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IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER ARTUZ, :
SUPERINTENDENT, GREEN HAVEN :
CORRECTIONAL FACILITY, :
Petitioner :

v. : No. 99-1238

TONY BRUCE BENNETT :

- - - - -X

Washington, D.C.
Tuesday, October 10, 2000

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

APPEARANCES:

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

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

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

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

2 (10:55 a.m.)

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

6 Mr. Castellano.

7 ORAL ARGUMENT OF JOHN M. CASTELLANO

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

16 MR. CASTELLANO: Yes, Your Honor.

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

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

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

1 MR. CASTELLANO: Yes.

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

4 MR. CASTELLANO: Yes, absolutely, Your Honor.

5 QUESTION: Yes.

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

12 QUESTION: And what is your definition of
13 properly filed?

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

19 In addition, here Congress used the word filed
20 24 times in the habeas corpus statute but modified it with
21 the word properly only once, so it must have meant that
22 the words properly filed had something more than an
23 inconsequential or nominal meaning.

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

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

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

7 MR. CASTELLANO: Absolutely, Your Honor.

8 QUESTION: But you want to go further than that.

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

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

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

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

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

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

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

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

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

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

1 issues --

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

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

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

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

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

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

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

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

18 QUESTION: Could I --

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

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

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

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

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

17 MR. CASTELLANO: Yes, absolutely, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that, this is a rather complex operation.

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

9 QUESTION: So what?

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

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

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

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

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

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

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

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

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

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

23 MR. CASTELLANO: Absolutely, Your Honor, yes.

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

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

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

9 MR. CASTELLANO: That --

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

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

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

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

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

10 QUESTION: But I'm --

11 QUESTION: What difference does it -- go ahead.

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

16 MR. CASTELLANO: Your Honor --

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

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

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

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

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

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

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

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

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

20 QUESTION: That are not procedurally barred.

21 MR. CASTELLANO: No --

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

25 MR. CASTELLANO: Under our position, that

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

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

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

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

23 MR. CASTELLANO: Right.

24 QUESTION: -- it's a contested matter.

25 MR. CASTELLANO: Well, you need the statute of

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

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

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

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

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

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

20 QUESTION: Very well, Mr. Castellano.

21 Mr. Schweitzer, we'll hear from you.

22 ORAL ARGUMENT OF DAN SCHWEITZER
23 ON BEHALF OF FLORIDA, AS AMICUS CURIAE,
24 SUPPORTING THE PETITIONER

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

1 please the Court:

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

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

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

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

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

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

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

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

15 MR. SCHWEITZER: Right.

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

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

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

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

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

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

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

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

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

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

25 QUESTION: Even though it turns out that, in

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

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

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

11 MR. SCHWEITZER: Well, the Federal --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. SCHWEITZER: Yes.

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

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

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

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

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

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

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

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

6 QUESTION: Thank you, Mr. Schweitzer.

7 Mr. Futerfas. Am I pronouncing your name
8 correctly?

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

10 ORAL ARGUMENT OF ALAN S. FUTERFAS

11 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

11 QUESTION: I mean your position.

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

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

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

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

3 QUESTION: And also, a timely filing?

4 MR. FUTERFAS: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 Where Congress sought to limit successive
17 applications and predicate tolling on one application
18 only, they did so not in one but in two places,
19 2244(b)(3), which requires judicial approval, and 2263 in
20 the opting provision, where you have tolling for a first
21 post conviction application, so Congress had that language
22 available it could have used.

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

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

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

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

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

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

1 filed in the right court.

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

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

16 QUESTION: Yeah --

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

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

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

10 QUESTION: Right.

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

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

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

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

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

12 MR. FUTERFAS: Well, you -- in -- I'm not -- I
13 apologize, I'm not sure I understand Your Honor's question
14 --

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

21 MR. FUTERFAS: Yes.

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

24 MR. FUTERFAS: No, that's right.

25 QUESTION: Yes --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 them.

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

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

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

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

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

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

12 QUESTION: How many States have opted in?

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

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

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

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

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

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

25 QUESTION: But it still is the case that if a

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

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

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

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

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

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

6 If a State determines that there is a general,
7 more general delay problem the State, under our version of
8 the rule, has absolute freedom to adopt any kind of
9 procedure the State wishes to do, whether it's timing
10 requirements or successiveness limitations. In fact,
11 2244(b)(3) is a wonderful model that States could follow.
12 They could set up a system where, under successive
13 application, the State prisoner must obtain judicial
14 review first, or approval first to file, so there is a
15 whole panoply, really, of options available to a State to
16 deal with these problems.

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

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

4 Now watch what could happen with a death penalty
5 defendant if the State's rule is adopted, because under
6 153, the death penalty defendant now is convicted, files a
7 post application, post conviction application, does -- may
8 or may not have a lawyer, because the State has not opted
9 in, and it turns out all of the claims in the post
10 conviction application are procedurally barred and more
11 than 1 year has gone by.

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

16 If I may just have a moment.

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

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

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

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

1 pronouncements in Lonchar v. Thomas.

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

4 QUESTION: Thank you, Mr. Futerfas.

5 MR. FUTERFAS: Thank you.

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

8 REBUTTAL ARGUMENT OF JOHN M. CASTELLANO

9 ON BEHALF OF THE PETITIONER

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

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

25 The respondent also mentions the workload costs.

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

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

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

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

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