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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear arguments  
4 next in Lawrence v. Florida.

5 Ms. Bonner.

6 ORAL ARGUMENT OF MARY C. BONNER

7 ON BEHALF OF PETITIONER

8 MS. BONNER: Mr. Chief Justice, and may it  
9 please the Court:

10 Mr. Lawrence in this case made an  
11 application for relief in the State courts of Florida,  
12 that unfortunately was denied to him, the relief that he  
13 sought. Consequently, he came here to the United States  
14 Supreme Court on a certiorari review and the certiorari,  
15 although it was denied, he did present to this Court an  
16 issue on which it could have acted had it chosen to act.  
17 It is well within the power under 28 U.S.C. 2104 for  
18 this Court to modify, vacate, remand. In other words,  
19 this Court can and could have affected that judgment.

20 Our position is that this -- there is a  
21 distinction between the, quote, "appellate jurisdiction"  
22 under 2104 and the original writ of certiorari which  
23 would lie in this Court in some instances. When one  
24 uses the appeal, one is not making a new application.  
25 We respectfully suggest that the utilization of the

1 emphasis in 2244 should be on application and what was  
2 before this Court on petition for certiorari was the  
3 application, the document, the issues, which had been  
4 presented below in the Florida courts and this Court was  
5 sitting to determine whether it would --

6 CHIEF JUSTICE ROBERTS: It would presumably,  
7 though, be limited in some ways. For example, if the  
8 application for State post-conviction relief raised  
9 arguments under State law, those would not be a proper  
10 subject of a petition for certiorari.

11 MS. BONNER: Absolutely not, Your Honor.  
12 And the issues which were raised were the same ones that  
13 were raised in the State court and were of  
14 constitutional dimension that Mr. Lawrence raised here.  
15 But our point is if the emphasis is on the application,  
16 then until the finality of action on the application --

17 JUSTICE SCALIA: You're saying the  
18 application is the application -- the petition for  
19 certiorari is the application?

20 MR. PECK: No, sir. I'm saying the  
21 application for 3850 in Florida State trial courts,  
22 which then goes to the Florida State Supreme Court, is  
23 the application upon which this Court would be acting.  
24 If it were not acting on that, what would it be acting  
25 on?

1 JUSTICE SCALIA: Well, we can't act on it  
2 unless -- unless it's final. We -- we need final action by  
3 the State court, don't we?

4 MS. BONNER: Well, except --

5 JUSTICE SCALIA: How can it be final action  
6 and yet still be pending?

7 MS. BONNER: To utilize the word "final"  
8 there would be -- we can use the word "final" after a  
9 jury determination and that in one effect, in one sense,  
10 is final. And when Florida is done it's final in some  
11 sense. But it's not final under 2104 because this Court  
12 can modify it, can remand it.

13 JUSTICE SCALIA: It's final as far as the  
14 application for State review is concerned.

15 MS. BONNER: There -- it is the --

16 JUSTICE SCALIA: Which is the text that  
17 we're dealing with here.

18 MS. BONNER: Yes. It is the application for  
19 State review which comes before this Court. We're  
20 asking you to review the lower court's rulings on the  
21 application.

22 JUSTICE BREYER: I take it you're talking  
23 about language, if I followed it, in 2244(d)(2).

24 MS. BONNER: Yes, sir.

25 JUSTICE BREYER: And it tolls the statute

1 while the "properly filed application for State  
2 post-conviction or other collateral review is pending."  
3 So the question is during the 90 days after they've said  
4 no to you in the State court and you have a chance to file  
5 the writ, is that application pending? And you say yes,  
6 that application is pending, that application is pending  
7 and subject to various motions, such as a motion or a  
8 petition for certiorari.

9 MS. BONNER: Yes, sir.

10 JUSTICE BREYER: But it is pending.

11 MS. BONNER: Yes, sir that is --

12 JUSTICE BREYER: That's where we are in this  
13 argument.

14 MS. BONNER: That is exactly our position.

15 JUSTICE BREYER: Thank you.

16 MS. BONNER: That this application is  
17 pending.

18 CHIEF JUSTICE ROBERTS: Of course, the other  
19 way to read the language is that the State application  
20 is final -- otherwise you couldn't file the Federal  
21 petition for certiorari, and that petition may affect  
22 what happens with your application for State relief, but  
23 the State application itself is final and over.

24 MS. BONNER: In that sense it is not final  
25 in that it can be altered and that this Court can

1 order --

2 CHIEF JUSTICE ROBERTS: Well, it has to be  
3 final before you can file a petition for cert.

4 MS. BONNER: Yes, sir. It's the vagaries of  
5 the use of the language --

6 JUSTICE BREYER: Does it say that? I would  
7 have thought it said that there has to be a final  
8 judgment of the lower court, and the final judgment of  
9 the State court concerns that application which is still  
10 pending and will continue to be pending at least for 90  
11 days in your view.

12 MS. BONNER: Yes.

13 JUSTICE BREYER: So it doesn't require a  
14 final State application. It requires a final judgment  
15 about the State application.

16 MS. BONNER: Yes, that's exactly true, sir.

17 CHIEF JUSTICE ROBERTS: So what about the  
18 argument raised by your friend that exhaustion doesn't  
19 require filing a petition for certiorari, that the State  
20 procedures are considered fully exhausted upon the final  
21 decision in the State court and that it makes sense to  
22 treat this, this 2244, in a parallel way with respect to  
23 the exhaustion requirement?

24 MS. BONNER: Well, Your Honor, first of all,  
25 it would require this Court to substitute the word

1 "exhaustion" for the word "pending" in the statute.  
2 There is no reason to believe and there is much reason  
3 not to believe that Congress intended exhaustion as a  
4 concept which should be read into this particular  
5 context in which we're dealing. In point of fact, in  
6 the 1995 proposal for habeas reform the word  
7 "exhaustion" was in there. It was taken out in 1996.  
8 Unfortunately, the Congressional history and the  
9 speeches on the floor, etcetera, are not really  
10 illuminating, except the concept of exhaustion  
11 apparently the legislature, the Congress, felt would be  
12 subject to interpretation differently in different  
13 States.

14 CHIEF JUSTICE ROBERTS: How do you read  
15 "is pending" with respect to when the State defendant,  
16 movant, doesn't file a petition for certiorari? Is  
17 that --

18 MS. BONNER: Well, I believe.

19 CHIEF JUSTICE ROBERTS: Is the State  
20 post-conviction application still pending on the 90th  
21 day?

22 MS. BONNER: I believe it is, Your Honor,  
23 and I think the logic that this Court has used in the  
24 context of 2255's obtains as well, and it -- it is  
25 pending because the reason that we have 90 days -- it's

1 an unusual amount of time that we have to come to ask  
2 this Court for relief. And I believe that part of that  
3 time and part of the reason for the existence of that is  
4 that we can contemplate whether we should be filing a  
5 petition for certiorari.

6 CHIEF JUSTICE ROBERTS: Well, anybody who  
7 wants the additional time -- this law was passed to  
8 prevent people from delaying. But anybody who wanted to  
9 delay would then have to file a cert petition, I assume?

10 MS. BONNER: I would suggest to you, Your  
11 Honor, that it should be -- this should be construed the  
12 same way that the finality of a State conviction, the  
13 finality of a Federal conviction, and the finality of a  
14 2255 are determined, and that is at the time that either  
15 this Court has dealt with certiorari by denying or  
16 granting it or that 90 days has, has been --

17 CHIEF JUSTICE ROBERTS: But if you filed --  
18 so you say you get 90 days whether you file or not?

19 MS. BONNER: Yes, I do, sir.

20 CHIEF JUSTICE ROBERTS: But if you want the  
21 additional time that it takes for an opposition, for  
22 waiver of response, for this court to dispose of it,  
23 then you have to file a petition for cert?

24 MS. BONNER: I don't -- that is not my  
25 position, Your Honor. I believe that the 90 days should

1 obtain no matter what so that we'll have a universal  
2 rule.

3 CHIEF JUSTICE ROBERTS: Right.

4 MS. BONNER: -- that practitioners will not  
5 be making this error because they will be acting in  
6 concert --

7 JUSTICE GINSBURG: But the Chief's point is  
8 if a petition is in fact filed it will end up being  
9 more than 90 days because then you would have, in  
10 addition to the 90 days you'd have to file the cert  
11 petition, the time it takes for this Court to dispose of  
12 the petition, and the statute of limitations would be  
13 tolled throughout that entire period, not just a fixed  
14 90 days.

15 MS. BONNER: That is true, ma'am.

16 JUSTICE GINSBURG: Do you -- does your  
17 argument mean that a defendant who wanted to file within  
18 the 90 days, wanted to file in the district court,  
19 wanted to file the habeas application in the district  
20 court within the 90 days, couldn't do so because it  
21 would be premature because the, the State application is  
22 still pending?

23 MS. BONNER: I believe that the way that we  
24 have been seeing the opinions come from this Court and  
25 from the various courts around the country are that

1 there seems to be a favorable disposition to protective  
2 2254, 2255 petitions. I agree with the premise of Your  
3 Honor's question that it would be pending and it would  
4 be pending here and therefore, you should not go to  
5 district court and file a 2254. Now whether you can and  
6 you can do it in a protective fashion is another entire  
7 issue which isn't really raised here because he did seek  
8 certiorari review.

9 JUSTICE ALITO: Do you read the tolling  
10 provision in 2263(b) the same way as you read the  
11 tolling provision that's before us?

12 MS. BONNER: No. Certainly I do not. And  
13 the State really did not analogize to 2263 as I believe  
14 perhaps they should have analogized to it. 2263 of  
15 course is the opt-in provision which moves things along  
16 on an even quicker track than a one year, and you have  
17 180 days to file, and the Congress was absolutely clear  
18 and this was enacted at the same time that the  
19 provisions at issue were enacted, that it was 180 days  
20 after final State court affirmance and you had to -- you  
21 had to file. That's it.

22 JUSTICE ALITO: Do you think Congress really  
23 wanted to have two different, entirely different tolling  
24 concepts in these provisions?

25 MS. BONNER: I think they did, and one of

1 the reasons that I believe that they did, number one was  
2 to achieve their goal of moving things faster if the  
3 States were able to guarantee counsel, and the second is  
4 that they told, as well, in 2263(b) the main difference  
5 between 2263(a) and (b)(1) is that the time when you're  
6 getting your certiorari petition ready for this Court  
7 under the opt-in provision is not tolled. But the time  
8 when this Court is considering the post-conviction  
9 certiorari request is tolled. It's tolled clearly by  
10 statute. I cannot presume and would not presume that  
11 what Congress did was write these in numerical order and  
12 when it got to 2263 come up with a new and exciting  
13 idea, and then not go back to 2254 and 2244 to change  
14 the language there.

15 I think Congress meant something different.  
16 And what it meant was the trigger time, the time that  
17 was going to be elapsing between the petition, between  
18 your final decision and when you could go to certiorari.

19 CHIEF JUSTICE ROBERTS: You know, what about  
20 2244(d)(1)(a) where Congress referred expressly to the  
21 time for seeking direct review or the expiration of the  
22 time for seeking such review? Your reading of D(2) is  
23 that that's what they meant when they said the State  
24 application was pending. The State application or the  
25 time for seeking review of the State application, and in

1 -- just in just a few sections above that they expressly  
2 said that shouldn't we read pending in a different,  
3 different direction?

4 MS. BONNER: Well, the distinction, I have  
5 at least two things to say about that. The distinction  
6 between the two sections, that would be (D)(1)(a) and  
7 (D)(2), one is dealing with one thing, a judgment which  
8 has reached finality and it is determining when that  
9 judgment is final. They would have had to rewrite the  
10 tolling provision because it is not speaking about a  
11 judgment. It is speaking about an application which is  
12 a process. And the second thing is that --

13 CHIEF JUSTICE ROBERTS: Well, they would  
14 have just said during the time of the application for  
15 State post-conviction, or that the expiration of the  
16 time for seeking review of it.

17 MS. BONNER: I believe that Congress is  
18 presumed to have read, written its laws knowing the  
19 history of interpretation of this Court. And pending  
20 has a very long tradition and this Court's role in the  
21 State-Federal continuum obviously is of well defined 200  
22 plus-year-old role, and the part of that role is that  
23 you as this Court are the final arbiters and the only  
24 true people who can make the decision about what the  
25 Federal Constitution says.

1           The State would have you read this as if it  
2 says application for State post-conviction relief is  
3 pending in the State court. I would be hesitant to  
4 rewrite the statute since Congress did not invite me to  
5 do so as the State has actually done by saying, pending  
6 in the -- in the State court. And that is not the concept  
7 that we have lived with for 200 years or 200- plus  
8 years. Pending means until it is, cannot be any longer  
9 acted upon, and it is clear here, you as this Court can  
10 act upon it.

11           JUSTICE ALITO: Do you think the final, the  
12 judgment in the criminal case is still pending because  
13 it can be acted upon?

14           MS. BONNER: Not the judgment in the  
15 criminal case, but I would suggest that the judgment in  
16 the 22 -- I mean the 385.1 procedures in Florida which  
17 would be that post-conviction application because that's  
18 where we are. We have reached finality on the, after  
19 this Court has had, after we have either come to this  
20 Court for certiorari or the 90 days is exhausted.

21           JUSTICE ALITO: Are you saying, are you  
22 arguing that there, during this period, there is an  
23 application for State relief pending in the State courts  
24 or that there is an application for State relief pending  
25 in this Court?

1 MS. BONNER: I am saying that the  
2 application in State court is yet pending when it is  
3 here, because that court can be ordered by --

4 JUSTICE ALITO: Where is it pending?

5 MS. BONNER: -- this Court to act upon it.

6 JUSTICE ALITO: Where is it pending?

7 MS. BONNER: It is pending still in State  
8 court because this Court can order that court.

9 JUSTICE GINSBERG: I thought your argument  
10 on brief was that it is pending here and the statute  
11 says pending. It doesn't say pending, as your statute,  
12 you compared it with says. That pending, the  
13 application is pending someplace. Where is it pending?  
14 Not in the State court anymore. They have reached their  
15 final judgment, but it's still pending in your case here  
16 because you filed a petition for cert.

17 MS. BONNER: Yes, ma'am. It just is, also,  
18 I -- there is some case law which speaks to the fact  
19 that it remains pending or unsettled or unsure or  
20 unfinal when a court can order another court to act on  
21 it.

22 JUSTICE SOUTER: In the same sense that it  
23 is pending after the trial court has acted but before  
24 the defendant or the petitioner decides whether he wants  
25 a State appeal.

1 MS. BONNER: Yes, sir.

2 JUSTICE SOUTER: I don't know where it's  
3 pending. Whether it's still pending in the State trial  
4 court or in the State appeals court. But nobody denies  
5 that it's pending. And I understood your argument to  
6 be, whatever pending means there, pending means here  
7 because there is no modifier that would limit the same  
8 -- the same construction.

9 MS. BONNER: Yes. That is -- that is so,  
10 sir.

11 CHIEF JUSTICE ROBERTS: But in what sense is  
12 it an application for State post-conviction review when  
13 it's pending before us? We are considering a claim that  
14 the State erroneously decided a Federal question --

15 MR. BONNER: You are --

16 CHIEF JUSTICE ROBERTS: -- but it's not an  
17 application, it's an application for our review, not  
18 State post-conviction review.

19 MS. BONNER: It began as a complaint. This  
20 is, analytically, everyone seems to have a little bit of  
21 pause because of exactly the context of your, of your  
22 comment, of your question. But there is only one  
23 lawsuit, complaint, whatever you wish to call it, which  
24 we are dealing with, and that is the one that seeks  
25 post-conviction relief in Florida. If you're

1 unsuccessful there, you go to the Florida Supreme Court  
2 and that same application is what we come to this Court  
3 on. There is nothing else out there. The State seems  
4 to tell us, or suggest to us that it's some kind of an  
5 independent State -- uh, Federal action.

6 JUSTICE ALITO: It's a Federal writ, isn't  
7 it? It's an application for a Federal writ. It's not  
8 an appeal in State criminal -- State case.

9 MS. BONNER: But it comes under this Court's  
10 appellate jurisdiction versus its original jurisdiction  
11 for writs of certiorari.

12 JUSTICE SOUTER: If you succeed you're going  
13 to get an order from this Court to the State court say,  
14 saying, go back in this State proceeding that has been  
15 begun, and do it right. So the focus of it is still the  
16 State proceeding even though we may correct it under  
17 appellate jurisdiction.

18 MS. BONNER: Yes, sir. The State brings  
19 forward an argument that this certiorari before this  
20 Court is not a part of, not an integral part of and in  
21 fact not any part of the State process. I believe they  
22 come to that conclusion because they insert what they  
23 wish the statute said, rather than what the statute  
24 actually says, and we are attempting as best we can to  
25 interpret what Congress did not, what you wish it did.

1 CHIEF JUSTICE ROBERTS: Do you have any -- I  
2 suppose this, we ought to know better, but how long the  
3 average disposition time is for a petition for  
4 certiorari in a case like this?

5 MS. BONNER: I believe it's like 44 days if  
6 you don't --

7 CHIEF JUSTICE ROBERTS: No. From the time  
8 of, I suppose the pertinent question would be from the  
9 time of final State -- final State judgment, eventual  
10 filing for petition for cert, opposition, waiver, our  
11 disposition? Presumably, probably five or six months?

12 MS. BONNER: It's not usually that long.  
13 This Court is very efficient with that. And that's one  
14 of the points --

15 CHIEF JUSTICE ROBERTS: Well, why don't you  
16 take, let's just if say you take 90 days, and you get --

17 MS. BONNER: You get 42 or so.

18 CHIEF JUSTICE ROBERTS: And you get a two  
19 month extension.

20 MS. BONNER: Yes.

21 CHIEF JUSTICE ROBERTS: Then you get another  
22 month for the opposition depending on what circuit  
23 you're from for the extension. Get another month for  
24 the opposition, at least two months, month and a half,  
25 for us to dispose of it. It probably comes out to about

1 six months.

2 MS. BONNER: It could, Your Honor.

3 CHIEF JUSTICE ROBERTS: Now I guess -- my  
4 question is, in a law that imposed a one-year statute of  
5 limitation, is this an implicit additional, I realize  
6 it's a question begging to some extent, but implicitly  
7 an additional six-month period would strike me as odd.

8 MS. BONNER: Well, Your Honor, it is not a  
9 one-year statute of limitations per se. That may be  
10 what looks good on paper with the writing of the statute  
11 and the expressing of the statute to the public, that  
12 one year is what's going to happen. But when one takes  
13 into account the exhaustion requirement and takes that  
14 time out, we are still not talking about a 365-day  
15 process.

16 JUSTICE STEVENS: Let me ask you on that  
17 score, what typically in Florida is the time elapsed  
18 between the conclusion of the criminal proceeding  
19 and the conclusion of the State collateral relief?

20 MS. BONNER: It's quite a while. Your  
21 Honor. I wouldn't know the average.

22 JUSTICE STEVENS: But it's more than six  
23 months, I assume.

24 MS. BONNER: It's a long time, Your Honor.

25 And --

1 JUSTICE STEVENS: Two, three, four, five  
2 years.

3 MS. BONNER: Yes, sir.

4 JUSTICE STEVENS: And all that time, the  
5 one-year statute has been tolled?

6 MS. BONNER: Exactly, so it's -- that's  
7 why I don't look at exactly --

8 JUSTICE STEVENS: The question is whether  
9 there may be another six months added on to that five or  
10 six-year period.

11 MS. BONNER: Yes, sir. And one of the  
12 important things here is --

13 CHIEF JUSTICE ROBERTS: Well, the reason  
14 that's tolled is because it's designed to encourage the  
15 exhaustion of the State procedures. This additional  
16 period is when it's pending, not before the State but  
17 before a Federal court.

18 MS. BONNER: But it's the State petition  
19 which is pending for your review. And one of the things  
20 I want to point out is that the 90 days, when they  
21 passed habeas reform, they were not speaking about 30  
22 days, 20 days, 60 days, 90 days or even the six months  
23 that Your Honor posits. It was 10 years, 12 years, 14  
24 years. And that was I think the major impetus to  
25 encourage the Congress to put the 365 day on there.

1           This Court has complete control over the  
2 certiorari process. You know, being lawyers we always  
3 do file at the last minute, but of course it's this  
4 Court's rules which gives us the 90 days versus another  
5 period of time. It is -- the petition for certiorari is  
6 not like a notice of appeal, because it's not just a  
7 one-page document that's laid out in the Federal  
8 statutes for us to do. It's an application to -- it's an  
9 application for review and it is -- it takes some time to  
10 fashion.

11           CHIEF JUSTICE ROBERTS: Any -- any  
12 statistics on how many petitions for cert from State  
13 post-conviction collateral review are granted? In other  
14 words, if we are talking about an additional six months  
15 in every case, how many of those are actually granted?

16           MS. BONNER: I don't know how many are  
17 granted, Your Honor, but one thing that struck me as I  
18 was reading through these cases is that many are granted  
19 to the State. And of course, when the State goes to  
20 certiorari from post-conviction, from a post-conviction  
21 loss on its side, then the whole process is turned on  
22 its head, and many, many times this Court has granted  
23 certiorari to the State. And that is another problem  
24 that happens with this tolling if you read pending the  
25 way the State wants you to read pending, because what do

1 we do then? What do people do?

2 CHIEF JUSTICE ROBERTS: No, but if the State  
3 is petitioning for cert it means you've won.

4 MS. BONNER: It means you've won.

5 CHIEF JUSTICE ROBERTS: So presumably you're  
6 not looking forward to further --

7 MS. BONNER: No. But what happens to the  
8 time? How do you count that time if you lose here?

9 JUSTICE KENNEDY: I suppose you'd have to  
10 file a protective petition with the district court  
11 saying we won but we might still lose.

12 MS. BONNER: I guess. And - you know, a  
13 protective -- to litigants, protective and to district  
14 court judges, I believe and State court judges,  
15 protective petitions are kind of anathema, because since  
16 you don't know what you're going to raise -- and in the  
17 2254 you have more of an idea, certainly, because you're  
18 limited in many instances if not all instances to those  
19 things which were exhausted -- but obviously there are  
20 new claims that are brought up because there would not  
21 be a stay and abey. There would not even be a request  
22 for stay and abey if there were things that the Federal  
23 courts find.

24 CHIEF JUSTICE ROBERTS: Assuming you make  
25 the same argument you make on questions 2 and 3 about

1 the availability of equitable tolling.

2 MS. BONNER: I'm sorry. I didn't --

3 CHIEF JUSTICE ROBERTS: I would be very  
4 surprised if the court found you were out of time  
5 because the State had filed a petition for certiorari.

6 MS. BONNER: I'd be surprised --

7 CHIEF JUSTICE ROBERTS: And have it granted.

8 MS. BONNER: I'd be surprised too, but I've  
9 practiced a long time and I've seen some very odd things  
10 happen in courts and, both a stay and abey, and the  
11 other procedures that have been discussed by this Court  
12 have not been handed down as mandates to the lower court  
13 to require the lower court to rule in a certain way, or  
14 to absolutely stay, or to entertain protective motions  
15 and then permit those protective motions to be  
16 supplemented at a time later. If Your Honors do not  
17 mind, I will reserve some time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
19 Mr. Kise.

20 ORAL ARGUMENT OF CHRISTOPHER M. KISE

21 ON BEHALF OF THE RESPONDENT

22 MR. KISE: Mr. Chief Justice, and may it  
23 please the Court:

24 Petitioner's case amounts to no more  
25 than a disagreement with AEDPA's recognized policies and

1 procedures, and an improper attempt to convert ignorance  
2 of settled law into an extraordinary circumstance  
3 warranting equitable relief. AEDPA's plain language and  
4 recognized purposes establish that tolling does not  
5 extend to the post-conviction certiorari process.  
6 Additionally, ignorance of settled law whether by an  
7 incarcerated pro se petitioner, by private counsel, or  
8 by appointed counsel is not an extraordinary  
9 circumstance and does not excuse prompt filing.

10 JUSTICE STEVENS: Mr. Kise, can I ask you  
11 what your view is on what happens if the Court  
12 grants certiorari, would the application be pending  
13 during the period that the case is under advisement in  
14 this Court?

15 MR. KISE: No, Your Honor. And I'm assuming  
16 your question is asking me, grant certiorari based on an  
17 application filed by the petitioner.

18 JUSTICE STEVENS: Either way.

19 MR. KISE: Well, in both circumstances the  
20 answer would be no, and in both circumstances I think  
21 the relief that would be accorded --

22 JUSTICE STEVENS: Let me ask a second  
23 question. Supposing we reversed the State court and sent  
24 it back for further proceedings in the State trial court,  
25 would you say that it's still not pending during the

1 further proceedings?

2 MR. KISE: It may be pending in State court  
3 during the further proceedings, but it's not pending  
4 during the time that it is at this Court, because this  
5 Court has not --

6 JUSTICE STEVENS: So it started pending  
7 again after an interruption, is that the way it would  
8 be?

9 MR. KISE: Based on equitable principles, I  
10 think that would be the interpretation, yes, Your Honor.

11 JUSTICE STEVENS: Forget about equitable  
12 principles, statutory principles. Is there a lack of  
13 continuity, where you could have it pending for a period  
14 through a couple years and then an interruption, and then it  
15 can resume pending after the interruption?

16 MR. KISE: You're using the phraseology  
17 interruption, and I would, would --

18 JUSTICE STEVENS: Well, period when it's not  
19 pending followed by a period when it begins to pend.

20 MR. KISE: In that unusual circumstance,  
21 Your Honor, I think principles of equitable tolling  
22 would apply to keep the petitioner's ability to file.

23 JUSTICE STEVENS: But there would be no  
24 statutory right in your view, it would depend on the  
25 equitable considerations?

1                   MR. KISE: I believe that's correct, Your  
2 Honor, because statutory pending contemplates a  
3 finality, it contemplates -- and I think that this is,  
4 it is one of the fundamental problems, I believe, with  
5 Petitioner's construction, is this ignoring of not only  
6 the plain language of the statute but what this Court  
7 has said about this statute, about 2244(d)(2). In  
8 Duncan this Court said that State, the word State  
9 modifies both post-conviction and other collateral  
10 review, and established that we are talking about a  
11 State application.

12                   JUSTICE SOUTER: But it doesn't say State  
13 pending or pending in State court, and what I want to  
14 do is go back and ask a question somewhat along the  
15 lines that Justice Stevens asked. Is the application  
16 pending in the period between the disposition of the  
17 petition by the State trial court and the determination  
18 by the petitioner whether or not to go forward for State  
19 appellate relief?

20                   MR. KISE: Yes, Your Honor, I believe it is,  
21 and I believe that's what this Court said --

22                   JUSTICE SOUTER: By the same token, why  
23 isn't it pending between the final disposition by the  
24 State appellate court and the determination to seek cert  
25 here?

1           MR. KISE: Well, I have two answers to that,  
2 Your Honor. First would be, that's inconsistent with  
3 the language utilized by this Court in Carey where the  
4 Court defined pending as until final resolution through  
5 the State's post-conviction --

6           JUSTICE BREYER: That was the issue in that  
7 case. This issue wasn't in that case.

8           MR. KISE: Correct, Your Honor, but the  
9 language utilized nevertheless --

10          JUSTICE BREYER: I can't when I write  
11 something, I don't think I or anyone else can, if it  
12 happens to be a State case, refrain from using the word  
13 State. I wouldn't say there is an implication in  
14 writing an opinion that it doesn't mean Federal as well.  
15 As least I can't find that written in the opinion  
16 anywhere.

17          MR. KISE: Fair enough, Your Honor. Then  
18 with respect to the second part of my answer to your  
19 question, Justice Souter, that it cannot be both final  
20 for 1257 purposes and pending --

21          JUSTICE SOUTER: But why isn't your sister's  
22 answer to that adequate? It is the State judgment that  
23 is final, but action on the petition is not yet final  
24 until it has gone through the period allowed for final  
25 review by this Court.

1           MR. KISE: I would -- I would respectfully  
2 disagree with that -- with that nondistinction, if you  
3 will, Your Honor, in the sense that the application --

4           JUSTICE SOUTER: Well, she's distinguishing  
5 between a State judgment and an application upon which  
6 further -- further proceedings can be had. Why is that a  
7 nondistinction?

8           MR. KISE: Because I would -- I would disagree  
9 with the notion that further proceedings could be had on  
10 that application. The basis for this Court's certiorari  
11 of jurisdiction is that it is subject to no further  
12 review or correction in any State.

13           JUSTICE SOUTER: Let's assume that the -- the  
14 petition for cert is granted and this Court grants  
15 relief. The relief as I understand it is going to  
16 consist of a remand to the State court saying you did  
17 something wrong on this application before, go back and  
18 do it over again and do it right. It's the -- it is the  
19 State application which is going to be the subject of it  
20 and that therefore, it is the State application that  
21 necessarily is the subject of the cert petition.

22           MR. KISE: I would say, Your Honor, that the  
23 State application may be the subject matter of what you  
24 are looking at from a subject matter standpoint, but  
25 what the Court is ruling on is the petition for

1 certiorari, which was a Federal court ruling on --

2 JUSTICE SOUTER: It's a petition for  
3 certiorari to review action taken on a State petition,  
4 just as at the State level, whatever may be the -- the  
5 nomenclature for filing an appeal from the State trial  
6 court to the State appellate court, is an application  
7 which relates entirely to the original application for  
8 relief that was filed in the State trial court. It  
9 seems to me the two situations are exactly parallel.

10 MR. KISE: And I would respectfully  
11 disagree, Your Honor, because I don't see how it can be  
12 final for 1257 purposes and still pending for purposes  
13 of the statute.

14 JUSTICE GINSBERG: But that -- that --

15 CHIEF JUSTICE ROBERTS: It's the application  
16 that is not subject to review. We review the State  
17 court judgment, not the State application, correct?

18 MR. KISE: In this case, Your Honor, the  
19 application is the State court. I mean, the judgment is  
20 what is being reviewed, and it is a final judgment in  
21 the application. The Florida Supreme Court in this case  
22 has no power at all once they have issued the mandate to  
23 go back and modify, to correct -- if six months later.  
24 If the Florida Supreme Court decided, you know, we made a  
25 mistake in that application, they don't have the power

1 sua sponte to correct it. It is final. It is over.  
2 The State's process has been completed.

3 JUSTICE STEVENS: But they would correct it  
4 if we told them to.

5 MR. KISE: In that circumstance, yes, Your  
6 Honor, certainly they would in a circumstance, in the  
7 very unusual circumstance where this Court were to  
8 accept certiorari and then subsequent to the acceptance  
9 of certiorari, then reverse the ruling.

10 JUSTICE STEVENS: And when it got back in  
11 the State supreme court, they would still be working on  
12 the application that had been pending until the end of  
13 the proceedings down there, and then suddenly came back  
14 to life after we sent it back.

15 MR. PECK: Yes, Your Honor, but that is,  
16 again, the extraordinary circumstance. And that I think  
17 points out the -- one of the flaws in Petitioner's  
18 argument, and that is that that's making the exception  
19 the rule, that clearly Congress did not intend to add  
20 what I believe Chief Justice Roberts alluded to earlier,  
21 an extra three months, an extra six months, an extra --

22 JUSTICE SCALIA: I think what he's saying  
23 when you have ambiguous language, a sensible rule  
24 is not a rule, it has to have a lot of exceptions  
25 to make sense. Surely that's a sound principle, isn't

1 it?

2 MR. KISE: Yes, Your Honor. And I don't  
3 think that this would be a lot of exceptions. I think  
4 this would be, the only exception would be, to the rule  
5 that we are advocating would be in the unusual  
6 circumstance, the one in 5,000 cases, the one in 1,000  
7 cases, the exceptional case where this Court actually  
8 grants certiorari, those cases are exceptional in and of  
9 themselves.

10 JUSTICE BREYER: Those are the most likely  
11 where people are going to get mixed up. I mean, I'm not  
12 following -- I think I think this argument about the  
13 word is metaphysical, you know, and I can make wonderful  
14 arguments, I suspect, and you have made wonderful arguments  
15 on both sides of this. I just can't get a clear answer.  
16 So if I were right about that and there is no clear answer  
17 from the language, then the thing, I'd like to go back  
18 to Justice Stevens' question, because it seems to me  
19 that that puts my greatest concern, my greatest concerns  
20 are practical. If we take your position, we have words  
21 right next to each other, near each other in the same  
22 statutory provision, meaning different things. And I've  
23 learned out of my own experience perhaps, judges and  
24 lawyers are not always geniuses and they get mixed up.  
25 And they will get mixed up all the time, and when they

1 get mixed up, people will lose rights that they have.

2           The second concern of Justice Stevens, which  
3 is what happens in the case, and those are the ones who  
4 intuitively are going to cause the problem. Because on  
5 a rare occasion, the State or the prisoner has a very  
6 good Supreme Court case. And that's going to be the  
7 case where he forgets to file in the Federal court  
8 because he thinks this thing isn't over, and lo and  
9 behold, the Court grants it. And now what happens? On  
10 your interpretation, I just see a mess, and on the other  
11 interpretation, it seems to work out fine. So those, I  
12 would say are the two practical problems, and anything  
13 you would like to say about that, I'd like to listen to.

14           MR. KISE: Thank you, Justice Breyer, and I  
15 would respectfully answer your question I think in three  
16 ways. First, drawing a distinction between when the  
17 State petitions for certiorari and when the habeas  
18 petitioner petitions for certiorari. Under both  
19 circumstances, equitable principles would apply, but  
20 they would apply in I think different ways. But in  
21 either circumstance, the ability of the petitioner to  
22 subsequently seek habeas review would be protected. And  
23 so what we are advocating is not making those  
24 exceptional cases the rule. In a case where the State  
25 petitions for certiorari there isn't an ability, there

1 is no way to even file a protective habeas because there  
2 is nothing to file. You've won, the habeas petitioner  
3 has won in the court below. There is no cause of  
4 action. There isn't a basis upon which to file a  
5 Federal habeas claim, so even a protective one would be,  
6 it wouldn't be premature, it would be effectively  
7 nonexistent. So from an equitable standpoint, the  
8 extraordinary circumstance which the courts have  
9 recognized, the circuits have recognized that the test  
10 for equitable circumstance is, the extraordinary  
11 circumstance would be this Court accepting certiorari.

12 And then the exercise of diligence on the  
13 part of the petitioner is if the petitioner did  
14 everything he or she could under that circumstance,  
15 because there would be no way for that petitioner to  
16 file for a Federal habeas review because there would be  
17 no basis for it.

18 JUSTICE SCALIA: Can I ask -- it seems very  
19 strange to me. I can understand protective filings when  
20 you've lost, but it seems to me a very strange  
21 protective filing. When you've won in State court and  
22 the government has taken certiorari, can you file, file  
23 in Federal district court? What do you say? What are  
24 you complaining about?

25 MR. KISE: Exactly my point, Your Honor.

1 You cannot.

2 JUSTICE SCALIA: No. It's their point. I  
3 don't see how it's your point. How can you cover  
4 yourself? I mean, if we come out your way, how -- how  
5 --

6 MR. KISE: There isn't a need to cover  
7 yourself, Your Honor, because you've won in the State  
8 court.

9 JUSTICE KENNEDY: Well, there isn't a need,  
10 provided there's equitable tolling.

11 JUSTICE SCALIA: You're worried about  
12 being reversed by the Supreme Court.

13 MR. KISE: In the one in 1,000 or one in  
14 5,000 cases, equitable principles would then apply. We're  
15 dealing with the distinction, and perhaps I'm not being clear,  
16 between statutory tolling, what the statute actually provides  
17 for, and equitable tolling, equitable principles that have  
18 been applied by the court.

19 JUSTICE KENNEDY: But you're asking us to  
20 say that the Congress has written a statute which  
21 doesn't take account that the State might sometimes file  
22 a petition for certiorari that would be granted. And  
23 you say oh, that's so rare, that's so extraordinary. It  
24 happens. It's part of the system.

25 JUSTICE SCALIA: Would you advise a client

1 that way? Would you advise a client that way?

2 MR. KISE: Well --

3 JUSTICE SCALIA: You've won here and the  
4 State is taking certiorari to the Supreme Court. Don't  
5 worry about making a protective filing in the district  
6 court because, you know, if by chance the Supreme Court  
7 reverses, equitable tolling will apply. You know, you  
8 roll the dice with equity.

9 MR. KISE: I don't think there would be -- I  
10 think it would be ill advised to -- to direct a petitioner  
11 to file in Federal court under those circumstances  
12 because there would be nothing to file. What would be  
13 the complaint?

14 JUSTICE SCALIA: I agree.

15 MR. KISE: There would be absolutely nothing  
16 to file.

17 JUSTICE STEVENS: The irony of your position  
18 is that it has its harshest consequences in those rare  
19 cases where there's a real argument about whether there  
20 was a denial of constitutional rights.

21 MR. KISE: I would submit, Your Honor, and  
22 respectfully disagree that it has its harshest consequences,  
23 because that's where the equitable tolling principles would  
24 in fact apply.

25 JUSTICE GINSBERG: Why do you need equitable

1 tolling? Why can't you use, why isn't it most sensible  
2 to use the model when -- for the time clock on direct  
3 appeal, say there has been a conviction affirmed by the  
4 highest court of the State, when does the time, when  
5 does that judgment -- it's a final judgment if you seek  
6 cert, right? But the time clock, the one year doesn't  
7 begin to run until after the 90 days has elapsed; isn't  
8 that right?

9 MR. KISE: Yes, Your Honor.

10 JUSTICE GINSBURG: So why shouldn't it be  
11 the same way for collateral review as it is for direct  
12 review? Direct review, everyone agrees that you get the  
13 State final judgment. But then you have 90 days and  
14 nothing starts until that 90 days is up or, if cert is  
15 granted, until the cert process is done. Why shouldn't  
16 it be just the same for collateral review?

17 MR. KISE: I would say it's different, Your  
18 Honor, respectfully, for two reasons: One, because this  
19 Court has said that direct review is different in  
20 numerous cases. And two, because the statute makes that  
21 distinction. Congress in (d)(1)(A) utilized that very  
22 specific language that included the -- the certiorari  
23 period and in (d)(2) did not use that language, and it  
24 is the absence of that language that indicates that  
25 tolling is only to apply while a petitioner is

1 exhausting relief -- state relief.

2 JUSTICE GINSBURG: Well that means -- that  
3 means that if a petitioner who has had his State  
4 application for collateral relief denied wants to  
5 petition this Court, but doesn't want to lose out on the  
6 possibility of seeking Federal habeas, that prisoner has  
7 to do two things at the same time: One, prepare a  
8 petition for cert; and the other is to prepare -- prepare  
9 a complaint to file in a Federal district court. That's  
10 a lot to put on a person, particularly the one who isn't  
11 represented.

12 MR. KISE: Well, Your Honor, I would say  
13 that in many circumstances that would be the case, but  
14 not always the case. It depends on how much time is  
15 left on the Federal statute of limitations, how much  
16 time is remaining, how long did it take to get through  
17 the State post-conviction process. How timely was the  
18 filing in the State post conviction process. And how  
19 much time is remaining, assuming for what was  
20 discussed --

21 JUSTICE GINSBURG: Here there were 31 days,  
22 right?

23 MR. KISE: Then they would need to file --  
24 yes, Your Honor, and they would need to --

25 JUSTICE GINSBURG: They'd have to file a

1 Federal court complaint and a cert petition within the  
2 31 days.

3 MR. KISE: Yes, Your Honor. Yes, Your  
4 Honor, because the amount of time that would elapse  
5 before this Court were to rule on the cert petition  
6 would consume that 31 days. And I don't think that's  
7 inconsistent with what Congress intended here because  
8 what Congress intended by this provision was to provide  
9 petitioner -- well, what this Court said in Duncan, what  
10 this Court has recognized, is that the scheme that has  
11 been put together here by Congress is one which  
12 encourages petitioners first to file and exhaust their  
13 State remedies, recognizing and giving deference to the  
14 principles of comity, and then second to file, once  
15 they're done with their State process, once they've  
16 completed the State process and exhausted their State  
17 remedies, to file their Federal habeas, in the words of  
18 this Court in Duncan, "as soon as possible."

19 And the anomaly that would be created by  
20 Petitioner's construction would be it would be the only  
21 time under all of AEDPA where a petitioner could file in  
22 Federal district court but isn't required to file. And  
23 so I would submit to this Court that it cannot be both  
24 exhausted and pending at the same time. It would not  
25 fit within the scheme that this Court has already

1 determined the structure of (d)(2) is designed to  
2 accomplish.

3           The principle is that you are to, as a  
4 habeas petitioner, go quickly to State court, and we're  
5 going to give State courts the first opportunity at  
6 these Federal constitutional questions.     And yes,  
7 Justice Stevens, it may take some time. It may take  
8 several years in Federal -- in State court, before they  
9 accomplish that purpose. But that's the State's issue  
10 because it's the State's judgment and the State is  
11 taking its time and it shouldn't be -- and this is what  
12 Congress recognized I think in (d)(2) -- is that --  
13 that the petitioner should not be penalized for that  
14 time. That's why it was tolled.

15           JUSTICE SCALIA: Is it -- is it clear that he  
16 can go to district -- I mean, I'm not familiar with how  
17 these things work. Is it possible that when there is an  
18 appeal or certiorari pending here there can be  
19 proceeding in district court a habeas action on the  
20 same -- on the same matter that we are considering on  
21 certiorari?

22           MR. KISE: Yes, Your Honor, I believe there  
23 can. I believe, there is, in fact --

24           JUSTICE SCALIA: District courts do that? I  
25 mean, they would be considering the same, the same

1 issues we are, I suppose?

2 MR. KISE: Well, I don't know that they  
3 would be considering the exact same issues, Your Honor.  
4 And there are many things that can be done -- petitioner  
5 --

6 JUSTICE SCALIA: You're sure that happens,  
7 that while cert is pending here there is a habeas  
8 proceeding ongoing in district court?

9 MR. KISE: Well, I certainly hope that in  
10 the 10 of the 11 circuits that have agreed with  
11 Florida's position here that that is happening, because  
12 if not then they are at risk, depending on how --

13 JUSTICE GINSBURG: Wouldn't a district judge  
14 who knows that there's a cert petition pending just say:  
15 Well, I'll wait; this petition will be held pending the  
16 Supreme Court's disposition of cert.

17 MR. KISE: I would respectfully say to Your  
18 Honor that it's not an automatic stay. I mean, perhaps  
19 there would be a stay at some point. But there are  
20 things that can be accomplished in Federal court before  
21 the undertaking of the review. There is the Rule 4  
22 screening process in habeas. There is the initial  
23 review by the district court to see if the filing itself  
24 meets the procedural requirements. There is the asking  
25 for an answer by the State. There is discovery that can

1 take place.

2 All of this can take place while the cert  
3 petition is pending before the Federal district court  
4 undertakes any review of the merits. Now, if there gets  
5 to be this juxtaposition where it looks like there is  
6 going to be a conflict between the Federal district  
7 court's review of the substantive merits and that is  
8 going to conflict with this Court's certiorari review,  
9 well, then I think a stay would be implemented.

10 JUSTICE KENNEDY: Well, I'll accept your  
11 view as being the personal experience. I'm rather  
12 surprised that district courts would go through all of  
13 these preliminary steps when the case is on cert and  
14 they may not have to.

15 MR. KISE: Well, they may not have to --

16 JUSTICE KENNEDY: I'm not sure if I would  
17 tell the district courts that's what they ought to do,  
18 is a wise expenditure of resources. I'll think about  
19 that.

20 CHIEF JUSTICE ROBERTS: Well, I mean, it sort  
21 of depends on how often cert is going to be granted,  
22 doesn't it? If you're a district court and you have  
23 hundreds of these habeas petitions being filed, you can  
24 either hold off on all of them whenever a cert petition is  
25 filed, if one in one thousand or whatever the number is,

1 because they might be granted. I think you'd probably take  
2 your chances depending on the petition. If it looks serious  
3 and there's a petition pending you don't have to  
4 proceed. If it's frivolous perhaps you can proceed.

5 MR. KISE: I think that's exactly right,  
6 Your Honor. I think that's really the point, and you've  
7 obviously articulated it better than I did in my  
8 previous answer. But that's exactly right, that --

9 JUSTICE STEVENS: But isn't it true that the  
10 real problem's with the capital cases? The State's interest  
11 in getting things moving is the strongest in the capital  
12 cases, I think.

13 MR. KISE: Absolutely, Your Honor.

14 JUSTICE STEVENS: In the non-capital cases  
15 there is an interest in promptness, but the longer the  
16 guy stays in jail is not going to prejudice the State.  
17 But you do want to get your death cases terminated as  
18 soon as you can. And what we're really talking about as  
19 I understand it is whether in most death cases we'll add  
20 on a period of six, eight, nine months to the total  
21 period. And in most of those death cases, which is a  
22 limited number -- I don't know, you have a couple  
23 hundred people I suppose on death row -- those cases  
24 it's going to be seven, eight, nine years anyway.

25 MR. KISE: Well, it may be that long. It

1 may be a shorter period. But I think what we need to  
2 look at is not what we would think would be the  
3 preferred time frame, but what Congress said was the  
4 preferred time frame. And Congress is saying that it's  
5 one year, and the only time it's tolled is when the  
6 petitioner is doing what the petitioner should be doing to  
7 exhaust State remedies. And that's again what this Court  
8 said in Duncan about describing this entire structure.

9 JUSTICE BREYER: That's if you're formally  
10 right on the metaphysical question. But if you're not,  
11 I'm now thinking you just gave a response to the Chief  
12 Justice that said, well, really the Federal district  
13 judge when he gets these things just has to look at them  
14 and then he figures out whether he is going to stay it  
15 or whether he's going to proceed on some issues or  
16 whether he is going to do something else.

17 And that's what you thought was fairly easy.  
18 You have the experience there and I just wonder how easy  
19 it is. I mean, why wouldn't it be easy? Because I  
20 guess before doing anything the judge has to know what  
21 this thing is about. And that's where it seems to me to  
22 take the time of a district judge. They have many, many  
23 petitions. Sometimes they are well organized, sometimes  
24 not. He sends them to a magistrate possibly. The  
25 magistrate has a lot to do, and the time consumed is the

1 time finding out what is this case about. Is that fair  
2 characterization or not? How easy is it?

3 MR. KISE: I think it's partly fair, Your  
4 Honor. What I would say is the time -- certain time is  
5 consumed just determining whether or not under the Rule  
6 4 screening process, whether or not the petition meets  
7 the formal requirements, whether they've articulated the  
8 claim in the correct way and then whether it's worthy of  
9 the State response, if there's discovery that needs to be  
10 had.

11 I mean, all of these things can be taking  
12 place and in the one in one thousand or perhaps more  
13 than that -- and I don't pretend to have the exact  
14 number or the statistics -- but in the very, very usual  
15 circumstance where cert is actually granted, I think  
16 then a stay could be put in place. And I don't think  
17 it's fair to say, respectfully, that Congress intended  
18 to forestall this entire process while this Court  
19 undertakes certiorari review.

20 JUSTICE GINSBURG: Mr. Kise, there are two  
21 applications. Your answer to the Petitioner is you have  
22 to file in the Federal court within that 31 days. If a  
23 prisoner says, I can't manage a cert petition and a  
24 Federal habeas corpus, it's hard enough for me to get  
25 any assistance, so I'll have to pick one or the other,

1 isn't the -- the reading of an ambiguous statute that  
2 you're proposing going to be an incentive or a  
3 disincentive to filing both, which the prisoner has a  
4 right to do? He is going to have to pick one or the  
5 other if he is in this time bind.

6 MR. KISE: Well, respectfully, Your Honor --  
7 and I know that that is the Petitioner's argument and I  
8 see that you have given me that question, but I don't  
9 know that it is that much of a choice. I mean, I think  
10 that they can file, they can file both in those  
11 circumstances and, and depending on the particular  
12 circumstances -- and this is back to the equitable  
13 tolling principles -- for statutory tolling purposes, I  
14 think the answer is they must file both or they forfeit  
15 the right to one or the other. If they choose not to  
16 file for cert, then they voluntarily if they pass the 90  
17 days forfeited that right; and if they don't file within  
18 the statutory period then they have under AEDPA missed  
19 the statute of limitations deadline.

20 But I would, I submit to you that it is  
21 possible to do both, and in circumstances where there is  
22 some impediment to them doing just that, if they  
23 exercise diligence, if they are doing everything they  
24 possibly can and it is not possible to file both at the  
25 same time, well, then I think under the facts of the

1 proper scenario that equitable principles might apply.  
2 But again, to say that Congress built into the system  
3 this automatic time period that's going to be tacked on  
4 to a very short one-year statute of limitations, a  
5 statute of limitations that is designed to really move  
6 things through the system rapidly, is, respectfully, I  
7 don't think the correct interpretation of the language,  
8 and I don't think it is consistent with what this Court  
9 said in Duncan or, with respect to Justice Breyer, what  
10 this Court said in Carey.

11 JUSTICE SCALIA: Let me be clear on your  
12 answer to Justice Stevens' earlier question. Where  
13 there is a reversal of the State judgment by, by this  
14 Court, and the case is remanded to the State, you don't  
15 argue that what occurs then is equitable tolling? But  
16 you say that the case is again pending once it goes back  
17 to the State, is that right?

18 MR. KISE: I think once it's back in the  
19 State system then it would have to be considered  
20 pending, because the statute contemplates that while  
21 it's part of the State process it would be pending.

22 If the Court has no further questions, thank  
23 you.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kise.  
25 Ms. Bonner, you have four minutes remaining.

1 ORAL ARGUMENT OF MARY C. BONNER

2 ON BEHALF OF PETITIONER

3 MS. BONNER: Thank you, sir.

4 I've heard the State over these many years  
5 say that a simple exception will help the defendant and  
6 don't worry, we will not proceed, we'll ask for -- don't  
7 worry, we won't object. Kind of what we're getting here  
8 is, we won't be objecting to a stay if there is a stay  
9 requested. However, they objected to the stay here that  
10 the United States district court entered. In an  
11 exercise of honesty, he said: I'm going to wait for the  
12 Supreme Court to decide what happens in Artuz, whether  
13 they accept cert or not. And they vigorously objected  
14 and utilized a good little bit of time litigating it on  
15 an interlocutory type appeal.

16 One of the practical problems is if this  
17 case is in both courts, this one and the United States  
18 district court, where is the record? Is -- It's just  
19 the most practical of things. And also, where is the  
20 lawyer, who is the lawyer?

21 CHIEF JUSTICE ROBERTS: Records don't have  
22 to -- typically are not filed with the petition for  
23 cert. So the record would be back in the lower court.

24 MS. BONNER: So that solves that. The --

25 CHIEF JUSTICE ROBERTS: Just to be clear, it

1 is your position that to get -- you think everyone's  
2 entitled to the additional 90 days whether they file or  
3 not.

4 MS. BONNER: Yes, I do.

5 CHIEF JUSTICE ROBERTS: To get the  
6 additional time for an opposition that would be  
7 considered here, you have to file the petition for cert.  
8 In other words, if you don't file after the 90th day  
9 it's no longer pending.

10 MS. BONNER: Absolutely.

11 CHIEF JUSTICE ROBERTS: Okay. So then why  
12 wouldn't the result of your position be that every  
13 person who is denied State post-conviction relief is  
14 going to file a cert position to get the additional  
15 time?

16 MS. BONNER: Why is my position that they  
17 would not?

18 CHIEF JUSTICE ROBERTS: Wouldn't that lead  
19 to that result? If Congress was concerned that people  
20 were stringing out the time before they seek habeas, one  
21 way to string it out under your reading, but not under  
22 the State's reading, would be to file a petition for  
23 cert.

24 MS. BONNER: Well, Congress couldn't have  
25 been too concerned about that 90 days because it

1 certainly permitted the trigger to have the 90 days  
2 included within it, and this Court has allowed the 90  
3 days --

4 CHIEF JUSTICE ROBERTS: I'm sorry. What's  
5 the trigger?

6 MS. BONNER: (A), 2241(b)(A).

7 CHIEF JUSTICE ROBERTS: Yes. When they  
8 wanted to include the 90 days, they said the expiration  
9 of the time for seeking review. They did not say that  
10 in (d)(2).

11 MS. BONNER: They did not say that, but they  
12 said while the application is pending. And the State  
13 did not address for this Court what is pending here if  
14 it's not that application from State court.

15 JUSTICE ALITO: Does your argument --

16 JUSTICE SCALIA: I guess you could also say  
17 that except in capital cases the defendant will not have  
18 an incentive to delay. He wants to get out, right?

19 MS. BONNER: Of course, of course. And you  
20 know, frankly, I think all of the defendants on death  
21 row --

22 CHIEF JUSTICE ROBERTS: I mean, if the  
23 defendant had no incentive to delay, why did Congress  
24 think it necessary to impose the statute of limitations?  
25 They did that because they thought people were stringing

1 out their -- and they were applying for Federal habeas  
2 after too long of a delay.

3 MS. BONNER: Well strangely enough in this  
4 case I was looking at statistics as to the average  
5 length of time that a case was pending before, between  
6 conviction and the filing of the 2254, and  
7 Mr. Lawrence's petition was filed within days of what  
8 the average was before the AEDPA. That comes up in a  
9 statistical analysis I believe by the Department of  
10 Justice cited to by the State.

11 JUSTICE STEVENS: Doesn't the title of a  
12 statute indicate the category of cases that Congress was  
13 primarily interested in?

14 MS. BONNER: Oh yes.

15 JUSTICE STEVENS: The death penalty.

16 MS. BONNER: Oh yes. When they joined  
17 together in anti-terrorism, effective -- the -- just the  
18 word effective was plenty to convey to us what they  
19 actually mean. The other big problem that's not been  
20 addressed is these people in a practical sense do not  
21 have the same lawyer for both proceedings. Many people  
22 who were more than willing to practice in State court  
23 are not willing to practice in Federal court. It's a  
24 more formalized, rigorous endeavor.

25 And in this case what happened was

1 Mr. Lawrence had a lawyer who practiced in the State and  
2 obviously must have prepared for him that initial place  
3 holder, if you want to call it, 2254, because it's  
4 typewritten. They cite to a Westlaw site. I don't  
5 think there is any way that anyone can contemplate that  
6 that would be Mr. Lawrence's doing in his own right.

7 Also, whether it's 90 days or six months as  
8 Your Honor has said, it's always in the control of this  
9 Court. Once the 90 -- this is not a frolic of  
10 unnumbered years. When someone files a petition he  
11 either files it by the time 90 days is over or he is out  
12 of court, or he files it and this Court is quickly  
13 reviewing it after some input from the other side.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 Miss Bonner.

16 MS. BONNER: Thank you.

17 CHIEF JUSTICE ROBERTS: The case is  
18 submitted.

19 (Whereupon, at 12:02 p.m., the case in the  
20 above-entitled matter was submitted.)

21  
22  
23  
24  
25



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