IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER ARTUZ, :

SUPERINTENDENT, GREEN HAVEN :

CORRECTIONAL FACILITY, :

Petitioner :

v. : No. 99-1238

TONY BRUCE BENNETT :

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Washington, D.C.

Tuesday, October 10, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:55 a.m.

APPEARANCES:

JOHN M. CASTELLANO, ESQ., Kew Gardens, New York; on behalf of the Petitioner.

DAN SCHWEITZER, ESQ., Washington, D.C.; on behalf of Florida, as amicus curiae, supporting the Petitioner.

ALAN S. FUTERFAS, ESQ., New York, New York; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:55 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-1238, Christopher Artuz v. Tony Bruce Bennett.

Mr. Castellano.

ORAL ARGUMENT OF JOHN M. CASTELLANO

ON BEHALF OF THE PETITIONER

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

The issue before the Court in this case is whether a State prisoner can extend the 1-year limitations period for Federal habeas corpus petitions by filing repetitive motions in State court that are procedurally barred from review under State law. There are at least three reasons why these motions should not be afforded tolling.

QUESTION: I take it it all comes up because we're construing the language, properly filed, in the applicable statutory provision.

MR. CASTELLANO: Absolutely, Your Honor, yes. These State post conviction motions, Your Honor, cause unnecessary delays from repetitive litigation that advance no purpose of the tolling provision. They provide State prisoners with a simple expedient to defeat the statute of

limitations at will, and allowing tolling for such motions undermines core principles of comity and federalism. They're at the heart of this Court's habeas corpus jurisprudence, and at the core of the AEDPA.

The statutory language supports the position of the States here. Under a plain reading of the statutory language the words, properly filed, must mean something more than simply filed.

QUESTION: Well, the courts are all over the lot on what the words, properly filed, mean. It seems to me there are several different approaches. Maybe just properly filed in the sense of being timely and in the proper place, or maybe getting permission from the State, a certificate of appealability if the State requires it, that kind of thing.

MR. CASTELLANO: Yes, Your Honor.

QUESTION: So not every lower court has thought that it also encompasses a review of substance to see whether it's procedurally barred.

MR. CASTELLANO: Yes, that's right, Your Honor. There are many --

QUESTION: And I guess the court has to later decide whether it's procedurally barred. The State court presumably would reach that question, or the Federal court, in due course, wouldn't it?

MR. CASTELLANO: Yes.

QUESTION: The Federal habeas court would, I suppose, at the end of the day have to address that issue.

MR. CASTELLANO: Yes, absolutely, Your Honor.

QUESTION: Yes.

MR. CASTELLANO: Here there are several different definitions. Even among the cases upon which the respondent relies, and that demonstrates, if anything, that there is some ambiguity in the language of the statute. The word properly is not easily susceptible of definition. Here --

QUESTION: And what is your definition of properly filed?

MR. CASTELLANO: It's this, Your Honor. There's really a three-step analysis, if you will. The first step is this. Properly filed must mean something more than filed, in addition to the ordinary rules of statutory construction, which would so indicate.

In addition, here Congress used the word filed 24 times in the habeas corpus statute but modified it with the word properly only once, so it must have meant that the words properly filed had something more than an inconsequential or nominal meaning.

Second, there's a plain sense, plain common sense reading of the words, properly filed, under which a

document, to be properly filed, has to be filed in the right place, in the right court, and even some of the cases upon which the respondent relies so indicated.

QUESTION: That gets you to the situation where the petition is filed in a court that didn't even have the authority to grant any sort of relief.

MR. CASTELLANO: Absolutely, Your Honor.

QUESTION: But you want to go further than that.

MR. CASTELLANO: Yes, Your Honor. We say that here this Court did not have the authority to grant the relief requested because there was an absolute mandatory State procedural bar in the way.

QUESTION: And is that the third part of your test, or the second part of your --

MR. CASTELLANO: That's the second part of the test. The third part of the test is that a -- is a plain common sense understanding of the words, right place, or right court, under which a document can't be filed in the right court if it's filed in a court that can't entertain the merits of it. That's really the third --

QUESTION: Well, but does it follow that the court can't entertain the merits? I mean, a procedural bar is something that can be waived and, as counterintuitive as it may be, I mean, we occasionally do get cases before this Court in which there seems to have

been a procedural bar that the State didn't invoke, so it seems to me that we're not in the position of even being able to analyze this on a merely -- or I shouldn't say merely, on a jurisdictional basis, because it really doesn't go to the State court's jurisdiction. It goes to the discretionary decision by the State prosecutor to invoke the bar, and so I don't think we can do it on the third prong that you mentioned, which I understood was in a sense in effect a jurisdictional prong.

MR. CASTELLANO: No, Your Honor, the third prong is not a jurisdictional prong. It's simply a prong that says that if the State court can't, under the State's procedural rules, adjudicate the merits, then that motion is not properly filed in that State court.

QUESTION: You mean, if it can't adjudicate the merits it's not properly filed.

MR. CASTELLANO: It's not properly filed if it can't adjudicate the merits.

QUESTION: No, but it can adjudicate the merits. It can adjudicate the merits if the State doesn't invoke the bar.

MR. CASTELLANO: Not in this case. First of all, Your Honor, these are absolute mandatory bars, and there's no indication that if the State waives these bars, that the Court has the authority to examine these

issues --

QUESTION: But doesn't this -- doesn't your answer, and I realize I'm shifting my position here, but doesn't your answer point out another difficulty of your position, and that is, a Federal court is, it seems to me, hard-pressed in these cases if it's got to decide whether a particular bar is jurisdictional or whether it's not jurisdictional under State law, and this is just adding one more complication, as against the position of the other side, which takes a kind of a plain language, almost physical act interpretation.

You're putting yet another burden on the State court to decide whether a bar is jurisdictional or not, and it seems to me that that counts against adopting your interpretation.

MR. CASTELLANO: No, Your Honor, I don't believe we are imposing an additional bar. I wouldn't use the sense jurisdictional. I would use mandatory State procedural bar which, under the procedural default doctrine, is a concept that the Federal courts are very familiar with.

This Court in Teague v. Lane, for example, did the type of analysis that we're advancing here. In other words, it decided whether or not to send a State prisoner back to State court in order to pursue a State remedy, or,

on the other hand, whether that State remedy is no longer available --

QUESTION: Well, there's no question that the Federal courts in a sense can do this. Sometimes the Federal courts have to do it, but it seems to me that it does count against your position that a Federal court will have to go through this every time a State court issues a laconic one-word order, denied.

QUESTION: And that essentially usurps the function, or at least duplicates the function of the State court and is, it seems to me, contrary to the Federal interests that underlie this statute.

MR. CASTELLANO: I don't believe it duplicates the function of the State courts at all. I believe that simply it shows respect to the State court procedural rules and respect to the individual State court decisions that have been --

QUESTION: Could I --

QUESTION: Well, presumably the State court made that determination when it made the underlying order, and it seems to me that this is really contrary to the federalism concerns that in large part were the basis of the statute. You're asking the Federal courts to make a determination which brushes up against the merits, just in order to determine the tolling provision.

MR. CASTELLANO: Actually, Your Honor, what the Court could do is to adopt the Harris v. Reid plain statement rule, and the Coleman exception to the Harris v. Reid plain statement rule and in this -- so that ordinarily there would be a plain statement on behalf of the State court applying the particular State procedural bar in that individual case.

QUESTION: Let's back up just a minute, Mr. -- I suppose you'd be on stronger ground if you're talking not about a procedural bar to the merits in the sense of plain statement, that sort of thing. Supposing you just have a failure to file within the time limit provided by the State.

MR. CASTELLANO: Yes, Your Honor, that's --

QUESTION: I take it you believe that in order to be properly filed the thing must be timely.

MR. CASTELLANO: Yes, absolutely, Your Honor.

QUESTION: Even though perhaps in a pleading sense, in the New York courts, a statute of limitations, if it isn't pleaded by the defendant, might be waived.

MR. CASTELLANO: Right, Your Honor. In New York there is no statute of limitations for post conviction review, but certainly in many States, such as Florida, which is represented here, there's a statute of limitations that does have exceptions to it, and as to

which there should be some judicial review with regard to the application of that particular --

QUESTION: So then the Federal court would have to determine not only if there is a procedural bar, but what exceptions exist, and whether this particular case fits within that exception, like statute of limitations often have tolling accoutrements, so you're getting the Federal court involved in a lot of up-front decisonmaking that substitutes for the State, and my question is I think the same as Justice Kennedy's. That is, you're asking the Federal court, as it does in the Erie area, to make a determination of what State law is.

Isn't it more respectful of the States to say, State -- State court, this is for you to decide. We don't know how to apply your procedural bar rule. We'd rather have you tell us, does this fall within an exception?

It seems to me that ordering the Federal court to decide the State law question is not as respectful of the States as it would be to say, that's a question that the State courts should decide.

MR. CASTELLANO: Well, Your Honor, in the ordinary case the State court will have already decided that very particular issue and applied that procedural bar to the very case that's now in front of the --

QUESTION: But here we don't know, because the

State order is opaque. It doesn't tell us.

MR. CASTELLANO: I think the application here is a little bit different. If you apply, for example, the Harris v. Reid plain statement rule, and the Coleman exception to it, we fall within that, so for example, under Coleman this Court held that there was no need to -- there was no need to have a plain statement, because from all the facts and circumstances it didn't fairly appear that the State court decision was based primarily on Federal law or interwoven with Federal law. That's exactly the situation that we have here as well.

QUESTION: The Federal court is always going to have to decide, when this question comes up, whether or not the State petition was, quote, properly filed. I mean, that was Congress' choice. I mean, it isn't necessarily any court's choice.

MR. CASTELLANO: Yes, absolutely, Your Honor, and it's the exact same interpretation.

QUESTION: And the question is what properly filed meant, and one thing to say, we look to State law to see if this is an application for whatever, and we look to see that it is, in fact, filed in the court, the stamp and everything, there it is in the properly filed, in the right court. It seems to me that those mechanical things are easy for a Federal court to check, but going beyond

that, this is a rather complex operation.

MR. CASTELLANO: The problem with reducing the word properly to such a limited view, to a view that just says, rudimentary filing requirements, is in part this. That means that a document that satisfies service and notice requirements only, but is filed in, for example, a surrogate's court, or a court that's -- can't possibly decide the claim, might be included.

QUESTION: So what?

QUESTION: Well, but if -- I suppose that a State could have its own State rule for second or successive petitions in State court for post conviction relief, such as a requirement that the applicant get a certificate from some reviewing court as a prerequisite to filing the successive petition, and if there were that kind of mechanical requirement, just like the requirement for a filing fee, or filing in a certain court or within a certain time, all those things are in the nature of kind of mechanical rules, so the State can certainly protect itself, it seems to me.

MR. CASTELLANO: Yes, Your Honor, the State can protect itself. The problem with that is this. There are only very few States that enacted their post conviction review schemes in terms of prefiling review, and it would mean --

QUESTION: Yes, but it's open to a State to do it.

MR. CASTELLANO: It's open to a State to --

QUESTION: I mean, there's no reason why we have to construct something to save the State that the State can take care of on its own.

MR. CASTELLANO: But it would be to assume that Congress meant that it's statute would not have any real or meaningful effect in all of those States in which there was no prefiling review, and that it would be --

QUESTION: Well, it does have a meaningful effect in the sense of looking to any State requirements for timing, place, et cetera.

MR. CASTELLANO: Except that that view, the respondent's view and the Second Circuit's view here doesn't look to all of the procedural rules. It looks to a very small subset.

QUESTION: Well, maybe we should expand it slightly, but not to include a procedural bar and substantive law component.

QUESTION: We don't have to take either all one or all the other.

MR. CASTELLANO: Absolutely, Your Honor, yes.

QUESTION: If we go beyond the mechanical, mechanical things are easy to check, but once you get

beyond the mechanical, you both have the Federal courts interpreting State law later, and it seems to me something worse. Any reasonable defendant who has a lawyer, certainly, who has any kind of complicated State issue, will know that he better file a protective habeas petition in Federal court.

Now, what's the Federal judge supposed to do when he gets that habeas petition --

MR. CASTELLANO: That --

QUESTION: -- prior to the State court deciding the issue, and that's going to happen all over the place. He now has to decide questions of State law which the State court might later say he's wrong about or risk dismissing it, or avoid the exhaustion problem. It sounds like a real mess as soon as you depart from the mechanical.

MR. CASTELLANO: No, not at all, Your Honor, because that's the same position that that Federal court is in if it's deciding whether to send that petitioner back to State court to exhaust his State remedies. We say, make that exact same determination.

In other words, when it comes to Federal court, you make that Rose v. Lundy determination. Are you going to send that petitioner back to State court, or are you going to presume that there's a State court procedural bar

that's in the way, that renders that remedy no longer available.

Make that determination, and that's a determination that's made regularly by the Second Circuit with regard to the very same procedural rules that are at issue in this case, and made regularly with regard -- with -- by the Federal circuit courts in New York with regard to the very same procedural rules that are at issue in this case.

QUESTION: But I'm --

QUESTION: What difference does it -- go ahead.

QUESTION: Well, I'm puzzled. There's litigation in the State court over whether or not a procedural bar exists. While that litigation goes on, what is a Federal judge supposed to do, decide the issue?

MR. CASTELLANO: Your Honor --

QUESTION: Or say the remedy hasn't been exhausted?

MR. CASTELLANO: There's more than one alternative. One of the reasonable alternatives would just be to dismiss the case under Rose v. Lundy to allow the exhaustion to take place.

QUESTION: Right, and then it takes more than a year to resolve the procedural bar issue in the State court, and eventually you end up saying you're

procedurally barred. Why do you need the statute of limitation, then? Why don't you just rely on the procedural bar?

MR. CASTELLANO: The statute of limitations is a timing device, separate from the procedural bar. In other words --

QUESTION: Yes, but whether the statute has run or not depends on whether or not the case was procedurally barred, and if it was procedurally barred, why do you need the statute of limitations?

MR. CASTELLANO: The procedural bar goes to individual claims. The statute of limitations goes to the --

QUESTION: Right, but you find in the State all the claims were procedurally barred, otherwise the statute would not have run, and if they find that, why do you need the statute of limitations?

MR. CASTELLANO: You need -- well, you need the statute of limitations for other types of cases.

QUESTION: That are not procedurally barred.

MR. CASTELLANO: No --

QUESTION: Under your rule, what would happen if there were some petition -- some claims that were procedurally barred and some that were not?

MR. CASTELLANO: Under our position, that

petitioner would receive exhaustion, and to go back to Justice Stevens' example, the court should dismiss that, or could, at least, dismiss that claim under Rose v. Lundy and during that period of time, that period of time in which the State -- in which the State prisoner was exhausting State remedies, he should receive tolling if this was a proper dismissal under Rose v. Lundy. That should be an automatic result of the dismissal under Rose v. Lundy, is to allow the tolling for the petitioner.

QUESTION: Yes, but then I'm asking you, at the end of this 14-month litigation in the State procedure the State court ends up saying, all the claims are procedurally barred. Why do you need a statute of limitations if that's the holding of the State court?

MR. CASTELLANO: You need the statute of limitations because that petitioner, first of all shouldn't be -- that petitioner, if he knows beforehand that those claims are procedurally barred, of course, shouldn't be --

QUESTION: Well, I'm assuming he doesn't know until the 14 months of litigation in the State court have resolved the issue, and there are lots of times

MR. CASTELLANO: Right.

QUESTION: -- it's a contested matter.

MR. CASTELLANO: Well, you need the statute of

limitations for one thing to keep that -- to encourage, not just that petitioner, but other petitioners who don't have to go through that process of 14 months of litigation into Federal court more quickly.

QUESTION: But they all have to go through that process if the State's going to plead a procedural bar.

MR. CASTELLANO: I'm sorry, Justice --

QUESTION: I really think there's tension between the exhaustion rule and your interpretation of properly filed.

MR. CASTELLANO: Not at all, Your Honor. That -- this interpretation follows the exhaustion rule to a tee. It says that if you would send this case back to State court for exhaustion purposes, then this petitioner receives tolling. If you wouldn't receive -- if you wouldn't send it back for exhaustion purposes, then you don't receive tolling.

I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Castellano.

Mr. Schweitzer, we'll hear from you.

ORAL ARGUMENT OF DAN SCHWEITZER

ON BEHALF OF FLORIDA, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. SCHWEITZER: Mr. Chief Justice, and may it

please the Court:

The language, structure, and objectives of section 2244(d) tell us that Congress intended the tolling provision to harmonize the limitations period and the exhaustion doctrine. Respondent's construction of the term, properly filed application, undermines the limitation period and reads the word properly out of the statute.

I'd like to turn to some of the federalism questions that were raised in terms of how the State's construction of the term furthers the State's federalism interests. It does so when we recognize the fact that the limitations period itself was enacted by Congress to further the State's comity concerns by speeding up the date at which the Federal habeas process will take place.

Congress was motivated by the fact that it often took many, many years for the Federal courts to possibly order a new trial, or generally to provide finality to the State conviction. It may be that as a consequence of the State rule there will be a protective Federal filing such as that which Justice Breyer and Justice Stevens mentioned.

Notwithstanding the fact that this may take place at the same time that the State proceeding is occurring, it still furthers the State's comity interest,

because often the State -- the Federal court will be able to recognize that the application is plainly procedurally barred, at which point the Federal court can proceed to rule on the habeas application and would be doing so many years sooner than it otherwise would have been, which is precisely the goal that Congress had in enacting the limitation --

QUESTION: What about the case where it just isn't clear? I mean, the easy cases can sort themselves out under either interpretation, I think, but what about the cases which are tougher?

MR. SCHWEITZER: Where it's not clear, and so the prisoner isn't certain --

QUESTION: It's a difficult -- you know --

MR. SCHWEITZER: Right.

QUESTION: -- frivolous cases aren't really that tough. I mean, we deal with them. But the cases that might -- may have some merit, and you're not sure, and the State law's uncertain, those are the ones that take the time.

MR. SCHWEITZER: Though I should make clear, a large percentage of these cases will be the frivolous ones, the second, third, fifth applications, but --

QUESTION: It's no problem, if the Federal court sees somebody abusing the State system this is an

equitable statute, tolling, and they can deal with it. But I'm worried about the complicated, close cases. What happens there?

MR. SCHWEITZER: Right. In that case where the protective Federal habeas filing is made, and the Federal court looks at the case and says, it's a close call whether or not the State procedure is available, so it might be possible for the State remedies to be exhausted.

At that point the Federal court would dismiss the Federal application under Rose v. Lundy.

QUESTION: It goes back, and now the State court says, oh, well, I guess, in fact, there's a independent State ground, or the statute of limitations wasn't tolled under State law, et cetera. Now what happens?

MR. SCHWEITZER: Right. If, upon return to the State court, the State court says, in fact, this is procedurally barred, in that case we believe would be an appropriate instance for equitable tolling to toll that time back --

QUESTION: How could you, under your interpretation? It's more than a year.

MR. SCHWEITZER: Right, but the time back in State court would equitably toll the Federal 1-year limitations provision.

QUESTION: Even though it turns out that, in

fact, it's not -- even though it was in the wrong court, it should have gone to the surrogate court, or something?

MR. SCHWEITZER: Well, if the Federal court, upon looking at the habeas petition says, this might, in fact, be a proper case to be back in the State courts, there may be those State remedies available. If the prisoner properly invokes those very State remedies that the Federal court had in mind --

QUESTION: It was wrong. It was wrong under State --

MR. SCHWEITZER: Well, the Federal --

QUESTION: The Federal court was wrong. It was a close question.

MR. SCHWEITZER: But in essence, since the State prisoner shouldn't be penalized for the Federal court being wrong, we think that would be an appropriate time for the limitations period to be tolled. It's presumptive that Federal statutes have equitable tolling available, and we don't challenge that here.

QUESTION: Mr. Schweitzer, the problem I have with your position is, I don't know how you can get out of the word properly the kind of line that you want to draw. I can see how you can say, properly filed means, you know, the technical things, the proper court, the name's right, that I can understand, but you want to say it includes

procedural bars, that the claim is invalid on the merits because of a -- it's invalid because of a procedural bar.

If that is embraced within the word, properly filed, why wouldn't the fact that the claim is unmeritorious for a substantive reason be included as well? It's not properly filed if it's a -- you know, it's a ridiculous, nonmeritorious complaint. How do you get the word properly to cover only procedural bars and not substantive bars?

MR. SCHWEITZER: Well, the first answer to that question is that we think it makes sense to believe that Congress took the word -- inserted the word properly here and created the phrase, properly filed application, borrowing from its past use of the word properly with respect to the terms, proper exhaustion, and proper presentation, both of which deal with the presentation of claims to State courts which, if it's properly done, provides the State courts with the opportunity to rule on the merits, regardless of how the court ultimately rules on that merits decision.

In terms of the question respondents focus on, which is, how does properly modify file, it's just that it means more than mere filing requirements. Respondents treat the word properly as merely modifying how a document is filed, almost the physical manner by which it's filed,

but properly can also be read to modify the question of whether the document should have been filed in the first place.

If the lawyer drafts a complaint that clearly violates Rule 11, but then files that complaint anyway, that's an improper act on the part of the attorney, and it would be an improperly filed complaint.

QUESTION: So also if it makes a frivolous merits claim. You could say that's not properly filed. There's no substance to it.

MR. SCHWEITZER: Well, in the habeas corpus context, where there's such a focus on compliance with the various procedural bars, and where the procedural default context expressly exists to accommodate the situations where State procedural rules aren't complied with, but prisoners aren't considered to have done anything wrong if they have exhausted their State remedies but lost on the merits, we think that same -- Congress had that same mind set here, where the prisoner isn't treated as having done anything wrong, having done anything improper or incorrect by bringing losing claims, but the prisoner has done something wrong by bringing claims that are barred by mandatory State court rules, and then attempting to delay the limitations period, possibly indefinitely, by filing repetitive, improper claims in the State court.

QUESTION: Mr. Schweitzer, does Florida have either a statute of limitations or any rules taking care of the repetitive and successive filing problem as a matter of State law?

MR. SCHWEITZER: Well, Florida has a 2-year limitations on noncapital cases and a 1-year limitation on capital cases, both of which have exceptions for new facts or new law, and mere existence of that exception means that under respondent's theory you can violate the time bar, and that's -- and it would still be a properly filed application.

QUESTION: Mr. Schweitzer, you have conceded, I think, in agreement with Mr. Castellano, that Congress could have been, as he put it in his brief, more specific in defining the scope of the tolling provision.

MR. SCHWEITZER: Yes.

QUESTION: And you say that -- well, Mr. Castellano says the reason probably that Congress was not more specific, that 1) it's Members couldn't agree on a definition, or because the types of State procedures that could be invoked were so varied, Congress thought it best to leave the application of the provision for the courts, but that seems -- why shouldn't the court say, well, Congress, we'll just go as far as you did. You were ambiguous about this. You left room for one

interpretation or the other. We're going to pick the one that favors the petitioner.

MR. SCHWEITZER: I wouldn't want to speculate as to why Congress didn't do a better job of defining the exact contours of the tolling provision, but I don't think that an ambiguity in the statute requires an answer one way or the other. I think for better or for worse we're left with the task of trying to determine what makes sense in light of the limitations period generally.

QUESTION: Well, it's not one or the other, because everyone would agree that at least it's got to be an application for habeas corpus, and has got to be filed in the court, so it's not -- it's -- that's -- no question about it. The question is whether there is something more than that, and I'm asking why the Federal court should read something into the statute that Congress didn't clearly put there.

MR. SCHWEITZER: Because the problem, without reading more into it, is that it would essentially allow subsection 2 of 2244(d), the tolling provision, undermine subsection 1, the limitations period, and it's an unusual provision of law which defeats itself.

As Mr. Castellano mentioned, if subsection 2, the tolling provision, is read as respondent suggests, then repetitive filings can be made by the prisoners who,

at will, can extend the limitations period indefinitely, and there's certainly no --

QUESTION: Not if the States, as Justice O'Connor suggested, enacts one of these -- you have to get permission before you can file such an application.

QUESTION: Thank you, Mr. Schweitzer.

Mr. Futerfas. Am I pronouncing your name correctly?

MR. FUTERFAS: Yes, you are, Mr. Chief Justice.

ORAL ARGUMENT OF ALAN S. FUTERFAS

ON BEHALF OF THE RESPONDENT

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

The State of New York has stood before you for the last half-an-hour, as well as Attorney General from Florida, and argued for a rule which, if adopted, will ensure that thousands of prisoners will file their Federal habeas petitions before exhausting their State post conviction remedies.

If adopted, it will be malpractice for a lawyer, we respectfully submit, not to file in Federal court first, or as soon as possible, because the defendant and the lawyer will never know under the State's rule whether or not they are properly filed until it is determined whether or not their claims are procedurally barred.

We respectfully suggest that that rule is inconsistent with 2244(d)(2), other provisions of the AEDPA, and this Court's decisions which encourage exhaustion.

QUESTION: What do you think the term properly filed means, Mr. Futerfas?

MR. FUTERFAS: As we state in the brief in the Second Circuit, and in fact the majority of the circuits, I tend to disagree with petitioner. There are a number of circuits who have construed this in --

QUESTION: I mean your position.

MR. FUTERFAS: Our position is, a properly filed application is an application which is delivered to the custodian designated to receive it in accordance with the rules governing its acceptance for filing.

QUESTION: Well, supposing, to use Mr. Castellano's example, there's a habeas corpus petition that is delivered to the clerk of a surrogate's court which has only probate jurisdiction?

MR. FUTERFAS: It's not properly filed. Properly filed -- the word properly, we respectfully submit, has meaning, has real meaning. Prisoners who want to exhaust their State remedies, Congress has created a simple mechanism for them to do so, but they must follow it accurately. They must file the right document with the

right custodian in the right time. It's a burden placed --

QUESTION: And also, a timely filing?

MR. FUTERFAS: That's correct.

QUESTION: And in the correct court that would have the authority to grant relief?

MR. FUTERFAS: Yes. When we look at what --

QUESTION: How about a State requirement for a successive position, petition that there be some -- something akin to a certificate of appealability?

MR. FUTERFAS: They have to require -- our position is -- our position, we respectfully submit, respects State court systems. If a State court sets up a procedure for its judicial screening, prisoners are on notice through the word properly that they have to file that.

They have to get it to the right recipient, whether it's a judge or a clerk, and they have to put it in the right document, on the right time, and we think it's a simple mechanism, but it's one that -- you know, Congress has kind of allocated burdens and risks here. They want State petitioners to be able to exhaust and not have to worry about making a protective filing. They don't have to worry about going to Federal court, but they have to do it right.

QUESTION: Your quarrel then, really, with the petitioner is on the procedural bar type of thing, where it's uncertain whether this can be raised.

MR. FUTERFAS: That's exactly the problem. If -- and I call it, for lack of a better word, the uncertainty principle.

If a petitioner, or the lawyer knows with certainty that tolling will be affected, the lawyer will not have to file a protective filing, but if there's uncertainty as to whether tolling will be affected, that uncertainty creates, there's no question, as I stated in my opening statement, that it be almost malpractice not to file a protective filing, and what's wrong with protective filings?

I think the petitioner takes a somewhat relaxed view of how Federal district court judges are going to view protective filings. I don't think Federal district court judges are going to be happy with them at all. What really will happen if there's uncertainty of tolling is that all State -- word gets around quickly in the jails. We all know that. This Court knows that.

These State prisoners will begin filing first in Federal court, and what they will be seeking and obtaining is essentially a declaratory judgment by the Federal judge on State substantive and procedural law, so they'll have a

Federal judge in the first instance say, okay, these three claims are exhausted, these four claims are not exhausted, so now you can go back.

And now, of course, the certainty of tolling, which Congress set up to be in the mechanism of the properly filed application, now that certainty of tolling is resulted by pronouncement of a Federal district court judge and, of course, this increases a Federal judge's workload immeasurably, because many of these claims, or some percentage of these claims where a State prisoner is exhausting will be resolved. Maybe the State prisoner will get relief on the merits in State court, and they'll never have to bother a Federal district court judge. But if there's uncertainty of tolling, the Federal judge will deal with all these cases before they're allowed to run through the State court system.

And the other thing to, I think respectfully to focus on is, as this Court stated unanimously in Michael Williams v. Taylor, quote, we start as always with the language of the statute. This statute says, properly filed application. Properly is an adverb, modifying the verb filed. The subject of that phrase is an application.

The State and amici have suggested that although Congress chose the words, properly filed application, it really meant to say something else, a properly presented

claim, an application presenting claims the defendant has a right to raise, but in fact, Congress had all of that phraseology and language at its disposal, and it's used that very language in other parts of the statute.

For instance, where Congress sought to define exhaustion, they did so. 2254(c), as this Court's recognized in the Wainwright and Duckworth and O'Sullivan decisions, that statute defines exhaustion, so if Congress -- if Congress wanted to write a statute that conditioned tolling on actual exhaustion, they could have simply said that tolling will occur with a properly filed application presenting questions the applicant has the right to raise by any available procedure. That language was right there for Congress to use just a few pages later, after 2244. Congress did not use that language.

Where Congress sought to limit successive applications and predicate tolling on one application only, they did so not in one but in two places, 2244(b)(3), which requires judicial approval, and 2263 in the opting provision, where you have tolling for a first post conviction application, so Congress had that language available it could have used.

In the very statute at issue, 2244, Congress specifically sought to address a claim presented in an application. Those series of words occur a number of

times, at 2244(b)(1), (b)(2), and (b)(4).

So all of this language that the petitioner suggests really, Congress really meant to say, was used, and under this Court's decisions we start with the language of the statute and I think in this case we also end with the language of the statute.

QUESTION: May I ask a question about the operation of the State procedural bar in this scenario? Let's assume that as your opponent suggests, that there is, in fact, a State procedural bar in this case, and let's assume that you're right that that doesn't factor into this 1-year statute of limitations determination by the Federal court. Then what impact, if any, would the State procedural bar have on the Federal habeas corpus proceeding?

MR. FUTERFAS: I'm not sure if I understand Your Honor's question.

QUESTION: In other words, there is a State -- the State will not hear this case because its court will determine there's a procedural bar. Let's say that Mr. Castellano is right about that, what a State court would do in this very case, but that you are right that that kind of complex determination should not be made by the Federal court, so the Federal court just checks to see that it is an application, and that it has indeed been

filed in the right court.

What impact, if any, does the State rule that this claim is procedurally barred in State court have in the Federal habeas corpus proceeding?

MR. FUTERFAS: Well, in terms of tolling, I don't think it would have any effect. Rules governing the granting of an application, which is I think what Your Honor's question concerns, rules governing whether an application shall be granted, whether relief shall be granted, are different than State rules governing the filing of the application, so in one instance whether a defendant's claims are procedurally barred or not should not have any effect on whether they toll the statute. We suggest that properly filed application was meant to promote federalism, promote defendants --

QUESTION: Yeah --

MR. FUTERFAS: -- and encourage them to exhaust.

QUESTION: -- I'm accepting both their position that this is, in fact, procedurally barred in the State, your position that that doesn't -- you don't get into that on the statute of limitations question. I'm asking you then, when there's no time bar in the Federal court, what effect, if any, does the State rule that this claim would be procedurally barred in State court, have on the Federal habeas proceeding?

MR. FUTERFAS: Well, if I understand Your Honor's question, certainly the time -- if the application is filed and it contains barred claims -- that's -- under the hypothetical it contains barred claims, the time is tolling. I think the best way I can answer Your Honor's question is to suggest that if we don't -- if it's not tolling, and the defendant's petition in State court contains barred claims, and there's not tolling occurring --

QUESTION: Right.

MR. FUTERFAS: -- then this Court's decisions, for example in the Coleman case, where this Court has a whole body of law governing cause in prejudice or miscarriage of justice, that will essentially almost be rendered a nullity, because yes, a defendant can have -- can be procedurally barred, and procedurally defaulted, and have waived everything, and not really present a good procedural picture when it gets to the Federal court.

But at least under Coleman, and the other decisions of this Court, at least when the defendant gets there, if the defendant can prove cause in prejudice, if the defendant can show a miscarriage of justice, then a Federal habeas court can overlook those procedural defaults and still reach the merits.

However, if, under the State -- if the State's

rule is adopted, the State determines that there's procedural bar, it makes that determination a year after -- you know, after 1 year has passed, now the whole jurisprudence allowing delving into the merits on cause in prejudice will not happen, because now the State prisoner can't even get before a Federal court because the statute's been tolled.

QUESTION: The significance of the procedural -- of the bar decision in State court is that you have to show cause in prejudice when you come into Federal court before those claims could be reached, don't you?

MR. FUTERFAS: Well, you -- in -- I'm not -- I apologize, I'm not sure I understand Your Honor's question --

QUESTION: Well, perhaps my question -- I think Justice Ginsburg asked, you know, then what is the State court determination that a claim is procedurally barred reduced to if it doesn't have any effect of tolling. Well, it still has an effect on the Federal court's ability to review the merits of the claim, doesn't it?

MR. FUTERFAS: Yes.

QUESTION: Because unless the person can show cause in prejudice the Federal court can't reach it.

MR. FUTERFAS: No, that's right.

QUESTION: Yes --

MR. FUTERFAS: We understand that, but that assumes, obviously, that the defendant can file, and that the tolling is occurring, so the defendant can at least get into the door in Federal court and try at least to avail himself or herself of the Coleman doctrine.

There were -- there was a question of petitioner, I believe by Justice Souter concerning whether or not the statute would be mooted. I think that was the essence of the question, and we suggest that it would be. If -- I think we can safely assume that adoption of the State's rule would encourage protective filings.

The result will be, we respectfully submit, as if Congress said there's a 1-year limitations period which is tolled where a Federal court finds a mixed petition, because that essentially will be the result, the practical result of adoption of the State's rule.

The -- there were concerns certainly raised in petitioner's brief about vexatiousness, about a defendant who's going to file and file and try to basically abuse the State court system. First, we don't have that in this case.

Mr. Bennett filed only two post conviction applications. A second 440 is the one that's here before this Court, and there's no question he wasn't trying to delay. Right in that second application he cited 2254, he

wrote in the application that I'm doing this to exhaust. When he didn't get a decision quickly, within a couple of months, he actually wrote to the courts. He wrote to the court and he said, when am I getting a decision, and he continued writing, and --

QUESTION: Did the State court here ever issue a written order?

MR. FUTERFAS: No, it did not, so in terms of delay, Mr. Bennett --

QUESTION: To this date we have no written order from the State court?

MR. FUTERFAS: That's correct, so the delay here has been a 4-year delay, but the 4 years is in truth attributable to the State. Once Mr. Bennett found out that there was actually a decision, something he didn't learn until a year after the decision took place, he immediately, 3 days later he wrote to the court and he said, please get me written order so that I can at least seek leave to appeal.

And again, this is inconsistent -- consistent with this Court's rule in O'Sullivan, which says, if you want to exhaust you have to try, at least seek leave to appeal on these claims that you're trying to exhaust, and he did so. He wrote to the court. He wrote again and again. All of 1997 was utilized by him writing four or

five letters to the court saying, when am I getting a decision.

It was only until February of '98, after '97 had gone, that he finally went in on 2254 and in his habeas petition itself -- he wrote to Judge Gershon. In the form it says, well, why haven't you appealed, and he said because the State hasn't given me the order, so this case certainly is not a question of delay.

This is a defendant who clearly did try to exhaust, and there's no question here that he complied with New York's filing requirements, filed his motion. The State responded, he filed the reply, and the court eventually ruled. There's no question that there wasn't a properly filed document here within the meaning of New York State's filing rules.

With respect, however, to the vexatiousness concerns that the petitioners have addressed in their brief, we think there are a number of answers to that. One answer is that properly filed application only permits tolling. It does not force the States to permit repetitive filings. I don't think we should be paternalistic, and I don't think we should suggest to States -- there may be some States who say, you know, we have no problem with successive applications. We don't need to amend our laws because we have no problem with

them.

There may be other States, and Florida might be one, that says, we have a significant problem. We're going to amend our laws. We're going to put strict statute of limitations in our laws, we're going to limit the numbers of successive filings so --

QUESTION: Of course, counsel, the States draw a distinction between noncapital cases and capital cases. It's always in the petitioner's interest to get prompt disposition when he's not -- in a nondeath case. In a death case, the stakes are reversed, and there is a motive -- a potential for repetitive filing just to delay the execution, so maybe you should address the capital cases, too.

MR. FUTERFAS: Very well. We think there is a difference, and we think we have a number of answers to that. The first answer is that Congress was very concerned with delays in capital cases. That wasn't a new concern. In 1989, the Chief Justice appointed the Powell Commission. The Powell Commission assembled, wrote a report called the Powell Commission report. Those findings were embodied in very large part in Chapter 154, so delays in capital cases is something that Congress has been concerned about.

They -- a commission was -- dealt with it, and

they recommendations of that commission were largely incorporated in Chapter 154, so with respect to death penalty cases, one thing is for sure, Congress said yes, we're concerned about it and we have an answer, and our answer is the opt-in provision, so if States comply with the opt-in provision, they get the one collateral review, and they have 180 days to go to Federal court, with some exceptions, so that's clearly -- Congress has dealt with that, number 1.

Number 2, States can always set an execution date, and in that regard --

QUESTION: How many States have opted in?

MR. FUTERFAS: At this point I'm not aware of any that have adopted -- opted in at this point, but that was Congress' -- that was Congress' considered judgment on the issue and I respectfully submit that this statute, a tolling statute, should not be judicially amended in order to somehow satisfy States that for whatever reason have not adopted in -- opted into the -- to Chapter 154.

In addition, this Court's decision in Gomez is very important, because it sets an incentive for defendants. What happened in Gomez, this Court may recall is, the defendant did abuse the State court system and started bringing last minute claims, new claims on the eve of the execution, and finally came before this Court and

said, well, please grant me a stay, and this Court in Gomez said no. You've abused the State court process, you've let too much time gone by, you haven't properly presented your claims, we're not going to give you a stay.

So the Gomez decision provides an enormous incentive on a capital defendant to use the State court process wisely and not abuse it.

Rule 9(a) -- Rule 9(a) of 2254 talks about laches. There again, where a defendant abuses a State court system, and the State can come in and say, you know, defendant abused the State system. Now we are prejudiced because so much time has gone by. Courts can avail themselves of Rule 9(a) and preclude a defendant from filing.

We respectfully submit that problematic defendants, defendants who are abusing State court systems, that's an ad hoc problem and it can be dealt with on an ad hoc basis. This Court, even in some of those cases where clearly petitioners maybe with mental problems that filed 40 or 50 or 60 applications with this Court, that's an ad hoc problem, and this Court took ad hoc measures and said with respect to those defendants we will not grant an in forma pauperis application, so there are many measures --

QUESTION: But it still is the case that if a

State has not opted in and a petitioner wishes to simply continue the tolling period he can make repeated filings in the State and if a district judge prefers not to hear the habeas petition he can just simply wait.

MR. FUTERFAS: The -- I think there is a theoretical possibility of a defendant filing repetitive applications for whatever reason to toll the time that the defendant has to go into Federal court. I think that clearly is a theoretical possibility. In practical effect, practical effect I think most defendants who are noncapital defendants are going to have an incentive to get their claims dealt with promptly, number 1.

Number 2, if that happens, the State can -- State judge can simply send an order to the clerk's office, do not accept this defendant's applications either without leave of court, or simply don't accept them any more.

In death penalty cases, a State can say, we've had enough of this, we're setting an execution date, and that will force the defendant to go straight to Federal court, so I think there are a lot of ways to deal with the vexatious litigant.

And also, keep in mind that even though tolling occurs, that during the periods of time that there is no tolling, that the clock is running, so if defendant files

an application and the application is denied, and then a month later files another one, or 2 months later, that time is going to toll, but I think these are ad hoc problems, and that State courts are certainly well-equipped.

If a State determines that there is a general, more general delay problem the State, under our version of the rule, has absolute freedom to adopt any kind of procedure the State wishes to do, whether it's timing requirements or successiveness limitations. In fact, 2244(b)(3) is a wonderful model that States could follow. They could set up a system where, under successive application, the State prisoner must obtain judicial review first, or approval first to file, so there is a whole panoply, really, of options available to a State to deal with these problems.

One concern that we suggest occurs with respect, however, to the interplay between 153 and 154 is the following hypothetical. If a State opts in, in a death penalty case, the State opts in, the defendant gets an attorney, a competent attorney, the defendant gets one run-through of the State collateral review process, and there's no question that they can bring up any claim they want, there's no suggestion in the State's briefs that they're limited on what kinds of claims they can bring up

in that one review process, be it procedurally barred claims or otherwise, when that petition is disposed of, they have 180 days to get into Federal court.

Now watch what could happen with a death penalty defendant if the State's rule is adopted, because under 153, the death penalty defendant now is convicted, files a post application, post conviction application, does -- may or may not have a lawyer, because the State has not opted in, and it turns out all of the claims in the post conviction application are procedurally barred and more than 1 year has gone by.

The defendant, who is not represented because the State has not opted in, now has lost his or her right to even get into Federal court on a habeas, so that's a possibility with the State's view of the rule.

If I may just have a moment.

The other cases that we respectfully suggest the State's rule conflicts with are this Court's decision in Rose v. Lundy. Rose said that an application, the mixed application should be dismissed. The State suggests, well, we can kind of modify Rose v. Lundy and say that the application will be held in abeyance, but Rose v. Lundy says no, it should be dismissed. Of course, if the application is dismissed, and 1 year passes, that defendant could be deprived of going into Federal court.

The O'Sullivan decision was just decided a year ago says the defendants must bring all their claims -- must seek leave to bring their claims to the highest court in the State. There again, this is exactly, actually, this case, Tony Bennett's case, is O'Sullivan, because here Tony Bennett is, having lost in the trial court, now is trying to seek leave to the Appellate Division, Second Department, hasn't received the order for 4 years in which to do so, so he's trying to comply with O'Sullivan.

But meanwhile, the clock is running, and under the State's rule -- well, because the trial court determined that his claims are procedurally barred, he's already lost his right to get into Federal court, even though at the same time O'Sullivan says you must be trying to seek leave and appeal your petitions in order to exhaust, so there's a conflict there as well.

Finally, this Court's decision in Lonchar v. Thomas, this Court said that dismissal of the first habeas corpus is a very serious matter, and any rule that would deprive a first habeas corpus application should be clear and fair. There's no limitation in 2244(d)(2) as to first habeases or second habeases, or first post conviction applications or second post conviction applications, so we respectfully submit that the State's rule is inconsistent as well with this Court's considered judgment and

pronouncements in Lonchar v. Thomas.

And if no Justices have any further questions, I will submit.

QUESTION: Thank you, Mr. Futerfas.

MR. FUTERFAS: Thank you.

QUESTION: Mr. Castellano, you have 1 minute remaining.

REBUTTAL ARGUMENT OF JOHN M. CASTELLANO

ON BEHALF OF THE PETITIONER

MR. CASTELLANO: Your Honor, I would just like to address the question, I believe it was Justice Ginsburg's question actually about why adopt our rule. If there are many different applications of the words, properly filed, there are many different reasonable interpretations of the words properly filed, why ours? Why not just the petitioner's?

Ours because the purpose of a statute of -- the purpose of a tolling provision is exhaustion, and our rule follows the purpose of the tolling provision to a tee. It follows it much more closely, certainly, than the respondent's. Exhaustion does not require a State prisoner to return to State court to exhaust a remedy that's no longer available under State law because it's procedurally barred.

The respondent also mentions the workload costs.

If the Court views the workload costs, it should view them as a whole. The States are saving much in the way of workload here, and the Federal courts, for example, are pushing most of these defendants forward. These are defendants who would in any event file in Federal court, but much later, and the purpose of the statute of limitations is being affected by drawing closer that period of time between final -- between direct review and Federal review.

And finally, as to time bars, the danger with requiring the States to enact time bars --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Castellano. The case is submitted.

(Whereupon, at 11:52 a.m., the case in the above-entitled matter was submitted.)