IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT JOHNSON, JR., :

Petitioner :

v. : No. 03-9685

UNITED STATES. :

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Washington, D.C.

Tuesday, January 18, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

COURTLAND REICHMAN, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

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

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

JUSTICE STEVENS: We'll now hear argument in Johnson against the United States.

Mr. Reichman.

ORAL ARGUMENT OF COURTLAND REICHMAN

ON BEHALF OF THE PETITIONER

MR. REICHMAN: Justice Stevens, and may it please the Court:

On occasion a prior conviction that's used to enhance a Federal sentence turns out to have been obtained in violation of the Constitution. This Court addressed the procedure for handling those challenges in Custis and Daniels. Those cases determined that, in most circumstances, the facts that would show the prior conviction is unconstitutional do not support a claim either at sentencing or under section 2255.

This is the key phrase in this case: facts supporting the claim. It's the key part of the fourth trigger in the 2255 statute of limitations. In this case, the State court vacatur is the fact supporting the claim for three reasons.

First, as expressed, Daniels made clear that the underlying facts, those facts that you use for the challenge to the prior conviction, do not support a claim

under 2255, leaving the vacatur as the operative fact.

Second, the plain meaning of the word fact encompasses a vacatur just like courts often refer to convictions as historical facts.

And third, there's no reason to dispense with the plain language of the statute to serve policy ends. The policies animating both AEDPA and section 2255 are served by the rule advanced by petitioner. And moreover, petitioner's rule will be a lot more straightforward in application.

Let me --

JUSTICE O'CONNOR: One little complication here. Under 2255, even if that applies in this situation, it does establish a 1-year statute of limitations. Right?

MR. REICHMAN: Correct.

JUSTICE O'CONNOR: And subsection (4) of that section says: the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Now, is that a requirement that the defendant seek State relief on a timely basis? Can the defendant just wait indefinitely before going back to the State and seeking a vacatur? Or does that due diligence requirement apply to the efforts to get State action?

MR. REICHMAN: Well, there -- there are several

levels to the response. Let me work through them.

The first is that the petitioner's position relies on a straightforward reading of the statute, and we think that the due diligence requirement is satisfied when the vacatur is discovered through the exercise of due diligence.

JUSTICE O'CONNOR: Well, but you're not being responsive to my question. Here the defendant did go back to the State courts and got this -- the earlier convictions vacated. Right?

MR. REICHMAN: Yes.

JUSTICE O'CONNOR: But I asked you, is there any requirement that the defendant act promptly in going back to the State to get the vacaturs?

MR. REICHMAN: There's no requirement in -- in the fourth trigger. However --

JUSTICE O'CONNOR: Well, except that the statute itself speaks of diligence.

Now, can the -- suppose he's been given a very long Federal sentence and part of that is the result of prior State convictions. And suppose he waits 10 years before going back to the State to seek to overturn those earlier State convictions. Is there no requirement that he act promptly?

MR. REICHMAN: The requirement is not found in

the fourth trigger. The requirement is found in the State statutes of limitations. And to elaborate on the footnotes in our brief, we have found that there are approximately --

JUSTICE O'CONNOR: Well, but the Federal statute says -- it puts a burden of diligence on the defendant.

MR. REICHMAN: Reading the plain language, we think that burden of diligence applies to discovering the vacatur. If you -- if a vacatur is a fact -- and I think the Government has all but --

JUSTICE SCALIA: How -- how could one not discover the vacatur?

Here's my problem. I -- I frankly don't think the text of -- of (4), part (4), really fits comfortably with either your interpretation or the Government's. It says the date on which the facts supporting the claim could have been discovered through the exercise of diligence.

Well, as you point out in your brief, the fact supporting the claim here is simply the elimination of the prior conviction, the vacatur of the prior conviction. That's the fact supporting the claim, not the facts which led to the vacatur, but it's the vacatur. So that makes the Government's case a little uncomfortable.

But it seems to me you have to acknowledge that

your case is pretty uncomfortable when you -- when you talk about discovering the fact of the -- of the vacatur. I mean, it's a matter of public record. How does one discover a -- a public record? How -- how could you need due diligence to discover a public record? I mean, it seems to me it's -- it's automatically -- isn't the vacatur always served on the -- on the person whose conviction is vacated? Isn't it always that person who seeks the vacation? So what sense does it make to talk about his discovering that particular fact? It seems to me it makes no sense.

So you're left with -- with two competing interpretations, both of which have some textual problems. I'm inclined to think you take the one that makes sense, given the purpose of the statute, and the purpose of the statute, as Justice O'Connor has suggested, is to make people bring up their claims promptly. And -- and that purpose would -- would be served by the Government's rule and not by yours. You say unless the State has some statute of limitation, this -- this Federal requirement of due diligence goes begging.

What's -- what's your response to that? You really think -- especially about the discover.

MR. REICHMAN: I do and here's why, first, starting with the language before I turn to the policy

side of your question.

On the language, paragraph (4), the fourth trigger, is broad language that was meant to cover a variety of circumstances, things from ineffective assistance of counsel, to Brady violations, to vacaturs. I'll grant you that if Congress only intended the vacatur situation to be covered by paragraph (4), we might wonder why they chose those particular words, but we know they didn't intend this one circumstance.

I think the Government's position as to discover boils down to this. Because the answer to the question, when could the vacatur have been discovered through reasonable diligence, is easy, the answer must be wrong. And we don't believe that to be the case. We think that you can easily ask when could the vacatur have been discovered through the exercise of reasonable --

JUSTICE BREYER: And when it could have been discovered I guess if he had taken due diligence and gone and made the motion within a year, at least, of his having been convicted in the Federal court.

I mean, I don't see how you can have it both ways. You want us to read that phrase very broadly to include under the word facts something like a vacatur, and then it sounds to me you're being very literal and linguistic when you say that due diligence to find the

facts shouldn't mean what I would take it as ordinarily meaning, that -- that you have to, when you had a chance, go back and generate this fact.

MR. REICHMAN: I --

JUSTICE BREYER: I don't see how you can do both, in other words.

MR. REICHMAN: I think we can. I think both the interpretations of each of those contested words are strict interpretations right within the plain meaning. And our case can boil down to asking whether there's something wrong with my English language when I say, on what day could the vacatur have been discovered through the exercise of due diligence. It's --

JUSTICE BREYER: On the pure English language, it's not exactly a fact.

MR. REICHMAN: Well --

JUSTICE BREYER: I mean, it's a legal determination. We usually separate law from fact.

MR. REICHMAN: And -- and as we point out in our brief, there's nothing -- in this context in particular, a vacatur is like a conviction. It's a fact, you know, that is -- is commonly referred to by the court.

JUSTICE SOUTER: Well, just so that I understand your argument then, going back to Justice O'Connor's question, if you get a long sentence, can you sit there

for 10 years, then initiate the process to get the earlier conviction vacated and then say, as soon as it is, with due diligence I'm here at the courthouse because, although I waited 10 years, I have brought my 2255 as soon as I learned that my earlier sentence had been vacated? Your answer to that question, I take it, is yes, he satisfies the statute.

MR. REICHMAN: He satisfies the statute, but I need to point out something that I think is critical to understanding this question. At the end of the day, we're talking about at most six States where this might be at issue. The rest of them either have laches or statutes of limitations. And these are small States. We're talking about a rule --

JUSTICE SOUTER: Okay, but in -- in six States, I would have thought that, A, the due diligence language, together with the general obvious policy of AEDPA, to get this over with, would have made it very difficult to conclude that he can sit there without doing anything for 10 years.

MR. REICHMAN: Well, I --

JUSTICE SOUTER: Maybe it's only in six States, but six States count.

MR. REICHMAN: They do count. But it ties into the response -- the second part of Justice Scalia's

question is, isn't finality served? Isn't that what AEDPA is all about? We don't believe that the Government's rule that they propose will serve finality in the vast majority of cases because in the vast majority of cases, you're talking about claims that will have no merit in State court. But because it's very difficult to complete the State court habeas process before the 1 year in the first paragraph, these petitioners will file placeholder petitions in Federal court and have them held while they finish their State court review. So what you're doing is you're talking about these six States, maybe 10 guys a year, you're going to cause, as the Brackett court on remand said, thousands of placeholder petitions to be filed, and you're needlessly extending all of those cases so that you cut off the rights for maybe 10 people who happen to be in these States.

JUSTICE SOUTER: All right. Here's -- here's a simple way of looking at it. The minute that you're convicted and you are subject to the enhanced sentence based on a prior conviction, the obligation of due diligence begins. You can't sit there for 10 years. That's the point at which you've got to file your petition so that you can come into court with reasonable promptness, if not by the sentencing hearing itself, as soon afterwards as the State process allows you.

That would be a simple due diligence point. It wouldn't involve placeholder petitions, and it would get things concluded with reasonable promptness. Why isn't that a way of -- of applying the statute?

MR. REICHMAN: Because if you were going to be strict about it -- and -- and I'm not sure I understand all of the parameters of the hypothetical -- in --

JUSTICE SOUTER: Easy. The minute he's convicted, the State has charged him and -- and -- or his -- by some charging document has made clear that there is going to be an invocation of a prior conviction for an enhanced sentence. As soon as he is convicted of the later offense in which that sentencing possibility has been raised, he has an obligation to go into the State court and start the process of -- of getting his earlier conviction vacated. Easy.

MR. REICHMAN: If Mr. Johnson had done that in this case, he still would have missed the 1-year statute of limitations. If Mr. Gadsen had done that in the Fourth Circuit case by Judge Wilkinson, he still would have missed the 1-year statute of limitations.

JUSTICE SOUTER: But he would have acted with due diligence and he would have had as -- I suppose, a very powerful argument, which -- which the Government apparently would accept, for -- for tolling.

MR. REICHMAN: For equitable tolling? Well, I don't know that the Government would accept equitable tolling.

JUSTICE GINSBURG: Well, as I understood Justice Souter's question, it is the alternate that the Government said. The Government puts forward two arguments, and its alternate argument sounds to me just like what Justice Souter put to you, that is, he has to move diligently to challenge those underlying convictions, that he cannot challenge in Federal court because of -- was it -- Curtis and Daniels.

Why isn't that an -- an accommodation of what we know was the concern of the Federal court -- of the -- of the Congress that people act diligently? It happens that 2255 wasn't framed with Curtis and Daniels in mind. There isn't any indication that the drafters of 2255 were aware of this peculiar situation where you can't make the challenge in Federal court, you must go back to the State forum. But we do know they were concerned with diligence.

MR. REICHMAN: Well, AEDPA was enacted after Custis was decided and I think we presume that the Congress was aware of the precedent, but the --

JUSTICE O'CONNOR: Now, wasn't -- didn't Mr. Johnson here wait a couple of years after the Federal sentencing before he tried to go back to the State courts?

MR. REICHMAN: Yes, he did.

The -- the -- our answer --

JUSTICE O'CONNOR: I'm not sure that was a diligent sort of a -- an effort.

MR. REICHMAN: We believe it was diligent within the -- the fourth trigger because, again, we rely on the plain language. And the -- the fall-back position, to address your question and Justice Souter's question, is that we don't believe -- we believe this is engrafting a whole different statutory scheme on top of the one that we have. The fall-back position of the Government is to say, all right, let's interpret the statute or rewrite it to say that we're going to trigger the date on when the vacatur could have been obtained, not when it could have been discovered. And to do that, what they're saying is, well, let's give him a year from the time of the Federal sentencing. So -- or -- or maybe even earlier, dating back to the time of the original conviction in State court. So they add that 1-year statute of limitations. Then they say then we'll add a provision that tolls during the pendency of State habeas, and then we'll add another 1-year statute of limitations on top of that after the vacatur is obtained. So we end up with -- instead of the plain language, we have two 1-year statutes of limitations with a tolling provision in between, the type of tolling

provision that is, by the way, in section 2244.

We believe that petitioner's interpretation, although the answer is not difficult, it -- it is the correct answer. On what date did the -- could the vacatur have been discovered through the exercise of due diligence? And the answer I think was --

JUSTICE GINSBURG: But then you -- you have to concede that you are watering down almost to nothing any due diligence requirement because on your reading of the statute, there isn't -- there isn't any such requirement.

MR. REICHMAN: Well, we think that that is -- I'll -- I'll say that there's no -- we don't believe that there is a requirement in the Federal statute, in agreement with -- with your statement, to exercise diligence and seeking the vacatur. But we believe that that is a necessary consequence of the administrative decision that this Court made in Custis and Daniels to send these back to the State court.

It -- it could have been the case that these were all challenged at sentencing, and in fact, I think that was the prevailing practice before Custis, that they were challenged at sentencing. But Custis and then followed on by Daniels made a different decision, and I think a good one. It made the decision to wrap these challenges back to the State and that inevitably will

result in delays as it works it way through the State.

The rationale for the Court's decision makes perfect sense when you apply it to this context. One of the key concerns, it seems to me, that the Court had was that if you allow these Federal challenges that are outside the State statute of limitations, then it's very possible the State is not going to have the records necessary to defend it because they wouldn't be expected to keep records outside of their statute of limitations.

And that's simply not the case here because these challenges, under the petitioner's rule, would be within the State statutes of limitations, and as this Court recognized in Daniels, the States have a powerful interest in defending their convictions and that powerful interest, it seems to me, would lead them to preserve the records necessary to maintain their convictions.

JUSTICE KENNEDY: Do you make the argument or is it implicit in your argument -- maybe you don't have this concern -- that if you imply a Federal due diligence standard on your duty to vacate the State conviction, that it's just too burdensome on the petitioner who has to begin fighting the vacatur battle at the same time that he has only 1 year to complete his habeas with reference to the other challenges to his conviction?

MR. REICHMAN: That is not something that we've

argued in the briefs. It -- it, no doubt, is true especially when you're talking about a pro se petitioner.

JUSTICE STEVENS: May I ask? You mentioned -- I just want to be sure I understand your point -- that there are only six States that are really affected by this rule. Is that because all the other States have State limitations periods that require the prisoner to act promptly?

MR. REICHMAN: Limitations period by statute or they have a laches principle that would limit the ability.

JUSTICE STEVENS: So that the -- the hypothetical of the prisoner waiting 10 years to challenge the State conviction can only arise in a few States. Is that right?

MR. REICHMAN: That's right, and from what I can tell from the Department of Justice statistics, there are even fewer number of convictions in those States, and best I can back-of-the-envelope it, we're talking about maybe I think less than 10 people per year.

JUSTICE KENNEDY: In those -- in those six States or those few States --

MR. REICHMAN: Yes.

JUSTICE KENNEDY: -- have those States all made clear they'd say we will never apply laches, or is it just the case that there have never -- there's never been an

instance where the laches issue was presented to them?

MR. REICHMAN: The latter is more accurate. I'm -- I'm -- I was trying not to overreach, but I went with the cases that States that were clear that laches would apply either by statute or by case law.

And why this becomes particularly important to me is because we think the petitioner's rule serves the ends of the Federal court overall, especially when you're talking about finality because it seems to be the tail wagging the dog, in a way, to have a rule that cuts off the possibility of the 10-year scenario for these few cases and then causes thousands of placeholder petitions to be filed and managed. And it has been pointed, you know, average non-merits dismissal, we're talking about roughly 260 days. It's a burden on the court that's unnecessary, particularly to bring it back, when we think that in light of Custis and Daniels, the plain language takes us all the way there.

JUSTICE GINSBURG: I know -- I know --

JUSTICE KENNEDY: But do you have any explanation of why your client waited so long?

MR. REICHMAN: The record doesn't reveal except that he is pro se.

JUSTICE KENNEDY: Pro se.

MR. REICHMAN: Yes.

JUSTICE GINSBURG: Even -- that was the question I was going to ask. With respect to -- he came into Federal court and he said -- a little -- like 3 days too late to move to extend the time to file the 2255. That motion was denied. That motion was made in April of '97, and then he doesn't file for State habeas to get rid of those prior convictions until February of '98. Is -- is there any indication of why, when the Federal court says we're not going to extend your time, he waits so long to go to the State court?

MR. REICHMAN: There's -- I'm aware of the facts, but there's none in the record other than the fact that he's pro se and has limited education.

I want to point out one thing that -- that I think is important perhaps, if -- if the Court were to go a way of equitable tolling, which as I've said, I don't believe is appropriate. But you mentioned that it was 3 days too late that he filed. Looking back at the record, I -- I don't think that's accurate. It shows that it was received by the court on April 25th, 1997, which is 1 day after the grace period under AEDPA which -- it expired on April 24th, 1997. Well, he did it by mail, and under the mailbox rule, that would have been a timely motion to the extent that we are concerned with equitable tolling and -- and permitting the placeholder petition of that kind.

But again, this -- this difficulty in managing the process is familiar to the court because it -- it's what happens when you have these pro se petitioners.

The important thing in this case, we believe, the core concern is with the plain language of the statute. Because Daniels in substance said, the underlying facts to a State court vacatur do not support a claim, we believe that you have to read section 2255, paragraph (4) to say that, okay, then the operative fact is a vacatur.

And this case -- it's a very real concern because without the prior convictions that were later vacated, Mr. Johnson would have a roughly 7-year sentence. Those prior convictions that were vacated -- and we all can conclude now were unconstitutional -- added 8 more years on his sentence. He's serving more time on the enhancements than he was on the underlying sentence. And of course, the sentencing scheme depends on reliability of the information used for purposes of sentencing, and that's why Congress chose to enact the fourth paragraph and the statute of limitations so that there would be an opportunity to correct unreliable information when it came to light and it was discovered.

If there are no further questions, I would reserve the remainder of my time.

JUSTICE STEVENS: You may. Thank you.

Mr. Himmelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE RESPONDENT

MR. HIMMELFARB: Justice Stevens, and may it please the Court:

Petitioner's State court habeas corpus petition, which challenged his guilty plea on a ground available at the time of the plea, was filed nearly 9 years after the plea was entered and nearly 2 years after a subsequent Federal conviction became final. Petitioner, nevertheless, contends that the challenge to his Federal sentence was timely under AEDPA's 1-year statute of limitations because it was filed within a year of the date on which his State conviction was vacated. That interpretation, which enables a defendant to extend the limitation period for challenging his Federal conviction by delaying a challenge to his State conviction, is fundamentally at odds with the statutory text, the statutory purpose, and the overall statutory scheme.

To begin with the statutory scheme, under clause (1) of AEDPA's limitation provision, the presumptive rule is that a defendant wishing to -- to collaterally challenge a Federal conviction has a year from the date on which the conviction becomes final.

Clauses (2), (3) -- (2), (3), and (4) create exceptions to that general rule when a prisoner is unable to comply with the rule in clause (1) for reasons beyond his control. The fundamental flaw in petitioner's interpretation is that it would excuse compliance with the presumptive rule in clause (1) for a reason that is not beyond his control, a failure to exercise diligence in challenging his State conviction.

Petitioner's interpretation is also inconsistent with the statutory purpose of the limitation provision.

JUSTICE KENNEDY: Well, are you saying that (4) is inapplicable?

MR. HIMMELFARB: No, Justice Kennedy. We agree that (4) is applicable in a case like this. It's just that our position is that petitioner's interpretation of it is wrong. We offer two alternative interpretations of how paragraph 6(4) would apply in a case like this.

Before I get to them, I'd like to respond to a question that you asked when petitioner's counsel was standing up here, and that had to do with the difficulty of getting everything that needed to be done done in the space of a year.

It's critical to keep in mind that in the typical case of this type, the factual basis for the State claim is going to available at the time of the State

guilty or trial, which in almost every case is going to be years before the Federal conviction becomes final. And since the limitation provision under AEDPA runs from the latest of the four dates, in a typical case a defendant is going to have many years to seek the vacatur of a State conviction and he'll have up until a year after his Federal conviction becomes final to challenge it.

JUSTICE STEVENS: But do you agree with your opponent that most States have their own limitations period that will reduce the number of cases in which there can be inordinate delay?

MR. HIMMELFARB: Some States do have statutes of limitations. Many don't. Massachusetts is a prime example. It doesn't. Many of the cases of this type that come through the Federal courts arise based on a -- a vacated Massachusetts conviction. My understanding is that perhaps as many as half the States don't have limitation provisions in non-capital cases.

JUSTICE STEVENS: But he says some of them have doctrines of laches that would kick in.

MR. HIMMELFARB: I think that's -- that -- that may well be true, Justice Stevens, but laches is a much more -- a -- a case-by-case --

JUSTICE STEVENS: It -- it does seem to me that the State has a greater interest than the Federal

Government does in the finality of its own convictions, and so the State would be the primary guardian of preventing dilatory tactics, it would seem to me.

MR. HIMMELFARB: The -- the State does have an interest. The problem is that when there's a delay in filing a challenge to a State conviction, one of two things can be happen -- can happen, and the cases bear this out. One is that you have a State prosecutor who is perfectly diligent and wants to defend the conviction but, because of the lapse of time, can't because the requisite records aren't available. The other thing you see in some of these cases is that because the State sentence has been served by the time it's challenged in cases of this type, the State prosecutor doesn't have the same kind of incentive --

JUSTICE KENNEDY: Well, as to your first --

JUSTICE SCALIA: I was going to say that. What -- what -- excuse me.

JUSTICE KENNEDY: -- as to your first -- as to your first instance, if there's lack of diligence, then there's laches. If the records are destroyed, somebody sits on their rights and the records are destroyed, then you have an obvious defense of laches.

MR. HIMMELFARB: The -- the important point, Justice Kennedy, is the limitation provision at issue here

has to do with the finality of Federal convictions. Congress was concerned that challenges to Federal convictions not be --

JUSTICE KENNEDY: Well, we're -- yes, I -- I recognize that that's going to be the ultimate issue, but your point was, oh, well, the State is powerless because the prosecutor might not have the records. The States have laches provisions precisely for that circumstance.

MR. HIMMELFARB: Justice Kennedy, we're not saying that States are powerless, and there are many cases, probably the majority of them, where States do diligently defend their own convictions in cases of this type. Unfortunately, the reported cases show that there are many cases where either they're not able to or they're unwilling to because the State sentence has long since been served.

JUSTICE SOUTER: Mr. Himmelfarb --

JUSTICE O'CONNOR: Well, in this case now, the petitioner did obtain a vacatur of the two State convictions. Isn't that so? Don't we accept that as a fact in this case?

MR. HIMMELFARB: Yes, Justice O'Connor. He actually obtained vacatur of seven prior State convictions, only one of which was relevant to the career offender sentence that he received in the Federal case.

JUSTICE O'CONNOR: But he did succeed. And then we have to look at whether the petitioner has complied with section 2255 of AEDPA. And so we look to subpart (4), do we not, in this case to answer that?

MR. HIMMELFARB: Well, in a case of this type, you would have to look to both subpart (1) and subpart (4) and determine which one gives him more time, and whichever one gives him more time is the one that applies. We think that 6(1) applies because under 6(4) he waited far too long to challenge his State conviction.

JUSTICE O'CONNOR: Well, that's possible, but you also question whether the vacatur can be a fact under subsection (4).

MR. HIMMELFARB: We don't really, Justice O'Connor.

JUSTICE O'CONNOR: Okay.

MR. HIMMELFARB: I think the lower court placed some weight on that idea. We don't dispute that if a conviction is a fact, the vacatur can be as well.

JUSTICE O'CONNOR: Okay. You think that the -- the vacatur here could be a fact, but then you say that even so, the petitioner didn't go back to State court diligently and on a timely basis.

MR. HIMMELFARB: That's exactly right. The textual language we rely on is not fact or facts

supporting the claim, but rather could have been discovered through the exercise of due diligence.

JUSTICE O'CONNOR: And you say he was not diligent in challenging those convictions.

MR. HIMMELFARB: That's -- that's absolutely our position, Justice O'Connor.

JUSTICE SOUTER: Mr. --

JUSTICE SCALIA: But that's -- go on.

JUSTICE SOUTER: Would -- would you comment on -- on one difficulty I have with what, I take it, is your preferred position of measuring due diligence from -- as I understand it, from the -- the date at which the State conviction became final?

Most of these -- I think it is fair to say that most of the State convictions, like most convictions in -- in general, are going to rest on -- on guilty pleas. It just is not realistic to assume that Congress assumed a due diligence system which was going to require a State defendant immediately to start a collateral attack on a guilty plea. I mean, if -- if there -- if there were reasons for the collateral attack that seemed strong and worthwhile, he wouldn't have been entering the guilty plea.

And it seems to me that if we're going to measure due diligence from the date of conviction, most

convictions resting on pleas, as a practical matter under your system, a conviction that rests on a plea is never going to be subject to a timely challenge for purposes of applying 2255. Is -- is that a fair comment, or have I -- have I missed something?

MR. HIMMELFARB: No. We -- we disagree, Justice Souter. And if I could, I'd like to say a little bit about the -- the proposal you made when petitioner's counsel was up here about when the diligence could be measured from. And I think your suggestion was that it could be measured from the time of the Federal conviction or --

JUSTICE SOUTER: Yes.

MR. HIMMELFARB: -- perhaps the time that Federal charges are brought because at that time, that's when the defendant has the incentive to -- to challenge the State conviction. We obviously prefer that interpretation to the one offered by petitioner.

We think the two that we offer are better than that one for a couple of reasons. The first is that we think that our two --

JUSTICE SOUTER: Well, would you comment specifically on your preferred position which starts at the very -- as I understand it, starts at the earliest date, which would be the date of the State conviction?

MR. HIMMELFARB: That's right. We think that's consistent with the text because the diligence has to be connected in some way to the facts supporting the claim, and we think you could take the view that in a case of this type, particularly given the diligence requirement, the facts supporting the claim either means the facts supporting the State claim or it means the vacatur of the State conviction.

JUSTICE SOUTER: Yes, but isn't it -- I guess my problem is isn't -- isn't it a sense -- isn't your argument for a sense of diligence which is really other-wordly? At the moment the defendant's conviction based upon his plea becomes final, it simply is unrealistic to expect that any defendant would have an incentive to attack that conviction. And -- and the result, it seems to me, of -- of your position, your preferred position, is if -- if diligence is measured from that moment, that no defendant will ever be diligent because no defendant will ever have an incentive at that point to be diligent.

MR. HIMMELFARB: Well, Justice Souter, the -- we think that there's a -- a textual problem with the interpretation you're offering because it doesn't tie diligence to facts supporting a claim.

JUSTICE SOUTER: Well, how about the one you're offering? Before you tell me why mine is bad, tell me why

yours does not suffer the -- the -- at least I think, the objection that I've -- I've raised?

MR. HIMMELFARB: Because it avoids the problem that you could have a Federal conviction long after, years or a decade or a more after, the State conviction. And on -- on your view, you would not be -- the -- the petitioner would not be required to challenge a State conviction for a decade or more until after --

JUSTICE SOUTER: That's -- that's right. But why is the requirement on your reading to challenge it promptly after it is entered in these plea situations, not a just totally unrealistic requirement that will never be met and will result in a consequence that all State convictions, resting upon pleas, will be, in effect, insulated from later collateral attack when -- under -- for purpose of 2255?

MR. HIMMELFARB: Justice Souter, an argument along those lines was actually raised in Daniels itself and rejected by the Court. And essentially what the Court said is that whatever the incentives may be at the time of the State conviction, the remedies are available, the procedures are available. And if a defendant does not avail himself of those remedies and procedures, at a minimum he will know that so long as his State conviction remains on the books, if he goes out and commits another

crime, he runs a risk that he will be subject to an enhanced sentence based on the fact that he's committed the prior crime. We think the same --

JUSTICE SOUTER: So you say we're all stuck with that.

MR. HIMMELFARB: I think that --

JUSTICE SOUTER: You don't mind, but -- if -- if you think -- if you think there's anything to my objection, you're in effect saying, too late.

MR. HIMMELFARB: I think that the arguments against your objection weigh in favor of our interpretation.

JUSTICE KENNEDY: Well, I'm not sure I agree with your argument, but I suppose one answer to Justice Souter is that you get the longer of (1) or (4), so that you would always get at least 1 year. If the -- if the State conviction was 10 years prior to the Federal conviction and he waited and did nothing, I take it, he still has 1 year because he gets the longer of the two provisions.

MR. HIMMELFARB: That's right, Justice Kennedy.

JUSTICE BREYER: It is right? Because I thought that Justice Souter provided that, but you don't because if you're relegated to (4) -- let's say it becomes final quickly. If you're relegated to (4), what you're saying

is the date on which the facts supporting the claim could have been discovered, if this is a conviction that took place 10 years earlier, you are saying the date on which those facts could have been discovered was 9 years earlier or whenever he could have brought it -- brought the claim in the -- in the State court.

MR. HIMMELFARB: That's right. Under --

JUSTICE BREYER: So, therefore, it is not true that he always has that year.

MR. HIMMELFARB: No. Under paragraph 6(4), what you say is absolutely correct, as we see things.

JUSTICE BREYER: Yes.

MR. HIMMELFARB: But the -- the limitation period under AEDPA runs from the latest of the four dates --

JUSTICE BREYER: But if the date of judgment became final prior to the running of (4), then he would not have a year.

JUSTICE SCALIA: That's true.

JUSTICE BREYER: All right.

Now, my question actually is the -- aside from Justice Souter's practical point, it seemed to me that the language here is different from Daniels and different in the other cases. The language is the date on which facts supporting the claim or claims presented could have been

discovered. And facts supporting the claim prior to there being a claim are not facts supporting the claim. And therefore, it seems as if it would run no later than the moment when he presents the Federal claim. No earlier than that could it run. So you have a year from the time that you present the Federal claim. At that point, all those facts that could have been discovered earlier, now he has a year to call them to the attention of the court.

And of course, for reasons that you point out, this is certainly a fact that could have been discovered earlier. He could have brought his motion long before.

So what's wrong with that? It combines the practical reason that Justice Souter mentioned with the language of the statute.

MR. HIMMELFARB: Let me comment on the language, if I could. If one were to read the phrase, facts supporting the claim, completely in isolation, keeping in mind only Daniels, but ignoring the broader statutory context and the statutory purpose, it might well be the case that the better reading is that the facts supporting the claim is the vacatur of the State conviction not the factual basis for the State claim.

But if you take into account the broader statutory context and statutory purpose, in particular if you take into account the due diligence requirement, we

think the better reading is that facts supporting the claim, in the context of this limitation provision, is the factual basis for the State claim. It is true --

JUSTICE KENNEDY: But I -- I thought that you conceded at the outset that the facts supporting the claim is the vacatur. I -- I thought that you opened up with that. And it -- it --

MR. HIMMELFARB: No, Justice Kennedy. What I was agreeing to was the idea that a vacatur of a conviction is a fact because in the lower court decision, there seems to be some reliance on the idea that that's not a fact at all. But in responding to Justice Breyer's question --

JUSTICE KENNEDY: Well, the minute -- the minute that you -- you say that, it -- it seems to me that you have to accept the petitioner's argument.

MR. HIMMELFARB: I don't think so, Justice Kennedy, and here's why. It is a true in a case of this type that the facts supporting the claim -- excuse me -- the factual basis for the State claim is not the facts supporting the Federal claim in a direct or proximate or immediate or sufficient sense. It is the facts supporting the Federal claim in an indirect, a but for, a once removed, or a necessary sense. If a defendant has served his State sentence, he's been sentenced to an enhanced

Federal sentence and he wants to challenge his Federal sentence and he's armed with a factual predicate for a State claim, so long as he takes the intermediate step of going into Federal court and obtaining a vacatur of the conviction, he can challenge his Federal sentence.

JUSTICE BREYER: I'm certainly not taking -- advocating the -- the defendant's position. I'm advocating the position as follows.

Suppose it were not a vacatur. Suppose it were a DNA test, and suppose it were a fact that the DNA test identified a different perpetrator of a long-gone State crime and it was definite.

Now, if no one thought of running that DNA test, although they should have, until 4 years after the Federal conviction, he's out of luck. He has 1 year from the Federal conviction, and that 1 year he has to, during that year, do everything, including bringing facts into being, such as the result of the DNA test, that he had not previously done. And that's consistent with the language. It avoids Justice Souter's practical problem, and it does not impose an unreasonable burden on the Government, I wouldn't think, because he has just a year from conviction.

MR. HIMMELFARB: Justice Breyer, under our view, the hypothetical you just gave would be one where a timely

2255 motion could be filed. If the DNA evidence were discoverable in the exercise of due diligence only more than a year after the Federal conviction became final such that the defendant would not be within paragraph 6(1), he would be able to file a timely 2255 motion under paragraph 6(4) if, within a year from the date that the DNA evidence was discoverable through the exercise of due diligence, he filed his State motion to get his State conviction vacated, and allowing tolling of the period while the State motion is pending, then filed his Federal motion within that same 1-year period, he would be able to file a timely 2255 motion. That's under our primary interpretation.

JUSTICE GINSBURG: From your answer, I take it then you would agree with Judge Black in the Eleventh Circuit that equitable tolling would apply. He goes to State court within the year after his Federal conviction becomes final. The State court is sitting on it for 2 years. The limitation, I take it from what you said, would be tolled during that time.

MR. HIMMELFARB: That's right, Justice Ginsburg. Under our primary interpretation, there would be tolling during the 1-year period of the time while the motion, the State motion, is pending in State court.

Our alternative interpretation doesn't depend on

tolling because it doesn't begin to run until the vacatur of the State conviction could have been obtained. So it's just the -- the time while the State motion is pending is just excluded from the calculation as a matter of course under our second interpretation.

JUSTICE STEVENS: May -- may I ask you sort of a general background question? As I understand your basic position, if the defendant lets things sit for too long, he loses the right to challenge the State conviction. On the -- and -- and what's -- what's at stake is an enhancement based on the -- on the prior conviction. Is there ever a time when the Federal Government loses the right to use a very old conviction for enhancement purposes?

MR. HIMMELFARB: Well, under -- under the guidelines, depending upon the -- the length of the prison term, I think very old convictions are not counted at all.

JUSTICE STEVENS: Is that right?

MR. HIMMELFARB: Yes. So -- so the length of time from the date of the State conviction to the time of the Federal sentencing can have a bearing upon what sentence he's going --

JUSTICE STEVENS: Whether he gets the --

JUSTICE SOUTER: Is that also true under the Armed Career Criminal Act cases?

MR. HIMMELFARB: I -- I don't believe it is, Justice Souter. I don't think there's any kind of time limitation there the way there is in the guidelines.

The -- the --

JUSTICE KENNEDY: I'm not sure which way that cuts. In a -- in a sense, if that set of old convictions is out of the way, then you won't be troubled by the loss of records problem.

MR. HIMMELFARB: Well, that -- I think that's actually a critical point, Justice Kennedy, because our view is that a -- a State defendant should be required to challenge his State conviction at the earliest possible opportunity, and in most cases that will be soon after his conviction in State court because that will be the time when he knows about the basis for his State claim. If he does that, by the time he gets to the Federal sentencing, you're not going to have the issue in this case because all will agree that that vacated State conviction can't be counted towards his Federal sentence. So that's one of the virtues of the interpretation we offer. It avoids this circumstance entirely.

JUSTICE GINSBURG: But you're not -- you're not insisting on that super diligence because you say, well, in every case he has at least a year to begin to try to undo the State conviction.

MR. HIMMELFARB: That -- that's right, Justice Ginsburg. We agree with that.

The -- the purpose of AEDPA's limitation provision, to use this Court's language in Duncan v. Walker, is to reduce the potential for delay on the road to finality by restricting the time that a prospective habeas petitioner has in which to seek habeas review. We think petitioner's interpretation is inconsistent with that purpose not only because it permits a delay in challenging the State conviction and, as a consequence, in challenging the Federal sentence, but because it encourages it. As I mentioned before, the longer a prisoner waits to challenge his State conviction, other things being the same, the greater the likelihood of success either because the necessary records that the State would need to defend the judgment are unavailable or because the State prosecutor has less of an incentive to defend it than he might have while the sentence was still being served.

JUSTICE KENNEDY: Recently I -- I lost my luggage. I had to go to the lost and found at the airline, and the lady said has my plane landed yet.

(Laughter.)

JUSTICE KENNEDY: I was kind of stopped by that question.

It seems to me this case is something like that. I mean, this is just not a question the -- the defendant asks until the Federal conviction arrives, which I -- which I suppose that argues for your 1-year --

MR. HIMMELFARB: Well, our --

JUSTICE KENNEDY: -- position, but it just seems to me that the purpose of this doesn't begin to run until he's been sentenced. And then he has to go through all the -- the questioning as -- as to whether or not his prior conviction is -- can be set aside, and he has to go to State court to do that.

MR. HIMMELFARB: Well, the -- the important point is that -- we think is that petitioner's interpretation doesn't work because it gives a defendant an indefinite period to challenge his State conviction, and the only diligence that's required under his interpretation is that you have to exercise diligence in seeing whether the motion to vacate your State conviction was granted whenever it was filed.

JUSTICE SCALIA: Well, that may be but that also may be what it says. I -- I don't follow your interpretation of what is the meaning of facts supporting the claim or claims. I mean, once you say that the facts supporting the claim is the vacatur of the -- of the State conviction, I mean, it seems that's the end of it.

MR. HIMMELFARB: Well --

JUSTICE SCALIA: And -- and as for due diligence, yes, it doesn't seem to make much sense in that context, but as pointed out by your friend on the other side, it makes sense in all other contexts and -- and you don't expect the language to be applicable all the time. So what's wrong with that?

MR. HIMMELFARB: What's wrong with it is that we think it's not only inconsistent with the basic principle embodied in AEDPA's statute of limitations, we think it's inconsistent with the very idea of a statute of limitations.

JUSTICE SCALIA: It may well be, but that's how they wrote it. I'm talking about the word facts.

MR. HIMMELFARB: Justice --

JUSTICE SCALIA: How can this be a fact supporting the -- you -- you want us to say a fact supporting the conviction includes the facts that lead up to the facts supporting the conviction or -- or supporting the claim.

MR. HIMMELFARB: Justice Scalia, if the Court rejects our view that the facts supporting the claim under paragraph 6(4) as the factual basis for the State claim, we think it should still reject petitioner's interpretation and should adopt our alternative

interpretation which is not subject to that objection because our alternative interpretation assumes that the facts supporting the claim is the vacatur of the State conviction. But in light of the due diligence requirement at the end of paragraph 6(4), the question is when could that vacatur have been obtained and thus discovered through the exercise of due diligence.

JUSTICE SOUTER: In other words, you're saying due diligence applies to an extraneous fact when you could, in the simple sense, discover it. It applies to a generated fact when you could have generated it.

MR. HIMMELFARB: That's absolutely our position, Justice Souter.

JUSTICE STEVENS: May I ask sort of a broad question? Am I correct in assuming that this really isn't the most important case we ever heard because it only affects a handful of enhancements that don't really affect the basic conviction or sentence; and secondly, that it's clear that the -- from both the text of the statute and whatever we know about the legislative history, that it's a problem Congress never even thought about?

MR. HIMMELFARB: As to your first question, Justice Stevens, one -- one would think that this is a little bit of an unusual situation and you don't see too many cases where it arises. Perhaps surprisingly, though,

there are quite a few reported decisions where this arises. There is a 2 to 1 circuit split on this question. There are some district courts from other circuits that have weighed in. I believe there may be three or four certiorari petitions pending in this Court from the Eleventh Circuit that raise the same question.

As to whether Congress ever considered this situation, I'm not aware of anything in the legislative history that is an affirmative indication that it did. It could well be --

JUSTICE STEVENS: And certainly they would have phrased the statute one way or the other more clearly. They could have done that.

MR. HIMMELFARB: That could well be, but of course, it wouldn't be the -- the first time the Court confronted a situation where there's a statutory text and there's a set of facts that Congress didn't necessarily consider when it was writing the text.

So we think our -- either our primary or our fall-back position is preferable to petitioner's interpretation for the fundamental reason that his interpretation does not require diligence. It enables the defendant to extend the limitation period through his own actions, and we think it's simply foreign to the whole notion of statutes of limitations to say that the

limitation period can be determined by actions that are within the prisoner's control.

The court of appeals --

JUSTICE BREYER: You certainly -- wouldn't you be making the opposite argument if it were a DNA test? If it were a DNA test, you would certainly be arguing that even though the results didn't come into existence until 32 years after his Federal conviction, that he could have discovered it 38 years before because he could have asked that the test then be performed.

MR. HIMMELFARB: Well, Justice Breyer, the question of whether a fact supporting a claim could have been discovered through the exercise of due diligence is a very fact-specific question which --

JUSTICE BREYER: All right. Then -- then once you admit that, you're going to have to find a difference between this and the DNA test, or your position here, if adopted, will catch you out there.

MR. HIMMELFARB: No. We don't think so because we think that the analysis should be the same for this case as it is for your typical case involving a statute of limitations with a discovery rule. The question is on the facts of this case, when could the factual basis of the claim been discovered given the totality of the information available to the plaintiff through the

exercise of due diligence. So we think it's precisely the same situation.

JUSTICE SCALIA: But you're still asking us -- I mean, even -- even in your fall-back position -- your -- your principal position asks us to -- to play games with the -- with the word facts, and your fall-back position asks us to play games with the word discovered. You want us to read discovered to mean either discovered or obtained, which discovered just doesn't mean obtained. It just doesn't.

MR. HIMMELFARB: Well, you're right, Justice Scalia. The fall-back position presumes the correctness of petitioner's interpretation of facts supporting the claim.

JUSTICE STEVENS: Thank you, Mr. Himmèlfarb.

Mr. Reichman, you have, I think, 8 minutes left. I'm not -- I'm sure you don't really need all 8.

REBUTTAL ARGUMENT OF COURTLAND REICHMAN

ON BEHALF OF THE PETITIONER

MR. REICHMAN: I hope not.

The Government's position boils down to this. They're advocating for the statute they want, not the statute they have. This statute says the fact that could have been discovered with exercise of due diligence. And once -- as this Court -- several Justices have recognized

once you admit that the vacatur is a fact, the Government's entire argument unravels because what the Government would have -- this Court holds -- is that the facts supporting the claim is exactly what it held it couldn't be in Daniels.

The -- underlying the Government's argument is, I think, a principle that -- that does not make sense. It's that the State can't be trusted to handle the challenges to prior convictions. I think that is not only against experience. It also cuts against this Court's decisions, in particular, about Daniels. It talked about the State having a strong interest in maintaining its convictions.

The idea about AEDPA and finality I think is also important. To answer your question, Justice Stevens, no, this is not the most important case this Court has ever heard. And I think that that ties into an important point. To use my rough numbers, we're talking about at this point with the six States, less than 10 guys that might be in this 10-year scenario per year. I think probably the number is more like three people per year. And if the Brackett court, the court on the front lines down there in the district court, the First Circuit is right, we're talking about the results of the Government's rule to be that thousands of placeholder petitions will be

filed so that petitioners don't lose their rights to challenge their Federal sentence based on the vacatur of their prior sentences. And when -- when I think about what serves the ends of the statute and finality overall, I think that to prolong all these other cases, these thousands of cases --

JUSTICE GINSBURG: Why would you need the placeholder if the rule were, as Judge Black said it should be, that if you go to the State court within the 1 year after your Federal conviction becomes final, then the time that you are in the State court the statute will be tolled? If that's the rule, then you don't need any placeholder filings.

MR. REICHMAN: Two responses to that. First, if that is the rule, I'm not sure I read the Eleventh Circuit to be so crisp on it that you definitely get tolling. I think it was a case-by-case determination. And anytime you're in a soft -- what I call soft equitable tolling situation where you don't know for sure, that's going to lead to placeholder petitions.

Alternatively, if we're talking about a rule that's a hard equitable tolling rule, that is, there is tolling every time there's the pendency of the State petition, well, it seems to me that we are adding a provision very expressly to the statute that doesn't

exist. 2244 has exactly that tolling provision, and that is not in this -- in the 2255 provision. And this Court would be adding it, and we don't think that is appropriate.

At the end of the day, there's been a question about doesn't a tie go to the Government in this case because of finality. That is, if both interpretations are equally plausible, because of finality, doesn't it go to the Government? Of course, you've heard me contest we don't think it's a tie. We also don't think finality cuts in the favor of the Government.

But even assuming we have a tie, we think that -- that should -- the tie goes to the petitioner because this statute is recognized in Clay as in derogation of common law, and statutes and derogation of common law are to be strictly construed.

Thank you.

JUSTICE STEVENS: Thank you, Mr. Reichman.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)