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IN THE SUPREME COURT OF THE UNITED STATES

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MIKE EVANS, ACTING WARDEN, :

Petitioner, :

v. : No. 04-721

REGINALD CHAVIS. :

- - - - - x

Washington, D.C.

Wednesday, November 9, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

CATHERINE BAKER CHATMAN, ESQ., Deputy Attorney General, Sacramento, California; on behalf of the Petitioner.

PETER K. STRIS, ESQ., Los Angeles, California; appointed by this Court, on behalf of the Respondent.

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1 difficulties in doing so can be ameliorated by the
2 limited nature of the State-law inquiry and adoption of
3 a 60-day presumption of timeliness.

4 JUSTICE GINSBURG: But that's something --
5 where would we -- we would just pick that number, that
6 --

7 MS. CHATMAN: The 60 days?

8 JUSTICE GINSBURG: Yes. Because that's a
9 normal appeal period?

10 MS. CHATMAN: Well, Justice Ginsburg, when
11 California does look to timeliness in proceeding from
12 one lower court to a higher court, then we see that it
13 contemplates that a -- that a litigant will proceed in
14 60 days or less, because -- and the reason we have to
15 turn to analogies is because nothing in California law
16 requires the appellate courts in State habeas to look
17 to that particular period of time between the lower
18 court decision and proceeding to that court, because
19 they're courts of original jurisdiction. So, they look
20 at how long the prisoner proceeded from conviction to
21 their court, as a whole.

22 But the reason that we need to figure out
23 this period is because this Court, in Carey versus
24 Saffold, has said that our system functions enough like
25 an appellate system to bring those periods into the

1 tolling provision. So, when --

2 JUSTICE KENNEDY: Well, can't --

3 MS. CHATMAN: -- we look --

4 JUSTICE KENNEDY: -- the -- can't the

5 California courts adopt a -- give us a 60-day rule, or
6 a 30-day rule, or a 90-day rule? And if they don't do
7 it, why should we do it?

8 MS. CHATMAN: Up to this point, they have not
9 done so. And I think that is because, as I said, they
10 are looking at the time from conviction. How long did
11 it take the prisoner to get to their court with their
12 claims? And how -- and how long they take properly
13 proceeding up the ladder through the courts is just one
14 factor that they look at. And they --

15 JUSTICE BREYER: I don't know how this came
16 about. I mean -- I mean, I'm asking both sides the
17 same question. It'll sound very favorable to you, but
18 if you answer it just yes, because it's favorable to
19 you, I might learn, later, I was wrong, and you won't
20 have had a chance to answer. So, I want your honest
21 opinion on this. I don't know how this happened. And
22 I don't know -- did you ask for en banc?

23 MS. CHATMAN: I'm sorry, how the 3-year delay
24 happened?

25 JUSTICE BREYER: No. I don't know how the

1 California Court could have read the opinion -- which,
2 of course, I wrote for the Court, so maybe I am reading
3 things into it that weren't there -- but I don't know
4 how any judge could read that opinion we wrote and come
5 to this conclusion. I thought that it said, you know,
6 on -- that there are three issues -- what's the word
7 "pending"? Does the word "pending" apply to the time
8 period between when the lower court decides a case and
9 you appeal? That's typically 20 days or 30 days.

10 MS. CHATMAN: Correct.

11 JUSTICE BREYER: Are those 20 days or 30 days
12 counted in the tolling period? I thought part one
13 clearly said the answer is yes. Then we looked at
14 California, and they don't have the words "20 days" or
15 "30 days." They say "reasonable time." And then we
16 said, "Still applies, because 'reasonable time' is
17 probably 20 or 30 days." They don't have a radically
18 different rule; it's a similar rule. Then we come to
19 part three, and it says, "This is 45 days." There's --
20 no 4 and a half months, wasn't it?

21 MS. CHATMAN: Uh-huh.

22 JUSTICE BREYER: This isn't just 20 or 30
23 days.

24 MS. CHATMAN: Uh-huh.

25 JUSTICE BREYER: So, is it timely?

1 MS. CHATMAN: Uh-huh.

2 JUSTICE BREYER: And, there, I thought the
3 Court said -- I mean, I was reading it -- say, "Well,
4 it's hard to say, because there might have been excuses
5 for the delay." What about the words that were written
6 there, "on the merits"?

7 MS. CHATMAN: And there was an equitable- --

8 JUSTICE BREYER: On --

9 MS. CHATMAN: -- -tolling question.

10 JUSTICE BREYER: But that had nothing to --

11 MS. CHATMAN: Right.

12 JUSTICE BREYER: -- do with the case. The
13 lack of diligence had nothing to do with this aspect of
14 the case. But, what about the words "on the merits"?
15 And there, what I think the court wrote is that the
16 fact that it says "on the merits" doesn't prove it --
17 what -- it doesn't prove that it was timely. Why? And
18 then I listed a bunch of reasons. There are reasons.
19 Sometimes courts say "on the merits," even though it's
20 delayed. All right? They say "on the merits." Or
21 because they want to tell the prisoner or -- there are
22 a lot of reasons why, all of which are listed. So, we
23 send it back to see whether this 4-and-a-half-month
24 delay, given the excuses, was still timely. We -- all
25 right?

1 MS. CHATMAN: Yes.

2 JUSTICE BREYER: Now --

3 MS. CHATMAN: Justice --

4 JUSTICE BREYER: -- we now get a case where
5 it's 3 years.

6 MS. CHATMAN: Uh-huh.

7 JUSTICE BREYER: And the court says, "It's
8 timely, because they used the word 'on the merits.'"
9 But I thought -- I said, in the opinion, I thought the
10 court adopted that the words "on the merits" do not
11 decide the matter.

12 JUSTICE SCALIA: Isn't it --

13 JUSTICE BREYER: Now, what do you --

14 JUSTICE SCALIA: -- worse than that?

15 JUSTICE BREYER: -- do in those
16 circumstances?

17 MS. CHATMAN: Justice Breyer, I could not
18 agree --

19 JUSTICE BREYER: No, but did --

20 MS. CHATMAN: -- with you more.

21 JUSTICE BREYER: -- you ask for rehearing en
22 banc? Because any judge, including me, can make a
23 mistake. What did you do?

24 MS. CHATMAN: We petitioned for certiorari in
25 this Court.

1 JUSTICE BREYER: And you didn't ask for a
2 hearing en banc.

3 MS. CHATMAN: No, we did not.

4 JUSTICE BREYER: Well, why, when you --

5 JUSTICE SCALIA: Would --

6 JUSTICE BREYER: -- get a fair -- because any
7 judge can make a mistake --

8 MS. CHATMAN: The --

9 JUSTICE BREYER: -- why don't you just go and
10 ask the Ninth Circuit to say, "Look, this is not --
11 read the opinion, read what they said. Correct it."

12 MS. CHATMAN: This is not the first time that
13 we have tried to take that approach with the Ninth
14 Circuit on this issue. They -- on remand, in Saffold
15 versus Carey, they made the same mistake, and the
16 rehearing has got us nowhere -- asking for a rehearing.
17 And so, we felt that in order to get this clarified as
18 soon as possible, it seems futile to ask for rehearing
19 when on the -- when we had not been successful before.

20 JUSTICE SCALIA: Yes. Well this --

21 MS. CHATMAN: This is, by the way --

22 JUSTICE SCALIA: -- this case is different,
23 actually, from the one that Justice Breyer put,
24 because, in this case, the California Supreme Court
25 didn't say --

1 MS. CHATMAN: Uh-huh.

2 JUSTICE SCALIA: -- "on the merits." It said
3 nothing at all. It just disposed of it. So, the
4 question presented is quite different.

5 JUSTICE BREYER: It's worse.

6 JUSTICE SCALIA: It's whether -- not whether
7 it can be, nonetheless, timely when they say "on the
8 merits," but whether it can be, nonetheless, timely
9 when they don't say anything at all.

10 MS. CHATMAN: But --

11 JUSTICE SCALIA: I would think it's an a
12 fortiori case, in other words.

13 MS. CHATMAN: And the Ninth Circuit is
14 treating it as if it were the same sort of decision
15 that was before this Court in Carey versus Saffold. It
16 is a decision on the merits. And they are reading that
17 as excluding any other possible grounds that might have
18 existed for the denial in that case.

19 JUSTICE BREYER: You're representing the
20 attorney general of California, and you have a lot of
21 litigation in the Ninth Circuit. It's -- I mean, the
22 other side's going to answer on the merits, if they
23 can. And they're in an awkward position here, I
24 understand. But I need to know what to -- what do you
25 think we should do? I mean, here, we write an opinion,

1 and they --

2 MS. CHATMAN: Uh-huh.

3 JUSTICE BREYER: -- it seems to perhaps,
4 inadvertently or not -- and the reason I turn to you
5 is, judges are busy, they have huge dockets --

6 MS. CHATMAN: Yes.

7 JUSTICE BREYER: And, often, unless it's very
8 clearly pointed out by the lawyers, or the lawyers take
9 action, you get -- waste everybody's time and money.

10 MS. CHATMAN: Uh-huh. Well, I think the
11 answer is to instruct the Federal Courts that, when
12 they're undertaking this inquiry of whether an
13 application is pending during the intervals, a Federal
14 question that has a State-law component, then they must
15 apply the State law to figure out if it's timely. And,
16 you know, as this Court said in Carey the -- versus
17 Saffold -- it's a matter of whether it's timely; it's
18 not a matter of the basis of the State Court decision.
19 And in the context of California, I think the answer
20 is to adopt a presumption of 60 days, because that is
21 the most analogous --

22 JUSTICE GINSBURG: In -- even if, as he
23 alleged, he was unable to do anything in --

24 MS. CHATMAN: Uh-huh.

25 JUSTICE GINSBURG: This is a layperson. He

1 said, "I tripped in the intermediate appellate court,
2 because I didn't do any research. And so, I wanted to
3 do better, but they gave me a job where, during the
4 hours that the library was open" --

5 MS. CHATMAN: Uh-huh.

6 JUSTICE GINSBURG: -- "I had to be at work.
7 And that's why it took me all this time."

8 MS. CHATMAN: Uh-huh.

9 JUSTICE GINSBURG: Now, is that -- suppose
10 the prison locks down someone and says, "You can't go to
11 the library."

12 MS. CHATMAN: This is an easy decision for
13 the Federal Court, even on these facts. Okay, this
14 Petitioner has taken longer than 60 days, and he's
15 offered an explanation. But if you look at his
16 explanation, on its face, it's completely inadequate to
17 account for a 3-year delay, because he doesn't take
18 action to get -- to get library access for an entire
19 year after the Court of Appeals decision denying his
20 application is issued. Then he spends 3 months, quite
21 correctly, going through the administrative procedures
22 of the prison to get a job change. And he does, in
23 fact, get a job change 3 months later -- about 3 months
24 later. Then, he waits still more than another year
25 before he files his petition in the California Supreme

1 Court presenting essentially the same claims, same
2 facts, same law.

3 JUSTICE BREYER: So, in other words, he
4 delays, after he gets the library access, for an extra
5 year.

6 MS. CHATMAN: Yes, he does. Now, he --

7 JUSTICE BREYER: Now, is there any excuse
8 they're making for that? Because if you don't tell me,
9 they're --

10 MS. CHATMAN: Later on --

11 JUSTICE BREYER: -- going to tell me.

12 MS. CHATMAN: -- later on, once he gets to
13 Federal Court --

14 JUSTICE BREYER: Yes.

15 MS. CHATMAN: -- he offers the explanation
16 that the prison was on lockdowns. There are several
17 problems with that assertion; the first being, it
18 wasn't presented to the State Court, so it's -- it
19 cannot cure his State untimeliness. The second being
20 that he doesn't offer specific dates or explain how it
21 prevented him from filing his petition. And the third
22 problem is that State prisons provide procedures during
23 lockdowns to get library materials to prisoners.

24 JUSTICE STEVENS: Can I ask a rather probably
25 sort of stupid question? But I gather there are a

1 large number of these cases disposed of by a postcard.

2 Would there be anything wrong if the California
3 Supreme Court said, "We're going to have two postcards.

4 One says that 'the delay was unreasonable, denied';
5 and the other said, 'there's nothing to the merits,
6 denied'" -- you use two postcards -- wouldn't that solve
7 all the problems?

8 MS. CHATMAN: The problem with that is --
9 certainly, it would solve things, but the problem with
10 that is, it would require the -- require the California
11 courts to make both of those determinations in every
12 case. And, as it is now, they use a procedure much
13 like --

14 JUSTICE STEVENS: But they could adopt a 60-
15 day rule, or a 90-day rule, and then just, when they
16 decided to not follow the rule, they'd put a check on -
17 - say, "Well, we did look at the merits in this case."

18 MS. CHATMAN: They could do that --

19 JUSTICE SCALIA: Under our current law, it
20 wouldn't make any difference, would it? Because even if
21 they sent the "on the merits" postcard, Carey versus
22 Saffold says --

23 MS. CHATMAN: Correct.

24 JUSTICE SCALIA: -- it doesn't matter.

25 MS. CHATMAN: That's true. And that is why I

1 say they would have to make both determinations,
2 because --

3 JUSTICE SOUTER: Well, may --

4 CHIEF JUSTICE ROBERTS: Well, it might --

5 JUSTICE SOUTER: -- may I -- no, go ahead.

6 CHIEF JUSTICE ROBERTS: I was just going to
7 say, it might matter if they had another postcard that
8 said it's untimely, and they didn't send that. That
9 would be a whole different situation, right?

10 MS. CHATMAN: That's true, but we are -- we
11 are engaging here in trying to tell the California
12 State Courts how to dispose of these cases, which I am
13 really not sure is an appropriate thing for us to do.
14 They're --

15 JUSTICE SOUTER: Well, but --

16 MS. CHATMAN: -- using a --

17 JUSTICE SOUTER: -- if we --

18 MS. CHATMAN: -- procedure --

19 JUSTICE SOUTER: -- if we decided it -- it
20 was at least appropriate to give a hint, aren't we in a
21 little bit better position than you suggested, in the
22 light of Carey? Because in -- is -- correct me if I'm
23 wrong, but I thought, in Carey, the State order was not
24 merely that it was on the merits, but that it was on
25 the merits and it was untimely. In other words, it

1 said A and B. And we said, you know, "That's
2 ambiguous," to start with, and then we went on and
3 said, "You know, sometimes 'merits' don't mean merits."
4 But if the State were to revise its procedure and say,
5 "We're either going to say A or we're going to say B,
6 and that's our reason," and they said, "It's on the
7 merits" or "it's untimely," wouldn't it make sense for
8 us, even in the light of Carey, to say, "Okay, we'll
9 accept that as the -- as the State's reason"?

10 MS. CHATMAN: If they were to do that. But I
11 don't anticipate the State Courts adopting that
12 practice, because it would double their work. They
13 would have to make both decisions, merits and
14 untimeliness.

15 JUSTICE SOUTER: I don't --

16 MS. CHATMAN: It --

17 JUSTICE SOUTER: -- see why. If they're
18 going to follow something like a prima facie 60-day
19 rule, and it's -- it's on day 65, all they've got to
20 say is, "It's untimely."

21 JUSTICE SCALIA: Well, in this --

22 MS. CHATMAN: But the --

23 JUSTICE SCALIA: -- in this case, in order to
24 determine it was untimely, they would have presumably
25 had to have gone into the factual analysis of whether

1 the prison was on lockdown, whether he delayed for a
2 year after getting the materials, and all of that
3 stuff. So, it's a lot easier for them, when the merits
4 of it seem to them absolutely clear, to simply deny it
5 on the merits and not reach the "timely" question.

6 MS. CHATMAN: And that --

7 JUSTICE SCALIA: But the "timely" question is
8 still before Federal Courts. That's what we said in
9 Carey versus Saffold. So --

10 MS. CHATMAN: I agree. And they --

11 JUSTICE SCALIA: -- although they can avoid
12 it, we can't.

13 MS. CHATMAN: And that -- and that is the way
14 the State Courts are approaching these cases. They,
15 for the most part, will look first for a prima facie
16 case, and in -- much like the Federal Courts do in
17 Federal habeas under Rule 4, where they scream for
18 frivolous petitions that can be dismissed outright
19 without asking for a response from the warden or
20 instituting briefing, then they can deny those
21 summarily. And the reason why they cannot just decide
22 timeliness is because then the Ninth Circuit will
23 interpret that as not reaching the merits, and we will
24 have a problem of deference. So, if they were to
25 decide one explicitly, they'd have to decide the other,

1 the way things stand now. And I --

2 JUSTICE STEVENS: I --

3 MS. CHATMAN: -- as a --

4 JUSTICE STEVENS: -- I must say, I don't
5 quite follow the -- why couldn't they simply say it's
6 untimely? Wouldn't that -- that it -- there was -- it
7 was not pending during this period, because it -- 3
8 years elapsed, and that's unreasonable. Wouldn't that
9 end the case?

10 MS. CHATMAN: It would, but it's not a State-
11 law question. They don't -- whether it's pending
12 during that period is not a --

13 JUSTICE STEVENS: No, I understand --

14 MS. CHATMAN: -- State law --

15 JUSTICE STEVENS: -- but whether --

16 MS. CHATMAN: -- question, because --

17 JUSTICE STEVENS: -- it was a reasonable time
18 to file is a State-law question.

19 MS. CHATMAN: Whether he took a reasonable
20 time from the lower -- from time of conviction to their
21 court is the only State-law question --

22 JUSTICE STEVENS: Well, isn't the --

23 MS. CHATMAN: -- because of the --

24 JUSTICE STEVENS: Doesn't the --

25 MS. CHATMAN: -- original --

1 JUSTICE STEVENS: -- California Supreme Court
2 sometimes decide that the time between the intermediate
3 court's decision and the filing in the California
4 Supreme Court -- don't they ask whether that was
5 reasonable?

6 MS. CHATMAN: I have --

7 JUSTICE STEVENS: Or they only relate it back
8 to the day of the conviction?

9 MS. CHATMAN: I have only seen one case in
10 California where they specifically addressed that
11 particular interval because the Attorney General raised
12 it, and that's Moss -- In Re Moss, which is cited
13 in the red brief.

14 JUSTICE STEVENS: May I ask that, if you had
15 a case in which the Attorney General raised the -- say,
16 this case, and yet -- and say California Supreme Court
17 wrote an opinion in which it said, "Now, 3 years has
18 gone by, but the prisoner has given us a very elaborate
19 explanation," as Justice Ginsburg suggested, "and we
20 find that explanation sufficient; therefore, we
21 conclude that, even though it was 3 years, it was a
22 reasonable time; and, therefore, we're going to address
23 the merits. And we now address the merits and say you
24 lose." Now, in that case, would it be pending, for our
25 purposes?

1 MS. CHATMAN: Yes, because the State Court
2 found it timely, and that would be --

3 JUSTICE BREYER: It would? I thought --

4 MS. CHATMAN: -- that would be --

5 JUSTICE BREYER: -- that was --

6 MS. CHATMAN: -- the end of --

7 JUSTICE BREYER: -- an open --

8 MS. CHATMAN: -- the matter.

9 JUSTICE BREYER: -- question, frankly. I
10 mean, I can't imagine California would do this, but I
11 guess if California did say that, "The period of time
12 between the time you lost in the District Court and the
13 time you filed, in every other State, is 30 days, but,
14 in California, it's a reasonable time. And what we
15 mean by a 'reasonable time' is 3 years, without any
16 excuses" -- I guess, then, maybe the dissent in Carey
17 v. Saffold would have been right in respect to that.

18 MS. CHATMAN: If --

19 JUSTICE BREYER: It would have said that that
20 isn't pending under Federal law, whether California
21 says it or not. So, the role of the Federal law versus
22 the State law, I thought we left open.

23 MS. CHATMAN: I think this Court, in Carey
24 versus Saffold, and in Pace versus DiGuglielmo, has
25 stressed the importance of deferring to State-law

1 determinations --

2 JUSTICE BREYER: But you can't --

3 MS. CHATMAN: -- State Court --

4 JUSTICE BREYER: -- defer to something --

5 MS. CHATMAN: -- determinations.

6 JUSTICE BREYER: -- under this statute, where

7 Congress wrote the word "pending." And I wouldn't

8 have thought they did have in mind a --

9 MS. CHATMAN: Uh-huh.

10 JUSTICE BREYER: -- State that says, "It's

11 pending, even though you have no excuse and didn't file

12 anything for 3 years, your appeal." Now, I haven't

13 heard that fully briefed and so forth, so I hesitate to

14 express a final conclusion on it. But it --

15 MS. CHATMAN: Well, it's --

16 JUSTICE BREYER: -- since it's never going to

17 come up, I don't think, I don't know I have to have a

18 final conclusion.

19 MS. CHATMAN: I don't think so. But it's

20 pending -- it's pending while -- if it's timely under

21 State law. And if the State Court has already spoken

22 to State law, I don't know that there's a question left

23 for the Federal Court. I think -- I think they say,

24 "Okay, this was timely, and, therefore, pending during

25 the interval." But --

1 JUSTICE O'CONNOR: Now, you want us to apply
2 a presumption that a petition is timely if it's filed
3 within 60 days. But California doesn't apply such a
4 presumption, does it?

5 MS. CHATMAN: No, it does --

6 JUSTICE O'CONNOR: And --

7 MS. CHATMAN: -- not, but --

8 JUSTICE O'CONNOR: -- where do we get that?
9 I mean, where does that come from?

10 MS. CHATMAN: Where that comes from is, if
11 you look to the closest analogous State procedures --
12 say, direct appeal from a conviction -- then you're
13 allowed 60 days to go to the next -- to the appellate
14 court. Similarly, if the State appeals the grant of
15 habeas relief -- the State, unlike the defendant, can
16 appeal -- then the State gets 60 days. So, when
17 California thinks -- when California quantifies the
18 concept of reasonableness in the appellate context,
19 they do so in terms of 60 days or less. And I say "or
20 less," because State habeas is actually supposed to be
21 a quicker process than the appellate process.

22 JUSTICE O'CONNOR: Well, shouldn't we leave
23 it to California to adopt such a presumption?

24 MS. CHATMAN: California's not going to do
25 that, because it's not a State-law question. It's just

1 not a State-law question. But it's -- I think it's
2 acceptable for a Federal Court to adopt a presumption
3 to assist them in deciding a State-law issue, much --

4 CHIEF JUSTICE ROBERTS: What --

5 MS. CHATMAN: -- the way.

6 CHIEF JUSTICE ROBERTS: -- good would the --
7 what good would the presumption do if it's just a
8 presumption? Presumably, if it's a presumption, the
9 prisoner is --

10 MS. CHATMAN: Uh-huh.

11 CHIEF JUSTICE ROBERTS: -- going to say,
12 "Well, here's why you shouldn't follow the presumption
13 in my case," just as, if it looks like he's waited a
14 long time, he's going to say, "Well, here's why that
15 delay was reasonable." I don't know that the
16 presumption you're proposing serves much of a purpose.

17 MS. CHATMAN: The value of a 60-day
18 presumption is that it saves the Federal Court from
19 having to look at the State-law time -- of the
20 timeliness in that particular case and --

21 CHIEF JUSTICE ROBERTS: No, it doesn't --

22 MS. CHATMAN: -- it ought --

23 CHIEF JUSTICE ROBERTS: -- not if the
24 prisoner says, "Here's why you shouldn't follow the
25 presumption."

1 MS. CHATMAN: Well, that's true. But if it -
2 - but if he files within 60 days, there's no need to
3 look further or consider his argument regarding
4 timeliness. And the other value in the 60-day --

5 JUSTICE SCALIA: Why phrase it as a
6 presumption? Why not phrase it, "We determine
7 California law to be, unless we hear otherwise, having
8 examined what it does in other situations, that 60 days
9 is timely"?

10 MS. CHATMAN: I think that would be perfectly
11 fair.

12 JUSTICE SCALIA: It's the same thing. But I
13 wouldn't call it --

14 JUSTICE BREYER: All right --

15 JUSTICE SCALIA: -- a presumption.

16 JUSTICE BREYER: -- that's a --

17 JUSTICE SCALIA: And then --

18 JUSTICE BREYER: -- that's --

19 JUSTICE SCALIA: -- and then the -- you know,
20 the incarcerated individual can come forward with
21 excuses and say that, "California would make an
22 exception to the 60-day rule for this," and we're back
23 where we were.

24 MS. CHATMAN: Well, that would be fair, and
25 it would accomplish the other thing that I offered the

1 60-day presumption to accomplish, is to offer a sort of
2 safe harbor where the Petitioner knows that he gets
3 tolling for 60 days, and need not file a protective
4 petition.

5 JUSTICE SOUTER: Well, it would --

6 MS. CHATMAN: So, it alleviates that problem.

7 JUSTICE SOUTER: -- it would -- it would be
8 fair, but to call it a finding of California State law
9 is a -- would be a bit of a stretch, wouldn't it? I
10 mean, you -- you've made a perfectly good argument that
11 it would be a sensible rule for California --

12 MS. CHATMAN: Uh-huh.

13 JUSTICE SOUTER: -- to adopt, would not be
14 sensible for us to adopt. But I'd have a hard time
15 saying that I could justify it as a statement of
16 current California law, and I'm --

17 MS. CHATMAN: Well --

18 JUSTICE SOUTER: Am I missing something?

19 MS. CHATMAN: Well, Justice Souter, I think
20 it works very well as a presumption adopted by the
21 Federal Courts for ease of administrability and, you
22 know, at the same time, reflecting State law.

23 JUSTICE SOUTER: Okay, the --

24 MS. CHATMAN: But the --

25 JUSTICE SOUTER: So you're back to the

1 presumption. But --

2 MS. CHATMAN: Right. But --

3 JUSTICE SOUTER: -- but if --

4 MS. CHATMAN: -- but the one thing --

5 JUSTICE SOUTER: -- if we're going to go
6 further and say, "Oh, well, we find that that's what
7 the State law is, unless they tell us differently,"
8 that's where I'm having trouble.

9 MS. CHATMAN: Well, it's not very different
10 from when the Federal Courts adopt a State statute of
11 limitations --

12 JUSTICE SOUTER: Yes, but we --

13 MS. CHATMAN: -- for a Federal --

14 JUSTICE SOUTER: -- know what it --

15 MS. CHATMAN: -- cause of action.

16 JUSTICE SOUTER: -- we know what it is.

17 There's a State statute of limitations. It says --

18 MS. CHATMAN: Uh-huh.

19 JUSTICE SOUTER: -- 3 years.

20 MS. CHATMAN: Well --

21 JUSTICE SOUTER: We don't have anything like
22 that here.

23 MS. CHATMAN: By analogy, you know that the
24 period of time for seeking direct appeal is 60 days.
25 So, it is -- it's deciding something by analogy, in

1 much the same way the Federal Courts do for a Federal
2 cause of action that has no statute of limitations.

3 JUSTICE BREYER: How many cases are there on
4 habeas in California every year, about?

5 MS. CHATMAN: Oh.

6 JUSTICE BREYER: No, I mean about. Just give
7 me the rough ballpark.

8 MS. CHATMAN: I would -- there are about
9 8,000, I would say.

10 JUSTICE BREYER: All right. So, the -- in
11 the Supreme Court.

12 MS. CHATMAN: No. In the Supreme Court, I
13 would say it is more like about 2500.

14 JUSTICE BREYER: So, there are 25- -- so
15 there are several thousand cases every year.

16 MS. CHATMAN: Thousands.

17 JUSTICE BREYER: All right. Thousands.

18 MS. CHATMAN: Thousands.

19 JUSTICE BREYER: Okay. So, I don't know what
20 I'm doing with California procedure when I pass a --
21 pass a law, is what it would be. Write a rule, write a
22 presumption. I have no idea what I'm doing there.
23 They've worked out a system. But I don't -- why
24 doesn't it work just to say to the lower courts, "Do
25 your job"? What we said -- and maybe it wasn't

1 expressed clearly -- maybe -- "Courts, look, it says
2 'reasonable time.' All right? Now, reasonable time,
3 in every other State is 30 days, sometimes 20 days."

4 MS. CHATMAN: Uh-huh.

5 JUSTICE BREYER: "Sometimes the most, 60
6 days. So, look and see if it was filed within a
7 reasonable time. That's all. And if California passes
8 -- some specific thing says something special about it,
9 of course, pay attention to that." What's wrong with
10 that? They just would do it like they do any other
11 thing of deciding what happens in --

12 MS. CHATMAN: That is -- that is exactly what
13 I would ask this Court to do. Exactly -- is to --
14 Federal Courts take on this Federal question of tolling
15 and complete the analysis by applying State law to find
16 out if these petitions were timely filed in merit
17 tolling.

18 JUSTICE SCALIA: Is "reasonable time" the
19 issue, or is it what California would consider a
20 "reasonable time"? I mean, that's the problem.

21 JUSTICE BREYER: Yes, that is the problem.

22 JUSTICE SCALIA: We're not --

23 MS. CHATMAN: It --

24 JUSTICE SCALIA: -- making up, for ourselves,
25 what's a reasonable time. If California says a year is

1 a reasonable time, that would be the reasonable time at
2 issue, wouldn't it?

3 MS. CHATMAN: I don't think it would be, in
4 light of --

5 -- in light of the analogous
6 State law that you only get 60 days to --

7 JUSTICE SCALIA: No, but if --

8 MS. CHATMAN: -- appeal, but --

9 JUSTICE SCALIA: -- the California Supreme
10 Court says, "Despite all of these, in this kind of a
11 situation, we think a year is a reasonable time" --

12 MS. CHATMAN: But they --

13 JUSTICE SCALIA: -- you --

14 MS. CHATMAN: -- haven't said so. The -- of
15 course, you --

16 JUSTICE SCALIA: I know, but if they said so
17 --

18 MS. CHATMAN: If they said so --

19 JUSTICE SCALIA: -- that would be binding --

20 MS. CHATMAN: -- if they had --

21 JUSTICE SCALIA: -- on us, wouldn't it?

22 MS. CHATMAN: If they said so, then we'd have
23 State law, and we would have to apply that. But we
24 don't.

25 CHIEF JUSTICE ROBERTS: Why would you have to

1 apply that? It's a Federal question whether the claim
2 is pending or not during that whole period, right?

3 MS. CHATMAN: Of -- certainly it is.
4 Certainly it is. But, at the end of the analysis,
5 there is a little bit of State-law analysis. It has to
6 be timely under State law. And if California Supreme
7 Court tells us more about what's timely under their
8 reasonableness standard, then I think you would have to
9 take that into account.

10 But the concept of reasonableness and due
11 diligence that are employed in States -- in
12 California's timeliness standards, I don't think
13 "reasonableness" and "due diligence" mean anything
14 different at the Federal courthouse in Sacramento than
15 they do at the State Court of Appeal five blocks away,
16 or in this Court. It's -- these are common terms that
17 are used in the law all the time.

18 JUSTICE STEVENS: May I ask this question? I
19 think our opinion the last time around suggested that
20 possibility would certify into the California --

21 MS. CHATMAN: Uh-huh.

22 JUSTICE STEVENS: -- Supreme Court, and that
23 was not done. Was any other effort made that you can
24 tell us about? Maybe you should, off the record, but
25 to try and get the guidance of the California Supreme

1 Court on the -- on the State-law problem here? Has
2 anybody suggested to the court they might adopt a rule
3 or a different practice or anything like that?

4 MS. CHATMAN: Your Honor, yes, we have
5 suggested that. The California Supreme Court -- and,
6 as you said, this is not within the record -- the
7 California -- but, if I may, the California Supreme
8 Court has declined to adopt a rule. They think it's a
9 political question that has to be decided by the
10 Legislature. And the Legislature, to date, has not
11 adopted a rule or -- not a rule, a statute of
12 limitations for these cases. And I have to say that,
13 if they undertook that, then there would be certain
14 costs to doing that, as well. You know, we would -- we
15 would -- we would ease this issue, but we would
16 confront the cost of considerable litigation, I would
17 imagine, if we adopted a new statute for collateral
18 relief in California. So, there's a cost to doing
19 that, that might outweigh the benefits of --

20 JUSTICE STEVENS: Thank you.

21 MS. CHATMAN: -- clarifying this issue.

22 If I may reserve my time?

23 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 Mr. Stris.

25 ORAL ARGUMENT OF PETER K. STRIS

1 -- in the summary-denial context, by citing to In re
2 Swain or In re Robbins --

3 JUSTICE KENNEDY: I missed it. You said the
4 problem is, California doesn't "support" or "import"?
5 I just didn't --

6 MR. STRIS: Oh, I --

7 JUSTICE KENNEDY: -- hear your word.

8 MR. STRIS: -- apologize.

9 JUSTICE KENNEDY: I -- the -- I just didn't
10 hear what you said.

11 MR. STRIS: What I had said is that
12 California does enforce its --

13 JUSTICE KENNEDY: Enforce.

14 MR. STRIS: -- timeliness standards. And the
15 way they customarily do that --

16 JUSTICE O'CONNOR: And what are those
17 standards, please?

18 MR. STRIS: Okay. The standards are that a
19 prisoner must file within a reasonable time. And that
20 requires a two-part inquiry, Justice O'Connor. The
21 first part is, Was there substantial delay? It's
22 determined based upon a set standard, when the delay
23 begins. But California's never articulated any
24 standards for what period of time constitutes
25 "substantial." That's the first problem. It's

1 essentially an ad hoc determination that's made by
2 individual California Courts. And that's why former
3 Justice Brown described that as "an abstraction," and
4 former Justice Moss described it as "vague and
5 indeterminate at its very core." But that's what the
6 Ninth Circuit is dealing with when it reviews these
7 cases.

8 So, to put it context for a moment, the way
9 the State Courts do enforce this on a case-by-case
10 basis, to be practical, is, the State Supreme Court
11 often summarily dismisses cases on procedural bars,
12 including timeliness. And, to give you some statistics
13 from the Warden's brief, in 2004 there were 1,223
14 unexplained summary denials -- in other words, just
15 denied -- and there were 1,174 denials with a citation
16 to a case. And this is significant, because this means
17 that, in about half of the cases in 2004 that went to
18 the California Supreme Court, they enforced one of
19 their procedural bars, and, in many of them, it was
20 timeliness.

21 JUSTICE SCALIA: Wait. A case that was a
22 procedural-bar case?

23 MR. STRIS: I'm not sure -- I'm not sure I
24 follow the --

25 JUSTICE SCALIA: Well, you --

1 MR. STRIS: -- question, Justice.

2 JUSTICE SCALIA: -- you could summarily deny
3 and cite a case that showed you were denying on the
4 merits.

5 MR. STRIS: Oh. What I -- what I was
6 suggesting is that there were 1,174 cases that were
7 procedural-bar cases, where it said --

8 JUSTICE SCALIA: Where they cited a
9 procedural-bar case.

10 MR. STRIS: That's correct.

11 It would say, "Denied, In Re Swain," meaning
12 denied for being untimely. As opposed, Justice
13 Scalia, to the 1,223 cases that were
14 unexplained.

15 JUSTICE KENNEDY: And this could be --

16 JUSTICE BREYER: But, now, maybe I'm --

17 JUSTICE KENNEDY: -- just one point, if I
18 may, Justice Breyer -- those are the California Supreme
19 Court or California appellate court?

20 MR. STRIS: That's the California Supreme
21 Court.

22 JUSTICE KENNEDY: Thank you.

23 MR. STRIS: Okay.

24 JUSTICE BREYER: So, the difficulty of
25 looking to that, which may be a good difficulty -- I

1 mean, that is a serious problem, but I thought what we
2 wrote in the case -- see, there are two problems here.

3 First, which was bothering me, had to do with our
4 Court's relation to the Ninth Circuit, which may be
5 simple and -- as far as legally is concerned -- but I'm
6 not sure about it. The other, which is much more
7 interesting, is what you're talking about.

8 All right, now, on the first one, I read the
9 words. It says the words "on the merits." The Ninth
10 Circuit thought those three words meant that the
11 California Supreme Court could not have considered the
12 petition too late, for, after all, it decided it on the
13 merits, just as with the cite. Now, whether these
14 words are right or wrong that follow, that's what we
15 wrote. The next words were, "There are many plausible
16 answers to this question." Sometimes, a court
17 addresses the merits of a claim that it thought was
18 presented in an untimely way. Why? Because they don't
19 present any difficulty, and the timeliness issue does,
20 or because it wants to give the reviewing court
21 alternative grounds for decision, or maybe it just
22 wants to show the prisoner we thought about the claim
23 on the merits. He, after all, doesn't have a lawyer.
24 He gets a postcard. That helps him. So, there are a
25 lot of reasons. And it says, "Conclusion." Given the

1 variety of reasons why they might have put the words
2 "on the merits," the fact that they are there, those
3 words cannot, by themselves, show that the petition was
4 timely. So, then I read what they wrote. What they
5 wrote is, "When the California Court denies a habeas
6 petition without comment or citation, we have long
7 treated the denial as a decision on the merits." Okay?
8 And then it cites a pre-Carey case. "Therefore, the
9 summary denial was on the merits, and the petition was
10 not dismissed as untimely," citing two pre-Carey cases.

11 Now, I don't see how, since I just said the
12 words "on the merits do not end the issue" -- here, the
13 words weren't even there, but they say, "We're treating
14 it as if they were, and that ends the issue." So, what
15 do we do about that?

16 Then the next question, once I figure that
17 one out, is, What do we do about the issue you're
18 raising, which is quite important and interesting and
19 so forth?

20 MR. STRIS: Okay. Well, as to the first
21 question, the explanation that you just provided
22 clearly requires the Federal Courts, when there's some
23 indication from the State Court that it might have been
24 untimely, to look into it. And that was the very
25 problem with what the Ninth Circuit did in that case.

1 It said "on the merits and for lack of diligence." So,
2 to presume that that was just on the merits, that's
3 flatly wrong. You'd need to do some further
4 investigation.

5 In light of the context of what's happening
6 in California, however, when the State Court says
7 nothing, there has to be some process by which the
8 Federal Court can make a decision as to what that
9 means, because if, in fact, in that case it was denied
10 on the merits and the State Court thought it was
11 timely, it would be extremely invasive for the Federal
12 Court to re-review the case, potentially come to a
13 different conclusion, and, we would suggest,
14 dramatically alter the landscape of how prisoners
15 exhaust their remedies in California, because now
16 you're developing a Federal body of law that may be
17 very different in deciding what's substantial and
18 what's reasonable than California did. And so, what
19 the Ninth Circuit, I believe, did in this case was look
20 to context and come up with the presumption that was
21 most reasonable in light of what's going on.

22 So, the first thing that is relevant, from a
23 --

24 JUSTICE SCALIA: Why is that the most
25 reasonable presumption? Why isn't the most reasonable

1 presumption that the California Court denies, for
2 untimeliness, wherever that issue is absolutely clear -
3 -

4 MR. STRIS: The --

5 JUSTICE SCALIA: -- and where that issue is
6 not absolutely clear, and the -- and the merits issue
7 is absolutely clear, it just -- it just denies?

8 MR. STRIS: The answer -- pardon me --

9 JUSTICE SCALIA: It doesn't want to say
10 "denied on the merits," because that would suggest that
11 it was timely.

12 MR. STRIS: The answer, I would suggest,
13 Justice Scalia, requires looking to California
14 practice. And where I would start is with the
15 California Supreme Court's decision in *In re Sanders*.
16 And in *In re Sanders*, the Court made clear that after
17 the Supreme Court adopted their policies in 1989
18 regarding certain presumptions in capital cases, and
19 after the seminal *In re Clark* case in 1993, which
20 asserted -- rather, articulated California's timeliness
21 standards, most petitions -- and these are the
22 California Supreme Court's words -- "Most petitions are
23 timely filed." So, with that backdrop and the fact
24 that half of the California Supreme Court's cases are
25 being denied with a case citation, it's reasonable to

1 conclude that the unexplained denials are not
2 necessarily untimely.

3 Now, I would add to that --

4 JUSTICE SCALIA: I don't know what it --
5 "most" is 51 percent. I mean, among those that you
6 don't know whether it was the merits or not, there
7 could be a lot of ones where the timeliness is simply
8 not decided upon.

9 MR. STRIS: It's certainly the case, Justice
10 Scalia, that the presumptions the Ninth Circuit adopted
11 could permit cases that even the California State
12 Courts would consider to be untimely --

13 JUSTICE BREYER: Well, we could work with
14 that. Now, that's, sort of, helpful, because if they
15 say "most are timely filed," then the next question
16 would be, "All right, what period of time is it?"

17 MR. STRIS: Well, that's the --

18 JUSTICE BREYER: You'd have to get some
19 professor to go through these cases, and they could --
20 they could figure out how long it is. What do you
21 think it is, from your experience?

22 MR. STRIS: I can't really answer that, and
23 that's at the heart of --

24 JUSTICE BREYER: But, I mean, is it more like
25 a month, or is it more like 3 years?

1 MR. STRIS: Well, the reason I would suggest
2 that -- and answering that is not necessarily
3 appropriate or helpful in resolving the question -- is
4 because of the series of cases that we quoted in
5 footnote 15 of our brief. In certain instances, the
6 California Courts have found 3 and a half years, 1 and
7 a half years, 2 years to be reasonable. Now, that
8 doesn't mean --

9 JUSTICE BREYER: Because?

10 MR. STRIS: In one instance, it was because
11 of attorney abandonment. In other cases, it was
12 because the prisoner was indigent.

13 JUSTICE BREYER: So, there's a special
14 reason. In your case, is there really a year that
15 isn't explained at all?

16 MR. STRIS: Oh, I think it would apply to our
17 case, as well.

18 JUSTICE BREYER: Because?

19 MR. STRIS: In our case, the first 15 months
20 --

21 JUSTICE BREYER: No, forget that. The
22 library, I'll give you. What's the rest?

23 MR. STRIS: After that, our client was
24 effectively on lockdown and had no access whatsoever to
25 the library. Now, this presents the burden problem

1 with doing any sort of independent determination. The
2 Attorney General suggested, in the District Court, that
3 there was a paging system in place whereby prisoners
4 who are on lockdown could get access to the library.
5 There was never any suggestion in the District Court on
6 the part of the Attorney General that the lockdown
7 didn't exist. And the Attorney General, and not my
8 client, would have access to those records.

9 JUSTICE BREYER: But -- well, did your -- did
10 your client file an affidavit or something saying he
11 didn't have access to the library during the whole
12 period of 3 years?

13 MR. STRIS: I wouldn't call it an affidavit,
14 but it was -- he filed an opposition to the motion to
15 dismiss.

16 JUSTICE BREYER: Well --

17 MR. STRIS: And --

18 JUSTICE BREYER: -- is there anything in the
19 record that says, during the year after they said,
20 "We'll change your job so you can get access to the
21 library," that he didn't have access to the library?

22 MR. STRIS: Yes. I -- well, I -- he didn't
23 talk about not having access to the library. It's
24 implicit, if you look at the Joint Appendix at --

25 JUSTICE BREYER: Well, all right, so what's

1 his reason for saying that, "Last year, I was not able
2 to file a petition in California Supreme Court"?

3 MR. STRIS: That he had had -- had access to
4 nothing. In other words, he didn't say, "I didn't have
5 access" --

6 JUSTICE BREYER: So, what does it say? What
7 does he say? Go ahead.

8 MR. STRIS: Well, it would be on the Joint
9 Appendix, pages 38 and 39, where he describes the
10 lockdown. And, you know, I haven't looked at it
11 recently, but my understanding is that he was
12 suggesting that he had had access to nothing, including
13 the prison library. And the Attorney General suggests
14 that there was a paging system, but the documentary
15 evidence that the Attorney General puts into the
16 record, which is on pages 68 -- 67 -- no, pardon me,
17 88 through 96 -- is a prison manual that's dated 2000.
18 Now, it says it's amended. But my client takes the
19 position that this wasn't in the place at his prison at
20 that time, and that would require a --

21 JUSTICE SCALIA: Well --

22 MR. STRIS: -- evidentiary hearing --

23 JUSTICE SCALIA: -- the burden --

24 MR. STRIS: -- to determine --

25 JUSTICE SCALIA: -- for that one is on him.

1 I mean, if you say the burden is on the State to come
2 up with a -- you know, showing that there was such a
3 system, they came up with it. And you say, "The system
4 may have been amended." Well, if it has been amended,
5 there the burden is on you.

6 MR. STRIS: Of course. But --

7 JUSTICE SCALIA: I mean --

8 MR. STRIS: -- the burden --

9 JUSTICE SCALIA: -- well --

10 MR. STRIS: Pardon me. The burden on him
11 would be in the context of an evidentiary hearing,
12 which never took place. The District Court in this
13 case didn't reach that issue, because they found that
14 statutory tolling --

15 JUSTICE BREYER: Now, the --

16 MR. STRIS: -- wasn't available.

17 JUSTICE BREYER: -- the next thing, what he
18 actually says here, is that the C facility where he was
19 confined was put into lockdown clearly into February
20 1997. And this is all after he got access. Then it
21 remained quiet and lockdown free until August 11th,
22 1997. So, that seems six months, on the most generous
23 interpretation --

24 MR. STRIS: But that --

25 JUSTICE BREYER: -- where he's not in

1 lockdown, and he has access to the library.

2 MR. STRIS: But that illustrates the very --

3 JUSTICE BREYER: About six months.

4 MR. STRIS: That's correct, Justice Breyer.

5 And that illustrates the very problem with this case,
6 which is that in cases where there is 90 days, 2
7 months, 4 months, the very difficult questions that a
8 Federal Court would normally look to State law, if it
9 was determinant, to apply, California is giving no
10 guidance. And our case falls within that once you look
11 to the particular explanations that our client put
12 forward. And so, we would suggest that if there is a
13 concern on the part of the Court about certain cases
14 getting through and essentially allowing prisoners to
15 abuse the writ, that this Court will use its equitable
16 discretion to look at individual cases and to decide,
17 "Hey, is this a situation where the behavior is
18 dilatory? Is this a situation where the behavior is
19 abusive?" And that would restrict the number of cases
20 where Federal Courts would need to engage in a factual
21 inquiry. The alternative is adopting a presumption,
22 that the Attorney General suggested, that the
23 California Courts have flatly rejected. That
24 presumption has been adopted -- has been imported from
25 the direct-appeal context. It has no significance in

1 California habeas law. In the direct-appeal context,
2 prisoners have the right to counsel. In the habeas
3 context, they don't, except in capital cases. And,
4 unsurprisingly -- pardon me -- unsurprisingly, the
5 California Supreme Court has adopted a presumption of
6 90 days, in the capital context. So, in the -- in the
7 noncapital cases, like my client's, where individuals
8 have no incentive to delay -- my client has been up for
9 parole twice already, he has no incentive to delay the
10 habeas process -- and where people like Mr. Chavis
11 think that they're, in good faith, complying -- and
12 it's not just an issue of excuse -- and this goes back
13 to a -- to a question that Justice O'Connor asked
14 earlier -- there are specific policy reasons why the
15 State of California has adopted the standard that it
16 has. They've articulated --

17 JUSTICE STEVENS: May I just interrupt? I
18 want to be sure that I get one thing straight. The 90-
19 day presumption in capital cases, that is that if it's
20 within 90 days, it's reasonable. Does it also presume
21 that it's a -- more than 90 days, it's unreasonable?

22 MR. STRIS: It presumes that if it's within
23 90 days, it's timely.

24 JUSTICE STEVENS: Right.

25 MR. STRIS: And then you engage in the

1 inquiry. But that's significant, Justice Stevens,
2 because these individuals are represented by counsel.

3 JUSTICE STEVENS: No, I understand. But do
4 they adopt the converse? If it's more than 90 days, is
5 it presumed to be untimely?

6 MR. STRIS: No, they do not. And they've
7 flatly rejected that and found cases where there's --
8 several years' delay, even in the capital context, to
9 be reasonable. But --

10 JUSTICE STEVENS: Well, I could see how they
11 could overcome a presumption that way, but there's not
12 even a presumption that over 90 days is unreasonable.

13 MR. STRIS: That is correct.

14 JUSTICE SCALIA: There isn't. You --

15 MR. STRIS: There is not.

16 JUSTICE SCALIA: You mean if you go in and
17 you say, "I'm" -- you know, it's more than 90 days, and
18 you bring in no evidence whatever of any excuse for
19 being over 90 days, you're telling me that California
20 Supreme Court would accept it?

21 MR. STRIS: No, that's not true. The --

22 JUSTICE SCALIA: Well, then --

23 MR. STRIS: -- the --

24 JUSTICE SCALIA: -- then it is a presumption

25 --

1 MR. STRIS: That's correct.

2 JUSTICE SCALIA: -- that if it's over 90
3 days, unless you have a reason, it's untimely.

4 MR. STRIS: The burden shifts the prisoner to
5 produce some evidence. I didn't understand that to be
6 --

7 JUSTICE BREYER: So, here we have 180 days --
8 180 days, twice 90 -- with no excuse at all presented.

9 MR. STRIS: In the noncapital context. And
10 it's very -- it's very different, because the
11 California State Courts are articulating particularly -
12 - particular policy reasons for noncapital prisoners to
13 delay. One that they're articulated is a desire to
14 avoid the piecemeal presentation of claims. And this
15 is particular to California's original writ system.
16 You can have a functional appeal, but, because it's
17 also an original writ, you -- if you have an additional
18 claim that's legitimate, you need to add it in that
19 claim.

20 JUSTICE O'CONNOR: But once it's --

21 MR. STRIS: And --

22 JUSTICE O'CONNOR: -- in the Federal habeas
23 context, the AEDPA law suggests there's a great premium
24 paid -- at stake for promptly resolving these things.
25 What do we do about that? This is in the Federal court

1 system now.

2 MR. STRIS: If it were the case -- and
3 there's no evidence on the record to suggest this --
4 that a substantial number of cases were going to start
5 coming through California with massive delays, and this
6 Court was going to be forced to provide statutory
7 tolling, that would be a problem. But there's no
8 evidence to suggest that. And that ties back to --

9 JUSTICE O'CONNOR: Well, what would we do in
10 that situation?

11 MR. STRIS: If that --

12 JUSTICE O'CONNOR: If it's --

13 MR. STRIS: -- started happening?

14 JUSTICE O'CONNOR: -- open to the Federal
15 Courts.

16 MR. STRIS: If that started happening, I
17 think you, in this Court, would do nothing. I think
18 that Congress would see what was going on, and they'd
19 amend the statute, because that's clearly not what they
20 intended. But that's not this case.

21 JUSTICE GINSBURG: Amend just for California,
22 when the system is working fine, all the other States
23 that do have the timelines?

24 MR. STRIS: I don't think they would do that,
25 Justice Ginsburg. But there's a proposal that I'm

1 aware of, already, to change the specific language of
2 2244(d)(2), and it was made by a congressman in
3 California. It doesn't suggest changing it for
4 California; it suggests changing the language. But
5 that hasn't happened.

6 JUSTICE GINSBURG: To do what? What would it
7 say?

8 MR. STRIS: I believe it replaces the word
9 "pending" with some replacement. And so, it
10 essentially changes the tolling provision to account
11 for this problem. But that hasn't happened yet. Right
12 now, we have a congressional statute that, on its face,
13 does not require the Federal Courts --

14 JUSTICE BREYER: What about this? You might
15 lose under this, but it -- see, so you say -- look, in
16 every other State, the time for appealing from an
17 appeals court to the State Supreme Court, asking them,
18 is 20 days, normally, or sometimes 30. So, if the
19 Ninth Circuit gets a case in which it was longer than
20 30 days, then, irrespective of whether they say "on the
21 merits," whether they cite a case, whether they don't
22 say anything and just have a postcard, what the Ninth
23 Circuit should assume that they've done is consider it
24 untimely, in the absence of the kind of excuse that the
25 California Courts might accept as an excuse. So, then

1 they'll look into that. And if California, in the
2 future, wants something different -- which I'd be
3 surprised -- they will say that their system means that
4 a 3-year delay, or whatever it is, is actually timely.

5 But, in the absence of some reason to think that, why
6 not use the words, which would give you a chance to go
7 back, and you could say, "This is not a case of total
8 lack of excuse. There is excuse of the kind that
9 California would accept."

10 MR. STRIS: Well, I think the problem with
11 that sort of rule, Justice Breyer, is that it risks
12 error, because California's standard is so
13 indeterminate, and at very little -- it gets very
14 little benefit. Because there's -- there is no real
15 harm -- there's no real harm to the Federal interest
16 here just because we have a conclusive presumption.
17 The very nature of a conclusive presumption is that
18 sometimes there will be cases that don't fit the
19 presumption. But, on this record, and on anything I've
20 seen from my review of California procedure, there's
21 nothing to suggest that a -- the Federal interest in
22 avoiding substantial delays is compromised by the
23 specific rule that the Ninth Circuit has adopted. And
24 the Ninth Circuit has adopted a --

25 CHIEF JUSTICE ROBERTS: Well, how can you --

1 how can you say that? We do have a Federal rule and a
2 limitation, and (d)(2) is an exception for time that
3 it's pending before the State Courts. And if the State
4 Courts aren't going to bother to tell us whether
5 something's timely or not, or pending, giving them a
6 blank check does undermine the Federal interest behind
7 the 1-year limitation period.

8 MR. STRIS: I would say two things about
9 that, Mr. Chief Justice. The first thing is, I would
10 strongly resist your characterization that the State
11 Court is saying nothing. I think that, in most cases,
12 they are saying something, and that, in the cases that
13 involve postcard denials, many of them, the court is
14 saying that they're timely, and, in others, those are
15 the hard questions. So, I would restrict your
16 characterization to the fact that California is not
17 saying something in some cases.

18 Now, because the Federal statute necessarily
19 imports a State standard, that's the very problem with
20 the statute. I can conceive of many instances where --

21 CHIEF JUSTICE ROBERTS: Why do you think the
22 Federal statute necessarily imports a State standard?
23 It says that the State postconviction proceeding must
24 be pending. And California presents an unusual
25 situation, but we interpret that pending is a question

1 of Federal law. It's not a State standard.

2 MR. STRIS: That's true, Mr. Chief Justice.
3 But if you took that to its logical conclusion, then,
4 when State Courts made errors -- they didn't see that a
5 case was properly filed, they just missed it -- the
6 Federal Court would go in and review. Or in a case
7 where they did claim the reverse, the Federal Court
8 could say, "No, there was clear error." But this Court
9 has rejected that in Saffold. It's rejected it in
10 Pace. And -- because that is informed by the very view
11 that the tolling provision was included to encourage
12 one round of State exhaustion free of Federal
13 interference.

14 JUSTICE BREYER: But we decided --
15 I'd like you to suggest something to -- from putting
16 yourself in the -- in an imaginary position. Carey
17 versus Saffold did have a dissent. And four Justices
18 joined it. And let's imagine that, when I read the
19 dissent, I see the -- and then I look at this case -- I
20 see imaginary words on the top of the dissent, which
21 are, "We told you so."

22 [Laughter.]

23 JUSTICE BREYER: And -- now, therefore, think
24 not of if you were arguing Carey v. Saffold afresh, but
25 think of the words that are actually written there.

1 And now think of what happened here. And now propose
2 something, please, that will, in fact, deal with the
3 problem that this case seems to present.

4 MR. STRIS: Well, I would be lying, Justice
5 Breyer, if I didn't say that I haven't thought about
6 that. And the problem is that the rule announced in
7 Saffold isn't the right rule. It's trying to deal with
8 a problem that's been created by the California State
9 Courts. And so, the solution that the Ninth Circuit
10 has adopted -- that's our proposal. We essentially
11 think that it has a minimal harm to Federal interests,
12 because maybe certain cases will get in that Congress
13 didn't intend, but if you don't adopt it, there's no
14 alternative. You can't certify the question. In
15 California, you can't certify to the Court of Appeal.
16 You can't certify from a District Court. So, if the
17 California State Courts aren't going to change, it's
18 not incumbent upon this Court to read the statute
19 differently than the proper interpretation. And I
20 concede the arguments that were made in the dissenting
21 opinion in Saffold are very interesting, and they don't
22 compel, in my opinion, a different interpretation of
23 the statute; they recognize the difficulty that the
24 statute presents. And it presents that difficulty
25 because it does incorporate, in some measure, a State

1 standard, and because there's one State out there,
2 California, that's doing something that's very
3 difficult to deal with.

4 JUSTICE STEVENS: May I ask this -- two
5 questions about California? Is the problem we're
6 discussing, with these long delays, primarily in the
7 application the third range, the application of the
8 California Supreme Court, as opposed to lower courts?

9 MR. STRIS: Well, I wouldn't characterize it
10 as a problem, because, like I said before, I don't
11 think that --

12 JUSTICE STEVENS: But is the condition, that
13 there is the long delay, that primarily occurs in the -
14 - in the application of State Supreme Court? Is it --

15 MR. STRIS: I have no -- I've seen no
16 specific evidence to be able to answer that with any
17 citation, but my understanding, Justice Stevens, is
18 that that makes sense, because it's the last process
19 that the prisoner is going to be able to engage in,
20 then they'll have to go to the Federal Circuit.

21 JUSTICE STEVENS: Then my second question is,
22 Have we decided, or is it a matter of common practice
23 in California, that the application to the California
24 Supreme Court is necessary in order to complete the
25 exhaustion?

1 MR. STRIS: It is -- it is necessary, in my
2 opinion. I don't know if the State -- if this Court
3 has ever --

4 JUSTICE STEVENS: We've held it --

5 MR. STRIS: -- decided that.

6 JUSTICE STEVENS: -- in cases where there's
7 direct review, but this is a different sort of animal
8 that you have in California.

9 MR. STRIS: But once you start from the
10 premise that these are functional appeals, which they
11 are, I don't see how you could read AEDPA any other
12 way. I mean, AEDPA says that if there's an available
13 method to challenge and -- a petition, whether it be by
14 review or original writ, to the California Supreme
15 Court would be available. So, you could be sure that
16 if prisoners --

17 JUSTICE STEVENS: I think it is --

18 MR. STRIS: -- didn't file --

19 JUSTICE STEVENS: -- required.

20 MR. STRIS: Yes. If they didn't file, they'd
21 get kicked out of Federal Court.

22 JUSTICE SCALIA: There's one aspect of
23 Saffold that you haven't addressed. We not only said
24 what we said about they're saying "on the merits," we
25 actually cited a case that involved exactly the

1 situation here -- namely, Welch versus Newland, a CA9
2 case from 2001. And we cited that as an example of how
3 the Ninth Circuit rule, quote, "risks the tolling of
4 the Federal limitations period even when it is highly
5 likely that the prisoner failed to seek timely review
6 in the State appellate courts," close quote.

7 MR. STRIS: I would say two things about
8 that.

9 JUSTICE SCALIA: How could the Ninth Circuit
10 here simply have ignored that criticism of exactly what
11 they did here?

12 MR. STRIS: Well, I don't believe they
13 ignored it, Justice Scalia. And if you look at the
14 Welch case that you're referring to, on en banc
15 rehearing the en banc panel reached a very different
16 result. They didn't reach the issue of timeliness, for
17 the reasons I described, but they determined that that
18 was not a functional appeal, because --

19 JUSTICE SCALIA: But we --

20 MR. STRIS: -- the claim --

21 JUSTICE SCALIA: -- we didn't cite the en
22 banc decision. We cited the panel decision --

23 MR. STRIS: The en banc --

24 JUSTICE SCALIA: -- didn't we?

25 MR. STRIS: -- decision occurred after your -

1 -

2 JUSTICE SCALIA: After.

3 MR. STRIS: -- case.

4 JUSTICE SCALIA: But the point is, we
5 criticized the panel decision in Welch, which did
6 exactly what this panel did here.

7 MR. STRIS: I don't agree with that
8 characterization, Justice Scalia. I believe that case
9 was included to illustrate that this Court thought that
10 was probably too long, and that not looking at all to
11 what's happening in the California system risks that.
12 I don't think anything was at least necessary to the
13 holding in Saffold --

14 JUSTICE SCALIA: We cited --

15 MR. STRIS: -- because it --

16 JUSTICE SCALIA: -- it for the proposition
17 that it -- as an example of how the Ninth Circuit rule,
18 quote, "risks the tolling of the Federal limitations
19 period even when it is highly likely that the prisoner
20 failed to seek timely review in the State appellate
21 courts." That's what we cited.

22 MR. STRIS: That is true. And in the context
23 of a case like Saffold, where there's a reference to
24 lack of diligence, that risk is too great. I'm not
25 going to get up here and suggest that there's no risk

1 to a conclusive presumption that some cases are going
2 to make it into Federal Court that Congress didn't
3 intend. But it's a balancing that's inherent in the
4 notion of federalism. There is a risk that, by not
5 reviewing clear statements by the California State
6 Court, that cases get in that shouldn't. A case could
7 not have been properly filed, and the State Court
8 didn't find it. But, in Saffold and in Pace, this
9 Court announced the principle that once the State Court
10 decides, that's the end of the matter.

11 And I guess, in summation, what I suggest is
12 that atmospherically this case presents a difficult
13 problem. The Ninth Circuit is involved. There is a
14 five-four decision in Saffold. We recognize those
15 things. However, there is no easy solution. The Ninth
16 Circuit has adopted a rule that balances the very
17 interest in federalism that the tolling provision was
18 intended to preserve, and there's no suggestion that
19 some corresponding Federal interest is compromised.
20 And, in fact, if the Federal Courts are required to
21 review these cases, they'll be required to do it in 60
22 days, in 70 days, in 80 days, and, if they make a
23 mistake, and they find a case to be untimely that the
24 California Court didn't, will deprive first Federal
25 habeas, one Congress didn't intend. That's

1 fundamentally contrary to the purpose of AEDPA.

2 CHIEF JUSTICE ROBERTS: Thank you --

3 MR. STRIS: Thank you.

4 CHIEF JUSTICE ROBERTS: -- Mr. Stris.

5 Ms. Chatman, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF CATHERINE BAKER CHATMAN

7 ON BEHALF OF PETITIONER

8 MS. CHATMAN: Thank you.

9 Of course there's a Federal interest at stake
10 here. It's the Federal interest in the Federal Courts
11 not having to deal with stale habeas claims in Federal
12 Court.

13 One thing I'd like to address is the capital-
14 case presumption, which is now -- excuse me -- 180
15 days. It's been changed from 90 days. That
16 presumption is for -- from the filing of the reply
17 brief to filing an initial petition in California
18 Court. That is, your first habeas petition. That --
19 you only get presumed timely for 180 days. Here, we're
20 talking about noncapital cases going just from --
21 taking claims, that have already been presented in one
22 petition, to the next level. So, in those --

23 JUSTICE BREYER: Well, 180 days from what?

24 MS. CHATMAN: From the filing of the -- the
25 final due date of the filing of the reply brief --

1 JUSTICE BREYER: Well, I mean, you file --

2 MS. CHATMAN: -- in the direct appeal.

3 JUSTICE BREYER: -- the reply brief in the
4 lower court. Maybe the judge will take 4 months to
5 decide it. What's the relation? I don't understand
6 that. Or maybe it'll take --

7 MS. CHATMAN: I --

8 JUSTICE BREYER: -- 2 days --

9 MS. CHATMAN: I think --

10 JUSTICE BREYER: -- to decide.

11 MS. CHATMAN: I think they -- I think they
12 date it from the filing of the reply brief because --

13 JUSTICE BREYER: Why? What would the theory
14 be? I don't understand that.

15 MS. CHATMAN: Because they like to see these
16 claims presented along with the appeal to be -- so that
17 they can possibly bring them together and decide habeas
18 claims in light of the record on appeal. So, I think
19 that's why they date it from filing of the reply
20 briefs.

21 JUSTICE BREYER: So, a judge -- you file it.
22 On day -- what -- you file it on April 1st, and then
23 the judge decides it in August. Or September. And now
24 it's only 3 days before the 6-months -- you have to
25 file your appeal, like, in 3 days. That wouldn't make

1 sense. And the converse would not --

2 MS. CHATMAN: Well, you're not -- you're
3 generally not supposed to be waiting. I mean, you were
4 talking about claims such as --

5 JUSTICE BREYER: You can't --

6 MS. CHATMAN: -- ineffective --

7 JUSTICE BREYER: -- file an --

8 MS. CHATMAN: -- assistance --

9 JUSTICE BREYER: -- appeal before -- oh,
10 maybe you can in California. You're going to file the
11 appeal before the lower court decides it?

12 MS. CHATMAN: Well, if we're talking about
13 capital cases here, they are -- they are filing their
14 appeals directly in the California Supreme Court;
15 similarly, with their habeas petitions.

16 JUSTICE BREYER: Even -- or even before they
17 get a lower court decision.

18 MS. CHATMAN: There would be no lower court
19 decision.

20 JUSTICE BREYER: They don't, at all.

21 MS. CHATMAN: No.

22 JUSTICE BREYER: In other --

23 MS. CHATMAN: No, no, no.

24 JUSTICE BREYER: -- they don't, at all.

25 MS. CHATMAN: No, they go --

1 JUSTICE BREYER: Oh.

2 MS. CHATMAN: -- straight to California
3 Supreme Court. Which brings up one point, which is
4 that the problem that we're looking at here in deciding
5 timeliness will not arise in capital cases. We will
6 not have that problem, because capital cases go
7 straight to the California Supreme Court. There are
8 not going to be intervals between the courts to deal
9 with. So, that simplifies, I think, the problem a
10 little bit.

11 The other thing I'd like to address is the
12 argument that a State Court is saying something with
13 these summary orders. I strongly disagree with that.
14 They are absolutely saying nothing. This Court said in
15 Ylst that the essence of an unexplained order is that
16 it says nothing. It does not say, "This is a timely
17 petition."

18 CHIEF JUSTICE ROBERTS: Well, the ones that
19 would cite a case that threw out the petition because
20 it was untimely -- and we were told there were over a
21 thousand of those every year -- that would be saying
22 something, wouldn't it?

23 MS. CHATMAN: That is -- in the California
24 Supreme Court, you will find that sometimes, that they
25 will indicate untimeliness by a case citation; hardly

1 ever in the lower appellate court.

2 And I would also disagree with the
3 characterization of delay being a problem going from
4 the lower appellate court to the California Supreme
5 Court. We see it at both levels.

6 And I would also disagree that this shouldn't
7 be a problem because these Petitioners have no
8 incentive to delay. That may be the case, that they
9 don't have an incentive to delay, but they do, in fact,
10 sleep on their rights, as --

11 JUSTICE BREYER: How often --

12 MS. CHATMAN: -- Mr. Chavis did.

13 JUSTICE BREYER: Do you, as the Attorney
14 General, what period of time after the District Courts
15 made a decision, and now -- they've now filed their
16 claim in the Court of Appeals -- how long is it before
17 you say it's untimely?

18 MS. CHATMAN: We would -- we would say
19 anything over 60 days. Yes, Your Honor.

20 I see my time is up. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, Ms.
22 Chatman.

23 The case is submitted.

24 [Whereupon, at 12:03 p.m., the case in the
25 above-entitled matter was submitted.]