1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOM L. CAREY, WARDEN, :

4 Petitioner :

5 v. : No. 01-301

6 TONY EUGENE SAFFOLD. :

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8 Washington, D.C.

9 Wednesday, February 27, 2002

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:08 a.m.

13 APPEARANCES:

14 STANLEY A. CROSS, ESQ., Supervising Deputy Attorney

15 General, Sacramento, California; on behalf of the

16 Petitioner.

17 DAVID W. OGDEN, ESQ., Washington, D.C.; on behalf of the

18 Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 STANLEY A. CROSS, ESQ.
4 On behalf of the Petitioner 3
5 DAVID W. OGDEN, ESQ.
6 On behalf of the Respondent 27
7 REBUTTAL ARGUMENT OF
8 STANLEY A. CROSS, ESQ.
9 On behalf of the Petitioner 54
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in No. 01-301, Tom L. Carey v. Tony Eugene Saffold.

5 Mr. Cross.

6 ORAL ARGUMENT OF STANLEY A. CROSS

7 ON BEHALF OF THE PETITIONER

8 MR. CROSS: Mr. Chief Justice, and may it please

9 the Court:

10 AEDPA's language, purpose, and legislative

11 history supports the conclusion that the circuit conflict

12 over the meaning of pending in 28 U.S.C., section

13 2244(d)(2) can be resolved by reversing the Ninth Circuit

14 for one or more of the following three reasons.

15 First, the Ninth Circuit improperly permits

16 tolling for substantial delay if the State Supreme Court

17 addresses the merits when denying an application for

18 collateral review.

19 Second, under California's system of successive

20 original petitions, nothing is pending under State or

21 Federal law following the denial of an application for

22 collateral review and prior to the proper filing of a new

23 application for review.

24 And third, the gap theory relied upon by the

25 district court more accurately reflects congressional

1 intent and the policy judgments underlying AEDPA's 1-year
2 statute of limitations than does the Ninth Circuit's
3 interpretation of pending --
4 QUESTION: Mr. Cross, would you explain to us
5 what it is in California -- what is the system and the
6 time within which post-conviction relief can be applied
7 for in California courts? Is there any time limit for
8 filing it with the trial court level?
9 MR. CROSS: It's within a reasonable time, Your
10 Honor, the general rule of timeliness. However, within a
11 reasonable time has parameters which I can give you the
12 case of In re Harris, a California Supreme Court case,
13 which addresses that. Specifically, it says the following
14 in footnote 7. That's -- the cite is 5 Cal.4th at 828-
15 829. Footnote 7 says the following. The general rule
16 regarding timeliness is the habeas corpus petition must be
17 filed within a reasonable time after the petitioner
18 counsel knew or with due diligence should have known the
19 facts underlying the claim, as well as the legal basis of
20 the claim.
21 They then follow that up with two significant
22 points. The first is, is that ineffective assistance of
23 counsel claims, which is the claim in this particular
24 litigation, should be filed as a verified -- excuse me --
25 a verified petition jointly with the direct appeal. In

1 other words, if you know about the claim, you should file
2 it at that time.
3 Now, as far as how long you should be able to
4 wait, the rules specifically state with regard to capital
5 cases, which are considered to be much more complex than
6 the average non-capital case, they give them a 90-day
7 period in which there is a presumption of timeliness so
8 that there is no substantial delay. You have a
9 presumption that you have not exceeded substantial delay
10 if you do it within 90 days.
11 QUESTION: All right. Now, here there was a
12 prompt filing in the -- at the trial court level.
13 MR. CROSS: Pardon?
14 QUESTION: Here there was a prompt filing at the
15 trial court level for habeas, State habeas.
16 MR. CROSS: I would -- Your Honor, I would
17 respectfully disagree that it was prompt since he waited 5
18 years --
19 QUESTION: Well, all right. It was -- it was
20 within the statutory period that we have imposed for these
21 situations where it had -- AEDPA became effective.
22 MR. CROSS: He filed his claim with 7 days
23 remaining --
24 QUESTION: Okay.
25 MR. CROSS: -- in the grace period of the

1 statute of limitations.

2 QUESTION: Now, after the trial court resolved

3 it and denied relief, then there's no review mechanism

4 other than filing an original writ with the court of

5 appeals?

6 MR. CROSS: Correct.

7 QUESTION: Is that how it's done?

8 MR. CROSS: Correct, in California.

9 QUESTION: And is that again a reasonable time

10 period within which to seek review by that mechanism in

11 the court of appeals? Or is there a time limit?

12 MR. CROSS: As far as the -- the time between

13 each original petition, there is no time limit. You would

14 be looking at the overall time period because you're

15 dealing with -- Your Honor, with original petitions here.

16 So he has every right in California to go directly to the

17 California Supreme Court or the Third District Court of

18 Appeal.

19 QUESTION: Well, that's the traditional rule in

20 habeas corpus, at least in -- in England.

21 MR. CROSS: Correct.

22 QUESTION: Wasn't it? That you could go from

23 one court to another and have -- have a different judge

24 look at it in a different proceeding and get a different

25 result.

1 MR. CROSS: Absolutely, Your Honor.
2 QUESTION: But if he goes -- if he's -- I take
3 it, under the California system, if he starts in the
4 Supreme Court of California, and there's a fact issue,
5 they're going to say, go back to the trial court and start
6 there. They're not going to have a factual trial, are
7 they?
8 MR. CROSS: In fact, Your Honor, I'd like to
9 correct a misunderstanding that's promoted by the
10 respondent's brief. If you look at the red brief at page
11 31, it gives the impression that you are indicating that
12 if you were to go directly to the California Supreme
13 Court --
14 QUESTION: Whereabouts on page 31?
15 MR. CROSS: On page 31 at the top paragraph,
16 there's a reference in the third line to In re Hillery.
17 Then there's a reference, the Ninth Circuit case, Harris
18 v. Superior Court, indicating that California appellate
19 courts may refuse to entertain habeas and that it be sent
20 back to the trial court. That's an incorrect statement of
21 law, and I'll refer you to the actual footnote on that
22 page, footnote 19, referring to California Rule of Court
23 56(a)(1).
24 The problem with respondent's position is that
25 he gives a literal quote of 56(a)(1) and it sounds like

1 that's the proposition that you're referring to, but he
2 ignores to cite to the subsection (h), which is, as of
3 January 1st of this year, is now labeled subsection (i),
4 which specifically states, quote -- and the title of the
5 subsection is proceedings not covered by this rule.
6 Quote: the provisions of this rule shall not apply to
7 applications for a writ of habeas corpus or to petitions
8 for review pursuant to rules 57, 58, and 59.
9 QUESTION: Well, what happens --
10 QUESTION: So, you -- you can begin in a higher
11 court.
12 MR. CROSS: Yes.
13 QUESTION: You don't have to begin --
14 MR. CROSS: Right, correct.
15 QUESTION: What happens if you do begin in a
16 higher court and -- and there are disputed factual issues?
17 How do they resolve the factual issues?
18 MR. CROSS: The -- that is explained, Your
19 Honor, in Harris v. Superior Court, the Ninth Circuit
20 opinion --
21 QUESTION: Well, I haven't read --
22 QUESTION: Why don't you tell us?
23 MR. CROSS: I will tell you, Your Honor. The --
24 the way it is handled is the California Supreme Court
25 around 1969 set up a procedure in which for original

1 petitions in the appellate court that are filed there,
2 either in the -- the district court of appeal or the
3 California Supreme Court, they can have a special master,
4 or they can send it back to the trial court, so that
5 there's no prevention from them taking the court and
6 deciding it with or without the hearing. But a prima
7 facie case must be made to them in order for those --
8 QUESTION: Did -- in the proceedings involved in
9 this particular case, did either of the appellate courts
10 go the -- do that?
11 MR. CROSS: No. There was -- the -- the
12 district court of appeal is a one-line denial, simply
13 stating denied. And in the California Supreme Court, the
14 petition was denied on the merits and for lack of
15 diligence.
16 QUESTION: But in this --
17 QUESTION: What happens just as a practical
18 matter? You go to the superior court on a collateral
19 attack with a -- with a petition for a writ, and the court
20 makes lots of findings and rulings of law. Some of those
21 rulings of law are absolutely wrong, but still, the
22 ultimate outcome may be in doubt. And so then the
23 petitioner, the original petitioner, wants to go to the
24 court of appeals. Does -- does he annex what happens in
25 -- in the superior court just for the enlightenment of the

1 court of appeals as to what the issues are or what the
2 wrong rulings were, what the right rulings were, what the
3 findings were?
4 MR. CROSS: The forms, Your Honor, are in the
5 joint appendix where you are expected to indicate -- it's
6 -- all three petitions use the same judicial counsel form.
7 California Supreme Court petition -- if you want to look,
8 it starts at page 31. And there -- I believe there is a
9 question which asks the defendant if they've sought review
10 in another court and to explain what the finding was of
11 that court and what claims were requested. That would be,
12 for example, question 9, did you seek review in the --
13 excuse me.
14 QUESTION: Well, it's just background. I -- I
15 see where to find it now.
16 MR. CROSS: The -- that's the extent of it. And
17 so, the purpose of that question is to determine whether
18 or not it's a -- it's a successive petition so they cannot
19 -- if they had gone to the lower court, it can't be
20 remanded back because the -- if the petition has been
21 denied in the lower court, they don't want to send it back
22 for an evidentiary hearing to the same judge or court who
23 has gone through the proceeding before and denied it.
24 QUESTION: Well, getting to the issue in the
25 case, the respondent's brief points out that under the

1 theory you propose, what would happen if it's the -- the
2 State that's appealing or filing a new -- not appealing,
3 but filing a new action? The -- the prisoner wins in --
4 in the lower court, and then the State files an action.
5 How -- how would you count that or not count that so far
6 as the limitations period is concerned?
7 MR. CROSS: That is the most difficult question
8 that is posed, without question, Your Honor. The response
9 I would have is it appears to me that Congress perhaps did
10 not think of that particular scenario other than perhaps
11 that under 2244(d)(1)(B), the State-created impediment
12 issue would take care of the extreme case where the --
13 where the State was trying to prevent the person's time
14 from --
15 QUESTION: This is the case where the petitioner
16 prevails --
17 MR. CROSS: Right.
18 QUESTION: -- in superior court, and by statute,
19 now California allows the State to appeal that.
20 MR. CROSS: Correct, Your Honor.
21 QUESTION: Well, certainly that would be -- that
22 would be pending all that time, would it not?
23 MR. CROSS: If you --
24 QUESTION: Or would it not?
25 MR. CROSS: If you take the position that it's

1 not an appellate system in a State like California, I
2 don't think it would be.
3 QUESTION: Well, but you know, it can -- it
4 could be not an appellate system from the point of view of
5 the petitioner who has to have an original petition each
6 -- each time he goes again to a new court. But the
7 legislature said, with respect to the State, if the -- if
8 the State loses, it can appeal, then that would be an
9 appellate proceeding, wouldn't it?
10 MR. CROSS: For California -- under California
11 law, Your Honor, absolutely. But as far as this statute
12 is concerned, I think we're interested in what the Federal
13 law is and how the Congress would have viewed it.
14 QUESTION: So, looking at how Federal law --
15 QUESTION: But I -- but -- if -- if I may, just
16 one moment, Justice Breyer.
17 What the Chief Justice suggests is that I -- I
18 did not pose a problem because what happens is is that the
19 State simply appeals the -- what it thinks to be the
20 erroneous ruling, and that means the action is still
21 pending. But I -- I thought from our earlier interchange
22 that you thought there was a bigger problem than that.
23 MR. CROSS: I think there is a bigger problem
24 because if there is -- it depends on when finality occurs,
25 and if -- if you have an original proceeding and the

1 decision is final upon that decision, the clock would, I
2 would assume, start at least under California law. The
3 case laws that's referred to in the yellow brief under
4 subsection (c) --
5 QUESTION: Well, but the Chief Justice suggests
6 it's not rocket science for us to say it's still pending
7 if there's an appeal.
8 QUESTION: Well, I -- I thought your --
9 QUESTION: Or am I missing something?
10 QUESTION: I am confused now. I thought your
11 position was that the case may well be pending, as Justice
12 Kennedy says, but there's no application pending --
13 MR. CROSS: Correct.
14 QUESTION: -- on the appeal. The application
15 has been disposed of in the first court. There's an
16 appeal, but there's no longer an application pending. And
17 that's how the statute reads, not the case is pending.
18 MR. CROSS: Right.
19 QUESTION: There is an appeal? I thought that
20 what happened -- I guess I'm mixed up. Maybe go back to
21 Justice O'Connor. But I thought I understood this. I
22 thought that they -- but that there is -- first of all,
23 you file in the district court normally. You don't have
24 to in California.
25 QUESTION: Superior.

1 QUESTION: But almost always they'll go to the
2 superior court and file a petition. And then in every
3 other State, the losing party would appeal, but in
4 California, they use different words. The words are not
5 you appeal; the words are you file a new petition in the
6 court of appeals. And indeed, if you lose there, the
7 words are not you have 10 days to seek review in the
8 Supreme Court; the words are you have whatever time you
9 want. You have to file a new petition in the Supreme
10 Court, but if you're too late, they're going to tell you
11 you're too late.
12 So, it functions exactly as if the words were
13 the following. You must appeal within -- now, normally it
14 will say 60 days, but in California it says within a
15 reasonable time.
16 Now, those aren't the words of the statute, but
17 that's how it functions. And if we don't read it that way
18 for purposes of Federal law, I guess we'd have to say that
19 in 10,000 case a year in the California superior courts
20 involving State habeas petitions -- as soon as those are
21 decided, they have to come here because they're all final
22 decisions of the State Supreme Court. And 5,000 cases in
23 the courts of appeals in California. Once they said
24 final, they have to come here. So, we better have 20,000
25 new petitions each year from the State of California

1 because California happens to use the word final and new
2 petition instead of using the word appeal.
3 Now, what's wrong with what I said?
4 MR. CROSS: What's wrong with what you said,
5 Your Honor, first of all, is that although California may
6 say that it's final at that level, it does not prevent the
7 individual from going to either of the other two next
8 levels or skipping one and going to the other because they
9 are in fact original and in fact not -- it's more than
10 just mere semantics because they can go to California with
11 different claims. It doesn't have to be the same petition
12 at all.
13 QUESTION: Justice Breyer suggests that when you
14 go, say, from the superior court to the district court of
15 appeal, it's -- it's like an appeal. Well, now, is there
16 a transcript of the record made in the superior court that
17 you have to file with the district court of appeal like
18 you would in other appeals?
19 MR. CROSS: Typically not. There could be some
20 circumstances, under rare circumstances, where the
21 superior court would have some sort of evidentiary
22 hearing. There would be a transcript.
23 QUESTION: Do you have to file a notice of
24 appeal in the superior court to go to the district court
25 of appeal?

1 MR. CROSS: No, Your Honor.
2 QUESTION: In other words, in the -- I've never
3 heard of this, and I know a lot of California lawyers. I
4 thought when you go to the superior court in California --
5 a prisoner and he says, I raise issues 1, 2, and 3, and
6 they have a record and they decide it. And now you go to
7 the California court of appeals. I thought in the normal
8 case they'll say, and the superior court judge made an
9 error, and the reason he made an error is because of --
10 and then they'll cite witnesses just like an appeal.
11 Now, I grant you they can do some extra things.
12 They can raise extra issues if they want, and they don't
13 have to raise everything below like any other appeal. But
14 aside from that, I don't know the differences. I've been
15 around for a while. I've seen a few cases. I've never
16 noticed some big difference. Now, you'll tell me I'm all
17 wrong about California, and I'm open to hearing that.
18 MR. CROSS: The California case law, in fact,
19 indicates that --
20 QUESTION: I'm not interested in California case
21 law. I want to know what the practice is in California.
22 MR. CROSS: The practice is quite different from
23 the description that you gave.
24 QUESTION: Fine. That's what I want to know.
25 MR. CROSS: In fact, there are -- I don't have

1 the exact statistics, but in my 15 years of experience in
2 practicing, I have seen probably around 40 to 50 percent
3 of the cases not go to the trial court, that in fact, very
4 commonly they go directly to the California Supreme Court,
5 and they are denied. That's a very common experience in
6 California --
7 QUESTION: Then can they go -- start over again
8 and go down to the trial court and the court of appeals?
9 MR. CROSS: Not -- Your Honor, not on those same
10 claims, they certainly can't. California and other States
11 would perhaps bar successive petitions if it's the same
12 claims. It doesn't necessarily prevent them from coming
13 back with something else that they've discovered at a
14 later time --
15 QUESTION: There's no bar in California to going
16 back as many times as you want if you have a new claim
17 each time?
18 MR. CROSS: There are escape clauses in
19 California, as well as other States, that -- that allow
20 you, if you discover, just like the Federal statute, new
21 claims.
22 QUESTION: All right. What -- what is the
23 general rule in other States that are unlike California
24 that say you go for post-conviction relief first to the
25 trial court? Let them decide it. Then you have 30 days

1 or whatever it is to go to the court of appeals. If
2 that's denied, you have X number of days to go to the
3 State Supreme Court.
4 Now, in a State like that, is it the case that
5 in applying AEDPA in this statute of limitations, that we
6 exclude all of the time for decision making as well as
7 that statutory time within which to file the appeal?
8 MR. CROSS: AEDPA grants --
9 QUESTION: Is that what a majority of courts are
10 holding?
11 MR. CROSS: The majority of courts are holding
12 that -- and the statute specifically provides for tolling
13 for all the time in which the decision -- excuse me -- in
14 which the petition is before a court. That's, you know,
15 specifically provided.
16 QUESTION: Well, yes, but is it -- is it the
17 case that most courts are holding, under the scheme I
18 described, that not only while the court is deciding it,
19 but the time allowed to enable them to go to the next
20 higher court is excluded as well?
21 MR. CROSS: The majority of courts are holding
22 that you will get time for the appeal time that's
23 specified by the State, for example, 60 days or 90 days.
24 QUESTION: Yes, all right. So, the problem with
25 California is we have no time specified. We have a

1 reasonable time. How are we supposed to decide what's
2 reasonable in California? Should we certify a question
3 back to the California Supreme Court and say, was this a
4 reasonable time? How do we know?
5 MR. CROSS: One --
6 QUESTION: What do we do?
7 MR. CROSS: One suggestion that was made in the
8 amicus briefs by the Criminal Justice Legal Foundation is
9 to adopt the nearest analogous State rule, which in
10 California under rule 2 or 30 through 31 would be 60 days.
11 That's one thing that could be done by the court which
12 would stretch the statutory language to -- to bring
13 California into an appellate system which --
14 QUESTION: Wouldn't that be up to California to
15 do? What we have is a system that allows a reasonable
16 time. I'm asking you how we determine what is a
17 reasonable time.
18 MR. CROSS: I think, Your Honor, the way to
19 determine a reasonable time would be to look at the
20 California rules for their original habeas petitions and
21 determine that under California law, we know that -- that
22 you are expected to file no longer than 90 days in a
23 capital case without having a presumption of timeliness --
24 QUESTION: May I just interrupt --
25 MR. CROSS: And that would be the absolute

1 outside limit for a determination of what would be
2 reasonable.
3 QUESTION: But may I just ask this question? If
4 in this case the California court did decide on the merits
5 -- apparently -- it's a little ambiguous, but it seems to
6 -- wouldn't that definitely disclose a decision that it
7 was reasonable? They took jurisdiction.
8 MR. CROSS: No, Your Honor. I -- I believe that
9 the -- the interpretation would be that even though a -- a
10 State Supreme Court decided, at least alternatively on the
11 merits -- simply indicates that for one reason or another,
12 they decided to perhaps excuse untimeliness if they didn't
13 have a -- an untimeliness finding --
14 QUESTION: To excuse untimeliness, they're
15 saying in this particular case we think it must have been
16 reasonable. Aren't -- isn't that -- doesn't that
17 necessarily follow?
18 MR. CROSS: In this particular case, they said
19 he acted with a lack of diligence.
20 QUESTION: But that might have been --
21 QUESTION: No, but it didn't excuse
22 untimeliness. Untimeliness was one of the two bases for
23 their decision, wasn't it?
24 MR. CROSS: In this case, absolutely.
25 QUESTION: We don't know whether that

1 untimeliness was the 5 years that he took to even get
2 started.
3 There's one fact question here that may make the
4 rest of this rather abstract. This petitioner says that
5 he never got notice of the -- of the intermediate
6 appellate court's decision and he -- when he did -- I
7 mean, the only gap here that's relevant for AEDPA -- the 5
8 years is gone. He gets that free. But the only gap we're
9 talking about, as I understand it, is the 4-and-a-half
10 months. And he says, as to that, I never knew. I wrote a
11 letter and finally they told me, and within 3 days after I
12 got notice, I filed in the next court. So, I was diligent
13 from the time I knew of that decision.
14 There is no -- there's been no determination by
15 anybody whether that 4-and-a-half-month interval was
16 beyond his control. I mean, you recognize that there
17 would be an exception for situations beyond his control.
18 So, how do we determine whether there was any lack of
19 diligence with respect to that 4-and-a-half months? This
20 record is totally blank on it.
21 MR. CROSS: Your Honor, this situation is even
22 more perplexing than what you set forth because there are
23 three possibilities. One is that it's the 5-year period
24 the California is returning to -- referring to. Another
25 possibility it's just the 4-and-a-half-month. And the

1 third possibility is the combination of all of those
2 periods.
3 The question simply is what is meant by timely
4 and what is meant by properly pursuing.
5 QUESTION: Well, and also I think what is meant
6 by pending because if -- if we were -- if it were
7 determined that these separate matters, as you say, before
8 three different courts were pending only during the time
9 those particular courts had them for consideration, it
10 might be quite a different result than if you say look at
11 the reasonableness of the whole series of proceedings
12 together.
13 MR. CROSS: Your Honor, absolutely that is
14 correct. If we look at the language --
15 QUESTION: Mr. Cross, as -- as I understand your
16 submission, it doesn't matter. That was not the ground on
17 which the Ninth Circuit decided the case, you contend.
18 They decided it simply on the ground that the Supreme
19 Court of California addressed the merits. End of case.
20 MR. CROSS: Right.
21 QUESTION: Right?
22 MR. CROSS: The California Supreme Court holding
23 and the -- the problem it presents for the statute is --
24 is that it eviscerates the statute by holding that as long
25 as -- as the State Supreme Court addresses the merits,

1 that regardless of the length of the delay, which could be
2 not just 4-and-a-half months in this case, but 4-and-a-
3 half years or 4-and-a-half decades, they will excuse the
4 delay.
5 QUESTION: But isn't the -- the answer that --
6 your -- your friends on the other side give a -- a good
7 answer. They say, look, the -- the point of requiring
8 speed here is to preserve the State interest and make sure
9 States don't have to retry cases years and years later and
10 there's relative finality and so on.
11 If the State wants to allow this kind of, in
12 effect, dilatory proceeding, the State has no claim to be
13 offended by it. It's in the State's power. So, if the
14 State wants to give you 10 years for habeas, the State
15 hasn't got any complaint. It gave the 10 years and it can
16 change its rule if it wants to. What's the answer to
17 that?
18 MR. CROSS: Your Honor, the answer to that is
19 that this is a Federal statute not a State statute. We're
20 not changing the --
21 QUESTION: It is a Federal statute that is keyed
22 to a State statute, and the point of doing this is to
23 preserve the State's interest in -- in finality in their
24 own proceedings and to -- to protect the State from being
25 forced, in effect, to retry cases years and years in the

1 future after the -- the evidence has grown stale.
2 MR. CROSS: That's --
3 QUESTION: And if that -- if those are the
4 objectives of the statute -- and I thought they were --
5 then California, in effect, or any State can control the
6 proceedings simply by its own time schedule.
7 MR. CROSS: Your Honor, that is certainly one of
8 the objectives of the statute, but there are a number of
9 policy interests related to the statute of limitations
10 itself which is part of AEDPA. You're absolutely correct
11 in that finality is one of the three main concerns of
12 AEDPA itself, but there are other concerns and policy
13 concerns related to the statute itself.
14 QUESTION: Mr. Cross, a State Supreme Court that
15 had that attitude, that didn't care that you were late,
16 would not -- would not have dismissed this case on two
17 grounds, one of which is it's untimely. That's not what
18 we have here. We don't have a situation in which the
19 California Supreme Court said, we don't care how late it
20 is; we're going to decide it on the merits. It decided on
21 two grounds, one of which is you -- you are too late under
22 our -- under our rules. And -- and the Ninth Circuit just
23 ignored that. Isn't that right?
24 MR. CROSS: That's absolutely right, Your Honor.
25 QUESTION: Isn't the counter argument equally

1 possible? A State that was really concerned about
2 timeliness would not have decided the case also on the
3 merits as an alternative ground. Therefore, if it does
4 decide that it's significant enough to get into the
5 merits, we ought to take the -- the State Supreme Court at
6 its word and say, if there was a merits determination, it
7 obviously was not untimely in -- in any dispositive sense.
8 Why isn't that an equally good interpretation?
9 MR. CROSS: I think, Your Honor, this Court has
10 stated before in Coleman v. Thompson that we -- that you
11 don't want to direct the State courts how to issue their
12 rulings for whatever State reasons they have for doing it.
13 QUESTION: No, but when the State says two
14 things and they seem to be in contradiction -- if it's
15 untimely, then you don't get to the merits. It's -- it's
16 unreasonable in time. If you do get to the merits, it
17 suggests that there is something timely about it.
18 And all, I think, the Ninth Circuit was saying
19 and all I'm suggesting is we're not mind readers. We
20 can't say, well, we guess they really meant the first part
21 of -- the first reason they gave or they really meant the
22 second reason. We're simply going to come up with a --
23 with a rule that everyone will understand and that the
24 State courts can understand.
25 And if they get to the merits, we're going to

1 deem it timely because we -- we assume these people are
2 not going to be reaching merits decisions on -- on matters
3 that are totally untimely under their law. Why -- why
4 doesn't that respect the State courts, give a rule that
5 everybody pretty much can follow and know where he stands?
6 MR. CROSS: Your Honor, because it would, in
7 effect, eviscerate the statute of limitations under
8 Federal law. If you have unlimited tolling for 20 or 30
9 years, there is not much left of the 1-year Federal
10 statute of limitations. And under Harris v. Reed,
11 alternative --
12 QUESTION: What's left is a 1-year Federal
13 statute of limitations after the conclusion of the State
14 proceedings, and if the State proceedings were begun in a
15 timely fashion, I don't know what else the statute is
16 supposed to accomplish.
17 MR. CROSS: Well, Your Honor, the statute --
18 statutory schemes across the country -- there's a wide
19 variety, of which there are over 20 States that have no
20 statute of limitations.
21 QUESTION: Do you know how the California
22 Supreme Court operates generally with respect to petitions
23 of this kind, post-conviction petitions? Is it common for
24 them to say on the merits, but anyway it's untimely, or do
25 they often say it's untimely, that's the end of it without

1 going on to the merits?

2 MR. CROSS: It's usually a combination, Your

3 Honor. There's in fact, a dispute between the members of

4 the California Supreme Court as to whether to even pose

5 procedural bars. Justice Brown has argued that it only

6 should be addressed on the merits. So, there's a

7 combination usually or sometimes just a denial on the

8 merits.

9 If you don't mind, Your Honor, I'd like to

10 reserve the remainder of my time.

11 QUESTION: Very well, Mr. Cross.

12 Mr. Ogden, we'll hear from you.

13 ORAL ARGUMENT OF DAVID W. OGDEN

14 ON BEHALF OF THE RESPONDENT

15 MR. OGDEN: Mr. Chief Justice, and may it please

16 the Court:

17 I would like to go directly to the two most

18 difficult questions that I need to answer this morning and

19 which have been addressed extensively thus far.

20 First, that the rule adopted by the -- by the

21 unanimous courts of appeals that any gaps between stages

22 of the State habeas process should be tolled so long as

23 the next stage is initiated in a timely fashion should

24 apply to California.

25 And second --

1 QUESTION: What happens if it -- go on. Give us
2 your second --
3 MR. OGDEN: And -- and the second point that I'd
4 like to address is that under that rule on the record in
5 this case, there is an insufficient basis to conclude that
6 the filing in the State Supreme Court was late and
7 therefore that the judgment below should be affirmed.
8 QUESTION: Are you going to cover the question
9 of whether these various actions were pending and for how
10 long?
11 MR. OGDEN: Yes, Your Honor. That's the first
12 -- that's -- that's the first subject that I'd like to
13 cover because I know that one of the concerns and one of
14 the difficulties of this case is applying the concepts of
15 the statute to California's unique system.
16 Now, California's system of original writ should
17 be subject to the rule that tolls the entire period of
18 time for two reasons. First, that is the best
19 understanding of the text of the statute because
20 California's system --
21 QUESTION: The text of AEDPA or the text of
22 California's statute?
23 MR. OGDEN: Of AEDPA, Your Honor, of -- of
24 section 2244(d)(2).
25 Because California's system functions as an

1 integrated appellate style process for prisoners seeking
2 to exhaust State remedies.
3 And second, because just as in other States, the
4 so-called gap theory espoused by the State would
5 discourage prisoners from making full use of California's
6 process and encourage premature Federal filings.
7 Now, turning to the text of the statute -- and
8 Justice Scalia asked about the -- about the word
9 application in particular -- Congress wrote a statute in
10 general terms intended to apply nationwide. It does not
11 turn on the particular form of pleading or the nature of
12 the action. To the contrary, an application within the
13 meaning of the statute is simply a request for relief so
14 long as it is submitted in the context of, as the statute
15 phrases it, State post-conviction or other collateral
16 review.
17 Now, that request for relief is distinct from
18 the claims that support it, and it is pending so long as
19 it -- as it is unresolved in the State system.
20 QUESTION: You -- you say the -- the application
21 is distinct from the claim. Granted, both words -- how
22 does that work out?
23 MR. OGDEN: The claims are the arguments that
24 support the request for relief in -- in a habeas or post-
25 conviction context. Typically the request is to be

1 released from an unconstitutional confinement. That
2 request is supported by -- by a set of claims. And -- and
3 it's the request that constitutes the application.
4 QUESTION: But, you know, we were confronted
5 with precisely the same argument in Artuz which dealt with
6 what constitutes a properly filed application. And the
7 argument was if the claim is not a proper claim, if it
8 does not lie under the State law, it is not a properly
9 filed application. And we held, no, that's not so. An
10 application is an application and a claim is -- is a
11 claim. And the -- the application is properly filed so
12 long as it's given to the -- you know, to the proper clerk
13 in the proper court and -- and so forth. Now, dealing
14 with the very same -- very same provision of law.
15 MR. OGDEN: Yes, Your Honor. I believe my
16 argument is entirely consistent with Artuz. Indeed, it's
17 -- it's really based on the reasoning there.
18 Artuz makes a distinction between bars that go
19 to claims and bars that go to the form of the -- of the
20 application itself. My submission is that the application
21 is the request for relief, that is, regardless of what
22 form it takes and what kind of proceeding, it is a request
23 that contains claims in the same way that an application
24 contains claims. A request is an application. And that
25 request, the request for relief, continues to be pending

1 within the meaning of the statute until the -- until it is
2 resolved within the State system.
3 Now, in the California system, that request for
4 relief, that request to be released from confinement,
5 continues to be unresolved so long as there is another
6 court to which one can bring a -- a petition to review a
7 decision.
8 QUESTION: Or presumably you could go back and
9 forth to a number of California courts, if you come up
10 with, you know, a different argument and that sort of
11 thing.
12 MR. OGDEN: Yes, Your Honor, you could present
13 different claims. But the way the California system
14 functions is that the -- the design of it where factual
15 development is required, quite naturally, is that that
16 claim should be brought in the superior court.
17 As we say in our brief, if you attempt to file
18 an original petition initially in a higher court and
19 factual development is required, typically if it's a non-
20 capital case, what that court will do is to issue an order
21 to show cause, returnable in the superior court. And once
22 you are there as a -- as a petitioner, if you lose, your
23 only recourse for further review is to file an original
24 petition yet again above.
25 Now, critically from the standpoint of

1 understanding whether this is an appellate system or a
2 system of completely independent free-standing
3 applications, it's important to understand that when one
4 goes from the superior court where one develops a record,
5 Your Honor, to -- to the court of appeal, that -- that
6 next filing is not considered a successive petition under
7 California law. It's not considered a second --
8 QUESTION: What do you mean -- what do you mean
9 by a -- do you mean the same thing as an original
10 petition?
11 MR. OGDEN: It's called an original writ.
12 QUESTION: Yes. So, what -- what do you mean by
13 the term successive?
14 MR. OGDEN: Successive petition is a procedural
15 bar under California law, which if you bring a second
16 petition that contains claims that could have been, but
17 were not, contained in your first petition or that
18 contains the same claims as were contained in your first
19 petition, it's dismissed as a matter of procedural law in
20 California as a successive petition. That successive
21 petition bar does not apply --
22 QUESTION: What does it look like in practice?
23 I mean, I had thought, as you were saying, that whatever
24 they call it, they call the trial court original, they
25 call the court of appeals original, they call the supreme

1 court original. But despite that, to an outside observer
2 who wasn't looking at the names, it would look pretty much
3 like any other State where you get an initial hearing and
4 then you get some appeals.
5 Now, there's obviously the difference, you could
6 file new claims at the second level, but leaving that
7 aside, it would look -- now, the attorney general said I'm
8 wrong on that, absolutely wrong, that that isn't what it
9 looks like, that sometimes at least it's random, sometimes
10 they -- they -- just as many might likely file, I guess,
11 in the court of appeals as the district court. They might
12 file in the supreme court. Maybe they look for appeal in
13 the -- in the trial court. I don't know. But it's a
14 random and -- and, indeed, if you go to the court of
15 appeals, you'll see they don't even look at the record in
16 the trial court.
17 All right. Now, he says that's how it's worked.
18 He's been around a long time. And at that point, I'm not
19 sure what to do frankly.
20 MR. OGDEN: Well -- well, it's -- it is
21 difficult because so much of this turns on California law.
22 But --
23 QUESTION: I mean, what does it look like? I
24 don't know how you get to that question.
25 MR. OGDEN: Well, what -- what it looks like, as

1 described in a case called In re Resendez, which is not
2 cited in our brief is --
3 QUESTION: You didn't --
4 MR. OGDEN: 19 P.2d, Pacific Second, 1171.
5 QUESTION: What's the date of that case?
6 MR. OGDEN: It's 2001, Your Honor.
7 QUESTION: Pacific Second?
8 MR. OGDEN: Pacific Third, 1171 at 1184.
9 That -- that case makes clear in discussing the
10 situation in which a subsequent original writ is filed --
11 originally filed in the superior court and you have
12 findings of fact made by the superior court. It is then
13 filed subsequently in the court of appeal and then --
14 QUESTION: When you say it is then filed, what
15 do you mean by it?
16 MR. OGDEN: A petition encompassing the same
17 claims is filed in the court of appeal and then again in
18 the supreme court.
19 First of all, the record is -- the record
20 generally forms the basis for that review. And in Gardner
21 against California in 1969, looking at this very system
22 for -- for handling habeas petitions on original writ,
23 this Court decided that the system was sufficiently
24 similar to an appellate process that a habeas petitioner
25 filing an original writ in the court of appeal was

1 entitled at State expense to a transcript of the
2 proceeding in the -- in the superior court because the
3 procedure in the court of appeal is essentially record
4 review.
5 QUESTION: Mr. -- Mr. Cross said -- and it would
6 be extraordinary if it's record review, but you don't have
7 to file the record. When -- when you go into the court of
8 appeals, do you have to file the record of -- of the
9 decision below?
10 MR. OGDEN: You certainly can file the record
11 and the clerk can request it.
12 QUESTION: Do you have to?
13 QUESTION: Do you have to?
14 MR. OGDEN: I don't know the answer to that,
15 Your Honor, as to whether it's required.
16 QUESTION: Is it ordinarily done?
17 MR. OGDEN: I -- I think ordinarily there -- the
18 record consists of the petition and the decision below.
19 But if there is a hearing where witnesses are presented, I
20 believe it is ordinarily done, and that's why --
21 QUESTION: That's not what the -- that's not
22 what Mr. Cross said.
23 MR. OGDEN: That's --
24 QUESTION: What is your -- I mean, Mr. Cross
25 apparently has been practicing in California for 15 years.

1 I think if you're going to make -- you don't claim to be
2 personally familiar with California law, do you?
3 MR. OGDEN: No, I don't, Your Honor.
4 QUESTION: Okay. Then I think perhaps you
5 should cite some authority.
6 MR. OGDEN: Well, I -- I cite for the
7 proposition that -- that the record is part of the -- the
8 process in the court of appeal, both the Resendez case --
9 QUESTION: But you say the record is part of the
10 process in the court of appeal. That's a very, very vague
11 statement.
12 MR. OGDEN: Well --
13 QUESTION: What we want to know is typically in
14 an appeal, you'd have a record from the superior court.
15 You're appealing from the superior court or the district
16 court of appeal, you have to -- you must file the record.
17 It's a part of the -- before the court of appeals will
18 hear your claim.
19 MR. OGDEN: The best I can do, Your Honor, is to
20 refer to these three cases -- the Resendez case, the
21 California Supreme Court decision at -- which I've given
22 the cite for; In re Wright, which is 78 Cal. App. 3d at
23 801 to 802; People against Singer, which is 226 Cal. App.
24 3d at 32 -- which make clear that the process of reviewing
25 these matters coming from the superior court where there's

1 been a prior petition there and the same claims are
2 brought in the next court is a process of reviewing the
3 record, and where what is presented are findings of fact
4 by the superior court that are based on credibility
5 determinations, great weight is given to those credibility
6 determinations by the reviewing court. And -- and that is
7 the -- the fundamental functionality, the way the system
8 works.
9 It can be used in other ways without question.
10 A petitioner can attempt to file, you know, claims at a
11 higher level.
12 QUESTION: You've practiced here a lot. I mean,
13 if the -- if the superior court decision in a State habeas
14 matter is a final decision and there's no more review of
15 it in the State, I guess then we have jurisdiction to
16 review that. But I have never seen someone come here
17 directly from the decision of the superior court of
18 California in a State habeas matter. Maybe they just
19 haven't thought of it.
20 MR. OGDEN: Well, no, Your Honor, they're not
21 permitted to, and I think that's a very important --
22 QUESTION: We wouldn't issue habeas when -- when
23 you have failed to exhaust all of your State remedies
24 whether it's by appeal or not by appeal. If you still
25 have State remedies available, we wouldn't issue Federal

1 habeas. It -- it would be useless to come here.
2 MR. OGDEN: This -- this Court's decision in the
3 O'Sullivan case has been applied by the Ninth Circuit in
4 -- in the case called James against Giles, which states
5 that it is a requirement, in order to fully exhaust one's
6 State remedies, that one file and submit one's claims to
7 the California Supreme Court.
8 QUESTION: Of course, and that applies whether
9 it's an appeal or whether it's an independent action. I
10 mean, it -- it sheds no light upon -- upon the central
11 issue here.
12 MR. OGDEN: Well, I --
13 QUESTION: Whichever one it is, you have to
14 exhaust those remedies before you apply for Federal
15 habeas.
16 MR. OGDEN: I think it sheds substantial light
17 on it, Your Honor, because as was made clear in Duncan
18 against Walker by this Court, the very purpose of this
19 tolling provision is to facilitate and to, indeed, promote
20 the full and complete exhaustion of State remedies.
21 QUESTION: Okay. Well, let me ask you this.
22 Suppose that a -- a prisoner has filed in California for
23 State post-conviction review in the superior court and
24 then in the court of appeals and then makes no filing in
25 the State supreme court, could but years go by. Then

1 there's a petition filed for habeas in the Federal court.
2 Now, the Federal court under your view presumably would
3 have to say, no, it's still pending in the State court.
4 MR. OGDEN: I believe the appropriate course for
5 the Federal court in that situation --
6 QUESTION: What would you do?
7 MR. OGDEN: -- would be to apply this Court's
8 decision in O'Sullivan against Boerckel and deem the
9 petition to be unexhausted. At that point, the petitioner
10 could apply to the California Supreme Court.
11 QUESTION: And say it is unexhausted and -- and
12 the -- a Federal statute of limitations hasn't run.
13 MR. OGDEN: Because simply it's unknowable. You
14 asked the question earlier whether -- who decides whether
15 it's a reasonable time or not, and I think it's very clear
16 the design of the statute of -- of 2244(d)(2) is that the
17 State of California decides. Whether something continues
18 to be pending in exhaustion law is a question of whether
19 it is possible whether there is a -- an available
20 procedure under State law to raise the claim to a higher
21 level.
22 QUESTION: Okay. Let's -- let's continue that
23 hypothetical that Justice O'Connor gives. There's a long
24 wait, years of wait. They go to the -- the prisoner goes
25 to the California Supreme Court. The California Supreme

1 Court said, you are late. You have lacked diligence. We
2 will not rule on the merits. Dismissed. When does the
3 Federal statute -- how does the Federal statute apply
4 there?
5 MR. OGDEN: That implicates a -- a circuit split
6 that's not presented in this case, Your Honor. There is a
7 difference of opinion among the circuits about how to
8 apply the -- the endpoint of -- of the tolling process.
9 In the majority of circuits, tolling terminates at the
10 point it is no longer possible to file a --
11 QUESTION: What is the position that you urge
12 upon us here in that instance?
13 MR. OGDEN: Your Honor, I don't believe it's --
14 it is important for my client what the answer to that
15 question is because the second point I want to make this
16 morning is that the submission to the California Supreme
17 Court was not late under California law.
18 QUESTION: I'm trying to -- I'm trying to
19 interpret the statute, and so I imagined this case and I
20 want to know how it would come out --
21 MR. OGDEN: I think the most --
22 QUESTION: -- under your view.
23 MR. OGDEN: I'm sorry. I think the most natural
24 interpretation of the statute is the majority of the
25 court's view which is that it continues to be pending

1 until it is too late to file a submission, and then the
2 opportunity to file -- if you file for leave to file out
3 of time, that would then resume the tolling if that motion
4 were granted. In California, that --
5 QUESTION: Retroactively. I mean, there's a
6 split. There are real problems and -- and those problems,
7 as well as the problems with the California system, seem
8 to me good reason to read the statute the way it's written
9 so that there has to be an application pending, not -- not
10 a case pending, but an application. On appeal, it could
11 be the application of either the petitioner or the
12 government if it lost, but the only time counted is the --
13 is the time during the pending application. Then you
14 would not have to worry about these problems. What
15 happens if they accept a -- you know, a late petition?
16 Does it automatically toll retroactively for the -- for
17 the period after the due date and so forth?
18 MR. OGDEN: Your Honor --
19 QUESTION: None of those problems exist if you
20 -- if you say it's pending when it's pending.
21 MR. OGDEN: I think those problems are more
22 complicated in a system like California's or North
23 Carolina's which is an appellate system that involves an
24 unreasonable delay standard than they are in a -- in a
25 system that has clear time lines. And California and

1 North Carolina, if they don't like the way it's playing
2 out under their provisions, can simply create time
3 lines --
4 QUESTION: Mr. Ogden --
5 QUESTION: Just so -- just so I understand your
6 answer. In the case that I put that I didn't quite get
7 the whole -- the California court says, you've waited 4
8 years. That's too late. How do I apply the statute of
9 limitations to that context or the pending rule that we're
10 discussing?
11 MR. OGDEN: I -- I believe there are about three
12 different ways that you can --
13 QUESTION: And what is -- what is your
14 submission as to how we ought to interpret the rule in
15 that instance?
16 MR. OGDEN: My submission would be that until
17 the California Supreme Court indicates how long the time
18 period is that -- that he would have had to file, the best
19 thing to do is to look to evidence of other cases that
20 have been decided by California to determine what is an
21 acceptable gap in the process.
22 And that's why in this case the evidence is
23 absolutely overwhelming that the 4-and-a-half-month period
24 that the State relies on simply wasn't the basis for the
25 California Supreme Court's decision.

1 QUESTION: How is that? It seems to me the
2 record is a blank on that, and with all this talk, if you
3 don't count those 4-and-a-half months, he's timely no --
4 no matter whether it's discrete applications. So, what do
5 we do? He says, I never got that notice. And it's not
6 established in the record whether he did or he didn't.
7 MR. OGDEN: Well, the only evidence in the
8 record is that he did not. He submitted a sworn statement
9 to that effect in the California Supreme Court in his
10 petition.
11 But as the Ninth Circuit said, there are two
12 possible bases for the lack of diligence finding in the
13 record. One is 5 years before he filed his initial claim.
14 The other is this 4-and-a-half-month period in which he
15 says and swears that he did not receive notice.
16 The -- when you look at the record of the minute
17 orders that have been entered by California on the very
18 day and in the very weeks -- the California Supreme Court
19 -- around when Mr. Saffold's case was dismissed, you see
20 that cases -- for example, the Davis case. There was an
21 18-month gap between the decision in the court of appeal
22 and the petition in the California Supreme Court, and the
23 California Supreme Court simply denied it, which under the
24 Ylst standard, looking through, goes back to the merits
25 determination before. No lack of diligence, no

1 untimeliness.
2 In the Sampson case, over 9 months had elapsed
3 between the court of appeal decision and the supreme court
4 decision. Again, absolutely no indication of a lack of
5 diligence or untimeliness.
6 In the Viegas case, over 7 months elapsed
7 between the court of appeal and the decision -- and the
8 petition. No explanation from Mr. Viegas, as there wasn't
9 from Davis and nothing meaningful from Sampson for the
10 delay again. And the Saenz case is another.
11 So, there are those four --
12 QUESTION: Is -- is there any -- some
13 possibility that those perhaps inconsistent rulings coming
14 from the Supreme Court of California might be based on
15 what Mr. Cross referred to as the division of opinion
16 within that court as to whether they should give any sort
17 of an explanation?
18 MR. OGDEN: Your Honor, I think anything is
19 possible because, as -- as somebody said, we're in a mind-
20 reading mode here, and so certainly that's possible. And
21 I can't stand here and tell you it is impossible that they
22 simply acted in an -- in an irrational and inconsistent
23 fashion.
24 The fact is while Mr. Saffold submitted a -- an
25 explanation which, at least on the surface, has some

1 appeal to it, none of these others did, and yet much
2 longer periods of time --
3 QUESTION: That's not the basis on which the
4 Ninth Circuit decided the case. It did not resolve
5 whether, you know, the 4-and-a-half or the other one. It
6 -- it did not do it. It just simply said, since the
7 Supreme Court of California alternatively addressed the
8 merits, that's the end of it. And so you're -- you're not
9 defending their basis for -- for deciding the case?
10 MR. OGDEN: I think it's somewhat unclear what
11 the Ninth Circuit's basis was, Your Honor. I concede
12 that. To the extent that the Ninth Circuit held that a --
13 a ruling on the merits would trump a clear finding by the
14 -- by the California Supreme Court that the petition to it
15 was untimely, I think that would be an -- an incorrect
16 interpretation of the statute. That's my view.
17 QUESTION: What would you say to the possibility
18 that we might certify the question to the California
19 Supreme Court whether this case was dismissed because it
20 was untimely?
21 MR. OGDEN: The critical question would be
22 whether the case was dismissed based on the gap between
23 the court of appeal and the supreme court as opposed to
24 the -- the portion that preceded the original filing in
25 the -- in the trial court which obviously could not make

1 the case stop pending once it began to pend.
2 But I believe that certification would not fit
3 the profile in California for certified questions. They
4 -- they certify questions of law, and this is -- this is
5 an --
6 QUESTION: Have -- have any courts considering
7 this AEDPA statute applied it in the way Justice Scalia
8 suggests that we look at pending and place all the
9 emphasis there and exclude all time after a decision by a
10 State court until the next filing?
11 MR. OGDEN: 11 courts of appeals have considered
12 that issue to this point, Your Honor, and all 11 have
13 adopted the view that the entire period of time should be
14 tolled.
15 QUESTION: Were any of them dealing with a
16 system like California's?
17 MR. OGDEN: The Ninth Circuit in this case and
18 in the Nino case previously, but no other -- no other --
19 none of the other cases really deal with that --
20 QUESTION: Can we use Justice Scalia -- he just
21 suggested an idea that -- that -- if this is right
22 factually as to how it works. Suppose you go into the
23 district court -- the superior court, trial court. All
24 right. Now I get a decision there. Now, I take it, under
25 California law, I cannot file a complaint about how the

1 judge decided it, i.e., an appeal, quotes, in any other
2 superior court, but I can do it in a higher court. Am I
3 right? Because they'll treat it as successive if I go to
4 the parallel level, but if I go to the next level, they
5 won't treat it as successive.
6 MR. OGDEN: That's my understanding.
7 QUESTION: But then if in fact I wait too long,
8 I'm beyond a reasonable time.
9 MR. OGDEN: That's correct.
10 QUESTION: And so, to put in terms of exhausted,
11 unexhausted as if he did -- as he did, you'd say the only
12 unexhausted remedy you have left to you, once you're in
13 the superior court, is to go up, as long as you do it
14 within a reasonable time. But once you exceed the
15 reasonable time, you're out.
16 MR. OGDEN: That's correct.
17 QUESTION: All right. So, what we would have to
18 say is that that system, looking to the exhausted instead
19 of the technical word appeal, we'd get to approximately
20 the same place, and then our issue would be, well, was
21 this beyond a reasonable time or not. And then I'd have
22 to say maybe we don't know. We'd have to find out in some
23 way or other. That -- that --
24 MR. OGDEN: Well, I think the general
25 description is fine and I think it's true that we don't

1 know whether it was considered unreasonable by the
2 California Supreme Court.
3 QUESTION: I mean, I can't see how we can accept
4 the Ninth Circuit's reasoning frankly because they said
5 the very fact that they say both, the very fact that they
6 say we'll consider it on the merits but it's untimely,
7 that that means that it wasn't untimely. Of course, they
8 didn't use the word untimely. They used a different word
9 which is harder to understand.
10 MR. OGDEN: Your Honor, I think that we -- it's
11 -- while we don't know, I think that a fair reading of
12 this record would lead one to the conclusion that it was
13 not the 4-and-a-half months. When we have four other
14 cases, two of them decided the same day, one of them
15 decided --
16 QUESTION: But it's way beyond what any other
17 State would have, isn't it? 4-and-a-half months? Unless
18 there's some excuse here that he didn't get the record or
19 he didn't know about it.
20 MR. OGDEN: Well, North Carolina has an undue
21 delay standard. Massachusetts, until just very recently,
22 as the First Circuit explained in the Curry case just last
23 week, previously had no time limit, has now imposed a 30-
24 day time limit presumably to deal with some of these
25 problems. The times in other States vary. 4-and-a-half

1 months is -- is somewhat longer than the certiorari time
2 in this Court, but it's not by an entire order of
3 magnitude. And the point is that the California Supreme
4 Court routinely seems to reach the merits despite this
5 period.
6 And in this case we have a 5-year delay staring
7 us in the face in which the only justification offered by
8 Mr. Saffold was that he needed to hire a private
9 investigator to -- essentially to interview the jurors.
10 The magistrate judge in this case, applying the due
11 diligence standard of Federal law, which is in 2244 --
12 QUESTION: This was a Federal magistrate?
13 MR. OGDEN: The Federal magistrate, yes, Your
14 Honor, in -- in this case applying the Federal due
15 diligence standard. Mr. Saffold suggested that the time
16 should be tolled for -- for the running of the entire
17 period because he had not discovered these claims. And
18 the Federal magistrate, looking at it, said, well, you
19 should have discovered these claims long before. you
20 didn't exercise due diligence.
21 I think looking at the face -- at the -- at the
22 joint appendix at 38, looking at the face of the
23 application Mr. Saffold submitted to the California
24 Supreme Court where he attempts to justify the 5 years on
25 that basis and notes, with respect to the 4-and-a-half

1 months, that he only received notice the very day he
2 filed, the only reasonable interpretation is that they
3 relied on the 5 years, a period of time irrelevant to the
4 question of whether review in the supreme court was
5 unavailable. And therefore, it is -- it is -- it would be
6 unreasonable for this Court to suppose that -- that the
7 period was the 4-and-a-half months.
8 This is somewhat similar to the approach to
9 questions of -- of -- related to procedural bars that this
10 Court adopted and modified in the Coleman against Thompson
11 case where -- where an underlying State decision leaves
12 reason to question whether the Federal bar is applicable,
13 this Court has gone ahead and decided the -- the merits of
14 the Federal claim because it's entirely within the power
15 of the State, the State of California or in the Coleman v.
16 Thompson circumstance, to be clear about the fact that
17 what was the period and when did it expire, or
18 alternatively, simply like most States, to have a clear,
19 definable period of time in which --
20 QUESTION: Didn't the -- didn't the superior
21 court here, or at least the magistrate did, made a
22 specific finding to the effect that the 4-month delay was
23 not excusable, that it was an excessive delay? Wasn't
24 there that finding below?
25 MR. OGDEN: The magistrate did not find that he

1 received notice earlier than he says. What the magistrate
2 said was that he should have been more diligent in calling
3 the court and contacting them and so forth.
4 QUESTION: But it was a finding that the 4-
5 month period was the -- was a period of inexcusable delay.
6
7 MR. OGDEN: He indicated -- suggested that he
8 would not --
9 QUESTION: So, to say that that couldn't have
10 been what the supreme court was thinking of strikes me as
11 implausible.
12 MR. OGDEN: Your Honor, I'm not saying that it
13 couldn't be. I'm saying it's far less likely that it was.
14 QUESTION: But that wasn't reviewed by the Ninth
15 Circuit.
16 MR. OGDEN: No. Indeed, the Ninth Circuit left
17 open the question of equitable tolling which depends on
18 that -- on that fact. And furthermore, again, it doesn't
19 go to whether he received notice. It's simply the opinion
20 of the magistrate that he should have called the court or
21 sent a letter to the court or done something within that
22 4-and-a-half-month period.
23 QUESTION: I do -- I do want, if I can, very
24 quickly to get to the question that Mr. Cross said was
25 very difficult and you raise it at pages 24 and 25 of your

1 brief. You say what -- what happens if the -- under the
2 theory that the petitioner proposes, if the State files an
3 appeal when the State has lost. And the Chief Justice
4 said, well, that shouldn't be a problem because we can
5 then easily say that the application is still pending.
6 How long does the State have to appeal generally?
7 MR. OGDEN: I believe it's 30 days in
8 California.
9 QUESTION: So, then -- so, then it seems to me
10 that isn't a problem. A, it's just 30 days, and B, you
11 can say that it's still pending. So, that's not a big
12 problem.
13 Mr. Cross, whose right of rebuttal we've
14 demolished, so I can't ask him, has said that that's a
15 very hard question.
16 MR. OGDEN: Well, I think it's a very hard
17 question for him because his -- his gap theory taken to
18 its literal extreme, taken to -- to the application that
19 it would -- that -- that gaps are not tolled, even in a --
20 an appeals situation, would cause that entire period of
21 time on the State's clock to run.
22 QUESTION: But why can't we easily say the
23 application is pending so long as the State has an
24 appeal --
25 MR. OGDEN: Well, that --

1 QUESTION: -- prevail?
2 MR. OGDEN: That would -- that would undermine
3 the so-called gap theory in every State but -- but
4 California where typically you do have appeals on both
5 sides. In California, you have a State appeal and a
6 functional appeal on the petitioner's side. And so, the
7 argument could be made -- I think it's a hyper-technical
8 argument. I think it's an argument that's inconsistent
9 with the purpose of this statute, but you could make the
10 hyper-technical argument that because California gives
11 unequal rights to the two sides, an appeal on the one hand
12 and a functional appeal on the other, we're going to treat
13 the functional appeal in a different way for Federal
14 purposes.
15 I would submit there is no way that Congress
16 intended to take a functional appeal that has the purpose
17 of -- of presenting claims that are required for
18 exhaustion and said, we want to treat that differently
19 because it's merely a functional appeal, not a real
20 appeal. That makes no sense.
21 All of the reasons why tolling should apply in
22 the gaps prescribed by the State, the period the State
23 believes is appropriate for the presentation of these
24 claims, the period the State believes prisoners should
25 have in order to prepare and present their claims, that

1 we're not going to toll that, the consequence of that will
2 be that petitioners will not wait for the transcript.
3 They will file their -- their motions in the -- in the
4 court of appeal without transcripts. They will not
5 develop their arguments well, and then those arguments
6 will finally be made for the first time effectively in the
7 Federal court. That is not what was intended by the
8 statute.
9 QUESTION: Thank you, Mr. Ogden.
10 Mr. Cross, you have 1 minute remaining.
11 REBUTTAL ARGUMENT OF STANLEY A. CROSS
12 ON BEHALF OF THE PETITIONER
13 MR. CROSS: I think the answer to Mr. Ogden,
14 Your Honor, is that the reason would be that Congress was
15 concerned about undue delay. In the last 10 years before
16 AEDPA was passed, over 80 bills were attempted to -- to
17 deal with this problem. And lack of diligence by
18 petitioners was the main concern of Congress, and they
19 dealt with that by writing into the statute the following
20 phrase. 2244(d)(2) at page 3 of the blue brief. Quote,
21 the time during which a properly filed application for
22 State post-conviction or other collateral review with
23 respect to the pertinent judgment or claim is pending
24 shall not be counted toward any limitation under this
25 subsection. They did not choose to use the -- the

1 language petition in 2263(b)(2), nor did they choose to
2 use the language in 2244(d)(1)(A) of the time for seeking
3 such review. They chose application for the reason that
4 Justice Scalia was talking about. They were concerned
5 that there would be undue delay in between applications.
6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cross.
7 The case is submitted.
8 (Whereupon, at 12:09 p.m., the case in the
9 above-entitled matter was submitted.)
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