IN THE SUPREME COURT OF THE UNITED STATES

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GREG MCQUIGGIN, WARDEN :

Petitioner : No. 12-126

v. :

FLOYD PERKINS :

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Washington, D.C.

Monday, February 25, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN J. BURSCH, ESQ., Michigan Solicitor General, Lansing, Michigan; on behalf of Petitioner.

CHAD A. READLER, ESQ., Columbus, Ohio; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-126, McQuiggin v. Perkins.

Mr. Bursch?

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

MR. BURSCH: Well, we think it --

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

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

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

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

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

MR. BURSCH: Yes.

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

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

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

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

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

So we see this all the time in the Sixth

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

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

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

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

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

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

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

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

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

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

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

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

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

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

there was no certificate of appealability on that issue.

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

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

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

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

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

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

statutory language.

JUSTICE SOTOMAYOR: Where does that leave us?

MR. BURSCH: I --

JUSTICE SOTOMAYOR: Let's assume --

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

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

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

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

MR. BURSCH: I'm saying that --

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

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

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

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

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

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

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

The case we have here is the third instance,

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

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

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

I do want to --

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

MR. BURSCH: Correct.

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

factual predicate.

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

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

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

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

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

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

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

If you look at 2244 --

JUSTICE GINSBURG: Before you present the argument --

MR. BURSCH: Yes.

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Where -- where is that in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BURSCH: Yes, I am --

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

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

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

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

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

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

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

Now -- you know, when we --

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

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

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

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

JUSTICE SOTOMAYOR: I'm not talking about

that presumption.

MR. BURSCH: Right.

JUSTICE SOTOMAYOR: What I'm talking about --

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

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

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

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

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

MR. BURSCH: That's correct.

JUSTICE KAGAN: Why does that make any sense?

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

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

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

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

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

MR. BURSCH: Because it's Congress and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: How many wins on the attempt?

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

JUSTICE SOTOMAYOR: Not many.

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

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

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

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

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

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

MR. BURSCH: Because there are so many.

JUSTICE SOTOMAYOR: Meaning --

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

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

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

MR. BURSCH: No.

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

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

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

MR. BURSCH: No, they don't.

JUSTICE SOTOMAYOR: As the first habeas.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Readler?

ORAL ARGUMENT OF CHAD A. READLER

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

that reason.

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

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

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

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

district court for application of the correct standards.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In Kuhlmann --

CHIEF JUSTICE ROBERTS: With 2255 -- remind me?

MR. READLER: For Federal -- Federal petitions.

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

MR. READLER: For Federal -- Federal convictions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, what --

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

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

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

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

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

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

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

MR. READLER: Sure --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

meet the Schlup standard.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: What about the actual innocence claim?

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

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

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

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

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

JUSTICE SOTOMAYOR: Counsel, I see --

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

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

two places on the statute.

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

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

JUSTICE SOTOMAYOR: Counsel --

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

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

JUSTICE SOTOMAYOR: Counsel --

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: The --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Well, what is your answer?

MR. READLER: -- different range of --

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

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

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

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

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

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

problem he's going to run into --

JUSTICE BREYER: Does he win or lose?

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

JUSTICE BREYER: I mean, what do you think?

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

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

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

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

(Laughter.)

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

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

JUSTICE BREYER: But they admit --

CHIEF JUSTICE ROBERTS: And how long did your --

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

MR. READLER: The -- the State?

JUSTICE BREYER: Yes.

MR. READLER: Well, the State --

JUSTICE BREYER: Do you believe he's diligent?

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

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

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

JUSTICE SOTOMAYOR: But there has --

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

MR. READLER: No, but --

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

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

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

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

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

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

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

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

respond, the -- Justice Breyer's hypothetical.

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

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

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

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

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

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

JUSTICE GINSBURG: How about --

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

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

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

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

For a period of time, he was denied access

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

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

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

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

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

So -- so no rational --

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

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

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

MR. READLER: Well, no, Justice Alito,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That's what should happen in this instance,

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

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

(Laughter.)

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

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

Or is it one that you can cast aside?

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bursch, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

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

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

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

something.

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

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

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

Now, with respect to diligence --

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

MR. BURSCH: Yes.

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

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

What sense would that be?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Go ahead, briefly.

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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