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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-126, McQuiggin v. Perkins.
5 Mr. Bursch?

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 We're not dealing here with the situation
11 where a prisoner is trying to gather new evidence AEDPA
12 has a tolling rule to take care of that problem.
13 We're also not dealing with anything that prevents
14 Petitioner from filing because that's the problem you
15 solved in Holland.

16 What we have here is the question of when a
17 petitioner must file his Federal habeas petition when he
18 has the evidence and there are no barriers to filing.
19 And 2244(d)(1)(D) addresses that exact question. It
20 says, "within 1 year."

21 Now, Mr. Perkins asks for a fairly dramatic
22 expansion of Holland. What he wants is equitable
23 abrogation with no diligence, no fault, or any other
24 factor. And our primary position is that you should
25 simply apply the plain language of 2244(d)(1)(D).

1 JUSTICE GINSBURG: Mr. Bursch, I thought
2 that -- that Perkins -- didn't he say that -- that you
3 could take into account -- I'm looking for the
4 brief -- you could take into account delay as a factor
5 in whether his actual innocence gateway plea should be
6 heard.

7 MR. BURSCH: Well, he -- he does say that,
8 and we read that as a concession that, sometimes, if you
9 wait too long, that can actually trump a claim of actual
10 innocence. And so, at a minimum, our alternative
11 position is that you have to act with diligence.

12 JUSTICE SOTOMAYOR: That's not quite what
13 he's saying. We've had a miscarriage of justice
14 exception for as long as there's been a habeas statute.
15 We've applied it repeatedly.

16 It's not that it trumps it, but that it puts
17 into doubt the evidence you're claiming, proves your
18 actual innocence. It's not the sort of situation where,
19 as reasonable -- as due diligence will do, which is to
20 override even an actually innocent person.

21 MR. BURSCH: Well, we think it --

22 JUSTICE SOTOMAYOR: What he says is it -- it
23 really puts into question the validity of your claim.

24 MR. BURSCH: But, Justice Sotomayor,
25 it -- it represents the same kind of principle, you've

1 got to act quickly, or adverse consequences can happen.
2 But what diligence does that his rule doesn't do is it
3 recognizes this compelling, countervailing State
4 interest in having notice and an opportunity to
5 investigate evidence, as soon as it's discovered.

6 Now -- and the problem here -- we don't have
7 any issue at all, if it takes 10, 15, 100 years to find
8 new evidence, but once he has that evidence, the burden
9 is on him to come forward, so that the State has the
10 opportunity to investigate. And the --

11 JUSTICE KENNEDY: It's a small point and
12 doesn't go to the general issues you have to discuss
13 with us, but just, on the small point, he gets -- I
14 forget exactly the detail -- he gets an affidavit that
15 Jones did it within a year. He has one.

16 MR. BURSCH: Yes.

17 JUSTICE KENNEDY: Now, if I were the
18 prisoner, I'd say -- you know, this one might not work.
19 Maybe I can get two, and then he gets a second, which
20 makes a certain amount of sense to me -- although a
21 substantial period of time elapses -- and the same thing
22 happens with the third.

23 It makes sense to me that the prisoner might
24 try to wait for the third. How -- how does that factor
25 into your diligence, assuming we get there?

1 MR. BURSCH: Yes. Justice Kennedy, there's
2 a very simple solution to that problem. If he gets
3 close to the end of his year and he thinks that that
4 next affidavit might be just around the corner, but he
5 doesn't have it yet, all he has to do is file a
6 protective habeas petition with the district court, ask
7 for a stay, and say, I'm still diligently pursuing what
8 I think is going to be another affidavit. And, if he
9 can't find that next affidavit, you litigate it on the
10 merits, and, if he does, then he amends his petition,
11 and then you hear it.

12 JUSTICE KENNEDY: I'm not quite -- excuse
13 me -- I'm not quite sure that wouldn't mean that you
14 have a whole raft of -- of petition-protective decisions
15 waiting on the shelf in the district court. That --
16 that -- that causes its own congestion problems in the
17 district court, it seems to me.

18 MR. BURSCH: Two thoughts on that. First,
19 we already see this in the exhaustion area. There are
20 petitioners who are concerned that, notwithstanding
21 statutory tolling for pursuing State remedies, that,
22 while they're monkeying around in State court, they
23 might somehow be time-barred from bringing their Federal
24 claim.

25 So we see this all the time in the Sixth

1 Circuit -- you know, in Michigan in particular, that
2 someone will file their petition and -- and ask for a
3 stay while they exhaust State remedies. So -- you know,
4 the pile really isn't going to be any different
5 than it is right now.

6 But the key difference between that scenario
7 and the scenario that Perkins proposes is that, when you
8 have him file something, the State's on notice, they
9 have an opportunity to investigate.

10 Now, here, we have his last affidavit from
11 the dry cleaning clerk, and it's 10 years old. So, even
12 if Michigan could find that person, there's no way for
13 us to meaningfully cross-examine her and investigate
14 what she really knew or didn't know when she wrote that
15 affidavit 10 years ago.

16 And so with the file and stay, you preserve
17 all of the rights, but, yet, you give the State the
18 countervailing interest that the statute was meant to
19 protect. And I do want to --

20 JUSTICE GINSBURG: What would it take to --
21 what would it take to show diligence? And didn't he say
22 that he tried to get a lawyer, several times, and was
23 unsuccessful?

24 MR. BURSCH: Sure. And that's a very
25 practical question that I'd like to address. Most of

1 the habeas petitioners don't have lawyers, but filing
2 the habeas petition itself is not something that takes
3 great difficulty. Every district court, on their
4 website, has a place where you click for forms. In the
5 Eastern District of Michigan, when you click that, the
6 very first two entries are habeas petitions for Federal
7 prisoners and State prisoners.

8 And it's a relatively simple form. You
9 check some boxes, say when your conviction was, and you
10 write your claim. And then every Federal district court
11 in the country has full-time pro se staff attorneys who
12 go through these pro se petitions.

13 And, if there is a legitimate claim there,
14 then they can work that up for the judge, if necessary,
15 and the State will respond. So --

16 JUSTICE ALITO: I have some difficulty
17 understanding what the Sixth Circuit was doing. And
18 maybe you can help me with that. The district court, as
19 I understand it, said to the Petitioner, you lose for
20 two reasons. First, you don't really have evidence of
21 actual innocence, not enough anyway; and, second -- and
22 I can understand that, because the evidence -- well,
23 that -- the most that is suggested by the affidavits is
24 that Jones was a participant in this murder, not that
25 Perkins was not responsible for the murder.

1 But, anyway, so you lose for two reasons.
2 First, you don't really have evidence of actual
3 innocence; second, you weren't diligent. The Sixth
4 Circuit grants a certificate of appealability only on
5 the issue of diligence, and they say, diligence doesn't
6 make any difference.

7 Well, where does that leave the petitioner?
8 He's already lost on the question of whether there's
9 evidence of actual innocence, and there was no appeal on
10 that issue.

11 MR. BURSCH: Well, we're very confused about
12 that, too. They do say, in their opinion, that the case
13 is remanded to the district court to determine whether
14 he's got evidence of actual innocence. Now, as you just
15 pointed out, Judge Bell in the district court already
16 made that determination, so maybe they're contemplating
17 an evidentiary hearing or some further investigation,
18 but it is curious because --

19 JUSTICE ALITO: Well, that -- that may be
20 what they're contemplating, but they can't get to the
21 issue of whether the district court adequately addressed
22 the issue of adequate innocence -- of actual innocence,
23 unless that issue is before them. And the issue isn't
24 supposed to be before them, unless -- isn't before them,
25 unless the certificate of appealability was issued, and

1 there was no certificate of appealability on that issue.

2 MR. BURSCH: We agree with that 100 percent,
3 so --

4 JUSTICE GINSBURG: Was that -- was that
5 argued to the -- to the Sixth Circuit? Did you argue in
6 the Sixth Circuit that, even assuming diligence, there
7 wasn't enough here, and that's what the district court
8 held?

9 MR. BURSCH: I believe that is the position
10 of the State of Michigan, that because he confessed to
11 his friends, both before and after --

12 JUSTICE GINSBURG: But it -- it was
13 explicitly made to the Sixth Circuit?

14 MR. BURSCH: I believe that the Sixth
15 Circuit argument did focus on the question of diligence.
16 But -- you know, our opinion would be that, even if this
17 Court would use -- you know, what we call equitable
18 abrogation, to kind of wipe away the 1-year limitations
19 period, and you would also disagree on diligence, and we
20 don't think you should do that, that you would still
21 reverse because there's nothing left to be done in the
22 district court.

23 This is not a case that rises to the very,
24 very high threshold of proving actual innocence, based
25 on new evidence. I would like to get back to the

1 statutory language.

2 JUSTICE SOTOMAYOR: Where does that leave
3 us?

4 MR. BURSCH: I --

5 JUSTICE SOTOMAYOR: Let's assume --

6 MR. BURSCH: Well, that leaves you with a
7 reversal in any of those three instances. We think that
8 you should address the circuit split, which is the
9 important question of do we apply the limitations
10 period. And, to turn to that, what I would like to do
11 is set up an analytical construct.

12 JUSTICE SOTOMAYOR: It's sort of an advisory
13 opinion, in your judgment.

14 MR. BURSCH: Oh, no, it wouldn't be an
15 advisory opinion. It would --

16 JUSTICE SOTOMAYOR: Sure, it would be
17 because you're telling us that there is no proof of
18 actual innocence.

19 MR. BURSCH: I'm saying that --

20 JUSTICE SOTOMAYOR: So why don't we just say
21 that?

22 MR. BURSCH: I'm saying that's an
23 alternative ground to get to the same place, but the
24 Sixth Circuit's holding was, consistent with some other
25 circuits, that there is no statute of limitations here,

1 that you can get by with equitable abrogation, as we
2 call it.

3 JUSTICE SOTOMAYOR: It might be its holding,
4 but, as Justice Alito just proved, there's no basis for
5 it because they didn't grant a COA on the substantive
6 merits question.

7 MR. BURSCH: Right. I -- I think you're
8 wholly within your right to address the merits question,
9 and I would like to turn to that.

10 The analytical construct I want to set up is
11 that we've got three different categories of prisoners
12 who claim actual innocence, based on new evidence. In
13 the first category, they used that new evidence only to
14 try to establish innocence with no constitutional claim.
15 And, in Herrera, you say no Federal habeas remedy for
16 that; you have to go back to the State courts, executive
17 clemency, prosecutorial discharging of verdicts, and
18 things like that.

19 The second category is where you have a
20 prisoner who uses new evidence as a gateway. It's not
21 related to the constitutional claim that they assert --
22 the true Schlup gateway. And that's not actually this
23 case, either, and you could reserve that question,
24 although I'm happy to talk about that.

25 The case we have here is the third instance,

1 where the evidence of actual innocence -- the new
2 evidence, is the factual predicate for the claim. And
3 you could not find a provision more on all fours with
4 that category than what Congress did in 2244(d)(1)(D).
5 And we know that Congress was thinking about actual
6 innocence in Schlup.

7 For those of you who are interested in the
8 context, in the legislative debate in '95 and '96,
9 before AEDPA's enactment, we have Senators Feingold and
10 Kennedy and Dodd, among others, talking about how this
11 new statute is going to eliminate claims of actual
12 innocence based on new evidence. In fact, Senator
13 Feingold even mentioned the Schlup decision.

14 And, yet, Congress adopts 2244(d)(1)(D) and
15 all the rest of the provisions by a 91 to 8 vote. So
16 Congress had this Court's decision in Schlup in the back
17 of its mind, it considered this particular construct and
18 it said, no, we want a 1-year limitations period.

19 I do want to --

20 JUSTICE KENNEDY: Your -- your three-way
21 classification, you began with Herrera?

22 MR. BURSCH: Correct.

23 JUSTICE KENNEDY: And -- and, in a way,
24 you're saying that you're three loops back in the
25 Herrera a bit because, here, the innocence is the

1 factual predicate.

2 MR. BURSCH: Right. And, in the Herrera
3 case, there is no constitutional claim, so there is no
4 factual predicate. It's just a stand-alone "I'm
5 innocent" claim. And this Court has said, appropriately
6 so, that the Federal habeas remedy doesn't cover that.

7 You know, if you think about the remedies
8 you can get from State courts, from prosecutors, from
9 executive clemency, it's a rather big circle, and AEDPA
10 is a much smaller circle that's subsumed in that. And
11 you recognize, in Herrera, that, just because you don't
12 fall within the habeas circle, doesn't mean that you
13 can't get relief.

14 In fact, if you look at the examples that
15 the amici briefs cite on the Respondent's side, in
16 almost every case, the final decision is motivated by
17 State action. There's a governor who grants clemency in
18 a couple of cases, there's a State attorney general's
19 office that dismisses charges in others, county
20 prosecutors who do the same. One, which the amicus
21 brief characterizes as a habeas grant, is actually the
22 Illinois Court of Appeals in a State proceeding
23 reversing.

24 You know, what the -- these are the best
25 examples that they have for why you need an equitable

1 abrogation rule, and, yet, in the vast majority of those
2 cases, it's the State system that's solving the problem.

3 Now, I do want to go back to what I think
4 is -- is the trickiest question, and that's,
5 Justice Kennedy, the second category of prisoners, those
6 who are using actual innocence to prove, not their
7 underlying constitutional claim, but, simply, the Schlup
8 gateway. And I would respectfully submit that, even
9 there, Congress has closed the door with 2244(d)(1)(D).

10 And the best way to understand that is by
11 looking two subprovisions earlier in the second and
12 successive petitions category. And this argument that
13 I'm going to make now is a little bit different than the
14 way we -- we did it in the brief, which was -- you know,
15 they had it there, they -- they don't have it here.

16 If you look at 2244 --

17 JUSTICE GINSBURG: Before you present the
18 argument --

19 MR. BURSCH: Yes.

20 JUSTICE GINSBURG: -- you are saying that
21 Congress overruled Schlup; is that what -- the point
22 you're making?

23 MR. BURSCH: The -- the contextual point
24 that I was making was that Congress knew about Schlup,
25 it was brought up in the debate that this was,

1 essentially, changing the Schlup rule and allowing
2 someone who claims actual innocence not to present their
3 claim, and Congress swept those objections aside by a 91
4 to 8 vote.

5 JUSTICE SOTOMAYOR: But that was with
6 respect to successive petitions.

7 MR. BURSCH: No, they were talking in the --
8 the legislative record, just generally, about actual
9 innocence and claims of miscarriage of justice.

10 So -- so the textual argument that I want to
11 present involving successive petitions is that, when
12 you're looking at 2244, you flow from successive
13 petitions down to the statute of limitations.

14 What that means is that, if you have a
15 successive petition, Congress requires you to prove
16 actual innocence and diligence, and you still have to
17 prove that you satisfied the statute of limitations.
18 The Seventh Circuit recognized this in the Escamilla
19 case.

20 So what that means is that, even when
21 Congress had a situation where they knew that someone
22 had presented evidence that would satisfy a heightened
23 actual innocence standard, they still required that you
24 satisfy the statute of limitations.

25 JUSTICE SCALIA: Where -- where is that in

1 the text? What are you relying on in the text of 2244?

2 MR. BURSCH: I'm relying on 2244(b), which
3 is the successive petition provision. It requires you
4 to, first, prove that you've got evidence of actual
5 innocence and then also demonstrate that you had
6 diligence.

7 And, after you're already gotten through
8 what I'll call the actual innocence statutory gateway,
9 you're still required to satisfy the statute of
10 limitations. If Congress was concerned about Schlup and
11 wanted to make a situation where someone with evidence
12 of actual innocence did not have to comply with the
13 limitations period, they would have put an exception in
14 the successive petition subprovision and they didn't do
15 that, so --

16 JUSTICE SCALIA: You -- you don't have
17 2244(b) in your brief, do you?

18 MR. BURSCH: Unfortunately, the text is not
19 there, no.

20 JUSTICE SCALIA: That is very -- that is
21 unfortunate.

22 MR. BURSCH: Yes. Well, as we explained in
23 the briefs, the fact --

24 JUSTICE SCALIA: If you're relying on it, I
25 mean.

1 MR. BURSCH: Well, as we explained in the
2 briefs, both parties rely on that. The fact that you
3 have an actual innocence exception only two
4 subprovisions earlier is strong reason to think Congress
5 didn't intend it here.

6 But I'm making a different argument now,
7 which is --

8 CHIEF JUSTICE ROBERTS: I'm sorry. Go
9 ahead.

10 MR. BURSCH: Which is simply that Congress
11 considered the -- the instance where you've establish a
12 statutory actual innocence gateway in (b)(2), the
13 successive petition, and still require that it be timely
14 filed, because the State's interest in having notice and
15 an opportunity to investigate is so important.

16 JUSTICE KENNEDY: But are -- are you saying
17 that this case is a fortiori from a successive petition?
18 Because this isn't a successive petition.

19 MR. BURSCH: No, this is not. What I'm
20 using the successive petition provision to demonstrate
21 is that, consistent with the legislative history,
22 Congress is demonstrating here, in 2244(d)(1)(D), that
23 there is no special actual innocence --

24 JUSTICE SOTOMAYOR: You don't see a
25 difference --

1 JUSTICE KENNEDY: Well, you're saying that
2 Congress knows how to write --

3 MR. BURSCH: Yes, I am --

4 JUSTICE KENNEDY: -- an exception if -- if
5 they want it. But this (b) does apply to successive
6 petitions and this is really before that.

7 MR. BURSCH: Well, my -- my point is that,
8 if Congress anticipated that actual innocence could be a
9 gateway to circumvent the limitations period, then
10 certainly they would have put that exception in the
11 successive petition of (b)(2) where they said, all
12 right, if you establish actual innocence, we're still
13 going to make you comply with the limitations period.

14 CHIEF JUSTICE ROBERTS: Well, now, your
15 friend on the other side, I think, argues that that --
16 they put that in expressly because they limited what
17 would be the otherwise applicable miscarriage of justice
18 provision in the question that's before us now.

19 MR. BURSCH: Right. And if you would --

20 CHIEF JUSTICE ROBERTS: What is your -- what
21 is your answer to that?

22 MR. BURSCH: If he was right about that,
23 then in (b), you would also see another provision that
24 says and anyone who satisfies this statutory actual
25 innocence standard doesn't have to comply with the

1 limitations period. And we think that -- that's
2 dispositive.

3 Now -- you know, when we --

4 JUSTICE SOTOMAYOR: I'm sorry. I don't
5 understand. I mean, there is a presumption that's been
6 longstanding that, at least with respect to the filing
7 of your first petition, that it is a statute of
8 limitations subject to exceptions, including the
9 manifest injustice one.

10 It would seem to me that if they intended
11 not to have that apply, they would have done what they
12 did with the successive petition, but they chose not to.

13 MR. BURSCH: Justice Sotomayor, the history
14 of this statute and of the case law isn't quite that
15 way. And I want to draw a sharp distinction between
16 this case and Holland, with respect to history. With
17 respect to equitable tolling, you did have decisions
18 going back to the 1800s recognizing that Federal
19 statutes of limitation in all kinds of contexts, civil
20 and criminal, were subject to equitable tolling.

21 And so then, in Irwin, 6 years before AEDPA,
22 you actually create a presumption that, if Congress
23 doesn't specifically -- you know, exclude equitable
24 tolling --

25 JUSTICE SOTOMAYOR: I'm not talking about

1 that presumption.

2 MR. BURSCH: Right.

3 JUSTICE SOTOMAYOR: What I'm talking
4 about --

5 MR. BURSCH: Now, I'm going to move to
6 miscarriage of justice.

7 JUSTICE SOTOMAYOR: -- are cause and effect
8 and manifest injustice.

9 MR. BURSCH: Yes. So the cause and effect,
10 the manifest injustice, the actual innocence, really
11 starts to develop in 1986, and it comes to fruition in
12 Schlup in 1995, right before AEDPA is passed.
13 Importantly, that exception was always applied to
14 court-created procedural bars, never once to a Federal
15 statute of limitations.

16 And, obviously, the separation of powers
17 considerations are quite different when you're talking
18 about a court-created exception to a court-created bar.
19 The first is a bar that's enforced by Congress itself.

20 JUSTICE KAGAN: But you're creating a world
21 in which this would function as an exception to a State
22 time limit, but not to the AEDPA time limit.

23 MR. BURSCH: That's correct.

24 JUSTICE KAGAN: Why does that make any
25 sense?

1 MR. BURSCH: Because it was the Court itself
2 that created the judicial exception to the State filing.
3 And so then -- or, I'm sorry, that created the bar with
4 respect to the State filing. And so then it was
5 completely within the Court's power to make an exception
6 to that bar.

7 But, again, here, the separation of powers
8 considerations militate differently when you're talking
9 about Congress doing the telling, and this Court has
10 acknowledged, in Launcher and Dodd and other places,
11 that Congress gets to set the parameters of habeas.

12 JUSTICE KAGAN: But I thought we said, in
13 Missouri v. Holland, that AEDPA was -- was enacted
14 against a background rule, which stated that normal
15 equitable principles, such as this one, which had been
16 applied everywhere to all procedural bars, that AEDPA
17 suggested that those would -- that AEDPA was
18 against a background that those would continue to apply.

19 MR. BURSCH: Well, it was a very short
20 background, one with no Irwin-like presumption and one
21 that, again, had never ever been applied to a Federal
22 statute of limitations. And --

23 JUSTICE KAGAN: But why is a Federal statute
24 of limitations any different?

25 MR. BURSCH: Because it's Congress and

1 Congress is the one that's handcuffing the Court with
2 respect to the scope of the --

3 JUSTICE KAGAN: Yes, but, again, it's
4 Congress but we said, in Holland, that it's Congress
5 and AEDPA has -- has -- was drafted against this
6 presumption that normal equitable principles would
7 apply.

8 MR. BURSCH: But here's another way to think
9 about it -- you know, if you imagine the -- the template
10 that you have on your Microsoft Word, when you're doing
11 a document, an opinion, whatever, you've got certain
12 stuff that's on the template. And you said, in Irwin,
13 that when it comes to equitable tolling, you've always
14 got a subprovision Z, call it, in every Federal statute
15 of limitations that appears on that template, And so
16 Congress has to do something affirmatively to strike
17 that out.

18 Because the miscarriage of justice exception
19 had never been applied to any Federal -- Federal statute
20 of limitations, there wasn't a miscarriage of justice
21 exception sitting on the template. Congress was writing
22 from scratch.

23 JUSTICE KAGAN: But, again, why would
24 Congress have thought that there would be any difference
25 in -- with respect to a statute of limitations?

1 MR. BURSCH: Well, the biggest reason is
2 because of the State interest in notice and
3 investigating the evidence. When you're talking about
4 the typical Schlup claim --

5 JUSTICE KAGAN: But that applies to States,
6 as well.

7 MR. BURSCH: Well, no, there -- there you
8 have stale claims, but you don't have stale evidence.
9 And -- you know, we -- we don't have any problem with
10 litigating a claim that could have been litigated
11 earlier and is going to be litigated now. But the world
12 of evidence, the record that supports the claim, is
13 already defined and is not going to change.

14 The world we're dealing with in
15 2244(d)(1)(D) is when new stuff has come forward, and,
16 if that new stuff sits in the jailhouse cell for 10, 20,
17 30 years and we don't have an opportunity to talk to
18 those witnesses, to do counter-investigation, then not
19 only are we prejudiced with respect to delay and
20 finality and things like that, but we're prejudiced with
21 respect to the merits determination of what that
22 evidence means.

23 And, when I talked about my three
24 constructs -- you know, this case, here, where you're
25 using the old evidence to establish the underlying

1 claim, that's really the position where the State is in
2 the worst possible position because, now, you've got
3 a -- you know, the dry cleaning clerk affidavit -- a
4 10-year-old affidavit -- we can't possibly cross-examine
5 her, and, yet, not only is that their gateway, that's
6 their substantive merits claim about why there is
7 ineffective assistance of counsel.

8 JUSTICE GINSBURG: Why can't you
9 cross-examine her? Is it just because the lapse of time
10 and she won't remember?

11 MR. BURSCH: It'll be very difficult. And
12 there are some examples in the amici briefs of the New
13 York case, for example, where witnesses were completely
14 unavailable. They had died, or one was out of State
15 and, because of mental infirmities, could not travel.

16 You know, we all know that, as time passes,
17 evidence deteriorates, whether it's because of -- of
18 death or illness or simply forgetfulness. I certainly
19 can't remember what I was doing 10 years ago today. And
20 the affidavit that she submitted was quite short. And
21 that one affidavit is just a microcosm of the problem
22 when you don't come forward immediately with evidence.

23 One other point that I want to make, really,
24 on the equities here because we're spending a lot of
25 time on that --

1 JUSTICE SOTOMAYOR: Do you have any idea how
2 many actual innocence claims win on the underlying
3 constitutional issue?

4 MR. BURSCH: Right. The number that win is
5 small. But what this case demonstrates is that the
6 number where it's claimed is very high. In fact, in
7 Michigan -- you know, where we deal with procedural
8 default every day, somewhere between a third and a half
9 of our petitioners claimed actual innocence, so that
10 they can use Schlup to get past the -- the failure to
11 prove cause and prejudice.

12 JUSTICE SOTOMAYOR: How many wins on the
13 attempt?

14 MR. BURSCH: Well, in the Sixth Circuit, a
15 little more than in some other circuits, but, generally,
16 not very many --

17 JUSTICE SOTOMAYOR: Not many.

18 MR. BURSCH: -- you know. But this case is
19 the perfect example. When you cut the court loose from
20 the statutory requirement, you end up with what
21 Justice Alito is describing -- you know, a situation
22 where no one thinks that Mr. Perkins is actually
23 innocent based on this new evidence; at best, it proves
24 that he had a co-conspirator who helped him commit the
25 murder together.

1 And, yet, now, we've got the Sixth Circuit order,
2 which purportedly sends us back to the trial court to
3 do -- you know, who knows what? I mean, how do you
4 prove that he's not innocent? Well, a jury already did
5 that.

6 You know, The jury heard all the evidence.
7 They had a presumption of innocence. All the
8 constitutional rules that should have been were applied
9 to that trial, and the jury said he's guilty, and
10 there's not a presumption of innocence anymore.

11 And -- and the equitable point that I wanted
12 to touch on is that this is not just about prejudicing
13 the State's interest. If you allow claims like these to
14 go forward, it also prejudices those who have legitimate
15 claims of actual innocence, the needle in the haystack.

16 And Justices O'Connor and Kennedy, in their
17 Herrera concurrence, talked about the haystack problem,
18 that, when you keep adding hay to that pile, not only is
19 it harder to find the needle, the truly meritorious
20 claim, but, at some point, the Federal judges just give
21 up, and they stop looking.

22 JUSTICE SOTOMAYOR: Why -- why is it that
23 the meritorious claim is going to be the one that's
24 going to be hidden?

25 MR. BURSCH: Because there are so many.

1 JUSTICE SOTOMAYOR: Meaning --

2 MR. BURSCH: It's important to understand
3 that -- that, notwithstanding the limits that Congress
4 was trying to put on these habeas petitions when it
5 enacted AEDPA, that we actually have more habeas filings
6 on an annual basis today than we did before AEDPA was
7 enacted. It's not going to stop the filing.

8 This is just one small rule to cut the
9 haystack down a little bit and make it that much easier
10 to find the needle. And, if you can find that
11 occasional needle -- and we submit there's not a lot of
12 those -- Federal judges are going to be more inclined to
13 look for those.

14 JUSTICE SOTOMAYOR: But you would -- you
15 want to keep it out altogether.

16 MR. BURSCH: No.

17 JUSTICE SOTOMAYOR: You want an actually --
18 potentially actually innocent person not to have --

19 MR. BURSCH: No, that is not our position.
20 And I want to be really clear about this. First,
21 they've got the year, but, if they go past the year,
22 they've got the State system. And what the examples in
23 the amici briefs demonstrate is that --

24 JUSTICE SOTOMAYOR: But they don't have the
25 Federal system.

1 MR. BURSCH: No, they don't.

2 JUSTICE SOTOMAYOR: As the first habeas.

3 MR. BURSCH: But, as the Alabama amici brief
4 explains, every State has got a process for hearing these
5 claims, no matter how old they are. You've also got
6 the -- the prosecutors who look at these and they don't
7 want to keep innocent people in jail.

8 And then, lastly, you've got clemency, which
9 this Court has always recognized as the remedy for those
10 who assert true, actual innocence, but have no
11 constitutional violation to assert.

12 Unless there are further questions, I would
13 like to reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Readler?

16 ORAL ARGUMENT OF CHAD A. READLER

17 ON BEHALF OF THE RESPONDENT

18 MR. READLER: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 I would like to start with Justice Kagan's
21 question regarding the important background interpretive
22 principle here that's set out -- set out in Holland.
23 There, the Court held that longstanding equitable rules
24 in the habeas context are incorporated into AEDPA,
25 barring a clear command by Congress to the contrary.

1 And the longstanding miscarriage of justice
2 exception has had a well-settled meaning. It has
3 allowed petitioners, who can meet the high standing of
4 showing actual innocence, a procedural gateway around a
5 procedural bar to allow them to present their otherwise
6 barred constitutional claims in Federal court.

7 JUSTICE GINSBURG: Before you proceed with
8 that, can you address Justice Alito's point that the
9 district court said there is no merit to this; it's not
10 an actual innocence -- it's not a valid actual innocence
11 claim. And then the Sixth Circuit sends it back for the
12 district court to decide something it's already decided?

13 How do you overcome that the Sixth Circuit
14 never reviewed the actual innocence question, the
15 district court did and said this doesn't make it?

16 MR. READLER: That's correct, Justice
17 Ginsburg. And, with respect to Justice Alito's
18 question, the reform recommendation from the magistrate
19 denied this petition on statute of limitations grounds
20 solely. It said it was too late, and it missed the
21 statutory period.

22 At the district court level, the court held
23 that the statute of limitations was missed and that
24 there was no diligence; the court believed there was a
25 diligence requirement, and so the petition failed for

1 that reason.

2 And then, as Justice Alito noted, the court
3 added some other language, which said -- was not a
4 weighing of the evidence, but the court said that it
5 felt that the evidence was not new, in the sense that it
6 was reasonably -- potentially reasonably known at the
7 time of trial, which I think is one -- was, one, the
8 wrong legal standard, but, two, was a misinterpretation
9 of Schlup because Schlup allows you to consider all the
10 evidence, old and new.

11 And I don't think that's what the
12 district -- the district court I think applied the wrong
13 legal standard, so it wasn't actually getting to the
14 merits. It didn't sort of set out all the evidence and
15 weigh them.

16 And then, Justice Ginsburg, you are correct
17 that this was not part of the certificate of
18 appealability. The certificate of appealability was
19 limited on the narrow question of whether there was a
20 diligence requirement.

21 That factual issue was not before the Sixth
22 Circuit and hasn't -- it is not before this Court as
23 well, and what I think this Court should do is what it
24 did in Schlup, which is announce the standard that
25 would apply and then it remanded the case back to the

1 district court for application of the correct standards.

2 JUSTICE ALITO: Well, I don't understand
3 that. The district court -- or you seem to suggest the
4 district court was wrong in saying that there wasn't
5 sufficient evidence for an actual innocence claim.
6 Maybe that's the case. Maybe it was wrong.

7 But, if it decided that issue and the issue
8 wasn't appealed, then the issue is settled. And that's
9 the problem that I see. Now, how do you get around
10 that?

11 MR. READLER: Right. Justice Alito, I don't
12 read the Sixth -- or I don't read the district court as
13 actually getting to the merits. I think it applied a
14 wrong legal rule and said, I can't even consider the
15 evidence because it's not new evidence. I think that
16 was an erroneous interpretation.

17 Under Schlup, the -- the Court has said many
18 times that the court can consider all the evidence old
19 and new. And I think that case really turns on the --
20 the equitable tolling of --

21 JUSTICE ALITO: Did you ask for a
22 certificate -- what other issues did you ask for a
23 certificate of appealability on?

24 MR. READLER: Well, our client was acting
25 pro se.

1 JUSTICE ALITO: What -- what other issues
2 did he ask for a certificate on?

3 MR. READLER: Justice Alito, I don't -- I
4 don't have that in front of me. I don't recall the full
5 contours of what he requested. The certificate -- the
6 Sixth Circuit granted it on the one narrow issue of
7 whether diligence was a requirement.

8 CHIEF JUSTICE ROBERTS: Counsel, you say, on
9 page 17 of your brief, that this Court has applied the
10 manifest-injustice exception to limits created by
11 Congress. What's your best case for that?

12 MR. READLER: Absolutely, Mr. Chief Justice.
13 Those cases are on pages 36 to 38 of the red brief, and
14 I think my friend and I have a disagreement here. It's
15 true that the -- the rule has never been applied to the
16 statute of limitations because there was no statute of
17 limitations for AEDPA before the statute, but the Court
18 has applied the exception to acts of Congress. It did
19 so in Sanders.

20 CHIEF JUSTICE ROBERTS: What -- what do you
21 mean, acts of Congress? Your sentence says, applied at
22 the limits created by Congress. I read that to mean
23 statutes of limitations. But that's wrong?

24 MR. READLER: Mr. Chief Justice, that --
25 that's incorrect, in the sense that there was no Federal

1 statute of limitations before AEDPA, but the Court had
2 applied the miscarriage of justice exception to acts of
3 Congress. So, for instance, in Sanders, the -- Congress
4 had included, in 2244, an ends-of-justice provision
5 which seemed to allow the Court to consider the ends of
6 justice when considering whether to hear a successive
7 petition, which is, essentially, the equivalent of
8 miscarriage of justice.

9 It did not include that language in 2255,
10 and, yet, the Court read 2255 as also including the
11 ends-of-justice requirement, hence the miscarriage of
12 justice, even though the language wasn't there.

13 In Kuhlmann --

14 CHIEF JUSTICE ROBERTS: With 2255 -- remind
15 me?

16 MR. READLER: For Federal -- Federal
17 petitions.

18 CHIEF JUSTICE ROBERTS: And said what with
19 respect to time --

20 MR. READLER: For Federal -- Federal
21 convictions.

22 CHIEF JUSTICE ROBERTS: Said what with
23 respect to the time limits?

24 MR. READLER: There were -- there were --
25 there was language in both -- in both statutes regarding

1 when you could bring a successive petition. The -- the
2 statute that applied to petitions out of State judgment,
3 2254, included an ends-of-justice provision, which said
4 the court could consider the ends of justice in deciding
5 whether to take a second or successive petition.

6 CHIEF JUSTICE ROBERTS: So -- so, when you
7 said limits, you didn't mean time limits; you meant
8 substantive limits?

9 MR. READLER: Substantive -- well, no.
10 Procedural limits, procedural limits on -- procedural
11 limits.

12 CHIEF JUSTICE ROBERTS: Procedural limits.
13 Do you have a case that applies it to time limits?
14 Which, of course, is the question we have here.

15 MR. READLER: We do. In -- in -- now, these
16 would be State time limits, but --

17 CHIEF JUSTICE ROBERTS: Right. But you said
18 limits created by Congress. So just -- I mean, I should
19 read "limits created by Congress" not to mean time
20 limits, but procedural or other limits.

21 MR. READLER: Well, Mr. Chief Justice, there
22 have never been any time limits --

23 CHIEF JUSTICE ROBERTS: Right. And I guess
24 that's the point of my questioning and your friend's
25 position. There have never been any time limits created

1 by Congress that have been abrogated by a
2 manifest-injustice exception.

3 MR. READLER: I think I can agree with that
4 because there was never a statute of limitations before
5 AEDPA. But --

6 CHIEF JUSTICE ROBERTS: Right. And the
7 difference is, in Holland, we are dealing with equitable
8 tolling, which had applied as far back as -- you know,
9 whatever the law goes to limitations; in other words,
10 equitable tolling, which is different from the
11 abrogation, I think, that you are asking for.

12 MR. READLER: Well, I don't think so,
13 Mr. Chief Justice. Two responses, first, with respect
14 to the timing issue, the Court had applied the
15 miscarriage-of-justice exception to abusive petitions.

16 So there is a timing concern invoked there
17 because you're filing a second petition when you could
18 have raised issues earlier. And the Court has said,
19 even in that timing context, not a statute of
20 limitations, but it certainly invokes timing concerns,
21 that even, in that instance, the miscarriage of justice
22 would still overcome the rule.

23 Now, what --

24 JUSTICE ALITO: Well, you are asking for
25 what is, potentially, a very big exception to the 1-year

1 statute of limitations. If you took a poll of all of
2 the prisoners in Michigan, how many of them do you think
3 would say they are actually innocent?

4 MR. READLER: Justice Alito, I suspect very
5 few of them could credibly say --

6 JUSTICE ALITO: "Very few" would say they
7 are actually innocent?

8 MR. READLER: Well, I haven't done that
9 study. I suspect very few of them would say that
10 they -- credibly say that they are actually innocent.

11 JUSTICE ALITO: Oh, "credibly say." But how
12 many would say that they are actually innocent? A lot.
13 And a lot would be able to come up with evidence that is
14 equal to -- to what the petition -- what the Respondent
15 here has come up with.

16 Now, do you think it's -- it's plausible
17 that Congress, in establishing this new 1-year statute
18 of limitations, because it doesn't want these things to
19 drag on indefinitely, intended to create an exemption
20 that broad, so that anybody who claims to be actually
21 innocent can at least get over -- can get to the point
22 where the Court has to decide whether the -- has to
23 weigh this evidence of actual innocence, to see whether
24 it -- it gets over the threshold?

25 MR. READLER: Sure --

1 JUSTICE ALITO: Is that plausible, given
2 what Congress was trying to do in AEDPA?

3 MR. READLER: Absolutely, Justice Alito, for
4 two reasons. First of all, the background presumption,
5 of course, given the established nature of this
6 exception -- in fact, on Mr. Chief Justice's question,
7 while this exception, as compared to equitable tolling
8 in the criminal context, I think is actually more
9 important because it goes to the ultimate equity, and
10 that is innocence.

11 But the background presumption is that
12 Congress includes these foundational equitable rules, of
13 which the miscarriage of justice exception is absolutely
14 one of them, unless Congress expressly says otherwise.

15 Now, Justice Alito, no -- no petitioner is
16 going to want to find themselves in the Schlup world,
17 where they missed the statute of limitations. It is not
18 a place they are going to want to be. They are going to
19 absolutely want to file within a year, if they can.

20 Sometimes, they miss that -- that period,
21 and what the Court has said, in those rare circumstances
22 where you can make a credible, compelling showing of
23 actual innocence, we will allow you around the statute
24 of limitations. But no petitioner wants to be in that
25 circumstance because the Schlup standard is so high.

1 CHIEF JUSTICE ROBERTS: Well, it's -- I'm
2 not sure that's right. They don't want to definitely
3 file within one year, if they don't have anything to
4 say. You know, if it takes a certain amount of time
5 before they either acquire it legitimately or can find
6 somebody or -- I don't know, in this case -- you know,
7 the codefendant dies, everybody has no reason any
8 more -- you know, to object and pin it on him.

9 There are a lot of reasons that it's in some
10 of these prisoners' interest to drag things out and then
11 to file. They don't have anything to say within the one
12 year and need time to either, from your point of view,
13 legitimately develop the evidence or, from your friend's
14 point of view, to concoct it.

15 MR. READLER: Well -- and the statute speaks
16 to that. I mean, I think we do have a disagreement on
17 the interpretation of the statute, but Section
18 2244(d)(1)(D) does speak to the discovery of new
19 evidence which goes to support a claim. I think
20 Congress --

21 JUSTICE GINSBURG: And the statute of
22 limitations would run from the discovery of the new
23 evidence, not from --

24 MR. READLER: That's -- that's correct,
25 Justice Ginsburg, to the extent that the evidence goes

1 to support a claim. Congress included a typical
2 discovery rule. If you've discovered new evidence
3 that -- that supports the factual underpinnings of your
4 claim, that starts the one-year period over again.

5 But, critically -- and I think my friend and
6 I have a disagreement here -- critically, with respect
7 to that provision, if you find evidence that solely goes
8 to your innocence, that provision is not triggered,
9 meaning you don't get another year if you find
10 completely exculpatory evidence that shows you're not
11 innocent, you don't -- you don't necessarily get another
12 year.

13 And there's a hypothetical I can give you.
14 If your underlying claim is a Batson claim, a
15 structural error claim, and you fail to raise it, and
16 you missed the one-year limitations period, but then, 10
17 years later, you find DNA evidence that completely
18 exonerates your client that was unknown to anyone, so
19 it's not the basis for an IEC claim, it's not the basis
20 for prosecutorial misconduct, in that instance, the
21 statute doesn't start the limitations period over.

22 You're entirely out of luck, which is why
23 Congress had to have meant to include the absolute --
24 the innocence exception for just that kind of case, so
25 that that petitioner at least has the ability to try to

1 meet the Schlup standard.

2 JUSTICE ALITO: But that's very odd because,
3 if you have somebody who's actually innocent, then
4 you're saying that person can't get out of prison,
5 unless the person happens to have a good constitutional
6 claim that's totally unrelated to the fact that the
7 person is actually innocent.

8 That's just very odd, isn't it.

9 MR. READLER: Well, I don't think so,
10 Justice Alito, in the sense that all this is, is a
11 gateway to allow them their first opportunity to bring a
12 Federal habeas petition. Ordinarily, they're out of
13 luck.

14 But, if they brought evidence that is so
15 compelling, that shows that there may well have been a
16 miscarriage of justice because this person has shown,
17 under the Schlup standard that they're actually innocent,
18 then, in that instance, the Court has always said that
19 we're going to allow those claims to be heard, at least
20 in the first instance, by -- by a Federal court for a
21 first petition.

22 CHIEF JUSTICE ROBERTS: Your friend responds
23 to that point, I think, by saying that every State
24 allows collateral review in that instance and that what
25 we're talking about is simply preclusion of the second

1 bite at the apple -- or a third bite at the apple, I
2 guess, by -- by assumption, in the Federal system.

3 MR. READLER: Well, Mr. Chief Justice, I'm
4 not sure that's practical, to the extent that we've
5 already raised our underlying constitutional claims in
6 the State court. Those have been exhausted. So the
7 Michigan rule, as I read it, doesn't allow us to go back
8 to State court and present our constitutional claims
9 again. They've already been adjudicated.

10 CHIEF JUSTICE ROBERTS: What about the
11 actual innocence claim?

12 MR. READLER: The innocence evidence may --
13 you may be able to pursue that under -- under the --
14 under the State rule, but that is more akin to a
15 freestanding --

16 CHIEF JUSTICE ROBERTS: Is that the most --
17 is that the most -- I thought I understood your friend
18 to say -- he can correct me if I'm wrong -- that every
19 State has an avenue for considering that.

20 MR. READLER: Well, two responses. One, I
21 think every State has different rules and so this -- the
22 application of the exception is never turned on sort of
23 what the alternative potential State rule is. That
24 wasn't -- that was true in House and true in Schlup,
25 where there were State alternatives.

1 But, two, those State alternatives go to
2 freestanding innocence claims, where you're not --
3 you're not alleging that there's an underlying
4 constitutional violation.

5 What you're saying is similar to Herrera,
6 and that is that I have evidence that shows, setting
7 aside any error of the trial, no errors, I have evidence
8 that shows I'm innocent. That's a completely different
9 concept. And what we're getting at here is the case
10 where you wanted evidence of innocence and, two, have a
11 constitutionally corrupt trial -- or at least an
12 allegation of a constitutionally corrupt trial.

13 JUSTICE SOTOMAYOR: Counsel, I see --

14 JUSTICE ALITO: Well, assuming for the sake
15 of argument that there is this exception, why shouldn't
16 diligence be required? How can it be equitable to allow
17 someone to bring a claim when the person has --
18 involving new evidence, when the person has not been
19 diligent in presenting this new evidence to the court?

20 MR. READLER: Well, Justice Alito, for
21 decades, this Court has never required diligence and, in
22 fact, in McCloskey, has expressly rejected it, and the
23 Court has noted that diligence has not historically been
24 required under the standard because, as the Court said
25 in House and Calderon, that Congress raised the bar in

1 two places on the statute.

2 But the reason why is because, as
3 Justice O'Connor said in her concurring opinion with --
4 with -- in Withrow, with Chief Justice Rehnquist, is
5 that innocence is the ultimate equity. And it trumps --
6 diligence is not the ultimate equity, it's innocence.

7 And if -- if a petitioner can come forward
8 and make a credible showing of actual innocence, that,
9 standing alone, has always been enough to allow a
10 Federal court to at least go ahead and then reach the
11 underlying claim.

12 JUSTICE SOTOMAYOR: Counsel --

13 JUSTICE GINSBURG: You have a larger -- you
14 have a larger category, you say miscarriage of justice,
15 so one is actual innocence. You say the category is
16 well defined. So what else would fit under this -- and
17 we can bring it up very late in the -- in the day.
18 Anything else other than actual innocence would be in
19 this category?

20 MR. READLER: Justice Ginsburg, I think the
21 Court has always treated the phrase "miscarriage of
22 justice" as synonymous with actual innocence, and
23 that's -- that's the one thing it's getting at. It's a
24 narrow exception, it's difficult to meet, but -- but
25 it's always included cases where you can make --

1 JUSTICE SOTOMAYOR: Counsel --

2 JUSTICE KENNEDY: Are bribed jurors not a
3 miscarriage of justice?

4 MR. READLER: I'm sorry, Justice --

5 JUSTICE KENNEDY: A juror who's bribed, is
6 there no -- no miscarriage of justice there?

7 MR. READLER: Well, that would, presumably,
8 be the basis for a habeas claim.

9 JUSTICE KENNEDY: But we're -- we're talking
10 about the meaning of the term "miscarriage of justice."
11 It seems to me there -- there are many serious errors
12 that can be described by that general phrase.

13 MR. READLER: Well, Justice Kennedy, I --

14 JUSTICE KENNEDY: Do you want to say it's a
15 term of art? Fine.

16 MR. READLER: Justice Kennedy, I'm relying
17 on the Court's decades of decisions, many of which
18 you've written in this area, where they've described
19 miscarriage of justice in the habeas setting as the
20 equivalent of incarceration of an innocent person, and
21 that's what the exception is -- is getting at.

22 JUSTICE SOTOMAYOR: The --

23 JUSTICE BREYER: So does this boil down
24 to -- I mean, you have a one-year statute of
25 limitations. Now, I guess -- suppose Hurricane Katrina

1 came along and threw all the documents away for two
2 months. I guess the Court could extend it, couldn't it?

3 MR. READLER: Well, that could be viewed as
4 an impediment under -- under the -- under the statute,
5 there's a statutory provision for --

6 JUSTICE BREYER: Yes, I mean, don't they
7 toll it when there's some -- when the courthouse burns
8 down?

9 MR. READLER: It could be also a basis for
10 equitable tolling, correct.

11 JUSTICE BREYER: All right. So you want to
12 say and that's also true when the person is actually
13 innocent, if you can prove that, delay it. Is that what
14 you're saying?

15 MR. READLER: I'm not sure if I fully
16 understand the question.

17 JUSTICE BREYER: Well, he has his one year,
18 and he gives four criteria, and the four criteria,
19 sometimes, are not exclusive. And you want to say yours
20 is one of the times.

21 MR. READLER: That's -- that's true.
22 They're not exclusive. And a --

23 JUSTICE BREYER: And a different one you say
24 is when he's actually innocent.

25 MR. READLER: That's -- that's correct.

1 JUSTICE BREYER: All right. If that's
2 correct, then suppose that he purposely has delayed
3 filing this until everybody's dead, so they know they
4 can't prove it anymore.

5 MR. READLER: Well, then that raises a
6 whole --

7 JUSTICE BREYER: Well, what is your answer?

8 MR. READLER: -- different range of --

9 JUSTICE BREYER: All right he, can he toll it
10 under those circumstances?

11 MR. READLER: Well, any -- as the Court said
12 in Schlup, the timing of the submission by the
13 Petitioner can certainly be considered in the Schlup
14 analysis, so --

15 JUSTICE BREYER: So the answer is, in your
16 view, if he deliberately and -- and, without cause,
17 delays it for 5 years, his filing, just so everybody
18 will die, you would say, okay, I'm not worried about
19 him?

20 MR. READLER: Well, Justice Breyer, I --

21 JUSTICE BREYER: Is that right? Would you,
22 or wouldn't you?

23 MR. READLER: I would say -- I would say
24 that he can still attempt to avail himself of the
25 settled miscarriage of justice exception, but the huge

1 problem he's going to run into --

2 JUSTICE BREYER: Does he win or lose?

3 MR. READLER: He likely -- he may well lose.

4 JUSTICE BREYER: I mean, what do you think?

5 MR. READLER: He may well lose at the Schlup
6 stage.

7 JUSTICE BREYER: I didn't ask that. I said
8 what do you think?

9 MR. READLER: Well, I don't have all the
10 facts. I suspect he's going to lose.

11 JUSTICE BREYER: Yes, you do. I made up the
12 hypothetical.

13 (Laughter.)

14 MR. READLER: Well, Justice Breyer, on those
15 facts, I'm going to say he loses at the Schlup stage
16 because Schlup, which is, one, an incredibly high bar to
17 meet, but, two, the Court expressly said, at page 322 of
18 the opinion, that it could consider the timing of the
19 evidence when it's submitted.

20 So it already takes into account any sort of
21 game-playing that petitioner may engage in when they're
22 trying to assert their -- their innocence.

23 JUSTICE BREYER: But they admit --

24 CHIEF JUSTICE ROBERTS: And how long did
25 your --

1 JUSTICE BREYER: I'm just trying to -- they
2 admit that, if he's diligent, it's okay?

3 MR. READLER: The -- the State?

4 JUSTICE BREYER: Yes.

5 MR. READLER: Well, the State --

6 JUSTICE BREYER: Do you believe he's
7 diligent?

8 MR. READLER: We believe he's diligent. The
9 State is asking for a diligence requirement that the
10 Court has never imposed.

11 JUSTICE BREYER: So the State is asking for
12 a diligence requirement. You admit that there's a
13 requirement that -- that you have to not really use this
14 as a sham device, so we're pretty close.

15 MR. READLER: Well, there's -- there's never
16 been a diligence requirement in this setting because
17 that's not been the focus.

18 JUSTICE SOTOMAYOR: But there has --

19 JUSTICE BREYER: But there is a sham --
20 there is a sham and deliberate delay requirement, not a
21 diligence one, but there is a sham. I'm not trying to
22 trick you.

23 MR. READLER: No, but --

24 JUSTICE BREYER: What I'm trying to say is
25 maybe we're arguing about something that we could solve;

1 that is, in fact, many of these people don't have
2 lawyers. They don't understand the statute of
3 limitations, they don't understand what diligence might
4 consist of looking later. You agree that it's -- it
5 shouldn't be a sham, shouldn't do it deliberately.

6 All right. Now, if I'm thinking about that,
7 how would you advise me to write it?

8 MR. READLER: I think -- I think the Court
9 can just build on the principles it's already set
10 forward in Schlup and other places, and that is, that
11 there's never been a diligence requirement in this
12 setting.

13 And Congress, by the way, did not -- the
14 Congress -- the intent of Congress was not to include a
15 diligence requirement here because, in two places, it
16 did include a diligence requirement with respect to
17 successive petitions or evidentiary hearings, so
18 congressional intent was not to include diligence --

19 JUSTICE SOTOMAYOR: But there has always
20 been a laches defense until Rule 9(a) was rescinded.

21 MR. READLER: That's correct, Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: All right. So there's
24 been some form -- not of due diligence, but some form of
25 check on a prisoner waiting so long that a State can't

1 respond, the -- Justice Breyer's hypothetical.

2 So he's asking you, I think, to tell us how
3 to write it. So do we write it by saying there's no
4 diligence requirement -- but there is a sort of common
5 law laches, although that's a hard argument to make
6 because it was based on 9(a) until recently.

7 Or do we just say it's equity, and equity
8 would suggest that, if it's contrived -- the delay is
9 contrived, that the evidence is suspect and doesn't --
10 and shouldn't be credited.

11 MR. READLER: Absolutely. Two responses.
12 First, just with respect to Rule 9(a), Chief Justice
13 Burger, in a concurring opinion to a dissent in
14 Spalding, said that even a laches rule would give way,
15 if there was a colorable showing of actual innocence.

16 With respect to the rule I'd write, I would
17 write the rule that is essentially already in place, and
18 that is that the miscarriage of justice exception does
19 not turn on diligence; it turns on whether you can show
20 innocence.

21 And in -- in attempting to show innocence
22 under Schlup, this timing -- the timing of the
23 submissions is a consideration. So if there's -- if
24 there's been a delay that, somehow, hurts the State
25 because a witness has died or that it appears to be that

1 that's the fault -- or that the petitioner was playing
2 games in that context, I think that's a fair
3 consideration under Schlup.

4 JUSTICE GINSBURG: How about --

5 CHIEF JUSTICE ROBERTS: So is this
6 established after -- after some kind of evidentiary
7 hearing, the delay, whether he delayed for a particular
8 purpose or not?

9 MR. READLER: Well, it depends. If -- if
10 the petition is filed 3 weeks after the star witness
11 dies, presumably, the State will come back in their
12 petition and note, one, all the evidence that they think
13 goes against the -- the petitioner's claim, but, also,
14 they'll note that this happened, and the court could
15 resolve it at that stage, too.

16 CHIEF JUSTICE ROBERTS: Why -- why did your
17 client wait 5 years after the last affidavit?

18 MR. READLER: A number of reasons,
19 Mr. Chief Justice. One, he was looking for counsel to
20 assist him; two, he continued to look for evidence;
21 three, he didn't have access to his legal papers. Many
22 of his legal papers were lost in a prison riot and then
23 a flood that occurred at this prison, so he didn't have
24 access to those and had to regain those.

25 For a period of time, he was denied access

1 to the library and to a legal writer. So there were a
2 culmination of reasons why he didn't do this, but I
3 think two of the critical ones were looking for counsel
4 and trying to develop more evidence.

5 JUSTICE ALITO: Well, as your -- as your
6 adversary says, there's nothing really procedurally
7 complicated about filing a Federal habeas. There --
8 there are forms -- I've read hundreds of them -- that
9 have been filed by pro se petitioners, and there is
10 nothing technical about claiming, "I'm innocent of this
11 offense."

12 This isn't a legal issue. It's something
13 anybody can understand. I've got an -- I've got my
14 sister's affidavit, I have an affidavit by a third
15 person, I have an affidavit by -- by a person who worked
16 in the dry cleaning shop that shows that I'm actually
17 innocent.

18 Why doesn't -- what is the reason for
19 waiting 5 years to file that?

20 MR. READLER: Well, Justice Alito, no -- no
21 rational petitioner is going to want to wait in that
22 period because, if they file within the 1-year period,
23 they go straight to review on their habeas claims, and
24 they don't have to worry about any procedural gateway.

25 So -- so no rational --

1 JUSTICE ALITO: But I just -- I don't understand
2 your answer about why it took him 5 years from the --
3 from obtaining the last affidavit to the filing of the
4 Federal habeas. You said he couldn't get a lawyer. He
5 really didn't need a lawyer to do this. He didn't have
6 access to a library. This isn't a legal issue -- isn't
7 a complicated legal issue. It's a factual issue, that
8 anybody who watches detective shows on TV can
9 understand.

10 MR. READLER: Well -- and, Justice Alito,
11 you're right, we're not arguing for equitable tolling
12 here, in the sense that he could have filed earlier.
13 There wasn't -- there wasn't a State impediment that
14 stood in his way the entire period of time. And he
15 should have filed it earlier, and had he filed earlier,
16 then he would have gone straight to consideration of his
17 underlying habeas claims and wouldn't have to worry
18 about this high hurdle of satisfying --

19 JUSTICE ALITO: But you think that Congress,
20 which, in AEDPA, was trying to speed all this up and get
21 rid of the delay and make things simpler, intended to
22 allow that? You could wait 5 years, you could wait 10
23 years, you could wait 15 years; it doesn't matter?
24 That's what AEDPA was intended to do?

25 MR. READLER: Well, no, Justice Alito,

1 you're correct that AEDPA was intended to delay -- or to
2 end delay when possible -- but, as the Court said in
3 Holland, AEDPA was not meant to end every delay at all
4 costs. I think this is exactly the situation it had in
5 mind.

6 In Calderon, the Court recognized that the
7 miscarriage of justice exception is consistent with
8 AEDPA because -- because it arises so rarely that, in
9 the vast majority of cases, the finality and comity
10 concerns that the State has are honored because there's
11 no -- there's no additional proceeding, the petitioner
12 will not meet the high Schlup standard, and the case
13 will end.

14 But, in the rare case where a petitioner can
15 satisfy Schlup, the Court has always said that the
16 courthouse doors, in that circumstance, will be open to
17 review of your first Federal petition. And that --

18 JUSTICE GINSBURG: The Second Circuit --
19 when it had a similar case, the Second Circuit itself
20 said that actual innocence is rare. This is such a
21 case. This is a case where the alibi that he had was --
22 it was established by forensic evidence, air-tight, he
23 was someplace else. The -- the Second Circuit didn't
24 send it to the district court to decide the actual
25 innocence.

1 It decided that itself and then said,
2 district court, now you deal with the -- with the
3 questions that the petitioner is raising -- the
4 constitutional questions. But the Sixth Circuit just
5 seemed to be -- it didn't matter whether -- it didn't
6 matter whether the actual innocence claim had any solid
7 basis, when they sent it back to the district court.

8 Shouldn't -- if there is an actual innocence
9 gateway, shouldn't the court of appeals determine that
10 before it returns the case to the district court?

11 MR. READLER: I think, ordinarily, yes. The
12 Sixth Circuit said, here, that there was a gateway, and
13 it was remanding the case back to the district court --

14 JUSTICE GINSBURG: Yes, but it didn't find
15 anything about whether this was -- this claim was -- was
16 a good one.

17 MR. READLER: That's correct. That's
18 correct --

19 JUSTICE GINSBURG: And I'm still puzzled
20 about what happens next. The case goes back to the
21 district court and the -- the district court is told,
22 diligence doesn't matter. The district court says, yes,
23 but I thought -- I thought that the claim was worthless.

24 MR. READLER: Well, it's correct that the
25 case should be remanded back to the district court, just

1 like this case -- just like the Court did in Schlup,
2 where it announced the standard and remanded back to the
3 district court for application.

4 But, here, I disagree with that reading of
5 the underlying opinion, in that the Court doesn't set
6 out in sort of weighing all the evidence and saying,
7 here's what I find in favor of the petitioner and here's
8 what I find in favor of the State. What the district
9 court said is that -- it said the timing of the evidence
10 was somehow a problem because the information was known
11 at trial, which I think is, again, wrong for two
12 reasons.

13 I think the petitioner has -- is able to use
14 the information because the problem for us was his
15 attorney was told about some of these things, but didn't
16 actually assert them -- or didn't interview one of the
17 key witnesses. One of the affiants was on the
18 prosecution's witness list, and my client's lawyer
19 didn't even interview that person, let alone call them.

20 And then the court -- I think the court --
21 the trial court misunderstood Schlup because Schlup
22 allows you to consider all the evidence, old and new,
23 make appropriate credibility determinations, consider
24 the timeliness of the evidence, and determine whether
25 that standard has been met.

1 And I think that's what should happen here
2 for the -- for the first time, in our view. And there
3 is a question -- there was a question, earlier, with
4 respect to how often the Schlup standard is met. In
5 response to the reply brief, we did a search of circuit
6 courts. And we found, since Schlup was decided, eight
7 circuits that have upheld or have found that Schlup was
8 satisfied.

9 If you add in House, then that adds nine
10 appellate cases where Schlup was satisfied. So it's --
11 it's a narrow range of cases. It shouldn't be difficult
12 to meet, but we --

13 CHIEF JUSTICE ROBERTS: Well, but, I mean,
14 the whole question -- and your friend made the -- made
15 the point -- the question is how many are filed, in how
16 many cases does the claim arise, not how few times it's
17 upheld.

18 MR. READLER: Sure. Mr. Chief Justice, I
19 suspect, no matter the rules, there will always be
20 filings by petitioners, and many of those may be
21 frivolous. But, as the Court has said in Panetti and
22 other cases -- you know, unmeritorious petitions can be
23 dismissed at the earliest course, and it's consistent
24 with Habeas Rule 4.

25 That's what should happen in this instance,

1 too. But it's -- and it's awfully --

2 CHIEF JUSTICE ROBERTS: How do you know
3 which of these are meritorious and which aren't? Is
4 this the meritorious -- I assume you think this is a
5 meritorious one?

6 (Laughter.)

7 MR. READLER: We -- we do,
8 Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: And your friend says
10 nobody can reasonably think this person is innocent.
11 Maybe he has constitutional claims. But, if you look at
12 the evidence, is this something, at the -- a preliminary
13 stage, you look and say, oh, this guy's clearly
14 innocent, and this goes forward?

15 Or is it one that you can cast aside?

16 MR. READLER: I don't think it's one you can
17 cast aside. I think you -- you have to give this more
18 development. And, by the way, he was proceeding pro se.
19 I think, when he -- when the case is remanded, with
20 assistance of counsel, he can present -- better present
21 the evidence and better present some other things, to
22 make -- make the showing stronger. And I think we can
23 meet the Schlup standard.

24 If there are no further questions, we'd ask
25 that the Sixth Circuit be affirmed.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Bursch, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF JOHN J. BURSCH

4 ON BEHALF OF THE PETITIONER

5 MR. BURSCH: Three brief points about
6 Holland and some closing thoughts about diligence.

7 With respect to Holland, I want to note,
8 first of all, that, there, you were dealing with
9 legislative silence. Everyone agreed that Congress had
10 not said anything about equitable tolling.

11 And, as I explained earlier, when you
12 consider the three categories of defendants who claim
13 actual innocence based on new evidence, this situation
14 here, where the new evidence relates to the factual
15 predicate of the constitutional claim asserted, that's
16 where Congress, most clearly, meant to have the
17 limitations period apply.

18 So it's very different. With respect to
19 equitable tolling applying to acts of Congress, everyone
20 recognizes that. Mr. Chief Justice, you note that this
21 has never been applied to limitations. I actually have
22 to take issue with my friend's statement that Sanders
23 and Kuhlmann, somehow, took a different tack because, in
24 both of those cases, what Congress did is it left it to
25 the district judge's discretion to do or not do

1 something.

2 And all this Court said was, well, if
3 they've got discretion, then they can still have an
4 equitable exception. So, even in those cases, this
5 miscarriage of justice exception has never, ever been
6 used to override a congressional act.

7 The last thing is that, in equitable
8 tolling, you are dealing with the fault of the
9 petitioner -- Hurricane Katrina or something else
10 happened that wasn't their fault. And, here, it's
11 entirely within the Petitioner's control.

12 All they have to do is print the form, check
13 the boxes, attach the evidence, and then file the claim.
14 And they have an unlimited time to find evidence and
15 then, 1 year after that, to file.

16 Now, with respect to diligence --

17 JUSTICE KAGAN: General, you had suggested,
18 earlier, some way out of this puzzle about why Congress
19 would have put the actual innocence exception into the
20 second successive petition provision and not had one for
21 a first petition?

22 MR. BURSCH: Yes.

23 JUSTICE KAGAN: So that seems really quite
24 odd to me. I mean, a number of my colleagues have said,
25 well, can we really believe that Congress contemplated

1 this. But, I mean, don't we have evidence that Congress
2 contemplated it in the second and successive context, a
3 slightly tighter version, wouldn't it be quite odd to
4 say that Congress contemplated an actual innocence
5 exception when you are on your second petition, but
6 barred it when you are on your first?

7 What sense would that be?

8 MR. BURSCH: Yeah, let me explain that and
9 I'm glad you raised that because -- you know, besides
10 the legislative history that informs what we are looking
11 at here, what they did in 2244(d)(1)(D) is they made it
12 broader. They said, even if you don't claim innocence,
13 if you are coming forward with new evidence, we want the
14 court to hear that constitutional claim, if you bring it
15 within one year.

16 The reason they didn't mention it there is
17 because it would have made the provision narrower, and
18 they didn't want to do that. Then they ratcheted it up
19 with respect to successive petitions, making you pass
20 through the successive petition actual innocence gateway
21 and then comply with the limitations period, so that's
22 the explanation, consistent with legislative
23 history.

24 JUSTICE KAGAN: Well, I guess I'm just not
25 sure I understand that. I mean, they could have added a

1 separate provision, just saying there's an actual
2 innocence exception, or there is -- there's not,
3 consistent with the way they did it in the -- in the
4 second and successive petition.

5 MR. BURSCH: Right, they could have, but,
6 again, that would have limited (d)(1)(D).

7 JUSTICE KAGAN: Well, it didn't have to.
8 Why would it have necessarily have limited (d)(1)(D)?

9 MR. BURSCH: Well, if they said there is an
10 exception for those who claim actual innocence, the
11 implication is, for those who don't claim actual
12 innocence, you are out of luck.

13 JUSTICE KAGAN: Well, you just you make the
14 converse clear.

15 MR. BURSCH: Well, if we could rewrite
16 congressional statutes with hindsight -- you know, maybe
17 we could draft a perfect statute.

18 JUSTICE KAGAN: All I'm suggesting is that your
19 interpretation of the statute creates a glaring anomaly
20 that people would be out of court on the first petition,
21 and they could turn around on their second petition,
22 which is usually disfavored, and get an actual innocence
23 exception.

24 MR. BURSCH: No, that -- that's not the way
25 that we interpret this at all. Under either provision,

1 you are stuck with (d)(1)(D), you have got to file
2 within a year. All that the successive petition adds to
3 it is that you do have a statutory actual innocence
4 gateway to pass through first that you don't have on your
5 first petition. That's our position.

6 I do want to close with some thoughts about
7 diligence. You know, looking for counsel, we've talked
8 about how simple it is to -- to file these things. The
9 papers lost in the -- the prison riot and the access to
10 the library are related, and it's because Defendant
11 Perkins incited the prison riot, so he is hardly in an
12 equitable position of -- of claiming any tolling benefit
13 from that.

14 And with respect to the -- the rule,
15 Justice Breyer, we can't have a diligence rule if you go
16 to that point, based on intent, because the interest
17 that is being vindicated here is not the purpose of the
18 Petitioner in --

19 JUSTICE BREYER: What do you think about the
20 words "discovered in exercise of due diligence"? You
21 know, you could manipulate those words so as to deal
22 with the circumstance of the -- say, below-average IQ
23 person who doesn't have a lawyer, who isn't certain
24 about what to do, and what counts as diligence and
25 discovery in that case.

1 Is that -- are you objecting to that? Do
2 you object to that? What do you think?

3 CHIEF JUSTICE ROBERTS: Go ahead, briefly.

4 MR. BURSCH: Sure. As long as it takes into
5 account that the State's interest in timeliness is at
6 its apex when we are dealing with new evidence that
7 relates to the actual constitutional claim. And they
8 are asking for -- not equitable tolling, but
9 extraordinary tolling that you should reject.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon at 11:01 a.m. the case in the
14 above matter was submitted.)

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