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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE DUNCAN, SUPERINTENDENT, :
GREAT MEADOW CORRECTIONAL :
FACILITY, :
Petitioner :
v. : No. 00-121
SHERMAN WALKER. :
- - - - -X

Washington, D.C.
Monday, March 26, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States as
11:05 a.m.

APPEARANCES:
PREETA D. BANSAL, ESQ., Solicitor General of New York, New
York, New York; on behalf of the Petitioner.
DEBORAH W. LOEWENBERG, ESQ., New City, New York; on behalf
of the Respondent.

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C O N T E N T S

PAGE

ORAL ARGUMENT OF

PREETA D. BANSAL, ESQ.

On behalf of the Petitioner

3

DEBORAH W. LOEWENBERG, ESQ.

On behalf of the Respondent

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REBUTTAL ARGUMENT OF

PREETA D. BANSAL, ESQ.

On behalf of the Petitioner

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CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-121, George Duncan v. Sherman Walker.

Ms. Bansal.

ORAL ARGUMENT OF PREETA D. BANSAL

ON BEHALF OF PETITIONER

MS. BANSAL: Mr. Chief Justice, and may it please the Court:

At issue in the case is the meaning and scope of the tolling provision applicable to the one-year statute of limitations for Federal habeas cases enacted by Congress in 1996 as part of the Anti-Terrorism and Effective Death Penalty Act, or AEDPA. The tolling provision states that in calculating the one-year statute of limitations, the period during which a properly filed application for state post-conviction or other collateral review shall not be counted.

The court below held that a prior filed Federal habeas petition dismissed without prejudice and without adjudication on the merits constituted an application for state post-conviction or other collateral review. We contend that the language of the statute, the provision in particular, the statute as a whole, and the policies underlying AEDPA make the Second Circuit's ruling

1 erroneous.

2 First, with respect to the statute, the
3 particular provision at issue, it is notable that the only
4 sovereign entity mentioned in the phrase state post-
5 conviction or other collateral review is state. In a
6 universe in which the only -- the relevant universe being
7 state or Federal, it is absolutely bizarre for Congress to
8 have suggested that Federal should be incorporated by the
9 word other. To hold that would be equivalent to saying
10 that Congress could enact a statute saying red, white, and
11 other colors of the flag. When universe is state and
12 Federal, it's simply illogical to assume that state or
13 other could stand for state or Federal. In fact, in other
14 parts of --

15 QUESTION: Wait. They don't really contend that
16 it stands for state and Federal. I think they concede that
17 it also stands for other state collateral review that is
18 not post-conviction review. I think they concede that in a
19 civil commitment case, for example, in which a habeas
20 action, a state habeas action is brought, that would be
21 covered by the other.

22 MS. BANSAL: Yes, I believe that's correct. But
23 in other parts of the statute, same provision of this
24 statute, Congress specifically stated state and Federal or
25 state or Federal when it meant to include both of them.

1 QUESTION: Well, logically, it could mean
2 either. I sort of think it doesn't say what it means.
3 It's a state post-trial or other collateral review. Other
4 collateral review could be read to mean of the state, or
5 it could be read to mean any of them. How do I get
6 anywhere with the language? I'm not saying you don't have
7 other arguments, it's just that the language itself seems
8 totally ambiguous as to which it means.

9 MS. BANSAL: Well, I think if you look -- in a
10 statute such as AEDPA and the habeas realm in particular,
11 if you're talking -- Congress was so concerned about
12 delineating specifically the roles of the state and
13 Federal courts. In our reading, it's simply illogical
14 that Congress would have specified state only. In fact,
15 under the Respondent's reading, or the Second Circuit's
16 reading, there's no reason whatsoever for state to even be
17 mentioned. And of all the words to try and make
18 superfluous, state is a --

19 QUESTION: It's an example. Go buy some walnut,
20 mocha or other chocolate cookies? You know? I mean, it
21 doesn't mean other walnut chocolate cookies. I guess it
22 might. Sometimes you give an example. The most obvious
23 example is state post-trial. That's primarily what
24 happens.

25 MS. BANSAL: If you look --

1 QUESTION: They mean to throw in the others,
2 too.

3 MS. BANSAL: Well, if you look at the provision
4 at issue in the context of the statute as a whole and both
5 the way in which Congress has specified other -- how
6 they're viewed in 2263(b), for example, which is the
7 capital tolling provision, Congress specifically stated
8 there that state or post-conviction and other collateral
9 review with respect to state court proceedings.

10 QUESTION: Why didn't it use the same language
11 here, because that made it clearer, don't you think, in
12 state opt-in provisions in capital cases?

13 MS. BANSAL: Yes, the capital case language is
14 clearer, and it, from our perspective, it would have been
15 preferable if Congress had used the same language.
16 There's no doubt that that is clearer. But the better
17 reading, and the more natural reading, of the language at
18 issue here especially in the context of the policies
19 underlying AEDPA, we believe is consistent with the manner
20 in which Congress wrote the tolling provision for capital
21 cases.

22 QUESTION: All right. The obvious thing on
23 policy, since you're going to get to that -- obviously in
24 Rose v. Lundy the exhaustion requirement is specified as
25 not setting of any kind of a trap for the prisoner. That

1 is, he has to go exhaust, but it's not supposed to muck
2 around with the statute of limitations. So if you win
3 this case, there will be a certain number of cases in
4 which a person thinking -- you know, these people don't
5 know the law that well -- they file a petition in the
6 Federal court, it sits around there for several months,
7 then they discover an unexhausted claim. Then he has to
8 go file it in the state court, and by the time they
9 dispose of that saying you're too late, he's now out of
10 time, so he's never gotten his habeas petition heard. So
11 it seems to me that that policy cuts against you quite --
12 to me fairly strongly -- and I want to hear what you have
13 to say about it.

14 MS. BANSAL: I think generally Congress and this
15 Court enacts procedural rules with the understanding that
16 litigants will be able to conform their behavior to those
17 rules. Certainly throughout -- in habeas jurisprudence in
18 particular, for example, even in McClesky v. Zant where
19 the Court laid down certain rules in respect -- or certain
20 standards with respect to successive petitions. There is
21 no doubt that certain pro se habeas petitioners might,
22 after McClesky, have been denied a bite of the apple of
23 meritorious claims because they weren't included in their
24 first habeas petition. There is no reason to assume that
25 habeas petitioners, after the Court announces a rule here,

1 will not be able to err on the side of exhaustion, which
2 is especially what Congress intended when it enacted
3 AEDPA.

4 In addition to enacting a statute of
5 limitations, Congress enacted a number of provisions
6 designed to enhance and strengthen the exhaustion
7 requirement.

8 QUESTION: I was looking for -- you see, you
9 have explained to me perfectly well why the policy I
10 mentioned maybe isn't that important or too bad, or it's
11 not determinative. But my question to you was, if the
12 language is totally open and ambiguous, and there is the
13 policy that I said, even if it's weak in your opinion,
14 let's say, what policy cuts the other way?

15 MS. BANSAL: Well, the two policies that
16 underlie AEDPA and the statute of limitations in
17 particular are finality and comity. Finality, as this
18 Court has recognized, is especially an important policy
19 when you're talking about state court convictions.

20 On the other hand, Congress was also concerned
21 about comity and ensuring proper respect for state court
22 proceedings and allowing state courts the first bite of
23 the apple of correcting constitutional errors. To toll
24 for the pendency of a state post-conviction or collateral
25 proceeding makes eminent sense in context of the scheme,

1 because it furthers the purpose of finality by limiting
2 the period during which they can file a Federal habeas
3 petition, but it also furthers the concern for comity by
4 encouraging litigants to go to the state court in the
5 first instance.

6 To toll for Federal petitions would undercut the
7 finality goal without concomitantly furthering the comity
8 goal, which was a --

9 QUESTION: Ms. Bansal, there is though, one for
10 interest of the Federal courts which Congress took away
11 their priorities. There used to be Federal courts who
12 have got to hear this kind of case first, and put it at
13 the top of the list. If we were to adopt a position that
14 you are taking, we would be creating a priority because
15 the Federal court would say, oh, my goodness, we better
16 take care of this because if there's an unexhausted claim
17 in it, we've got to make sure that this pro se petitioner
18 gets back to the state court before the clock runs out.

19 So you are, in effect, creating a priority in
20 the Federal courts to put these prisoners' petitions at
21 the very top of the list of the business that they do.

22 MS. BANSAL: It's quite possible that the courts
23 of appeals and the district courts will choose, in order
24 to implement the rule that Congress has enacted here, to
25 pursue that kind of line -- to give priority to these

1 cases, to even instruct district court judges that that's
2 the way they should proceed.

3 QUESTION: And that doesn't strike you as odd
4 when once we had a whole list of statutory priorities in
5 Federal courts, and then Congress decided it didn't want
6 to do that? It didn't want to set the agenda for the
7 Federal courts?

8 MS. BANSAL: To me, that's not inconsistent at
9 all. In fact, it's consistent because part of what
10 Congress was -- part of what -- habeas jurisprudence in
11 general has been the interaction and the intersection
12 between Congressional enactment and judicially crafted
13 rule. And insofar as Congress has now left it open to the
14 judiciary to implement and apply the statute of
15 limitations in individual cases, we believe that that's
16 consistent.

17 QUESTION: It would be appropriate, do you
18 agree, for the Federal courts -- say you prevail, to say,
19 well, now, we have to take these prisoners' petitions
20 first thing to make sure that if there is something to be
21 exhausted, they get back before the clock runs out.

22 MS. BANSAL: But that would be appropriate in
23 our view.

24 QUESTION: Ms. Bansal, may I ask you a question?
25 If I remember the situation correctly, there was sort of a

1 nonstatutory one-year period of limitations that courts of
2 appeals crafted for the one year after the enactment of
3 the statute that wasn't actually provided for by the
4 statute. I'm just wondering if you'd comment on the
5 suggestion that even if your reading of this particular
6 provision is correct, would it be conceivable that the
7 Federal court, not relying on the statute but just general
8 equitable principles of tolling, might be able to address
9 the hypothetical that Justice Breyer is concerned about.

10 MS. BANSAL: I think that is correct -- that
11 there are general equitable principles that a lower
12 Federal court could adopt, but I would add that the
13 circumstances under which that power might be exercised
14 are extremely circumscribed.

15 At least eight courts of appeals so far have
16 found an equitable tolling basis with respect to the
17 habeas statute of limitations -- the one-year statute of
18 limitations. And the types of conditions that they've
19 looked to is first the delay during which the habeas
20 petition was brought had to have been for circumstances
21 entirely outside of the petitioner's control.

22 And secondly, the petitioner had to have acted
23 diligently without that period of delay. And some courts
24 -- one court, at least -- in addition has added a
25 potentially meritorious requirement to actually reaching

1 out and addressing that.

2 I think that it's not enough -- or we would
3 contend that it would not simply be enough that a habeas
4 petition would have brought mixed petition in which there
5 were clearly unexhausted claims and had that sit on the
6 district court's docket for about thirteen months before
7 being dismissed. That, in our view, would not be enough
8 to make it clearly outside of the petitioner's control,
9 that that delay occurred because if there was no serious
10 question as to the exhaustion status of the claims, then
11 that's something that the petitioner could have filed
12 properly after exhaustion.

13 QUESTION: Well, then if you're right, then on
14 your reading of the statute, unless the prisoner is a
15 legal genius which you'd have to be in this area -- he's
16 had it, and he'll never get a Federal habeas filed.

17 MS. BANSAL: With all respect, I believe that's
18 incorrect.

19 QUESTION: Because?

20 MS. BANSAL: The habeas petitioners will just be
21 informed that they must err on the side of going to state
22 court first. I mean, it's not that different from what
23 this Court has said with regard to successive petitions.

24 QUESTION: Oh, no, no. They'll go to the state
25 court first. They'll all go. See, and what'll happen is

1 they'll end up finished. Then they'll go into Federal
2 court. Then lo and behold, an idea will strike one of
3 them that he hadn't had before and he'll stick it in his
4 petition and, lo and behold, it will be held by a Federal
5 judge after several months of looking at it, that it has
6 an unexhausted claim in it. I mean, these people are not
7 all represented all the time, and that could happen,
8 couldn't it?

9 MS. BANSAL: It could, but under *Rose v. Lundy*,
10 what could happen at that point is that after the district
11 court determines that it's a mixed petition, the habeas
12 petitioner would have the option of deleting the
13 unexhausted claim for purposes of getting the petition
14 heard.

15 So we contend that the difficult hypothetical
16 that your positing is really -- it's simply premature and
17 probably unlikely that it will come to fruition.

18 QUESTION: I get a lot of claims they say, well,
19 I couldn't really make this before. You see, I had a
20 black-out about what happened during the trial with a
21 certain period. Now, I'm exaggerating with that one, but
22 certainly it's not new to you or to me that prisoners
23 allege something, and they say we couldn't have known it
24 before.

25 MS. BANSAL: Well, in that case, the statute

1 would allow for that. 2244(b)(1) has certain other
2 exceptions that allow for the tolling, so to speak, of the
3 statute.

4 QUESTION: And even if not -- I take it the way
5 it works is that when it goes back to the state court,
6 then the tolling commences during the time it is in state
7 court.

8 MS. BANSAL: That's correct.

9 I would just like to add that in -- it's often
10 common for this Court, both in the statute of limitations
11 context and the habeas context, to read the plain words
12 that Congress intended, or to fashion a rule that's clean.
13 The subsequent applications of that can be worked out as
14 time goes on, and as experience with the effects of the
15 rule become known.

16 In a statute of limitations context, just last
17 year in the context of the Clayton Act, the Rotella case.
18 And also three years ago in the RICO statute, the Claire
19 case, this Court held strictly what the statute of
20 limitations required, and it subsequently said that we
21 will work out the equitable -- you know, let the issues
22 percolate through the Federal courts and we will determine
23 what, if any, equitable discretion is retained by the
24 courts.

25 In the habeas context as well. In *Wainwright v.*

1 Sykes, for example, when the Court announced the cause and
2 prejudice rule, the Court specifically said that we will
3 give content to those terms and as time evolves --
4 certainly with respect to habeas jurisprudence, we believe
5 that it's appropriate that this Court read the language of
6 the statute, as we believe the provision itself states
7 that it's consistent with a statute as a whole and
8 subsequently let the equitable applications of it, and if
9 there are concerns about the difficult hypothetical, to
10 work themselves out.

11 QUESTION: Now, why doesn't this case fit into
12 an equitable application? Because he took a long time to
13 file his state --

14 MS. BANSAL: This case isn't even close to an
15 equitable application. He filed -- first of all, the
16 district court held onto his petition for a mere three
17 months before dismissing it -- his first Federal habeas
18 petition. He still would have had nearly ten months after
19 that to file a timely petition, to amend his petition, to
20 delete the unexhausted claims, or whatever. He didn't do
21 any of that. He didn't go back to state court during that
22 time. He had an entire ten months in which to act, and
23 instead he waited nearly eleven months and then filed the
24 second Federal habeas petition. And at that point, there
25 were entirely new claims. There weren't even the same

1 claims that he was claiming in the first petition.

2 QUESTION: So your basic position is that we
3 could decide this case and leave open the possibility of
4 equitable tolling in more meritorious cases?

5 MS. BANSAL: Yes, that's correct. But we also
6 believe that consistent with the way the courts of appeals
7 have applied the equitable tolling doctrine, it should be
8 if there is one at all, and we think there is a
9 substantial argument that it may not be appropriate in the
10 statute, but if there is one, that it would be reserved
11 for the extremely rare and extraordinary cases.

12 QUESTION: Would this judge have had the option
13 to give the prisoner leave to amend?

14 MS. BANSAL: I believe -- well, he dismissed it
15 without prejudice, this particular judge did, because it
16 was unclear -- it was a pleading defect as opposed to a
17 Rose v. Lundy dismissal. He said it was unclear from the
18 face of the pleadings whether or not the claims had been
19 exhausted.

20 QUESTION: I see.

21 MS. BANSAL: So the petitioner here would have
22 been able to replead within the applicable statute of
23 limitations.

24 QUESTION: Suppose there were only one week left
25 in the year period and the district court was concerned

1 about the fact the prisoner couldn't get it. Could he
2 have said I'm going to dismiss the complaint unless you
3 amend, but I'll give you five weeks to amend? Does the
4 district court have that authority?

5 MS. BANSAL: If it's a Rose v. Lundy situation
6 where there are some unexhausted claims --

7 QUESTION: Yes.?

8 MS. BANSAL: We believe under this Court's
9 holding in Rose v. Lundy there isn't that discretion.

10 QUESTION: There is not?

11 MS. BANSAL: There is not. The Court says that
12 it must dismiss, or --

13 QUESTION: Because of the unexhausted claim?

14 MS. BANSAL: Right. Unless he deletes the
15 unexhausted claims.

16 QUESTION: Does the district court have the
17 option to say I'll give you leave -- but before it
18 dismisses, I'll give you the choice of deleting the
19 unexhausted claim?

20 MS. BANSAL: It's a little bit unclear from the
21 language of Rose whether that -- how that exactly works,
22 but I think that is the way, in practice, the way district
23 courts have applied it. There are no further questions?

24 QUESTION: I'll ask one question -- which you're
25 not going to like either of these alternatives, but I'm

1 curious to know which of these two alternatives do you
2 think is more consistent with the statute? One, to read
3 the word other to include Federal rather than state, or
4 two, to read it to include state, but assume that there is
5 a tolling provision that would permit tolling in the
6 circumstance for the unexhausted claim leads the prisoner
7 to go back to the state court, and there's enough tolling
8 there to make him whole, in other words. He doesn't lose
9 anything for having -- which of those two approaches is
10 the more consistent with the statute? The whole of it, et
11 cetera?

12 MS. BANSAL: Well, of course, we think neither
13 is, but as between the two, probably -- well, I'm not sure
14 from where you would even get the authority with respect
15 to the second approach you suggest. I mean, what basis
16 would there be for tolling for a Federal mixed petition?
17 I don't -- with the exception of the rare circumstances of
18 equitable tolling if that doctrine was even found to
19 apply, I don't know where you would find the authority to
20 toll for Federal petitions.

21 QUESTION: Are preserving your time, Ms. Bansal?

22 MS.BANSAL: Yes, thank you.

23 QUESTION: Ms. Loewenberg, we'll hear from you.

24 ORAL ARGUMENT OF DEBORAH W. LOEWENBERG

25 ON BEHALF OF RESPONDENT

18

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1 MS. LOEWENBERG: Mr. Chief Justice, and may it
2 please the Court:

3 This is essentially respondent's position: he
4 should be held accountable for all the time he takes, for
5 whatever reason, before he files an application in the
6 court. Only he can control that time period. But he
7 should not be held accountable for time over which he has
8 no control, the time his application is actually pending
9 in a court.

10 QUESTION: And this is derived from the statute?

11 MS. LOEWENBERG: Your Honor, I respectfully
12 believe that it is. The statute uses the words that the
13 petitioner -- the state petitioner -- is granted the
14 benefit of tolling during the period that his state post-
15 conviction or other collateral -- his application for
16 state post-conviction or other collateral relief review is
17 pending. It does not say before a state court as the
18 statute -- the provision in the Ogden statute says in
19 2263(b)(2). It says simply state post-conviction or other
20 collateral review.

21 QUESTION: Of course, there is only one noun in
22 that phrase.

23 MS. LOEWENBERG: Your Honor, there might only be
24 one noun in that phrase, but the word review is implicit
25 after state post-convictions.

1 QUESTION: But I'm not sure whether you are
2 making the same argument that the court of appeals opinion
3 adopted, but they seem to feel that there was just a very
4 sharp break with the word or. And I think that's somewhat
5 inconsistent, but the idea that review is the only noun in
6 the phrase.

7 MS. LOEWENBERG: Your Honor, the word or really
8 does create a disjunctive here so that you do have two
9 separate parts of the phrase, state post-conviction review
10 because review is implicit in it, or other collateral
11 review.

12 QUESTION: Why is review any more implicit than
13 state?

14 MS. LOEWENBERG: Your Honor, respectfully, to
15 say that the statement says state post-conviction or state
16 other collateral review just makes no sense.

17 QUESTION: How about or other state collateral
18 review? Try or other state. I mean, it does sound really
19 bad if you say state other -- rather than other state.

20 MS. LOEWENBERG: Because other collateral review
21 or other state collateral review really is subsumed under
22 state post-conviction review.

23 QUESTION: Is it not correct that under your
24 reading of the statute it would have exactly the same
25 meaning if the word state were deleted from the statute?

1 MS. LOEWENBERG: Your Honor, I believe that
2 that's correct. That's correct. I do believe that.

3 The statute is clear, and the term other
4 collateral review has to include Federal petitions for
5 habeas corpus because the alternative construction really
6 leaves the state petitioner in a very, very untenable
7 position.

8 QUESTION: Well, let me put this to you, and
9 let's just talk about a single jurisdiction. When I was
10 practicing in California, if I file a negligence complaint
11 and it was dismissed without prejudice after three or four
12 months, I couldn't argue that the statute was tolled
13 during the time the court was considering it. That's just
14 not standard statute of limitations law. So it seems to
15 me that you're asking for something quite exceptional, or
16 --

17 MS. LOEWENBERG: Your Honor --

18 QUESTION: -- or maybe you'll tell me I'm wrong,
19 that California was different. I just don't think statute
20 of limitations are tolled during the time the courts are
21 considering pleadings when those pleadings are ultimately
22 dismissed. That's just not the rule, unless I'm wrong.

23 MS. LOEWENBERG: Your Honor, I believe that
24 under two readings of the statute, the statute of
25 limitations needs to be tolled for during the pendency of

1 the Federal habeas petition. Those two readings are
2 these: the first reading, obviously, is in the tolling
3 provision that we're here discussing -- state post-
4 conviction and other collateral review. It's our position
5 that other collateral review does take into account
6 Federal petitions for habeas corpus.

7 Also, this Court has noted in American Pipe and
8 Burnett that even if there is a -- when there is a very,
9 very specified statute of limitations as we have here, one
10 year, and even when tolling is provided for, this Court
11 has the power to impose upon litigants in this particular
12 area of law other tolling events. And if you don't find
13 -- and I'm not saying that you shouldn't find, because I
14 do believe it's in the language -- but if you don't find,
15 Justice Kennedy, that Federal habeas petitions are
16 subsumed in the other collateral review piece of (d)(2),
17 you will find the ability to toll the statute under your
18 own powers when you look at habeas jurisprudence the way
19 it has functioned for over --

20 QUESTION: Burnett has just got to be regarded
21 as confined to its peculiar facts. I don't think the
22 Court would follow that today. But even Burnett is a case
23 different -- here Congress has been very, very precise, at
24 least in putting in one sentence in what it wants done,
25 and I don't see what authority we would have to bring in

1 some other considerations in construing that language.

2 MS. LOEWENBERG: Your Honor, I believe Congress
3 has been very precise, and that in its precision Federal
4 habeas petitions are covered in other collateral review.

5 QUESTION: Yeah, and the court of appeals agreed
6 with you. But I thought you are suggesting that even if
7 we don't agree with you, that that's how the statute --
8 this particular sentence -- should be construed. There
9 are some other considerations we could rely on to reach
10 the same result.

11 MS. LOEWENBERG: What I was referring to, Your
12 Honor, is not looking at that portion of the statute
13 (d) (2), but looking at (d) (1) -- just the statute of
14 limitations. And what I was referring to, Your Honor, was
15 an alternative to you which was espoused by this Court in
16 American Pipe which gives you the ability to impose
17 equitable tolling across a broad base of cases, not
18 specifically with respect to Mr. Walker, but to a broad
19 base of cases and those cases being habeas cases such as
20 we have here.

21 QUESTION: What do you say to the argument of
22 opposing counsel that there is no need really to invoke
23 any extraordinary equitable powers like that? The better
24 rule, she argues, is simply a rule that if in doubt the
25 prisoner should raise the issue at the state court first,

1 and there may be, I suppose, situations in which there is
2 doubt. But the default rule is raise it there, then you
3 don't have this to worry about.

4 MS. LOEWENBERG: You're right, Your Honor, and
5 the exhaustion rule requires the state petitioner to bring
6 all of his claims before the state courts first because he
7 actually comes into Federal court. But as Justice Breyer
8 has noted -- and I'm sure many of the other Justices know
9 -- the questions of exhaustion are often very, very
10 complicated.

11 QUESTION: No, but Justice Breyer's example was
12 the example of the individual who simply didn't think of
13 one of his claims when he went into state court. He gets
14 into Federal court and says, oh, I've got another idea.
15 And I think the argument on the other side is, you better
16 think carefully before you go into Federal court because
17 the obvious objective here is to get the state litigation
18 over with so we can get the Federal litigation over with,
19 and that object is not going to be served if every time
20 somebody has a delayed good idea, in effect the clock
21 stops. Now, is that a fair reading of the congressional
22 objective? And if it is a fair reading of the
23 congressional objective, then isn't the answer to the late
24 good idea, in effect, too bad, you really should have
25 thought of it before, and if you didn't, you're out.

1 MS. LOEWENBERG: Your Honor, I believe that the
2 congressional objective is consistent with Rose v. Lundy
3 and with all the habeas jurisprudence that has evolved
4 over the last century -- that you're supposed to bring
5 your claims in state court. All your claims of
6 unconstitutional confinement must be first brought there.
7 And to the extent that we assign that obligation to the
8 state prisoner, that's a fair obligation. However, it is
9 unfair to assign to the state prisoner the obligation of
10 understanding a very, very complex area of law when he
11 just might have guessed incorrectly. He might have
12 believed he did bring this claim properly before the state
13 court, and that's why --

14 QUESTION: But then why isn't the rule, when in
15 doubt, go to the state court? It's not -- he might
16 believe but he's not certain, so he should go to the state
17 court.

18 MS. LOEWENBERG: Well he might be certain but he
19 might be wrong, and in that case, Your Honor, if he's
20 wrong and the clock doesn't stop while he's in front of
21 the district court. In this case we've got three months
22 on the first petition, but we've got over a year on the
23 second petition. He's just out of luck, and that can't be
24 what Congress intended by --

25 QUESTION: Well, on the contrary, I'm not sure

1 you're right, Ms. Loewenberg. Congress was intending to
2 cut back substantially on Federal habeas hearings, and in
3 Barefoot v. Estelle, we said that, you know, direct review
4 is good enough for a Federal conviction, Federal habeas is
5 not an integral part of it. Now, Congress has not
6 eliminated Federal habeas, but it certainly cut back on
7 it.

8 MS. LOEWENBERG: It certainly has, Your Honor.
9 It has established the one-year statute of limitation
10 where none ever existed before, and you were having cases
11 coming into the Federal district courts that could be five
12 years old or ten years old. That has been addressed, and
13 that statute of limitations is not at all affected by the
14 Second Circuit or the Tenth Circuit's ruling, it's intact.
15 What that statute of limitations does -- it does a lot of
16 things, but what it does primarily -- it really defines
17 what we mean by diligence. If you're within that one
18 year, you're diligent. If you're outside that one year,
19 you're not diligent and you're out of luck. You've got no
20 Federal review, no merits review whatsoever, Your Honor.

21 QUESTION: If the Rose v. Lundy has been around
22 really for almost twenty years, and I think we're talking
23 about noncapital cases where I would imagine even now,
24 even last year, even four years ago prisoners wanted their
25 case heard sooner, not later.

1 MS. LOEWENBERG: Absolutely, Your Honor.

2 QUESTION: They don't want to be subject to Rose
3 v. Lundy.

4 MS. LOEWENBERG: They do not.

5 QUESTION: No -- what percentage, do you have
6 any idea at all of whether there are a lot of Rose v.
7 Lundy cases even now, nineteen years later, or just a
8 handful? Is there any way to say what the amount is?

9 MS. LOEWENBERG: Your Honor, I don't have
10 statistics that I could say, you know, specifically, but I
11 could tell you from my experience these are overwhelming.
12 The number of cases that present mixed petitions are
13 overwhelming.

14 QUESTION: Why does that happen?

15 MS. LOEWENBERG: Why does that happen? Because
16 you have a pro se petitioner who's got maybe a seventh
17 grade education who can barely string two words together
18 -- all you have to do is look at the petition in this
19 case. It's very hard to decipher what it is he's trying
20 to make out, and you're ascribing to him -- the state
21 would ascribe to him -- this ability to understand if he's
22 exhausted or not. That's an absurd position to put the
23 petitioner in, and what makes it absurd and unfair is to
24 state that the time that this petition with this
25 unexhausted or maybe unexhausted claim that's in front of

1 the Federal district court counts against him when he
2 can't control that length of time. He can't control how
3 long it's in the clerk's office, he can't control how long
4 the prosecutor is going to ask for an adjournment to
5 respond to it.

6 QUESTION: But as I pointed out, that's true
7 with any statute of limitations in a single jurisdiction.

8 MS. LOEWENBERG: That might be true, Your Honor,
9 and I understand what you're saying, but habeas is a whole
10 different ball of wax, so to speak.

11 QUESTION: Why is that? It's a civil
12 proceeding, isn't it?

13 MS. LOEWENBERG: It is a civil proceeding, but
14 we're dealing with people who are, by and large,
15 uncounseled. And that makes a huge difference. They're
16 pro se.

17 QUESTION: Well, but there are pro se litigation
18 filed in other cases than habeas. We see all sorts of
19 things here.

20 MS. LOEWENBERG: I'm certain you do, Your Honor,
21 but I don't think to the extent that they're --

22 QUESTION: And those people are bound by the
23 statute of limitations the same way anybody else is.

24 MS. LOEWENBERG: I'm certain that's true, Your
25 Honor, but I think the habeas petitioner really is a

1 unique petitioner.

2 QUESTION: Your opponent, Ms. Bansal, suggested
3 that for an egregious case, there may still be equitable
4 discretion in the Federal court to fashion some kind of
5 equitable tolling. I suppose you agree with that much of
6 her argument?

7 MS. LOEWENBERG: Absolutely, but I can't imagine
8 where this Court wants to go with this particular
9 legislation. You're going to have ad hoc determinations
10 throughout the country, there's going to be disparity,
11 because you're going to have some judges who are going to
12 decide, oh, I can't do this, this draconian result is --

13 QUESTION: So we should reject that principle
14 then.

15 MS. LOEWENBERG: I --

16 QUESTION: I mean, you make very good arguments
17 --

18 MS. LOEWENBERG: Justice Scalia --

19 QUESTION: -- for rejecting the equitable
20 tolling.

21 MS. LOEWENBERG: I'm not saying that there are
22 certain -- there won't be certain situations where
23 equitable tolling will still come up after this Court
24 determines this.

25 QUESTION: You got to either like it or not like

1 it. I don't think you can say --

2 MS. LOEWENBERG: I don't think you will like it.
3 I don't think the Federal courts will like that extra
4 burden of having to determine these various individual
5 cases under that --

6 QUESTION: Let me ask, though, in the strongest
7 equitable case -- say a case is pending on the merits for
8 over a year in Federal court, and then at the end of the
9 year the judge suddenly realized this part of the claim
10 wasn't exhausted, and you say that's very unjust. In your
11 view, would the Federal judge in that situation have the
12 authority to keep the case on the docket while the case is
13 -- as an abstention case while the claim is exhausted, or
14 do you agree with your opponent that it would have to be
15 dismissed at that point?

16 MS. LOEWENBERG: Your Honor, I think that the
17 district court judge has had that discretion all along,
18 has done that in various situations, has related -- has
19 allowed the defendant -- the prisoner, to relate back, has
20 done all sorts of things in order to do justice for that
21 state petitioner, but it doesn't mean that all district
22 court judges do that, and they're not obligated to do
23 that, and the statute does say that they need to send back
24 for exhaustion purposes to the state courts those claims
25 that have not been exhausted.

1 QUESTION: But sending it back to the state
2 court doesn't seem to me -- there are other abstention
3 situations -- necessarily means they must dismiss the
4 pending petition, I'm just not sure about that.

5 MS. LOEWENBERG: I'm --

6 QUESTION: I mean, they're sending it -- they
7 obviously can't rule on it on the merits until the state
8 is exhausted. Does that mean they must dismiss the
9 pending Federal petition?

10 MS. LOEWENBERG: Under *Rose v. Lundy*, yes, they
11 must dismiss it if there are questions of exhaustion.

12 QUESTION: But of course there could be mixed
13 questions that are unexhausted where the petitioner, once
14 counsel is obtained, says we can give those up. Let's
15 stick with the Federal habeas petition and abandon those
16 unexhausted state claims because they don't amount to
17 much.

18 MS. LOEWENBERG: You're right, Your Honor, but
19 oftentimes the petitioner is not aware that he has that
20 option unless he's told, and he's not told that in every
21 instance. In fact, in very few instances is he given that
22 option at that juncture.

23 QUESTION: Or the even tougher case is that the
24 only claim that has any merit happens to be the
25 unexhausted claim.

1 MS. LOEWENBERG: Absolutely. And then we're
2 totally out of time. It's very, very difficult.

3 The position that the state takes also works
4 against the theory behind exhaustion. The theory of
5 comity and federalism is not advanced by the state's
6 position at all, and that's because the Federal district
7 court, when it's reviewing the petition to see whether or
8 not claims are exhausted, the Federal district court has
9 always felt comfortable dismissing without prejudice in
10 order to enable the state court to really, really look at
11 the claims that are made. But the state's position will,
12 for fair-minded district court judges, it will have those
13 judges make determinations on exhaustion, on close
14 questions, and find that there has been exhaustion. And
15 that really cuts against -- in order to safeguard the
16 petitioner's rights to a merit review, and that --

17 QUESTION: Why not just, as has been suggested,
18 say, I'm going to hang onto this so at least when you go
19 to the state court swiftly, and then it will come back
20 here, and so the only time that will be lost is the
21 initial time that you took to get to any court.

22 MS. LOEWENBERG: Your Honor, that's not the
23 rule, and it's not something that's used in practice with
24 any kind of frequency. And if it was, maybe my position
25 would be a little bit different, but I still need to take

1 this Court back to the original language. And the
2 original language does support the Second Circuit's
3 reasoning and ruling that Federal habeas petitions are
4 other collateral review that would stop the clock for
5 tolling purposes.

6 QUESTION: Then why put in those -- the word
7 state at all? Why not just -- it would have been more
8 economical just to say collateral review.

9 MS. LOEWENBERG: You're right, Justice Ginsburg,
10 and I think Justice Souter called the statute in a world
11 of silk purses, this is a sow's ear. And that would --
12 it's not well-crafted in a lot of different instances.

13 QUESTION: We really don't have a world of silk
14 purses, in fact. I'm not sure it's much worse than one is
15 accustomed to receiving.

16 MS. LOEWENBERG: I think it would be, Your
17 Honor, much worse from Mr. Walker's perspective and from
18 other state petitioners who get caught up in the mire of
19 delay that they really have no control over at all.

20 QUESTION: Well, this defendant did have
21 something on the order of ten months to go do something,
22 didn't he?

23 MS. LOEWENBERG: Yes, he did, Your Honor.

24 QUESTION: And nothing was done.

25 MS. LOEWENBERG: Those -- those -- that time

1 period is counted against him. He doesn't have the
2 benefit of it, and that's how the statute of limitation
3 works. It's definitely counted against him, but not the
4 time -- the three-month period that it was sitting in
5 Judge Sterling Johnson's office, for whatever reason,
6 because he had no control over that time period at all.

7 If there aren't any further questions?

8 QUESTION: Thank you, Ms. Loewenberg.

9 Ms. Bansal, you have eleven minutes remaining.

10 REBUTTAL ARGUMENT OF PREETA D. BANSAL

11 ON BEHALF OF THE PETITIONER

12 MS. BANSAL: Just briefly, Your Honor.

13 Respondent in the court below would do violence to the
14 statute in order to achieve the policy result they seek.
15 They would basically, as this Court has suggested,
16 eliminate the word state which is a very big word to
17 eliminate from a statute. But furthermore, we believe the
18 policy concerns that they raised are entirely unfounded at
19 this point -- speculative and premature. First of all, in
20 terms of the options the district courts already have, the
21 reasons this won't lead to a harsh result in the vast
22 majority of cases are as follows.

23 Prisoners will be required to err first on the
24 side of exhaustion. There is no reason to believe that
25 they can't do that in the vast majority of cases. If

1 there are mixed petitions that ultimately go before the
2 district court, the prisoner at that point would have the
3 opportunity to delete the unexhausted claims in order to
4 have the exhausted claims continue to be heard. Third,
5 the district courts can reach out and decide the merits of
6 unexhausted claims if it's for purposes of denying the
7 petition. And since the vast majority of claims actually
8 end up being unmeritorious, this actually provides the
9 mechanism for the prisoner to achieve substantive Federal
10 habeas review.

11 QUESTION: I don't see that. I don't quite
12 understand that. What is the anomaly of the other side?

13 MS. BANSAL: I'm sorry?

14 QUESTION: I mean, if you lose, what anomaly
15 does it create? You were saying the policy --

16 MS. BANSAL: Right.

17 QUESTION: All right. The policy anomaly, were
18 you to lose, would be what, precisely?

19 MS. BANSAL: I think for us to lose would do
20 violence to the statute.

21 QUESTION: Well, you have the words, but the
22 reason is as I said. I can imagine that you're -- you
23 either read it your way --

24 MS. BANSAL: Right.

25 QUESTION: -- or you read it their way. Their

1 way is saying state post-trial is the main thing, and then
2 there are other things, a lot of examples like that. I
3 mean, I'm more indifferent between the two. So I'm
4 looking at the policy.

5 MS. BANSAL: The policy concern that we have is
6 that it would be undermining the finality of state court
7 convictions. I mean, it would be --

8 QUESTION: Because?

9 MS. BANSAL: The first canon of statutory
10 interpretation is that you give effect to the words of
11 Congress.

12 QUESTION: No, I'm -- the policy you say
13 undermines the state. I want to understand how.

14 MS. BANSAL: Because the whole purpose of the
15 statute of limitations was to put a finite limit on the
16 time in which Federal petitions could be brought in the
17 state's interest in preserving the finality of its
18 convictions. If you allow tolling for pending Federal
19 petitions, it undermines that purpose of finality without
20 serving any other purpose of the statute. The only other
21 possible purpose that it could serve would be respect for
22 state court processes, which isn't implicated when you're
23 talking about tolling for Federal petitions. The whole
24 reason you have that tolling provision is to allow
25 exhaustion, and to, you know, serve respect for state

1 court processes. But --

2 QUESTION: The thing is -- I don't want to --
3 it's probably my fault, I mean -- you have the year while
4 it's in state. Now, you go their way, you still have a
5 year. You're never going to have more than a year. The
6 only thing they're throwing into that is the situation
7 where a Federal court sends it back to the state. No
8 matter what, it's all over in a year.

9 MS. BANSAL: Well, what the court below and the
10 respondents want -- they want to reward petitioners who
11 haven't been able to comply with the procedural
12 requirements. The normal rule is as Justice Kennedy
13 suggested, which is that when a Federal -- when a case is
14 dismissed without prejudice, it's treated as though it
15 were never filed. I mean, the concern that respondent
16 raises -- I mean, this is just Congress clearly intended
17 -- or they contemplated that there might be some harsh
18 results, regardless of the Rose v. Lundy situation.
19 Forget about the mixed petition situation.

20 It could be that a petitioner decides thirteen
21 months after his judgment becomes final that he may have a
22 meritorious Federal habeas claim. Well, it doesn't
23 matter. Under the statute of limitations, he's out of
24 time. The fact that he first filed one month into the
25 statute of limitations -- the fact that he might have

1 filed a petition that is unexhausted and that doesn't meet
2 the procedural requirements and therefore requires
3 dismissal without prejudice -- that can't change the
4 results. I mean, petitioners are supposed to act in mind
5 with the procedural rules. This Court has recognized that
6 in repeated contexts, even when we're talking about pro se
7 litigants, and I believe Justice Stevens said that in the
8 McNeil case when we're talking about the Federal Tort
9 Claims Act. Procedural rules are designed to have
10 regularity. Congress enacted a harsh -- arguably harsh
11 statute. Thirteen month meritorious claim? It doesn't
12 matter. The person is out of time.

13 QUESTION: He may be as unaware of the twelve
14 month limitation as he is of the necessity for state
15 exhaustion.

16 MS. BANSAL: That's correct.

17 QUESTION: Yes.

18 MS. BANSAL: If there are no further questions.
19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Bansal.
21 The case is submitted.

22 (Whereupon at 11:44 a.m., the case in the above-
23 entitled matter was submitted.)

24
25