

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

CHARLES RUSSELL RHINES, :

Petitioner :

v. : No. 03-9046

DOUGLAS WEBER, WARDEN. :

- - - - -X

Washington, D.C.

Wednesday, January 12, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:35 a.m.

APPEARANCES:

ROBERTO A. LANGE, ESQ., Sioux Falls, South Dakota; on
behalf of the Petitioner.

LAWRENCE E. LONG, ESQ., Attorney General, Pierre, South
Dakota; on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

| | PAGE |
|-----------------------------|------|
| ORAL ARGUMENT OF | |
| ROBERTO A. LANGE, ESQ. | |
| On behalf of the Petitioner | 3 |
| LAWRENCE E. LONG, ESQ. | |
| On behalf of the Respondent | 20 |
| REBUTTAL ARGUMENT OF | |
| ROBERTO A. LANGE, ESQ. | |
| On behalf of the Petitioner | 42 |

1
2
3 JUSTICE STEVENS: We'll now -- we'll now hear
4 argument in Rhines against Weber.

5 Mr. Lange. You may proceed, Mr. Lange.

6 ORAL ARGUMENT OF ROBERTO A. LANGE

7 ON BEHALF OF THE PETITIONER

8 MR. LANGE: Justice Stevens, and may it please
9 the Court:

10 Stay and abeyance is the proper way to
11 administer the total exhaustion rule under the unique
12 facts of this case. Several Justices of this Court
13 already have endorsed stay and abeyance, and seven of the
14 eight circuit courts of appeals that have considered the
15 issue have permitted stay and abeyance under similar
16 circumstances.

17 Section 2254 and the decisions of this Court in
18 Granberry v. Greer and Strickland v. Washington make clear
19 that exhaustion is not a jurisdictional requirement.
20 District courts have the inherent authority and the broad
21 discretion to issue stays in cases that are within their
22 jurisdiction.

23 JUSTICE SCALIA: I think that's unquestionable.
24 The -- the issue really is whether it's an abuse of that
25 discretion to -- to grant a stay and abeyance when the --

1 the petitioner comes before the court for habeas without
2 having exhausted in State court. I mean, that's the
3 question. I think everybody will stipulate that there's
4 power to -- to stay proceedings, but is it an abuse of
5 discretion to do so in these circumstances given the
6 statute that -- that wants a 1-year, prompt resort to the
7 Federal courts.

8 MR. LANGE: Justice Scalia, I agree with your
9 framing of the issue.

10 JUSTICE SCALIA: Okay.

11 MR. LANGE: And I also believe that a stay under
12 these circumstances is appropriate under the statutes,
13 section 2254 and 2244, and is consistent with those
14 statutes. There is nothing, as Justice Souter noted in
15 his concurrence in *Duncan v. Walker*, that prohibits the --
16 the granting of a stay under circumstances such as these.
17 Indeed --

18 JUSTICE KENNEDY: Well, there's no -- there's no
19 abuse of discretion here. Why? Because we have an
20 interest in having all of the claims exhausted? If -- if
21 it's no more -- if it's as broad as that, then there's no
22 AEDPA statute of limitations.

23 MR. LANGE: No, Your Honor. I believe there is
24 no abuse of the discretion here because if a stay had
25 not --

1 JUSTICE O'CONNOR: Well, why shouldn't -- why
2 shouldn't the petitioner for habeas have to first go to
3 the State court and exhaust the State court claims? Here
4 that wasn't done. The petitioner eventually ended up in
5 Federal court with a laundry list of 30-some unexhausted
6 State claims, for goodness sakes. Why shouldn't those
7 have been presented in the first instance to the State
8 court?

9 MR. LANGE: Well, in an ideal world, they would
10 be presented in the first instance, but we're dealing with
11 a -- a world where 93 percent of petitioners are
12 proceeding pro se. Your Honor, stay and abeyance does
13 force a petitioner to present unexhausted claims in State
14 court --

15 JUSTICE KENNEDY: At the price of suspending the
16 1-year statute of limitations that Congress thought was
17 central to AEDPA.

18 MR. LANGE: No, Your Honor. I do not see this
19 as a suspension of the statute of limitations. Mr. Rhines
20 met the AEDPA statute of limitations. He filed when only,
21 by the State's own admission, 8 to 14 days had run on his
22 1-year AEDPA statute of limitations.

23 JUSTICE SCALIA: Well, but it's a free ride if
24 you say -- so long as you get in within the 1-year period,
25 the court can then give you another 3 years or as long as

1 the court thinks is reasonable for you to go back and --
2 and do what you were supposed to do before you arrived. I
3 mean, that seems to me is a frustration of the 1-year
4 statute of limitations.

5 MR. LANGE: I disagree that that is a free ride,
6 and I do not see that as a frustration of the 1-year
7 statute of limitations when a petitioner has met the
8 1-year statute of limitations.

9 Your Honor --

10 JUSTICE O'CONNOR: But the petitioner --

11 JUSTICE SOUTER: No, but the point --

12 JUSTICE O'CONNOR: -- didn't go to the State
13 court with this enormous laundry list of unexhausted
14 claims. I mean, what do we do to encourage the procedure
15 to be followed? Congress did want all this compressed and
16 thought people should apply first to State court and, when
17 those are exhausted, then within the time limit apply to
18 Federal court. But this -- this scheme does something
19 else, it seems to me.

20 MR. LANGE: Your Honor, Congress wanted to
21 compress certainly the time between exhaustion of the
22 State remedies and the time when the petitioner came to
23 Federal court. However, Congress gave unlimited tolling
24 while there is any proceeding going in -- in State court.
25 I -- I see this stay and abeyance as a procedure that gets

1 applied somewhat infrequently and at the discretion of a
2 judge to -- a district court judge to apply or not apply
3 when it's appropriate to --

4 JUSTICE GINSBURG: Is there a difference --
5 would you say there's a difference between a case where
6 the petitioner comes into Federal court in the first
7 instance with this laundry list or as, if I recall
8 correctly, this case, goes first to the State court and
9 then, when it's dismissed from the State court, comes to
10 Federal court with the same basic list which has been
11 exhausted, plus others which have not? Would you
12 distinguish the case on the propriety of stay and abeyance
13 of passing up the State court, going to Federal court
14 first, going to State court with your pro se petition
15 raising a bunch of claims but not all of them, and then
16 coming to Federal court?

17 MR. LANGE: I think it truly depends on the
18 circumstances which of those two hypotheticals present a
19 more compelling case for stay and abeyance. In Mr. Rhines
20 situation, he did go to State court first and exhausted
21 the vast majority of the 35 separate claims that he has
22 raised.

23 JUSTICE GINSBURG: How many -- how many were not
24 exhausted of that -- that laundry list?

25 MR. LANGE: The court -- or the State challenged

1 12 of the claims as unexhausted. The district court found
2 eight of those claims to be unexhausted, Your Honor, and
3 made that finding after Mr. Rhines' 1-year AEDPA period
4 had run. The finding -- Mr. Rhines had filed in February
5 of 2000 pro se. The district court's conclusion that he
6 had a mixed petition and that there were eight unexhausted
7 claims was made in July of 2002.

8 JUSTICE GINSBURG: 16 months.

9 MR. LANGE: It's actually a little bit -- it's
10 longer than 16 months, Your Honor. The district court
11 referred to 16 months, but it's almost 2 and a half years,
12 from February of 2000 to July of 2002, Your Honor.

13 JUSTICE KENNEDY: One of the problems is that
14 the statute encourages prompt resolution in -- in the
15 Federal system as well, and under a stay and abey
16 procedure, you could have a district judge who lets the
17 matter sit for 9-10 months and all of a sudden issues a
18 stay and abey. How are we going to control that?

19 MR. LANGE: Your Honor, I think the alternative
20 that the State proposes presents an even more troubling
21 illustration. A district court, of course, can proceed at
22 its own -- at its own rate, grant a stay, grant the terms
23 of the stay as it sees fit, and I believe that takes care
24 of the consideration that -- that Your Honor's question
25 indicated, Justice Kennedy.

1 The suggestion of the State sets up a situation
2 where, according to the State, they want Rhines to purge
3 his -- his claim -- his petition of the unexhausted claims
4 and proceed in State court at the same time, which is
5 unseemly to have Mr. Rhines proceeding on 27 exhausted
6 claims in Federal court at the same time that he is
7 proceeding on 8 claims in State court.

8 Now, South Dakota is a little bit unique. It --
9 it allows a second State habeas action. There's no time
10 bar to a second State habeas action. In fact, the South
11 Dakota legislature has made a policy decision that
12 indigent prisoners are entitled to representation of
13 counsel in their first habeas.

14 JUSTICE KENNEDY: Well, so then he's protected
15 in the State system, and if he needs Federal review, he
16 can come here on direct.

17 MR. LANGE: Your Honor, the problem is the eight
18 claims that he is now exhausting in State court, if the
19 State's approach is taken, he forever sacrifices, loses
20 the right to Federal review of those eight claims.

21 JUSTICE KENNEDY: No. He can come to -- here --
22 this Court on direct review.

23 MR. LANGE: Excuse me. Under direct review?
24 Is --

25 JUSTICE KENNEDY: He can come to this Court on

1 certiorari after the State decision in the second -- in
2 the second habeas.

3 MR. LANGE: Your Honor, as a matter of --

4 JUSTICE SCALIA: It's fair for you to say he
5 loses his right to Federal review --

6 MR. LANGE: Right. Your --

7 JUSTICE SCALIA: -- because we wouldn't
8 necessarily take that case, whereas you say he'd have a
9 right to go into Federal -- Federal habeas. So --

10 MR. LANGE: Thank you for throwing me the life
11 preserver. I --

12 (Laughter.)

13 MR. LANGE: I understand this Court grants fewer
14 than 1 percent of the cases, so as a practical matter, for
15 there to be an independent review, as contemplated by
16 section 2254(a), it does require a district court's
17 involvement. As a practical matter, this Court on -- on
18 cert can't be expected to -- to conduct that review.

19 2254(a), which is the statute that grants
20 jurisdiction, does indicate that a Federal court shall
21 entertain causes of this action. Now, 2254(b) does
22 contain the exhaustion requirement in (b)(1) and makes
23 clear in (b)(2) and (b)(3) that it is not jurisdictional.

24 The -- the irony --

25 JUSTICE O'CONNOR: Would we have to -- would we

1 have to reverse in part Rose against Lundy to go with your
2 view?

3 MR. LANGE: I don't believe so anymore than you
4 would have to reverse in part Rose v. Lundy to go with the
5 State's view. And let me explain.

6 The approach of stay and abeyance is more
7 consistent with the principles of Rose v. Lundy than the
8 -- than the State's position. In Rose, this Court was
9 concerned about comity and federalism. It -- it serves
10 the interests of comity and federalism for a Federal court
11 to suspend consideration of a Federal habeas case while a
12 petitioner has a remedy and is actually pursuing it in
13 State court. The petitioner may be granted the remedy in
14 State court, which in turn would render the Federal
15 petition moot altogether. There could be, between the
16 competing State and Federal cases, competition for the
17 transcript or even the exhibits.

18 Rose v. Lundy also contemplated a process that
19 would not unreasonably impair the petitioner's right and
20 would give the petitioner the choice of either purging the
21 unexhausted claims or going back to State court,
22 exhausting the claims, and then coming back to Federal
23 court with one fully exhausted --

24 JUSTICE O'CONNOR: Well, that was at a time
25 before the AEDPA enactment that tried to put limits, time

1 limits, on these things.

2 MR. LANGE: The only --

3 JUSTICE O'CONNOR: That's what we run into here,
4 is a total frustration almost of Congress' time limiting.

5 MR. LANGE: Your Honor, I -- I would disagree
6 that this is a total frustration of Congress' time
7 limiting -- time limiting. Again, Congress granted
8 unlimited tolling while a petitioner is pursuing remedies
9 in State court. Congress was not attempting to frustrate
10 or impede the petitioner's right to seek State court
11 relief or --

12 JUSTICE O'CONNOR: Yes, but Congress, I think
13 under this scheme, envisioned having someone make all the
14 State claims the first time around, gather them up and go
15 to State court, and let them take as long as they like --
16 no statute will run until that's complete -- and then go
17 to the Federal court. And this does an end run around
18 that approach.

19 MR. LANGE: Your Honor, I don't believe this
20 does an end run because this is different than -- than
21 tolling. First of all, in tolling it's automatic under a
22 statute, and stay and abeyance is always discretionary
23 with the court. The court can grant or deny the stay and
24 abeyance order, alter it, revoke it, or in this case, put
25 time limits on the petitioner's right to go back and --

1 and forth.

2 Also, Mr. Rhines has complied with the AEDPA
3 period. He did file.

4 The unusual situation that could result here is
5 if you assume a prisoner B who's in Rhines' same position
6 and files at the same time, when only approximately 9 days
7 have elapsed on his AEDPA period. Petitioner B, let's
8 assume, files three claims: one exhausted, one
9 unexhausted, and one there's a dispute over whether it's
10 exhausted or not. Because petitioner B had a short trial
11 perhaps or draws a different judge in the District of
12 South Dakota, the judge can rule on that case perhaps
13 within 100 days. It gives petitioner B, under my
14 scenario, 256 days to go to State court, exhaust his
15 claims, and then come back into Federal court with one
16 fully exhausted petition.

17 Rhines would be in the position of prisoner B in
18 my scenario but for the fact that his claims are -- are
19 much more complicated. He is serving a -- a sentence of
20 death. He did have a long trial. And under that
21 situation, it's simply unfair to someone in Rhines' place
22 to have his right to a review of the eight unexhausted
23 claims cut short because he had a complicated case or the
24 district court was slow in getting to a decision.

25 JUSTICE SCALIA: That -- that happens often with

1 time limits. I mean, it depends on when the court
2 finishes its job and so forth.

3 What do you do about -- about our opinion in --
4 in *Duncan v. Walker* where we refused to toll the
5 limitation period during the pendency of a -- of the
6 Federal proceeding and -- and said, in -- in justification
7 of that holding, by tolling the limitation period for the
8 pursuit of State remedies and not during the pendency of
9 applications for Federal review, 2244 provides a powerful
10 incentive for litigants to exhaust all available State
11 remedies before proceeding in the lower Federal courts?
12 You are now urging us to eliminate that incentive
13 entirely.

14 MR. LANGE: No, Your Honor.

15 JUSTICE SCALIA: Why not?

16 MR. LANGE: I believe there's always a very
17 powerful incentive to prisoners to exhaust in full because
18 if they file a mixed petition, they're not going to have
19 relief.

20 JUSTICE SCALIA: Sometimes --

21 MR. LANGE: (b) (1) says it shall not be granted.

22 JUSTICE SCALIA: Well, you said -- you said in
23 your brief that -- that it's always in the -- with the
24 possible exception of capital cases, it's always in the
25 interest of a habeas applicant to get -- get it decided as

1 soon as possible. That's not really true. Sometimes it's
2 -- it's in his interest to delay it as much as possible.
3 Witnesses will die. People will move away. All sorts of
4 -- there are all sorts of reasons why he -- he might want
5 to delay the process.

6 MR. LANGE: I think those illustrations are --
7 are the -- very much the exception rather than the rule,
8 as this Court recognized in --

9 JUSTICE SOUTER: Well, what about the
10 exceptional case? I mean, how do we avoid the exceptional
11 case?

12 MR. LANGE: Well, I think that's then the
13 district court's task that has more familiarity with the
14 particular case.

15 JUSTICE SOUTER: Which can do what?

16 MR. LANGE: The district court can refuse to
17 issue a stay and abeyance order. It can put tight
18 deadlines on a stay and abeyance order. The district
19 court can revoke a stay and abeyance order. It can alter
20 it if there is delay. I believe that is a decision that
21 should be left to the court that's closest to the facts,
22 the district court.

23 JUSTICE STEVENS: Do you think the procedure
24 should be any different between capital cases and
25 noncapital cases? We're basically talking about what

1 would be an abuse of discretion, as you indicated at the
2 outset. Do you think the same rule should apply to both,
3 or do you think there might be -- because there is a
4 greater incentive to delay in the capital case than there
5 is in the noncapital case.

6 MR. LANGE: You're right, Justice Stevens. I --
7 it's difficult to develop a rule that distinguishes
8 between the two classes, but I do believe that's in the
9 realm of the discretion of the district court. The
10 district court can set very tight deadlines on a
11 petitioner returning to State court to exhaust remaining
12 remedies like the Court here set a deadline of 60 days,
13 and in the circuit courts, more commonly the deadline is
14 30 days to go back to State court and then 30 days to
15 return once the State proceeding is -- is completed.

16 JUSTICE SCALIA: But you -- you don't really
17 think we can hold that line, giving less favorable
18 treatment to somebody who's -- who's trying to argue
19 against a capital penalty, less favorable treatment to him
20 than somebody who's -- who just wants to avoid 10 years in
21 jail? That's just not going to work.

22 MR. LANGE: I'm not advocating less favorable
23 treatment or more favorable treatment for that matter. I
24 believe the rule has to be consistent between the two.

25 JUSTICE GINSBURG: Could you just replay the

1 order of the proceedings? The first petition is to the
2 State court. Was the defendant in that first State habeas
3 represented by counsel?

4 MR. LANGE: Yes, he was, Your Honor.

5 JUSTICE GINSBURG: So he's been represented by
6 counsel throughout.

7 MR. LANGE: Well, he filed his Federal habeas
8 petition pro se. The counsel was appointed shortly
9 afterwards, yes, Your Honor.

10 JUSTICE GINSBURG: But the -- the State
11 application that preceded that -- he was represented
12 there.

13 MR. LANGE: Yes, Your Honor.

14 JUSTICE GINSBURG: And then he lost his
15 representation when he came to the Federal court?

16 MR. LANGE: Justice Ginsburg, a different lawyer
17 gets appointed in the Federal court system than
18 represented him in the -- in the State court system.

19 JUSTICE SCALIA: How -- how general is -- is
20 this problem? And -- and to what extent is it tied to the
21 fact that you can bring a second habeas in South Dakota?
22 I mean, in -- in most States, if this had happened, I
23 presume, when you went back to the State court, the State
24 court would say, you know, you didn't -- you didn't put in
25 these claims the last time around and they're procedurally

1 barred. Isn't that what would happen in -- in most other
2 States?

3 MR. LANGE: I think that's an excellent point
4 and on footnotes 9 and 10 of the yellow brief, there is a
5 litany of the State procedural rules, and many States
6 would bar a second habeas or would put a strict time limit
7 that the petitioner could not meet. South Dakota is
8 different in that regard.

9 JUSTICE SCALIA: Yes.

10 MR. LANGE: South Dakota allows a second habeas
11 and, indeed, allows a petitioner in a second habeas to
12 show cause for a default by proving that he received
13 ineffective assistance of habeas counsel, which is unique
14 among the States.

15 Yes, many States that don't allow a second
16 remedy would -- would not -- we would not be in this
17 situation that we are here. However, South Dakota does.
18 And in fairness to Mr. Rhines, it makes sense to stay the
19 Federal petition and to allow him to exhaust his State
20 court remedies on satisfaction of Rose and to come back
21 with a fully exhausted claim.

22 JUSTICE SCALIA: Unless what would happen in
23 these other States as the -- is that the court would grant
24 the -- the stay of proceedings in order to let him go back
25 to the State court and be told after however long it takes

1 that -- that his -- his claims are now procedurally
2 barred. Do you think the Federal court would simply make
3 its own determination that the claims would be rejected by
4 the State court and therefore it would not stay? I don't
5 know.

6 MR. LANGE: I -- I believe that would -- could
7 be and -- and should be a factor in a district court's
8 consideration of whether to grant stay and abeyance, Your
9 Honor.

10 The State has expressed concerns about delay.
11 There are four reasons why those concerns are overstated.

12 First, in the 3 and a half years since Duncan v.
13 Walker was decided, there have been cases in circuit
14 courts of appeals that have approved of the stay and
15 abeyance procedure. None of those cases evidence that it
16 is being misused or is causing undue delay.

17 Second, the terms of the stay themselves can
18 restrict a petitioner's delay, as I've already recounted
19 the -- the district court did here.

20 Third, this Court in Slack v. McDaniel addressed
21 very similar arguments to what the State is making now
22 about delay through a second habeas filing. And this --
23 this Court noted that the Rules of Civil Procedure vest
24 courts with flexibility to prevent vexatious or delayed
25 litigation and that there are other reasons why those

1 concerns expressed in Slack v. McDaniel were -- were
2 overwrought.

3 Fourth and finally, on the prospect of delay, as
4 already mentioned in answer to one of Justice Scalia's
5 questions, the vast majority of petitioners are not under
6 a capital sentence. It is not hyperbole to say that 99.4
7 percent of Federal section 2254 habeas petitioners are not
8 serving -- are not under a capital penalty. Those are
9 statistics from the year 2000 from the Department of
10 Justice. And those, I think with the extremely rare
11 exception, are people who believe rightly or wrongly that
12 they're in prison because their constitutional rights have
13 been violated and would not favor delay under any
14 circumstance. So the delay concern that the State raises
15 is -- is overwrought.

16 Unless there are other questions, I'd reserve my
17 remaining time for rebuttal.

18 JUSTICE STEVENS: Thank you, Mr. Lang.

19 General Long, we'll hear from you, please.

20 ORAL ARGUMENT OF LAWRENCE E. LONG

21 ON BEHALF OF THE RESPONDENT

22 MR. LONG: Justice Stevens, and may it please
23 the Court:

24 Congress -- excuse me. Congress carefully
25 crafted a scheme designed to encourage State prisoners

1 first to exhaust all of their State post-conviction
2 remedies and then to file their habeas corpus petitions as
3 soon as possible. The congressional design includes three
4 mutually dependent statutes, including a 1-year statute of
5 limitations, a tolling provision, and a total exhaustion
6 requirement, the combined effect of which is supposed to
7 reduce delay, serve the principles of comity, finality,
8 and federalism.

9 However, stay and abeyance erodes each side of
10 this triangular statutory design. Stay and abeyance
11 allows tolling in Federal court when Duncan said there
12 should be none. It extends the statute of limitations
13 beyond 1 year, and it ignores the total exhaustion
14 requirement of 2254(b). The result is that State
15 prisoners, especially capital prisoners, are encouraged to
16 file mixed petitions and rewarded with delay if they do
17 so.

18 JUSTICE SOUTER: What -- what is your answer to
19 -- to your -- your brother's answer on this, and -- and
20 that is, that the -- the existence of stay and abey as a
21 possibility is not a right to stay and abey? And -- and
22 if a district judge finds that a -- there is reason to
23 believe that the defendant is gaming the system, because
24 he's a capital defendant and wants to delay or wants delay
25 for any other reason, there's -- there's no requirement

1 that -- that there be a stay and -- and abeyance order.
2 And why -- why doesn't that take care of what I -- I think
3 is a very legitimate issue that you raise? Why isn't that
4 a -- a sufficient answer to it?

5 MR. LONG: I think that -- I think that the --
6 the answer is that Congress designed the system to resolve
7 all those issues in State court first. I think one of the
8 things that needs to be kept in mind is that an
9 unexhausted claim is, by its very nature and by
10 definition, a claim where there's an available remedy in
11 State court.

12 JUSTICE SOUTER: Oh, again, there's no question
13 about that. And -- and in a perfect -- sort of in a
14 perfect system, I think your objection would be
15 unanswerable.

16 The trouble with the system we've got is -- is
17 the trouble that -- that is -- is undisputed here, and
18 that is, that most of these petitions, the overwhelming
19 number of them, are going to be pro se petitions.

20 Exhaustion can -- can be tricky. The -- the statute of
21 limitations is -- is going to run and -- and an individual
22 can end up in the -- in the situation that this one had.

23 What -- what he's asking for, in effect, is how
24 do we tinker with the system, in effect, to prevent its
25 being a -- a very unfair burden on people who don't have

1 the sophistication to help themselves.

2 MR. LONG: I don't think the system needs to be
3 tinkered with, Your Honor.

4 JUSTICE SOUTER: Well, I -- I know but there's
5 -- what -- what is your answer on the merits to the fact
6 that most of the people who are going to ask for stay and
7 abey are -- are going to be pro ses, or at least have
8 gotten into the mess that they're in as a result of pro se
9 representation, and -- and that -- that exhaustion in
10 close cases can be a very -- very tricky issue? What --
11 what's your response to that?

12 MR. LONG: My response is in two parts. First
13 of all, Your Honor, I agree with you that exhaustion can
14 be a tricky issue, but it's -- it's the most tricky in the
15 question about whether or not the question has been fairly
16 presented. The less tricky portion of the question is
17 whether or not the claim is unexhausted, having been --
18 that means there's an available remedy in State court.
19 The easy way to sort that out is just to file your claim
20 in State court. If there is in fact an available remedy,
21 then you get tolling, and that solves the problem. I --

22 JUSTICE SCALIA: I'm not sure -- I'm not sure
23 it's -- it's true, are you, that -- that the reason people
24 get into these situations is because they were pro se.
25 That wasn't the case here. I -- I think they probably get

1 into this situation very often because they have a better
2 or at least a different lawyer at the Federal habeas stage
3 than they had at the State habeas stage, and this new
4 lawyer sees additional claims that -- that he wants to
5 make. Isn't -- isn't that exactly what happened here?

6 MR. LONG: That's -- I -- I suspect that's the
7 typical case in -- in capital cases. Mr. Rhines is
8 currently --

9 JUSTICE BREYER: It's typical. I mean, what I
10 have in the statistics is that about 36 percent of all the
11 habeases are dismissed for failure to exhaust, and 93
12 percent of all of the habeas petitioners are pro se. Now,
13 the conclusions I draw for that is it's probably these pro
14 se people -- I mean, 93 percent are pro se -- that will get
15 the procedural dismissals, and certainly a third or so, if
16 we agree with you, of all of the habeas petitions filed
17 in -- in Federal court are going to be finished,
18 terminated. The door is closed because it takes a Federal
19 court about nine months on average to process a habeas.

20 Now, you just take that and you say, we've
21 closed the door of the Federal court to a third of all the
22 habeas petitioners. And if I had thought that Congress
23 wanted that, then I might say fine.

24 But I thought that Duncan -- and I know I was on
25 the other side of the case, but I felt the majority had a

1 pretty good point on the language, to tell you the truth.
2 But what I didn't think they had such a -- I mean, I
3 couldn't find much of a congressional purpose one way or
4 the other there. I thought the purpose of the statute of
5 limitations is really to get people to file their
6 petitions. Once they file them, they have a year but it's
7 tolled. You know, I mean, you understand the thing.

8 I -- I'm really looking for you to tell me some
9 tremendously strong congressional purpose that's served so
10 strong that you want to knock a third of the petitioners
11 out of Federal court forever.

12 MR. LONG: I think it's less complicated than
13 that, Your Honor. I think that it --

14 JUSTICE BREYER: That's pretty simple.

15 MR. LONG: I --

16 JUSTICE BREYER: The door is closed forever. I
17 mean --

18 MR. LONG: I disagree. I disagree with you,
19 Justice Breyer. I -- I think that even for a pro se
20 petitioner, I do not think it is more difficult for him to
21 find the door of the State courthouse than it is to find
22 the door of the Federal courthouse. And the key, I think,
23 to your argument is that claims are unexhausted by
24 definition if there's an available State court remedy.
25 Therefore, by definition, they ought to be going to the

1 State courthouse rather than the Federal courthouse.

2 JUSTICE GINSBURG: The --

3 JUSTICE BREYER: They seem to have made a
4 mistake here quite a lot. Why do these statistics come
5 out the way they do? I mean, it is just as easy.

6 MR. LONG: I -- I can't --

7 JUSTICE BREYER: I agree with you. Why -- why
8 aren't they filing -- why -- why are they all filing so
9 many, 36 percent filing in the wrong court? Why is that?

10 JUSTICE SCALIA: You know, it -- it could be, I
11 suppose, that these people have nothing else to do sitting
12 around in the jailhouse, and -- and having written their
13 State petition, they sit around for a few more months and
14 they say, you know, there are a few more claims I could
15 make. I think that's -- it's as simply as that.

16 And -- and what the statute is designed to do, I
17 -- I think you're telling us, is to say, look it, be
18 careful. Make all your claims in the State court the
19 first time. That doesn't seem to me to be too much to
20 demand.

21 MR. LONG: Justice Scalia, I think that's
22 exactly what the statute -- the statutes -- the three read
23 together and enforced together --

24 JUSTICE GINSBURG: But they're all --

25 JUSTICE KENNEDY: I take it -- I take it that

1 one of the answers to the observation that the Federal
2 court is closed to a third of the claims is that that's
3 not true with respect to the exhausted claims. The -- the
4 petition can simply be purged as to unexhausted claims and
5 as to the exhausted claims, the courthouse door remains
6 open.

7 MR. LONG: Well, I agree with that. The --
8 let's -- let's deal with the facts in this case.

9 JUSTICE GINSBURG: May I ask you --

10 MR. LONG: Please.

11 JUSTICE GINSBURG: -- with respect to this case?

12 I thought this case was such a good illustration of the
13 problem. If claims came into the Federal court neatly
14 labeled, exhausted, unexhausted, then I think that you
15 would have a very strong argument. But as this case
16 illustrates, the question of whether it's been exhausted
17 or not is something on which people can disagree. And I
18 suppose why the district court took well over a year to
19 decide this case is the petitioner says, I've exhausted
20 everything, and the prosecutor says, you have not
21 exhausted 12. And the district court is going by the --
22 going over these one by one and says in the end, you're
23 both wrong. My list is eight. And it's that problem of
24 has this claim been exhausted.

25 Now, if it was a case of deliberately

1 withholding a case from State court and bringing it up
2 fresh in -- in the Federal court, that would be a case
3 where the Federal court should say, go away, you didn't
4 even try. But what do you do with these cases where it's
5 really hard to tell whether the claim has been exhausted?

6 MR. LONG: That was not the situation in this
7 case, Your Honor.

8 JUSTICE GINSBURG: Then why did the -- the
9 district judge says four on the State's list have been
10 exhausted?

11 MR. LONG: Well, the -- factually the court --
12 the court examined the amended petition and concluded that
13 eight claims in the amended petition were unexhausted.
14 The problem is this -- or -- or at least the variance in
15 the facts from what you suggest is this. Mr. Rhines filed
16 an amended petition in November of 2000 with counsel,
17 after having been through all the record. He admitted in
18 his amended petition that four of the claims were
19 unexhausted. He still had 80 days left to run on the
20 statute of limitations. So he conceded in his amended
21 petition in Federal court that he still had 80 days to run
22 -- while there was still 80 days to run on the statute of
23 limitation, that four of the claims he submitted in the
24 petition were unexhausted. That's not difficult to sort
25 out because defense counsel admitted it, as he pled them.

1 And so there isn't tricky question about whether there
2 were unexhausted claims in this petition.

3 Now, that was in November of 2000. He waited
4 until the court decided the decision in July of 2002 and
5 didn't pursue his State court remedies until the court
6 ordered him to do that in July of 2002. And he filed his
7 State habeas to exhaust those admittedly unexhausted
8 claims.

9 JUSTICE GINSBURG: So that -- that would take
10 care of the four claims. How about the other four?

11 MR. LONG: Well, it doesn't make any difference
12 at that point, Your Honor. If there's a single, solitary
13 unexhausted claim, the problem --

14 JUSTICE GINSBURG: Well, they --

15 MR. LONG: -- is not -- is not worse if there
16 gets to be 12 or 15.

17 JUSTICE GINSBURG: But those could be -- those
18 could be dropped out of the Federal complaint. There
19 you're saying, district judge, you would be abusing your
20 discretion because admitting that he hadn't exhausted
21 these, he should have gone immediately to do that.

22 But what about the other four?

23 MR. LONG: Well, if he -- if he goes within the
24 80 days and immediately files to pursue in State court his
25 unexhausted claims, the statute is tolled. He doesn't

1 lose the statute.

2 JUSTICE SCALIA: Even without going back to the
3 State court, I don't see anything in this statute which
4 indicates that Congress expected everybody who comes into
5 Federal court with unexhausted claims to have time to
6 remedy that defect by running back to State court and --
7 and filing. This statute doesn't give any such
8 indication.

9 And it's clear that will never happen if he
10 files on the 364th day after the conclusion of the State
11 proceedings. Right? I mean, his year is up already.
12 Even if the judge decides the question the next morning,
13 it's too late.

14 So I -- I don't know why we have to be concerned
15 about giving him some entitled second chance to go back to
16 -- to State court. I don't see anything in the statute
17 that -- that guarantees or that even envisions that. And
18 I -- I --

19 MR. LONG: I'm sorry, Your Honor.

20 JUSTICE BREYER: But I don't agree with that you
21 were saying or you do agree with that, I know.

22 The -- but the -- the question that I would have
23 is, is there anything the other way? I mean, in Duncan,
24 you know, I was dissenting and the thing that sort of
25 moved me is I couldn't imagine Congress really cared about

1 this. I mean, what they do is they want to have you file
2 within a year. And they say, well, but if you filed
3 within a year and you're in State court, we don't care
4 anymore. You're being -- if you file in the wrong State
5 court, you're tolled. We don't really care once you're
6 proceeding. And now, however, if you go in -- into
7 Federal court by mistake instead of State court by
8 mistake, well, you're out of luck on a random basis. Some
9 judges will get you back in on time. Other judges won't.

10 Is there anything in the history or anywhere --
11 I -- I'm interested in the history from your point of
12 view, as much as the other. Is there anything that
13 suggests that Congress cared about that?

14 MR. LONG: Not that I've found, Your Honor.

15 JUSTICE BREYER: Either way.

16 JUSTICE GINSBURG: If that's so, then why isn't
17 a system like the one that the Second Circuit described
18 the most reasonable thing to do, that is, to put very
19 tight deadlines both on the petitioner and on the Federal
20 court, that is, to deny -- deny the stay and abey when the
21 prisoner has not been diligent, to put a tight time line
22 on when that prisoner has to go to State court, and a
23 similarly tight line on returning to the Federal court
24 after the State court is done? And you could check
25 against repeatedly abusing this by saying, and you get

1 only one opportunity to do it.

2 MR. LONG: I think the answer to the question,
3 Your Honor, is that in order to follow the Second Circuit
4 as you've described, this Court would have to rewrite the
5 interpretation of the exhaustion statute that they issued
6 in *Rose v. Lundy*. That's my belief because *Rose v. Lundy*
7 -- or the statute, as interpreted by *Rose v. Lundy*
8 indicates that at a minimum, the unexhausted claims ought
9 to be dismissed without prejudice and sent back for
10 exhaustion in State court.

11 JUSTICE SOUTER: But *Rose* and *Lundy* also assumed
12 that they could go back to State court and -- and in -- in
13 fact this could be done without wiping out the claims.
14 And the difference between the situation in *Rose* and *Lundy*
15 and the situation we've got now is the difference which is
16 focused, I think, in -- in Justice Ginsburg's four claims
17 as to which there was disagreement even between the
18 district court and -- and the State as to whether there
19 was exhaustion. There -- there isn't a -- a -- as a -- as
20 a systemic matter across the United States, there simply
21 isn't a way for most of these people to go back and
22 litigate their State claims. *Rose* and *Lundy* assumed there
23 was. Now there isn't.

24 MR. LONG: Your Honor, if the petitioner is not
25 capable of going back to litigate the State claim, the

1 claim is not unexhausted by definition. And --

2 JUSTICE SOUTER: It may not be -- it -- it will
3 be waived. I mean, if -- if -- on your theory, he -- he
4 jumps from the frying pan of nonexhaustion into the fire
5 of waiver. That's -- that's no answer to the problem.

6 JUSTICE GINSBURG: See, you could -- there are
7 two things in *Rose v. Lundy*, and everybody agrees with the
8 one, you must exhaust in State court. You cannot have the
9 Federal court take a first view of that question. You --
10 you must exhaust. And -- but then *Rose v. Lundy* also said
11 without prejudice, and your reading strikes out without
12 prejudice not based on the defendant's conduct, not based
13 on the petitioner's conduct, but because it took the
14 district court more than the limitation period just to
15 sort out which claims were exhausted and which weren't.

16 MR. LONG: I think there are two responses to
17 that, Your Honor. First of all, the -- the fact of
18 whether it is without prejudice in fact or in law is
19 driven by how much time is left on the statute of
20 limitations. A dismissal without prejudice at the time
21 the amended petition was filed in this case would have
22 left 80 days on the statute and he could have pursued his
23 -- his remedy in State court and tolled the statute.

24 Now, in the -- in the more common situation with
25 the habeas petitioner, I think the answer has to be

1 Congress has changed the landscape. They have changed the
2 landscape relying upon the total exhaustion rule in --
3 that they enacted and that this Court has interpreted.
4 And they have added the statute of limitations and they've
5 added the tolling provisions, and that has to be entered
6 into the computation.

7 Now, I think that that simply raises the bar for
8 all petitioners to make doubly sure that if they have a
9 claim, they have presented it to a State court judge
10 because they -- they --

11 JUSTICE GINSBURG: Well, the -- the troublesome
12 thing is some petitioners will be able to do just what you
13 said in South Dakota, go back to the State court a second
14 time, because they had a swift district judge, and some
15 won't because the district judge was slow. So to treat
16 identically situated petitioners differently not because
17 of any lapse on the petitioner's part but solely because
18 one had the luck to get before a swift district judge and
19 the other, the bad luck to get before a procrastinator,
20 that seems arbitrary and not anything that Congress built
21 into the statute.

22 MR. LONG: Your Honor, I -- I struggle with the
23 -- one of the premises of your hypothetical, and the
24 portion I struggle with is the -- is the situation where
25 the petitioner, through no fault of his own, either -- and

1 I think that's implied in your hypothetical -- doesn't go
2 to State court. I -- I think that that is -- I think that
3 that's the --

4 JUSTICE GINSBURG: No, did go. Did. Every one
5 of these cases, I say if they came rushing to the Federal
6 court first, no Federal judge would even consider giving
7 them a stay so they can go to the first -- first time.

8 But these -- these come up where someone has
9 gone to the State court and then they come to the Federal
10 court with a new petition and there's arguments about what
11 they exhausted and what they didn't. I'm -- I'm leaving
12 out the person who never went to the Federal -- State
13 court at all. That person is -- is not the category that
14 this case represents. This case represents the one who
15 goes to State court and comes to the Federal court and
16 has arguably some additional claims.

17 MR. LONG: The -- there's the -- the difficulty
18 in the stay and abeyance procedure, as it is currently
19 practiced, I think, is that there is no set of standards,
20 other than the three statutes that we've -- that we have
21 discussed, to guide the district court's discretion in
22 when they give stay and abeyance.

23 JUSTICE SCALIA: General Long, do -- do those
24 States that apply stay and abey make a distinction between
25 whether the person who comes with unexhausted claims has

1 exhausted some claims in State court and ones who haven't?

2 MR. LONG: Well, I think the predicate to
3 getting stay and abeyance, Your Honor, is that there has
4 to be at least the presence of one exhausted claim and one
5 unexhausted --

6 JUSTICE SCALIA: Why should that be?

7 MR. LONG: Well, I think that that follows from
8 -- I think that follows from *Rose v. Lundy* which talked
9 about a mixed petition and that's the -- that's the
10 factual background.

11 JUSTICE SCALIA: If you get a second bite, why
12 shouldn't you get a first bite? I mean, I -- I don't see
13 -- I don't see any reason for treating preferentially the
14 -- the person who files in State court but does not file
15 new claims, which he should have known to file at that
16 time, and treating the person who comes to the Federal
17 court with those new claims but doesn't have -- doesn't
18 have even one that he took to State court. I -- I don't
19 see any reason to be merciful to one and not the other.

20 MR. LONG: Well, I think the --

21 JUSTICE GINSBURG: The -- the --

22 JUSTICE SCALIA: But you're -- but you're
23 telling me the States do draw a distinction.

24 MR. LONG: Well, I don't think --

25 JUSTICE SCALIA: I mean -- I mean --

1 MR. LONG: -- it's not distinction. I'm sorry.

2 The Federal court --

3 JUSTICE GINSBURG: Well, hasn't the second --

4 JUSTICE STEVENS: But the difference is that one
5 of those petitions could be totally dismissed and the
6 other one would not be. If there were no exhaustion
7 whatsoever, they -- they'd plainly dismiss the Federal
8 case.

9 MR. LONG: I think so, yes, Your Honor.

10 JUSTICE STEVENS: Whereas, if there's one
11 exhausted claim, they could -- they could keep the Federal
12 -- petition in Federal court and stay it and let the
13 unexhausted claim be exhausted.

14 MR. LONG: Well, that's -- that's the -- it's
15 the stay that we're having the problem with, Justice
16 Stevens. But -- but if there is the presence of one
17 unexhausted claim, the -- the total exhaustion
18 requirement --

19 JUSTICE STEVENS: And the judge could dismiss
20 the others.

21 MR. LONG: He -- he can dismiss the unexhausted
22 one and move forward. And -- and, of course, what has
23 happened in the -- since the -- the landscape has changed
24 since 1982 and because now the 1-year statute and the
25 tolling provisions, there is more sanction for that

1 dismissal under the total exhaustion requirement than
2 there used to be.

3 JUSTICE O'CONNOR: General Long, if you were
4 designing a system to set standards to guide the Federal
5 judge in deciding how to treat these, what standards would
6 you set?

7 MR. LONG: That's a hard question, Your Honor,
8 because --

9 JUSTICE O'CONNOR: Do your best.

10 (Laughter.)

11 MR. LONG: I -- I think this, Your Honor. I --
12 I think the court, faced with a mixed petition, ought to
13 first ask why have you not -- if -- if there is truly an
14 unexhausted claim in this petition, why did you not
15 present that claim previously in State court. And after
16 that, if -- if the -- if the answer to that is not
17 satisfactory, I think that the -- I think that that ought
18 to be tested on, for example, the cause and prejudice
19 standard or the actual innocence or fundamental
20 miscarriage of justice standards which this Court has
21 announced to cure procedural defaults in extreme cases.

22 But in the absence of those type of standards, I
23 think that stay and abeyance has been simply applied too
24 broadly and this case is a classic example of the
25 misapplication of stay and abeyance.

1 JUSTICE KENNEDY: Well, are you suggesting then
2 that we could have a rule, oh, somewhat like the grant of
3 a preliminary injunction? If it's a likelihood of success
4 on the merits, if it's a fundamental right, if there's
5 reason for maybe mistake and not having exhausted, then --
6 then you'd allow a stay and abeyance?

7 MR. LONG: Well, I --

8 JUSTICE KENNEDY: Because if you have that, we
9 then have a new Gothic jurisprudence where we're reviewing
10 discretion on a collateral issue.

11 MR. LONG: Well, but --

12 JUSTICE SCALIA: Rococo I think.

13 MR. LONG: Well, the -- the difficulty with the
14 way it is now, Your Honor, is there is no review of the
15 discretion of the district courts at all. I mean, they
16 simply do it, and --

17 JUSTICE KENNEDY: Well, I suppose the suggestion
18 I made --

19 MR. LONG: -- and it's --

20 JUSTICE KENNEDY: -- is preferable than the one
21 I gave. Would you adopt that or would you insist just
22 that there be no stay and abey at all?

23 MR. LONG: Well, our first position, obviously,
24 is no stay and abey at all, that the unexhausted claims
25 ought to be dismissed, as the Eighth Circuit said in this

1 case. And if they -- if they are truly unexhausted, then
2 there is going to be a remedy in State court, and State
3 courts are perfectly capable of identifying constitutional
4 remedies and -- and meting out the requirements. I've had
5 -- I've had South Dakota judges send murder cases back to
6 me to try after 12 years, and it's -- it's a burdensome
7 thing, and those cases need to move forward.

8 But what I would envision, Justice Kennedy, is
9 this, that the rule ought to be that -- that the -- the --
10 that the case is sent back to State court if there is
11 truly, as -- as the name implies, an unexhausted claim,
12 implying that there is an available State remedy. If --
13 if resolution in the State courts does not resolve it, if
14 the case comes back in some fashion, then the court needs
15 to apply some standards like cause and prejudice or
16 fundamental miscarriage of justice, which -- which is what
17 is applied in -- in procedural default cases, and -- and
18 deal with it on that basis.

19 But the -- the current lack of discretion with
20 reference to how stay and abeyance is applied is in my
21 judgment the -- that is the -- that is the most
22 fundamental problem with --

23 JUSTICE GINSBURG: But again --

24 MR. LONG: -- stay and abeyances.

25 JUSTICE GINSBURG: -- I come -- I come back to

1 the -- the Second Circuit tried to deal with that problem
2 and why isn't that adequate? They didn't leave the
3 district judges to do whatever was their will.

4 MR. LONG: The -- well, the -- the Second
5 Circuit followed very closely to what the -- what the
6 district court did here, Your Honor, but what I did not
7 see in the Second Circuit opinions and frankly haven't
8 seen in any of the opinions except the Eighth Circuit
9 opinion was any type of analysis about an explanation of
10 why the petitioner hadn't been prudent and hadn't been
11 diligent in State court. And -- and in the absence of any
12 kind of inquiry like that, I think that stay and abeyance
13 simply is -- is -- it's unguided. There are no standards.

14 If there are no questions, thank you very much.

15 JUSTICE STEVENS: Thank you, General Long.

16 Mr. Lange, you have 7 minutes left, and normally
17 I wouldn't intrude on your rebuttal time, but I would like
18 to ask you to comment on one thought.

19 Do you think it would be appropriate before a
20 district judge ever grants a stay and -- and abeyance
21 procedure, to make some kind of a preliminary, not exactly
22 a probable cause determination, but some kind of a
23 determination as to whether or not there is arguable merit
24 to the State claim that he wants to stay the proceedings
25 to -- to allow him to exhaust?

1 doesn't know absent testimony, et cetera, et cetera.

2 MR. LANGE: Right, and those should be
3 circumstances where the State court is left to judge
4 whether the claim has merit while the Federal court
5 proceedings are suspended, are abeyed or held in abeyance.
6 It makes sense, under the exhaustion norms of this Court,
7 to let the State courts pass judgment first on claims that
8 have sufficient merit where they can't be disposed of
9 under rule 4 of the rules governing habeas corpus.

10 JUSTICE SCALIA: Mr. -- Mr. Lange, why -- why
11 isn't -- gee, you have Lange and Long. Why isn't Attorney
12 General Long's assertion sensible? That is to say, it's
13 an extraordinary thing to have Federal district courts in
14 all criminal cases reviewing the work of State supreme
15 courts. We -- we got into this in an era when we couldn't
16 trust State supreme courts, especially in racial cases.
17 But that's where we are now.

18 But why is it unreasonable to say, look, you get
19 one shot at coming to Federal court? And if -- if you --
20 if you bungle that and you haven't exhausted first, we're
21 not denying your claims. Go back to State court. We're
22 just not going to reintervene as Federal courts. Your --
23 your claims are not dead. Justice is not denied. You
24 just have to go back through the State system and we're
25 not going to blue pencil the work of the State system a

1 second time. That's all. Why isn't that reasonable?

2 MR. LANGE: Well, this is Mr. Rhines' one
3 opportunity. Congress did give in section 2254(a)
4 jurisdiction to the courts and said the Federal courts
5 shall entertain petitions of this -- of this nature. So
6 this is a -- a right that Mr. Rhines has to have these
7 entertained. He filed timely.

8 JUSTICE O'CONNOR: Well, to have exhausted
9 claims entertained. Right? Is there some -- do you say
10 there is some absolute right to have the Federal court
11 hear unexhausted claims?

12 MR. LANGE: Well, under (b)(1), a claim must be
13 exhausted to support relief from a Federal court. That is
14 right, Your Honor. And these claims -- if under the
15 petitioner B scenario, the court had ruled promptly or the
16 claims were less complex, allowing them to be disposed of
17 earlier, Mr. Rhines could have had or -- and should have
18 all of his claims before the district court to be
19 resolved.

20 The Court needs to be watchful here not to
21 penalize Mr. Rhines and people who are in similar
22 situations because they have complex claims.

23 JUSTICE O'CONNOR: Well, this is not a pro se
24 petitioner.

25 MR. LANGE: No. He is represented by counsel,

1 obviously, Your Honor.

2 I -- I think it inappropriate to draw lines
3 between pro se and represented counsel, though, in the
4 realm of habeas. That I think invites trouble. So the
5 rule you formulate is obviously not only for Rhines but
6 for pro se litigants as well that -- that deserve
7 consideration.

8 This exhaustion rule is not to be an -- a trap
9 for the unwary pro se petitioner. The whole purpose of
10 the exhaustion rule, as this Court said in *Keeney v.*
11 *Tamayo-Reyes*, is to -- not to erect a hurdle on the path
12 to Federal habeas court, but to channel claims into an
13 appropriate forum. And stay and abeyance does just that.
14 It prohibits further proceeding on a mixed petition in
15 Federal court and channels, indeed requires, as a term of
16 the order that the petitioner go and exhaust the remaining
17 State remedy and come back to court with one exhausted
18 claim. That is what *Rose v. Lundy* contemplated and
19 allowed with the dismissal without prejudice.

20 JUSTICE O'CONNOR: Earlier you -- you suggested
21 that in your view the district court could deny it.

22 MR. LANGE: If under section 2254(b)(2) it does
23 not meet the standard, yes. Congress has allowed, because
24 exhaustion is not jurisdictional, for district courts to
25 reach the merits, albeit to deny unexhausted claims.

1 That's --

2 JUSTICE STEVENS: Mr. Lange, you were appointed
3 by the Court, and on behalf of the Court, I want to thank
4 you for your services and for the quality of your
5 services.

6 MR. LANGE: Thank you.

7 JUSTICE STEVENS: The case is submitted.

8 (Whereupon, at 12:32 p.m., the case in the
9 above-entitled matter was submitted.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25