

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRANK. B. McFARLAND, Petitioner v. JAMES A.
COLLINS, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

CASE NO: 93-6497

PLACE: Washington, D.C.

DATE: Tuesday, March 29, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRANK. B. McFARLAND, :

4 Petitioner :

5 v. : No. 93-6497

6 JAMES A. COLLINS, DIRECTOR, :

7 TEXAS DEPARTMENT OF CRIMINAL :

8 JUSTICE, INSTITUTIONAL :

9 DIVISION :

10 - - - - -X

11 Washington, D.C.

12 Tuesday, March 29, 1994

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:01 a.m.

16 APPEARANCES:

17 MANDY WELCH, ESQ., Houston, Texas; on behalf of
18 the Petitioner.

19 MARGARET P. GRIFFEY, ESQ., Assistant Attorney

20 General of Texas, Austin, Texas; on

21 behalf of the Respondent.

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-6497, Frank McFarland v. James A.
5 Collins.

6 Ms. Welch.

7 ORAL ARGUMENT OF MANDY WELCH

8 ON BEHALF OF THE PETITIONER

9 MS. WELCH: Mr. Chief Justice and may it please
10 the Court:

11 Frank McFarland asked the district court to
12 appoint him a lawyer and to stay his execution long enough
13 so that that lawyer could do what was proper and necessary
14 to prepare and file Mr. McFarland's first Federal habeas
15 corpus petition.

16 The respondents took the position --

17 QUESTION: When did he ask that, counsel?

18 MS. WELCH: He made the request on October 22nd,
19 Justice Scalia.

20 QUESTION: That was how long after the petition
21 for certiorari had been denied from his original
22 conviction?

23 MS. WELCH: It was denied June 6th, so it was
24 approximately 4 months, 4-1/2 months.

25 QUESTION: Why did it take that long to worry

1 about the counsel problem?

2 MS. WELCH: Well, I'm sure that Mr. McFarland
3 worried about the counsel problem the entire period of
4 time, Your Honor.

5 QUESTION: Did the Texas Resource Center worry
6 about it?

7 MS. WELCH: Yes, sir, we worried a great deal
8 about it.

9 QUESTION: And what was it, 5 days before his
10 execution you came in with this motion?

11 MS. WELCH: Yes, Your Honor. We took the
12 position and have taken the position that we should do
13 everything we can in order to get counsel for
14 unrepresented death row inmates in Texas for State court
15 proceedings before we resort to the provisions in Federal
16 court.

17 QUESTION: And you didn't see the problem
18 arising until 5 days before the execution, having already
19 gotten one extension of the execution, right?

20 MS. WELCH: Your Honor, we did see the problem
21 arising, and we were worried about the problem. We were
22 worried about the problem with respect to approximately 65
23 people in Texas' --

24 QUESTION: How many lawyers do you have at the
25 Texas Resource Center?

1 MS. WELCH: At this time, Your Honor, we have
2 18, and there are 376 people on death row. We are
3 involved in at least 220 cases in which people are -- in
4 which those prisoners are seeking relief in any State and
5 Federal court.

6 QUESTION: But this was a man who had been
7 scheduled to be executed in mid-September. You had
8 already gotten one extension, and nonetheless, you wait
9 until 5 days before the extended execution date to come in
10 with a request for counsel.

11 MS. WELCH: No, Your Honor, we did not wait
12 until 5 days before. We did not intend to wait until
13 5 days before the execution date. At that point, there
14 was a request pending in State court and we were expecting
15 and hoping the State court would grant an extension, or
16 would grant a modification, and that going to Federal
17 court would be necessary. It was not something we wanted
18 to happen, Your Honor.

19 QUESTION: It was not.

20 MS. WELCH: No.

21 QUESTION: There were so many easy ways to avoid
22 it. I find it extraordinary to think it was something you
23 did not want to happen.

24 MS. WELCH: The Texas Resource Center, or the
25 lawyers at the Texas Resource Center consider the

1 recruitment of counsel for people on death row to be an
2 enormous and important responsibility. What we are here
3 today for --

4 QUESTION: Counsel, I am circuit justice for the
5 Fifth Circuit, as you know, and the Texas Resource Center
6 comes in at the last minute regularly.

7 MS. WELCH: Your Honor, we do come in at the
8 last minute if the last minute is -- if you're talking
9 about shortly before an execution date, but we try to come
10 in earlier.

11 In Mr. McFarland's case, the execution date was
12 set without notice to us. We learned about it when
13 Mr. McFarland wrote us and asked us to continue helping
14 him recruit a lawyer.

15 When -- during the month of September, and
16 it's -- it may look to an outsider who is only thinking
17 about Frank McFarland's case as though we were sitting
18 around during July, August, and September, with
19 Mr. McFarland's agreement, waiting for an execution date
20 to be set so that we could put into play the circus that
21 goes on down there. That is not what we were doing, Your
22 Honor. I assure you, that is not what we were doing.

23 In the month of September, the month in which
24 Mr. McFarland's execution date was set, there were 10
25 executions. Seven of the people who were scheduled for

1 execution, Your Honor, did not have lawyers.

2 In August, there were -- I think there were six
3 executions, and our lawyers were involved in most of those
4 cases. On September 3rd --

5 QUESTION: Eighteen lawyers *and you?

6 MS. WELCH: I can't remember if some of those
7 lawyers -- one or two has come on since then, Your Honor.

8 Of those 18 lawyers -- and this is important,
9 although -- although it is just piece of a really big
10 picture. Of those lawyers, five have less than 2 years
11 experience, and only five have more than 5 years
12 experience.

13 QUESTION: Ms. Welch, don't waste anymore of
14 your argument time on this. I just want you to know that
15 I am not happy with the performance of the Texas Resource
16 Center in the cases that come before me as circuit
17 justice. Let's leave it at that.

18 MS.WELCH: I understand, Your Honor.

19 QUESTION: Try harder.

20 MS. WELCH: Respondent took the position in the
21 court below that the court did not have jurisdiction over
22 this matter because Frank McFarland had not yet filed a
23 legally sufficient habeas petition. The lower courts
24 agreed and denied a stay.

25 In this Court, respondent argues that while a

1 Federal court may have authority to appoint counsel before
2 the filing of a petition under these circumstances, there
3 is an absolute jurisdictional bar that prevents that court
4 from keeping the prisoner alive.

5 QUESTION: Ms. Welch, you said that the
6 petitioner here had not filed -- that the reason for the
7 court's denial was he had not filed a legally sufficient
8 habeas petition. Had he filed any habeas petition in the
9 Federal court?

10 MS. WELCH: No. He had only filed a motion
11 requesting appointment of counsel, notifying the court
12 that he was a State prisoner under sentence of death, that
13 he did want to seek relief under 2254, and that he needed
14 a lawyer under -- that he needed a lawyer to prepare a
15 petition in order to seek that relief. He specifically
16 asked for the lawyer under --

17 QUESTION: Did he ask for a stay at the same
18 time?

19 MS. WELCH: Yes, Justice O'Connor, he asked for
20 a stay in order to have a lawyer appointed, and so that
21 that lawyer could do what was necessary to file the
22 petition that was needed under the State's position to
23 invoke the court's jurisdiction.

24 QUESTION: Just to clarify, when the district
25 court did finally obtain counsel for McFarland -- I think

1 that was on the very eve of execution -- then counsel did
2 file a pleading entitled, petition for writ of habeas
3 corpus, did he not?

4 MS. WELCH: That's not -- I mean, the court did
5 not obtain counsel. What happened is the counsel that --
6 Danny Burns was the lawyer that did end up filing a
7 petition. He called us that afternoon and told us that he
8 had gotten a call from the Federal magistrate asking him
9 if he would accept an appointment in this case, and he was
10 calling to find out about the case in order to try to
11 decide whether or not he was in a position to accept an
12 appointment.

13 QUESTION: But he then did file a petition, did
14 he not?

15 MS. WELCH: He did. He was never appointed, and
16 in fact he was never contacted by the judge.

17 QUESTION: And the district court thereupon
18 denied the stay based upon the merits of an incomplete
19 petition, right?

20 MS. WELCH: That is correct, Your Honor.

21 QUESTION: And a divided panel then issued the
22 stay.

23 MS. WELCH: Well, this Court issued a stay at
24 the same time on the petition for certiorari from the
25 lower -- from the district court and the Fifth Circuit's

1 denial of the appointment of counsel and stay motion in
2 the first proceeding. Those are two separate proceedings.
3 They were filed at the insistence of the court clerk, I
4 believe, in the Federal court, under two separate case
5 numbers, and there were two stays that were simultaneously
6 granted.

7 No one disputes -- no one before this Court
8 disputes that when Congress enacted 848 it intended to
9 authorize and require district courts to appoint counsel
10 to assist with the preparation and filing of a habeas
11 petition, and there is good reason why no one disputes
12 that, and in fact the respondent's amicus Criminal Justice
13 Legal Foundation explicitly adopts that interpretation of
14 848. They know --

15 QUESTION: It isn't clear that the State agrees,
16 is it?

17 MS. WELCH: You're right, Justice O'Connor, it's
18 not agreed that they concede it. They don't dispute it.
19 they have said, in the event, if the Court determines,
20 they have really not taken a position on it as far as I
21 can tell.

22 QUESTION: In any event, you take the position
23 that 848 does allow the appointment of counsel by the
24 court prior to the filing of a petition for habeas?

25 MS. WELCH: Yes, Your Honor. Yes, we definitely

1 do, and as the Criminal Justice Legal Foundation's brief
2 indicates, they explicitly agree that 848 authorizes the
3 prepetition appointment of counsel, and in fact --

4 QUESTION: It does have language of, in any post
5 conviction proceeding under 2254 or 2255 the appointment
6 can be made, but you think that doesn't limit it to --

7 MS. WELCH: No, and in paragraph -- I can't find
8 it. I thought I had it here, but in paragraph (8) under
9 that provision, the court indicates that counsel appointed
10 in accordance with those provisions shall do whatever is
11 necessary, including six stays of execution, and it refers
12 to the post conviction process, and it uses language that
13 suggests that counsel is intended to be available at all
14 critical stages.

15 QUESTION: And the district court in the Fifth
16 Circuit in this case, what is the position, now, on that
17 point, the appointment of counsel?

18 MS. WELCH: They did not -- the Fifth Circuit
19 did not specifically address the right to counsel, but the
20 district court specifically refused to appoint counsel,
21 apparently relying upon the jurisdictional bar that
22 respondents urge.

23 QUESTION: Would it be simpler to take the
24 position that a proceeding does require the filing of a
25 petition, but that in order to give effect to the

1 statutory counsel guarantee, it would be an abuse of
2 discretion to act on the pro forma petition before the
3 appointed lawyer has had time to investigate and to amend,
4 if the lawyer sees fit?

5 MS. WELCH: I think that that would just -- yes,
6 Justice Souter, I think that would certainly address the
7 problem that Frank McFarland was faced with and that is
8 being presented to the Court, but only if it is clear to
9 the inmate that an insufficient petition does not invoke
10 the court's jurisdiction and insofar as it requires the
11 Barefoot standard to be met.

12 QUESTION: That's right. Of course, I suppose
13 the answer to Barefoot is that the statutory provisions
14 for appointment of counsel have come after Barefoot, and
15 Barefoot should be at least narrowed at least not to
16 frustrate the counsel guarantee.

17 MS. WELCH: Yes, Justice Souter, but in addition
18 to that, I think it is important to note that Barefoot
19 paid a lot of attention to the fact that in that case he
20 had had competent counsel throughout the proceedings, and
21 to some extent both the Fifth Circuit and this Court
22 relied upon that in approving the standards that have
23 since become the --

24 QUESTION: No, I realize that. Maybe I'm not
25 getting the point, but it seems to me that the enactment

1 of the statutory guarantees for counsel in both the State
2 and the federally derived habeas proceedings reflects in
3 effect a congressional judgment that there ought to be
4 more counsel, i.e., that there ought to be a guarantee of
5 counsel at the habeas stage in the Federal court, and I
6 don't suppose that we could in effect honor that guarantee
7 that Congress has chosen to provide if Barefoot were not
8 narrowed to a degree in order to allow counsel time to do
9 what counsel is supposed to be there to do.

10 MS. WELCH: I absolutely agree with you, Justice
11 Souter. I do think that there could be circumstances
12 where someone files a piece of paper asking for counsel
13 and attempts to prepare what would be considered a
14 petition, but the court might find that it's not a
15 petition, and in those circumstances I think that the All
16 Writs Act would provide a habeas court with the necessary
17 authority to issue a stay to protect its jurisdiction
18 over --

19 QUESTION: What jurisdiction? Jurisdiction over
20 what? I mean, it seems to me no matter how liberally you
21 interpret the requirement, despite Barefoot, the provision
22 for counsel only applies to someone who is seeking habeas
23 corpus, and it seems to me that you need some assertion of
24 an error in the State court, not simply an assertion, I
25 don't know whether there's an error or not, appoint a

1 lawyer for me to see if there was one. That's certainly
2 not what Congress said.

3 Congress said, if there's an error that you're
4 claiming, you're entitled to a lawyer to prosecute it, but
5 don't you need some assertion of an error, at least?

6 MS. WELCH: Yes, Your Honor, but Congress also
7 recognized that in order for a death row inmate to
8 articulate an error sufficiently to benefit from habeas
9 corpus review, a lawyer is necessary.

10 QUESTION: To help him prosecute his claim of
11 error, but he has to have a claim of error. It's not
12 saying anybody, whether he has a claim of error or not, is
13 entitled to get a lawyer to see if he might have a claim
14 of error. That's not what Congress said.

15 MS. WELCH: Your Honor, I do think that that is
16 what Congress said, that a lawyer is required in order to
17 assist a death row inmate in identifying those claims
18 which must be reviewed by habeas corpus in order to
19 provide an effective remedy for people who are sentenced
20 to death in violation of the Constitution.

21 QUESTION: Well, of course, the further question
22 is the authority to issue a stay, and turning your
23 attention to Justice Souter's suggestion that a skeletal
24 petition be filed, is that consistent with Rule 4 of the
25 habeas rules, which requires that a petition be dismissed

1 unless it appears on its face that there's a probability
2 of relief?

3 MS. WELCH: I think that it could conflict with
4 Rule 4 if Rule 4 is construed as an absolute, automatic
5 bar to proceeding, but that is not what Rule 4 is, nor
6 what it was intended. While the court might have
7 discretion under some circumstances to do that, I think
8 that 848 makes it clear that it would be an abuse of that
9 discretion, as Justice Souter indicated, if that were done
10 in a case -- in a death case without counsel.

11 QUESTION: So if it plainly appears from the
12 facts of the petition that he's not entitled to relief,
13 nevertheless it would be an abuse of discretion to dismiss
14 it in a death case.

15 MS. WELCH: Your Honor, I think that it would be
16 an abuse of discretion to determine from that pleading
17 whether or not someone is clearly entitled, or clearly not
18 entitled.

19 QUESTION: Or would you say that you could not
20 determine from the pleading whether or not he is clearly
21 entitled?

22 MS. WELCH: Yes, Your Honor. I think that the
23 rule should be that the court is not committed to
24 determine from an uncounseled petition that --

25 QUESTION: And would this apply in -- just in

1 death cases, because that's the only time in which counsel
2 are appointed under the statute, or would you extend this
3 rule to any habeas petition in Federal courts?

4 MS. WELCH: No. I would --

5 QUESTION: The Federal court is sort of a filing
6 cabinet until the petition is fleshed out?

7 MS. WELCH: No, Your Honor. I think that when
8 Congress passed 848 it make an absolute determination that
9 counsel is required in every capital case. It has not
10 made that determination with regard to other habeas
11 provisions. That would have to be addressed --

12 QUESTION: Yes, but you're interpreting Rule 4
13 saying it's an abuse of discretion to dismiss until
14 counsel has been obtained.

15 MS. WELCH: But that is because of the intent
16 expressed by Congress in 848. There are counsel
17 provisions that are within the discretion of the court
18 when the interests appear to require appointment of
19 counsel under the Criminal Justice Act, but I think that
20 what Congress did in 848 is enact an un rebuttable
21 presumption that the interests of justice requires the
22 appointment of counsel in all capital cases.

23 QUESTION: Is it essentially your argument that
24 848 contemplates that there will be a lawyer-drawn
25 petition, and not that there will be a petition -- that

1 the petition will be drawn pro se by the prisoner, so that
2 it is 848 that would inform everything else and would take
3 precedence over any rule? If 848 entitles the defendant
4 or petitioner to a lawyer-drawn petition, then the
5 question about -- the other questions become moot.

6 MS. WELCH: Yes.

7 QUESTION: But that's -- you're reading 848 to
8 say, not only are you entitled to counsel in a capital
9 proceeding, but you are entitled to counsel to draw your
10 habeas petition.

11 MS. WELCH: Yes, Your Honor. Yes, Justice
12 Ginsburg, that's --

13 QUESTION: Why do you do that? That's a very
14 roundabout way to say that.

15 I mean, it would be very easy for Congress to
16 say, anyone who desires to file a habeas petition is
17 entitled to a lawyer for that purpose.

18 It did not say that. It said, in any post
19 conviction proceeding.

20 MS. WELCH: Yes, but if you take into account
21 the need for a lawyer, and the difference between the
22 right to a lawyer, the discretionary right to a lawyer
23 under 3006A and that mandatory right to a lawyer under
24 848, it makes no sense to create a situation where a pro
25 se habeas petitioner would go into court, ask for a

1 lawyer, be executed because his petition was inadequate,
2 regardless of whether or not he had any claims that a
3 lawyer could have presented and obtained relief on. That
4 makes no sense.

5 QUESTION: Ms. Welch, your opponents say that
6 the Pennsylvania case, or our case of Pennsylvania Bureau
7 of Corrections v. U.S. Marshall's, militates against your
8 contention that the All Writs Act is available to you.
9 What is your response to that?

10 MS. WELCH: That case involved issuing of -- is
11 it issuing of subpoenas? Anyway --

12 QUESTION: Subpoenas ad testificandum, yes.

13 MS. WELCH: Right. That -- in that case, there
14 was a specific statute that dealt with the specific thing
15 that was before the court. In this case --

16 QUESTION: Isn't there a specific statute
17 dealing with stays --

18 MS. WELCH: There is a specific statute dealing
19 with stays, and if you interpret it as we do, it gives the
20 court jurisdiction when a request for counsel is filed.

21 If you interpret it as the State does and limit
22 its application to that period of time after a petition is
23 filed, then there is nothing -- it is void. There's a
24 void. There's a blank for that period of time when
25 uncounseled petitioner is seeking his rights under 848,

1 and so you have a totally different situation.

2 QUESTION: Well, you know, if you're reading
3 things into section 848 simply because fairness or logic
4 requires it, why do you have to read into it that a stay
5 of execution would be available?

6 It seems to me the most you would read into it
7 is that if he comes in soon enough to request counsel,
8 counsel will be given an opportunity to draw a habeas
9 petition, and if that petition has merit, then a stay can
10 be issued, but if you come in 5 days before the execution
11 with no claim at all and ask for counsel, should you be
12 able to get a stay? You've had 180 days.

13 MS. WELCH: Your Honor, the question before this
14 Court is whether or not the Court has jurisdiction to stay
15 an execution --

16 QUESTION: To stay.

17 MS. WELCH: -- when it's necessary in order to
18 appoint counsel and protect its habeas review over claims
19 that are then presented in a counsel petition.

20 QUESTION: And what I'm suggesting is that your
21 necessity argument that 848 must operate even before a
22 meritorious habeas petition has been filed, that argument
23 only carries you to the point where you have to allow them
24 to file it within a reasonable time before a stay of
25 execution is necessary, but not 5 days before, that

1 requires Federal courts to stay the process of State
2 justice.

3 MS. WELCH: I don't agree with you, Justice
4 Scalia, and I don't think that it's necessary to read the
5 stay provisions into 848.

6 The stay provisions are within the All Writs
7 Act, which authorizes the Federal habeas court to issue a
8 writ or other orders when it is necessary to protect its
9 prospective jurisdiction over a State conviction and death
10 sentence.

11 QUESTION: But its jurisdiction comes from 848,
12 and if 848 only guarantees that you get counsel if you
13 apply in a timely fashion and not when you decide 5 days
14 before your execution that there may be something wrong,
15 although you can't really state anything wrong.

16 MS. WELCH: Your Honor --

17 QUESTION: We have to go back to 848, it seems
18 to me, whether you use the All Writs Act or not.

19 MS. WELCH: There may be circumstances where a
20 death row inmate so abuses the process and so toys with
21 the court and so ignores available processes that it would
22 not be an abuse of discretion to deny a stay or to deny
23 counsel, but those issues are not before this Court.

24 QUESTION: Well, Ms. Welch, when is the earliest
25 time in this case that you think 848 would have allowed

1 the appointment of counsel?

2 MS. WELCH: It's -- because of the uncertainty
3 about the provisions, Your Honor, it is really difficult
4 for me to say. We had always approached the right to --

5 QUESTION: Can you look back and say there is
6 some time after which this request could have been made?

7 MS. WELCH: After the State court refused to
8 appoint counsel, or after this, and also refused to allow
9 additional time for other measures to be taken that might
10 have provided counsel.

11 QUESTION: When was that?

12 MS. WELCH: That was October 22nd, when the
13 Court of Criminal Appeals denied our request to order the
14 State court to appoint counsel.

15 QUESTION: And you say no, it would not have
16 been possible to have asked for counsel before that date
17 under 848?

18 MS. WELCH: Well, that was the position that we
19 had taken that we should pursue all available State
20 remedies for counsel.

21 QUESTION: Excuse me, you didn't ask the court
22 to appoint counsel until October 22nd. That's the first
23 time you asked a State court to appoint counsel, isn't it?

24 MS. WELCH: No. We asked the State court to
25 appoint counsel in -- well, we went before the State court

1 in September, and the judge was not there, and the judge
2 modified the date so that we could come back before the
3 actual trial judge, and there was pending before that
4 judge a request for assistance, for time to recruit
5 counsel.

6 That judge took the position that Texas law did
7 not authorize him to appoint counsel, and we -- and so we
8 were trying to persuade that judge to give us enough time
9 to recruit volunteer counsel, but that judge said
10 explicitly to me over the telephone, with the district
11 attorney on the phone, I do not interpret Texas law as
12 even allowing me to appoint counsel, so I'm not going to
13 do it.

14 QUESTION: Well, whatever the reason for not
15 asking may have been, the fact is that you did not ask for
16 State appointment of counsel until October 22nd, isn't
17 that right?

18 MS. WELCH: That is -- no. No, Your Honor,
19 that's not correct. Mr. McFarland did ask for counsel in
20 September, and that request was held over when another
21 judge modified the execution date until October.

22 I reserve the rest of my time for rebuttal, Your
23 Honor.

24 QUESTION: Very well, Ms. Welch. Ms. Griffey,
25 we'll hear from you.

1 ORAL ARGUMENT OF MARGARET P. GRIFFEY

2 ON BEHALF OF THE RESPONDENT

3 MS. GRIFFEY: Mr. Chief Justice, and may it
4 please the Court.

5 McFarland asks the Court to disregard the plain
6 meaning of 2251 and amend the express limitations enacted
7 by Congress in order to allow a stay of execution to be
8 entered whenever a death sentence inmate approaches the
9 Federal court claiming to be without the assistance of
10 counsel.

11 In asking the Court to validate his
12 misconstruction of statutory authority, McFarland seeks to
13 effectively overturn the limitations of constitutional
14 review recognized in McCleskey v. Zant, and to indirectly
15 overturn the limitations of Coleman, Giarrantano, and
16 Finley.

17 McFarland complains that the ruling of the court
18 below effectively foreclosed Federal habeas review because
19 under the Fifth Circuit's analysis a petitioner is unable
20 to obtain a stay, an appointment of counsel, without first
21 filing an application, but is unable to file an
22 application without first obtaining the assistance of
23 counsel in a stay.

24 QUESTION: Ms. Griffey, what is your position
25 now on this section 848? Can a defendant facing an

1 execution obtain appointment of counsel by the Federal
2 court before the filing of a petition for habeas?

3 MS. GRIFFEY: No. 848(q)(4)(B) --

4 QUESTION: You think it is not open to that
5 interpretation?

6 MS. GRIFFEY: I think it is not open to that
7 interpretation.

8 QUESTION: Some of the amici supporting your
9 views in the case take a different view, do they not?

10 MS. GRIFFEY: One did.

11 QUESTION: Yes.

12 MS. GRIFFEY: The amicus of the Criminal Justice
13 Legal Foundation took the position that counsel could be
14 appointed beforehand. However, it is clear --

15 QUESTION: Of course, normally, you would expect
16 if the habeas petition were going to be prepared properly
17 that some advance preparation might be required by counsel
18 and possibly investigators.

19 MS. GRIFFEY: That is not what Congress provided
20 for. There is a specific provision, 848(q)(4)(B), that
21 refers to a habeas proceeding, or a post conviction
22 proceeding under 2254. 2254 is explicitly conditioned on
23 there being an application on the ground that custody is
24 in violation of the Constitution, laws, or treaties of the
25 United States.

1 The general provisions contained in subsection
2 (q) (4) (A) and the following provisions are merely general
3 provisions and do not prevail over the specific provision,
4 or there would have been no need for that specific
5 provision.

6 QUESTION: Do you think that if the petitioner,
7 prisoner himself, files the habeas petition and then
8 requests counsel, that it is within the discretion of the
9 Court to dismiss the habeas petition based on a review of
10 just what the prisoner has put, or does a court properly
11 exercise its discretion by refusing to dismiss the
12 petition until the attorney has looked at it?

13 MS. GRIFFEY: I think that is entirely within
14 the court's discretion. What is not within the court's
15 discretion is the basis upon -- whether a State --

16 QUESTION: You do not think it would be an abuse
17 of discretion for the court to dismiss the writ, thereby
18 ending the proceeding?

19 MS. GRIFFEY: I think if there is a petition
20 before the court that raises constitutional basis for
21 relief, then under 848(q), that petitioner is entitled to
22 the appointment of counsel, but he may not be entitled to
23 the appointment of -- to the stay of execution unless he
24 raises a substantial showing of the denial of a Federal
25 right upon which relief might be granted.

1 QUESTION: Oh, but you even say that before you
2 can get counsel the petition has to have some merit.

3 MS. GRIFFEY: Under Rules 2 and Rules 3 and
4 2242, yes, it does, otherwise the district clerk of the
5 court is entitled to not file that petition.

6 QUESTION: So the critical document is the
7 filing of the initial petition?

8 MS. GRIFFEY: Or application, yes.

9 QUESTION: And Congress you think intended
10 our -- an interpretation that the critical document be
11 filed without counsel?

12 MS. GRIFFEY: That is what Congress wrote.

13 QUESTION: Ms. Griffey, is there any ambiguity
14 at all -- what sense does it make to attribute to Congress
15 the purpose of having an inadequate petition filed? Let
16 us take, which is not an usual case, somebody who has a
17 below-normal IQ. Why would Congress want this proceeding
18 to start out with an inadequate pleading? If Congress is
19 providing for counsel on 848, doesn't it make sense to say
20 that Congress wants a well-pleaded complaint, rather than
21 an inadequately pleaded complaint?

22 MS. GRIFFEY: I think you have to judge what
23 Congress intended by the language that is in that statute,
24 and it refers to a post conviction proceeding under 2254.
25 Congress could have provided for the prepetition

1 appointment of counsel. It could have provided for a stay
2 to allow the appointment of counsel prior to the
3 formulation of an application and petition, sufficient
4 time, under whatever standard Congress found, to prepare
5 that application and petition, but nonetheless, Congress
6 didn't do that.

7 QUESTION: Is it your position that this statute
8 is plain on its face, that the statute requires the pro se
9 petitioner, himself, to file the pleading, the essential
10 pleading that is going to govern the case, and does not
11 give him a right to counsel for that pleading?

12 MS. GRIFFEY: Not with respect to the filing of
13 the initial pleading. Once a petition has been filed
14 raising error of constitutional dimension, then he is
15 entitled to the appointment of counsel, and he is also
16 entitled to file an amended pleading.

17 QUESTION: Is the request for counsel a part of
18 the proceeding?

19 MS. GRIFFEY: No. A proceeding is --

20 QUESTION: The request for counsel is not a part
21 of the proceeding?

22 MS. GRIFFEY: If it comes after the filing of
23 an --

24 QUESTION: If it comes after, it is a part of
25 the proceeding?

1 MS. GRIFFEY: It is incidental to the
2 proceeding, such as a hearing would be, or any of the
3 other rules pertaining to Federal habeas review that --

4 QUESTION: If it's incidental to the proceeding,
5 then it's part of the proceeding?

6 You're hesitating because if you say yes, then
7 the proceeding begins, and he is entitled to counsel
8 before the habeas petition is filed, and it seems to me
9 perfectly plausible that Congress intended to expand the
10 proceedings under 2254 by including that phase in which
11 counsel is appointed under 848.

12 MS. GRIFFEY: If Congress intended to do that,
13 they did not do that, and it is a well-established rule of
14 statutory construction that the court will not provide
15 what Congress intended to do but presumably by one theory
16 or another omitted by inadvertence.

17 QUESTION: But isn't it equally incumbent on us
18 to construe our procedural rules in such a way that it
19 does not turn congressional statutes into dead letters,
20 and if we continue to construe the procedural requirements
21 as it seems to me you are asking us to do, then 848 was a
22 waste of everyone's time.

23 Because if the petition has -- I will grant you,
24 by the way, for the sake of argument and probably
25 ultimately, that a petition, a habeas petition must be

1 filed in order for 848 to kick in, but assuming that a
2 habeas petition, once filed, may, without any abuse of
3 discretion, be finally adjudicated before counsel has had
4 so much as a peek at it, is to turn the 848 guarantee into
5 a farce, and haven't we got an obligation to adjust our
6 procedural requirements in a way that avoids that?

7 MS. GRIFFEY: The only way that 848(q) is turned
8 into procedural farce by -- under that scenario would be
9 if the petitioner waits until the last minute to file
10 whatever it is --

11 QUESTION: No. Oh, with respect, I don't
12 think -- maybe I haven't made the question clear. It
13 seems to me that on your argument that is true if the
14 petitioner comes in on the very first possible day,
15 because the petitioner comes to the court and says, I want
16 to make a habeas claim, and I want counsel, and the court
17 says, in order to get counsel you've got to file a habeas
18 claim in the first place, and we'll assume that's correct.

19 The petitioner does so, and on your view, it is
20 then no abuse of discretion for the court to look at that
21 petition and say, this is no good. I dismiss it. Or,
22 indeed, to wait until counsel appears and says, I want to
23 amend the petition, and the court says, oh, no, I've got
24 the petition before me and I'm going to dismiss it right
25 now, because it is inadequate for various reasons.

1 I understood that to be your argument, that that
2 would be no abuse of discretion for the court to do that.
3 Was I wrong?

4 MS. GRIFFEY: There is no abuse of discretion
5 there.

6 QUESTION: Okay, then 848 is a farce.

7 MS. GRIFFEY: 848(q) could -- the protection
8 that would be given to a defendant under those
9 circumstances would be, needless to say, if they came in
10 at the last minute --

11 QUESTION: No. We're talking about coming in at
12 the first minute. The petitioner is there. Without an
13 abuse of discretion the court says, I don't have to waste
14 time while you amend this petition, I've got a petition in
15 front of me, it is for any one of various reasons
16 inadequate, and I dismiss it. That has nothing to do with
17 timing.

18 It may well be -- it may well be within the
19 court's discretion not to stay, if they deliberately wait
20 and come in at the last minute. We're not talking about
21 that. We're simply talking about the authority of a
22 court, consistent with our construction of the
23 Constitution and the procedural rules, to dismiss before
24 counsel has had a chance to do anything, and you're saying
25 it would not be an abuse of discretion.

1 MS. GRIFFEY: Yes, I am saying that. I'm saying
2 that 848(q) right to counsel is conditioned upon a 2254,
3 or actually a habeas corpus proceeding is defined by title
4 28, chapter 153, and all the statutory provisions therein,
5 all of which uniformly require a petition or an
6 application to be pending, and incidentally, none of which
7 address any prepetitioner application stay of the
8 proceeding.

9 QUESTION: Is it right that this Gosch case,
10 that applies without regard to the time of the petition?
11 That is, if the petition is inadequate, it can be
12 dismissed and that's the end of it?

13 I take that that's what this case holds. The
14 district court can look at the hand-drawn petition, say
15 it's no good, goes up on review, affirms that it's no
16 good, and then, as Justice Souter said, where is there
17 room for counsel in that picture?

18 MS. GRIFFEY: Yes, that can happen, but
19 underlying all this concern is the assumption that Federal
20 habeas review is somehow indispensable to the State's
21 valid imposition of a death sentence, and it simply is
22 not. There is no constitutional requirement of Federal
23 habeas review or of counsel in Federal habeas review.

24 QUESTION: You're saying it's perfectly rational
25 for the Federal Government to say, where you've come

1 forward with a good claim, we'll give you counsel to help
2 you, but where there's no good claim, we do not provide
3 counsel to engender a claim. That's perfectly rational,
4 and if the language reads that way, you're saying we
5 should read it that way.

6 QUESTION: May I ask a factual question? In the
7 first part of the blue brief there's a description of the
8 practice, an informal practice that had developed before
9 the Gosch case was decided. Is that an accurate statement
10 of what the practice was before?

11 MS. GRIFFEY: I don't remember exactly how it
12 was delineated there. I believe it was. We -- our office
13 does not oppose a stay of execution if anything is filed
14 that can reasonably -- and we're talking reasonably as if
15 it were almost a pro se petition, or was a pro se petition
16 filed, that can be construed as a habeas application.

17 So, for example, when something is filed saying,
18 I want a stay, and here's four potential grounds for
19 relief, we will say, if the court should --

20 QUESTION: The practice they described, as I
21 understand it they would file a perfunctory petition which
22 recited one claim that had been raised on direct appeal,
23 knowing that there might be more there, but then routinely
24 there was no opposition to a stay, as long as there was a
25 claim stated that had been --

1 MS. GRIFFEY: That's correct.

2 QUESTION: But that all changed after the Gosch
3 case.

4 MS. GRIFFEY: That changed -- that was not the
5 procedure that was followed in Gosch. I can't say that
6 that has all changed. It is still our office's position,
7 and most of the courts are continuing to act in that
8 manner, of allowing time to file amended petitions and
9 that sort of thing, and I also would like to point out --

10 QUESTION: But wasn't -- McFarland's situation
11 was that if Gosch was going to apply in his case, and he
12 filed just this rudimentary petition, he was at grave risk
13 of having it thrown out, because it would not have been a
14 well-pleaded complaint, and then not being able to come
15 with a counseled petition?

16 MS. GRIFFEY: That --

17 QUESTION: Wasn't he -- that was a real risk for
18 him.

19 MS. GRIFFEY: That was his risk in Federal
20 court, but underlying McFarland's claims here is the
21 assumption that somehow the procedure fell down in the
22 first instance in the Texas courts because Texas does not
23 routinely and regularly with a uniform procedure provide
24 for the appointment of counsel.

25 QUESTION: That had to do with the timing of it.

1 I think Ms. Welch said she wanted to exhaust the State
2 remedy route.

3 But now we're not talking about a question of
4 timing, as was brought out in the colloquy with Justice
5 Souter. It could be at the earliest possible moment the
6 prisoner writes is hand-drawn petition, and it's no good.
7 It gets thrown out, gets affirmed on appeal, that's the
8 end of Federal habeas, there's never been any chance for
9 848 to operate, and you say that's what Congress
10 contemplated, that the prisoner himself must write a
11 decent enough petition -- not a pro forma petition of the
12 kind that went on before Gosch, but a really good
13 petition.

14 MS. GRIFFEY: Habeas jurisdiction is conditioned
15 upon there being errors of constitutional dimension
16 identified, and the factual support for those set forth in
17 an application, and Congress has not changed its
18 delineation of a Federal habeas proceeding. As a
19 practical --

20 QUESTION: Discovered by the prisoner himself,
21 if he has no lawyer.

22 MS. GRIFFEY: There are several underlying
23 assumptions here that need to be addressed. First of all,
24 if it was known 4 months, 3 months in advance that the
25 resource center was going to be unable to recruit counsel,

1 petitioner should have been and maybe was advised of that
2 fact.

3 There still exists in Texas the inmate legal
4 services legal group that will provide representation for
5 all indigent non-fee-producing cases. That organization
6 has not been utilized since the advent of the Texas
7 Resource Center, but it nonetheless continues to exist.

8 QUESTION: May I ask you this question: aren't
9 you making an argument for unreasonable delay as opposed
10 to an argument about jurisdiction? Maybe they waited
11 until too late here. Maybe it would not have been an
12 abuse of jurisdiction to deny the stay, but we've got a
13 jurisdictional question about the power of the court to
14 appoint counsel and to grant a stay if warranted, and I
15 don't see how that question turns on the facts that you're
16 arguing.

17 MS. GRIFFEY: You're correct, it doesn't, and
18 the equitable concerns seem to have come in in this case,
19 although they should not come in, in terms of analyzing
20 whether jurisdiction should be found in this case, and in
21 fact this case is strictly controlled by 2251.

22 QUESTION: I don't want to -- am I interrupting
23 your answer?

24 MS. GRIFFEY: No.

25 QUESTION: There's one question that runs

1 through my mind in these cases when we talk about the
2 delay. This case as I understand it started in 1988,
3 early in 1988 the man was indicted, and the proceedings in
4 the Texas direct review system ended sometime in 1993, and
5 then all of a sudden we have this terrible emergency a
6 matter of a few weeks after the execution date is set.

7 Is this period of time where it's mostly in the
8 state court, typical in Texas? You have these long delays
9 between trial and -- and then it suddenly becomes an
10 emergency at the end of 4 or 5 years?

11 MS. GRIFFEY: That period of delay is not at all
12 unusual.

13 QUESTION: In Texas.

14 MS. GRIFFEY: It can vary anywhere from 2 years
15 to 8 years.

16 QUESTION: But then why is there such a sudden
17 emergency after 4 or 5 years? You've got to get
18 everything done, you can't let them have 2 or 3 weeks to
19 get a lawyer. I don't understand the contrast between
20 5 years on the one hand and a matter of weeks on the
21 other.

22 MS. GRIFFEY: Well, it was not just a matter of
23 2 or 3 weeks to get a lawyer. In this case they had at
24 least 4 months following the denial of certiorari review
25 to get an attorney.

1 QUESTION: Well, I must say that that's -- it's
2 hard to expect Federal judges or any judges to get excited
3 about staying a Texas execution when Texas itself diddles
4 around for 3 or 4 years before trying the individual and I
5 think you should bear that in mind. If you want us to get
6 serious, you should get serious yourselves.

7 MS. GRIFFEY: Texas is well aware of that fact,
8 and in fact in the 1993 legislative session tried to amend
9 our habeas procedure to provide for the regular and
10 routine appointment, to provide for filing deadlines that
11 would not necessity setting execution dates to compel
12 State litigation to go --

13 QUESTION: Wasn't the real delay here much
14 before that? If I have the figures, the dates right,
15 McFarland was convicted in November of '89, but his
16 conviction wasn't affirmed on appeal until December of
17 '92. What accounts for that length of time just on -- the
18 direct appeal took so long -- 3 years.

19 MS. GRIFFEY: In this particular case, I can't
20 speak to specifics, but I do know that it frequently takes
21 a year to get the record on appeal compiled, that the
22 direct appeal may raise 20, 25 claims, so that the
23 briefing on each side goes way outside the normal
24 statutorily prescribed limits for filing the briefs on
25 each side. The --

1 QUESTION: It just seems extraordinary that you
2 are complaining about the few months that lapsed here and
3 said that that was no occasion for a stay, and yet in the
4 State's own process it took over 3 years to get from the
5 conviction to the affirmance on appeal.

6 MS. GRIFFEY: It has been my experience in
7 watching a number of capital cases go through that. That
8 period of time is not unusual on direct appeal, nor is
9 that period of time at all unusual for a case to be
10 pending before a Federal district court. The issue here
11 is how to make the petitioner proceed in an orderly
12 fashion from one stage of litigation to another.

13 Sometimes these cases raise complex issues that
14 require extended review. The period of time in between
15 should not be one that is simply used to sit there and
16 say, I don't have counsel. It should be used for the
17 preparation of a petition, and Texas tried to provide for
18 the regular, routine appointment of counsel and for the --
19 a series of filing dates that did not require execution
20 dates to be set, and that provision was defeated by the
21 very people who are now lobbying, or the very people who
22 are now representing McFarland in this Court, and by the
23 lobbying of some of the groups who have appeared as amicus
24 in this case.

25 QUESTION: You mean, it was defeated -- it was

1 pending in the legislature?

2 MS. GRIFFEY: It got through the Texas House,
3 and did not get passed in the Texas Senate. It will be
4 reintroduced.

5 QUESTION: It may be that the defeat had nothing
6 to do with giving the defendant adequate opportunity to
7 get counsel. It may be that there were other reasons for
8 opposing the measure.

9 MS. GRIFFEY: There could have been. It has
10 been my experience that while the appointment of counsel
11 is a desired feature by the defense bar, that an abuse
12 doctrine is not.

13 QUESTION: Do you know what the -- what do the
14 capital defendants' lawyers get paid in Texas for
15 representing defendants in the State system?

16 MS. GRIFFEY: At trial?

17 QUESTION: Yes.

18 MS. GRIFFEY: I'm afraid I do not know the
19 answer to that question.

20 QUESTION: They are paid by the State, though.

21 MS. GRIFFEY: Yes, they are.

22 QUESTION: They are.

23 MS. GRIFFEY: As the Court recognized, the issue
24 before the Court is properly one of jurisdiction, not of
25 the equitable concerns here.

1 Under Conway, an action is not pending until it
2 is commenced by the filing of the initial designated
3 pleading. While civil actions are commenced by the filing
4 of a complaint, a Federal habeas corpus proceeding is
5 commenced by the filing of an application or petition in
6 which available grounds for relief are identified and the
7 factual support for each ground is set forth.

8 QUESTION: Let me ask another question about
9 your -- assuming we don't have any deadline or time
10 problems, and a petitioner just wants to get a lawyer and
11 he files a perfunctory petition that is dismissed as
12 really saying nothing, and then later he gets a letter and
13 he comes in for the second time, would it be your position
14 that that second petition was an abuse of the writ?

15 MS. GRIFFEY: Yes.

16 QUESTION: It would.

17 MS. GRIFFEY: The understanding that a habeas
18 application is commenced by the filing of an application
19 or petition raising constitutional bases for relief is
20 consistent with the Court's conclusion in Barefoot v.
21 Estelle that a stay can only be entered if there is a
22 substantial showing of the denial of a Federal right upon
23 which relief might be granted. It is also consistent with
24 the jurisdictional concerns expressed by the Court in
25 disposing of petitions filed by next friends, and finally,

1 it is consistent with the legislative history of the
2 habeas corpus statutes.

3 In 1908, Congress attempted to eliminate the
4 delay in the carrying out of State executions attributable
5 to frivolous appeals by enacting the CPC requirement, and
6 in 1934, Congress eliminated the provision for automatic
7 stays.

8 The provisions of the Anti-Drug Abuse Act
9 contained at 848(q) do not authorize the prepetition stays
10 of execution. 848(q) does not expand the scope or meaning
11 of the term, proceeding, as used in 1151, nor does 848(q)
12 constitute an expressly authorized exception to the
13 prohibition of the Anti-Injunction Act under the analysis
14 of *Mitchum v. Foster*.

15 Both the provisions, as we -- as I stated
16 earlier --

17 QUESTION: May I just understand that your
18 essential position is that what must be done, and what
19 cannot be avoided, is in the first instance the petitioner
20 himself file an adequate petition, uncounseled?

21 MS. GRIFFEY: That is correct.

22 QUESTION: That's what has to happen. He has to
23 draw the petition. He cannot have a lawyer, unless he can
24 pay for one, draw his petition, so the well-pleaded
25 complaint has to come from the pro se petitioner. That's

1 the nub of your argument -- that to get your foot in the
2 door, he has to do it on his own.

3 MS. GRIFFEY: The critical point of my argument
4 is that he's not entitled to a stay while he finds
5 counsel. He must have a constitutional basis for relief.

6 QUESTION: Yes, but that -- but the
7 constitutional basis would be coming in with an adequate
8 complaint, and he can't get counsel for that, and he's not
9 entitled to counsel, you say, until he has that well-
10 pleaded complaint on his own. I took it that that's what
11 you were saying. I just wanted you to confirm that that
12 is indeed what your position is.

13 MS. GRIFFEY: I disagree only that I believe
14 that he can file an adequate complaint without the
15 assistance of counsel.

16 QUESTION: Well, and you don't insist that he
17 come in on his own. He may well be able to find counsel.
18 He can say look, all you have to do is file a well-pleaded
19 complaint for me. I don't want you to try the whole
20 habeas matter. I don't even want you to do all the
21 investigation. All I have to do is make out a solid
22 Federal claim, then I'll get free Federal counsel.

23 It would make it a lot easier to get a State-
24 appointed counsel if you knew that all that person is
25 committed to is getting the foot in the door, whereupon

1 the Federal system will take over and you'll get another
2 counsel.

3 Isn't that a plausible scenario?

4 MS. GRIFFEY: If I understand your question
5 correctly, yes, and in fact in this case Tarrant County
6 District Attorney's Office said, file a petition of any
7 sort. We will not oppose a stay or modification of
8 execution date, and the circumstances that existed in
9 Gosch did not prevent McFarland in the State courts from
10 filing a perfunctory petition and from filing an amended
11 position.

12 QUESTION: So Congress can be relying on State-
13 provided free legal services to get the foot in the door,
14 and once the foot is in the door, the Federal funding will
15 take over. That seems to me a perfectly reasonable
16 disposition.

17 QUESTION: Well, does the State finance these
18 things?

19 MS. GRIFFEY: The State habeas actions?

20 QUESTION: Yes.

21 MS. GRIFFEY: In some -- they have the authority
22 to. They do not have the obligation to.

23 QUESTION: And they didn't in this case.

24 MS. GRIFFEY: No.

25 QUESTION: I take it there's no State agency or

1 defense agency that maintains a list of lawyers who re
2 willing to file well-pleaded complaints for free.

3 MS. GRIFFEY: There is no -- there is no State
4 agency that maintains that list. There is a staff counsel
5 for inmates that if they are requested to represent a
6 death sentence inmate who is indigent will do so. There
7 is also the Texas Resource Center.

8 QUESTION: Are there enough of them to represent
9 all of these people to get their well-pleaded complaints
10 in?

11 MS. GRIFFEY: I do not know the size of their
12 staff.

13 QUESTION: You don't know how many there are.

14 MS. GRIFFEY: No.

15 QUESTION: In the Gosch case, it was the
16 district judge who decided to rule on the petition, it
17 wasn't the State that asked for it, was it?

18 MS. GRIFFEY: That is correct. The district
19 judge --

20 QUESTION: -- did it on his own.

21 MS. GRIFFEY: Right.

22 QUESTION: Was it the same district judge in
23 this case?

24 MS. GRIFFEY: No. No, and in fact in another
25 case in Texas that immediately followed this one, there

1 was a suggestion from the district judge that they file a
2 perfunctory petition with a request to be -- for leave to
3 file an amended petition, and that was not followed.

4 If there are no further questions from the
5 Court, I will --

6 QUESTION: Thank you, Ms. Griffey.

7 Ms. Welch, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF MANDY WELCH

9 ON BEHALF OF THE PETITIONER

10 MS. WELCH: Thank you, Your Honor.

11 I want to correct something that I said in
12 response to a question that Justice Scalia asked. We did
13 not specifically request in our letter to -- the State
14 court did not request appointment of counsel. We asked
15 that we be allowed time to recruit volunteer counsel.

16 There was a pro se motion that was presented to
17 the judge requesting a stay and time to obtain counsel,
18 but I don't -- that is not in the record, and I don't
19 believe it specifically asked for appointment.

20 The appointment system in Texas is -- really
21 varies on a county-by-county basis. Nowhere in Texas does
22 the State provide funds for indigent defendants, either at
23 the trial level or at the postconviction habeas level.
24 All of that is done by counties, and some judges take the
25 position that they do not have the authority to provide

1 counsel in habeas, and that was the position of the judge
2 in this case.

3 QUESTION: Therefore you didn't ask -- yes.

4 MS. WELCH: Yes, Your Honor.

5 QUESTION: Thank you for that clarification.
6 That's what I --

7 MS. WELCH: Oh, and I would also like to address
8 the problem that was created by the absence of any rules
9 or procedures in State court.

10 We were faced with the same dilemma in State
11 court that we were faced with in Federal court. The
12 district attorney, just like the Attorney General's
13 Office, did agree not to oppose a stay if Mr. McFarland
14 filed a perfunctory petition, but the judge made it quite
15 clear that he would not allow time for counsel to be
16 recruited in order to amend that petition.

17 He made it quite clear that he would not appoint
18 counsel to represent Mr. McFarland on that petition, and
19 when it was explained to him that we could not, unless we
20 had additional time, he made it quite clear that we would
21 not be allowed to substitute counsel even if volunteer
22 counsel was found.

23 So it is not quite so simple to say that they
24 agreed not to oppose a stay, just as the Attorney
25 General's Office agreed not to oppose a stay. They were

1 unable to agree -- they were unable to assure us in any
2 way that the judge would appoint counsel, and in fact the
3 judge said he would not.

4 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Welch.

5 MS. WELCH: Thank you.

6 CHIEF JUSTICE REHNQUIST: The case is submitted.

7 (Whereupon, at 12:00 noon, the case in the
8 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

FRANK. B. McFARLAND, Petitioner v. JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

CASE NO.: 93-6497

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

BY *Don Mari Federico*

(REPORTER)

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