IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -X

GEORGE DUNCAN, SUPERINTENDENT, :

GREAT MEADOW CORRECTIONAL :

FACILITY, :

Petitioner :

v. : No. 00-121

SHERMAN WALKER. :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, March 26, 2001

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

APPEARANCES:

PREETA D. BANSAL, ESQ., Solicitor General of New York, New York, New York; on behalf of the Petitioner.

DEBORAH W. LOEWENBERG, ESQ., New City, New York; on behalf of the Respondent.



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P R O C E E D I N G S

(11:05 a.m.)

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

Ms. Bansal.

ORAL ARGUMENT OF PREETA D. BANSAL

ON BEHALF OF PETITIONER

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

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

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



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erroneous.

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

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

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



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

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

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

MS. BANSAL: If you look --

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

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

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

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

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



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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

out and addressing that.

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

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

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

QUESTION: Because?

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

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



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

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

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

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

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

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

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

MS. BANSAL: That's correct.

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

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

In the habeas context as well. In Wainwright v.

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

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

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

claims that he was claiming in the first petition.

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

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

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

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

QUESTION: I see.

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

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

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

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

QUESTION: Yes.?

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

QUESTION: There is not?

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

QUESTION: Because of the unexhausted claim?

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

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

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

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



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

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

QUESTION: Are preserving your time, Ms. Bansal?

MS.BANSAL: Yes, thank you.

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

ORAL ARGUMENT OF DEBORAH W. LOEWENBERG

ON BEHALF OF RESPONDENT

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

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

QUESTION: And this is derived from the statute?

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

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

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

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

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

QUESTION: Why is review any more implicit than state?

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

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

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

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

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

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

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

MS. LOEWENBERG: Your Honor --

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

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

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

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

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

some other considerations in construing that language.

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

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

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

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

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

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

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



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

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

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

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

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

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

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



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MS. LOEWENBERG: Absolutely, Your Honor.

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

MS. LOEWENBERG: They do not.

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

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

QUESTION: Why does that happen?

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



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

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

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

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

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

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

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

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

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

unique petitioner.

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

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

QUESTION: So we should reject that principle then.

MS. LOEWENBERG: I --

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

MS. LOEWENBERG: Justice Scalia --

QUESTION: -- for rejecting the equitable tolling.

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

QUESTION: You got to either like it or not like



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

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

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

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



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

MS. LOEWENBERG: I'm --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: And nothing was done.

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

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

If there aren't any further questions?

QUESTION: Thank you, Ms. Loewenberg.

Ms. Bansal, you have eleven minutes remaining.

REBUTTAL ARGUMENT OF PREETA D. BANSAL

ON BEHALF OF THE PETITIONER

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

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

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

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

MS. BANSAL: I'm sorry?

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

MS. BANSAL: Right.

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

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

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

MS. BANSAL: Right.

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

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

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

QUESTION: Because?

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

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

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



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court processes. But --

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

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

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

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

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

MS. BANSAL: That's correct.

QUESTION: Yes.

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

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

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