browers, I'm curious. I'm enormously surprised that we have never confronted this issue before.

MR. BROWERS: I am too.

QUESTION: Do you have any explanation for that? Is it -- is it that when issues are significant enough to go to Federal habeas, they normally are carried up for discretionary review? Or -- I -- I just can't understand why -- why this thing hasn't come up before.

MR. BROWERS: I don't either. I think there have been hints in various opinions -- three on the same day I believe, Teague v. Lane, Castille v. Peoples, and Harris v. Reed -- both in the majority opinions and in concurrences and footnotes all alluded to this possibility

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in discussion of exhaustion and how the plain statement rule of Harris may not apply where no one gave the State the opportunity.

The various circuit courts of appeals, cited in footnote 32, I believe it is, of our brief -- those that accept our position rely on those very precedents, as well as footnote 48 of Engle v. Isaac and footnote 1 of Coleman v. Thompson.

So, it's all sort of been suggested by Your Honors' jurisprudence. I'm not sure why the issue hasn't come here. Some States maybe don't promote it. I don't know.

QUESTION: To go back to Justice Kennedy's question for a minute, what in your view would make a difference if -- suppose the State had quite clearly said, as South Carolina has said, they said in a -- they published something called In re Exhaustion of State Remedies. And -- and in that document, they say, we declare that all appeals from criminal convictions, a litigant shall not be require to petition for certiorari to the State supreme court in order to be deemed to have exhausted all available State remedies. All right. Now, so that couldn't be clearer.

MR. BROWERS: I think that's an irrelevancy, Your Honor.

QUESTION: All right.

MR. BROWERS: Exhaustion is a Federal question.

QUESTION: So, in other words, your view is that even if the State of Illinois were to say, we've thought about this matter. We understand, says the supreme court, that if we say you don't have to exhaust in trivial cases, we're also saying you don't have to exhaust in important ones. We understand that, and we don't want to hear them. We don't want it. We don't want all that flood of things. That's our policy. Nonetheless, we would have to say to the State prisoners, you have to go to the supreme court.

Now, why should that be? We don't say that about post-conviction release -- relief in States. Why would we have to say that?

MR. BROWERS: I understand the lure of that, and in fact, Boerckel relies on Arizona precedent doing precisely that. But the Ninth Circuit said, no, no, no, no. This is a Federal question.

QUESTION: I understand it's a Federal question. I'm just saying that given our reading of the language of the statute, the Federal statute, a reading that does not take it literally because we do not apply it to State habeas, nor a lot of other things, a reading that looks to the policy, if we discover that the policy in respect to comity is that the State thinks comity means don't give it

to us, please, don't insist on this flood, that we should, nonetheless, insist on it. Now, I know maybe the Ninth Circuit or somebody has said that's so, but I want to know why should that be so.

MR. BROWERS: Well, I mean, this is the reverse. This is the State telling --

QUESTION: That's a different --

MR. BROWERS: -- the Federal courts what to do?

QUESTION: I come to that after the first one. I want to know -- I want to know suppose I decide you're wrong on that or I decide it's ambiguous. I don't know how -- I'm saying suppose the State were clearly to say we don't want this in the State supreme court. Go to Federal district court. They don't have enough to do.

(Laughter.)

MR. BROWERS: I think short of a State saying we won't entertain your claim at all --

QUESTION: They don't say that. They say it's our policy, i.e., we consider the -- the matter to have been exhausted for Federal habeas purposes just like South Carolina said. So, you're not bothering us to say avoid the State supreme court.

MR. BROWERS: I wonder what that same court will do later.

QUESTION: I don't know, but I want to know your

-- my problem legally is am I or am I not supposed to give that weight. Now, if I am, I'm going to see it one way. If I'm not, I'm going to see it another way.

MR. BROWERS: I mean, there's -- there is jurisprudence of this court that says a useless resort to State court will be forgiven.

QUESTION: It's not -- you see, it's not useless.

QUESTION: Mr. Browers, I -- some -- some of this colloquy leaves me perplexed. Did -- did you confirm or -- or by silence at least, the statement that we do not apply the exhaustion requirement to State habeas? That is, we --

MR. BROWERS: No. I don't accept that.

QUESTION: Don't we require State habeas to be -- to be undergone before you come to Federal habeas?

MR. BROWERS: Depending on the issue raised in Federal habeas and depending on what was done in the State court. I was not confirming that by silence.

QUESTION: Well, I don't know the status of that specifically. I believe that there's --

MR. BROWERS: I believe it's Brown v. Allen that holds that one need not do a redundant State habeas raising the very issues one raised on direct appeal.

QUESTION: Well, there's a lot of water that's

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flowed under the bridge since Brown against Allen I think.

MR. BROWERS: I acknowledge that. I -- I think that aspect of this Court's jurisprudence regarding exhaustion remains valid, that the States -- that the Federal courts will not require a petitioner to do a redundant action in State court.

QUESTION: What I'm testing out -- and I suppose you don't have an answer to it -- was Justice Kennedy's point. Does it matter or doesn't it matter whether the Supreme Court of Illinois would or would not prefer to get this flood of petitions? I don't mean to be pejorative there. I mean --

MR. BROWERS: I understand. I think that makes a presumption that this would increase the number of petitions. I'm in a unique position at my desk where virtually every petition that they get crosses my desk to know that -- let me back up.

For 11 years in the Seventh Circuit, the rule was the opposite of the rule in this case. There was a case called Nutall v. Greer, which held that the words exhaustion were not used. They were -- it was in language called waiver. And from 1985 to 1996, the rule in the Seventh Circuit was that you did have to raise your claims on a petition for leave to appeal in the Illinois Supreme Court in order to exhaust them for habeas purposes.

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In 1996, the Seventh Circuit reversed itself. I haven't seen any appreciable increase or decrease in petitions for leave. I think petitioners go there initially hoping to get relief in the State courts and not necessarily with an eye toward Federal habeas corpus. So, I don't accept the proposition that this will encourage an increase of either issues or petitions in the Illinois Supreme Court.

QUESTION: Should we make an exception under your rule for States such as, for example, Arizona that have made clear, we don't want these? Don't come here.

MR. BROWERS: No.

QUESTION: Illinois is silent, but there are a few States that have said, we don't want them. Now, maybe we should make an exception.

MR. BROWERS: The only exception I think would be rational, since the question is a Federal one, is if you have a State that has a rule that on its face shows that relief is impossible with respect to Federal questions.

QUESTION: Mr. Browers, to me this discussion indicates that the point on which you and I disagree, that there has to be some national rule, and you say, no, it can just be State by State, that a national rule is going to be very, very difficult to put together particularly if

any part of the rule depends on the attitude of the highest court of the State, and you've got 50 different States. I wonder if we don't need something more general than that.

MR. BROWERS: Well, I'm not sure the attitude of the State is as important as what its rule is. I am seeking a national rule, and for those States for which no relief would be available within the wording of 2254(c), they would have to be the exception to the rule we'd promote.

QUESTION: So, you say no relief legally possible, not discretion --

MR. BROWERS: Not discourage --

QUESTION: -- rarely exercised in favor of it.

MR. BROWERS: Exactly. That's our --

QUESTION: It'd be like Texas where the State supreme court doesn't hear criminal matters.

MR. BROWERS: If they don't hear criminal matters, I would say that's not an available remedy.

QUESTION: Correct.

QUESTION: That's not much of a concession.

(Laughter.)

MR. BROWERS: I get what I can here.

I'd like to reiterate the point that --

QUESTION: Well, that's one line that could be

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drawn. Another one is between appeals of right and discretionary appeals, and then you'd have a national uniform rule based on that line. But you say that the line to choose is the one that will require more petitions to be filed or more -- at least more laundry list petitions to be filed in the State's highest court.

Do you know what -- how many States have their supreme court with jurisdiction no longer of right, but only discretionary?

MR. BROWERS: No, I don't. I would assume most.

But I'd like to back up to your question. I don't think this encourages laundry list petitions. I think one has to look at what is one seeking in habeas, and to the extent that one is seeking to vindicate constitutional errors where one has been grievously wronged, I don't think inclusion of that in a petition for leave to appeal to a State's highest court can be deemed so minimal as a laundry list. I think it's a serious constitutional claim, and if one is really there, however fact-bound it is, it's not onerous to require a petitioner to raise it.

No further questions. I'll reserve my time.

QUESTION: Thank you, Mr. Browers.

Mr. Mote, we'll hear from you.

ORAL ARGUMENT OF DAVID B. MOTE

ON BEHALF OF THE RESPONDENT

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

I'd like to initially address a question by Justice Stevens regarding statistics. We do, in our brief in footnote 2, provide some statistics regarding the number of PLA's and the number of -- petitions for leave to appeal and the number of petitions for leave to appeal granted. And in the most recent 2 years for which those numbers were available, the Illinois Supreme Court granted petitions for leave to appeal in approximately 3 percent of the cases.

I'd also like to respond to --

QUESTION: That's 3 percent of criminal cases.

MR. MOTE: Correct.

QUESTION: Do you know what the percentage is across the board?

MR. MOTE: Granted? No, I don't.

I'd also like to respond to -- to something Mr. Browers said regarding three cases, three Illinois cases, that had reviewed the kind of claims that Mr. Boerckel did not present.

QUESTION: Excuse me. Before you go on to that, do you know whether that -- you know, some States -- Virginia I know before -- before it had an intermediate

court of appeals and every appeal to the supreme court was discretionary used to assert -- I don't know whether it was true -- that cert was never denied unless the court satisfied itself that there was no substantial error.

MR. MOTE: That is certainly --

QUESTION: Now, might not some State supreme courts and, for all I know, the Illinois Supreme Court do a -- do a quick look and if it -- if it has no reason -- at least no reason to think that there was an error, deny it, but if it has reason to think there was an error, grant it? I mean --

MR. MOTE: On that --

QUESTION: -- we don't know what they're doing just because they have a discretionary system.

MR. MOTE: On that, there is an Illinois opinion. It's an appellate court opinion that says that a decision not to grant a petition for leave to appeal by the Illinois Supreme Court is in no way a review of the merits or a decision on the merits. So, to that extent, that would not be the case.

QUESTION: Well, Virginia had the same rule. It wasn't a decision on the merits. It didn't purport to be, but nonetheless, they claimed that they were really looking for those cases that in their view were erroneous and would grant cert if there was any real possibility of

an error. I can't say for sure that -- that Virginia doesn't still do that even though it now has an intermediate court or that some other States don't do it.

MR. MOTE: If -- I -- I think that Illinois Supreme Court rule 315 tells us that -- that the Illinois Supreme Court, like this Court, is trying to set itself up as a body to resolve broad questions, and as in this Court, if -- if a claim amounted to nothing more than the right standard was applied but the result was wrong, there's no indication in Illinois Supreme Court -- in Illinois Supreme Court rule 315 that the Illinois Supreme Court wants to hear that kind of a claim.

QUESTION: Supervisory authority. I mean, that's one of the grounds that they say, and what in the world could that cover except correcting an error?

MR. MOTE: I think that what that -- what that would cover is -- is allowing -- I think it has been applied in cases involving allowing misconduct and in some -- but that -- that is the most general provision --

QUESTION: Yes, I know, and we -- we have the same, and we use it, you know, rarely I will admit, but occasionally we take a case just because we think it was wrongly decided, if the injustice is outrageous enough.

QUESTION: It's fair to say, isn't it, that there's nothing either in the rule or in the written

opinions of the court where the court has ever said that claims such as these should not be submitted to it?

MR. MOTE: That -- that's fair to say.

QUESTION: What about -- I thought you were going to get down to a comment specifically on sort of the number of error correction cases that in one way or another the Supreme Court of -- of the State does entertain. Your -- your brother, in effect, said to me it entertains a good many of them. Is that -- is that not true?

MR. MOTE: Numerically I have not looked at all the cases. I -- I have looked at the three cases that Mr. Browers cited, and I think a close reading of those cases or even a cursory reading shows that they did not resolve the fact-specific questions that it would appear from the Illinois Attorney General's summary they resolved. For example, in People v. Tulate, which is the case they cite saying the Illinois Supreme Court has resolved a sufficiency of the evidence question, what the question was, was whether a -- a conviction for burglary to -- a burglary with intent to commit rape could stand based on no evidence of intent to commit sexual assault. And what they said is that while Illinois cases had recognized that an intent to commit a theft could be inferred from a breaking and entering, you couldn't infer from just the

breaking and entering the intent to commit rape or any other felony. So, that was just a broad question of law. It wasn't a normal sufficiency --

QUESTION: Okay. Let me -- let me ask you a broader question. I mean, the State's counsel said, look, I just cited two or three cases because they were very close in their subject matter to -- to this particular case. But he said that generally speaking, over the whole spectrum of the criminal law, either because it actually reviews or because it -- it will remit to a -- a lower court for review under its supervisory authority, the -- the supreme court actually entertains a -- a large number -- lots I think was the term I used in -- in commenting on his answer -- lots of these cases which seem to be error correction cases.

As a general proposition, do you dispute that?

MR. MOTE: Yes, I do. And -- and I have not -- I have not done a -- tried to do a comprehensive review of the cases decided by the Illinois Supreme Court, but of the three cases they chose to cite, they are all upon review decisions on broad legal questions and not fact-specific decisions.

QUESTION: Mr. Mote, do you think that the answer to the questions posed in the petition here should depend, to any substantial degree, on the likelihood of

success in a petition to the Illinois Supreme Court as opposed to a likelihood of success in some other State supreme court and where there's an intermediate court of appeals?

MR. MOTE: No, I don't -- I don't think this Court should adopt a rule where -- where they look at it and try to determine the likelihood of -- of success a particular petition would -- would have. I think that would -- that would be very subjective and -- and put the Federal habeas court in the position of trying to guess what a State supreme court would have done on cert. And that -- that would be a very difficult thing for the habeas court to -- to decide.

I do think in -- in response to -- to a question of yours, Mr. Chief Justice, about the fact that this has never been presented before, it should be pointed out that what the -- what the Illinois Attorney General is doing is asking this Court to take a footnote out of Coleman v. Thompson and essentially not over -- not only override the rule adopted by the Illinois Supreme Court, which has the authority to make that rule under both the Illinois constitution and Illinois statute, but also effectively the Illinois Attorney General asked this Court to overturn a slew of this Court's prior decisions. This Court --

QUESTION: You say override the view of the

Illinois Supreme Court. In the sense that has been previously discussed?

MR. MOTE: Yes. In the sense that the -- that the Illinois Supreme Court, while it says this is not an exclusive list of the factors they'll consider, there's no purpose in having the rule if it's not intended to give guidance to the litigants. And it's understandable that the Illinois Supreme Court, like this Court, reserves to itself a -- a certain amount of discretion in deciding what it will review, but certainly the rule is not there to invite litigants to disregard it.

QUESTION: Not every potential habeas litigant is going to have a garden variety case, you know, with 15 errors and you hope one of them is -- is found -- finds favor with the court. On occasion there's -- there's going to be a case that is -- is a precedent-setting case, and under the rule you're contending for, that too need not be taken to the Supreme Court of Illinois.

MR. MOTE: I've not contended for a specific rule in this case, but I see the Court as having two alternatives. One, in this case, it would be sufficient to decide this case to say that where the prisoners -- where the prisoner has complied with the rule enunciated by the State and presented to the State the claims that meet the factors enunciated in the State rules, that he

has not waived claims that did not fall under those factors.

QUESTION: That -- that is going to leave habeas courts trying to decide what factors that are concededly not dispositive mean, which strikes me as introducing a great deal of subjectivity among the 700 district judges in the country.

MR. MOTE: The Federal habeas courts are already required to look at what State law requires and they have some familiarity with that. But at the same time, if this Court wanted to enunciate a national rule, it would -- it would -- it would be easier to administer a rule that said that if the State has adopted a system of discretionary supreme court review, then the claims need not be presented to the State supreme court.

QUESTION: If -- if we're talking about ease of administration, which may not be the final criterion, certainly as -- as easy a rule to administer as any is to say if you could have applied to the Supreme Court of Illinois, you -- you had to.

MR. MOTE: That -- that would be --

QUESTION: That -- that doesn't take a lot of thinking on anybody's part to apply that rule.

MR. MOTE: Correct. Correct. That -- that absolute rule would be as easy to apply, but it would

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offend a comity and federalism to say that the Federal courts are going to require prisoners to present all their claims to the State supreme courts regardless of what the State supreme courts enunciate as their role.

QUESTION: I'm trying to think which -- which course would more likely be corrected by Congress if we get it wrong. I frankly don't --

(Laughter.)

QUESTION: I frankly don't know how many State supreme courts will -- will be -- what should I say -- annoyed if we come out the way -- the way your friend wants and -- and as you assert, dump more cases in their laps versus how many would be offended if we come out the way you want and -- and go about reversing State court decisions when the State court -- State supreme court has not even had a chance to hear the arguments that we use for reversing those decisions. I don't know which is which.

MR. MOTE: Well --

QUESTION: So, you know, there are congressional committees that can hear these contentions on both sides, make an assessment.

And which -- which erroneous result do you think would more likely be corrected by Congress? I suspect that if the State supreme courts in general were -- were

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ticked off that we were dumping too many cases in their laps, that they would make their voices heard pretty quickly, whereas I don't think anybody is -- the other one -- I can't imagine. I don't know.

MR. MOTE: That's true, Your Honor, but hopefully this is not something that Congress will have to decide.

One -- one key point in all of this is that the State gets to make the rules, and if the State says under -- under a policy that you don't have to present it to -- to a court that has not given you a right to have your claim heard, we don't think we're getting to look at enough of these cases, they can change their rule.

QUESTION: How -- how do they change their rule?

MR. MOTE: Well, in Illinois --

QUESTION: To say what? That --

MR. MOTE: They -- they can -- well -- and I can't give you exact numbers. The breakdown between States that have what is referred to as a mandatory system of review where you have a right to present your claims to the State supreme court and the courts where it's discretion -- the States with discretionary review, it's about an even split. There's about 20 and 20, and then there are States that have a mixed system.

QUESTION: No, it's not a feasible system for

any large State to say that you're entitled to an appeal. Is that what you're talking about? Changing their -- changing their discretionary review to mandatory review?

MR. MOTE: If --

QUESTION: Maybe the little States can do that, but gee, I -- I cannot imagine any State with a substantial number --

MR. MOTE: Well --

QUESTION: -- of cases being able to have the supreme court review every one.

MR. MOTE: And -- and that -- that just points out the -- the reality, which is any big State does not want to look at every claim from every prisoner. They -- they don't have the capacity to do it.

But what we're saying is that the rule adopted by the States should be respected, and --

QUESTION: I bet you we look at more than they do? You think we look at more? How many -- how many do they look at, do you think? I mean, we -- you know, you come here from -- from any Federal question from any State or Federal -- any Federal court of appeals any State supreme court.

MR. MOTE: The -- the Illinois Supreme Court I -- I believe gets about half the number of cases a year as this Court does, about 3,500.

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QUESTION: May I ask you a question about Illinois procedure? Does the Illinois Supreme Court allow petitions for rehearing from denials of petitions for leave to appeal?

MR. MOTE: Not that I'm aware of.

QUESTION: There's no rule providing for that.

MR. MOTE: No.

But that -- that brings up, Justice Stevens, a -- a good point, which is that this Court has -- has on numerous occasions said that the any available remedy language doesn't include, as Mr. Browers has put it, redundant actions. It doesn't -- and it doesn't include, as this Court stated in -- in Wilworth v. -- Wilwording v. Swenson, actions where it is conjectural if the State would agree to hear the claim.

QUESTION: Well, but this case, of course -- we're not -- this is not an exhaustion case. This is a procedural bar case, as I understand it.

MR. MOTE: Exactly.

QUESTION: And there really isn't any question that the language of the statute is complied with if the litigant allows the time to -- for leave to appeal to run. At that point there is no available remedy under State law. So, he's exhausted. But the question is whether that omission bars him from proceeding in Federal habeas

under Coleman against Thompson, or whatever the name of it is.

MR. MOTE: And -- and, Justice Stevens, under this Court's precedent, it clearly does not because this Court has repeatedly said that procedural default occurs when a State prisoner does not comply with a firmly established and regularly followed State practice. Mr. Boerckel tried to comply with Illinois Supreme Court rule 315.

QUESTION: Just -- just to come back to the statutory text, I'm trying to think. In administrative law where we require an exhaustion of administrative remedies before you can get to -- to a Federal Article III court, do we allow you to dispense with the level of administrative review that is just discretionary?

MR. MOTE: In administrative law? I'm not sure, Your Honor.

QUESTION: I don't think we do.

MR. MOTE: Your Honor, a better analogy --

QUESTION: I mean, you know, let's say -- let's say you're going through this, and exhaustion is exhaustion. It's a term we use all the time, and I think if you have a case in the Social Security system, for example, and the last -- the last review is discretionary by the board, I doubt whether we would allow the litigant

to come into Federal district court where the -- the litigant did not first seek to get the agency to correct its -- its mistake, even if -- even if it was a discretionary level. We wouldn't consider the administrative remedies to have been exhausted.

And I don't know why, if we're just talking the terms of the statute, we shouldn't apply the same rule here.

MR. MOTE: Well, this Court has previously held that exhaustion within the terms of this statute refers to whether or not there -- there are available remedies left at the time the Federal habeas petition is followed. And that is one of the line of cases that the Illinois Attorney General's position would require essentially overturning.

I would also point out that this Court has held that in order to --

QUESTION: I didn't get that. Say it again. What would we have to overturn?

MR. MOTE: The -- the cases from this Court that have said that exhaustion within -- as it's used in -- let me rephrase that.

This Court has previously stated that the term any available State remedies within 2254 refers to whether there are any available State remedies at the time that

the Federal habeas petition is filed. And as Justice Stevens said, there's no question that --

QUESTION: At this point, there aren't. Right?

MR. MOTE: That there's nowhere to go at this point.

QUESTION: And what -- can you think of one case you say that we've decided that stands for that proposition?

MR. MOTE: Yes, Your Honor. It is -- it is discussed in Engle v. Isaac at footnote 28, which was referred to by Mr. -- Mr. Browers. It's also referred to in -- in Coleman v. Thompson and Fay v. Noia.

QUESTION: And I think Moore against Dempsey too.

MR. MOTE: Thank you very much.

QUESTION: Once again, we certainly wouldn't use the term that way in administrative law where -- where you would dismiss a case for failure to exhaust -- exhaust administrative remedies. Even if there were no longer any administrative remedies available, because you had failed to appeal, we would -- we would dismiss for failure to exhaust.

Now, maybe it shouldn't be called failure to exhaust. Maybe it should be called -- I don't know -- waiver or something like that, but we've certainly called

it that.

MR. MOTE: Your Honor, I -- I would point out that in -- in the habeas context, this Court has previously held that it's not necessary to ask this Court for certiorari enable to -- in order to preserve issues for Federal habeas review. And this Court has stated that -- in Coleman v. Thompson that the State's procedural rules are entitled to the same respect as Federal procedural rules.

Given that and given the fact that, as we stated in our -- our brief, the Illinois Supreme Court has recognized that its petition for leave to appeal practice is similar to this Court's certiorari practice. The effect of not asking for that discretionary review, particularly when you're talking about just not asking on claims based on the guidance given in the rule -- the effect should be the same if we give the State procedural rule the same respect we give the Federal procedural rule.

QUESTION: Mr. Mote, I'm a little confused about this question of just what is the right word because you said it's not a question of exhaustion. There's no place to go now, but it is a question of exhaustion, is it not, because if you have no place to go now, including the Federal court, it's because you did not take a step at the time you should have taken it in the Illinois courts. So,

it's because you did not exhaust that last step in the Illinois State courts that you are in this posture now in the Federal courts.

MR. MOTE: There -- there is certainly a -- a connection between the two. Procedural default comes about if one doesn't -- doesn't comply with a practice that's firmly established by the State courts. And what that will mean at some point is that there was something that wasn't exhausted, but as Justice Stevens stated, under the -- the way this Court has defined exhaustion, when the time to pursue that possible avenue has run, then it becomes exhausted because exhaustion talks about merely the fact that it's no longer available.

QUESTION: But it seems to me it's just the same thing but you're calling it procedural default; that is, you didn't exhaust the remedy that was there when you had it, when you could have done so. Therefore, you can't now because it's time barred, and so the reason that you can't proceed in Federal court you say is -- we're calling it a procedural bar or something like that, but what it means is there was a step to take and you didn't take it in the State court system.

MR. MOTE: There's a distinction, Your Honor. Procedural default means not just that there was a step that you could have taken that you didn't take. It means

that there was a step that you were required take and didn't take.

QUESTION: Well, if it were that, then you would prevail because you're not required to petition for cert in Illinois.

MR. MOTE: Correct, Your Honor. And that -- and that's exactly our position.

QUESTION: Do you know why your client waited for 10 years after the direct proceedings had run their course before filing for Federal habeas?

MR. MOTE: I do, Your Honor. It's not in the record. It's not in the record explicitly anyway. But the record does reflect that Mr. Boerckel has an IQ of 70 and the State appellate decision reflects that at the time of his conviction, his -- his reading level was grade 1 and a half. The initial habeas petition that -- that was filed was written by a cell mate of his, and it just happened to be that period of time before he understood and had the help to do it. Certainly most State prisoners would have become aware of that option and -- and been able to do something with it much earlier.

In -- in terms of -- of the decisions of this Court that the State's position route effectively require be overruled, there are the cases that draw the distinction between exhaustion and default. That includes

Coleman v. Thompson, Engle v. Isaac, Wainwright v. Sykes, and Fay v. Noia.

There's also the cases I mentioned before, saying that the right to raise by any available means, talks about whether you have the right to raise by any available means at the time the Federal petition is -- is filed, and that includes some of the same cases.

QUESTION: Well, then you're saying that procedural default is the -- the what we're talking about here rather than failure to exhaust. Supposing that you don't take an appeal from a judgment of conviction to the Illinois appellate court where you have appeal as of right, and the time for that goes by, is that a failure to exhaust or is that a waiver?

MR. MOTE: That -- what happens is the failure to exhaust, when the time that you could take that step runs, ripens into a procedural default.

QUESTION: So, once the remedy is gone under the terms of State law, it's no longer a question of failure to exhaust. It's a procedural default.

MR. MOTE: Exactly, Mr. Chief Justice.

And -- and this -- this Court has said that procedural default, as I said, requires violation of a firmly established and regularly followed State procedure. The Court said that in Ulster County v. Allen, James v.

Kentucky, Teague v. Lane, and more recently Coleman v. Thompson.

QUESTION: What do you -- what do you say about the consequence which follows from your theory which is that even where the issue that is sought to be raised on habeas is a major question of State law which the Illinois Supreme Court would have loved to reach? Since there is no requirement to bring it, you don't have to bring it, and you would -- you would say there is no -- there is neither a failure to exhaust nor a procedural default since the -- whether to go to the Illinois Supreme Court was optional. And it's a major issue of Illinois law which will be decided by a Federal -- a Federal district court in habeas simply because the prisoner chose not to bring it to the Illinois Supreme Court.

MR. MOTE: My response would be that Illinois and any other State can define, through its rules, the claims and the types of claims that a -- a prisoner is allowed or required to present.

QUESTION: Change the discretionary review to mandatory is your answer.

MR. MOTE: In the --

QUESTION: Anything short of that?

MR. MOTE: Sure. They don't have to do it across the board. Just as on discretionary review,

Illinois and -- and most of the other States that have adopted discretionary review have given some guidance, you could -- a State could -- could say --

QUESTION: Wow.

MR. MOTE: -- you have the right to have the following kinds of claims heard. Mr. Browers --

QUESTION: And Federal courts would have to decide whether a particular claim -- I mean, how would they draw -- you know, issues raising major issues of State -- a Federal district court would then have to decide whether this claim raises a major issue of State law because if it does, then there is a procedural default, and if it doesn't, there is not a procedural default.

QUESTION: Does the Federal court have the jurisdiction to decide the State law issue as a basis for -- relief --

MR. MOTE: If it is -- if it is truly just a -- a State law issue --

QUESTION: It would be --

MR. MOTE: -- the Illinois Supreme Court is normally a prisoner's last chance to have that heard. And it should be kept in mind that the prisoner has no -- no incentive to bypass the Illinois Supreme Court. As -- as the Seventh Circuit said, that would -- that would assume

a very risk-prone group of prisoners. It's another chance for -- for the prisoner to get relief.

Mr. Browers suggested that if a claim is important enough to raise in a Federal habeas, it's important enough to present to the State supreme court. I think that -- that whole viewpoint is incorrect because the mere fact that there's an alleged constitutional violation, while it's very important to the prisoner, doesn't mean it's important in a broader sense, that -- that the claim in that particular case, particularly a fact-specific claim, be resolved.

But if a State supreme court wants to be -- wants the first chance to review everything that will end up in Federal habeas corpus, they could have a rule that says that you have a right and to exhaust your remedies must present to the Illinois Supreme Court those claims.

QUESTION: I'm not entirely clear on why you're making this argument because the issue isn't exhaustion. The issue is procedural default, and I don't see how the Illinois Supreme Court can tell us whether there's been a procedural default or not. I mean, it seems to me they -- they could say whatever they want to, and we could adopt either a rule that you must exhaust discretionary right or you don't have to. It's up to us to decide that.

Or we could even say you don't have to go to the

-- we could even say there's no procedural default if you've appealed to the intermediate court but you -- and you had a right to appeal to the supreme court. There's nothing -- the exhaustion rule wouldn't prevent us from saying that's not a procedural default as long as you had the opportunity to -- for review in the trial court and the intermediate appellate court.

I'm not suggesting we're going to do that, but I think it's very important to keep in mind the difference between the exhaustion rule and the waiver rule. And I'm -- I think your argument is directed at exhaustion.

MR. MOTE: Your Honor, it's -- I was -- I was intending it -- and I see I'm out of time. May I finish my answer on that?

QUESTION: I don't think it was a question.

(Laughter.)

QUESTION: Thank you, Mr. Mote.

MR. MOTE: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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BY: Lona M. May
(REPORTER)