IN THE SUPREME COURT OF THE UNITED STATES

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ERICK CORNELL CLAY, :

Petitioner :

v. : No. 01-1500

UNITED STATES. :

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Washington, D.C.

Monday, January 13, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

DAVID W. DE BRUIN, ESQ., Washington, D.C.; as amicus curiae; invited to brief and argue as amicus curiae in support of the judgment below.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 01-1500, Eric Cornell Clay versus The United States.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

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

Paragraph 6 of section 2255 provides that, quote, a 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -- and it identifies four events, the first of which is, quote, the date`on which the judgment of conviction became final.

Congress did not define or otherwise explicate when the judgment becomes final in that provision, and the question presented by this case is that, given that final can mean many different things in different contexts, when does it -- judgment become final here?

Petitioner agrees with the clear majority of circuits and the United States that the judgment becomes final upon the conclusion of direct review or the expiration of time for seeking such review. As applied to

this case, petitioner's time to seek 2255 relief began to run when his time to seek certiorari in this Court expired.

Congress most likely intended that interpretation for two reasons. First, it is the one that this Court has consistently used in the most analogous context, and that is the dividing line between direct and collateral review; and, second --

QUESTION: Are you talking about now our retroactivity cases?

MR. GOLDSTEIN: Not merely retro --

QUESTION: The --

MR. GOLDSTEIN: Those included, Mr. Chief Justice, but also cases like Barefoot versus Estelle, dealing with the presumption of correctness, and also Bell versus Maryland, which addresses the question of when a statute is repealed, when does that repeal affect -- what -- what convictions does it affect?

QUESTION: Well, those come from quite diverse contexts.

MR. GOLDSTEIN: Yes, Mr. Chief Justice, and that is, in effect, our point. Those -- most of those contexts, however, do deal with the dividing line between direct and collateral review.

The amicus quite rightly points out that there

are other meanings of final. We do believe, however, that they don't -- they aren't as close as this one, and they aren't the one that Congress most naturally looked to, and since Congress didn't tell this Court what it meant, you would look to the dividing line between direct and collateral review, because that's the point of this provision in section 2255.

I mentioned there was a second reason that I'll come to, and that is that the -- the minority rule doesn't work textually and would produce anomalous results.

The -- as I mentioned, the Court has picked up the notion of final -- the judgment of conviction becoming final, and that language appears almost verbatim in Linkletter, in contexts like Teague, Barefoot, and Bell.

QUESTION: Well, Link -- Linkletter was really a bygone era by the time Congress passed AEDPA.

MR. GOLDSTEIN: Mr. Chief Justice, but I think the point still would favor us. You're absolutely right, because although the Court has changed the line for retroactivity and changed the test, it has never changed the definition of what is final, and so for 40 years plus the Court has consistently included the time to seek certiorari, and that's a perfectly sensible result, as it would be applied in this case.

The -- the minority rule, by contrast, would

produce anomalous results. It would mean, for example, that in the couple of months after the mandate issues in the court of appeals, a judgment of conviction would be both final and non-final at the same time, because you wouldn't -- although the statute refers to the judgment of conviction becoming final, you wouldn't actually know at that point.

QUESTION: I thought that their -- amicus wrote, you know, a pretty good argument on that side, and I thought one of his better points, which is that if we're looking at the -- the 1-year limitation from a person in State proceedings, what it says is, it runs from the latest of the date on which judgment became final by the conclusion of direct review, or the expiration of time for seeking such review; and then when you`look to the parallel for somebody in Federal proceedings, it says it becomes final from the date on which the judgment of conviction becomes final.

In other words, they use the first half of the sentence, doesn't use the sentence -- the second; and in -- - in the State proceeding it has two, and here it has one, and he says you have to give some meaning to that difference.

MR. GOLDSTEIN: I understand. Justice Breyer, that is exactly what has caused the Fourth and Seventh

Circuits to scratch their head. It's a conceivable inference. We don't dispute that.

Of course, the majority of courts have applied another canon of construction here, and that is that when Congress uses the same phrase in a statute, it's interpreted generally, absent some strong contrary indication, to have the same meaning.

QUESTION: Oh, no, it doesn't, see, because you have became final by the conclusion of direct review, and then we have the date on which judgment of conviction became final, and he's saying that he would interpret it so they mean the same thing.

MR. GOLDSTEIN: Ah, but he wouldn't, and here's the reason, and let -- let me just take you very carefully through this, and for anyone who wants`to look it up, it's the blue brief on page 1 would be the different statutory provisions.

2255 says, the limitation period shall run from the latest of the date on which the judgment of conviction became final. According to the amicus, that means the date on which the mandate issues.

2244(d)(1) says -- has the -- has that, and it has some more, and that's your point. The limitation period shall run from the latest of the date on which the judgment became final, and then he gives that -- that same

phrase, judgment became final, a different meaning in the same statute. He reads that to mean either review in this Court, or the expiration of time to seek cert, so it does -- it would have actually a -- that phrase, judgment became final, would have a different meaning in 22 --

QUESTION: Well, but the -- the -- that doesn't -- the sentence doesn't end with judgment became final. It goes on to say, by the conclusion of direct review, or the expiration of the time for seeking such review.

MR. GOLDSTEIN: That's right, so what we have, Mr. Chief Justice, is 2244, Congress explicates a phrase. 2255, it doesn't explicate it at all, and our --

QUESTION: So you are saying that in the -- within 2244(d)(1), those words are surplusage, they don't do anything, that -- the -- that 2244 would mean the same thing if there were a period after "became final."

MR. GOLDSTEIN: Justice Ginsburg, it is correct that we think it would mean the same thing even if it weren't there, but it's not surplusage. It does have a role, and so I have several reasons to articulate to the Court why there's no negative pregnant -- our view is, and this Court has said, not every silence is pregnant. What we have in 2255 is silent.

My point, Justice Ginsburg, is that the

inference that the minority of courts draw, that Congress was doing something special in 2244, and therefore impliedly didn't intend to do the same thing in 2255, is not correct, and I have several points.

The first one goes to yours, Justice Ginsburg, and that is, it's reasonable for this Court to ask, okay, why did it put it in 2244 and it didn't put it in 2255? It would have been easier, obviously, if it had put it in 2255.

The reason we think they put it in 2244 is not to specify which among the Federal interpretations of "judgment becomes final" applies, but to say that it's the Federal one, not the State one.

That's the real difference of force between 2244 instead of 2255. 2244 cases come out òf the State courts, and State courts define finality differently, and so what Congress did there in 44 was make quite clear that they were applying the Federal rule.

That was very important in particular, because State proceedings have the added complication of not just State direct review, but State post-conviction review, and so Federal habeas courts could be terribly confused on when the judgment and --

QUESTION: But -- but you're going to get State post-conviction review in connection with Federal habeas

cases because of the exhaustion requirement.

MR. GOLDSTEIN: Yes, Mr. Chief Justice, and that is our point, and that is that Congress really needed to do a better -- a very good job, as -- as good as they did in AEDPA in any context, but they needed to do a good job in telling Federal habeas cases in the 20 -- courts in the 2244 context when the judgment of conviction became final, because if 20 --

QUESTION: Well, but you can also say that they had to give a special meaning of finality so that we could respect the processes of the States and make it clear that the -- all of the State procedures had to be exhausted, as the Chief Justice indicated, because of the intrusive nature of -- of habeas jurisprudence, of habeas orders from the Federal courts, and so you can read this as -- as being an exception to this general Federal rule when, in fact -- that brings me to another point -- you can address both.

I -- I had -- I had thought, as the amicus brief does indicate, that finality usually does mean from the date of the issuance of the mandate, and then you go back and you toll if there's -- if there's discretionary review.

MR. GOLDSTEIN: Justice Kennedy, this is the second point on the question of do -- does this Court have

some reason to believe that the presence in 24 -- excuse me, 44 but not 55 creates a negative inference, the sort of Russello presumption, and I agree with you that it would rest on a view that this interpretation in 44(d)(1) is unusual, and our point is that it's not unusual.

You are correct that the -- the -- as they said in Melconian, for example, that the term of art, final judgment, does generally mean the judgment of the district court, but everyone agrees that that's not the interpretation here. In fact, it's very clear that the -- the phrase here, if I could again take you back to -- take you back to it in 2255, is judgment of conviction becomes final. That phrase, judgment of conviction, picks up Federal Rule of Criminal Procedure 32.

Judgment of conviction includes the conviction, the judgment of conviction and the sentence, and it is by necessity already final and appealable. If this Court were to say that the baseline rule is final judgment in the sense of a district court, that would mean in the 2255 context that, although your -- your direct appeal could be sitting here in the Seventh Circuit for 2 years, after the first year, you need to be back in the district court on 2255, because the judgment of conviction would have become final when it was entered by the district court, and no one thinks that's sensible.

In fact, the -- the notes to rule 5 of the -- of the 2255 rules make quite clear you're not supposed to be in on your 2255 until the direct review process is over, so that -- my point was that the -- what you're describing as the normal background rule of when a judgment of conviction becomes final actually describes the term "final judgment," which couldn't apply here.

QUESTION: When you're -- when you're appealing from the district court to the court of appeals, when does the term, final -- what does the term of final mean there, as to the district court judgment?

MR. GOLDSTEIN: In this -- in -- in our view, under 2255, Mr. Chief Justice, or --

QUESTION: Yes.

MR. GOLDSTEIN: It -- it does not become final, in our view. What happens is, if you did not appeal, it would -- the judgment of conviction would become final after the 10 days --

QUESTION: Well, characterize for -- for us, then, your understanding of the amicus view. I thought their view is that it just becomes tolled. The minute you -- the minute you file the appeal it becomes tolled, so there's no problem.

MR. GOLDSTEIN: Well, Mr. -- Justice Kennedy, I do agree with you that that's the amicus's view. Our

point is that it doesn't pick up what you're describing as the normal rule of final judgment. That wouldn't be the normal process. Our point is that the most --

QUESTION: Oh, I should think the normal rule does include the tolling exception that I -- that I -- we've just explained.

MR. GOLDSTEIN: Justice Kennedy, as a matter of -- for example, Melconian, if we go back to what this Court has described as the normal background understanding, the normal background understanding is that just when it's entered by the district court; but if, again if I could come back to my basic point, and that is, we all agree final can mean a lot of things, and the closest one, it seems perfectly clear, is the one that divides direct and collateral review, because that's what this provision does.

I won't deny to you, Justice Kennedy, that it could mean different things. But no one -- and my third point I wanted to make, Justice Ginsburg, about why you shouldn't draw negative inferences, nobody's got a good reason. Nobody's got a reason to think that Congress would have wanted this time to be available to State prisoners, but not to Federal prisoners.

If I could reserve the balance of my time.

QUESTION: Very well, Mr. Goldstein.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE RESPONDENT

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

When a defendant does not petition this Court for certiorari on direct appeal, his judgment of conviction becomes final within the meaning of section 2255 when the time for filing a petition expires. That interpretation accords with the well-settled meaning of final and the law of collateral review, and it sensibly provides Federal prisoners the same time to prepare collateral attacks as similarly situated State prisoners.

QUESTION: What about an appeal from the district court to the court of appeals?

MR. ROBERTS: The judgment would become final if there -- if no appeal was filed at the time -- when the time to file an appeal expired after the 10-day period.

QUESTION: And yet that's contrary to a lot of other things, is it not? I mean, you can't go into the district court 60 days after your time -- after the district final judgment was entered and still maybe have 30 more days to appeal, and the district court isn't going to do anything.

MR. ROBERTS: Well, we're talking about finality

for -- for a different purpose here. It's not a question of finality for the purpose of seeking appeal, or when a judgment -- in the term like final judgment, which is -- which would be the sense of finality when, for the purposes of deciding --

QUESTION: Why -- why should those be different?

MR. ROBERTS: Well, in -- in terms of -- of collateral review, first of all the Congress used the particular phrase, when the judgment becomes final, that has an established meaning in that context. Second of all, it's logical that the time to commence collateral review should start to run at the conclusion of direct review, which this Court has made clear includes the period when -- within which to seek certiorari even if a petition isn't filed, and that's, in fàct, what Congress concluded in section 2244, the parallel provision for State prisoners, and there's no persuasive reason why Congress would have started the -- the time limitation at a different time for Federal prisoners.

QUESTION: Except that -- except that they wrote the two sections differently. That -- that certainly is something of a reason.

MR. ROBERTS: Well, that -- that -- well, I'm talking about a -- a reason why they would have intended that result as opposed to a -- a canon or a textual

indication that there might be a difference, but even as to the textual indication --

QUESTION: Well, I -- I thought they would intend it in order to show special respect for the processes of the State, so that a State has completely exhausted all of its procedures for determining what the law ought to be --

MR. ROBERTS: But --

QUESTION: -- before they're disrupted by a Federal judgment.

MR. ROBERTS: But this doesn't concern the processes of the State, Your Honor, it concerns review in -- in this Court, and this Court's made clear the -- the distinction of the time is between whether the -- the time to seek review in this Court is included or is not included, and that's not a -- a State -- a remedy, this Court's made clear that exhaustion of State remedies doesn't require a petitioner to seek review in this Court, that State remedies are exhausted as long as all avenues of review are pursued in -- in the State court system. So concerns about -- concerns about requiring them to go through the full State court system wouldn't justify the difference in the rule, nor would generalized concerns about comity, which would suggest that State prisoners ought to have less time to seek review from their

convictions, if -- if anything, to upset their State court convictions, rather than -- than more time.

And really, collateral review rules are driven more by finality concerns, which are equally strong in the Federal context and the State context. That's why the Teague retroactivity rules and rules of procedural default apply equally to both, and because finality concerns are the same, there -- there isn't any persuasive reason why Congress would have started the time limit at a different time.

The negative -- the negative inference points, to address the negative inference point, there are three reasons why it would be inappropriate to draw a negative inference from the omission of the clarifying language here. First, it contradicts the presumption that Congress used final in accordance with its settled meaning in the collateral review context, which petitioner discussed earlier.

QUESTION: But I -- I think, Mr. Roberts, that as I pointed out in the question to petitioner's counsel, 2250 -- 44(d)(1) doesn't just stop with the word, final, it goes on to kind of explicate the possible -- possible meanings.

MR. ROBERTS: Yes, it explicates the meanings, but it explicates the meanings by providing the definition

that is the -- is -- by providing an explication that's consistent with the background definition that you would expect final to have, and there's a -- there are good reasons why Congress would have -- might have wanted to explicate the -- to explicate it more carefully in 2244.

Petitioner discussed one, which is that 2244 concerned State prisoners, and Congress might have been concerned that, absent clarification, courts might import the definition of finality used by the State of conviction, and there are varying definitions there. There's not the uniform definition that would include review in this Court.

Second, it's possible that Congress might have been concerned that the courts would assume that the time limit in section 2244 starts to run thè same time as the time limit in section 2263, which also concerns State prisoners, State capital defendants and States subject to expedited collateral review proceedings, and so Congress --

QUESTION: Do you --

MR. ROBERTS: -- may have spelled it out here.

QUESTION: Do you think it makes any difference that in 2255 Congress used the phrase, judgment of conviction, and in 2244(d)(1) it simply used the word, judgment?

MR. ROBERTS: No, I -- I don't think that it makes a difference. There are variations in -- in language like that.

QUESTION: Well, usually variations in language mean variations in meaning.

MR. ROBERTS: Yes, Your Honor, but it's referring back to the judgment of the State court under which the person is in custody. The -- the provision 2244(d)(1) is reproduced in the gray brief on page 2 to 3.

So where it says the date on which the judgment became final, it's -- it's referring back to a -- a person who's in custody pursuant to the judgment of a State court, and that would be the judgment of the district court -- I mean, of the trial court in -- in that situation, but fundamentally, our points are two.

One, there's a background rule, and the presumption is generally of -- of what -- when a judgment becomes final in the collateral review context, and it's generally presumed, with good reason, that Congress legislates against that background rule and uses the terms with their settled meaning in that context; and second, we know Congress did that with respect to State prisoners in section 2244 because they clarified it there; and it makes sense that the time limitation should run at the same time, because there's no persuasive reason for them to run

at a different time.

QUESTION: Mr. Roberts, refresh my recollection. Was 2255 and 22 -- and 2240(d)(1) enacted as part of the same statute?

MR. ROBERTS: They were enacted as part of the -- the same statute, Your Honor, but the -- the proposition that the same word has the same meaning, the same word becomes final, has the same meaning throughout the statute -- same statute would apply by virtue of that. So the -- so that we would expect that when Congress said, becomes final in section 22 -- 2255, and when it said, became final in 2244, both referring to a judgment of the trial court convicting the defendant, that it -- it intended those phrases to have the same meaning.

QUESTION: I wouldn't think that. I would -- I would think that where you say, on the one hand, where it becomes final by (a) or (b), and elsewhere you simply say, where it becomes final --

MR. ROBERTS: Right.

QUESTION: -- I would think that the latter means, even if it becomes final in some other fashion.

Now, that happens not -- that happens not to help the respondent here.

MR. ROBERTS: Yes.

QUESTION: But I -- but I do think that that's

the more natural --

MR. ROBERTS: Well, that -- that would be one possibility, that here it was restricted --

QUESTION: Don't you think that's the more natural --

MR. ROBERTS: -- but it was broader.

QUESTION: That's right, broader.

MR. ROBERTS: Yes, but it's hard for me to conceive, frankly, what the broader --

QUESTION: What the broader would be.

MR. ROBERTS: -- understanding of finality is, Your Honor. I do think that -- that not every time that -- that Congress uses the different language to -- that's more amplified and clarifying, does that -- that mean that --

QUESTION: Not necessarily.

MR. ROBERTS: -- that the words -- and the Court does not generally -- does not generally apply the negative inference, the Russello presumption to draw the conclusion that the -- that identical phrases have -- have different meaning.

QUESTION: Oh, if -- if you applied the Russello presumption here, you -- you would be applying the presumption that I just described, namely in -- in one section, it limited it, in -- in the other section, it

didn't limit it at all. You'd think the latter section would be broader, not narrower.

MR. ROBERTS: That -- that would be --

QUESTION: That's -- that's what Russello said.

MR. ROBERTS: That would be parallel to Russello and parallel to some other cases where there's been additional limiting language, and the Court has said therefore, the -- we won't read that limit into the earlier language, but in those cases also what bears note is that the word that was limited later on, here the word becomes -- the phrase becomes final, was by the Court, in those cases, given its ordinary meaning, what you would expect, apart from the Russello presumption.

QUESTION: Yes, but what I --

MR. ROBERTS: And here --

QUESTION: That gets you into the argument of whether there is an ordinary meaning of final.

MR. ROBERTS: Yes. Yes, Your Honor, and there isn't -- there isn't an ordinary meaning across the board in every context, but here we have a -- a narrow context in which Congress has acted in the collateral review context, in particular in the commencement of collateral review, and in this Court's cases, in the collateral review context, particularly delineating when direct review ends and collateral review begins, the Court has

used repeatedly, over 30 years before enactment of AEDPA, the -- this established definition of finality, and there's -- there's no reason why Congress would have departed from that here.

If there are no further questions, we would submit.

QUESTION: Very well, Mr. Roberts.

Mr. de Bruin, we'll hear from you.

ORAL ARGUMENT OF DAVID W. DE BRUIN,

AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

MR. DE BRUIN: Mr. Chief Justice, and may it please the Court:

There are four points that are dispositive of this case. First, the most natural and logical inference is that the textual language in section 2255 cannot mean exactly the same thing as the very different textual language enacted at the same time in the same statute in section 2244. Second, the text of each provision has an ordinary and accepted meaning that is not, in fact, the same. Third, there are at least three reasons why Congress logically used a different trigger for the limitation periods in section 2244 and 2255, and fourth, no harmful or absurd consequences flow from a determination that Congress did not intend these very different provisions with their very different texts to

mean precisely the same thing, as the parties here contend, and for these reasons, I submit the judgment of the court of appeals in this case is correct, and it should be affirmed.

The Russello presumption in this case is particularly strong. Congress, in fact, used three different formulations in AEDPA in identifying triggers for time limitations under the statute, 2244, 2255, as we've talked about, and also 2263. In each of those formulations, enacted in the same statute at the same time, Congress explicitly chose different words to describe what the triggering event was and what the consequences of subsequent events were.

QUESTION: Let's -- let's review the Russello presumption. Russello had an earlier section where the more general word was limited. What -- what was the -- what was the -- the -- what was the general word involved in that case?

MR. DE BRUIN: I believe -- I have the exact language, that in Russello, the -- the general was any interest acquired.

QUESTION: Any -- any interest acquired. That's what the later provision said, and the earlier provision said, any interest in the enterprise acquired.

MR. DE BRUIN: Correct, any interest in any

enterprise which the defendant has established.

QUESTION: Okay, and -- and what Russello said is, where you have a limitation in the earlier one, an interest in any enterprise, and then the later one just says, any interest, we assume that any interest is broader. It's not limited by, in any enterprise.

Now, if you apply -- and I think that's entirely reasonable, but if you apply that same principle here, what it comes to is that where in the early one it says final by reason of (a) and (b), and in the later one, it just says, becomes final, you would think the later one would -- would include (a), (b), and maybe (c), (d), (e), but it certainly wouldn't be narrower than the earlier one, which is what you're insisting it is.

In other words, it seems to me Russello cuts exactly against your position, rather than for it.

MR. DE BRUIN: Well, I think the -- the meaning of becomes final in 2255 is, in a sense, broader, in that there are different conditions that can trigger when a judgment becomes final. The -- the normal rule is that judgments of courts become final when the court acts, not upon the expiration of review. That finality, however, may be disrupted, or arrested by subsequent filings.

QUESTION: But aren't you picking one of the two means of finality that's set forth in the earlier

provision? You're saying in the later provision it only means one of those two. That's not Russello at all. That's the opposite of Russello.

MR. DE BRUIN: No --

QUESTION: I -- I think what you'd have to say is, it means those two perhaps plus some others.

MR. DE BRUIN: No, for two reasons. One, Congress logically can include the first phrase, the conclusion of direct review, as a means of clarifying and contrasting its inclusion of the second or the expiration of the time for seeking such review.

That is the unusual clause. Typically, judgments become final when the court acts. They're not dependent upon the expiration of the time for review for finality to attach.

QUESTION: Or on the issuance of a mandate.

MR. DE BRUIN: But that is an action of the court, Justice Ginsburg. In other words, the point is, and the parties agree that the word final does have different meanings in different contexts.

QUESTION: It surely does.

MR. DE BRUIN: And -- and I don't dispute that, but in this case, I think you have to look at final, and it is guided by two things. The meaning of final in 2255 is informed by the language in 2244, where Congress

provided a very specific definition there that it did not employ in 2255.

QUESTION: You seem to take only one part of the definition, because 2244 says, on direct review, or the expiration, but you seem to accept that 2255 does encompass direct review. That is, if someone actually files a petition for cert, then the finality rule would not kick in.

MR. DE BRUIN: Justice Ginsburg, that is not actually clear. It is not clear that Congress in 2255 intended either formulation to be the defining point in all cases. Under Rule 33, there was very similar language that triggered a time bar to -- to when the judgment became final and, as interpreted by the courts there, finality was not always coextensive with the conclusion of direct review.

The rule there, universally established, was that if a court of appeals issued its mandate and a stay of the mandate was not obtained, the 2-year clock under Rule 33 began to run from the date of the mandate whether or not the defendant, not having obtained a stay, petitioned this Court for certiorari. So although the question is not presented in this case, it is not automatically clear that Congress in 2255 meant either of the triggers that appear in 2244, but, as this Court

recognized in Russello, these provisions do not need to be mutually coextensive. One can be a subset of the other.

In this instance, Congress could include the words, the conclusion of direct review, simply to provide clarity that it also wanted to include the unusual event, which was the expiration of the time for seeking such review.

QUESTION: You would also -- what -- they -- they also -- the Government gave meaning to the -- gave meaning to the difference by saying, even if you're right about that, becomes final, becomes final includes expiration of time. That's their argument.

And as to the first thing, by direct review, that includes expiration of time, too. They just put it in to make sure it was not the habeas route in the States, and then they put the second clause in really to save Federal judges from being confused about what happens in the California Court of Appeals, what happens in the lower inter -- intermediate State courts to make sure that -- that this ordinary Federal situation was seen as applying to cases as they wend their way up through the State court system, too.

MR. DE BRUIN: What is --

QUESTION: I think that's -- that was -- I heard that being given, in any case. Are you following? Was I

clear enough?

MR. DE BRUIN: Yes, I believe.

QUESTION: Yes.

MR. DE BRUIN: But what is significant, Justice Breyer, is that that argument essentially undercuts their argument that Congress, in enacting 2255, was using an established meaning of final, coming from this Court's precedents in their retroactivity cases.

If Congress believed that the word final, as used in 2255, standing alone, without clarification, automatically conveyed the definition this Court has used in the retroactivity cases, that definition, as this Court knows, applies equally to State convictions as well as to Federal convictions. In fact, that rule in Linkletter was originally developed in the context of`review of a State conviction. In Griffith, the Court applied that same concept of finality both to a State conviction and to a Federal conviction, so if Congress thought by using just the word final, we mean, in essence, the retroactivity definition --

QUESTION: If you -- if you --

MR. DE BRUIN: -- that would have applied to both.

But conversely, if Congress was aware that that word, final, might mean something different, then the

obvious differences in wording here make a meaningful difference. 2244 means what Congress specified.

The point is, there is no greater reason to believe that the Court's definition in the retroactivity cases applies in 2255 but not 2244.

QUESTION: Right. If -- if, in fact, you could read it, as Justice Scalia suggested, which I think maybe you could, or as the way the SG suggested for the sake of argument, is there any argument that you shouldn't? I mean, it sounds simple, clear, uniform; everybody'd understand it. Is there any reason not to read it that way if the language permits it?

MR. DE BRUIN: I think what you have done is, you've rendered the words of section 2244, as Justice Ginsburg pointed out, wholly superfluoùs.

QUESTION: All right, but then you're answering my question, no. You're saying, there is no reason not to read it that way if you could, with the language, but the language doesn't permit it.

MR. DE BRUIN: I --

QUESTION: That's your argument.

MR. DE BRUIN: I believe that's correct. I believe --

QUESTION: And I take it as a no, that if it did permit it, there isn't any good reason.

MR. DE BRUIN: I think Congress certainly could have enacted a statute that had the same trigger. I think there also are significant reasons why it made sense for Congress not to use the same trigger. There are --

QUESTION: It wouldn't render that language superfluous if you interpreted it the way I suggested, which is that -- that finality in the second provision includes not just the two specifications in the first, but also some other unnamed aspects of finality, which we don't have to decide upon in this case, but which doesn't help your case.

QUESTION: Well, I mean --

MR. DE BRUIN: Justice Scalia, what --

QUESTION: Go ahead.

MR. DE BRUIN: What I think defeats that is that there isn't anything else. There isn't a broader universe that --

QUESTION: If -- if you're -- if you're going to say that 2255, by contrast with 2244(d)(1) must mean something broader, then -- though, the broader you define finality, the more difficult it is for a petitioner to make his case, it seems to me -- a habeas petitioner. If there are any number of different ways that a judgment can become final, that -- that is bad for the person seeking habeas relief.

MR. DE BRUIN: I think that's right. As, Mr. Chief Justice, you recognized, the habeas -- there -- there's an interest in setting the date and in a non-capital case, as these cases will be, where certiorari has not been sought, if claims are to be brought, have the statute begin, the claims be filed, if relief is appropriate, relief be granted; but what I think is significant, Justice Scalia, is that there is no broader meaning of final that anyone has ever articulated.

The -- the broadest definition that has been identified is that which is set forth in 2244, the conclusion of direct review, or, what is not normally included for finality, the expiration of the time for seeking the conclusion of direct review, as opposed --

QUESTION: But that makes sense --

QUESTION: I suppose you could answer Justice Scalia by saying that these are exceptions to the ordinary rule of finality, although the statute doesn't quite read that way. They're -- they -- or they are special extensions --

MR. DE BRUIN: They --

QUESTION: -- of the ordinary rule of finality.

MR. DE BRUIN: I -- I -- they're extensions, is exactly right, but I think it is clear that finality normally occurs when a court acts. Here, when the court

of appeals issued its mandate, nothing else happened in the case. Mr. Clay did not --

QUESTION: Mr. de Bruin, I'd like to take you back to that word, mandate, because finality means different things in different contexts. The most basic finality rule is when the district court disassociates itself from the case, and then the case is lodged on appeal. It's final for, say, preclusion purposes at that point.

This Court dates from, not from the mandate in the court of appeals, but take, for example, our rule on cert. Doesn't it run from the entry of judgment in the court of appeals, not from the later time when a mandate is issued?

MR. DE BRUIN: Yes.

QUESTION: So where do you make up the mandate rule as a general rule?

MR. DE BRUIN: Well, two points. One, I believe 2244 makes clear that whatever 2255 means, it can't mean exactly the same thing as 2244, because Congress didn't use those words. That still leaves the question, well, what, then, does becomes final mean in 2255? Does it mean when the court of appeals issues its judgment? Does it mean when it issues its mandate? Those questions still need to be answered.

QUESTION: Am I right that our rules don't refer to the mandate date at all, that it's always the entry of judgment?

MR. DE BRUIN: That is correct. The 90-day clock runs from the -- from the entry of judgment, not the mandate, but in deciding that question, what did Congress mean by final, assuming it's not what it said in 2244. Because it didn't say that here, the Court has to decide, is it the judgment, is it the mandate, and there is, in fact, a developed body of law under, I submit, a very analogous situation. Under Rule 33, the defendant had 2 years from final judgment to bring a claim, and the courts had interpreted finality in that context to mean when the court of appeals issued its mandate.

QUESTION: I think your case would be persuasive if, indeed, there was a generally understood meaning of finality, and -- and that's the part of your brief I focused on, and I just don't think you carry the day. I just think, as Justice Ginsburg points out, it means a lot of different things. So once that's the case, all you have to rely upon is this principle that -- that where -- where a thing is said two different ways in a statute, there must be a reason. You have to give them different meaning. That isn't an absolute principle, and it -- it has all sorts of exceptions. I mean, it -- it just

depends.

For example, if you say, from the day of entry of judgment in one section of the statute, and in another section of the statute it reads, from the day judgment was entered, do you really think you have to give different meaning to those two formulations? Of course not. It all depends on what -- what the other factors involved are, and here --

MR. DE BRUIN: I think --

QUESTION: -- I don't see any other factor, unless you show that finality has a normal meaning, which -- so that the earlier provision is giving it some peculiar meaning. That -- that would be persuasive --

MR. DE BRUIN: I agree with you --

QUESTION: -- but -- but I dòn't think you carry the day on that point.

MR. DE BRUIN: I agree with you that Russello sets a presumption, it's not an automatic rule, but what is significant in this case is not just that there's a formulation that appears essentially the same, but in different words. What you have is two provisions, 2244 and 2255, that are markedly parallel. You cannot read them, going along almost word-for-word, and then you get to this difference -- which is not a minor difference, but there's an entire qualifying clause added -- and not be

struck: "Congress must have meant something different or they would not have diverged so significantly."

QUESTION: But you admit that for one part of that clause, Congress didn't mean any different. The -- if there is a petition filed, if there is, in fact, a cert petition filed, then State and Federal prisoners got treated alike, so it's the -- the only place, as I understand it, where you're saying there's a difference is whether the time for filing a petition counts even when the -- there -- no petition is filed.

MR. DE BRUIN: Well, Justice Ginsburg, I don't concede that. I don't concede that it is true that if a petition is filed, that the clock is automatically arrested so that automatically the conclusion of direct review isn't counted. That's not really presented here because there was no petition, it may be Congress did not mean for either of those clauses to be in all cases the determinative fact under 2255.

QUESTION: So under your reading, it might be that the judgment becomes final, the court of appeals judgment becomes final when the mandate comes down, even though the petitioner has filed a cert petition. It could mean that.

MR. DE BRUIN: It could mean that, and that was, in fact, the established rule under Rule 33, which is a

very similar time mechanism, and I submit the most appropriate context is, look at other congressional enactments imposing time limits on the bringing of claims after judgment, and the rule under Rule 33 was cert was irrelevant unless a stay of the mandate was obtained under Federal Rule of Appellate Procedure 41; and, of course, under 41(c) you can obtain a stay of the mandate if a substantial question exists for the presentation of a petition for certiorari.

QUESTION: Am I wrong in thinking that the general understanding is that when you file a cert petition, that the finality is suspended until that petition is disposed of?

MR. DE BRUIN: I don't believe that is a general rule. The most analogous rule, as it èxisted both under the Speedy Trial Act and under Rule 33, was that simply petitioning this Court for certiorari did not automatically arrest the finality of a judgment for either of those two statutes: only if you got a stay of the mandate. That's the whole purpose under Rule 41(c) for providing for a stay of the mandate; and, of course, it's that rule that the simple filing of a petition, that's what may engender meritorious petitions, which the Government contends is a reason not to interpret 2255 the way the court of appeals did below.

It makes sense, I submit, not to have a rule that the automatic filing arrests the finality of the judgment, and that was, in fact, the rule under Rule 33, and that's the way the Speedy Trial Act has been interpreted, and other statutes of limitations, that the filing for cert does not automatically trigger the -- or disrupt the statute.

QUESTION: Mr. de Bruin, I think I understand your argument based on the different wording, but -- I think this question was asked before, too: is there any reason why Congress might want to give Federal post-conviction petitioners less time than State post-conviction petitioners?

MR. DE BRUIN: Yes, but first I must correct you. Under this overall statutory schème, I submit Federal prisoners have more time, not less, and the reason for that, it is wrong for the parties to argue, as they do, that this construction of 2255 is necessary to ensure parity. There is no parity.

As the Court knows from its decision in Duncan versus Walker, and just last term in Carey versus Saffold, the 1-year statute under 2244 applies to the preparation of two different things. It applies to the preparation of your State collateral petition, and then once that is filed, but only after it's filed, there is tolling, as was

at issue in Duncan versus Walker and Carey versus Saffold; and then after the State petition is resolved, but not including certiorari, that's very clear, then you've got to file your Federal 2254 petition. So a State inmate has one year to do both, prepare his State collateral claim, assuming total exhaustion under Rose versus Lundy, and then, after the State collateral petition is resolved, the Federal collateral petition.

The Federal inmate, by contrast, has a full year simply to bring his 2255 motion. So it is not true that only by forcing this different language in 2244 and 2255 to mean the same thing, will you achieve parity. There isn't parity. Federal inmates have more time. But there are, in any event, reasons for that difference.

Again, claims coming from State court by definition must be exhausted, previously litigated claims. By definition, 2255 claims cannot be the same claims that were litigated on direct review. I submit it makes logical sense for Congress to allow the State claim, previously litigated in State court, to run its full course at least through cert on direct review before starting the statute.

If this -- and I submit Teague here really provides a reason. Since this Court has recognized that if it were to issue a new rule of constitutional procedure

before the time expired to file for cert, and if one of the petitioner's State claims was litigated on direct review, it is less an affront to the State system for this Court to simply grant, vacate, and remand than for a lower Federal court to take up that claim on habeas. So Congress logically could have said that the time to begin the statute will not run until the expiration of time for the conclusion of direct review. There are reasons such as that that could provide an explanation for why Congress did what it did, which is to provide very different triggers in these two statutes.

Fourth, it's important that there are no harmful consequences that follow from granting these two different provisions, with their very different text, different meanings. As I mentioned, Federal defèndants will always have at least one full year from the issuance of the mandate to bring their claim. As this Court has recognized, in a non-capital case, the defendant has no interest in delaying the adjudication of any collateral claims that may exist. The construction of the court of appeals in this case is clear and easy to administer. The Federal inmate has one year from the issuance of the mandate if not --

QUESTION: Well, it isn't clear on the point that I asked you about, because I thought that the court

of appeals said yes, if you actually file your petition for cert, then the time doesn't run until the petition is disposed of. I thought -- you -- you said that's ambiguous, but I don't think that that's what the court of appeals said.

MR. DE BRUIN: You are correct, Justice Ginsburg. The courts of appeals have held universally that if you petition for cert, the 1-year period does not begin to run until the petition is resolved, and that rule is not presented here. There is, in fact -- authority goes both ways, that subsequent filings in a different court at times do arrest the finality of a prior judgment, and at times they do not.

My only point was, in looking at the language of 2244 and asking whether the language there, the conclusion of direct review defeats the Russello presumption, my point simply is, it does not defeat it. One interpretation is that Congress didn't mean either to apply here, and instead embraced a rule much like the established practice under Rule 33, but even if -- the Court does not need to accept that to affirm the court of appeals here.

The rule logically could be that if the court of appeals issues its mandate, the case is over in the court of appeals. Nothing else happens, no motion to stay, no

petition for cert. The case is final. That's -- that's consistent with common understanding of the word.

QUESTION: But in terms of confusing things, if we were to take that view of it, it would, because everybody assumes, well, you file your cert petition, then it's on hold until --

MR. DE BRUIN: No, but -- I'm sorry, but continuing on my thought, if nothing happens, the case is final when the court of appeals rules. You have a year.

If, however, you petition for cert, then the judgment, the finality of the judgment is arrested, and the one year does not begin to run until the petition is resolved. That would be perfectly permissible. In other words -- and that is, in fact, the construction of the Seventh Circuit, that --

QUESTION: That's -- that's not quite tolling. If -- if you -- if you waited for, say, 40 days before you filed, does the 40 days count again? Do you tack, or do you get a whole new period?

MR. DE BRUIN: You would get a whole new period, and that is consistent with --

QUESTION: So -- so that's not quite like tolling, I think.

MR. DE BRUIN: It's not tolling. Now, Congress has provided tolling under 2263. It has provided tolling

under different aspects of the statute. But no, this is not tolling. There -- there are established rules that a judgment is final, but yet, if you file a motion for reconsideration, for instance, the finality of the judgment, even though it was final and the time bars were running, finality is arrested; and then once the petition for reconsideration is decided, you have a full period, again, and so Justice Ginsburg, that would be a perfectly permissible construction, and in fact, perhaps the most logical construction, that if you petition for cert, the finality of the judgment is arrested and you have a full year.

The point is, finality will always be affected by what the defendant does and does not do, and there will always be a series of different rules, depending on whether a petition for cert was filed, whether an appeal was filed, and there will be different rules from State as well as Federal.

There's a whole series of different rules; but the rule of the court of appeals in this case was, if nothing happens after the court of appeals issues its decision, the judgment is final within the meaning of 2255. That's consistent with the fact that judgments routinely are final without being dependent upon the expiration of the time for review.

The formulation in 2244 is, in fact, unusual. Congress provided for that in 2244, but did not provide for that in 2255.

For all these reasons, I -- I urge the Court to find that the decision of the court of appeals is correct, the construction of the language affords the text its natural meaning, does not work any harmful results, and should be affirmed.

Thank you very much.

QUESTION: Thank you, Mr. de Bruin, and the Court thanks you for your help to the Court with your amicus brief in this case.

MR. DE BRUIN: Thank you.

QUESTION: Mr. Goldstein, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Thank you, Mr. Chief Justice. If I could address first the question of whether or not there is a background understanding of when a judgment of conviction becomes final, because conceivably that would give rise to the negative inference that Congress was doing something special in 2244 that it didn't intend in 2255.

The amicus points the Court to the pre-amendment

Rule 33, and I think it's important to play out exactly what finality means there, because in the pre-amendment Rule 33, there wasn't agreement on whether or not finality attaches upon the issuance of a mandate.

QUESTION: Which set of Rule 33 are we talking about?

MR. GOLDSTEIN: Before the 1998 amendment, Mr. Chief Justice.

QUESTION: To what set, what --

MR. GOLDSTEIN: I apologize, to criminal procedure.

QUESTION: Criminal procedure.

MR. GOLDSTEIN: I do apologize.

Under -- before it was amended, some courts said it was the judgment. Some courts said`it was the mandate. That's discussed in the advisory committee notes to the amendment.

In addition, most things under Rule 33, those other than newly discovered evidence, ran from the entry of the judgment in the district court, and perhaps most important of all, it's settled under Rule 33, and this is the Cook case from the Ninth Circuit that's cited in the amicus brief, that under Rule 33 if a cert petition was filed, that didn't stop the time.

QUESTION: Well, you say it's settled. It's

settled in the Ninth Circuit?

MR. GOLDSTEIN: Mr. Chief Justice, there were no contrary cases, you're quite right. This Court never passed on it, and there's no contrary authority.

And so my point is this. Even under Rule 33, it could mean a lot of different things, and I do think it's perfectly clear that among all the analogies, the closest one is this Court's collateral review precedents.

I do want to pick up on Justice Breyer's and -- and the Chief Justice's question about, well, didn't they explicate something in 2244 that they didn't in 2255, and if I could give a contrary -- give a hypothetical where I think that reasoning would apply, if 2255 said, when the judgment of conviction becomes final by the expiration of direct -- by the conclusion of direct review, it would be very difficult for a 2255 petitioner to say, "and that includes the time for seeking cert," because then you would have a real contrast with 2244. You would have one of the phrases in 55, but both in 44, and there you could have a genuine inference.

Here we don't have anything, and my point is that this silence is not pregnant. You don't draw the inference that Congress meant nothing at all, or that Congress meant -- as Justice Scalia points out, an even narrower universe.

The final point I want to make is about --

QUESTION: I thought his point was it was an even broader universe.

MR. GOLDSTEIN: Mr. Chief Justice, no, his -- the amicus's point would have to be that 2255 means some subset, or some smaller interpretation, or some shorter time.

QUESTION: Well, I -- I thought you were talking about Justice Scalia's --

MR. GOLDSTEIN: I apologize. You're quite right. Justice Scalia's point is that look, if you use the word by, it could either mean it's explicating things, or more naturally it means, we've picked a subset, and so you don't have the subset here. That's Russello. Interest versus interest in an enterprise. Interest in an enterprise is a -- a smaller part of the bigger ball.

The final point is about policy reasons. There really is no reason Congress would have intended this period of time, the time when you could have sought cert but didn't, to be available to a State prisoner versus a -- a Federal prisoner. There's no explanation given by amicus that makes any sense. For example, GVRs apply only when a cert petition is filed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you,

Mr. Goldstein. The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)