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IN THE SUPREME COURT OF THE UNITED STATES

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RICKY BELL, WARDEN, :

Petitioner :

v. : No. 04-514

GREGORY THOMPSON. :

- - - - -X

Washington, D.C.

Tuesday, April 26, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:12 a.m.

APPEARANCES:

JENNIFER L. SMITH, ESQ., Associate Deputy Attorney
General, Nashville, Tennessee; on behalf of the
Petitioner.

MATTHEW SHORS, ESQ., Washington, D.C.; on behalf of
the Respondent.

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

2 (11:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Ricky Bell v. Gregory Thompson.

5 Ms. Smith.

6 ORAL ARGUMENT OF JENNIFER L. SMITH

7 ON BEHALF OF THE PETITIONER

8 MS. SMITH: Mr. Chief Justice, and may it please
9 the Court:

10 When the Sixth Circuit withdrew its judgment
11 affirming the denial of habeas corpus relief 6 months
12 after this Court denied certiorari review, it exceeded its
13 authority to act under both the rules of appellate
14 procedure and this Court's decision in Calderon v.
15 Thompson.

16 As to the rules, rule 41(d)(2)(D) requires,
17 without exception, that the court issue a mandate
18 immediately upon the filing of an order of this Court
19 denying certiorari. That did not happen in this case.
20 But because the court had no discretion under the rule to
21 do anything other than to issue that mandate, its
22 subsequent action withdrawing its judgment was tantamount
23 to a recall of the mandate, which, under this Court's
24 precedent in Calderon, cannot be justified in this case
25 because the evidence simply does not support a miscarriage

1 of justice, which under Calderon means actual innocence of
2 the offense or actual innocence of the death penalty.

3 JUSTICE BREYER: If you're -- if you're going to
4 -- if you're going to consider something that wasn't a
5 recall of a mandate as if it was, why don't you consider
6 it as a rule 41(b) action?

7 MS. SMITH: Your Honor, we don't read rule 41(b)
8 as allowing any sort of recall authority. Rule 41

9 JUSTICE BREYER: They didn't recall it, didn't
10 -- did they? Did they recall it? They issued it and then
11 recalled it?

12 MS. SMITH: The mandate was not recalled --

13 JUSTICE BREYER: Fine.

14 MS. SMITH: -- because it was never issued.

15 JUSTICE BREYER: Correct. So we did -- they
16 didn't recall it. So, of course, 41(b) does not have to
17 do with recalls. 41(b) has to do with issuances, and
18 41(b) says the court may shorten or extend the time for
19 issuing. Now, why wouldn't that be the obvious rule to
20 apply to what occurred here?

21 MS. SMITH: Your Honor, that is not -- not the
22 rule applicable here because that rule applies in a
23 different context. That applies at an earlier stage of
24 the post-judgment proceeding.

25 JUSTICE SOUTER: Where does it say earlier?

1 MS. SMITH: Rule 41(b) specifically deals with
2 the 7-day period of -- of time for issuance following the
3 expiration of the time for a petition for rehearing or the
4 disposition of that petition for rehearing.

5 JUSTICE SOUTER: And the court can -- can extend
6 it or -- or in fact truncate it, can't it?

7 MS. SMITH: It can, Your Honor, at that point.

8 JUSTICE SOUTER: What -- what if the court then
9 -- I'm -- let me just get to -- and I think this is
10 consistent with Justice Breyer's question. What if the
11 court, at the -- at the point cert was denied and
12 rehearing was denied, simply said, I -- we're now
13 operating under (b) and we're extending the time?

14 MS. SMITH: Because the more specific provision
15 -- what the court had actually done was to stay the
16 mandate pending a petition for writ of certiorari. The --
17 the --

18 JUSTICE SOUTER: Oh. That's -- that's what it
19 did, but what if the court had -- had been more articulate
20 about what -- what it -- it was doing or may have been
21 doing and -- and simply said -- at the moment at which the
22 -- the rehearing period expired for cert, said, all right,
23 we're still not issuing the mandate and we're operating
24 under subsection (b), we're extending the time. Would --
25 is -- is there anything in the rule that, at least in

1 terms, would have precluded the court from doing that if
2 it had said that?

3 MS. SMITH: I think that simply a plain reading
4 of the rule and looking at the rule as a whole would
5 preclude that result. And the reason is that the -- the
6 specific language that -- that Your Honor is referring to
7 speaks in terms of shortening or extending the time, the
8 time being the 7-day period for issuance. That 7-day
9 period is simply a period to allow the clerk a window of
10 time to get the mandate out after the rehearing period has
11 expired or after the rehearing has been disposed of. But
12 it does not give the court carte blanche to simply
13 withhold the mandate.

14 JUSTICE KENNEDY: Well, there are -- are they
15 any --

16 JUSTICE SCALIA: Well, you -- you would make the
17 same argument to that that -- that you were making
18 earlier, I assume, that to read it that way would -- would
19 be to nullify Calderon.

20 MS. SMITH: That -- that's exactly right, Your
21 Honor.

22 JUSTICE KENNEDY: Well, are there any
23 circumstances in which the court can -- and let's again,
24 as Justice Souter said, say that it put it on the record
25 what it was going to do, that we hereby, after the Supreme

1 Court has ruled in the case, will withhold -- order that
2 the mandate shall be withheld for a period of 30 days
3 because there is a -- a new case coming out on a different
4 issue that may affect our -- our holdings?

5 MS. SMITH: The court --

6 JUSTICE KENNEDY: Or that a new case has been --
7 has been released and we think that bears on -- on the
8 outcome.

9 MS. SMITH: After the --

10 JUSTICE KENNEDY: And we want to consider that.

11 MS. SMITH: After the denial of cert, Your
12 Honor?

13 JUSTICE KENNEDY: Yes, or after disposition by
14 this Court on it --

15 MS. SMITH: The --

16 JUSTICE KENNEDY: -- when cert is granted.

17 MS. SMITH: The rule does not allow for that
18 withholding of the mandate.

19 JUSTICE KENNEDY: No -- so no circumstances can
20 the issuance of the mandate be extended after this Court
21 has denied the petition for writ of certiorari?

22 MS. SMITH: If the --

23 JUSTICE KENNEDY: Under no circumstances?

24 MS. SMITH: If the mandate has been stayed
25 pending the petition for writ of certiorari and that

1 petition has been denied, the rule requires the immediate
2 issuance. Now, there -- there may be and -- and --

3 JUSTICE GINSBURG: But -- but you accepted the
4 petition for rehearing in this Court would also count,
5 although the rule doesn't say that.

6 MS. SMITH: I'm sorry, Your Honor?

7 JUSTICE GINSBURG: The rule speaks about the
8 mandate should issue when cert is denied, but in this
9 case, there was a further extension while this Court was
10 considering a petition for rehearing. Do you say that
11 that was also outside the rules so that the mandate would
12 have to issue when cert is denied even if there is a
13 petition for rehearing and a request to continue the stay
14 during the pendency of that rehearing petition?

15 MS. SMITH: Yes, Your Honor. The mandate should
16 have issued --

17 JUSTICE GINSBURG: So you say that that was
18 wrong in this case too.

19 MS. SMITH: That was in excess of the court's
20 authority under the rules.

21 JUSTICE BREYER: So -- so your view --

22 JUSTICE KENNEDY: I just want to get -- if I may
23 just get -- you say there are no circumstances in which --
24 where (d) is otherwise applicable, the mandate can -- can
25 be -- the issuance of the mandate can be extended.

1 MS. SMITH: In our view the rule does not allow
2 any other circumstances. Rule 41 does not allow any other
3 circumstances. If that authority --

4 JUSTICE GINSBURG: Did the prosecutor -- did the
5 prosecutor object when there was a further extension given
6 for the pendency of the petition for rehearing?

7 MS. SMITH: The State did not object to the --
8 to the extension, Your Honor, because the -- the mandate
9 was of no consequence to the State in terms of the State's
10 actual -- a State court proceedings. The State did not
11 need the mandate to go forward with its proceedings, and
12 in fact, the State was not authorized under State law to
13 even seek an -- an execution date until the time had
14 expired for rehearing. So --

15 JUSTICE SCALIA: I -- I guess I'm -- I'm not
16 clear about the facts here. Did -- did the court -- did
17 the court comply with (b)? Did it shorten or extend the
18 time? Was there any issuance of a -- of a -- of an order
19 shortening or extending the time, or did the court just
20 ignore the deadline and -- and act later?

21 MS. SMITH: The court simply ignored the -- the
22 -- the process of -- of the case -- the extension ability
23 in subsection (b) was never invoked by the court. There
24 was a timely petition for rehearing filed, which
25 automatically stayed the mandate under subsection (d) (1).

1 JUSTICE SCALIA: So there -- there is nothing
2 from the court that -- that says we -- we shorten or
3 extend the time.

4 MS. SMITH: That's absolutely correct, Your
5 Honor. The court never invoked subsection (b) as
6 authority for exaction. After -- when the petition for --
7 for rehearing was denied, the 7-day period in subsection
8 (b) then came into play. The petitioner, or the -- the
9 petitioner below, Mr. Thompson, filed a motion to withhold
10 the matter, stay the mandate pending a petition for writ
11 of certiorari, and that was --

12 JUSTICE BREYER: Is that --

13 JUSTICE SCALIA: Then I guess that the -- that
14 the conclusion would be, if you read 41(b), that if the
15 court has not shortened the time, the court's mandate must
16 issue 7 calendar days after.

17 MS. SMITH: That is our reading of the rule,
18 yes, sir.

19 JUSTICE BREYER: But isn't that the reading of
20 circuit?

21 JUSTICE STEVENS: Does that reading of the rule
22 require that a decision to extend the time be set forth in
23 any particular form of order or any written document?

24 MS. SMITH: It's our -- it's our reading of the
25 rule that -- that the language employed in subsection (b)

1 implies some affirmative action of -- of the court.

2 JUSTICE STEVENS: Maybe they internally
3 did affirmatively decide to extend the time, but they just
4 didn't enter an order. Would that count?

5 MS. SMITH: I don't think so, Your Honor. A
6 court in -- in our view --

7 JUSTICE STEVENS: What if they called counsel
8 and said, we've decided to delay extending the time?
9 Would that -- but we're -- we're going to extend the time,
10 but we're not going to bother to enter an order. Would
11 that constitute an extension?

12 MS. SMITH: I don't think that would constitute
13 an extension. I think the language in subsection (b)
14 requires some --

15 JUSTICE STEVENS: It requires a written
16 document --

17 MS. SMITH: -- some affirmative order --

18 JUSTICE STEVENS: -- saying for how long it's
19 going to be extended?

20 MS. SMITH: Some affirmative order of the court
21 not only saying we're going to extend the -- the time, but
22 to give an alternative time. That -- subsection (b) does
23 not allow for -- for an indefinite withholding of a
24 mandate.

25 JUSTICE STEVENS: Well, they apparently did

1 decide to extend the time for whatever time it took them
2 necessary to review the files that this particular judge
3 became aware of during this period. They did, in fact,
4 extend the time because they didn't issue it.

5 MS. SMITH: All this record shows, Your Honor,
6 is that the mandate did not issue. So the reason for that
7 is -- is not clear.

8 CHIEF JUSTICE REHNQUIST: Did the court give any
9 explanatory reason for what it did?

10 MS. SMITH: No, Your Honor. There is no order
11 in this record explaining why the mandate did not issue.

12 JUSTICE STEVENS: No, but the opinion of Judge
13 Suhrheinrich -- I forget his name -- explains in great
14 detail why he thought they needed more time before the
15 mandate issued. I don't know why that isn't explaining
16 why he extended the mandate.

17 CHIEF JUSTICE REHNQUIST: But a single judge
18 doesn't have the authority, does he?

19 MS. SMITH: Your Honor, I believe that a single
20 judge would have the authority to extend the mandate, but
21 a single judge would not have the authority to grant
22 rehearing because that would be a determination of -- of
23 the case.

24 JUSTICE GINSBURG: Ms. Smith, this -- unlike the
25 Calderon, which is a -- was a -- a court has authority to

1 recall a mandate that has already issued, this seemed to
2 be a really idiosyncratic case. I mean, this was an
3 extraordinary situation where a judge said, my goodness, I
4 wrote an opinion that assumed this person was mentally
5 okay, and now I discovered in the file things I never saw
6 before. This is a death case. I have reason to suspect
7 that this person may not have been competent when he
8 committed the crime, may not have been competent when he
9 -- when he stood trial, may not be competent at this very
10 moment.

11 A judge in that situation -- he finds something
12 that looks like it's the -- it's -- it's the key piece of
13 evidence in favor of the defendant. Somehow it never got
14 submitted. A judge, knowing that he has written an
15 opinion saying this man, as far as the Federal courts are
16 concerned, goes to the State and they can set their date
17 of execution and all that -- that was an -- this case is
18 so idiosyncratic that I'm concerned about dealing with
19 41(b) and mandates for this really unusual situation.

20 MS. SMITH: It is an unusual situation, Your
21 Honor, but the court did more than simply write an
22 opinion. The court entered a judgment on that opinion,
23 and that judgment became final and became the final word
24 of the court upon entry --

25 JUSTICE SCALIA: He couldn't have recalled the

1 opinion because of the extraordinary circumstance. My
2 God, I made a mistake. He couldn't recall the opinion,
3 could he?

4 MS. SMITH: The court always have the -- the
5 safety valve of -- of its recall power under extraordinary
6 circumstances. Now, in a habeas case, that extraordinary
7 circumstance has to be more than just this -- for some
8 reason, I overlooked this.

9 And -- and bear in mind as well that this
10 evidence was in front of the court. Judge Suhrheinrich
11 had this deposition for 21 months before that first
12 opinion was entered and that first judgment was entered.
13 So this was not something --

14 JUSTICE KENNEDY: Let -- let me ask you this.
15 Your -- I think you say that you -- you cannot extend the
16 period for issuance of a mandate after the Supreme Court
17 has denied the petition. Could the court then issue the
18 mandate and then recall it under Calderon?

19 MS. SMITH: That's precisely what the court
20 should have done in this case, Your Honor, in -- in our
21 view. The mandate was required to issue and then the
22 court should have looked at this extraordinary
23 circumstance, this -- this unusual circumstance, and made
24 the determination under Calderon whether that met the
25 standard for a miscarriage of justice under the habeas

1 decisions of this Court, specifically Calderon.

2 JUSTICE BREYER: Have you surveyed the circuits?
3 I know this -- what -- what you describe as the practice
4 certainly wouldn't have been in the First Circuit. Maybe
5 in the D.C. it was, but I mean, we would have thought that
6 we have the power over our own mandate. And of course, if
7 it hasn't issued and some extraordinary thing comes along
8 requiring a revision, we would have revised it.

9 So when you read the rules and you say that's
10 what we argue, you're not arguing it about any court that
11 I'm familiar with as an appeals court. So -- so have you
12 looked up the appeals courts and found that in fact there
13 is at least one court or two or maybe more that follow the
14 interpretation that you're arguing for?

15 MS. SMITH: Your Honor, we have not done that
16 type of -- of inventory.

17 JUSTICE BREYER: Well, if you have not, then my
18 experience would be you're arguing for a rule that no
19 appeals court follows, that -- that all think they have
20 power over the mandate, and that the question becomes one
21 of whether or not there was a good reason for delaying the
22 mandate.

23 MS. SMITH: Your Honor --

24 JUSTICE BREYER: If there was a good reason,
25 they could, and if there wasn't, maybe they couldn't.

1 But Justice Ginsburg has set forth what sounds
2 to me like an excellent reason, that the judge discovered
3 he had made an error that could mean life or death or jail
4 or innocence, and before that opinion issues, I want to be
5 sure it's correct.

6 Now -- now, that's how I'm thinking, that the
7 general practice is contrary to what you say, that the
8 question is a good reason, and that here there could
9 hardly be a better one. So what is your response?

10 MS. SMITH: Your Honor, our response to that is
11 -- is twofold. Number one, I don't think that -- that the
12 Rules of -- of Appellate Procedure can be abrogated by the
13 consensus of the circuits.

14 JUSTICE BREYER: And all the circuits have just
15 been wrong in their interpretation.

16 MS. SMITH: If the circuits are not complying
17 with the plain language of the rule, then -- then, yes,
18 they have.

19 JUSTICE SCALIA: We don't know that all the
20 circuits have that interpretation.

21 JUSTICE BREYER: I don't either.

22 JUSTICE SCALIA: Has Justice Breyer conducted
23 the kind of investigation he asked you about?

24 (Laughter.)

25 CHIEF JUSTICE REHNQUIST: Well, how many cases

1 very similar to that -- this exists? It struck me as just
2 procedurally bizarre.

3 MS. SMITH: This is an unusual case in the way
4 that it's set out in Judge Suhrheinrich's opinion, Your
5 Honor. But if you look at it and -- and look at it in the
6 way that -- that it should have played out -- and the way
7 it should have played out was that the mandate should have
8 issued after this Court denied cert. This Court then went
9 on after that to deny rehearing and the State moved
10 forward. If at that point Judge Suhrheinrich looked at
11 this deposition and believed that it established or showed
12 an extraordinary circumstance, than a recall would --
13 would have occurred, and then that would have been an
14 issue.

15 But if you look at the evidence itself, it
16 simply does not rise to the level of -- of extraordinary
17 circumstances. It does not show actual innocence of the
18 offense. Gregory Thompson has all along admitted that he
19 committed this offense. There was no defense of it at
20 trial.

21 JUSTICE KENNEDY: Let's -- let's take the
22 hypothetical where there is an extraordinary -- where it
23 -- it does rise to the very high level. And then you have
24 these facts. They just don't say anything and -- and they
25 keep the case. If they could have issued the mandate and

1 then recalled it, what difference does it really make,
2 assuming there is an extraordinary circumstance? I know
3 you deny that.

4 MS. SMITH: Assuming there is an extraordinary
5 circumstance, I think to prevent the result of having to
6 issue and then immediately recall, I think the court in
7 that circumstance, assuming there was actually an
8 extraordinary circumstance, actual innocence of the
9 offense or actual innocence of the death penalty, which we
10 don't think was shown in this case -- what the court could
11 do in our view is to invoke its authority under rule 2 to
12 suspend the rules for good cause. And in that
13 circumstance, given the finality of the judgment, the good
14 cause must rise to the level of a miscarriage of justice
15 under Calderon.

16 JUSTICE SCALIA: Well, it wouldn't have to
17 suspend the rules for good cause since it has authority to
18 extend the time for issuing the mandate. It can comply
19 with 41(b). So I think the most you can say is that the
20 court, when it's faced with extraordinary circumstances of
21 -- of the sort that could overcome Calderon, should issue
22 and order extending the mandate because, and explaining
23 why, because there's this evidence which, if true, would,
24 you know, produce a miscarriage of justice in this case.

25 MS. SMITH: I think that's one interpretation of

1 the rule, Your Honor. We read that -- the rule a little
2 bit stricter than that, and we limit that extension in our
3 reading to the 7-day period after the expiration of the
4 time to seek rehearing or the denial. But I think that
5 that is a -- that is a reading --

6 JUSTICE SCALIA: Tell me again. How do you --
7 you read the rule to say?

8 MS. SMITH: We read the rule (b), the extension
9 period --

10 JUSTICE SCALIA: Yes.

11 MS. SMITH: -- to be limited to the 7-day period
12 after the expiration of the time to seek rehearing or the
13 disposition of the petition for rehearing en banc or by
14 panel or the disposition of a motion to stay the mandate.
15 We limit that to -- that interpretation to a different
16 phase of the proceeding.

17 JUSTICE O'CONNOR: Well, it doesn't expressly
18 say that in that last sentence.

19 MS. SMITH: It -- it doesn't, Your Honor.

20 JUSTICE O'CONNOR: Are you going to address the
21 seriousness with which this evidence should be viewed?
22 Because it is disturbing. It certainly would go to
23 whether a death penalty should be given.

24 MS. SMITH: I would like to address that, Your
25 Honor, because I think that -- that the seriousness of

1 this evidence has been vastly overstated in the concurring
2 opinion of the Sixth Circuit.

3 The evidence itself was -- was quite simply a
4 deposition of a clinical psychologist who opined based on
5 her -- some additional -- some additional meetings with
6 family members and a review of the transcripts and other
7 evidence that the petitioner suffered from a mental
8 illness at the time of the offense.

9 JUSTICE STEVENS: Didn't she interview the --
10 the petitioner herself? Did she not interview the -- the
11 defendant himself?

12 MS. SMITH: She did.

13 JUSTICE STEVENS: Yes.

14 MS. SMITH: She conducted some -- some --

15 JUSTICE GINSBURG: At two different points in
16 time, wasn't it?

17 MS. SMITH: Yes, she did, Your Honor, but her
18 ultimate opinion was couched in the language of
19 Tennessee's statutory mitigating circumstance, that --
20 that Mr. Thompson at the time of the offense suffered from
21 a mental illness or defect that -- that impaired his
22 ability to -- to conform his conduct to the requirements
23 of the law, but that was not sufficient to meet the legal
24 definition of insanity. That is the -- that is the --
25 exactly the language under Tennessee's mitigator that --

1 that Dr. Sultan's opinion was specifically limited to.

2 JUSTICE STEVENS: Do you disagree with the
3 factual point that I think one of the opinions made, that
4 this study was not, in fact, known to exist by the members
5 of the court of appeals panel who decided the merits of
6 the case before the petition for cert was filed?

7 MS. SMITH: Your Honor, there is a disagreement
8 in the opinion itself that --

9 JUSTICE STEVENS: As to how serious it was. I
10 understand. But do you -- do you disagree with what I
11 understood to be a representation of Judge Suhrheinrich
12 that he did not know about this study, did not know -- it
13 had not gotten into the record, and neither did anybody
14 else on the panel, even though, it seems to me, sort of
15 strange that nobody did know it? I have to confess that.
16 But do you dispute the factual predicate or the fact that
17 -- that they did not know that this study was available?

18 MS. SMITH: Judge Suhrheinrich represented that
19 he was unaware of the deposition, and I have no way to
20 dispute that except to say -- I have no way to dispute his
21 own personal representation. But Judge Moore pointed out
22 in the majority opinion that the deposition was, in fact,
23 before the court and had been presented for -- 21 months
24 earlier than the initial opinion was entered.

25 JUSTICE GINSBURG: How would it have been

1 presented? Because it wasn't -- it wasn't even in the
2 record in the district court. I mean, that was what
3 Suhrheinrich was so bewildered about, that here was what
4 seemed to be the strongest evidence for the defendant, and
5 at the end of the proceeding in the district court, it's
6 not even made formally a part of the record. It was a
7 deposition. Right?

8 MS. SMITH: It was a deposition. It was
9 attached to a motion to hold the appeal in abeyance
10 pending the disposition of a rule 60 motion in the
11 district court. That's how it came before the -- before
12 the court of appeals.

13 JUSTICE GINSBURG: So it wasn't -- it wasn't in
14 the district court record. It wasn't in the record that
15 went from the district court to the court of appeals. It
16 wasn't in the record on appeal.

17 MS. SMITH: It was -- it was before the court by
18 way of that motion. It was not properly in the record.
19 But then again, it was not any more proper to consider
20 after its opinion than it was to consider before it --

21 JUSTICE KENNEDY: Was -- was it before the --

22 JUSTICE SOUTER: But wasn't the --

23 JUSTICE KENNEDY: -- court of appeals in the
24 petition for rehearing after the court of appeals made its
25 decision?

1 MS. SMITH: It was quoted in the petition for
2 rehearing.

3 JUSTICE KENNEDY: So -- so it was referenced in
4 the petition for rehearing.

5 MS. SMITH: It was directly quoted. The
6 ultimate opinion, with regard to the mitigator, was
7 directly quoted.

8 But the -- the point that I was making earlier,
9 this deposition in no way renders the -- the defendant
10 ineligible for the death penalty because it does not
11 undermine any of the three aggravating circumstances. It
12 does not even make a prima facie showing of insanity under
13 Tennessee law, as I've stated earlier. It simply tracked
14 the mitigating circumstance under the statute, and as this
15 court held in Sawyer v. Whitley, simply additional
16 mitigating circumstances does not rise to the level of
17 innocence of the death penalty. So it neither -- it
18 demonstrates neither innocence of the -- the offense or of
19 the death penalty. And even more so than that, it would
20 not have even defeated --

21 JUSTICE O'CONNOR: You -- you think it could not
22 have been considered in mitigation in the decision whether
23 to give a death sentence?

24 MS. SMITH: Your Honor, I think it would have
25 been one element of -- that -- that may have been

1 considered. But in terms of the extraordinary
2 circumstance, innocent of the death penalty or innocence
3 of the offense, it would not rise to that level.

4 JUSTICE SCALIA: Calderon requires not just that
5 it might have been additional mitigation, but that the
6 defendant would have been ineligible for the death
7 penalty.

8 MS. SMITH: That's -- that's exactly right, Your
9 Honor.

10 JUSTICE SCALIA: That's how I read the case.

11 MS. SMITH: In Sawyer v. Whitley, this Court
12 specifically said that and rejected the -- the contention
13 that additional mitigation -- mitigating evidence would
14 render a defendant ineligible of the death penalty. So
15 this does not satisfy the actual innocence extraordinary
16 circumstances. Nor would it have --

17 JUSTICE SOUTER: Well, that -- that may be but
18 the -- the fact that this sort of evidence would
19 ultimately be kept out from the court of appeals and
20 ultimately from the district court may be a very good
21 reason for us not to adopt your analysis that what
22 happened here is the equivalent of a mandate issuing and a
23 mandate being recalled. It may be a very good reason to
24 prefer a different analysis.

25 MS. SMITH: Your Honor, we -- we -- it would be

1 mere speculation to -- for -- for this Court or any court
2 to -- to conclude why this evidence was not presented to
3 the district court. There are any number of reasons.

4 JUSTICE SOUTER: We -- we don't have to conclude
5 why it was not presented. All we have to be concerned
6 with or what, I think, we have to be concerned with is
7 this. Is this very important evidence? The answer is
8 yes. It may not go to eligibility, but it's very
9 significant.

10 Number two, if we accept your Calderon analysis,
11 this evidence will be kept out forever. If it's that
12 important, that may be a good reason not to accept your
13 Calderon analysis and say if the mandate hasn't issued, it
14 hasn't issued.

15 MS. SMITH: Your Honor --

16 JUSTICE SOUTER: That's -- that's my point and
17 -- and you may want to respond to that.

18 MS. SMITH: Your Honor, my response to that is
19 it is not that important, and when I say that, it is not
20 that important because it would not even have defeated
21 summary judgment. The --

22 JUSTICE SCALIA: I -- I presume your -- your
23 answer would also be that if it's a good reason for -- for
24 not issuing the mandate, as you're supposed to, it would
25 equivalently be a good reason to recall the mandate. We

1 -- we crossed that bridge in Calderon.

2 MS. SMITH: That is precisely the argument that
3 we are making, Your Honor.

4 JUSTICE SOUTER: And I take it you also
5 recognize that the bridge that we did not cross in
6 Calderon was -- was in answering the question whether --
7 in a case in which a court does not issue the mandate, we
8 are going to construe the court's authority, its -- its
9 discretion narrowly or broadly. And that is the issue
10 before us here, isn't it?

11 MS. SMITH: It is, Your Honor. The issue here
12 is -- is whether Calderon extends to this situation. We
13 think it does.

14 JUSTICE GINSBURG: What you're saying is --
15 essentially is we should regard this as though what wasn't
16 done had been done because it was supposed to have been
17 done. In other words, you're saying treat this just as if
18 the mandate issued and was being recalled. That's what I
19 get to be the gist of your argument.

20 MS. SMITH: That is what we're saying, Your
21 Honor, because the effect on the State of Tennessee is
22 precisely the same. The finality is the same. The
23 judgment was -- was entered and final at the point that
24 the court entered it the first time in January of 2003.

25 JUSTICE STEVENS: But let me ask you this. Why

1 should not the proper standard of being -- deciding -- the
2 court of appeals panel has decided a case. They -- they
3 learn something that would have caused them to come to a
4 different conclusion had they not -- had they known it in
5 time. Should not that be a sufficient reason to extend
6 the 7-day period?

7 MS. SMITH: I do not think that that would be a
8 sufficient reason, Your Honor, because --

9 JUSTICE STEVENS: Why not?

10 MS. SMITH: -- the extension period --

11 JUSTICE STEVENS: Why does it have to be
12 miscarriage of justice? They just say we goofed for an
13 inexcusable reason. We now realize there's something very
14 important we failed to -- failed to find out. We now know
15 it, and we would decide the case differently had we known
16 it a week ago. Is that not a sufficient reason to say
17 let's postpone the 7 days?

18 MS. SMITH: If the court felt -- the 7-day
19 period is not to allow the court to rehear the case. If
20 the court wishes to invoke --

21 JUSTICE STEVENS: I understand that.

22 MS. SMITH: -- a rehearing --

23 JUSTICE STEVENS: I'm just asking whether if you
24 were on the -- on the court of appeals, wouldn't you think
25 that would be a sufficient reason to say, hey, don't issue

1 the mandate? Hold it for a week so we can look at this.
2 You don't think that would be permissible for an appellate
3 judge to do that?

4 MS. SMITH: That would not be permissible. That
5 is not the purpose of the extension. It is not to allow a
6 court to continue to mull over a case once a final
7 judgment has been entered. The mandate is not the
8 judgment. The judgment is the decision of the court, and
9 once the -- the court has affirmed that judgment, the
10 judgment dismissing, denying habeas relief, the State's
11 interests become paramount. Particularly at the point
12 when this Court has denied cert, all avenues of review
13 have been exhausted, the State at that point ought to be
14 able to rely on the finality and ought to be able to rely
15 on a court to comply with the plain language of the rules
16 that governed it.

17 If any -- if any body should be -- should be
18 bound by the rules, it should be a court, and they should
19 not be able to be abrogated by some consensus or just the
20 fact that courts don't ordinarily follow them or -- or may
21 or may not think that -- that it's appropriate under a
22 particular circumstance.

23 Mr. Chief Justice, may I reserve the remainder
24 of my time?

25 CHIEF JUSTICE REHNQUIST: Very well, Ms. Smith.

1 Mr. Shors.

2 ORAL ARGUMENT OF MATTHEW SHORS

3 ON BEHALF OF THE RESPONDENT

4 MR. SHORS: Mr. Chief Justice, and may it please
5 the Court:

6 Before it relinquished jurisdiction over this
7 case, the court of appeals engaged in sua sponte
8 reconsideration to correct a clear error in its prior
9 decision which called into question the reliability of Mr.
10 Thompson's death sentence. That --

11 CHIEF JUSTICE REHNQUIST: For how long after the
12 judgment becomes final can a court engage in sua sponte
13 consideration of whether to grant a rehearing?

14 MR. SHORS: Your Honor, if the court is acting
15 pursuant to 41(b), which we believe can occur without a
16 formal stay order, it -- it can do that at any time before
17 it issues the mandate. We're unaware of circumstances in
18 which that's extended for indefinite periods of time, and
19 I think this case is a perfect illustration as to why.
20 This is a --

21 JUSTICE SCALIA: What do you do about -- about
22 the provision not of 41(b) but of 41(d)(2)? There had
23 been a petition for certiorari here, which was denied.

24 MR. SHORS: That's correct.

25 JUSTICE SCALIA: Correct?

1 MR. SHORS: That's correct, Justice Scalia.

2 JUSTICE SCALIA: And -- and (d) (2) (D) says the
3 court of appeals must issue the mandate immediately when a
4 copy of a Supreme Court order denying the petition for
5 writ of certiorari is filed. That didn't happen.

6 MR. SHORS: That's correct, Justice Scalia.
7 (d) (2) (D) sets forth the endpoint of a stay entered
8 pending a petition for certiorari in this Court. That is
9 not the only reason a court of appeals may stay or delay
10 issuance of its mandate. In fact, if you look at other
11 sections of the rule, (d) (1) affirmatively sets forth a
12 separate basis for staying issuance of the mandate if
13 there is a petition for rehearing filed. And the mere
14 fact that you could have competing stays in a case we
15 think illustrates the incorrectness of the State's view
16 that (d) (2) (D) eclipses everything else and requires
17 issuance of the mandate under all circumstances.

18 The ultimate power at issue in this case is rule
19 41(b) which gives the court the power to shorten or extend
20 the time for which to issue its mandate. As we've set
21 forth in the brief, there are all kinds of reasons why a
22 court of appeals may occasionally continue to do that
23 beyond the denial of certiorari review by this Court.

24 JUSTICE SCALIA: Don't you think it has to issue
25 an order? The State here, having received a judgment and

1 -- and seemingly a mandate has to issue after the judgment
2 unless there's an order extending the time -- went ahead
3 with proceedings to -- to set the execution, to have the
4 -- the person examined to be sure that he was competent to
5 be executed, going through many stages, and was it proper
6 for this court without -- without ever issuing an order
7 extending the time for the mandate, simply to come back --
8 what -- 18 months later and say, oh, by the way?

9 MR. SHORS: Justice Scalia, it was proper for
10 several reasons.

11 First, rule 41(b) does not require a court
12 order. Unlike other provisions of the Federal Rules of
13 Appellate Procedure, including rule 40, it simply says,
14 may extend or shorten the time.

15 If you look at the history of the rule, one of
16 the reasons the advisory committee specifically rejected a
17 reading of rule 41(c) that would have made the mandate
18 effective when it should have issued is that you can never
19 know from looking at the docket alone whether the non-
20 issuance of the mandate was because of a clerical error or
21 because of a judge's intervention in the case.

22 JUSTICE KENNEDY: You're on -- you're on the
23 court of appeals. They're proceeding for execution. The
24 families of the victims know. The -- the accused, the
25 condemned man, is being -- you tell your colleagues, let's

1 just say nothing about this. You think that's good
2 practice?

3 MR. SHORS: I don't think it's necessarily good
4 practice, Justice Kennedy, but it is consistent with the
5 rule. And their attack on -- on rule 41 in this case is
6 an attack on the general authority of courts of appeals.

7 JUSTICE KENNEDY: It's consistent with the rule
8 not to enter an order that you're extending the time?

9 MR. SHORS: Absolutely it is, Justice Kennedy,
10 because as I noted, the rule doesn't say by order. The
11 practice --

12 JUSTICE KENNEDY: That's a very strange reading
13 of the rule.

14 JUSTICE GINSBURG: Do you know any precedent,
15 any case, in which rule 41(b) has been invoked after there
16 has been a petition for cert and petition for cert has
17 been denied? In practice, is there any other case in the
18 world like this? I don't know of any.

19 MR. SHORS: Your Honor, there are cases we've
20 cited and rules where the question comes up, does there
21 have to be a formal order entered. We've cited the Sparks
22 case, the Alphin case, and the First Gibraltar case. And
23 -- and there are some cases in which, following the denial
24 of certiorari, courts of appeal continue to engage in
25 reconsideration of the matter. We think that's what

1 happened in the Fairchild case cited in the -- in the red
2 brief, and to a lesser extent, it's what happened in the
3 Muntaqim case coming out of the Second Circuit. And the
4 reason is --

5 JUSTICE SOUTER: Were -- were those cases in
6 which they issued an order saying what they were doing?
7 I.e., we extend under (b)?

8 MR. SHORS: Justice Souter, in the Sparks case,
9 as well as in the Rivera case, no, there was no such
10 order. And what the Sparks court said, reading rule (b)
11 correctly we believe, is there's no provision in rule
12 41(b) that requires a formal order. That's what's set
13 forth in (d) in response to motions. And the reason is a
14 case is not final until the court of appeals issues its
15 mandate. And so the burden is on the litigant --

16 JUSTICE GINSBURG: Is that -- is that really
17 true? Is -- you have a judgment, and it doesn't have
18 preclusive effect from the time it issues? It -- it's
19 just sort of suspended there with no effect until the
20 mandate issues?

21 MR. SHORS: Justice Ginsburg, it has some
22 effects, but the -- the critical point for this case is
23 the power to reconsider is not eclipsed until the mandate
24 issues. That's what this Court held in Forman v. United
25 States, and we think it's what the advisory committee

1 notes of rule 35 and 40 indicate.

2 CHIEF JUSTICE REHNQUIST: Shouldn't the State at
3 least be notified of the pendency of this sort of thing?

4 MR. SHORS: Mr. Chief Justice, the -- the State
5 was effectively notified when the mandate did not issue.

6 CHIEF JUSTICE REHNQUIST: Well, now, that --
7 that really doesn't add up.

8 MR. SHORS: Well, Mr. Chief Justice --

9 CHIEF JUSTICE REHNQUIST: That might be a
10 clerical error all by itself.

11 MR. SHORS: It -- it could be a clerical error,
12 Mr. Chief Justice, and we -- we think that's exactly why
13 the advisory committee note -- notes indicate that an
14 attorney who believes that a mandate should have issued
15 should confirm that he or she has secured a final judgment
16 before assuming that the court of appeals jurisdiction
17 over a case is completed. That didn't happen in this
18 case.

19 CHIEF JUSTICE REHNQUIST: But there was no doubt
20 that there was a final judgment here in the death
21 sentence.

22 MR. SHORS: For -- for purposes of appeal, that
23 -- that would be true, but in -- in this case, as we think
24 the advisory committee notes made clear, the -- the burden
25 is on the party, seeking to secure a final judgment, to

1 confirm that a mandate has issued. In fact, in --

2 JUSTICE O'CONNOR: But it's so remarkable, isn't
3 it, that the court did not notify the State and -- and the
4 defendant about what it was considering? It didn't enable
5 them to address the issues by briefs, memos, or argument.
6 I mean, this -- this -- it's just an amazing sequence,
7 don't you think?

8 MR. SHORS: Justice O'Connor --

9 JUSTICE O'CONNOR: And how -- how could they
10 possibly do the best job they could on the opinion without
11 letting the parties know what they were trying to do and
12 to address the issue?

13 MR. SHORS: Justice O'Connor, the -- the panel
14 did get the decision right in the second case, and it did
15 so in response to a thorough review of the entire record.
16 Courts of appeal frequently engage in reconsideration
17 without requiring additional briefing and --

18 CHIEF JUSTICE REHNQUIST: This was -- this was
19 how long after cert had been denied?

20 MR. SHORS: Cert was denied on December 1st and
21 the second opinion was June 23rd. So it was a period of
22 about 6 and a half months. It's less than that if you
23 consider that there was a second petition to stay the
24 mandate filed and granted, which didn't expire until
25 January 23rd when the court of appeals received word that

1 this Court had also denied a petition for rehearing.

2 We think that in any case the burden is on a
3 litigant seeking to secure a final judgment and to ensure
4 that the court of appeals jurisdiction over a case has
5 ended.

6 JUSTICE BREYER: But that's why I'm quite
7 curious, but I only have experience in one circuit. And
8 -- and I have an impression, but I need to know what is
9 the general practice. I would have thought -- but this is
10 highly impressionistic -- that probably the mandates
11 didn't always issue within 7 days, that it wasn't totally
12 uncommon to have them 10 days or 12, and it was fairly
13 informal. Certainly there were no notice, but maybe other
14 circuits do it differently. It's an area that's obscure
15 to me, and I'd like to know how do people actually handle
16 it. Is it something that is generally within the -- up to
17 the individual court of appeals to provide notice or not
18 or whatever as it wishes? Is it that some delays, 6
19 months, might be really much too late? Is it -- how does
20 it work in the circuits?

21 MR. SHORS: Justice Breyer, our understanding is
22 that the Fourth, Fifth, and Sixth Circuits, including the
23 decision below, have all come to the conclusion that the
24 ultimate decision of when to issue the mandate lies within
25 the broad discretion of the court of appeals.

1 JUSTICE BREYER: And they don't normally give
2 notice or -- or something like that? They say, it will be
3 here in 7 days, but we'll tell you we've delayed it. They
4 just do it.

5 MR. SHORS: That's correct, Justice Breyer.

6 JUSTICE BREYER: I think they might have handled
7 it that way, but I don't know if that's the right way.

8 MR. SHORS: That -- that occasionally happens,
9 and -- and there are some cases clearly where there is a
10 formal stay order in place if the court is acting pursuant
11 to (d), which we --

12 JUSTICE SCALIA: They -- they just do it even
13 when they're delaying it for 18 months in order to
14 reconsider the case? I can understand they're just doing
15 it when -- you know, for clerical or other reasons, it --
16 it comes out in 10 days or even 2 weeks instead of -- if
17 that's what you're talking about, that I can understand.
18 But here we're talking about a decision for a lengthy
19 delay in order that the court may reconsider the case. I
20 would be astonished if it were regular practice for a
21 court to do something like that without notifying the
22 parties.

23 MR. SHORS: Justice Scalia, it -- we're not --
24 it's not regular practice. It does happen, and the reason
25 it happens, as we've set forth in the brief, have nothing

1 to do with this Court's decision to deny review. There
2 are instances, which Justice Kennedy pointed out, in which
3 following the denial of certiorari review, a court of
4 appeals recognizes the clear error of its prior decision.
5 The question in this case is does it have to send out that
6 decision even though it realizes it's in clear error.

7 And the other reason it sometimes happens over a
8 period of time is that reconsideration, much like the
9 initial decision-making process, is a fluid process.
10 Rules 35 and 40 give the court sua sponte the power to
11 engage in reconsideration, and that's exactly the power
12 the court exercised in this case.

13 There are particular reasons in this case, as
14 the panel noted, that there was no unfair surprise to the
15 State in this case, Justice O'Connor. First, the State
16 took Dr. Sultan's deposition in July of 1999. The
17 briefing on that subject was -- was a matter of days
18 following that deposition, and as the panel correctly
19 noted, there was no unfair surprise to the State. The
20 critical, factual issue in this case was as the result of
21 egregious attorney malfeasance not included in the
22 district court record.

23 In addition, the court of appeals --

24 CHIEF JUSTICE REHNQUIST: Well, to say there's
25 no surprise to the State, that may be the State probably

1 knew as much as the defendant about what was in the
2 record, but certainly it was a surprise to the State to
3 know that the court of appeals, after cert was denied, was
4 pondering all this for that long a time.

5 MR. SHORS: Mr. Chief Justice, I don't believe
6 that was unfair surprise. The court of appeals called for
7 the record back from the district court after it had
8 otherwise finished with the case and while cert was
9 pending. That was reflected in the docket sheet, and
10 we've cited that in the joint appendix at page 8. There
11 was --

12 CHIEF JUSTICE REHNQUIST: So the counsel should
13 go to the -- see the docket sheet regularly to see whether
14 the court of appeals might be doing something?

15 MR. SHORS: Mr. Chief Justice, at a minimum, an
16 attorney seeking to secure a final judgment should check
17 the docket sheet to ensure that a mandate has issued in
18 accordance with when the practitioner believes the mandate
19 should have issued. That's exactly what the advisory
20 committee --

21 CHIEF JUSTICE REHNQUIST: And you say the State
22 should have known what the court of appeals -- before cert
23 was ever considered because it was on a docket sheet. But
24 the case was over, so far as the parties were concerned,
25 in the court of appeals and in the district court.

1 MR. SHORS: Mr. Chief Justice, I don't believe
2 so. It's not that one reason. It's a combination of
3 reasons. If you consider the fact that the State was
4 aware it had benefited from a clear factual error with
5 the fact that the docket was returned to the court of
6 appeals reflected on the docket sheet, with the fact that
7 the State itself initiated collateral litigation in the
8 fall of 2003 to preclude the Federal Public Defenders
9 Office from representing Mr. Thompson in the State court
10 competency proceedings. And even their brief, the Wolfel
11 case that they cite says that alone might be a reason a
12 court of appeals might want to hold onto its mandate
13 because it was an issue that was immediately relevant on
14 -- on remand in the State court proceedings.

15 JUSTICE SCALIA: What I don't understand is how
16 your argument fits in with -- with the rule that you can't
17 recall the mandate. I mean, you have the same horrific
18 situation. My God, we made a mistake. And we've held you
19 can't recall the mandate unless these very high standards
20 are met. Now, are we going to hang on that technical
21 distinction between not issuing the mandate forever and
22 ever and recalling the mandate?

23 The court -- a court has inherent power to
24 recall a mandate, but we said you will not do it unless
25 these very serious obstacles are -- are eliminated. And

1 it seems to me, just as a court does have power to extend
2 the time for issuance of the mandate, it makes sense to
3 say the same thing. You shouldn't do it unless these very
4 serious obstacles are eliminated.

5 MR. SHORS: Justice Scalia, I don't believe it's
6 a technical difference. This Court has always drawn a
7 sharp distinction between a court's ability to grab back a
8 case from another court after that case has passed beyond
9 its authority to -- as opposed to reconsidering it before
10 ever relinquishing jurisdiction over a case.

11 JUSTICE SCALIA: Yes, but they did grab it back
12 from us. I mean, if what you say is true, we should deny
13 cert in all cases where the mandate hasn't issued or where
14 the only stay for the mandate is pending disposition of --
15 of cert. We should -- we should put that in our rules.
16 They did snatch it back from us, didn't they? What if we
17 had granted cert?

18 MR. SHORS: Justice Scalia, I don't think that
19 even the State's view would affect this Court's doctrine
20 about what happens to the mandate if the Court grants cert
21 because they're only talking here about cases in which
22 cert is denied.

23 The denial of cert is not a final decision on
24 the merits, and there are reasons, as we've cited in the
25 brief, for reconsideration sometimes continued after that.

1 JUSTICE SCALIA: What if we had granted cert?
2 You -- you say they then could not -- what -- what would
3 happen then?

4 MR. SHORS: I think it would depend on whether
5 the mandate was stayed by the court of appeals. If -- if
6 -- I think it's pretty --

7 JUSTICE SCALIA: It wasn't stayed. It just
8 wasn't issued.

9 MR. SHORS: If the mandate hadn't been issued,
10 then I think no matter how the Court decides this case,
11 that depending on the circumstances, the court of appeals
12 might be able to alert this Court to a -- a change in the
13 facts that might lead this Court to dismiss the petition
14 as improvidently granted. These are not things that
15 happen all the time. They are things that sometimes
16 happened.

17 And I did want to get back to the final reason I
18 think that the State was not the victim of unfair surprise
19 in this case, and that is there was a Federal court stay
20 of execution in this case. The State was perfectly well
21 aware of the importance of securing a final judgment in
22 the court of appeals before returning to State court. And
23 as this Court held in Calderon, this Court rejected the
24 State's view that a Federal habeas appeal is final when
25 cert is denied. That was the view of the State of

1 California in that case.

2 This Court instead specifically tied the State's
3 interest in finality to issuance of the appellate court
4 mandate. That's consistent with the unbroken history, we
5 think, of drawing a sharp distinction between the moment
6 at which the court of appeals relinquishes jurisdiction
7 over a case and permitting the court to correct errors
8 before then.

9 In fact, this Court also in Calderon
10 specifically noted that it was not a case where the
11 mandate had been stayed pursuant to a (d)(1) motion.
12 There is no reason to distinguish a case involving the
13 non-issuance of a mandate under rule 41(b) from a case
14 involving a stay of the mandate under rule (d)(1). Those
15 are both circumstances in which the court of appeals still
16 has the case, and if the court of appeals still has the
17 case and recognizes a clear error in its prior decision or
18 wishes to apply a new precedent to its decision or
19 discovers that new evidence bears on a question, it has
20 wide discretion to reconsider that judgment before
21 relinquishing jurisdiction over the case.

22 CHIEF JUSTICE REHNQUIST: What if the court of
23 appeals were talking about a point of law and the court of
24 appeals issued an opinion saying we agree with three
25 circuits and disagree with four others? The losing party

1 brings it here and we deny certiorari. It goes back. And
2 then one of the judges on the panel says, gee, I think we
3 should have gone with the other circuits. Can they do
4 that at that point?

5 MR. SHORS: Mr. Chief Justice, we're not saying
6 that this power is plenary. It is an abuse of discretion
7 standard. There would have to be a reason for doing so.
8 If the court sua sponte decided it had reached the wrong
9 result and wished to reconsider it, I don't think there's
10 anything in rule 41(b) that would forbid it.

11 That does occasionally happen in en banc cases,
12 and those are salutary appellate practices. If, for an
13 example, there's a national security case or some other
14 case and the court of appeals resolves it and denies an en
15 banc petition without prejudice, thinking that it's an
16 important enough case that it should come immediately to
17 this Court, there's absolutely nothing wrong with the
18 court of appeals reconsidering en banc the decision if
19 this Court denies review. Those are the kinds of
20 circumstances that -- that happen that are good appellate
21 practices --

22 CHIEF JUSTICE REHNQUIST: But that's an
23 intervening circumstance. It's not a single judge
24 changing his mind.

25 MR. SHORS: That's true, Mr. Chief Justice, but

1 -- but we think that the fact that this is a single judge
2 changing his mind is exactly why there is no abuse and why
3 this isn't a case like Calderon where the full court
4 stepped in 2 days before the execution. This is a case
5 where the same three judges who denied all habeas relief
6 and denied rehearing came back later and said, you know
7 what? We made a serious mistake. Mr. Thompson deserves
8 an evidentiary hearing to test the reliability of his
9 death sentence. Those are not circumstances unlike recall
10 of the mandate by a full court of appeals --

11 JUSTICE KENNEDY: Well, we might address the --
12 the issue of whether this is that extraordinary. Number
13 one, the court of appeals did have reference to this
14 deposition in the petition for rehearing that was filed
15 with it. Number two, the -- the testimony of -- of the
16 psychiatrist bears on the issue but the -- there was
17 a hearing on that point and another psychiatrist
18 disagreed.

19 MR. SHORS: Justice Kennedy, I don't think
20 that's a reason that it is an abuse of discretion to fix
21 that error. The State makes a -- a lot of an issue in
22 their reply brief of a fact that the court of appeals
23 should have gotten this right the first time. That is
24 exactly why we have reconsideration. That is a
25 quintessential illustration of why reconsideration is a

1 good idea. The court should have gotten something right
2 the first time, didn't, recognizes its error, and while it
3 still has jurisdiction over the case, fixes that error. I
4 think far from showing it's an abuse of discretion

5 JUSTICE KENNEDY: Well, but let's -- let's
6 assume for the moment -- you may disagree. Let's assume
7 for the moment that the Calderon standard applies. There
8 has to be an extraordinary showing. And the State has
9 made an argument here that this isn't that extraordinary.
10 We see these cases all the time.

11 MR. SHORS: Justice Kennedy, I think that the
12 Calderon standard should not be applied for several
13 reasons. First, that this is a -- a challenge to a rule
14 of general application, rule 41. There is no explanation
15 in the State's brief, and indeed their amicus concedes
16 that -- that our reading of rule 41(b) is consistent with
17 AEDPA. It is basically -- reconsideration is permitted by
18 Federal law, and the only question is whether the State's
19 interest in finality becomes somehow more significant the
20 moment this Court denies certiorari.

21 JUSTICE SCALIA: So is recall permitted. I
22 mean, courts have inherent right to recall too. I mean,
23 the same --

24 MR. SHORS: Justice Scalia, that's --

25 JUSTICE SCALIA: -- the same situation existed

1 in -- in Calderon.

2 MR. SHORS: Justice Scalia, I think it's a
3 little different only because in Calderon it was only an
4 inherent power question, and this Court read the exercise
5 of that inherent power in light of AEDPA. This case
6 involves a rule of general application that authorizes a
7 practice. And the -- the proper standard of review for --
8 for that practice is the abuse of discretion standard.

9 JUSTICE SCALIA: Why wouldn't -- but why
10 wouldn't that be read in light of AEDPA as well? I mean,
11 whether it's a common law rule or a rule that -- that's
12 written down, why equally shouldn't they be read in light
13 of AEDPA?

14 MR. SHORS: The abuse of discretion standard
15 absolutely would vary depending on the facts and
16 circumstances of a case. And if it appeared that a
17 particular exercise of rule 41(b) power was contrary to
18 AEDPA, it would surely be an abuse of the court's
19 discretion.

20 JUSTICE STEVENS: Of course, isn't it also true
21 that in Calderon the Court didn't merely hold that it was
22 an abuse of discretion, they held it was a grave abuse of
23 discretion, but even -- even more serious in that case?

24 MR. SHORS: Absolutely, Justice Stevens, and --
25 and the Court's opinion suggests that even if it hadn't

1 applied the miscarriage of justice standard, it would have
2 had grave doubts about the exercise of that power
3 precisely because it involved the extraordinary
4 circumstance of reaching out and taking the case back from
5 the State court system.

6 The -- the fact that the Federal stay of
7 execution was in place I think is especially important to
8 -- in addressing the State's argument, that there was
9 nothing preventing the State from going back and --

10 JUSTICE KENNEDY: Well, of course, this court --
11 this -- in this case the State court thought it was in the
12 system. It -- it set an execution date.

13 MR. SHORS: Justice Kennedy, it did set an
14 execution date but it was not informed either that the
15 mandate hadn't issued or that there was a Federal court
16 stay in place. In a decision in which both of those two
17 facts were brought to its attention, the Alley case, which
18 we cite in the red brief, the Tennessee Supreme Court
19 refused to set an execution date, ruling that it was
20 premature. And that's consistent with 28 U.S.C., section
21 2251, which says that if there's a Federal court stay of
22 execution in place, any execution date set by the State
23 court is null and void.

24 CHIEF JUSTICE REHNQUIST: What was the -- what
25 court had granted the stay?

1 MR. SHORS: The district court on February 17th
2 of 2000 had -- had granted the stay.

3 CHIEF JUSTICE REHNQUIST: And it remained in
4 effect all that time?

5 MR. SHORS: It remained in effect. The -- the
6 Fifth Circuit has come to that conclusion that -- that if
7 -- unless the court of appeals takes a contrary action or
8 this Court takes a contrary action vacating the stay, that
9 stay remains in place until the case is out of the Federal
10 court system.

11 Because this case never became final, as the
12 advisory committee notes made clear -- and we think that
13 the cases that we've cited in the brief are largely
14 undisputed on this point -- a court of appeals decision is
15 not final until it issues its mandate. Even the State in
16 the blue brief concedes that's true. And so the question
17 in this case really is, if you still have jurisdiction
18 over a case, under what circumstances can you correct an
19 error?

20 And I think the miscarriage of justice standard
21 is just way too harsh of a test under the circumstances
22 because this case is a perfect illustration. There are
23 overwhelmingly persuasive reasons for the court of appeals
24 to have fixed its mistake in this case.

25 JUSTICE SCALIA: Well, we don't -- we don't have

1 to be that harsh. We can -- I don't think that's the
2 question. I think the question is under what
3 circumstances can you correct the error without having
4 formally acted to extend the time for issuance of the
5 mandate. I think one can draw a distinction between the
6 court just sitting there and doing nothing for a year and
7 a half and -- and then, you know, during which it's
8 reconsidering the case without notice to anybody, and a
9 situation in which a court takes formal action. We're
10 extending the time. We could have a much lower standard
11 for the latter than -- than for the former.

12 MR. SHORS: Justice Scalia, that's true, but
13 that imposes a burden under rule 41(b) that simply does
14 not exist in the text of the rule. The rule does not say
15 by order. Previous versions of the rule did. Other rules
16 in the Federal Rules of Appellate Procedure do, and to
17 graft that onto it, despite the absence of that language
18 and an understanding that that's how courts given the
19 ministerial function of -- of issuing mandates do their
20 practice would be unfair.

21 JUSTICE SCALIA: Well, this is -- it's an abuse
22 of discretion standard, and -- and it is certainly
23 reasonable to apply one standard for abuse of discretion
24 where the court has entered an order notifying all parties
25 that it's reconsidering the case and a different standard

1 when it hasn't done that. I don't -- I don't think it has
2 to be spelled out in the rule.

3 MR. SHORS: Well, Justice Scalia, I think that
4 the rule does permit this practice, and if you look at the
5 history of the rule, it makes it even more clear. The --
6 the advisory committee rejected a rule, akin to what the
7 State is arguing today, that a mandate should be effective
8 when it should have issued. And the reason they denied
9 that rule was because you can't tell from looking at the
10 docket whether the reason is a clerical error or the act
11 of a judge delaying issuance in the mandate. That alone
12 makes clear that the committee had in mind circumstances
13 in which judges would delay issuing their mandates without
14 issuing formal orders to that effect.

15 Numerous courts of appeals have come to that
16 conclusion, and we think that's entirely consistent with
17 the rules, in addition to the reasons I -- I stated
18 earlier, that I think in this case particularly, there
19 were reasons that the State was aware of the fact that the
20 court was engaged in sua sponte reconsideration of its
21 decision.

22 If there are no further questions.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shors.

24 MR. SHORS: Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE REHNQUIST: Ms. Smith.

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REBUTTAL ARGUMENT OF JENNIFER L. SMITH
ON BEHALF OF THE PETITIONER

MS. SMITH: Just briefly responding to the question of the stay of execution under section 2251, there was a stay of execution extended by the district court pending the disposition of appeal -- of the appeal, but appeals are disposed of by judgments, and that judgment was entered in January of 2003. The State had a judgment which was final. The court of appeals denied rehearing both by the panel and en banc. At that point, the State, particularly after this Court denied cert, was entitled to rely on the finality of that judgment.

The State did not need the mandate in order to proceed. A mandate simply directs the district court what to do next. It was not necessary. It is not -- it is completely independent and -- and separate from the disposition of the case on the merits.

JUSTICE KENNEDY: Did -- did the stay remain in effect in the district court, in your view?

MS. SMITH: The stay of execution?

JUSTICE KENNEDY: Yes. Respondent represents that the stay of execution was entered in the district court and it stayed in effect.

MS. SMITH: The stay of --

JUSTICE KENNEDY: At what point in your view did

1 that stay become dissolved?

2 MS. SMITH: The stay of execution dissolved upon
3 the disposition of the appeal. The stay was pending the
4 appeal. The appeal in our view was disposed of upon the
5 affirmance of the denial of rehearing. That judgment was
6 final when entered. Finality was suspended only during
7 the timely filed petition for rehearing. So once the
8 court of appeals declined to exercise its error-correcting
9 authority to -- to rehear a case -- rehear the case either
10 en banc or by panel --

11 JUSTICE STEVENS: I know that's your position,
12 but has any judge so ruled in this case?

13 MS. SMITH: Your Honor, we have cited two cases
14 on page 13 of -- of our reply brief.

15 JUSTICE STEVENS: You may be right. In this
16 case did any -- either the court of appeals or the
17 district court terminate the stay?

18 MS. SMITH: No. There was no formal dissolution
19 of the stay. In our view it dissolved as an -- by
20 operation of law.

21 Thank you, Your Honor.

22 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Smith.

23 The case is submitted.

24 (Whereupon, at 12:08 p.m., the case in the
25 above-entitled matter was submitted.)

