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IN THE SUPREME COURT OF THE UNITED STATES

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CHERYL K. PLILER, WARDEN, :
Petitioner :

v. : No. 03-221

RICHARD HERMAN FORD. :

- - - - -X

Washington, D.C.
Monday, April 26, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

PAUL M. ROADARMEL, JR., ESQ., Deputy Attorney General, Los Angeles, California; on behalf of the Petitioner.

LISA M. BASSIS, ESQ., Los Angeles, California; on behalf of the Respondent.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 03-221, Cheryl Pliler v. Richard
5 Herman Ford.

6 Mr. Roadarmel. Am I pronouncing your name
7 correctly?

8 ORAL ARGUMENT OF PAUL M. ROADARMEL, JR.

9 ON BEHALF OF THE PETITIONER

10 MR. ROADARMEL: Yes, Mr. Chief Justice.

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

12 In 1996 the Antiterrorism and Effective Death
13 Penalty Act, or AEDPA, was enacted, which imposed a 1-
14 year limitation period upon the filing of Federal habeas
15 petitions following the finality of a State criminal
16 conviction.

17 In *Duncan v. Walker*, this Court held that the 1-
18 year limitation period may be tolled during the pendency
19 of a properly filed State post-conviction or other
20 collateral application, but not during the pendency of a
21 Federal habeas application.

22 Despite that holding, the Ninth Circuit in this
23 case concluded that the district court's dismissal of
24 admittedly mixed Federal habeas petitions was improper and
25 prejudicial because the district court did not provide

1 certain advisements designed to effectuate the Ninth
2 Circuit's practice of stay and abeyance.

3 QUESTION: Is there some peculiar virtue about
4 the word advisements as opposed to advice?

5 MR. ROADARMEL: No, not in this particular
6 situation, Your Honor.

7 We believe stay and abeyance is incompatible
8 with this Court's precedent, as well as AEDPA, for four
9 reasons.

10 QUESTION: Before we get to that, do you agree
11 that some kind of remedy is required here, warnings or no
12 warnings, as a result of the fact that what the judge did
13 tell the -- the defendant in this case seems to have been
14 just affirmatively misleading. He said you -- dismiss and
15 then you can come back when it was perfectly clear, that
16 -- that he could never come back that the time in -- in
17 all practical terms would have run. Haven't we got to do
18 something or hasn't the courts got to do something to
19 correct that?

20 MR. ROADARMEL: We don't believe that the advice
21 was misleading or erroneous in this case.

22 QUESTION: Well, is -- is there any chance --

23 QUESTION: Well, is that issue still open? I
24 mean, even if you're correct on your premise that a court
25 doesn't have to inform a defendant of the statute of

1 limitations, is -- is the issue of possible misleading of
2 the defendant open on the remand even if you were
3 successful?

4 MR. ROADARMEL: No, we don't believe it would
5 be.

6 QUESTION: Well, shouldn't it be? I mean, if --
7 if we think that the record shows there is some evidence
8 of misleading where the defendant expressed concern about
9 a statute of limitations problem and was told it wouldn't
10 present a problem, when in fact it did -- it had already
11 run -- you don't think that should be open on remand?

12 MR. ROADARMEL: If that were the case, perhaps
13 that would be the situation or perhaps that would be the
14 remedy. That wasn't the case here. The district court
15 told Ford that he could refile his petitions following
16 exhaustion and dismissed the mixed petitions without
17 prejudice.

18 QUESTION: But it wasn't without prejudice. For
19 all intents and purposes, he could never come back because
20 the statute of limitations, as I understand the facts, had
21 already run before the case was even dismissed in the
22 district court. So he could never come back. Therefore,
23 without prejudice was surely misleading.

24 MR. ROADARMEL: No. Dismissal without prejudice
25 merely means that the petitioner can refile. It will be a

1 separate issue as to whether the claims of the petition
2 that he refiles will be considered on its merits.

3 QUESTION: Do you think any person in the
4 prisoner's position would conceivably have understood the
5 statement as you have just defined the term, without
6 prejudice?

7 MR. ROADARMEL: Yes. I --

8 QUESTION: I mean, maybe somebody who -- who had
9 three law degrees could figure that out, but a defendant
10 standing here certainly isn't going to understand that.

11 MR. ROADARMEL: Well, that -- that has always
12 been the procedure when courts have addressed mixed
13 petitions. They have always dismissed them without
14 prejudice.

15 QUESTION: And they have always made a statement
16 that was affirmatively misleading?

17 MR. ROADARMEL: There is no statement here, we
18 believe, that was affirmatively misleading.

19 QUESTION: I mean, we -- we may agree with you
20 that the court does not have to give warnings. That's --
21 that's a -- that's an open question. But surely the court
22 is -- is not free to make misleading statements.

23 MR. ROADARMEL: Well, the court --

24 QUESTION: We need to -- let me put it this way.
25 Wouldn't any defendant in his right mind, if he had known

1 that he could not come back into court, that the statute
2 had run, at least have said, well, judge, get rid of the
3 unexhausted claims so that I can at least litigate the
4 ones which I have filed in time and which are exhausted?
5 Wouldn't that have been the only sensible thing for him to
6 do if -- if he had understood what you understand?

7 MR. ROADARMEL: Not necessarily. A Federal
8 habeas petitioner may believe, in fact, that his exhausted
9 claims are unmeritorious or frivolous compared with the
10 claims that he wishes to exhaust in State court. So there
11 may be circumstances where a Federal habeas petitioner
12 will not, in fact, object to the dismissal of even his
13 exhausted claims or to the -- the dismissal of an entire
14 petition.

15 QUESTION: May I ask you about the unexhausted
16 claims that have to go first to the State court? When
17 *Rose v. Lundy* was decided, this problem of time didn't
18 exist because there was no statute of limitations on
19 Federal habeas. Now that there is this bind, why isn't it
20 appropriate to say the stay and abeyance applies not
21 simply to the Federal claim but to the entire complaint,
22 which is -- is the ordinary rule when there's a -- a prior
23 action pending or abstention? Usually the -- the whole
24 complaint just sits in Federal court till the State court
25 is through. Why shouldn't this, now with the statute of

1 limitations, the 12 months, in the picture, be the same
2 way?

3 MR. ROADARMEL: I think there are two responses
4 to that. The first is that Congress would not have
5 contemplated that procedure because Congress, in
6 incorporating section 2254(b)(1) in virtually unaltered
7 form, would have contemplated *Rose v. Lundy*'s application
8 in the way it had always been applied by this Court.

9 The second response is that a stay of the
10 proceeding under those circumstances would make sense only
11 if the claims that are being dismissed as unexhausted can
12 be added back and would, in fact, be --

13 QUESTION: So not added back. I mean, this is
14 the Third Circuit's solution, and I'm asking you why isn't
15 that the simplest way to deal with this. Nothing is added
16 back. Everything, the entire complaint sits in Federal
17 court while the petitioner goes over to State court to
18 exhaust the State claims and then comes back to the
19 Federal court with nothing to supplement. The complaint
20 is already there.

21 MR. ROADARMEL: That procedure guts *Rose v.*
22 *Lundy* and AEDPA. *Rose v. Lundy* would have absolutely no
23 meaning under that procedure because *Rose v. Lundy* never
24 contemplated that procedure. It contemplated the complete
25 dismissal of a mixed petition or, at most, the dismissal

1 of unexhausted claims from a mixed petition.

2 QUESTION: But coming -- with the ability to
3 come back, which was not a problem then because there was
4 no statute of limitations.

5 MR. ROADARMEL: Well, even prior to the
6 enactment of AEDPA, refiled petitions would not
7 necessarily be considered on their merits. Claims could
8 be procedurally defaulted, for instance, and if the
9 default was based upon an adequate and independent State
10 ground, the claims would not be considered on their
11 merits, but would be summarily denied. So even prior to
12 the enactment of AEDPA, this Court contemplated that
13 refiled petitions would not necessarily be considered on
14 their merits.

15 But --

16 QUESTION: I mean, just to elaborate on Justice
17 Ginsburg's question, what is your answer to her point?
18 Why -- imagine the imaginary author of *Rose v. Lundy*.
19 When I read this, I think they're worried about exhausting
20 the State claim so the State will have a chance to pass on
21 it. All right. Now, what Justice Ginsburg just said
22 gives the State the chance to pass on it. What is it in
23 *Rose v. Lundy* that cares whether the way you give the
24 State to pass on it is to dismiss the whole thing and let
25 them pass on it or hold it on the docket and let them pass

1 on it or call them into your office, any other thing you
2 can think of? I mean, what is it in Rose v. Lundy that
3 cares how you give the State the opportunity to pass on it
4 as long as they pass on it?

5 MR. ROADARMEL: Because Rose v. Lundy
6 contemplates the unexhausted claims will be presented in
7 State court first, and it enforces or promotes that
8 through what this Court has referred to in Rose v. Lundy
9 as a rigorously enforced total exhaustion requirement.
10 Now, if the petitioner can simply file a mixed petition in
11 Federal court without any consequences either under Rose
12 v. Lundy or under AEDPA, what we will have is a situation
13 where petitioners have an incentive to file mixed
14 petitions in Federal court instead of presenting their
15 unexhausted claims in State court first.

16 Contrary to this Court's holding in Duncan v.
17 Walker that AEDPA is not indifferent between State and
18 Federal filings, but promotes and encourages the filing of
19 unexhausted claims in State court first --

20 QUESTION: I guess Rose v. Lundy could have --
21 could have said what is now being proposed if it had
22 wanted to. I mean, Rose v. Lundy could have said --
23 instead of you have to dismiss the whole thing, they could
24 have simply said, you know, hold it in abeyance.

25 MR. ROADARMEL: Yes. And in fact, this Court

1 has always disapproved of stays of -- of mixed petitions.

2 QUESTION: So -- so you think --

3 QUESTION: So, of course, there was no statute
4 of limitations in place when Rose was decided. There
5 would have been no point to put that in the opinion when
6 there was no statute of limitations in place.

7 MR. ROADARMEL: That's correct, but --

8 QUESTION: Well, presumably Congress knew about
9 Rose v. Lundy when it enacted AEDPA and didn't indicate
10 any change in Rose v. Lundy.

11 MR. ROADARMEL: No. And Congress certainly, if
12 it had desired a stay or contemplated a stay of
13 proceedings pending exhaustion, could have put something
14 into AEDPA that --

15 QUESTION: Is -- is there any indications when
16 they passed AEDPA, that the Congress was aware of the fact
17 that like two-thirds of all petitions are filed
18 incorrectly in the Federal courts because they don't know
19 where to go? I mean, these are not legally represented
20 people. Is -- I mean, I'd be interested in that. Is
21 there information there that suggests Congress focused on
22 that and said, we don't want to -- we -- we just want to
23 -- is there or not?

24 MR. ROADARMEL: There's nothing in the
25 congressional record to indicate that as to what

1 individual Members of Congress had before them in terms of
2 studies or other data at the time AEDPA was crafted. I'm
3 not aware. But the congressional record doesn't speak to
4 that.

5 But certainly Congress --

6 QUESTION: Counsel, you're asking us in this
7 case to say that the stay and abeyance procedure is -- is
8 not a valid procedure.

9 MR. ROADARMEL: Yes.

10 QUESTION: And yet, it didn't occur in this
11 case. Here Mr. Ford chose dismissal without prejudice.
12 There was not a stay and abeyance used here. Why should
13 we rule on that?

14 MR. ROADARMEL: Because it's --

15 QUESTION: I mean, it's just you're asking us to
16 reach beyond the confines of this case in doing that.

17 MR. ROADARMEL: Because the correctness of the
18 Ninth Circuit's advisement requirements can't be
19 adequately addressed or intelligently addressed without
20 understanding what it is they promote and without
21 understanding what the practice is of the Ninth Circuit.

22 QUESTION: I would think it would. We have a
23 question here of whether some particular advice was
24 required, yes or no, and I don't see how we get into stay
25 and abeyance in this case properly.

1 MR. ROADARMEL: Well, because --

2 QUESTION: Six of the seven circuits allow it I
3 know, but I don't see how we -- we get into it here.

4 MR. ROADARMEL: Because the Ninth Circuit
5 majority concluded that the failure to advise in the
6 manner in which they thought was appropriate was improper
7 and prejudicial because they assumed that had the
8 advisement been given with regard to the dismissal of
9 unexhausted claims as a precondition to the consideration
10 of a motion to stay, that Ford would have dismissed his
11 unexhausted claims. And in doing so, the district court
12 would have been required to grant the motion to stay. In
13 fact, the majority concludes it would have been abuse of
14 discretion not to do so. So it's inextricably bound in
15 the advisement requirement in this case.

16 QUESTION: But we could rule, I suppose, that
17 the advice was unnecessary when leaving open the question
18 of whether the stay and abey proceeding is permissible or
19 desirable, whatever.

20 MR. ROADARMEL: Yes, I believe that's true.

21 QUESTION: And there's also a second question
22 presented about the relation back. I -- I hope you'll
23 take an opportunity to state your point of view on that.

24 MR. ROADARMEL: Yes. The Ninth Circuit, after
25 concluding that the advisements that were given in this

1 case were inadequate and misleading, fashioned a remedy
2 for that particular error which it believed occurred by
3 way of applying rule 15(c) of the Federal Rules of Civil
4 Procedure in a manner that no other circuit court has ever
5 applied before. In fact, three prior panels of the Ninth
6 Circuit itself concluded that relation back would not
7 apply under these circumstances because there's nothing to
8 which the subsequent proceeding can relate back.

9 QUESTION: But the Ninth Circuit did that only
10 because their own precedents said all you can stay is the
11 Federal claim. You can't stay the entire petition. That
12 was the preliminary to doing this fancy 15(c) application.

13 MR. ROADARMEL: Yes, but in doing so, what the
14 Ninth Circuit majority did was have a subsequent
15 proceeding relate back to a prior proceeding that had been
16 dismissed and was no longer pending.

17 QUESTION: If the Ninth Circuit decided or if we
18 decided that equitable tolling is permissible in this
19 case, what -- what procedure should be adopted to reflect
20 that rule? I know that's maybe not -- not your position,
21 but if that -- if that were the holding, how -- how would
22 that work? And -- and how is that any different than
23 relation back?

24 MR. ROADARMEL: Well, it's -- it's difficult to
25 say because equitable tolling has been applied differently

1 in different situations. The Ninth Circuit itself applies
2 it in a very different fashion than it was applied in this
3 case. I suppose equitable tolling could be applied to
4 toll the limitation period during the pendency of the
5 first set of proceedings, the 1997 proceedings, up to the
6 time that the claims were -- or the petitions were
7 dismissed as unexhausted. That would leave Ford with 5
8 days to file his unexhausted claims in State court,
9 exhaust, and -- and then return with those claims to
10 Federal court.

11 QUESTION: Let -- let me ask you this somewhat
12 related question. You look at the records that the --
13 that's presented -- the petitions that are presented to
14 the district courts through their magistrates, and they're
15 bewildering. The petitioner really restates a claim in
16 three or four different ways to make sure he's left
17 nothing out. And the -- the district courts are -- are
18 very busy.

19 Suppose you have a sort of Johnny-on-the-spot,
20 prompt attorney at -- at the habeas level in a Federal
21 court and he files on day one. He has got a year but he
22 files on day one. The district court just doesn't get
23 around to it until, say, the 10th month, and then it says,
24 oh, well, this has -- this has some unexhausted claim.
25 Any relief for the -- or even on day 360. Any relief

1 available there for the petitioner?

2 MR. ROADARMEL: It certainly wouldn't appear to
3 be the case under AEDPA because AEDPA doesn't toll the
4 limitation period during pendency of the Federal habeas
5 proceeding, and that's very clear, we believe, from the
6 statute itself. So an individual filing a petition in
7 Federal court is well advised, of course, to ensure that
8 all the claims are fully exhausted.

9 The Eighth Circuit in *Akins v. Kenney* suggested
10 that where a petitioner is concerned that any of his
11 claims may be unexhausted, he's well advised under AEDPA
12 to present those claims in State court first and
13 accomplish two goals simultaneously. First, he exhausts
14 beyond any doubt, and second, he tolls the limitation
15 period during the pendency of that proceeding.

16 QUESTION: But -- but in my hypothetical
17 district judge number one rules in a week. District judge
18 number two waits 300 days. The petitioner is in the same
19 position in either case in your view.

20 MR. ROADARMEL: Yes, because I think the
21 petitioner has to contemplate the vagaries of any kind of
22 judicial interpretation or ruling on his matters, and that
23 may depend upon the particular court. It may depend upon
24 the caseload. It may depend upon the particular matter
25 that's put before the court, the number of claims, the

1 complexity, and so on. That's always going to vary in any
2 case. A petitioner who files a one-claim petition will
3 most assuredly receive a quicker resolution of that than
4 the petitioner who files a 200-page petition containing
5 hundreds of claims. That's just in the nature of any kind
6 of adjudication in any kind of court.

7 And that has to be contemplated and anticipated
8 by any would-be Federal habeas petitioner because if that
9 petitioner files a mixed petition under AEDPA, the clock
10 keeps ticking during the pendency of that Federal habeas
11 proceeding no matter how long or how short. So, again,
12 he's well advised, as the Eighth Circuit noted, to file
13 any claims that he's unsure about in State court first.
14 And that's what AEDPA contemplates, as this Court
15 concluded in *Duncan v. Walker*.

16 To allow petitioners to file mixed petitions in
17 Federal court without any consequences and -- and to do so
18 in the manner in which the Ninth Circuit contemplates it
19 here and in other cases would eviscerate AEDPA's
20 limitation period because, as we point out in our
21 briefing, a petitioner could well file a mixed petition
22 containing only one exhausted claim, confident that all of
23 his unexhausted claims will be purged from the petition,
24 the remaining exhausted claims stayed, and those purged
25 claims, following exhaustion, will be added back to the

1 State petition, no matter that they were pursued in State
2 court after the expiration of the limitation period, and
3 they will be deemed timely by the Ninth Circuit.

4 QUESTION: Well, of course, that -- that would
5 -- that may well be the Ninth Circuit rule, but you could
6 also have a stay and abey rule in which in order to -- to
7 grant the petitioner time to go back and -- and litigate
8 the State claims, he has to make a -- a showing first that
9 there is some reason to excuse his delay, in other words,
10 a -- a kind of an equitable tolling argument at the
11 threshold. And -- and if -- if that were the requirement,
12 then the -- the scenario that you just -- just outlined
13 would -- would not be an objection.

14 MR. ROADARMEL: Well, I think the problem with
15 that approach, first of all, with regard to the
16 application of equitable tolling to AEDPA, is that AEDPA
17 itself doesn't contemplate the application of such
18 tolling.

19 QUESTION: So you're -- you're saying that --
20 that there cannot be equitable tolling under AEDPA?

21 MR. ROADARMEL: It certainly seems foreclosed by
22 this Court's holdings in United States v. Beggerly, United
23 States v. Brockamp, and Lampf v. Gilbertson. In all of
24 those cases, this Court concluded, in reviewing Federal
25 limitation periods, that because the statutes contain

1 tolling provisions within them, it would be inconsistent,
2 incompatible with those statutes to apply equitable
3 tolling. Congress had spoken as to the circumstances
4 under which tolling could be applied.

5 In *Beggerly*, in particular, this Court concluded
6 that under the Federal Quiet Title Act, equitable tolling
7 would be inapplicable because there was already an accrual
8 or tolling provision built in that provided that the
9 limitation period did not begin to run until the plaintiff
10 knew or reasonably should have known of the claim of the
11 United States.

12 AEDPA contains a very similar provision in
13 section 2244(d)(1), subsection (D), which provides that
14 the limitation period does not begin to run until the
15 petitioner was aware of the factual predicate of the claim
16 or claims through the exercise of due diligence.

17 In *Brockamp*, this Court commented upon the
18 tolling provisions in the IRS tax refund statute and noted
19 that because they were numerous and very specific,
20 equitable tolling likewise would be incompatible with the
21 statute.

22 AEDPA also contains very specific tolling
23 provisions, beyond the one that I just described, tolling
24 where there is a properly filed State post-conviction or
25 other collateral application, tolling where, for instance,

1 unconstitutional State action leads to an impediment to
2 filing, tolling where this Court issues a ruling on an
3 issue of Federal constitutional law that's made
4 retroactively applicable to cases on collateral review.

5 QUESTION: Leaving aside tolling, you said
6 something I didn't quite grasp; that is, if you allowed
7 the Federal petition to sit while you went to State court,
8 all this is well within the 12-month period. You're in
9 State court, you exhaust everything there. The statute is
10 tolled during that time. Then you come back to Federal
11 court and you -- as long as you're still within the 12
12 months, you're okay. It doesn't gut the statute of
13 limitations. It just recognizes that it's tolled while
14 you're in State court.

15 MR. ROADARMEL: I'm sorry. I misunderstood your
16 hypothetical, Your Honor. If claims are presented in
17 State court, prior to the expiration of the limitation
18 period, yes, they will toll the limitation period. The
19 problem with stay and abeyance under that situation,
20 however, is that it actually gives the petitioner greater
21 benefits under AEDPA than he received prior to the
22 enactment of AEDPA.

23 Prior to the enactment of AEDPA, mixed petitions
24 in -- in certain circuits would actually, instead of being
25 dismissed, have their unexhausted claims purged, and the

1 petitioner would go back to State court and exhaust those
2 claims. But the purged petition, the purged Federal
3 habeas petition, would go forward and be resolved
4 expeditiously. It would not be stayed.

5 And that I think was the basis of the
6 plurality's warning in *Rose v. Lundy* that where a
7 petitioner chooses that course of action, he will be
8 barred from having his refiled claims considered on the
9 merits because they will consist of a second or successive
10 application. They will consist of a second or successive
11 application only if the purged Federal habeas petition
12 goes forward. If it's stayed, there will never be a
13 second or successive application relating to those claims.
14 And that would, I think, vitiate not only rule 9(b) of the
15 rules governing --

16 QUESTION: Are you now questioning the propriety
17 of -- let's just stick with the *Rose v. Lundy* the way it
18 was. You have the Federal claim and the State claims.
19 You lop off the State claims. Are you saying the Federal
20 court can't say, well, I'm going to let this Federal claim
21 sit until the State is through? Why should I adjudicate
22 it? Maybe he'll prevail on some claim in the State court.

23 MR. ROADARMEL: Well, this Court has never
24 intimated that that wouldn't be an appropriate procedure.
25 In fact, under *Rose v. Lundy*, in --

1 QUESTION: That it would or wouldn't?

2 MR. ROADARMEL: It would not. In -- in
3 McCleskey v. Zant, when this Court talked about second or
4 successive applications and abuse of the writ, it
5 contemplated or presumed that that procedure if followed
6 under Rose v. Lundy would lead to those refiled claims
7 constituting second or successive applications.

8 QUESTION: So are you saying that the Federal
9 court would have no choice under the -- we'll keep the
10 Federal claim in Federal court, no choice but to go full
11 steam ahead on that claim?

12 MR. ROADARMEL: I think so because to do
13 otherwise would be inconsistent with Rose v. Lundy, rule
14 9(b), but it would also be inconsistent with AEDPA because
15 AEDPA contains a provision in section 2244(b)(1) of title
16 28 of the United States Code that requires claims that are
17 dismissed from an initial petition and submitted as a
18 second or successive application to be dismissed.

19 If we're always going to stay mixed petitions,
20 pending the exhaustion of even timely presented
21 unexhausted claims, it certainly leads one to wonder what
22 the purpose of section 2244(b)(1) would be. That also
23 appears to contemplate what the plurality suggested in
24 Rose v. Lundy, which is that the purged Federal habeas
25 petition goes full speed ahead, to use your words, and

1 that it's not, in fact, stayed.

2 To stay the Federal habeas petition under those
3 circumstances would also result in delay, which is
4 something that is inimical to AEDPA. As a number of lower
5 courts have pointed out, one of the primary purposes of
6 AEDPA is to tighten the Federal habeas process.

7 QUESTION: Am I wrong in thinking some Federal
8 courts did that and after exhaustion was over, the case
9 came back and -- with now the State claims added in?

10 MR. ROADARMEL: No, you're not wrong in thinking
11 that. In fact, the Third Circuit in *Crews v. Horn* follows
12 that particular procedure.

13 QUESTION: The Third Circuit follows what I -- I
14 suggested to you might, in this post-AEDPA world, be
15 appropriate, that is, to say we're going to stay -- we're
16 going to let the whole complaint sit here.

17 MR. ROADARMEL: Yes.

18 QUESTION: Not -- we're not going to lop off the
19 State claims. We just won't turn to it till the State
20 gets finished.

21 MR. ROADARMEL: Yes, that's correct.

22 Unless the Court has any further questions, I'd
23 like to reserve the balance of my time for rebuttal.

24 QUESTION: Very well, Mr. Roadarmel.

25 Ms. Bassis, we'll hear from you. Am I

1 pronouncing your name correctly?

2 ORAL ARGUMENT OF LISA M. BASSIS

3 ON BEHALF OF THE RESPONDENT

4 MS. BASSIS: Yes, you are, Mr. Chief Justice.

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

6 When this Court adopted the total exhaustion
7 rule in *Rose*, there was no statute of limitations for the
8 filing of Federal habeas petitions, and a prisoner seeking
9 to file a second Federal petition, after fully exhausting
10 State remedies, faced no time bar. But AEDPA added to the
11 mix a 1-year statute of limitations, which in many cases,
12 such as Mr. Ford's, converts the choices under *Rose* into a
13 complete bar on Federal habeas corpus review.

14 QUESTION: Well, isn't it reasonable to -- at
15 least one view, to think that Congress -- we think
16 Congress legislates in the light of existing law or
17 existing rules from this Court, that that's exactly what
18 Congress intended?

19 MS. BASSIS: No, I disagree, Your Honor. What
20 *Rose* said is that a prisoner be afforded a choice, and
21 that choice involves either proceeding on exhausted claims
22 and deleting the unexhausted or dismissing the petition
23 without prejudice to a right to return.

24 No one ever suggested in *Rose* that the
25 petitioner would lose the right to have even his exhausted

1 claims heard on the merits. In order to avoid the
2 exhaustion requirement from becoming what would, in
3 effect, be a trap for the unwary pro se prisoner requires
4 nothing more than adding a sentence to what Rose already
5 requires, a sentence made critical by AEDPA, which was
6 nonexistent at the time of Rose.

7 There is no need for warning, however, if the
8 court issues a stay. The lower courts almost unanimously
9 do so and endorse State procedures where the failure to do
10 so would result in a forfeiture of the right to Federal
11 habeas review.

12 QUESTION: Well, if -- if you say there's no
13 need for a warning, then do you think the Ninth Circuit
14 was mistaken here to require a warning?

15 MS. BASSIS: No, I don't, not under the
16 circumstances of this case. First of all, the Ninth
17 Circuit's stay procedure is somewhat unusual. It makes it
18 incumbent upon the prisoner litigant to withdraw his
19 unexhausted claims and then renew a motion to stay. So
20 the motion to stay is at the defendant's or the
21 petitioner's election.

22 But without being apprised of that peculiar
23 procedure, Mr. Ford was not informed as to his choice of
24 options with regard to amendment. The only choices he was
25 given were the two choices under Rose: delete the

1 unexhausted claims and proceed on the exhausted or
2 dismissal of the entire petition without prejudice, an
3 option which was illusory at the time it was given to him
4 because of the running of the limitations period.

5 57 percent of the habeas petitions filed are
6 dismissed for want of exhaustion.

7 QUESTION: Were there -- were there any
8 potential equitable tolling arguments open to him other
9 than based on the so-called misleading advice?

10 MS. BASSIS: Well, I believe that there were.

11 QUESTION: In other words, was it absolutely
12 clear at the time that he could not come back?

13 MS. BASSIS: Well --

14 QUESTION: Do you agree he had no -- no basis to
15 argue that he could come back?

16 MS. BASSIS: Well, the issue is that he had a
17 potential argument, but I don't know what Mr. Ford knew at
18 that time in terms of the availability of equitable
19 tolling. He certainly didn't know about the availability
20 of filing a contemporaneous writ petition in State court
21 in order to toll the limitations period. Had he done so,
22 most assuredly he would not have pursued the option of
23 motions to stay, which he filed contemporaneously with his
24 writ. I doubt that he also knew about equitable tolling,
25 statutory tolling, or really the statute of limitations

1 and how that was calculated. All he knew is that there
2 was 1 year, and he filed in time.

3 But he also did so by simultaneously filing a
4 motion to stay. However, without -- or without knowledge
5 at the time the court made a judicial disposition of Mr.
6 Ford's petitions, that he could elect a stay procedure,
7 the court -- he -- he merely went with the option of
8 dismissal without prejudice. That decision was not
9 informed absent further information about the availability
10 of the stay.

11 QUESTION: What should be the rule if the habeas
12 petitioner files in -- in Federal habeas on claims one,
13 two and three, and those have already been exhausted? But
14 then a week after he files in the Federal court, makes a
15 timely filing, he says, my heavens, I have claim number
16 four, and he files that in the State court. Does that
17 stay claims one, two, and three in the Federal court?

18 MS. BASSIS: Well, if it's filed untimely, I
19 don't know how it would absent a stay unless the court
20 granted a stay --

21 QUESTION: So the court -- so the Federal court
22 always has to file a stay when it knows that claim four
23 has just been filed in the State court?

24 MS. BASSIS: No. I believe that a court, when
25 it determines that a petition is unexhausted, may on its

1 own -- has the discretionary authority, taking many
2 factors into consideration, to grant a stay on its own and
3 delete the unexhausted claims.

4 QUESTION: But the -- the Ninth Circuit opinion
5 suggests that a district court really doesn't have
6 discretion. It's -- to me it suggested that the district
7 court had to do this.

8 MS. BASSIS: Under Ninth Circuit precedent, the
9 -- the Ninth Circuit believed that a district court lacks
10 discretion to stay a mixed petition. I actually believe
11 that courts have broader authority than what the Ninth
12 Circuit held. The discretionary authority to stay is part
13 of the inherent power of the courts, and courts routinely
14 stay matters pending before them while there -- a
15 determination of independent matters relating to the case
16 are being made.

17 QUESTION: So if district judge had advised the
18 petitioner of the Ninth Circuit law, the district judge
19 would have been wrong.

20 MS. BASSIS: I'm sorry. Pardon?

21 QUESTION: If the district court -- based on
22 what you say, if the district court had advised the
23 petitioner of what the Ninth Circuit law was, the district
24 court would have been wrong, because you say the Ninth
25 Circuit is wrong.

1 MS. BASSIS: I'm not -- I'm saying that the
2 Ninth Circuit followed its own precedent, but I'm saying
3 that the power to stay is broader than what the Ninth
4 Circuit precedent currently allows. I do believe the
5 courts --

6 QUESTION: Well, all this -- all this seems to
7 me a good argument that the -- that the district courts
8 shouldn't have to advise clients of their rights. It's
9 the -- the job of the client to figure that out.

10 MS. BASSIS: I believe that that's impossible
11 without further information regarding the choices under
12 Rose. The reason the Court ruled as it did is because pro
13 se -- 93 percent of the habeas petitioners are proceeding
14 in pro se. Mindful of the fact that pro se litigants
15 require certain procedural protections, the Court stepped
16 in and said that certain advisements are required in -- in
17 order to -- to assure that there is no unwarranted
18 forfeiture of the right to Federal --

19 QUESTION: But it's -- it can be a very
20 complicated question to know what time is left to make a
21 State claim. The court is often not in a -- a good
22 position to even know that information as required by the
23 Ninth Circuit.

24 MS. BASSIS: Justice O'Connor, I agree with you,
25 but I'm not advocating that the court calculate the

1 limitations period. What I'm requesting is not --

2 QUESTION: Well, the -- the Ninth Circuit ruling
3 seems very broad. Are -- are you suggesting that some
4 lesser notification would be adequate?

5 MS. BASSIS: I'm -- I'm requesting a specific
6 notification, not an advisement, but a warning, and I
7 believe that there is a distinction. But what I propose
8 that the circuit courts be required to give, where a mixed
9 petition is filed, is after the Rose options are afforded
10 to the prisoner, they also be told prisoners have a 1-
11 year period, generally starting when their conviction
12 becomes final and excluding the time when a State post-
13 conviction application is pending, in which to file a
14 Federal habeas corpus petition, absent cause for equitable
15 tolling. Before deciding to dismiss your petition to
16 exhaust claims, you should determine whether your 1-year
17 period has expired and, if not, how much time remains.

18 It requires no additional burden for the
19 district court to give this kind of admonition or this
20 kind of warning. The court is not required to calculate
21 the limitations period, and I agree with Your Honor. At
22 the time that this decision is made, the court probably
23 doesn't have a sufficient record to make -- to undergo the
24 complex task of computing the limitations period and
25 making that decision.

1 QUESTION: If that's so --

2 QUESTION: That's the problem --

3 QUESTION: If -- if that's so, Ms. Bassis, why
4 do you not agree that the Third Circuit's approach in
5 Crews v. Horn is the right one? It's the simplest, just
6 to say you don't have to tell the -- the petitioner, you
7 don't have to read any particular litany. You just say
8 we'll put the Federal complaint on ice while he goes off
9 to -- to the State court.

10 MS. BASSIS: Well, I agree with Your Honor
11 completely. And in fact, I don't believe that warnings
12 are necessary if stays are permitted. In fact, it would
13 make the stays essentially superfluous, but a stay is -- a
14 warning is necessary if there is no stay.

15 Now, one of the cases cited by the petitioner
16 Slayton was cited for the proposition that the court lacks
17 authority to stay a mixed petition. Slayton is
18 distinguishable in that, first of all, it didn't involve a
19 mixed petition. It involved a singular claim. And the
20 State in that case argued that the claim, the senility of
21 the trial court judge, was a matter, a sensitive matter,
22 exclusively of State court concern. So for that reason,
23 this Court held that a stay was inappropriate. Yet, at
24 the same time, it acknowledged --

25 QUESTION: Before -- before we -- we launch into

1 the -- into the stay alternative, I -- I'd like to finish
2 up the -- the advisement alternative. This is not the
3 only situation in which pro se litigants would profit from
4 some good advice from the court. We generally do not
5 require the courts to -- to act as counsel for the
6 litigants, if only for the reason that they may give wrong
7 advice, in which case you will -- you -- you will have an
8 equitable -- an equitable claim. What -- what is
9 distinctive about -- about this area that -- that we
10 should depart from that rule?

11 MS. BASSIS: Because of the right of Federal
12 habeas corpus review. This is a very, very significant
13 right, one of the last equitable bastions that remain
14 available to a litigant to challenge their State court
15 conviction.

16 QUESTION: Well, there are a lot of other
17 significant rights that -- that pro se litigants bring
18 before courts, and -- and I'm -- I'm just resistant to the
19 idea that, in addition to the requirements that the
20 Constitution imposes to give counsel to -- to litigants,
21 we're -- we're going to add on that a -- a requirement in
22 some situations that the court act as counsel for the
23 litigants.

24 MS. BASSIS: I understand. However, this Court
25 already requires advisements in certain limited instances

1 in recognition of the fact that pro se litigants' rights
2 require careful protection.

3 QUESTION: Well, what is that? I -- I think we
4 -- we do it where it's necessary to assure, for example,
5 the -- the constitutional validity of a confession.

6 MS. BASSIS: That's true, but this Court --

7 QUESTION: But that's -- that's not a matter of,
8 you know, legal advice as to how you should proceed with
9 your litigation.

10 MS. BASSIS: That's true, and that constitutes
11 an advisement as distinguished from a warning. However,
12 in United States v. Castro, this Court did require certain
13 limited advisements when recharacterizing a motion for
14 relief.

15 QUESTION: But that was -- that was when the
16 court was doing something on its own.

17 MS. BASSIS: True, and this is -- this -- the
18 advisement or the warning that I'm requesting is done in
19 order to effectuate the choices under Rose.

20 QUESTION: Well, I think it --

21 QUESTION: Those are two different things.

22 QUESTION: I think it's really a -- a major
23 departure from -- from the -- the position that the Court
24 in -- in common law jurisprudence has occupied. It would
25 be the first time that I know of where, not on -- not

1 because of something the court itself is doing, the court
2 has to provide legal advice to a -- to -- to an indigent
3 prisoner.

4 MS. BASSIS: Well, in light of Rose v. Lundy, I
5 believe that the options afforded are misleading. And
6 this Court never -- never intended that those options be
7 exercised in a manner that would forfeit the right --
8 result in a forfeiture of the right to Federal review.

9 QUESTION: How do you know what the Court
10 intended in Rose v. Lundy, other than reading the opinion?

11 MS. BASSIS: Well, it appears that -- that
12 beginning with the line of cases, Rose starts a line of
13 cases. Two other significant ones are this Court's
14 opinions in Slack and in Martinez which affirmed a right
15 of return following exhaustion. And it said that that
16 right of return, where the first petition was filed
17 without a determination on the merits because either --

18 QUESTION: But that was an -- was an
19 interpretation of AEDPA.

20 MS. BASSIS: Yes, exactly. But they were not --
21 but the ensuing application was not deemed to be second or
22 successive and it approved a right of return.

23 In this -- in this particular case, the
24 operation of -- the impact of AEDPA on Rose v. Lundy
25 operates as a bar to the right of return in the event the

1 defendant files a mixed petition.

2 QUESTION: Well, but it -- it certainly makes it
3 more difficult for the defendant. But, you know, Congress
4 wasn't trying to make things easy for defendants in AEDPA.

5 MS. BASSIS: That's true, but Congress also
6 never prohibited the choices that have been afforded under
7 Rose. And in order to implement those choices, I believe
8 an additional sentence is necessary and is made critical
9 by the adoption for the first time of a 1-year limitations
10 period in order to ensure that prisoners do not lose this
11 very important right to Federal writ relief.

12 As far as the operation of the relation back
13 doctrine under rule 15(c), I believe that that was a
14 remedial device that was adopted by the Ninth Circuit in
15 order to restore Mr. Ford --

16 QUESTION: But there wasn't a second petition
17 there to which it could relate back. I don't see how we
18 could possibly sustain that --

19 MS. BASSIS: That's true.

20 QUESTION: -- order of the Ninth Circuit. That
21 just came out of no place. There wasn't anything to which
22 it could relate back.

23 MS. BASSIS: Unless, of course, one follows the
24 rationale of the opinion, which is that the petitions
25 should have been stayed not dismissed, and therefore to

1 restore Mr. Ford to the position he was in previously --

2 QUESTION: But there wasn't a stay order. I
3 mean, that -- that's just manufacturing something. In
4 this case the petitions were dismissed.

5 MS. BASSIS: That's true, and other cases faced
6 with that kind of situation have either used their
7 equitable authority to reinstate the improperly dismissed
8 petitions or have used the doctrine of nunc pro tunc,
9 either of which would be available.

10 In any event, the Ninth Circuit --

11 QUESTION: Well, why would -- I mean, have we
12 sanctioned the use of, quote, nunc pro tunc, closed quote,
13 in similar situations to this?

14 MS. BASSIS: In Anthony v. Cambra, that's what
15 the Ninth Circuit used.

16 QUESTION: I said have we.

17 MS. BASSIS: No, I don't believe it has, Your
18 Honor, and I believe the reason for that is because this
19 is a relatively -- this case -- this is the first case to
20 have gone this far.

21 QUESTION: But in any case, your client would be
22 in exactly the same position that the Ninth Circuit tried
23 to put your client in if the Ninth Circuit had simply said
24 a -- a mistake was made, either because there was
25 misleading advice or because there was a failure to give

1 the advice that we say should have been given, and we're
2 simply going to put him back in the position that he would
3 have been in had there not been that mistake, i.e., put
4 him back with a petition before the district court just as
5 there was within the -- the 1-year period.

6 MS. BASSIS: Yes, taking --

7 QUESTION: So -- so the relation back is simply
8 -- well, it's -- I guess it's one way of explaining
9 something that the court, on your view simply under its
10 power to correct an error, could have done.

11 MS. BASSIS: Exactly, Your Honor.

12 QUESTION: On your view, Ms. Bassis, would there
13 be any disincentive for a litigant to bring a mixed
14 petition, to come to the Federal court first rather than
15 to go to the State courts, which is certainly what -- what
16 AEDPA contemplates? What -- what disincentive is there?

17 MS. BASSIS: Well --

18 QUESTION: What does he -- what does he have to
19 lose by just marching off to Federal court with all his
20 claims?

21 MS. BASSIS: Well, first of all, he loses
22 precious time. Most of these litigants believe that
23 they're -- they've been unfairly convicted. Many are
24 serving life terms, and they want to have -- they're
25 interested in an expeditious resolution of their claim.

1 They want to do it right. They want to have their claim
2 heard on the merits as quickly as possible. They're not
3 interested in delay. And so, they would not choose a
4 procedure that would cause them to return to State court.
5 It's not in their interest to do so.

6 QUESTION: Well, it isn't there -- in their
7 interest, but they're not lawyers.

8 MS. BASSIS: That's --

9 QUESTION: And they say, you know, I don't know
10 which ones need exhaustion and which ones don't. I'm just
11 going to dump the whole thing onto Federal court. Won't
12 that happen in every situation? And is that -- is that
13 what AEDPA contemplated?

14 MS. BASSIS: I don't think AEDPA contemplated
15 that -- well, in fact, I believe AEDPA recognized the
16 possibility that mixed petitions would be filed.

17 And indeed, the exhaustion requirement is an
18 extremely difficult one both for lawyers and pro se
19 litigants alike. By the time a judicial determination has
20 been made, on average 263 days go by after that Federal
21 writ petition has been filed. So you can easily have a
22 situation where your pro se litigant filed well in
23 advance, maybe 3 months after the limitations period
24 started, only the -- to find that by the time he -- a
25 judicial determination is made, that he's failed to

1 exhaust the --

2 QUESTION: Would -- would you have a reason to
3 object to a -- a modification of what the Ninth Circuit
4 was talking about? And instead simply of this kind of
5 automatic stay and -- and abeyance procedure, there were
6 engrafted on it a further condition, and the condition be
7 that before the -- the stay be granted and -- and the
8 petition kept in abeyance, the -- the defendant would have
9 to show that there was some good reason for or excuse for
10 his failure to exhaust the -- the unexhausted claims.
11 That would accommodate -- the reason I raise it is that
12 would accommodate the -- the issue, at least in part, that
13 Justice Scalia is raising and it would address the case
14 that your answer didn't address, and that is, of -- of the
15 prisoner under a death sentence who does not want fast
16 action at all. He wants the slowest action possible.
17 Would there be an objection to -- to engrafting that
18 further condition of a defendant must excuse failure to
19 the Ninth Circuit's procedure?

20 MS. BASSIS: No. In -- in fact, I believe that
21 that condition is inherent in a court's discretionary
22 authority to stay. It can take into consideration a -- a
23 variety of factors, including whether or not the
24 petitioner has been diligent in exhausting. The reason --

25 QUESTION: Justice Souter is suggesting that it

1 must take into account that factor.

2 MS. BASSIS: I believe it already does, but I --
3 I would have no problem with that.

4 QUESTION: What -- what would be a good excuse?
5 That I -- I didn't know enough?

6 MS. BASSIS: No.

7 QUESTION: Would it -- would it be an excuse
8 that I'm not a lawyer and I didn't realize I had to
9 exhaust?

10 MS. BASSIS: No. I believe one of them would be
11 that I didn't receive my transcripts from my State
12 appellate attorney, and I didn't know what claims were
13 there because I didn't receive the information. The other
14 -- one of the other reasons --

15 QUESTION: He's bringing the claim in Federal
16 court.

17 MS. BASSIS: Yes.

18 QUESTION: How could he not know the claim?
19 He's bringing it in Federal court, and -- and the
20 objection is you should have brought it in State court
21 first. What possible excuse could he have? I mean, the
22 normal excuse is going to be, you know, I'm just -- I'm
23 just a simple prisoner. I'm not a lawyer. I -- I had no
24 idea I had to exhaust.

25 MS. BASSIS: Well, for example, a defendant may

1 have had a direct appeal, but it doesn't mean that other
2 claims such as ineffective assistance of counsel claims,
3 which normally must be raised in a writ, have been pursued
4 at all. This requires reliance on extrajudicial evidence.
5 Normally counsel, at least in California, appointed
6 counsel in some districts, is not authorized to file a
7 writ petition without express permission of the court of
8 appeal. Very often those counsel don't pursue that, and
9 therefore the writable issues, the -- which rely on
10 extrajudicial evidence, have not been developed, and they
11 have -- those claims have, therefore, not been exhausted.
12 So there are a number of reasons why a pro se prisoner
13 litigant may find that certain viable claims, meritorious
14 claims, have not been exhausted --

15 QUESTION: Well, I don't -- I don't certainly
16 see that condition in -- in the procedure that the Ninth
17 Circuit has adopted, that it -- there has to be some
18 justification for not having exhausted. Is -- is that set
19 forth in -- in the Ninth Circuit's procedure?

20 MS. BASSIS: No, it isn't, but Your Honor --

21 QUESTION: That's new to me.

22 MS. BASSIS: -- a stay is discretionary, and in
23 deciding whether or not a stay is appropriate, the court
24 takes into factors such as a petitioner's dilatoriness,
25 whether or not they're attempting to evade a time

1 limitation, whether or not their efforts are in good
2 faith. I believe that these are all factors that the
3 district courts already are mindful of.

4 QUESTION: But you -- and you disagree then with
5 the Ninth Circuit which said, in effect, that it is -- the
6 district courts don't have discretion. They must grant a
7 stay.

8 MS. BASSIS: No. I -- I disagree with the Ninth
9 Circuit's opinion that it lacks authority to stay a mixed
10 opinion. I believe that all district courts have the
11 inherent authority to stay a mixed opinion. And in fact,
12 there's considerable authority for it based upon this
13 Court's own precedent.

14 QUESTION: But perhaps you and I don't read the
15 Ninth Circuit's opinion the same way insofar as the -- the
16 authority of a district court to -- in its discretion to
17 turn down a stay application. I thought the Ninth Circuit
18 said that there was no discretion.

19 MS. BASSIS: No. I believe that what the court
20 said, in a circumstance -- it -- it -- I agree with Your
21 Honor. On one hand, it appears to speak in mandatory
22 terms. On the other hand, I believe that the issue that
23 there may potentially be a forfeiture of the right to
24 Federal review is a factor which the district court must
25 also take into consideration in deciding whether or not to

1 enter a stay. So it's just one additional factor. While
2 it did appear that the Ninth Circuit spoke in mandatory
3 terms, I don't believe it's mandated, the -- the decision
4 of whether or not a district court should stay a mixed
5 petition.

6 And I believe it also has authority under this
7 Court's decisions in Nelson and in Wade to stay an unmixed
8 petition, which I know is not the issue before us with
9 regard to this case.

10 QUESTION: Can you give us any idea, perhaps
11 anecdotally, about the number of -- of times we have mixed
12 petition arguments or questions about mixed petitions? Is
13 it 10 percent of the time, do you think, or 90 percent of
14 the time? I see them all the time.

15 The reason I ask is you say the district judge
16 has discretion to stay and abey in every case. This is a
17 -- a huge undertaking by the judicial system to make AEDPA
18 work, and AEDPA was supposed to simplify things.

19 MS. BASSIS: Well, AEDPA was supposed to
20 simplify things, but it was adopted 8 years ago and we're
21 still litigating nearly every sentence of AEDPA. So I
22 wish it had simplified things, but unfortunately, it is
23 not a simple statute to understand.

24 QUESTION: Do -- do you have any idea of the --
25 the number of instances in which there's an allegation of

1 a mixed petition?

2 MS. BASSIS: I know that 57 percent of the -- of
3 cases are dismissed for failure to exhaust.

4 QUESTION: About 5 -- 7?

5 MS. BASSIS: 5 -- 7.

6 QUESTION: And is this in the Central District
7 or the California or all over?

8 MS. BASSIS: I think it's all over, and in fact,
9 the statistics comes from this Court's opinion in Duncan,
10 and I believe it's Justice Breyer's opinion where he cites
11 to the statistics.

12 QUESTION: I think it was something like -- I
13 got it from some official source -- said there were about
14 two-thirds were actually filed in the wrong court, namely
15 the Federal court. And I think it was 57 percent of those
16 that were dismissed.

17 MS. BASSIS: Right, for failure to exhaust.

18 QUESTION: That's where it came from. That's
19 what --

20 MS. BASSIS: So what I am proposing is that the
21 Court permit -- approve a stay of mixed petitions, but if
22 not, that it gives a warning to pro se litigants about how
23 the Rose choices are effectuated, that it gives the Rose
24 choices and then it continues to apprise the defendant
25 about the running of the 1-year limitations period, and

1 that they essentially must calculate the limitations
2 period on their own.

3 If the Court has no further questions.

4 QUESTION: Thank you, Ms. Bassis.

5 Mr. Roadarmel, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF PAUL M. ROADARMEL, JR.

7 ON BEHALF OF THE PETITIONER

8 MR. ROADARMEL: With the Court's permission, I'd
9 like to make four brief points.

10 The proof is in the pudding regarding stay and
11 abeyance and what we're experiencing in California. We're
12 experiencing greater delays since the enactment of AEDPA
13 than we ever experienced before because of stay and
14 abeyance and relation back, particularly in capital
15 Federal habeas cases.

16 We make mention in footnote 1 of our reply brief
17 of a capital Federal habeas case pending in the Central
18 District Court of California called *Reno v. Woodford*. In
19 that case, the district court issued a stay of the purged
20 petition on May 7th, 1999 for the ostensible purpose of
21 allowing the petitioner to exhaust his State court
22 remedies. To date, no State court exhaustion petition has
23 been filed. None is on the horizon. But under stay and
24 abeyance and relation back, whenever one is filed and the
25 claims are exhausted and added back into the State

1 consider them on the merits conceivably if there wasn't
2 some kind of default that was applicable, and they would
3 also toll the limitation period during the pendency of
4 that State proceeding.

5 Ford was under the misapprehension that his
6 Federal filing tolled the limitation period in much the
7 same way that the petitioner in Duncan was under the
8 misapprehension that his first mixed petition tolled the
9 limitation period in that case as well. We know from
10 Duncan v. Walker that it does not.

11 Finally, advice regarding AEDPA's limitation
12 period, to be meaningful at all, to be more than just a
13 meaningless gesture, has to rely on specific documents and
14 has to provide specific information that a district court
15 is simply in no position to provide at the time a mixed
16 petition is dismissed. The only documents a district
17 court typically has before it at that time are documents
18 relating to filings by the petitioner in the State supreme
19 court. The allegations contained in those documents are
20 then compared against the allegations in the Federal
21 habeas proceeding for the purpose of determining whether
22 the claims are exhausted. The court does not have before
23 it the entire record of proceedings.

24 And even if it did, there are certain
25 circumstances that would warrant tolling that would not be

1 contained in those documents and the court would not be
2 able to make any kind of a reasoned decision or give any
3 kind of reason or correct advice regarding the impact of
4 the limitation period on any unexhausted claims.

5 Stay and abeyance we believe vitiates AEDPA by
6 rendering largely irrelevant the limitation period,
7 rendering the State court tolling provision near
8 surplusage, and in effect, encouraging petitioners to file
9 mixed petitions in Federal court instead of presenting
10 their unexhausted claims in State court first.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Roadarmel.

14 The case is submitted.

15 (Whereupon, at 10:58 a.m., the case in the
16 above-entitled matter was submitted.)

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