

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JEANNE WOODFORD, WARDEN,                   :

4                   Petitioner                   :

5           v.                                       :   No. 01-1862

6   ROBERT FREDERICK GARCEAU.                   :

7   - - - - -X

8                                       Washington, D.C.

9                                       Tuesday, January 21, 2003

10               The above-entitled matter came on for oral

11   argument before the Supreme Court of the United States at

12   10:06 a.m.

13   APPEARANCES:

14   JANIS S. McLEAN, ESQ., Supervising Deputy Attorney

15       General, Sacramento, California; on behalf of the

16       Petitioner.

17   LYNNE S. COFFIN, ESQ., State Public Defender, San

18       Francisco, California; on behalf of the Respondent.

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 01-1862, Jeanne Woodford,  
5 Warden versus Robert Frederick Garceau.

6 Ms. McLean.

7 ORAL ARGUMENT OF JANIS S. McLEAN

8 ON BEHALF OF THE PETITIONER

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

11 In Lindh versus Murphy, this Court held that  
12 chapter 153 was non-retroactive to cases pending at the  
13 time of AEDPA's enactment. In the general run of habeas  
14 cases, this is determined by the filing date of the  
15 application for habeas relief.

16 This case will resolve a split between the five  
17 circuits that apply this rule to capital cases and the  
18 Ninth Circuit which, instead, looks to the date the  
19 pre-application motion for counsel was filed in a capital  
20 case.

21 We believe that the five circuits are correct.

22 Neither chapter 153 nor Lindh versus Murphy  
23 identifies the commencement event that triggers the  
24 application of chapter 153. In light of this, we must  
25 determine Congress' intent, and the first place to look is

1 to the express terms of chapter 153 and, of course,  
2 AEDPA's purposes to expedite habeas cases and to provide  
3 greater deferential review to State -- State criminal  
4 convictions.

5 Chapter 153 by its terms can only apply to a  
6 merits petition. It repeatedly contains express language,  
7 such as that contained in 2244(d), which is found at  
8 petitioner's appendix 185, which concerns the statute of  
9 limitations provisions and provides that the statute of  
10 limitations applies to the application for habeas relief.

11 Similarly, the standard of review in 2254(d) at  
12 petitioner's appendix 191 --

13 QUESTION: Well, what do we do about McFarland's  
14 approach?

15 MS. McLEAN: Your Honor, I believe that -- that  
16 these are easily reconciled. I believe that it -- that  
17 there's a -- I think the habeas proceedings can be -- are  
18 unique and can be extended. They can also be divided  
19 into -- into segments.

20 The first phase is the pre-application phase,  
21 which is what McFarland was concerned about. In that  
22 case, this Court was concerned about providing, pursuant  
23 to 21 U.S.C. 848 -- concerned about the pre-application  
24 grant of counsel to habeas petitioners. But that is  
25 entirely separable from the merits proceeding that occurs

1 after the filing of the -- of the petition itself which  
2 brings the merits before the court.

3 QUESTION: It's the difference between a case  
4 and a proceeding. How -- how do you get us here under the  
5 words of the statute?

6 MS. McLEAN: The -- actually, the provisions of  
7 chapter 153 themselves do not contain the word case.  
8 That -- we only come to that term at all because in this  
9 Court's opinion in Lindh, the Court looked to -- created  
10 a -- viewed the -- as being a negative inference from the  
11 absence of the pending cases language that appears in the  
12 154 provisions.

13 The 153 provisions do not have that -- those --  
14 that term in them. Instead, they use the specific express  
15 words of an application. They clearly apply to an  
16 application. And the case -- that's reconcilable because  
17 the portion of the case that we're talking about is the  
18 merits portion of the -- of the case.

19 This Court recognized that there can be multiple  
20 cases in a habeas proceeding. In Slack versus McDaniel,  
21 the Court recognized that there could be a separate  
22 appellate case that --

23 QUESTION: How was it treated on the court's  
24 docket? I mean, the -- something was going on. There was  
25 a request for a stay. There was a request for the

1 appointment of counsel. So something was initiated, and  
2 what was that something called?

3 MS. McLEAN: That would -- it could be  
4 characterized as -- you could use the word case. You  
5 could use the word habeas corpus proceeding.

6 QUESTION: Do you know how it was in fact? How  
7 was it treated on the court's docket?

8 MS. McLEAN: It --

9 QUESTION: Was it given a case name and a file?

10 MS. McLEAN: It was -- it was certainly given a  
11 case name and assigned a case number, undoubtedly, but I  
12 do not --

13 QUESTION: And would that number indicate that  
14 it was a habeas petition?

15 MS. McLEAN: I'm sure it did because our courts  
16 in California, the -- the district courts have numbers  
17 that specify that it's a habeas proceeding.

18 QUESTION: So it was on the docket as a habeas  
19 case.

20 MS. McLEAN: That's correct.

21 QUESTION: And that's not good enough.

22 MS. McLEAN: That's not determinative. What  
23 I'm -- my position is, or our position is, is that  
24 these -- that the habeas proceeding is unique and  
25 extended. It includes three phases; includes the

1 pre-application phase, which is the -- what McFarland was  
2 concerned about. It -- it then has the merits application  
3 phase that begins with the filing of the application for  
4 habeas relief. It then also has the appellate phase.

5 QUESTION: Well, McFarland was a totally  
6 different statute from AEDPA, was it not? It -- it was --  
7 it's a totally separate statute.

8 MS. McLEAN: That's correct, Your Honor.

9 QUESTION: And really, what we're trying to  
10 interpret here, I take it, is the meaning of some of the  
11 language in Lindh. We're -- we're not talking about any  
12 specific language in -- even in AEDPA.

13 MS. McLEAN: Well, we're concerned about --  
14 Lindh used the phrase that -- that there was  
15 non-retroactivity of chapter 153 to cases -- to cases  
16 pending under 153.

17 So the question is, what is the commencement  
18 event that we talked about, that -- that we're referring  
19 to? What -- what creates the pending case for purposes of  
20 chapter 153?

21 For that, we have to look back to the express  
22 terms of the statute. Since 153 can -- doesn't apply to  
23 the -- the pre-application phase --

24 QUESTION: Why -- why would we look to the  
25 express terms of the statute when Lindh itself didn't rely

1 on any express terms of this statute? Why wouldn't we  
2 look to -- to what makes sense with respect to the rule  
3 that we have created?

4 MS. McLEAN: I would agree with that, that  
5 the -- what I'm saying is that in the absence of -- in the  
6 absence of language -- there's clearly an absence of  
7 language in 153 that addresses this commencement event.  
8 So that puts us into a position of looking to see what  
9 Congress intended based on what the express words of  
10 chapter 153 are. Is -- is there anything in chapter 153  
11 that tells us that, no, we didn't mean the -- the -- a  
12 commencement of a habeas proceeding based on the filing of  
13 an application? We meant something earlier, i.e., the  
14 motion for -- for a request for appointment of counsel.

15 And the answer to that is no. Simply no. There  
16 is nothing in chapter 153 that has anything to do with the  
17 pre-application proceeding. Those provisions, as is  
18 demonstrated by their terms and also the habeas corpus  
19 rules concerning chapter 2254 cases -- those only can  
20 apply -- expressly apply to applications for habeas  
21 relief. They do not apply to any earlier event, and it  
22 doesn't -- it thwarts the purposes of AEDPA by -- by  
23 unduly confining the number of cases covered by it,  
24 capital cases covered by it. It --

25 QUESTION: That's the part I wonder. I was



1 thinking that if it's open to -- pend -- the -- the  
2 case -- what is it called? Is it -- McFarland -- suggests  
3 that it's at least open to calling this pending. It's a  
4 possible construction.

5 MS. McLEAN: Yes, it's a possible construction.

6 QUESTION: And then -- and then it being a  
7 possible construction, I wonder, well, there was an awful  
8 lot of proceeding that went on here. There was a stay.  
9 It was opposed. And all of this took place before the --  
10 the petition was filed. So if the purpose of AEDPA, at  
11 least as we've interpreted it, is to stay away from  
12 proceedings that were already underway, this would seem to  
13 have been well underway.

14 MS. McLEAN: It was -- the -- the proceeding was  
15 well underway, but that doesn't -- is not determinative  
16 in -- in the sense that counsel had been appointed and a  
17 petition was in the works. But that --

18 QUESTION: That's -- that's what I want you to  
19 address precisely. That's where I'm uncertain. It seems  
20 as if the language -- you could -- you could -- you  
21 could -- the language is open to either interpretation --

22 MS. McLEAN: I don't --

23 QUESTION: And yet -- well, you -- you think  
24 it's more strong in your direction. I -- I understand  
25 that. But if -- say, if it's open to either

1 interpretation, then why doesn't the purpose of the  
2 application provisions, as we've interpreted them, suggest  
3 don't apply it where proceedings are well underway, which  
4 would mean the other side would win here. That's why I'm  
5 asking you. I want to see what your response is.

6 MS. McLEAN: In order to deviate from -- from  
7 the normal -- also, there is no question that in -- in the  
8 general run of habeas cases, it's triggered by the filing  
9 of the application. So the question is whether there's  
10 some justification, some harm that would be caused by  
11 not -- by treating them -- them being the capital cases --  
12 under the Ninth Circuit's ruling differently than we do  
13 the normal run of habeas cases. And there's nothing about  
14 the fact that a counsel had been appointed or that -- that  
15 a application was in the works, but not yet filed, that  
16 would prevent us or harm in any way those petitioners from  
17 ultimately being subject to the greater standards of  
18 deferential review that -- that AEDPA ultimately imposed.  
19 There's no harm whatsoever.

20 And it doesn't further -- it thwarts the  
21 purposes of AEDPA to do that. It -- it also creates a  
22 subclass of capital defendants who are treated  
23 differently --

24 QUESTION: But if everyone had focused on AEDPA,  
25 which they didn't because it wasn't enacted at the time

1 all this started, then maybe the district judge would have  
2 made the time lines different. And the district court had  
3 a proceeding before it with a number. It was classified a  
4 habeas case. And the district court set a rather relaxed  
5 schedule. He gave the counsel, appointed counsel, many  
6 months to file the actual petition. And if everybody had  
7 known that the -- that the time the district judge gave  
8 would mean that AEDPA would apply, then I assume counsel,  
9 being diligent, would have said, don't give me that much  
10 time. I have to get this in quickly.

11 MS. McLEAN: This case that's before the Court  
12 does not involve the statute of limitations, however. The  
13 concerns that you're expressing would be valid --

14 QUESTION: But you don't want AEDPA to apply, if  
15 you're diligent counsel, because the standards are much  
16 tighter.

17 MS. McLEAN: It does affect the standards of  
18 review, but they don't --

19 QUESTION: Well, counsel didn't have to take all  
20 the time that the district court allowed, did he?

21 MS. McLEAN: He did not need to, but he -- he  
22 was fully compliant.

23 To the extent that the Court's concern here  
24 appears to this counsel to be concerned about the statute  
25 of limitations, there was no issue here. This case came

1 in timely. And in fact, in the Ninth Circuit, they  
2 followed the same rule that all the other five circuits  
3 followed all the way up until 1998. So really the statute  
4 of limitations is virtually a non-issue in this situation.  
5 This case did -- the -- the -- any delays or long periods  
6 of times that were granted or anything didn't have  
7 anything to do with this case. There is no harm in this  
8 case.

9           The only issue is that now, once this case was  
10 in the district court and in the Ninth Circuit, should it  
11 be subject to the deferential standards of review that  
12 AEDPA imposed, and the answer to that is yes. There was  
13 no -- there is absolutely no harm in now saying that  
14 because the filing of the application came in after the  
15 enactment of AEDPA, that it should be subject, just as all  
16 other habeas cases are, to --

17           QUESTION: Do we know how many cases fall in  
18 this category? This is a transition case caught in  
19 between. No AEDPA when it all started; AEDPA in the  
20 middle before the petition is filed.

21           MS. McLEAN: That's correct.

22           QUESTION: How many cases are in that category?

23           MS. McLEAN: We believe -- we believe that it  
24 affects approximately -- in the Ninth Circuit,  
25 particularly in California, it affects approximately

1 45 capital cases.

2 QUESTION: 45 cases.

3 MS. McLEAN: It also -- it also, of course,  
4 affects the other -- those cases, those capital cases,  
5 that are covered by the other circuits which currently  
6 use -- all of which, other than the Ninth Circuit, as to  
7 those 45 cases, use the filing date of the application.  
8 So if the Court, obviously, was to choose the position  
9 advocated by respondent, it would change the standard of  
10 review from AEDPA to non-AEDPA in those States covered by  
11 those circuits.

12 In the Ninth Circuit, what will -- would happen  
13 if you adopted the position that I'm advocating is that  
14 you -- that those 45 cases in California, approximately  
15 45 cases in California, will now become AEDPA cases. And  
16 that will primarily affect the standard of review that is  
17 applied to them.

18 Garceau --

19 QUESTION: Do you happen to know -- that was a  
20 very good answer. Do you happen to know the number of  
21 cases in the other circuits if we ruled the other --

22 MS. McLEAN: I'm -- I'm sorry, Your Honor, I do  
23 not.

24 QUESTION: It's a vanishing problem in any  
25 event.

1 MS. McLEAN: That's certainly true, but it's  
2 very important. Garceau is the perfect example of why  
3 this is an important issue for this Court, the -- in  
4 Garceau, the -- the State -- the State supreme court  
5 issued a very well-reasoned opinion issuing -- saying that  
6 it had decided that error was harmless, upholding the  
7 conviction that occurred in this case. It went through  
8 the district court. The district court agreed. It went  
9 to the Ninth Circuit in 2001 -- this was a 1984 killing.  
10 In -- in 2001, it was reversed by the Ninth Circuit, which  
11 did -- because it did not believe it was an AEDPA case,  
12 refused to apply the deferential standard of review,  
13 refused to apply the precedents of this Court, instead  
14 looked at its own -- its own cases, and reversed it.

15 And this is -- you know, this is the most  
16 important -- a capital conviction in California is the  
17 most important cases -- some of the most important cases  
18 that that State issues. And -- and to have that reversed  
19 for the failure to apply this -- the standards that  
20 Congress imposed in 1996 is a very, very serious matter.  
21 And that's just one case. It's happened in other cases.  
22 And -- and so, we believe that it's very important to have  
23 this issue straightened out.

24 QUESTION: Do you wish to reserve the remainder  
25 of your time?

1 MS. McLEAN: Your Honor, I do. At this point,  
2 I would like to reserve my remaining time. Thank you.

3 QUESTION: Very well, Ms. McLean.

4 Ms. Coffin, we'll hear from you.

5 ORAL ARGUMENT OF LYNNE S. COFFIN

6 ON BEHALF OF THE RESPONDENT

7 MS. COFFIN: Mr. Chief Justice, and may it  
8 please the Court:

9 The issue is not whether this harms Mr. Garceau,  
10 but whether it is appropriate under this Court's precedent  
11 to rule the way the State asked this Court to rule.

12 For two independent reasons, the amendments to  
13 chapter 153 do not apply to Mr. Garceau.

14 First, it simply cannot be, as the State  
15 suggests, that after this Court found in McFarland that  
16 a capital case is commenced by the filing of a motion for  
17 counsel, that Congress then passed a new statute,  
18 intending it to be interpreted consistent with the dissent  
19 in this case. Congress must be presumed to have been  
20 informed by this Court's majority ruling in McFarland.  
21 The McFarland Court ruled that -- that Congress had  
22 permitted a capital proceeding to be initiated by the  
23 filing of a motion for counsel. That ruling was only  
24 2 years before Congress made major revisions to the habeas  
25 corpus law in AEDPA. Under statutory construction

1 principles, Congress must be found to have been aware of  
2 and followed this Court's precedent set in McFarland.

3 QUESTION: Well, are you -- are you saying,  
4 Ms. Coffin, that McFarland is controlling in the very  
5 strict sense of the word here, that if -- we must rule in  
6 your favor without looking anywhere else just because of  
7 the decision in McFarland?

8 MS. COFFIN: No. What I'm -- what I am saying  
9 is that I believe that this Court should look to what  
10 informed Congress when they wrote AEDPA. And I think once  
11 that is done, this Court will conclude that if you  
12 interpret the ruling in Lindh, where -- where 107(c)  
13 applies to 153 and 154 -- where did Congress get the word  
14 case when they were determining who would be subject to  
15 this law? And I agree with Justice Ginsburg that when a  
16 case is begun, you get a number, you're put on a docket.  
17 That is your case, and that is consistent with what this  
18 Court decided in McFarland.

19 What is not consistent is to believe that  
20 Congress used the word case rather than petition when they  
21 quite clearly used petition in many other parts of the  
22 statute.

23 QUESTION: When -- when did Congress pass the  
24 law that -- that overturned the result in McFarland? You  
25 say they passed a law that overturned the result?



1 MS. COFFIN: No, no. What I said was that they  
2 passed AEDPA, and when they did that, they were informed  
3 in how they wrote that statute by McFarland. That was in  
4 '96.

5 QUESTION: Okay. And they -- they haven't dealt  
6 with the issue of McFarland.

7 MS. COFFIN: Well, in -- yes and no. I mean,  
8 I think that they -- they had an opportunity to change  
9 848(q) and looked at 848(q) --

10 QUESTION: Yes.

11 MS. COFFIN: -- when they wrote AEDPA, and they  
12 chose to leave 848(q) in place.

13 QUESTION: Well, now, is that supported by  
14 something in, say, the legislative history, or is that  
15 just your -- your own view of what must have happened?

16 MS. COFFIN: There is nothing in the legislative  
17 history that supports one side or the other. However, if  
18 one looks at McFarland -- the majority decision, as well  
19 as Justice O'Connor's concurrence and dissent -- one sees  
20 that this Court made it very clear to Congress that if  
21 they meant something like petition or application, which  
22 are pretty much used synonymously, that they better put  
23 those words in because, in fact, the majority in this --  
24 in -- of this Court refused to read that kind of language  
25 into McFarland, and that's part of how McFarland got

1 decided.

2           So very shortly thereafter, Congress wrote a law  
3 completely revising or, you know, substantially revising  
4 habeas corpus. And it's simply difficult to believe that  
5 at that point, they decided not to look at the majority  
6 opinion in McFarland which uses the word case.

7           QUESTION: But it's -- it's not at all an  
8 unusual phenomenon that -- that a word in -- in statutes  
9 has different application in different contexts where  
10 you --

11           We had a case the other day. When is something  
12 final? Congress says, you know, when -- when it's final.  
13 It depends on what the context is, and nothing -- nothing  
14 says that just because you -- you think that the case for  
15 one purpose, for the McFarland purpose, begins with the --  
16 with the initial filings, for -- for all purposes it has  
17 to begin there.

18           And what impresses me about this case is that I  
19 don't see what is gained by extending the inapplicability  
20 of AEDPA earlier than the filing of the habeas petition  
21 because the purpose of -- of the non-retroactivity  
22 provision is certainly not to cause somebody to be  
23 frustrated in actions that he took in reliance upon the  
24 prior law. And -- and a -- a habeas applicant could be  
25 frustrated in events that occur after the filing of his

1 habeas petition. But all of the events prior to that  
2 filing that were covered by McFarland, they aren't covered  
3 by AEDPA anyway. AEDPA could not possibly affect those  
4 earlier events. So -- so nothing -- nothing is served by  
5 making the retroactivity go back further.

6 MS. COFFIN: Well, I -- I think there are  
7 actually two answers to that question. The first one is  
8 it isn't really an issue of whether or not -- in my  
9 opinion, it's not an issue of whether or not some harm is  
10 going to come to -- to Mr. Garceau by interpreting this  
11 one way or the other. That's not the issue.

12 The issue is what did Congress mean when they  
13 did this. They had one purpose, I agree with you, which  
14 was to reform habeas corpus and make things move in a --  
15 in a more orderly fashion.

16 QUESTION: Right.

17 But they had another -- there -- there is also  
18 another part to that, and that is, they determined that  
19 certain cases would not be covered by AEDPA. And so --

20 QUESTION: Well, those cases -- those cases, in  
21 which they did not want to frustrate legitimate  
22 expectations.

23 But my point is, there is no possible legitimate  
24 expectation that would be frustrated by AEDPA in the  
25 pre-application stage. AEDPA simply doesn't have anything

1 to do with that.

2 MS. COFFIN: Well, the language of the statute  
3 says case, and -- and I think there -- I think --

4 QUESTION: Okay. You're back to that argument,  
5 but on that argument, you know, what's a case depends on  
6 the context.

7 MS. COFFIN: I also think that there is a -- a  
8 reason that can be discerned from their retroactivity  
9 provisions which was --

10 QUESTION: Well, in your -- in your answer to  
11 Justice Scalia, you said, well, you're not sure about the  
12 harm, but the harm exists, it -- it seems to me, in not  
13 giving full effect to the congressional scheme. The --  
14 the Congress obviously thought that this was a -- that  
15 AEDPA was a preferred regime, and you are delaying what  
16 Congress has found a preferred regime. So it's a harm in  
17 that sense, maybe not the harm in a particular case that  
18 would come out one way or the other, but you are delaying  
19 the effectiveness of -- of a congressional scheme.

20 MS. COFFIN: But Congress chose to determine  
21 that not everyone would be immediately affected --  
22 immediately affected by AEDPA, and they --

23 QUESTION: Well, of course, for -- for the  
24 reasons given. We -- we want -- we want cases that  
25 have -- where the merits have been addressed to be decided

1 under the -- the law before it was changed by AEDPA.

2 MS. COFFIN: Justice Kennedy, I believe that, in  
3 fact, the -- the cases that were in the pipeline, this  
4 finite number of cases, were exactly the cases -- not the  
5 154 cases, but the 153 capital cases that were in the  
6 pipeline that Congress was aware that they were  
7 pre-petition cases, petition cases, various kinds of  
8 cases. And if they wanted to make sure that it -- this  
9 statute would be interpreted in a way so that anyone that  
10 was in Federal court and that had vast proceedings take  
11 place, but that had not filed a petition yet, all they had  
12 to do was put the word petition in. And I believe that we  
13 are bound by what Congress did. I understand that  
14 they want --

15 QUESTION: But -- but that -- but that's just  
16 not true that -- that we give a word the same meaning in  
17 all contexts. We -- we evidently don't. There are so  
18 many instances of that, that your argument cannot --  
19 cannot rely just upon that. And it seems to me all of the  
20 other courts that have come out the other way from the  
21 Ninth Circuit have done so for a very sensible reason, and  
22 that is that there is nothing to be gained, nothing  
23 whatever to be gained, by refusing -- or by -- by refusing  
24 to apply AEDPA to these pre-petition activities inasmuch  
25 as AEDPA cannot affect them at all.

1 MS. COFFIN: Well, if -- to give you a brief  
2 answer, on the other -- on the other circuits, the fact of  
3 the matter is none of them analyzed this in terms of  
4 Congress' intent at the time that they wrote AEDPA and how  
5 they were informed by McFarland.

6 However, even if this Court is not convinced  
7 that Congress' awareness of McFarland is dispositive as to  
8 the meaning of case pending, Garceau had a case pending  
9 pre-AEDPA under this Court's definitions of what  
10 constitutes a case.

11 Prior to AEDPA, Garceau had begun the process of  
12 challenging a State conviction and death sentence in part  
13 by filing in the district court a pleading detailing two  
14 fully exhausted claims of Federal constitutional  
15 violations. Garceau sought and received counsel in order  
16 to raise claims and challenge a State conviction and death  
17 sentence. He filed a document detailing the two claims I  
18 just mentioned with their factual and legal foundation  
19 which were ripe for adjudication. The district court made  
20 a determination, after hearings, that these claims  
21 presented viable grounds for habeas corpus relief.

22 Under Hohn, we believe Garceau had a case  
23 pending. The determination in Garceau's case is very  
24 analogous to the judicial determination in Hohn concerning  
25 the COA application.

1                   QUESTION: I mean, is it true, by the way --  
2   is -- is that the case or not that -- I'm interested in  
3   the question -- that -- that if in fact AEDPA applies to  
4   a -- AEDPA does -- there's a difference whether AEDPA  
5   does -- does it make a difference if AEDPA applies or not  
6   to the --

7                   MS. COFFIN: Yes.

8                   QUESTION: How?

9                   MS. COFFIN: Well, there's more deferential  
10   standard to the State -- to the State court's decision.

11                  QUESTION: So it does make just as much  
12   difference.

13                  QUESTION: No, but not -- not to any decision  
14   that is taken before the filing of the -- of the formal  
15   habeas application.

16                  MS. COFFIN: Oh. If you're asking whether this  
17   particular thing that I was just talking about would have  
18   made a difference, no.

19                  QUESTION: Your case. In your case. A person  
20   files a petition asking for a lawyer, and then we have a  
21   lot of litigation.

22                  MS. COFFIN: Right.

23                  QUESTION: Should there be a stay? Should there  
24   not be a stay?

25                  MS. COFFIN: Right.

1                   QUESTION: And I guess the answer to that could  
2 affect a later determination in the case. I don't know.

3                   MS. COFFIN: I would concede that, in fact, in  
4 this case and I think all the pipeline cases, that even if  
5 AEDPA had applied at the time that the case originated,  
6 there would not have been a different determination in  
7 terms of those early proceedings.

8                   QUESTION: Yes.

9                   MS. COFFIN: However, the -- the point I'm  
10 trying to make now is that even if this Court doesn't  
11 believe that -- that case pending can be determined by  
12 looking at McFarland and Lindh, I think that the -- what  
13 Hohn has identified as what is needed for a case is, in  
14 fact, found in the Garceau case and that's because of the  
15 proceeding that Garceau followed where he actually filed  
16 what could have been a petition had that name been put on  
17 it.

18                   QUESTION: Can you specify what were the  
19 pre-petition -- I thought that there was -- there was also  
20 something submitted by counsel, a kind of skeletal  
21 statement of issues, and -- and because there was an  
22 adversary proceeding, was there not? The -- the State  
23 moved to dismiss the stay. And something what -- was  
24 something different submitted by Garceau himself earlier,  
25 and then something by counsel later? What was the



1 sequence?

2 MS. COFFIN: No. What -- what happened is there  
3 was an application for counsel. Counsel was appointed.  
4 Counsel then -- there was a stay before counsel was  
5 appointed so that counsel could be found. Then counsel  
6 was appointed, and an additional 120-day stay went into  
7 effect before counsel filed the document I'm now talking  
8 about. And this document is the Specification of Non-  
9 frivolous Issues, which includes two claims that were --  
10 and were in the petition ultimately that put -- set forth  
11 the factual and legal basis for those two claims. And  
12 then the judge had to determine whether or not one or both  
13 of those claims were non-frivolous. Otherwise, the stay  
14 would have been dissolved, and Garceau -- actually I would  
15 imagine that the counsel may have been pulled, but that's  
16 not what happened.

17 QUESTION: And that statement of issues was  
18 filed pre-AEDPA.

19 MS. COFFIN: Yes. Yes, and as in Hohn --

20 QUESTION: Well, excuse me. There was -- but  
21 that was also after the application for habeas corpus had  
22 been filed. No?

23 QUESTION: No.

24 MS. COFFIN: No, no. This is before. What  
25 I'm -- what I'm saying is this document, the Specification

1 of Non-frivolous Issues, which is required under the rules  
2 of all of the district courts in California --

3 QUESTION: In order to get counsel appointed.

4 MS. COFFIN: No. Actually, you get it after  
5 counsel is appointed. In order to get an additional stay  
6 in which to file the petition, you --

7 QUESTION: Isn't this --

8 MS. COFFIN: -- you get counsel and then counsel  
9 must file something that a district court determines is,  
10 in fact -- has at least one non-frivolous issue --

11 QUESTION: Is that ex parte?

12 MS. COFFIN: No. It's served -- it's served on  
13 the other side.

14 QUESTION: And it -- so is it generally argued  
15 whether or not these are non-frivolous issues?

16 MS. COFFIN: It wasn't argued in this particular  
17 case whether they were non-frivolous issues. It's a --  
18 it's a determination made by the district court. However,  
19 the other parties are served and certainly could make an  
20 argument --

21 QUESTION: See, that -- that's why I thought  
22 there --

23 QUESTION: Could any -- could any of those -- of  
24 those events that you've just described, pre-filing of the  
25 habeas, conceivably be affected by AEDPA? Is there any

1 way that AEDPA could have disappointed expectations with  
2 regard to that pre-application activity?

3 MS. COFFIN: No.

4 QUESTION: Why? I mean, that's -- what I  
5 don't -- I'm a petitioner. I ask for a lawyer. The judge  
6 says, do you have any non-frivolous claim? He says, sure,  
7 this is it, and you list them. Now, if, in fact, AEDPA's  
8 in effect, we're going to apply a pretty lenient standard  
9 in reviewing the State court determinations on those  
10 issues, but if AEDPA isn't in effect, we're --

11 QUESTION: Are the State court's determinations  
12 reviewable?

13 MS. COFFIN: Well, I -- I certainly --

14 QUESTION: I mean, if the State court  
15 appoints --

16 QUESTION: I'm sorry. What I was thinking is  
17 that if the standard for reviewing the State court  
18 determinations is different, depending on whether you  
19 apply AEDPA or not, I don't see why, in principle, that  
20 couldn't affect the outcome of a judge's decision as to  
21 whether the issue in the petition in front of me is or is  
22 not a frivolous issue.

23 MS. COFFIN: I agree.

24 QUESTION: So I think in principle it could  
25 affect the outcome. In fact, probably -- I don't know if

1 it did or not, but I -- I don't see the difference between  
2 that affecting the outcome there --

3 MS. COFFIN: Well --

4 QUESTION: -- and the outcome of an early stage  
5 where you file the petition.

6 MS. COFFIN: Well, in fact -- in fact, in this  
7 case there probably would have been a different  
8 determination at least as to one of the two issues that --  
9 that Garceau put forward.

10 QUESTION: I wasn't even aware that these things  
11 were reviewable. You -- you mean to say that you get  
12 judicial review of whether, when counsel is appointed,  
13 the -- the trial court allows counsel to proceed with a  
14 habeas? You -- you can take that up on judicial review?

15 MS. COFFIN: Well, I -- I --

16 QUESTION: Don't you just go ahead and what  
17 ultimately is reviewed is the -- is the substantive  
18 disposition of the habeas application?

19 MS. COFFIN: No. I -- I don't believe so. In  
20 fact, had the district court determined that there were no  
21 non-frivolous issues, the stay would have been dissolved,  
22 and unless Garceau appealed that judgment of -- of the  
23 district court or filed something else, he would have been  
24 out of court.

25 QUESTION: Well, what -- but what if the

1 district court determined that these were non-frivolous  
2 issues? Does the State have any right to appeal that  
3 determination? Has it ever happened?

4 MS. COFFIN: I don't believe it's ever happened.

5 QUESTION: But does the State have a right to be  
6 heard? The -- the question is whether the stay will be  
7 continued. The Specification of Non-frivolous Issues is  
8 filed. If the State says these are frivolous issues, can  
9 the State be heard?

10 MS. COFFIN: Yes.

11 QUESTION: Can the State file a responsive  
12 pleading?

13 MS. COFFIN: Yes.

14 QUESTION: Do the -- do such hearings occur?

15 MS. COFFIN: It didn't occur in this case.

16 QUESTION: Yes.

17 QUESTION: But there was some proceeding.

18 MS. COFFIN: There was a proceeding. Before the  
19 statement of non-frivolous -- Specification of Non-  
20 frivolous Issues was filed, the State objected to the stay  
21 that the district court had put into place to -- so that a  
22 petition could be filed because under the local rules, you  
23 can't get an additional stay to file the petition unless  
24 you file this document that shows that you have at least  
25 one viable issue. And so prior to the filing of that

1 specification by counsel, the State objected when the  
2 district court extended the stay.

3 QUESTION: And once the issue -- the statement  
4 of issues -- once that was filed, then there was no  
5 response?

6 MS. COFFIN: No. There was no response from the  
7 State at that point.

8 QUESTION: If there had been a response, the  
9 State had lost, and the State wanted to contest it, could  
10 the State take that up?

11 MS. COFFIN: I believe -- I -- I believe that  
12 they could, but it didn't happen in this case.

13 QUESTION: It -- it would be interlocutory.

14 QUESTION: You just answered a minute ago to my  
15 question that they couldn't.

16 MS. COFFIN: That they couldn't -- no. I  
17 said -- no. My answer -- I'm sorry if I gave a confusing  
18 answer. My answer was they didn't in this case and I'm  
19 not aware of it happening in other cases.

20 QUESTION: Has -- you -- you don't know that  
21 it's ever been done.

22 MS. COFFIN: No. That's correct. That was my  
23 answer.

24 QUESTION: But if -- if the district judge said,  
25 all right, I accept these, you've got a non-frivolous

1 issue, at that point, the State couldn't go up to the  
2 appellate court because it would be very -- it would be  
3 interlocutory.

4 MS. COFFIN: I believe that's correct.

5 QUESTION: Help me out and -- and tell me  
6 what -- what portion of -- of AEDPA would apply to this  
7 pre-application event.

8 MS. COFFIN: Well if --

9 QUESTION: (d) says, an application for a writ  
10 of habeas corpus on behalf of a person in custody pursuant  
11 to the judgment of State court shall not be granted with  
12 respect to any claim that was adjudicated on the merits in  
13 State court proceedings. Well, that -- that provision  
14 certainly wouldn't apply to any -- there -- nothing has  
15 been -- been adjudicated on the merits. Right?

16 MS. COFFIN: If the district court determined  
17 that -- if AEDPA applied and the district court looked at  
18 the issues that you wanted to go forward on, and applied  
19 the deferential standard of AEDPA and, therefore,  
20 determined that, in fact, it was a frivolous issue because  
21 under AEDPA you would not be able to win --

22 QUESTION: Would you call that an adjudication  
23 on the merits? Just the preliminary determination that  
24 there is or is not a frivolous issue here? I -- I  
25 wouldn't call that a -- a determination on the merits. So

1 I don't think (d) would apply.

2 What about (e)? (e) says, in -- in a proceeding  
3 instituted by an application for a writ of habeas corpus  
4 by a person in custody pursuant to the judgment of a State  
5 court, a determination of a factual issue made by a State  
6 court shall be presumed to be correct. Are there factual  
7 issues decided in these -- in -- in these --

8 MS. COFFIN: Well, there are --

9 QUESTION: -- pre-applications?

10 MS. COFFIN: There are factual issues put forth.  
11 The factual and legal foundation of the claims that --  
12 that are in the Specification of Non-frivolous Issues are  
13 put forth.

14 But I think that there's an additional question  
15 that -- that needs to be examined, which is, is what  
16 Garceau filed, under this Court's precedent in Hohn, a  
17 case? And I believe that it is.

18 QUESTION: Was that the view of the Ninth  
19 Circuit?

20 MS. COFFIN: Excuse me?

21 QUESTION: Was that the view of the Ninth  
22 Circuit when it decided this case?

23 MS. COFFIN: The Ninth Circuit didn't apply  
24 AEDPA to this case.

25 QUESTION: So you're saying even if AEDPA had



1    been -- had been applicable, your client still should have  
2    prevailed.

3                   MS. COFFIN:  No.  What -- what I'm suggesting is  
4    that AEDPA should not be applied to Garceau either because  
5    of the first argument that I made about McFarland, or if  
6    this Court is not satisfied that, in fact, Garceau had a  
7    case pending, which is the language from Lindh that  
8    determines whether or not AEDPA should be retroactive.

9                   And I'd like to make one other point, which is  
10   that there are -- it is a finite number of cases that were  
11   in the pipeline.  It's a very unusual situation.  In fact,  
12   you had to be post-State court determination and in  
13   Federal court and somewhere along in -- in the process in  
14   Federal court in order to be in this sort of bubble area.  
15   And I think --

16                  QUESTION:  Well, Lindh was a similar case, was  
17   it not?

18                  MS. COFFIN:  Yes, but it was non-capital.

19                  QUESTION:  I have a question about this -- the  
20   proceeding.  AEDPA was pending when this was going on, and  
21   the counsel that represented this petitioner was the same  
22   counsel who represented him in the State court.  Isn't  
23   that so?

24                  MS. COFFIN:  Actually not.  What happened was  
25   lead counsel in State court was unavailable to go forward

1 and neither counsel that -- there were two counsel that  
2 participated at one point or another in State court, but  
3 neither participated in the whole case and neither was  
4 lead counsel. And so lead counsel was unavailable and the  
5 court appointed two new counsel who had some familiarity  
6 with the case.

7 QUESTION: Knowing that AEDPA was on the front  
8 burner, counsel having some familiarity with the case, why  
9 did they use all the time that the district court gave  
10 them instead of filing before AEDPA went into effect?

11 MS. COFFIN: Well, there were a number of  
12 reasons for that. The first is that in State court,  
13 they -- there was neither discovery nor any evidentiary  
14 hearing. There was no mechanism -- there was very little  
15 money and there was no mechanism by which counsel could  
16 pull together an entire petition. And the district court  
17 agreed with that by giving counsel funds in Federal court.

18 However, the district court set forth a schedule  
19 by which funds would be -- would be given, and those  
20 funds -- you did some investigation, you got -- you  
21 satisfied the district court, you got more funds. The  
22 last funds were not -- were not given to counsel until,  
23 I believe, the end of May, which was only about 4 weeks  
24 before the petition was filed. So that's one reason.

25 The other reason is that counsel had to make a

1 determination, under this Court's precedent, whether or  
2 not it would be a mistake not to file a full petition, the  
3 best petition that could possibly be made and because it  
4 would be possible that it might not have been able to be  
5 amended. And so --

6 QUESTION: Ms. -- Ms. Coffin, you -- you have to  
7 make the best argument for your client here, and -- and  
8 you're doing that.

9 But it strikes me that -- that there -- this is  
10 sort of a mixed bag, that actually, in agreeing with you,  
11 we would probably be -- be harming most capital  
12 defendants, that is to say, your client will win on this  
13 retroactivity point which will eventually vanish. It's  
14 a -- it's a temporary problem.

15 But the effect of our holding that -- that the  
16 habeas action for purposes of AEDPA commences with the --  
17 the initial request for counsel is that all -- all of the  
18 transactions -- I mean, if -- if that provision that all  
19 factual determinations by the State court must be deemed  
20 to be correct, that means that AEDPA would, in the future,  
21 apply to those -- to those determinations. Whereas, if we  
22 came out the other way, until the habeas application is --  
23 is applied, the strictures of AEDPA don't -- are -- are  
24 not applicable. So, you know, it's a -- it's -- it's not  
25 a -- not a win-win game, but it is for your client, I

1     suppose.

2                   MS. COFFIN:   Well, actually, Your Honor, since I  
3     have clients in many different positions here, I actually  
4     don't believe that it would be a problem for other capital  
5     defendants, and I do believe that it's the correct result  
6     on either basis that I have put forth for Garceau.

7                   QUESTION:   Because even under AEDPA, if you just  
8     come in at the threshold, the court -- the Federal court,  
9     in general, is quite liberal about letting you develop the  
10    facts necessary to present your claim.  It may be a  
11    problem with amending a petition in habeas, but your  
12    point, I take it, is that you can't envision any real harm  
13    to any of your clients if the starting date of AEDPA would  
14    be considered the filing of the stay application and the  
15    request for counsel.

16                  MS. COFFIN:   No.

17                  QUESTION:   May I just ask one question?  The --  
18    the proceedings that took place between the appointment of  
19    counsel, which involved the -- whether the -- the  
20    statement as to the kind of issues and so forth and the  
21    State's motion to vacate the stay and so forth -- were  
22    they all given the same number that Justice Ginsburg  
23    referred to earlier?

24                  And then after the habeas application itself was  
25    filed, was the case given a different number, or was the

1 same number continued?

2 MS. COFFIN: This case has only had one number  
3 in district court, and it is one of the kind of ironies of  
4 all of this. I would have thought that the word case is  
5 very obvious. You go to district court. They stamp your  
6 papers. You have a number. That's your district court  
7 case and that's your case number. And that's the number  
8 that Garceau had all the way through his district court  
9 proceedings. He then got a different number stamped on  
10 his case by the Ninth Circuit when he was on appeal --

11 QUESTION: Oh, yes --

12 MS. COFFIN: -- but there's been one -- one  
13 number all the way through and you don't get a get a  
14 different number when you file a habeas petition.

15 If there are no further questions.

16 QUESTION: Thank you, Ms. Coffin.

17 Ms. McLean, you have 16 minutes left.

18 REBUTTAL ARGUMENT OF JANIS S. McLEAN

19 ON BEHALF OF THE PETITIONER

20 QUESTION: Ms. McLean, we've been talking about  
21 the statement of non-frivolous issues that's filed. In  
22 your view -- and I -- I would assume, at least for  
23 purposes of my question, that AEDPA might make a  
24 difference, that it might be non-frivolous before AEDPA,  
25 but -- but then frivolous after. I'm assuming that could

1 be true because of clear -- clear and convincing evidence  
2 standing, for instance.

3 MS. McLEAN: Your Honor, I respectfully disagree  
4 with that. There's nothing in AEDPA that applies  
5 whatsoever to the pre-application period. The deferential  
6 provisions of 2254(d) can only apply once an application  
7 is filed by its express terms.

8 QUESTION: Well, I'm -- I -- I take it the  
9 district court is interested. That's because they --  
10 that's why they require this filing -- whether or not  
11 there's going to be anything here for the court to  
12 adjudicate. Is there some substantial issue?

13 And the point of my question was going to be  
14 let's assume that post- and pre-AEDPA, the standard of  
15 frivolity changes. Let's assume that. Or non-frivolity.  
16 Would you say that there is an expectation that's  
17 legitimate and that exists if there's a filing of a  
18 statement of non-frivolous issues pre-AEDPA and then  
19 before the complaint is filed -- before the petition is  
20 filed, AEDPA comes into effect? Would you say an  
21 expectation has been established?

22 MS. McLEAN: No. And the reason for that is  
23 that that document that is filed is so skeletal that it  
24 absolutely bears no resemblance to a -- ultimately to a  
25 petition. Its sole purpose is to satisfy the local

1 district court rules that require that there be some  
2 showing for the court to exercise its discretion in  
3 issuing a stay.

4           This Court recognized that requirement, or at  
5 least a -- the discretionary nature of the State grant in  
6 McFarland. This isn't something that automatically  
7 happens. It's something that has to be deserved, and the  
8 way the local rules in -- in California work are that they  
9 have to file the statement -- a specification of non-  
10 frivolous claims. It doesn't ask for habeas relief. In  
11 this case, it stated 2 out of ultimately 28 claims that  
12 were ultimately raised. It -- it doesn't -- it's not  
13 labeled a petition. There was no expectation whatsoever  
14 by Mr. Garceau that that was treated as any sort of a  
15 petition --

16           QUESTION: The only expectation is you'll get a  
17 stay until you file your petition.

18           MS. McLEAN: Exactly. That was its sole  
19 purpose. There's absolutely nothing that is in --  
20 contained in chapter 153 that has anything to do with the  
21 pre-application proceedings.

22           QUESTION: Well, why -- why --

23           QUESTION: Would you just confirm for me the --  
24 the language of 153 applies to an application for a writ  
25 of habeas corpus. Okay. That's (d) and also (e) in a

1 proceeding instituted by an application for a writ of  
2 habeas corpus. Now, that -- that was not quite the  
3 language involved in McFarland, was it? What was the  
4 language involved in McFarland?

5 MS. McLEAN: In McFarland, this Court was  
6 construing the term post-conviction proceeding and  
7 saying -- because 848 -- 21 U.S.C. 848 --

8 QUESTION: Before whom a habeas corpus  
9 proceeding is pending. I think --

10 MS. McLEAN: That is actually the -- the  
11 companion provision, the State provision, in 2251. The  
12 provision in 21 U.S.C. 848 specifies that there's an  
13 entitlement to an appointment of counsel in a  
14 post-conviction proceeding --

15 QUESTION: Yes.

16 MS. McLEAN: -- under -- arising under 2254 or  
17 2255.

18 QUESTION: So you think instituted by an  
19 application for a writ of habeas corpus means just that.  
20 It has to be instituted by the application.

21 MS. McLEAN: It's extremely explicit. And it  
22 also is consistent with how we're treating all other  
23 habeas cases.

24 QUESTION: Can you -- forgetting the -- the --  
25 I -- I'm still slightly confused on what I'd call the



1 practical point. Imagine on January 1, before AEDPA is  
2 passed, they file a petition -- no, not a petition --  
3 a petition for a lawyer. And there's stay applications.  
4 And everything under the sun is litigated on that stay  
5 application, as it often is in a capital case. On June 1,  
6 once the stay was granted, they file their official habeas  
7 petition. On December 1, AEDPA is enacted. Now, the  
8 question is whether AEDPA will govern future proceedings  
9 in the case. And what we've said is it doesn't govern  
10 those future proceedings if, in fact, that petition had  
11 been filed on June 1. Right?

12 MS. McLEAN: Well, this Court hasn't -- that's  
13 what this case --

14 QUESTION: No. I'm saying the petition for  
15 habeas. The habeas is pending as of the time that AEDPA  
16 was there. The petition for habeas was filed on June 1.  
17 The petition for the lawyer and so forth was filed  
18 6 months before. Am I right? Am I right? Maybe I mixed  
19 up that.

20 MS. McLEAN: I -- I -- in all -- the only cases  
21 that this Court has addressed is in the non-capital  
22 context, and you have -- you've said that AEDPA applies  
23 once the filed petition is -- if the filed petition  
24 occurred prior to the enactment of AEDPA --

25 QUESTION: If the filed -- the habeas petition

1 applies -- was filed, and habeas proceedings are underway,  
2 and then later on AEDPA is enacted, does AEDPA apply?

3 MS. McLEAN: Once -- if the habeas petition --

4 QUESTION: Yes, the habeas petition.

5 MS. McLEAN: -- the application for merits is  
6 filed before --

7 QUESTION: Before AEDPA.

8 MS. McLEAN: -- the enactment of AEDPA, yes,  
9 there -- that is not an AEDPA case in --

10 QUESTION: Thank you.

11 Now, what I'm saying is -- is January 1, they  
12 ask for a lawyer and then they go through the stay. On  
13 June 1 they file the habeas petition. On December 1,  
14 AEDPA is enacted. Now, we don't apply it to that case  
15 because the habeas proceeding was underway.

16 MS. McLEAN: That's correct.

17 QUESTION: All right. Why don't we? Because  
18 that judge might have made up his mind about various  
19 things because there could have been things decided. Now,  
20 why isn't precisely the same thing true as to the period  
21 January 1 to June 1, where all kinds of things were  
22 decided, the stay was litigated, the judge has made up his  
23 mind, who knows how it affected the future proceedings?  
24 That's what -- do you see the question?

25 MS. McLEAN: I do.

1 QUESTION: What's the answer?

2 MS. McLEAN: Respectfully, though, I believe  
3 that that ignores the express wording of -- of AEDPA.

4 QUESTION: I get the linguistic point. That's  
5 why I said that I wanted to know the practical point,  
6 which I think maybe Justice Kennedy's question was trying  
7 to get at; I'm trying to get at.

8 MS. McLEAN: Practically also, there is no --  
9 whatever litigation might occur with regard to the State  
10 proceedings has nothing to do with the merits of the case  
11 which is what AEDPA goes to. So there can be no harm.  
12 The fact that this was tremendously litigated State  
13 proceedings doesn't decide any issues that ultimately will  
14 be affected by AEDPA. So there's no harm whatsoever.

15 QUESTION: Well, you -- you described the -- the  
16 State proceeding as, quote, tremendously litigated, close.  
17 What did that -- what did that involve?

18 MS. McLEAN: And in our -- I'm not saying that  
19 that happened in our case. I think that usually they  
20 don't have -- there's virtually no litigation involved.

21 In this case, what happened was that they're  
22 required under our local rules to present the  
23 Specification of Non-frivolous Issues. They have to at  
24 least put in one or two of the claims that are ultimately  
25 going to be raised. They didn't file anything. What they

1 filed was a conclusory statement that there were  
2 constitutional claims that would be made. And we objected  
3 to that rightfully because they didn't satisfy our local  
4 rules. And so, it was that -- that was the sum total of  
5 our litigation related to the State proceedings. It  
6 certainly doesn't create -- nothing occurred in this case  
7 that would affect in any way --

8 QUESTION: Wasn't there also a request for  
9 funds?

10 MS. McLEAN: There was -- there was a request  
11 for funds under -- there was a request for funds under  
12 848.

13 QUESTION: And that was before the -- before the  
14 habeas corpus petition was filed, yes.

15 MS. McLEAN: That's correct. Under 848 because  
16 of -- it's part of that -- or that post-conviction  
17 proceeding that was construed in McFarland.

18 QUESTION: I thought what had happened here was  
19 that the petitioner asks for a lawyer and a stay, and then  
20 the district court granted the stay. Then the State came  
21 in and said, we want you to vacate the stay. And then,  
22 the district court asked the petitioner to file the non-  
23 frivolous issues, et cetera, and so there was a  
24 considerable argument about whether the stay should be  
25 vacated or not vacated, which I guess eventually the

1 petitioner won.

2 MS. McLEAN: I think --

3 QUESTION: It sounded to me like a fairly  
4 substantial proceeding.

5 MS. McLEAN: I think that overstates the  
6 situation.

7 QUESTION: What is it now?

8 MS. McLEAN: We filed papers that objected to  
9 the fact that the stay had been granted based on a  
10 failure -- failure to comply with the local rules. And we  
11 filed papers that stated that and the court ruled against  
12 us because they corrected the deficiency, and that's all  
13 that happened.

14 QUESTION: But you say that whether or not this  
15 case is governed by AEDPA, AEDPA has no effect whatever on  
16 all of that.

17 MS. McLEAN: AEDPA does --

18 QUESTION: By its terms, it simply does not  
19 affect it.

20 MS. McLEAN: That's correct. And that is really  
21 demonstrated -- also another a twist on that is that an  
22 848 appointment, by its very terms -- if you look at  
23 848(q)(9), I believe is the provision, it talks about how  
24 a -- how the appointment of counsel survives the habeas  
25 proceeding. It goes on. The appointment continues on

1 into clemency proceedings and competency proceedings and  
2 other things. So clearly this is sort of an independent  
3 track. There's an appointment of counsel. It includes  
4 that habeas corpus proceeding under chapter 153, and then  
5 it survives and may go on into other areas.

6 It also would survive the dismissal of a  
7 petition. We've had experiences in the Ninth Circuit  
8 where the petition that ultimately ends up being filed is  
9 deficient. It gets dismissed out. They go back into  
10 State court and they've allowed them to continue with that  
11 appointment of counsel. And so it continues on. It  
12 clearly is a separate phenomenon.

13 QUESTION: But doesn't it --

14 QUESTION: Suppose Garceau had filed a  
15 handwritten thing, and he called it petition for habeas  
16 corpus, and it had the same thing as the statement of  
17 issues?

18 MS. McLEAN: I think he would have -- if --  
19 assuming that it had been -- asked for relief and stated  
20 at least one claim with a summary of facts, fact pleading  
21 that's required --

22 QUESTION: Would there have been a problem then  
23 for counsel, once counsel is appointed? And my scenario  
24 is Garceau files his own petition, it's handwritten, and  
25 it's got one -- one issue. Then the lawyer is appointed,

1 and a Dandy petition is filed with 28 issues. Would  
2 that -- would be any problem about that being considered a  
3 successive petition?

4 MS. McLEAN: No. In my experience with the  
5 Ninth Circuit, they're very liberal in that situation. It  
6 occurs frequently. Especially in non-capital cases where  
7 a -- a petitioner is initially unrepresented and files a  
8 limited petition, the court's very liberal about granting  
9 the ability to amend the petitions later. They're not  
10 considered successive.

11 QUESTION: Is it ultimately beside the point  
12 that AEDPA itself doesn't say anything about this -- the  
13 so-called pre-petition, the stay stage? Because if your  
14 stay is dependent upon the Specification of Non-frivolous  
15 Issues, and frivolousness has some reference to the  
16 standards that you're going to have to meet for success  
17 and AEDPA affects those standards, doesn't, as a matter  
18 of -- of implication, doesn't AEDPA affect your  
19 frivolousness standard and hence have at least a potential  
20 effect at the stay point?

21 MS. McLEAN: Your Honor, I don't believe that  
22 that's the case. The -- the non-frivolous issue  
23 standard -- very low. They're just trying to make sure  
24 that there's some colorable claim, that -- that the stay  
25 is not being just granted on something that has -- that is

1 just air.

2 QUESTION: Yes.

3 MS. McLEAN: They want something there so that  
4 the court is reasonably exercising its stay discretion  
5 and -- and appointment of counsel discretion.

6 That's a substantially -- that's unaffected, in  
7 my opinion -- unaffected and substantially different than  
8 the question that comes up once the merits petition is on  
9 file, and we're looking to see whether or not this is --  
10 this is -- there's a valid constitutional violation --

11 QUESTION: Oh, I -- I quite agree. But if -- if  
12 the State decided that it simply was going to be less  
13 complacent at the stage at which there is a request for  
14 stay and said, okay, we're going -- we're going to start  
15 contesting the non-frivolous character of these -- these  
16 claims that are being raised, number one, wouldn't the  
17 State be able to do that if it thought it was worthwhile  
18 to spend its time doing that? And number two, if it did  
19 that, wouldn't the ultimate standard of persuasion that  
20 AEDPA applies have an effect on -- on the argument that  
21 you would make as to what was or was non-frivolous at that  
22 stage?

23 MS. McLEAN: A State could do that. The --  
24 I don't believe, again, though, that AEDPA has any  
25 application to that. The question -- all we would be



1 looking at at that phase is whether there's enough to  
2 justify the stay.

3 The -- AEDPA goes to the issue of whether the --  
4 you know, what the State court adjudication of the claim  
5 was and whether it was a -- involved a reasonable  
6 application of Supreme Court precedent and an entirely  
7 different analysis. I don't believe that there was,  
8 a) any intent to affect that, or any actual effect  
9 whatsoever from changing the deference that's ultimately  
10 applied to a merits petition to have any effect whatsoever  
11 on that initial inquiry that a -- that our courts in  
12 California require in order to satisfy the stay  
13 requirement, or the --

14 QUESTION: In any event, you're saying it isn't  
15 having an effect. It -- it --

16 MS. McLEAN: I'm sorry.

17 QUESTION: You're saying that, in fact, in  
18 California, it is not having such an effect.

19 MS. McLEAN: It is not.

20 QUESTION: Yes.

21 MS. McLEAN: Thank you, Your Honor. If  
22 there's --

23 CHIEF JUSTICE REHNQUIST: Thank you, Ms. McLean.

24 The case is submitted.

25 (Whereupon, at 11:02 a.m., the case in the

1     above-entitled matter was submitted.)

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