

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: ARTHUR CALDERON, WARDEN, ET AL. Petitioners v.  
TROY A. ASHMUS, ETC.  
CASE NO: 97-391 C. 1  
PLACE: Washington, D.C.  
DATE: Tuesday March 24, 1998  
PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR CALDERON, WARDEN, ET AL. :  
Petitioners :  
v. : No. 97-391  
TROY A. ASHMUS, ETC. :

Washington, D.C.

Tuesday March 24, 1998

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

APPEARANCES:

RONALD S. MATTHIAS, ESQ., Deputy Attorney General of California, San Francisco, California; on behalf of the Petitioners.

MICHAEL LAURENCE, ESQ., San Francisco, California; on behalf of the Respondents.

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

2 (11:15 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 97-391, Arthur Calderon v. Troy Ashmus.

5 Spectators are admonished, do not talk until you  
6 get out of the courtroom. The Court remains in session.

7 Mr. Matthias, you may proceed whenever you're  
8 ready.

9 ORAL ARGUMENT OF RONALD S. MATTHIAS

10 ON BEHALF OF THE PETITIONERS

11 MR. MATTHIAS: Mr. Chief Justice, and may it  
12 please the Court:

13 This suit was initiated by a California death  
14 row inmate to prevent State officials from claiming in  
15 habeas cases that California is a Chapter 154 qualifying  
16 jurisdiction. The principal issue before this Court is a  
17 threshold question. That question is whether this suit is  
18 barred by the Eleventh Amendment or, alternatively,  
19 whether it qualifies or is authorized under the ex parte  
20 Young exception to the Eleventh Amendment.

21 QUESTION: Mr. Matthias, do you think this suit  
22 could have been brought as a class action in a State court  
23 in California?

24 MR. MATTHIAS: As a declaratory judgment?

25 QUESTION: Yes.

1 MR. MATTHIAS: There is a -- Your Honor, there  
2 is a provision of California law for declaratory  
3 judgments. I'm not intimately familiar with the  
4 provisions of that.

5 QUESTION: Well, I'm just wondering what the  
6 alternatives might have been. You're objecting because  
7 the suit was filed in Federal court, but presumably had it  
8 been filed this same kind of issue and demand in State  
9 court, it would be all right as far as you're concerned.

10 MR. MATTHIAS: Well, I'm not sure that the State  
11 courts would have thought themselves to be an appropriate  
12 forum for entertaining the question insofar as the issue  
13 of 154 compliance or not only has significance for --

14 QUESTION: Well, a State court can decide that  
15 just as well as a Federal court, couldn't it?

16 MR. MATTHIAS: Certainly I'm convinced that a  
17 State court could read the Federal statute, interpret it,  
18 and would be actually in a better position to understand  
19 the issue at least insofar as the 154 compliance  
20 question --

21 QUESTION: Well, as a practical matter it makes  
22 a lot of sense to have the whole issue resolved and not do  
23 it case-by-case in every separate Federal habeas petition  
24 that's filed. I mean, that makes some sense, I would  
25 think, from the standpoint of the State as well as the

1 defendants.

2 MR. MATTHIAS: It does make some sense. It also  
3 makes some sense to allow issues to percolate, especially  
4 an issue as difficult as this one has evidently proved for  
5 many Federal courts. Obviously not Federal courts within  
6 California, because in fact only one Federal court has  
7 been allowed, has allowed itself, effectively, to consider  
8 this question, but I certainly don't dispute that there is  
9 some economy in somehow aggregating these issues, and  
10 there are procedures for that.

11 Your Honor's suggestion about perhaps going to  
12 State court at least on some of the subissues that will  
13 turn critically on questions of State --

14 QUESTION: Not just the subissues, the whole  
15 thing.

16 MR. MATTHIAS: That, too, might have been  
17 available.

18 QUESTION: Did -- has California complied -- by  
19 the way, has California adopted a statute in the interim,  
20 since we took this --

21 MR. MATTHIAS: Yes. There was a change in the  
22 law the effect of which -- the effective date of which is  
23 January 1 of this year, and a handful, and I think three  
24 to five death row inmates have since had their counsel  
25 appointed under that new procedure and, theoretically,

1 when they finish their State proceeding in however many  
2 years that takes, and they then move to Federal court if  
3 that proves necessary, then the issue of Chapter 154  
4 compliance at/or -- I should say, the issue of Chapter 154  
5 applicability to their Federal habeas proceedings will  
6 then turn on what we call the new law.

7 I will indicate, though, that obviously the vast  
8 majority of the class is utterly unaffected.

9 QUESTION: Now, you're arguing, Mr. Matthias,  
10 that the Eleventh Amendment bars this proceeding. There  
11 are a number of State officials joined. Was the State of  
12 California also joined?

13 MR. MATTHIAS: No. The State itself was never  
14 named as a defendant formally.

15 QUESTION: And so you're arguing this is not an  
16 appropriate ex parte Young situation, I guess.

17 MR. MATTHIAS: Precisely.

18 QUESTION: And who were the State officials who  
19 were joined?

20 MR. MATTHIAS: It's two wardens. It's the  
21 warden at San Quentin, where the men's death row is  
22 housed.

23 QUESTION: Were the wardens going around making  
24 contentions about what California had done by way of  
25 providing counsel?



1 MR. MATTHIAS: To my knowledge the wardens had  
2 never breathed a word on the subject of 154 --

3 QUESTION: Was there an allegation in the  
4 complaint that the wardens had made these contentions?

5 MR. MATTHIAS: No. There was an allegation in  
6 the complaint, I think generically, and I think the theory  
7 here was that insofar as the Warden Calderon and Warden  
8 Farmon would be the named defendants in any habeas  
9 proceeding, they would be the ones who would be urging  
10 Federal courts to apply chapter 154.

11 And the Attorney General of the State of  
12 California, approximately 1 year before the AEDPA passed,  
13 testified before the Senate Judiciary Committee praised  
14 the AEDPA and expressed the view that it would work very  
15 well in California insofar as it took account of  
16 California's unitary review procedure where collateral  
17 claims and direct appeal claims can be processed at or  
18 about the same time. They're on a roughly parallel  
19 temporal track, and those comments --

20 QUESTION: And he's a defendant, the Attorney  
21 General's a defendant?

22 MR. MATTHIAS: Yes. The Attorney General  
23 himself is a defendant and as I read the complaint the  
24 sole wrongful conduct attributed to the Attorney General  
25 in this case were his statements to the Senate expressing

1 approval of the AEDPA and expressing rather optimistically  
2 the hope that it would work well in California.

3 QUESTION: Are you suggesting by what you just  
4 said that California's position really is kind of iffy,  
5 non-final on this matter of whether the State complies  
6 with 154, because I thought that the lawsuit was premised  
7 on the idea that California has said yes, we make it, we  
8 fit under 154, but now you seem to be saying something  
9 that would -- doesn't even get us to something fancy like  
10 the Eleventh Amendment, that California really hasn't  
11 taken a firm position.

12 MR. MATTHIAS: Well, California officials  
13 certainly spoke to the issue publicly. We had precious  
14 little chance to actually advocate this position in the  
15 context of any actual pending habeas proceeding because  
16 Mr. Ashmus filed his lawsuit about 4 hours after the  
17 AED --

18 QUESTION: Well, what is California's position  
19 right now, yes we fit, or maybe we fit, we hope we fit?

20 MR. MATTHIAS: No, it's not maybe. We believe  
21 firmly that we have qualified under the provisions of  
22 Chapter 154 since June of 1989. We have since that time  
23 regularly appointed counsel to represent death row  
24 inmates --

25 QUESTION: So now you're backing off from what

1 you said before. It was suggested to me that you were  
2 saying, it's still iffy, he just made that one statement  
3 or two statements, and he was under pressure and all that,  
4 so --

5 MR. MATTHIAS: Your Honor, I didn't say he was  
6 under pressure. I was simply describing what the  
7 allegation was in the petition. What was the alleged  
8 wrongdoing --

9 QUESTION: But now you say, forget all that, yes  
10 we have crossed swords here, we are saying we've made a  
11 final decision, we comply, is that --

12 MR. MATTHIAS: We believe we have complied, and  
13 I think --

14 QUESTION: You say you've complied, but you  
15 didn't say you had complied earlier. You're saying at the  
16 time this complaint was filed there was no -- no evidence  
17 that you had -- that the State had taken a firm position  
18 we were in compliance.

19 MR. MATTHIAS: That's correct. We had made --  
20 there had been State officials who had made statements to  
21 the media, there were State officials who had testified  
22 before Congress and expressed the view that we had  
23 complied.

24 QUESTION: So when did you join issue on this  
25 point?

1 MR. MATTHIAS: During the litigation I think it  
2 became clear that the plaintiffs had correctly anticipated  
3 our position. They understood, anticipated that we would  
4 take the position that we are a Chapter 154 --

5 QUESTION: So a plaintiff is predicting what a  
6 defense would be, and then the defendant says, yes, that's  
7 our defense, and that's the basis for a lawsuit?

8 MR. MATTHIAS: That appears to be the basis for  
9 this lawsuit. Yes, Your Honor, that appears to be the  
10 basis for this lawsuit, and I frankly don't think it  
11 matters whether or not we had managed to somehow get  
12 ourselves into a courtroom and assert to the Federal  
13 district court judge, Your Honor, we believe this new law  
14 applies, or if we hadn't. Either way, our role in Federal  
15 habeas corpus is purely adversarial. It's not within our  
16 power to command the application of the AEDPA.

17 If the AEDPA would be applied to any California  
18 inmate wrongly because we're not in compliance, that would  
19 be a Federal judicial error, if it's anything. We are not  
20 in a position to violate the AEDPA. The AEDPA, and  
21 Chapter 154 in particular, does not impose any duties on  
22 State officials --

23 QUESTION: It's to be applied by Federal courts,  
24 which is why I'm not sure that there could have been a  
25 declaratory judgment in State court. What would the State



1 courts declare, that Federal courts must follow the AEDPA?  
2 I don't think State --

3 MR. MATTHIAS: No, I --

4 QUESTION: -- courts would give that kind of a  
5 declaratory judgment.

6 MR. MATTHIAS: I don't think it would be that,  
7 Your Honor, but I think -- and the reason I responded  
8 affirmatively to Justice O'Connor's question is, I thought  
9 we both understood, and it's true that there are State law  
10 subquestions lurking in the AEDPA. In order to qualify  
11 under the AEDPA, State law provisions must be of a certain  
12 character. The State must have done certain things.

13 QUESTION: But unless California has a very  
14 unusual declaratory judgment procedure, you usually  
15 declare the existence of nonexistence of a certain right.  
16 You just don't come in and say, I want an abstract  
17 interpretation of this subproposition of law, am I right  
18 or wrong about it. I mean, you usually say you're  
19 entitled to this or you're not entitled to this.

20 MR. MATTHIAS: I quite agree, although there's  
21 another relevant change in the law, a very recent  
22 development that speaks to this precise question.

23 When this lawsuit was filed, California did not  
24 have a certified question procedure. Let me make this  
25 very concrete. One of the questions, one of the

1 subquestions that lurks in a question of compliance, is a  
2 State in compliance or not, is whether or not a State has  
3 a rule of court governing the appointment of counsel and  
4 standards.

5 Now, California clearly has written published  
6 standards, and you can find them in your own law library,  
7 I'm confident, clearly has had that.

8 The claim of the inmates was that that did not  
9 have the dignity of a rule of court within the meaning of  
10 California law. That's actually not that easy a question,  
11 because there are many things that go by that label, rule  
12 of court, under California law, and the district court  
13 quite clearly did not understand that and applied one very  
14 rigid question of California law, one very rigid  
15 definition, the most limited definition possible.

16 Now, if California standards for the employment  
17 of counsel deserve dignity as a rule of law, that's a  
18 State law question. The Federal courts we had hoped would  
19 understand that and correctly construe it, but in this  
20 case that failed. I'm just using this as one example.

21 There really would have been -- when this  
22 lawsuit was filed there was no mechanism for the Federal  
23 courts to turn to the State courts in California and  
24 effectively ask for guidance on that State procedural  
25 question. Fortunately, that, too, has changed, and

1     although the district court would not today have any  
2     mechanism for asking for guidance on a certified question  
3     basis from the district court, the Ninth Circuit surely  
4     would have.

5             QUESTION: Can -- I see that. Are you finished  
6     with that, because I've one question only that I'd like to  
7     ask, if you're finished.

8             MR. MATTHIAS: Surely, Your Honor. Go ahead.

9             QUESTION: What in your opinion is the right  
10    route? That is to say, I believe that you think the State  
11    of California thinks it has complied with the counsel  
12    requirements in AEDPA, and a group of prisoners on death  
13    row think they have not.

14            And so what the group of prisoners says is, if  
15    we file our first habeas within 180 days, we can't  
16    complain about the statute because we complied with it,  
17    and if we wait until after 180 days, and it turns out  
18    we're wrong, we are literally without a remedy to complain  
19    about being sentenced to death.

20            Now, that seems a terrible dilemma to be in, and  
21    that's why they filed this lawsuit, and I want to know, in  
22    your opinion, are they without any remedy, or if they have  
23    a remedy to test out the situation in advance, so they  
24    don't get into that dilemma, specifically, what is it?

25            MR. MATTHIAS: There are many, and they all

1 arise in the context of the habeas corpus proceeding  
2 itself.

3 It's the earliest opportunity, perhaps, for an  
4 inmate to learn whether or not the judge before whom he  
5 appears with his habeas proceedings, it's -- the earliest  
6 opportunity for him to learn whether or not that judge is  
7 of the mind that 154 should apply is probably the very  
8 first appearance he makes in that court, when he asks for  
9 the appointment of Federal counsel and seeks a stay,  
10 because if Chapter 154 is applicable in that jurisdiction,  
11 the court's authority for entering that stay is 2262(a).

12 QUESTION: But there's a problem with that,  
13 because he has to file the petition in order to see the  
14 judge, and I thought that the problem was how much time  
15 does he have to file the petition. If it's 154, half the  
16 time, or something like that.

17 MR. MATTHIAS: Your Honor, I'm speaking to a  
18 point in time that typically precedes the actual filing of  
19 a petition by years.

20 I'm talking about the first appearance in  
21 Federal court -- not a physical appearance, but the filing  
22 of a document that requests -- State proceedings are done,  
23 you turn to Federal court and you say, I would like a  
24 lawyer, I want to pursue Federal habeas corpus review, I  
25 have a execution date pending, and I would like that



1 stayed for the purpose of appointing a lawyer, the  
2 procedure that this Court essentially described in  
3 McFarland. That is well pre-petition, well pre-petition,  
4 years.

5 QUESTION: But is the applicant going to -- is  
6 he going to know any particular judge at that point?

7 MR. MATTHIAS: Yes.

8 QUESTION: He would be dealing with a --

9 MR. MATTHIAS: The procedure in the Northern  
10 District and all the districts of California is that the  
11 request for appointment of counsel gets docketed, it gets  
12 a number, it gets the initials, it goes to a court, and  
13 that judge almost invariably that day enters the stay,  
14 signs the order, and the search for a lawyer begins.

15 And if the judge is going to enter a stay in a  
16 death penalty case, that judge must at that point in the  
17 procedure, at that early stage must ask himself, is this  
18 going to be a Chapter 154 case, or is this going to be a  
19 Chapter 153 case?

20 And the reason the judge must consider --  
21 concern himself with that question is that the authority  
22 for entering a stay in a jurisdiction where Chapter 154  
23 does apply is 2262. The judge must ask himself, what am I  
24 staying, and what is my authority for staying it?

25 QUESTION: So does the death row prisoner argue,

1 I want the stay, and I'm entitled to a stay only if  
2 California has not complied with these legal requirements?

3 MR. MATTHIAS: No. He's entitled to a stay --

4 QUESTION: He's entitled to a stay only if your  
5 position on the merits is wrong.

6 MR. MATTHIAS: No. He's entitled to stay --

7 QUESTION: Only if it's right.

8 MR. MATTHIAS: No. He's entitled to a stay  
9 whether we are Chapter 153 or 154. The difference is --

10 QUESTION: I'm saying, how does he get to raise  
11 his claim?

12 MR. MATTHIAS: He raises that claim by  
13 identifying the provision of law under which --

14 QUESTION: Well, he said the judge would say it  
15 doesn't matter.

16 MR. MATTHIAS: The judge could say that.

17 QUESTION: All right. Well, what he's trying to  
18 do is to require a court to say that he's right about  
19 California's not complying and California thinks he's  
20 wrong, and my question is, although this is a very unusual  
21 action, what other kind of action could be bring to get  
22 that raised, and the answer may be none, but I want to  
23 know what you think about that.

24 MR. MATTHIAS: The answer is no other action,  
25 but numerous other courses of conduct, numerous other

1 avenues of recourse. One would be --

2 QUESTION: Let's get one. Let's get one --

3 MR. MATTHIAS: One would be --

4 QUESTION: -- because the first one I'm not too  
5 happy with.

6 MR. MATTHIAS: One would be asking for a stay,  
7 and having the court decide whether or not the stay is  
8 pursuant to 2262, which does not apply unless Chapter 154  
9 applies.

10 QUESTION: Okay. Is there another one? Let's  
11 try another one.

12 MR. MATTHIAS: He could ask -- he could ask the  
13 court for guidance on that, and the judge would have to  
14 provide it, because the judge is required to determine  
15 whether Chapter 154 applies or not, because if it does,  
16 the judge is statutorily obligated to give that matter  
17 priority, so the Federal district judge must concern  
18 himself with this question.

19 QUESTION: Is it essential to your case to show  
20 that there was some other way for these people to get an  
21 advanced declaration of what their rights were?

22 I mean, many litigants are faced with the  
23 problem, is my cause barred under a 2-year statute of  
24 limitation, under a 3-year statute of limitation, and  
25 ordinarily the cautious ones will take the 2-year statute

1 of limitations.

2 MR. MATTHIAS: That's exactly right, Your Honor.  
3 I quite agree, it is utterly unessential for us to  
4 demonstrate the existence of these other opportunities. I  
5 was simply responding to the concern that wouldn't  
6 guidance be a good thing early on, and guidance would  
7 certainly be a good thing early on, and it's manifestly  
8 attainable without suing State officials in a separate  
9 cause of action for a declaratory judgment and enjoining  
10 them from ever breathing a word of their view again about  
11 the question of compliance.

12 QUESTION: A lot of the questions from the bench  
13 up to now, and the -- your argument have been devoted to  
14 the second question presented, is this a proper  
15 injunction, but you also contend it's a violation of the  
16 Eleventh Amendment. Could you state briefly what the  
17 basis for that contention is?

18 MR. MATTHIAS: Ex parte Young was developed,  
19 which was the doctrine that was ultimately invoked by the  
20 Ninth Circuit in support of this cause of action, of this  
21 proceeding. Ex parte Young exists to harmonize the  
22 Eleventh Amendment with the well-recognized importance of  
23 having Federal courts be open to interpret and enforce  
24 Federal rights against State conduct that illegally  
25 infringes upon it.



1 State officials do not act illegally by  
2 expressing a legal point of view to a Federal district  
3 court on a question that's in dispute. That's not an  
4 illegal act. At worst, it's mistaken. At worst, it's  
5 that. But that's the question that the suit was designed  
6 to resolve, whether or not it's -- who's right or who's  
7 wrong.

8 The AEDPA is not something that State officials  
9 have any capacity to violate one way or the other. It's a  
10 reform measure. It's not directed to us. It's directed  
11 to inmates, primarily, and secondarily it's directed to  
12 the conduct of Federal district courts and Federal courts  
13 of appeal.

14 We're not in the -- it imposes no duty on us.  
15 It establishes no prohibitions that we can fail to heed.  
16 The most we can do on this question of AEDPA  
17 applicability, Chapter 154 applicability in particular,  
18 the absolute most we can do is explain to a Federal court  
19 what our view of its applicability is and why.

20 If there's going to be a violation of its  
21 provisions, which would be their application to a  
22 situation where the law would not have them applicable,  
23 that would be judicial error. That's the sort of thing  
24 you take care of by an appeal, if you feel aggrieved by a  
25 ruling by a district court that you think is wrong.

1           Not illegal. The district court is not in a  
2 position to act illegally by erring. That's just pure  
3 judicial error, if it's anything.

4           QUESTION: Well, you're right on that. The  
5 thing that -- I think the thing that's bothering me that  
6 makes this a serious case is this. Ex parte Young  
7 essentially had I think two justifications, and they did  
8 not have to be separated in Ex parte Young.

9           In the first place, there was the threat in  
10 effect of the imposition or the threat of the -- an  
11 illegal restriction upon the imposition of a tax, so that  
12 if it was an improper restriction, the State officials  
13 were acting illegally.

14           Secondly, there was what the Court described as  
15 rather a fear of draconian consequences if an Ex parte  
16 Young proceeding could not be brought because, in fact, if  
17 it should turn out that those who wanted to protest the  
18 State restriction were wrong, the consequences, the  
19 exactions that the State would then be entitled to would  
20 virtually, economically would destroy the person who had  
21 objected. The stakes, to put it crudely, were too high  
22 for normal litigation.

23           What we've got here, arguably, is half of Ex  
24 parte Young. You're entirely right, we don't have the  
25 kind of threatened illegal action that Ex parte Young was

1 talking about.

2 But as Justice Breyer's question indicated,  
3 there does seem to be an argument that if in fact the  
4 prisoner who claims that the State is not in compliance,  
5 that that prisoner either has to play it safe and act in  
6 accordance with a shorter period, or the prisoner has to  
7 take an awful risk, because if the prisoner is wrong, the  
8 prisoner, in effect, will be executed without the benefit  
9 of Federal process.

10 So it seems to me that arguably half of Ex parte  
11 Young is here, and the question is, to me is, is that  
12 enough? I will agree with you that the other half seems  
13 to be missing, but is the draconian consequence half here,  
14 and is that enough for us to say Ex parte Young should  
15 apply?

16 MR. MATTHIAS: It is not here. It is not here.  
17 That draconian choice does not exist. That Hobson's  
18 choice, that dilemma that you see referred to in the  
19 respondent's brief, does not exist.

20 This lawsuit is not a way out from a bind. If  
21 any inmate in California wants guidance on the question,  
22 will I or will I not be held to the time lines of Chapter  
23 154 or any other provision of the AEDPA, for that matter,  
24 all he need do is ask the judge, and Mr. Ashmus knows this  
25 first-hand.

1 QUESTION: Well, what if the judge says, look,  
2 I'm not here giving you advisory opinions. I'm just going  
3 to appoint counsel for you and you'll have to worry about  
4 your time limits. The judge can perfectly well respond  
5 that way, can't he?

6 MR. MATTHIAS: The judge must concern himself  
7 with that question. He must concern himself with that  
8 question at the threshold the first time he meets that --

9 QUESTION: Tell me -- that's the point that I  
10 think I'm not getting. Why does he have to concern  
11 himself with it at the threshold?

12 MR. MATTHIAS: Because it's a different  
13 provision of law that will authorize --

14 QUESTION: Yes, but as Justice Breyer said, he  
15 says, look, I'll appoint him under this section or that  
16 section. I'm still going to make an appointment. I mean,  
17 that would be open to the judge, wouldn't it?

18 MR. MATTHIAS: I think the judge would more than  
19 likely want to inform himself not only what is the  
20 authority for the stay, and I realize it could be one of  
21 two places, he would also need to inform himself whether  
22 the entire proceeding is one which he will be statutorily  
23 required to --

24 QUESTION: But wouldn't it be premature for  
25 the -- I mean, the one thing he has to do, whether it's



1 153 or 154, is appoint a lawyer, and you said this could  
2 happen years before the actual petition is filed, so why  
3 would a judge want to make a determination at that  
4 threshold state that might well be different down the road  
5 when the petition is actually filed?

6 I mean, you just pointed out that California has  
7 passed new legislation and everything. Why --

8 MR. MATTHIAS: It won't change. The question  
9 whether a particular proceeding will be conducted under  
10 154 or 153 will not change as a result of changes in the  
11 law that occur after you get into Federal court, because  
12 Chapter 154 looks to the mechanism that was in place --

13 QUESTION: You say -- but when is getting into  
14 Federal court? Is it when you file the application for  
15 the stay of execution, or when you file the habeas  
16 petition?

17 MR. MATTHIAS: Well, you get into Federal court  
18 under McFarland for the purpose of asking for a lawyer and  
19 getting a stay.

20 QUESTION: Yes, but not for the purpose of  
21 making a determination whether it's 153 or 154.

22 MR. MATTHIAS: Well, that may not be the  
23 purpose, but that's the effect, because if the judge  
24 grants the stay, the judge must concern himself with his  
25 statutory authority for entering such a stay, and the

1 source of that authority will differ, depending on whether  
2 it's 153 or 154. The judge must also concern himself --

3 QUESTION: But it -- for the purpose of what the  
4 judge is doing at the moment, does it make any  
5 difference -- does it have anything to do with what  
6 counsel he can appoint, how much that counsel will be  
7 paid, whether at that point he says 153 or 154?

8 MR. MATTHIAS: It does, because the judge will  
9 have read the statute and will understand that the minute  
10 that petition is filed he's obligated to treat it with  
11 priority over all other noncapital matters. The judge  
12 must concern himself, and I think it's inconceivable that  
13 a court would concern itself with that question and  
14 indulge in case management process and somehow keep it a  
15 secret from the inmate, and --

16 QUESTION: Well, if that was all so clear, why  
17 didn't the district judge and the Ninth Circuit just tell  
18 us that? They said this -- this is a nonissue, because  
19 the minute he files for the say of execution the judge,  
20 district judge is going to put a stamp, 153 or 154 on it.

21 MR. MATTHIAS: I can't tell you why the Ninth  
22 Circuit did not take stock of the fact that there are many  
23 mechanisms for determining that short of a separate  
24 lawsuit.

25 QUESTION: What's another one? You've given us

1 one. What's another?

2 MR. MATTHIAS: You could simply file a motion.  
3 When attorneys are in Federal court they get extensions of  
4 time to file the petition, and stays of execution in  
5 connection with their efforts to get more time to file a  
6 petition.

7 If we're talking about a due date it wouldn't  
8 make any sense to discuss that between and among the  
9 parties without some sense of what the controlling law  
10 would be. You don't need to confront this at the last  
11 minute.

12 QUESTION: But ordinarily, you know, if you're  
13 going to get a ruling from a district court you ordinarily  
14 would have one party actually present, the other party  
15 present. To simply kind of casually ask a judge, you  
16 know, what's the law in this case, I think most judges  
17 would tell you, well, you know, you brief me. I'm not  
18 going to brief you.

19 MR. MATTHIAS: Well, that's right, except  
20 Mr. Ashmus knows very well that it's entirely possible to  
21 go to your Federal district court judge with questions,  
22 uncertainties that you have about the application of  
23 AEDPA, and you get lickety-split answers.

24 QUESTION: Yes, but may I just go -- you never  
25 completed your answer to Justice Breyer as far as I was

1 concerned, because you gave the example if he thinks 134  
2 applies, or 154 applies then he'll act pursuant to 2262,  
3 grant the stay, and so forth.

4 It seems to me most judges in the Ninth Circuit,  
5 district judges are probably going to think that the court  
6 of appeals was right on the ultimate issue, and that 153  
7 applies, just as a practical matter, even if we vacate the  
8 decision.

9 MR. MATTHIAS: No. As -- I suspect strongly  
10 Your Honor is exactly correct.

11 QUESTION: But then what happens if the judge  
12 thinks, well, I'll follow 153, when he comes in and asks  
13 for a lawyer and a stay?

14 MR. MATTHIAS: Then he gets the benefit, the  
15 inmate knows that he will not be held to 154, we express  
16 our objections, and that will become an issue that will be  
17 reviewed in due course.

18 QUESTION: And --

19 QUESTION: But in due course it may turn out the  
20 inmate's wrong --

21 QUESTION: He's wrong --

22 QUESTION: -- and end of line. That's the  
23 dilemma.

24 MR. MATTHIAS: Well, it may still turn out --

25 QUESTION: I mean, you just backed yourself into



1 it. There is a problem, and I would think that California  
2 would be as interested as the prisoners in knowing whether  
3 or not it is correct that California has a unitary  
4 procedure within the meaning of the statute, and much of  
5 that's going to be determined as a matter of State law.

6 MR. MATTHIAS: We are enormously interested --

7 QUESTION: Which is why I asked you in the first  
8 place whether they couldn't go into State court and  
9 determine whether there are State laws that establish what  
10 is required for a unitary proceeding.

11 MR. MATTHIAS: Your Honor, I assure you the  
12 State is enormously interested in attaining resolution of  
13 this question. We are simply not interested in being sued  
14 under circumstances where we are immune in order to attain  
15 resolution to that question.

16 QUESTION: Well, let me ask you, suppose you had  
17 conferred in the Office of the Attorney General and you  
18 said, you know, this suit is a vehicle for us to get a  
19 quick answer. We'll know one way or the other. We'll  
20 know if we have to adopt a special rule or statute, so  
21 we'll accept the jurisdiction of the court, but we don't  
22 want an injunction. Would that have made any sense?

23 MR. MATTHIAS: It certainly would have been --  
24 it would have made enormous sense to insist up on no  
25 injunction, because that's preposterous and unprecedented.

1           QUESTION: Well, but then what good would the  
2 class action have done without the injunction, because  
3 then these petitioners would be in the same position as if  
4 they hadn't filed a class action at all. They still have  
5 to look at their calendar and file their petitions, or am  
6 I wrong about that?

7           MR. MATTHIAS: My only response to that is, I --  
8 to the extent that there is an insoluble dilemma created  
9 by the AEDPA, and I don't believe it's at all insoluble,  
10 but to the extent it is troubling and the stakes are  
11 indisputably high, that is a function of the AEDPA itself,  
12 not what State officials say about the AEDPA.

13           QUESTION: Thank you, Mr. Matthias.

14           Mr. Laurence, we'll hear from you.

15           ORAL ARGUMENT OF MICHAEL LAURENCE

16           ON BEHALF OF THE RESPONDENTS

17           MR. LAURENCE: Mr. Chief Justice, and may it  
18 please the Court:

19           The question before this Court is when a State  
20 has declined to participate in a Federal program, does Ex  
21 parte Young permit a declaratory judgment action to  
22 prevent State officials from unlawfully, not necessarily  
23 illegally, obtaining the benefits?

24           QUESTION: What's the difference between  
25 unlawfully and illegally?

1           MR. LAURENCE: The unlawfully aspect of this  
2 case is that Ex parte Young doesn't focus merely on  
3 whether the State's actions are illegal, but rather  
4 whether or not the State's actions interfere with a  
5 cognizable Federal right, and that is precisely what --

6           QUESTION: Well, that's not really right. It's  
7 only been used to enjoin some kind of continuing violation  
8 of Federal law and as I understood this new Federal  
9 procedure, the State isn't obliged to opt for a unitary  
10 review procedure.

11           It's an option open to a State that meets  
12 certain requirements, and California now has passed a  
13 statute apparently trying to opt in, but it doesn't  
14 violate the law by not doing so, or by taking a position  
15 on whether it wants to or doesn't want to. I mean, that's  
16 just the strangest complaint that you've made.

17           MR. LAURENCE: The question of whether or not  
18 California's entitled to the benefits of Chapter 154 is  
19 one that Congress determined by the presence of a statute.  
20 Either 153 applies --

21           QUESTION: No, the State does not have to try to  
22 opt in to unitary review. It's an option open to the  
23 State.

24           MR. LAURENCE: That's absolutely correct. The  
25 State does not have to opt in under Chapter 154. They can

1 maintain the status quo under Chapter 153, and States  
2 cannot be sued to be forced to opt in under Chapter 154,  
3 but Congress did say that if the State does not opt in to  
4 Chapter 154, they are not entitled to the benefits of  
5 Chapter 154.

6 QUESTION: But your injunction that you obtained  
7 in the district court prohibits the State from taking the  
8 position that 154 applies, and the State says, it seems to  
9 me with considerable justification, that there is nothing  
10 illegal about our arguing the position, and you have  
11 therefore taken away one of the principal threshold  
12 primary tests for Ex parte Young.

13 The State is doing nothing illegal in arguing a  
14 position.

15 MR. LAURENCE: What the district court found as  
16 a matter of fact as well as a matter of law is that the  
17 effect of the threats that the State of California would  
18 invoke Chapter 154 in future habeas proceedings was that  
19 petitioners were forced to comply with 154 in -- without  
20 regard to the law.

21 QUESTION: But that has nothing to do with the  
22 State's position, the State violating the law. So it put  
23 these death row inmates to their option, but that  
24 doesn't -- the State has a perfect right, I would think,  
25 to make an argument that thus-and-such is so. If it's



1 wrong, it will be told so, but to make an argument of law  
2 that ultimately turns out to be incorrect surely is not  
3 violating the law.

4 The district court -- you know, a lot of mumbo-  
5 jumbo doesn't change that.

6 MR. LAURENCE: What the district court found was  
7 that Chapter 154 does not apply in California. That was  
8 the basis for the declaratory judgment.

9 To give effect to that declaratory judgment,  
10 however, the court found it necessary to enact a re --  
11 antirelitigation injunction, preventing the State from  
12 going to the next courtroom and saying, we don't care what  
13 this judge said over here, Chapter 154 does apply here, in  
14 an attempt at creating divergence opinions, and divergent  
15 opinions are precisely what Justice O'Connor pointed to as  
16 the problem.

17 QUESTION: But Mr. Laurence, I take it from what  
18 you said about the declaratory judgment that nothing  
19 really turns on California's bragging or -- that the  
20 defendants on death row would be in precisely the same  
21 position if the California Attorney General didn't speak  
22 one word, as long as there was a realistic suspicion that  
23 California might take this position. Suppose somebody in  
24 the AG's office said, yeah, we might take that position.

25 I don't see where you have made a lawsuit on the

1 basis of what the Attorney General said he would do any --  
2 I don't see that your case is any stronger than it would  
3 be if all there was was a suggestion that California might  
4 make such a claim. If your death row inmate is  
5 differently situated in those cases, explain to me why.

6 MR. LAURENCE: That is absolutely correct, that  
7 whether or not you're entitled to a declaratory judgment  
8 does not turn on whether or not the State officials have  
9 already asserted compliance with Chapter 154.

10 QUESTION: So you're saying every death row  
11 inmate in every State in the country could come in and  
12 say, district court, give us the assurance that when we  
13 file our petition it will be under 153 and not 154.  
14 Nothing peculiar to California and the Attorney General  
15 having acted in a certain way.

16 MR. LAURENCE: I think there are two limiting  
17 principles here that would prevent that kind of result.  
18 The first one is the operation of Ex parte Young can only  
19 apply when Congress has established two mutually exclusive  
20 procedures for governing habeas procedures and the State  
21 is the gatekeeper.

22 QUESTION: But I'm not even getting up to Ex  
23 parte Young. I'm getting up to, do we have a case or  
24 controversy fit for Federal adjudication?

25 Looked at one way, this is a plaintiff coming in

1 and saying, Federal court, please knock out what would be  
2 an affirmative defense to my habeas case.

3 Ordinarily, you simply can't go to a court and  
4 say now, I've got this lawsuit, but there's a defense in  
5 it, and I'd like to have a separate lawsuit about that  
6 defense to knock out that defense, and then I'll come in  
7 with my lawsuit.

8 That in any other context would be unimaginable,  
9 that a plaintiff could come in with a lawsuit and say, but  
10 I've got a threshold lawsuit which will be to knock out  
11 this affirmative defense, and then we can have a nice  
12 clean lawsuit, without that defense.

13 MR. LAURENCE: That goes to the second limiting  
14 principle that I think is present in this case, and let me  
15 first say that standing, ripeness, and cause of action  
16 were all litigated below, and the State has waived any  
17 consideration by this Court of those issues.

18 QUESTION: Oh, you cannot waive the presence of  
19 an actual case or controversy within Article III. Nobody  
20 can waive that.

21 MR. LAURENCE: Absolutely not.

22 QUESTION: We're obliged to raise that on our  
23 own.

24 QUESTION: You can raise standing.

25 QUESTION: And that's what I'm raising.

1           This, I think you'll agree with me, is a  
2    plaintiff saying, I am a potential habeas petitioner. In  
3    my habeas case, I don't want them to raise that defense,  
4    because it will be literally death for me, so I want an  
5    anticipatory suit to get rid of what would be an  
6    affirmative defense in my full-blown lawsuit.

7           I don't know of any other situation like this.

8           MR. LAURENCE: And I agree, Your Honor, and to  
9    clarify my earlier remarks, the cause of action argument  
10   was the one that was expressly raised by the petitioners  
11   in the reply brief, but --

12           QUESTION: Well, that's a 12(b)(6) question.  
13   I'm --

14           MR. LAURENCE: That's correct.

15           QUESTION: -- way short of that. I'm really  
16   asking, do we have a justiciable case or controversy under  
17   Article III when a plaintiff comes to court and says,  
18   before I bring my complaint, please knock out an  
19   affirmative defense.

20           MR. LAURENCE: If we fulfill the requirements of  
21   the Declaratory Judgment Act, which is a discretionary  
22   jurisdiction but is limited to specific circumstances  
23   where the rights and responsibilities of the parties must  
24   be decided before there's irreparable injury, then I  
25   believe we are properly before this Court.



1 QUESTION: Well, the declaratory judgment is a  
2 remedy. It isn't -- doesn't create jurisdiction that  
3 wouldn't exist otherwise.

4 MR. LAURENCE: That's correct, and under section  
5 1331 there's no question that this Court has jurisdiction  
6 because this dispute arose from a Federal statute. Which  
7 of the two competing procedures apply to habeas  
8 petitioners in California.

9 QUESTION: Do you know any other instance in  
10 which someone has gotten a declaratory judgment on just an  
11 abstract issue of law, whether 153 or 154 applies, as  
12 opposed to whether I am entitled to occupy this property,  
13 or whether, you know, a particular right -- this is no  
14 adjudication of any right of your clients at all, whether  
15 they're entitled to get out of prison, whether they're --  
16 you know, it's just a declaratory judgment for a  
17 declaration about an abstract proposition of law. I  
18 didn't know you could use declaratory judgment for that.

19 MR. LAURENCE: It's not an abstract --

20 QUESTION: I thought you had to have a cause of  
21 action. Maybe it was a little early that you're asserting  
22 it, but you have to be making a claim of right.

23 MR. LAURENCE: And the claim of right I believe  
24 stems from Chapter 153 and 154. Congress said --

25 QUESTION: -- not claim of right. You're

1 claiming that -- as Justice Ginsburg said, you're raising  
2 an anticipatory defense and saying that defense is  
3 invalid. That's not a right.

4 MR. LAURENCE: Congress I believe established  
5 that these two procedures cannot coexist, that habeas  
6 petitioners, by default, as this Court recognized in *Lindh*  
7 *v. Murphy*, are entitled to the benefits of Chapter 153.  
8 They have 1 -- up to 1 year to file their Federal  
9 petitions. They have the normal rules of amending those  
10 petitions, and they have the additional procedures that  
11 are governed by 153.

12 Chapter 154 is far more restrictive, requiring  
13 habeas petitioners to do far more faster than anything we  
14 ever saw in Chapter 153.

15 If Congress intended our rights to be vindicated  
16 under Chapter 153, the only way to obtain those rights is  
17 a declaration that we are entitled to those rights.

18 QUESTION: Well, Mr. Laurence, supposing in a  
19 somewhat different context you have a claim that you want  
20 to bring under 1983, some sort of a civil rights claim,  
21 but you're not ready to bring the claim yet, and you're  
22 worried which statute of limitations, which State statute  
23 of limitations will the Federal court apply to your case.

24 Do you think you can go in and say, I'm not  
25 ready to file yet, I just want to know what statute of

1 limitations is going to apply?

2 MR. LAURENCE: I believe in most circumstances  
3 the answer is no.

4 QUESTION: Why should it be different here?

5 MR. LAURENCE: A statute of limitations that  
6 does not depend upon an assertion of a defense by a State  
7 officer does not involve the same kind of problems that  
8 were recognized in Ex parte Young.

9 QUESTION: Yes, but the problems are --  
10 certainly that doesn't make it any easier for you. It  
11 makes it harder.

12 MR. LAURENCE: I'm sorry, it does make it more  
13 difficult to understand what the law is, but Congress has  
14 not established these two independent statute of  
15 limitations depending on what the State officials do after  
16 you have filed in excess of the time permitted by one of  
17 those statute of limitations.

18 QUESTION: Mr. Laurence, is it clear that the  
19 application of the statute of limitations depends, as you  
20 say, upon the assertion of a defense by the State?

21 Suppose California comes in and says, we don't  
22 qualify for 154 treatment, whereas they plainly do. Do  
23 you think a Federal court can ignore 154?

24 MR. LAURENCE: Absolutely not.

25 QUESTION: And say, because California wants to

1 do it the old way, and they like these lengthy procedures,  
2 we're going to subject the Federal court to these lengthy  
3 procedures? Does it make any difference whether  
4 California asserts it or not?

5 MR. LAURENCE: It makes a difference in that  
6 they can only apply if the State qualifies, that's  
7 correct.

8 QUESTION: If the State qualifies, not if the  
9 State asserts that it qualifies.

10 MR. LAURENCE: I don't believe that any court  
11 has held that we are going to apply Chapter 154 despite  
12 the fact the State has not demonstrated --

13 QUESTION: Well, I'll be darned if I'm going to  
14 let a State make the Federal process more cumbersome than  
15 Congress has said just because it chooses to. You don't  
16 think a Federal court is going to allow that, do you?

17 MR. LAURENCE: I respectfully disagree. I do  
18 believe that this is a unique situation where Congress has  
19 said the States must come forward and demonstrate that  
20 they opt in to get these beneficial provisions. If a  
21 State fails to do that, then the habeas petitioners have  
22 the right under Chapter 153 to have their habeas  
23 proceedings processed by that chapter.

24 QUESTION: I -- we know the substantive part,  
25 but I'm having the same problem. I don't -- and I think



1 your case turns on this. I don't see any need for an  
2 injunction here if you can get a declaratory judgment.  
3 After all, you get a declaratory judgment, appeal that,  
4 you'll get an authoritative ruling, but what right do you  
5 have to a declaratory judgment?

6 Now, you must have read about declaratory  
7 judgments in preparation for this. Everybody's asking you  
8 I think the same question. Can you find any analogy at  
9 all -- I mean, I can be helpful, I think.

10 I know that you can get a declaratory judgment  
11 against the State where the State's threatening to do  
12 something bad to you. I know you can get a declaratory  
13 judgment against the State where the State's threatening  
14 to bring a lawsuit against you and there's good reason for  
15 proceeding first. I know you can get a declaratory  
16 judgment about a defense if they think almost certainly  
17 the thing's going to be raised and there's very good  
18 reason, you know, for finding out the defense first.

19 So you've read those cases. I haven't. What's  
20 your best way of saying, even if there's nothing right on  
21 point, we can get a declaratory judgment here even though  
22 it's about a defense likely to be brought in a lawsuit  
23 called habeas corpus that I, who want the declaratory  
24 judgment, are going to bring?

25 MR. LAURENCE: I think the case most on point is

1 this court's decision in Steffel v. Thompson, in which  
2 this Court said a threat for future proceedings brought by  
3 State officers which interferes with a person's Federal  
4 rights is a proper -- proper forum to bring it within a  
5 declaratory judgment act.

6 QUESTION: But there the people had been  
7 arrested and the threat was to continue the arrests. It  
8 wasn't just taking a position on some legal point.

9 MR. LAURENCE: If I remember the facts  
10 correctly, the two people who brought the lawsuit  
11 originally had not been arrested.

12 QUESTION: But there was -- they proved a  
13 continuing threat of arrest, did they not?

14 MR. LAURENCE: The continuing threat was the  
15 threat to take action. That is absolutely correct.

16 QUESTION: Well, to take action of arresting  
17 them.

18 MR. LAURENCE: But this Court hasn't  
19 distinguished between arresting or threatening some other  
20 type of proceeding for the purposes of the Declaratory  
21 Judgment Act, and in fact the State's position in this  
22 case before the district court was that, despite the fact  
23 that a Declaratory Judgment Act -- declaratory judgment  
24 would be entered, they planned and were wishing to seek a  
25 divergent opinion in the very next courtroom. That is the

1 basis for the injunction.

2 QUESTION: But if -- cases like Great Lakes v.  
3 Huffman and others say that you have to comply with  
4 virtually the same requirements to get a declaratory  
5 judgment that you have to comply with to get an  
6 injunction, so it's not as if you can avoid the principles  
7 of injunctive law on the merits by saying all I want is a  
8 declaratory judgment. You have to make a showing there,  
9 too.

10 MR. LAURENCE: You certainly have to make a  
11 showing that there's an actual case or controversy as well  
12 as the particular requirements of standing, Federal  
13 jurisdiction, and everything else, but the State here has  
14 conceded that a declaratory judgment was proper in the  
15 district court if it had been made in a habeas proceeding  
16 in behalf of an individual petitioner.

17 QUESTION: Well, that wouldn't be so much of a  
18 declaratory judgment. That would simply be a ruling on  
19 the habeas petition that it was timely filed. You know,  
20 in that sense you can say that any number of rulings are  
21 declaratory judgments. I don't think the State concedes  
22 that a separate declaratory judgment would be proper.

23 MR. LAURENCE: Well, in the district court they  
24 did, Your Honor, and I refer to the proceedings that were  
25 conducted on May 6, 1996, where they actually -- I'm --

1     pardon me. They stated that a declaratory -- you can get  
2     a declaratory judgment in the actual habeas proceeding  
3     brought by Mr. Troy Ashmus.

4             Now, of course, they can't concede Federal court  
5     jurisdiction, nor can they concede any of the other  
6     aspects.

7             QUESTION: I don't understand that point,  
8     because it seems to me if they bring it, say, after 180  
9     days the judge makes a ruling of law in that case. They  
10    don't have to label it a declaratory judgment or anything.  
11    This is -- how is it any different from a defendant pleads  
12    statute of limitations, the judge rules on that  
13    affirmative defense and rejects it? Why do you label that  
14    declaratory judgment? It's just a ruling on the  
15    timeliness of the lawsuit.

16            MR. LAURENCE: It certainly doesn't have the  
17    label of a declaratory judgment, necessarily, but when we  
18    were discussing the alternatives in the district court and  
19    the Ninth Circuit the State took the position that you  
20    would get the same declaratory judgment in Mr. Ashmus'  
21    habeas proceeding. That would be a binding order that  
22    would provide some protection to Mr. Ashmus.

23            Now, of course, this case wasn't brought only on  
24    behalf of Mr. Ashmus. It is a class action --

25            QUESTION: But the problem is -- you gave us



1 Steffel v. Thompson, where I suppose the defendant -- the  
2 petitioner is trying to ward off the State instituting  
3 criminal proceedings against him. Wasn't that it?

4 MR. LAURENCE: The person actually wanted to  
5 handbill at a mall and was threatened with arrest for  
6 loitering, for distributing the handbills.

7 QUESTION: Right. So that has all the feel of a  
8 concrete -- I mean, he said, I've done it, they told  
9 they're going to arrest me, I'm going to do it again,  
10 they're going to arrest me again.

11 But here we just -- we have an -- a question  
12 abstracted from a controversy down the road, and I think  
13 there are all kinds of courts in the world, even in some  
14 States that can say, this is what the law means, but the  
15 Federal courts don't have that kind of authority.

16 MR. LAURENCE: Maybe it would be helpful if I  
17 bring it to actually one individual case. Mr. Clarence  
18 Ray, who was affirmed -- his convictions and death  
19 sentence was affirmed by the California supreme court on  
20 May 6, 1996.

21 A reading of Chapter 154 by anyone would say  
22 that the time for filing his Federal petition has begun to  
23 run unless he takes some further action.

24 QUESTION: But that's true -- what you're saying  
25 now is true of every person in every State that might say

1 154 applies. Every death row inmate is identically  
2 situated to the person you're just describing.

3 MR. LAURENCE: Where they have to make some  
4 decision about how to proceed.

5 QUESTION: Where they -- whether the State has  
6 said anything as long as there is any genuine concern that  
7 the State might attempt to qualify, that person is going  
8 to be facing the kind of dilemma that you're bringing to  
9 our attention.

10 So I don't see anything that you -- anything  
11 additional stemming from what the California Attorney  
12 General said unless a State says, look, we're know we're  
13 so far away from compliance, and some of them have, I  
14 understand, so it's going to be 153 for us, because we  
15 could never prove that we have all our ducks in line.

16 Unless a State is saying that it's 153 for us  
17 because we can't comply with 154, then every defendant,  
18 every person on death row in any State that might claim  
19 154 could bring exactly the case that you're bringing, a  
20 class action.

21 MR. LAURENCE: I would think they would have to  
22 show some actual case or controversy. They would have to  
23 demonstrate that the State could plausibly claim  
24 entitlement to Chapter 154.

25 QUESTION: Right. Right.

1 MR. LAURENCE: But I would think that those  
2 kinds of situations likely are going to be resolved either  
3 by this, resorting to this mechanism, or by individuals in  
4 cases such as Maryland, which has only six people on death  
5 row at the time they filed their complaint, in any  
6 individual case.

7 QUESTION: Mr. Laurence, getting down to one of  
8 the themes that we have here, which is what's different  
9 about the claim that you're making from the claim of any  
10 litigant who says, I'm not quite sure when to sue, so I'd  
11 like to bring a preliminary threshold action to litigate  
12 the possibility of affirmative defense of the statute of  
13 limitations --

14 MR. LAURENCE: I think that --

15 QUESTION: What is at stake here that's not at  
16 stake there? In each of those cases, if the litigant  
17 comes in on the assumption that the shorter statute  
18 applies, the litigant is going to lose some luxury of time  
19 which the litigant would have had if the longer statute  
20 applies, so no question, you would lose that, too.

21 Do you lose anything else?

22 MR. LAURENCE: You do if you're uncertain as to  
23 the law and you don't know, for example, in Mr. Ray's case  
24 what he should have done on May 6, his options are this:

25 He could have filed a pro se Federal petition

1 without the assistance of counsel to toll the time for the  
2 Chapter 154 statute of limitations.

3 He could have filed a pro se State habeas  
4 petition. His first petition would toll the statute of  
5 limitations, yet he would have done so without the basis  
6 of investigation or resources that Congress --

7 QUESTION: So you're saying if one or the other  
8 applies, he better get his petition for counsel in fast.

9 MR. LAURENCE: He has to make some decisions.

10 QUESTION: All right. Is that enough to elevate  
11 this to the level of a case or controversy whereas a  
12 normal statute of limitations doubt would not suffice as a  
13 case or controversy?

14 MR. LAURENCE: I think the Congress has set up  
15 this statutory scheme where it intends one of the two  
16 circumstances to apply, and those circumstances involve  
17 the risk that people will be executed because they have  
18 made the wrong choice.

19 QUESTION: What about his suggestion that you  
20 could structure this differently? I take it to be that  
21 you file it within 180 days. You move for a stay for a  
22 year-and-a-half. The State comes in and says, that's  
23 absurd, a stay for a year-and-a-half, because the Congress  
24 wants this quickly.

25 You stipulate that it is absurd, unless they



1 don't comply, you see, making your legal argument. The  
2 judge decides one way or the other. You ask for a  
3 certified appeal. You get an appeal to the Ninth Circuit.

4 I take it he's suggesting something like that as  
5 a route. Is there anything wrong -- of course, I don't  
6 know if you can structure it that way or not.

7 MR. LAURENCE: It is possible for the 110  
8 individuals who are in Federal court --

9 QUESTION: I mean, you couldn't get a class, but  
10 you could get a test case.

11 MR. LAURENCE: But the test case would not have  
12 been resolved until after the running of that 6 months.

13 QUESTION: Everybody would have to file the  
14 protective and ask for the stay. I mean -- I'm trying to  
15 make something of what he was saying.

16 MR. LAURENCE: Absolutely.

17 QUESTION: And everybody would have to file  
18 within the 180 days, immediately move for a stay, so he  
19 can bring it a year later, and the issue of whether that  
20 stay is proper or not proper would turn on exactly what  
21 you want to raise.

22 MR. LAURENCE: And that would have been a remedy  
23 for the 50 or so individuals in Federal court at the time  
24 we brought this lawsuit who hadn't filed petitions yet,  
25 but our class contains 300 members who were not in Federal

1 court or who were in Federal court without counsel.

2 Mr. Monteo, who's case was affirmed on April 26,  
3 had to wait 6 months before he got counsel from the  
4 district court. During that time period, if he had not  
5 been part of this lawsuit, he would have had to make a  
6 decision to either file a declaratory judgment motion by  
7 himself or a Federal petition by himself in order to stay  
8 the tolling of the time period.

9 It is those individuals who don't have counsel  
10 or the ability to get into Federal court who had to know  
11 which of these two provisions apply.

12 QUESTION: But isn't it also true that it's not  
13 just a stay. The first petition he files may be  
14 incomplete. He may not have thought of all his claims.  
15 The question would be whether he has a right to amend  
16 after the period goes by if 154 applies.

17 MR. LAURENCE: That's absolutely correct,  
18 because if you file your petition and you're governed by  
19 Chapter 153, the normal rules of amendments apply, but if  
20 you're -- if you file a petition and you're governed by  
21 Chapter 154, you cannot --

22 QUESTION: Amend it --

23 MR. LAURENCE: -- except under exceptional  
24 circumstances amend that petition.

25 All the petitioners and the plaintiffs in this

1 case are asking for is some guidance as to how the rules  
2 are going to be played in Federal court. They ask for no  
3 more, but they certainly ask for no less.

4 QUESTION: Well, we have certain rules, too, you  
5 know, as to when various pleadings have to be filed, as  
6 well as statutory rules about, you know, how long after  
7 the judgment in the court of appeals you can seek  
8 certiorari.

9 Why is your case different from the case in  
10 which someone claims that the judgment in the court of  
11 appeals was entered at a much later date than the other  
12 side could plausibly claim? Can that person bring a suit  
13 against the other side asserting that the judgment in the  
14 court of appeals was entered at the later date in order  
15 that he can assure himself of having another year to  
16 prepare his petition for certiorari?

17 MR. LAURENCE: I don't believe so. I don't --

18 QUESTION: Why not?

19 MR. LAURENCE: I don't believe that the rules  
20 governing when you must file the cert petition depend upon  
21 the actions of the other party. That is precisely the  
22 situation here.

23 QUESTION: Oh, it doesn't depend on the -- oh, I  
24 see. It depends -- you mean, it depends on the action of  
25 whether the State has adopted the rule.

1 MR. LAURENCE: Absolutely.

2 QUESTION: Not on whether the State has -- is  
3 taking the position that they satisfy the statute. Yes.

4 MR. LAURENCE: Exactly, and the other option  
5 that the habeas --

6 QUESTION: That is --

7 MR. LAURENCE: -- petitioners had is that they  
8 could have waited until their petitions were finally  
9 complete, filing them 6, 7, 8, 9 months after their direct  
10 appeal was concluded, and risk having the State come in  
11 and say, I'm sorry, you will be executed because you  
12 failed to comply with the 6-month statute of limitations.

13 And Justice O'Connor's question at the beginning  
14 of this proceeding I think was completely appropriate,  
15 which is, do we want to have a uniform resolution of the  
16 systemic question, and I think the answer has to be yes,  
17 and you have to provide habeas petitioners with some means  
18 of ascertaining their rights.

19 QUESTION: And that answer would be yes even if  
20 the State had said nothing at all on this question, just  
21 the fact that they might do it?

22 MR. LAURENCE: I believe so. I believe that it  
23 does not depend on whether or not they assert compliance  
24 if they have the capability of asserting compliance.

25 If they sat in their offices and said, we'll let



1 you know in 6 months whether or not the statute is going  
2 to apply to you, then I think you have a Declaratory  
3 Judgment Act that allows you to come in and say, we have a  
4 real controversy here, because Congress says there are two  
5 competing mechanisms. Please decide --

6 QUESTION: I just want to be clear on what your  
7 position is, that this could be done in every State except  
8 for those States that have admitted that they fall far  
9 short of what's required to fit under 154.

10 MR. LAURENCE: Or where the issue has -- doesn't  
11 have to address 400 individuals. For example, Maryland,  
12 which could have done this in a simple district court  
13 action in which the habeas petitioner could have resolved  
14 that issue on his behalf.

15 We're talking about California, that has --

16 QUESTION: Well, the fact that there are only  
17 six people in -- maybe, if that's what you're talking  
18 about in Maryland on death row, it still would have to  
19 bring this kind of a threshold case, because whether we're  
20 talking about six or 600 they all still face the dilemma  
21 that you say. If we file now, when we haven't  
22 investigated, it's going to be an inadequate complaint, so  
23 that shouldn't matter.

24 That there are only six shouldn't affect whether  
25 you can bring this kind of lawsuit.

1           MR. LAURENCE: That's correct, Your Honor, if  
2   you've satisfied the requirements for the Declaratory  
3   Judgment Act.

4           Thank you.

5           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6   Laurence. The case is submitted.

7           (Whereupon, at 12:16 p.m., 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:

ARTHUR CALDERON, WARDEN, ET AL. Petitioners v. TROY A. ASHMUS, ETC.  
CASE NO: 97-391

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

BY Donna Marie Fedele  
(REPORTER)