IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - - x

CARLOS JIMENEZ, :

Petitioner :

v. : No. 07-6984

NATHANIEL QUARTERMAN, :

DIRECTOR, TEXAS :

DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL :

INSTITUTIONS DIVISION. :

- - - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Tuesday, November 4, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

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

SEAN D. JORDAN, ESQ., Deputy Solicitor General, Austin, Tex.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-6984, Jimenez v. Quarterman.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

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

When the Texas courts in this case reinstated the Petitioner's direct appeal, the Texas Court of Appeals decided that appeal like it would decide any other case on direct review. We filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was denied, and it was considered like any other appeal would be.

The question presented by this case is whether the final judgment that indisputably results from those rulings triggers the one-year statute of limitations to file a Federal habeas corpus application. The statute that governs that question is reproduced in the blue brief at page 1.

Section 2244(d)(1)(A) prescribes "a 1-year period of limitation that shall apply to an application for a writ of habeas corpus by a person in custody

pursuant to the judgment of the State court. The limitation period shall run from the latest of -- and it identifies four dates, the first of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review."

JUSTICE KENNEDY: And you don't think you need to go beyond (A) to resolve the case?

MR. GOLDSTEIN: That's right, Justice Kennedy. Subsection (A) resolves this case by its plain terms.

Now, the Fifth Circuit decided this case -- this issue, I'm sorry -- in 2004 in a case called Salinas, and it thought that the factual scenario of the case was more logically covered by subsection (d)(2) of the statute, which is on page 2 of the blue brief. And that provision is the tolling provision, and it says: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under the subsection."

And the Fifth Circuit's view in that Salinas case was that the better way of looking at this is that when the State post-conviction court awarded relief of

further direct review, all of that should be regarded as part of the post-conviction process. But four years after -- three years after the Fifth Circuit decided Salinas, this Court decided Lawrence v. Florida, and Lawrence disposes of the Fifth Circuit's logic in Salinas, because Lawrence says that when the post-conviction court, here the Texas Court of Criminal Appeals, issues its mandate the application for post-conviction review is no longer pending. And so there isn't any reason to believe that Congress thought this factual scenario was covered by the tolling provisions of (d)(2).

CHIEF JUSTICE ROBERTS: So, does your position depend upon the proposition that we are not free to consider sort of a second direct appeal as part of the collateral review process?

MR. GOLDSTEIN: It doesn't depend on it, Mr. Chief Justice. We don't have to reach that question because, as I have said in answer to Justice Kennedy's question, you can resolve this under (d)(1). But I was just trying to explain why the Fifth Circuit, which struggled with how to handle this scenario, was wrong in thinking it was governed by the tolling provision.

CHIEF JUSTICE ROBERTS: I guess it doesn't -- or does it really make a difference? I mean,

if you view the direct appeal that is the result of the collateral review process as part of the collateral review process, that time is tolled. And if you take your view and regard it as not final to trigger the process until you have another final decision, it kind of leads to the same result, doesn't it?

MR. GOLDSTEIN: In many cases, but not all, including this one. The difference is that if you regard this as governed by tolling, that the second -- what we will call for purposes of the argument, just so we know, the second appeal, so the appeal that's granted by the post-conviction report, if you regard the proper way of reading 2244 to be you have to regard that as being tolled and the start date is the dismissal of the original appeal, if the State Petitioner seeks post-conviction review more than one year after the dismissal of the first appeal, his Federal time is done. So, this --

CHIEF JUSTICE ROBERTS: But does that really matter? I mean, the whole purpose of the Federal statute of limitations is to make sure these things get done within one year. And if he waits a year before filing, then he's out of time under AEDPA.

MR. GOLDSTEIN: It is -- it is the case that Congress wanted it done within one year. The question

presented by this case is one year of what?

CHIEF JUSTICE ROBERTS: Right.

MR. GOLDSTEIN: So, there are four different possible start dates. We know that the Fifth Circuit was wrong in the Salinas case when it said that Congress envisioned only a linear time period stopped only by tolling that would run from the first disposition of the case, because 2244(d)(1)(B), (C), and (D) are all provisions under which the time can expire and then be restarted.

So, what we think Congress wanted when it was picking start dates and the start date in (d)(1)(A), the one that usually applies, is it wanted the State courts on direct review to be done with the case, finish it off. Then the State petitioner will have one year to start the State post-conviction process and when that's done go on to Federal court.

The reason we think Congress wanted to include the second appeal, the conclusion of the second appeal, as the trigger is that what's going on in the Federal district court is you are trying to decide if the State court's disposition of the case is contrary to clearly established law as established by this Court. And you won't know that, you won't even know what the Federal district court is supposed to be reviewing,

until the conclusion of the second appeal.

If I could just illustrate that, in the joint appendix at page 43, is the State court opinion in this case. The Texas Court of Appeals decided this case and resolved his, the Petitioner's, Federal constitutional claims. And it only did that in the second appeal. And that's what Congress was concerned with the Federal district court's reviewing. It's -- when this opinion is issued and then the Texas Court of Criminal Appeals, which is their highest court in criminal cases, denies review, then it's logical for the time period to start.

JUSTICE GINSBURG: In the background of this case, Mr. Goldstein, is that in fact he didn't know the first time that his appeal had been dismissed. He didn't know that his lawyer had filed an Anders brief. But when he found that out, he waited some four and a half years.

So why isn't the -- Texas right when it says look at (B) and (D), they would have fit his case? He could have used those to get time starting from the date that he found out. It wouldn't give him four and a half years. But why -- you say we, all we have to consider is (A); you said that in answer to Justice Kennedy. But why shouldn't we say that either

(B) or (D) fits his case?

MR. GOLDSTEIN: Okay, can I answer that question, Justice Ginsburg, in two parts?

First most directly, I want to explain our position with respect to (B) and (D) and then I want to discuss the broad thematic concern that's raised by our case. Here's the troubling fact by our case, and that is the prospect that multiple State defendants will take more than a year, and I would like to deal with that thematic point and explain why I don't think that's a concern.

But to start directly with your point, (B) and (D), assuming that they apply for a moment, will only accomplish the following -- and then I want to explain why I don't think they would apply. But even if they apply, what they would do is defer the start date of the one year. So on the facts in this case, one year after -- 11 months or so after the Texas Court of Appeals erroneously dismissed the Petitioner's first direct appeal without giving him the opportunity to file a pro se brief, he found out.

On the State's view, the one-year Federal habeas corpus time would be deferred for 11 months, and that is a very generous defendant-favoring position for Texas to take in this Court. If it then starts, it

doesn't -- that reading does not accomplish what Congress wanted in 2244, because the State prisoner, though the time will have been deferred for a year, will still have to file for Federal habeas corpus within a year, notwithstanding the fact that he will get a second direct appeal.

So he will be proceeding in both courts. His start date will have been deferred for 11 months, but he nonetheless one year later must appear in a Federal district court in Texas, even though on post-conviction review in the State courts he is sent back to direct review.

CHIEF JUSTICE ROBERTS: Oh, but is that right? I mean unless you count, as I gather your friends on the other side would do, the period of direct appeal as part of the collateral review process?

MR. GOLDSTEIN: That's correct. And that's the argument about Lawrence. That argument is not sustainable in light of Lawrence. Just to say that you have their argument exactly right, Mr. Chief Justice, the State's position is, as the Fifth Circuit held in the Salinas case, that when you get relief on post-conviction review and you are sent back to the State system, (d)(2) continues to apply, but that is not correct. The tolling stops, and that is because, as

Lawrence held, the application which is his post-conviction application in the State court, saying that I was deprived of my right to appeal, is no longer pending. The Texas Court of Criminal Appeals has issued its mandate. So that's why this anomaly arises under the application of (B) or (D) that we don't think Congress could have intended.

Now, Justice Ginsburg, there is a second part to my answer, and that is the specific point about whether (B) and (D) do by their terms apply; and here we are in the anomalous position that if, again, Texas is arguing very defendant-favoring readings of (B) and (D) and I, representing the habeas Petitioner, am in the unusual role of questioning whether these later start dates apply.

But here our -- the lower courts I think it is clear would say that (B) and (D) don't apply. To take you to the textual -- the text of the statute, again, (B) appears at the bottom of page 1 of the blue brief; and that has a start date of the date on which the impediment for filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action. And the lower courts, as we explained in our brief, pretty

uniformly conclude that the failure to give a defendant notice that his appeal has been dismissed is not an impediment created by State action to him filing a Federal habeas corpus application. And so their attempt to grapple with our unusual facts has -- would substantially broaden the application of subsection (B).

CHIEF JUSTICE ROBERTS: What about the State convicting, penalizing the defendant despite the fact that his constitutional right to competent counsel was -- he lost that right because of the failure of notification?

MR. GOLDSTEIN: It's just -- it's not regarded as an impediment. The -- the courts -- the lower courts take quite literally that there has to be an impediment. The lower court decisions grappling with what an impediment is deal with the situation where a prison warden, for example, does not allow you access to the prison mails or somehow access to the legal resources you in order to be able to file it. He won't deliver the habeas corpus application.

(D) is even easier, I think, and that is the deadline starts from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. And the reason the State is not right about that

provision and does not even really seriously argue it is that the claims referenced in (D) are the claims that are presented in the Federal habeas corpus application. Here that's the claim that he had ineffective assistance of trial counsel and that the judge was biased against him. They are not the claim that he received -- that he was denied the right to an appeal. And so it just -- there is no textual basis to say that the later start date would apply under (D).

CHIEF JUSTICE ROBERTS: Is this just a dispute about the label? Because Texas chooses to call the proceeding that you get if you are successful on collateral review a second direct appeal, you would count finality one way; if they just switch the label and say that is the collateral review appeal process, then you would agree with them?

MR. GOLDSTEIN: No, sir. We think that you have to look at substance. As -- the language that we use in a footnote in our reply brief addressing this is whether the proceeding has the hallmarks of direct review. There are two States that do have a procedure, South Carolina and Delaware, in which you can raise your claim on post-conviction review that you were deprived of your right to a direct appeal. And the post-conviction court has the power to decide that on

post-conviction review.

We haven't found a case in which they actual exercised the power, but it appears that 48 of the 50 States deal with this problem the way Texas does, and that is the relief that you get is that you are sent back into the direct review system. And then we think it's covered quite plainly by the text of (d)(1). When that direct review is over, direct review concludes by its plain terms.

Now, Justice Ginsburg, I had said that I wanted to come back and deal with the thematic problem that might concern the Court about our case, and that is the prospect that we will have defendants filing State post-conviction applications more than a year late, which could trouble the Court. As the Chief Justice indicated, Congress had a concern with moving this process along.

In addition just to the plain text of the statute which we think is controlling, there are I think three points. The first is there are State limitations principles that get these State prisoners to file their applications in a timely way. Now, in the great majority of States that's set by a number of years. In some States like Texas it's applied by the principle of laches. And the important point and the reason we are

here today is that Texas, for whatever reason -- and the time limitations are intended to protect Texas here -- decided not to assert that his State post-conviction application was untimely. It didn't object to the granting of relief to the Petitioner at all.

The second reason, in addition to the State's own limitations period, is that the AEDPA one-year limitations period has real force. In the great majority of cases in which a State defendant is going to allege that he was deprived of his right to an appeal and raise that claim on State post-conviction review, he's going to lose that claim. The -- the States don't give this stuff out like candy, and the Texas Court of Criminal Appeals is not, you know, constantly reinstating defendant's appeals. And defendants know that.

And unless you prevail on this claim, you are stuck with the one-year AEDPA time that runs from the dismissal of your first appeal. And so you have every incentive in the world to get into State court quickly.

And the third is just the general notion that defendants in non-capital cases don't have a real incentive to just delay before instituting a State post-conviction review. And --

JUSTICE SCALIA: Suppose it is denied by -- by the State court. And suppose it's denied by the State court more -- more than a year after the conclusion of the original proceeding. What -- what is the consequence then?

MR. GOLDSTEIN: I -- can I just ask one point of clarification? If he instituted it more than a year after the dismissal of the first proceeding, he is out of time, because there is only one final judgment, and that is the original dismissal.

JUSTICE SCALIA: Suppose he institutes it, however, within the year.

MR. GOLDSTEIN: Okay. If he instituted it -- can I just say six months? So six months' after the first dismissal, the Petitioner appears in the Texas post-conviction court. At that point (d)(2) starts to apply, because he has a properly filed application for State post-conviction relief. The State court -- the State post-conviction court takes three months to dispose of it, a year to dispose of it; it doesn't matter. When the State post-conviction court is done and in your hypothetical denies him relief, he has six months left to go to federal district court. (d)(2) operates as it should. While the case is sitting in the State post-conviction court --

JUSTICE KENNEDY: And he can't go to Federal court until that is resolved?

MR. GOLDSTEIN: That is correct, because he has not exhausted his claim. When the claim is that you were denied your right to a direct appeal, the only place that you can raise that claim is State post-conviction review. Federal habeas corpus requires you to exhaust your available State remedies. Your available State remedy for that is State post-conviction review. He may not appear in Federal district court. The district court I think would abuse its discretion in staying a plainly unexhausted claim. That wouldn't be good cause, as this Court has said, for it.

JUSTICE KENNEDY: If you do prevail, it is rather dramatic, because your client was stunningly negligent. He does nothing for four and-a-half years, then strolls over to the State court.

MR. GOLDSTEIN: Well, Justice Kennedy, the State, as I said, did not raise this argument in the place where we think it's appropriate, and that no record was built on laches. It does -- it does have that feel.

I do think that the Court's opinion could make clear that this anomaly arises from the fact that, despite the fact that the Texas courts have made clear

that there are laches principles and limitations --

JUSTICE GINSBURG: May I ask if laches is something that the Texas court could bring up on its own, or is it for the State to raise or not as it chooses?

MR. GOLDSTEIN: It is for the State to raise, and we cite our Texas authority for that in our reply brief, Justice Ginsburg.

JUSTICE KENNEDY: Is the State statute that allows the early conviction to be set aside and the appeal reinstated -- do we have that statute?

MR. GOLDSTEIN: Justice Kennedy, that is section 11 -- article 11.07.

JUSTICE KENNEDY: I thought I had it. Do we have it in --

MR. GOLDSTEIN: I do not believe you do. And the reason is that article 11.07 is just the general Texas post-conviction regime. The procedure that is used for reinstating direct appeals is developed through caselaw, not by statute.

Justice Scalia, there was a final point that I was about to make when I said, look, defendants in non-capital cases have every incentive, if they want to get relief, to move their cases along. The Court may be concerned about capital cases where there is the

opposite concern, that defendants will try and keep their cases alive, if you will. And Texas recognizes this point and has a deadline by statute that is quite short for instituting post-conviction relief in capital cases.

They simply recognize that laches is the way to handle the prospect of delay in non-capital cases. We don't think there is any reason for this Court to override that determination, to second guess the judgment of the Texas court that the judgment is not final until the reinstated appeal concludes.

JUSTICE BREYER: What happens -- just out of curiosity, a prisoner's lawyer doesn't take the appeal, the time expires, bong, the year begins to run. Within that year he files federal habeas. Then he discovers that he had a right to a state appeal. So he goes, just like this man, goes back and, sure enough, he gets his direct appeal, and three years later or a year later they finish the direct appeal. Bong, he can file again.

Is that his first habeas or his second habeas?

MR. GOLDSTEIN: I have to ask one question, sir, because the answer is it depends.

JUSTICE BREYER: Yes.

MR. GOLDSTEIN: The question is, when he

files for Federal habeas corpus the first time in your hypothetical, I take it he doesn't raise the claim --

JUSTICE BREYER: No.

MR. GOLDSTEIN: He raises a substantive claim, like the judge was biased against him and the like?

JUSTICE BREYER: Yes.

MR. GOLDSTEIN: That is regarded as a first habeas application, because the claim did not -- I think the judgment did not arise until later. I don't believe a case like that has arisen. I think --

JUSTICE BREYER: I doubt that one -- I mean, one may never arise but --

MR. GOLDSTEIN: The strange thing is that it is an exhausted set of claims. So it is a proper Federal habeas corpus application, because he went to --

JUSTICE BREYER: The first one is proper and on your view so is the second one proper. So they are both proper, and there are two of them. And --

MR. GOLDSTEIN: It's proper in terms of it being exhausted. It would be dismissed, to be clear. So his appeal was denied, right? He doesn't file an appeal in the hypothetical. So when he shows up in Federal district court, it's an exhausted -- it is -- he would be dismissed for failure to exhaust, in fact,

because he didn't pursue his --

JUSTICE BREYER: No, nobody knows about this.

MR. GOLDSTEIN: But he -- but he was --

JUSTICE BREYER: No, but nobody knows that the State made a mistake in not giving him a direct review.

MR. GOLDSTEIN: Your hypothetical, Justice Breyer, I took it to be --

JUSTICE BREYER: Oh, forget my hypothetical. They're never going to come up.

MR. GOLDSTEIN: I think, though, I can tell you this with some confidence. The way that this thing happened in Texas is the way that it happens in the States, and the way it happens in Federal courts as well under 2255. You file a post-conviction application. You say: I was denied entirely my right of appeal by something the court did or something my lawyer did, and then you get to pursue your appeal.

And that's what Congress wanted the Federal district court on habeas corpus to review. So logically, the one year begins to run after that's done.

CHIEF JUSTICE ROBERTS: Well, except that you kind of elide the point that Congress and AEDPA quite clearly wanted these federal claims to be brought

within a year. This seems to allow the State processes to trump the one-year requirement.

MR. GOLDSTEIN: Well, in many cases, Mr. Chief Justice, of course, the State appeals can take 20 years to go up and down and back and forth from State post-conviction review. We also have the rather commonplace case in which a defendant doesn't file a notice of appeal at all, as in Justice Breyer's hypothetical, but the court of appeal says, you know, for good cause we are going to let you file this appeal late.

And it's quite clear in that scenario, so your appeal is reinstated there, too, because you were 20 days late, 30 days late on the filing deadline. It's quite clear and I think agreed in all of those situations that, while Congress did want you to move expeditiously, the question is move expeditiously from when. And it's from the State court's direct review, finishing the conclusion of direct review.

And we know that Congress recognized that that wouldn't always be one year from the end of the case the first time around from the structure of (B), (C), and (D); and the fact that if there were a tie-breaker at all, it is that the statute shall -- the limitation period shall run from the latest of several

days. So Congress quite clearly contemplated that there would be multiple possible start dates.

CHIEF JUSTICE ROBERTS: You said that it's unusual for the Texas State to grant these. But presumably you could challenge the determination five, ten, 15 years later by the Texas court not to grant you a direct appeal.

MR. GOLDSTEIN: I'm not sure I understand the -- the hypothetical, Mr. Chief Justice. If -- if you lose your post-conviction application for it?

CHIEF JUSTICE ROBERTS: Yeah. Let's say this fellow -- the State court says, well, you know what, we are not going to give you another direct appeal. And he says, well, that decision was made in violation of my federal constitutional rights. What happens then with respect to federal habeas?

MR. GOLDSTEIN: Well, he is challenging his original -- Federal habeas corpus is reviewing the judgment in his case. He has, since there was only one conclusion of direct review in his case, one year measured from the first dismissal, tolled only during the period of pending post-conviction application.

CHIEF JUSTICE ROBERTS: But is he challenging the first conviction, or is he challenging the failure of the State court to give him another

direct appeal?

MR. GOLDSTEIN: He is challenging the fact that he was denied a direct appeal, which is a challenge to his actual conviction. That is a constitutional flaw in his conviction. And so it runs from the conclusion of the direct review, not from anything related to post-conviction review.

CHIEF JUSTICE ROBERTS: Well, that's I gather if he is granted the collateral -- the direct -- second direct appeal. What if the Court says no, we don't agree that you were denied your right to a direct appeal; we think you had it so you don't get another one. And he says that determination has been made in violation of the Federal Constitution.

MR. GOLDSTEIN: The fact that the State post-conviction court did not remedy a violation of his constitutional rights on direct review does not create a new constitutional violation. The constitutional violation in your hypothetical arises on direct review.

CHIEF JUSTICE ROBERTS: Well, doesn't it depend upon the allegation he wishes to make? Say he comes in in one of these proceedings four and a half years later and says, you should give me another direct review, I didn't have it. And the court says, well, no, we're not going to give you one. And he says, well, you

give it to all the white criminal defendants and you are not giving it to me, so that violates equal protection?

MR. GOLDSTEIN: I don't think so. And if I could just explain -- give an analogy. Say he could make the same allegation about ineffective assistance of trial counsel. You can always try and recharacterize your claim as the post-conviction court violated my constitutional rights by not vindicating my original constitutional rights, my right to constitutionally effective counsel at trial or on appeal. And the Federal habeas courts uniformly reject those efforts to recharacterize. The constitutional violation arises in the original criminal case.

CHIEF JUSTICE ROBERTS: I guess my hypothetical supposes a new constitutional violation. And I am just suggesting that the fact that Texas doesn't grant this relief freely doesn't mean that that's a sufficient answer with respect to the abuse of federal habeas.

MR. GOLDSTEIN: I understand, Mr. Chief Justice. I think that body of cases is relatively narrow as it arises, and it also isn't implicated here.

If the Court has no further questions, I will reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.
Mr. Jordan.

ORAL ARGUMENT OF SEAN D. JORDAN

ON BEHALF OF THE RESPONDENT

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

Congress's commitment to preventing unnecessary delays in the filing of Federal habeas claims is reflected in section 2244(d)(1)'s strict one-year limitations period. And it did not intend that inmates who wait for years before seeking post-conviction review would obtain a new Federal limitation start date when an out-of-time appeal is awarded.

JUSTICE SOUTER: Well, why should that be, given the fact that the day it is going to run from is the day that -- which the State of Texas is willing to take action. And if Texas is willing to let the matter ride as long as it rode here, why shouldn't the one-year statute apply?

In other words, I guess what I'm saying is the -- the decision about what is appropriate, that, in effect, would start this period running, is Texas's And as long as Texas is -- is satisfied with it, why does AEDPA have an independent concern?

MR. JORDAN: Your Honor, the reason is that in (d)(1)(A) Congress set a uniform Federal rule for finality. And that finality date is either when the -- the period of direct review ends by the conclusion of direct review or the expiration of the time for seeking direct review.

So when that happens, by statute, Congress has said that the (d)(1)(A) finality date is attached.

JUSTICE SOUTER: Yes, but that -- in effect, I think that begs the question, because if -- if Texas says: Okay, we are going to -- we are going to recognize a direct appeal starting -- or a direct-appeal right exercisable now, then (d)(1)(A) applies by its own terms exactly at the -- at the conclusion of the process which Texas has at this date chosen to allow.

Texas doesn't have any gripe. It decided it ought to act, and -- and, undoubtedly, it should have.

As long as the -- as long as the State is protected, why is there an independent interest in enforcing AEDPA, or enforcing the shortest possible rule under AEDPA?

MR. JORDAN: Justice Souter, there is an independent Federal interest that the Court has recognized consistently in avoiding abusive and unnecessary delay in the filing of Federal habeas

claims.

JUSTICE SOUTER: Yeah, but we are -- we are concerned about State interests, aren't we?

MR. JORDAN: Certainly, Justice Souter, and comity and finality are important purposes of AEDPA. But another recognized and important purpose of AEDPA is to avoid, you know, abusive and unnecessary delays in the filing of Federal habeas claims. So even if a State court would allow stale claims years later to be heard, that doesn't mean that Federal courts need to hear those claims 10, 15 or 20 years later.

But there is a second point, Justice Souter, that -- that is a problem with interpreting (d)(1)(A) in the manner the Petitioner suggests, which is that it will make it far more difficult for Federal courts to administer that statute. Because if the Court interprets "direct review" to bring in Texas and all the 50 States various remedies for ineffective assistance of counsel on appeal, then what that means is you are no longer going to have a uniform Federal rule for finality in any of these cases.

What you are going to have is a patchwork of -- of various dates, and the -- the reality is --

JUSTICE SOUTER: Well, you have got a -- in a sense, you have got a patchwork now. I mean not --

not every State rule for the commencement of a direct appeal in the normal course is -- is identical. So we -- we start with a patchwork.

MR. JORDAN: But the difference is stark, Justice Souter, because the -- the dates that the States use for deadlines on initial direct appeal, the vast majority, are within a short timeframe, 20 days to 90 days, the vast majority. Whereas, these remedies for out-of-time appeals are genuinely varied, and they vary over time in the States.

And if I could give you a couple of examples --

JUSTICE SOUTER: But aren't they -- and I will -- you know, I will take the examples, but I mean, aren't they varied because the -- the circumstances of error which led to these late appeals vary, too? And isn't that exactly the way it ought to be?

MR. JORDAN: Well, it is correct, Justice Souter, that some States -- the remedy varies with the type of ineffective assistance of counsel, for example, the difference between not filing a notice of appeal or not filing a brief.

But my point is that those remedies -- the Petitioner's brief -- opening brief at pages 29 to 32 says: This is going to be easy for Federal courts to

apply, because what they can do is look at these six different aspects of the nature of the remedy in each State, and they can determine from that whether -- when -- whether it should be a new start date or just tolling. The --

CHIEF JUSTICE ROBERTS: Can't we leave that -- and you suggest that it is a Federal rule. I am not sure that's right. Why don't we just leave that up to the States? I am not -- if I don't accept your friend's determination that this is a matter of substance rather than form, States have it -- excuse me -- within their control. Here -- your State calls it another direct appeal.

Why don't we just take them at their word? And if they don't want to get into the business of having a Federal review of a second direct appeal that they choose to allow, they just call it something else. Call it a -- you know, the collateral review of a successful claim of ineffective assistance of counsel and file whatever. And then, you know, under AEDPA that wouldn't count as a new final judgment.

MR. JORDAN: Well, it's -- it's true, Your Honor, that the -- that States can fashion whatever remedy they want. And in terms of the comity and finality interests, it is going to be a responsibility

of the States if they want to change their law. But because in -- in these out-of-time appeals -- and most of the States' remedies look somewhat like in -- somewhat like Texas in the sense that they are coming through post-conviction review and they -- they are awarding another, if you will, chance for the inmate to assert his claims. There is not a reason for the court to strain the interpretation of (d)(1)(A) to protect the State's interest --

JUSTICE BREYER: Why -- why is it a strain? I mean suppose that Texas decided to give every criminal defendant convicted one thousand years to appeal. You know, if they did, I guess they would have one more year after that to go to Federal habeas, right?

MR. JORDAN: That's true, Your Honor.

JUSTICE BREYER: Okay. Then what's the difference between that, giving them a thousand years, which I doubt they will do, and what they have said here? They said for purposes of the Texas rules all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this court issues.

There they are. The Texas Supreme Court gave him all that time, it's whatever it was, and said that's the time you have. How, how is that different

from the legislature decides to give him one thousand years?

MR. JORDAN: It's true, Your Honor, that the -- that the -- the Texas court made a decision to give a remedy to this inmate that was meant to duplicate the type of claims he could have raised on direct appeal. Our position is that does not change the finality date under (d)(1)(A), because by statute, Congress has said that that date attaches at the -- at the expiration of direct review. And -- and the natural reading of that language --

CHIEF JUSTICE ROBERTS: Well, I -- I was just going to stop you there. It doesn't say that starts to run at the expiration of direct review. It says on the date the judgment became final.

MR. JORDAN: That's correct, Your Honor, and it says, it became final by --

CHIEF JUSTICE ROBERTS: -- by the conclusion of direct review.

MR. JORDAN: Or the expiration of the time for seeking such review. And the importance there, Your Honor, is that it -- it anticipates one of two events occurring. In other words, the natural reading is Congress understood that in some cases there wasn't going to be a conclusion of direct review. There was

going to be an expiration of time for seeking review. And at that point finality would attach.

JUSTICE GINSBURG: Even though, as in this case, it turned out he found out within a year. But suppose he didn't find out for more than a year; that is, he didn't find out that -- that the appeal had been filed, and he didn't find out about the dismissal? So because either his counsel or the State blundered, he is out in the cold, and he can never present his direct-appeal claim.

MR. JORDAN: Not necessarily, Justice Ginsburg, and that's the reason why Congress already provided exceptions in the statute in the form of subsections (b) through (d) that provide later start dates for extenuating circumstances beyond the inmate's control.

JUSTICE GINSBURG: Mr. Goldstein just explained to us why those two provisions, the (b) and (d) would not work. That this --

MR. JORDAN: I understand, Your Honor. And, respectfully, I disagree -- I disagree with that, and here is the reason why (d)(1)(B) applies. And (d)(1)(B) applies because in -- for example, in this case you had the -- a finding that there was constitutionally ineffective assistance of counsel to the extent of

abandoning the inmate on appeal.

And this Court's precedent has said that when there is -- in the trial or on direct appeal, when there is ineffectiveness of counsel that amounts to abandonment, that winds up being imputed to the State because it means that the State got or -- or kept a conviction by the violation of the inmate's due-process rights.

CHIEF JUSTICE ROBERTS: Do you have a case to cite for that? Because I understood your friend to say the opposite: That wouldn't count as an impediment.

MR. JORDAN: I do --

CHIEF JUSTICE ROBERTS: How do I resolve that dispute?

MR. JORDAN: I do, Your Honor. You -- you need -- need to look no longer than the case that is cited in both briefs. It is Evitts versus Lucey, and it is cited in the Petitioner's brief at pages 27 and 37, and it is cited in our brief at pages 36 and 37.

It is also in another case not cited in the brief, but it is also noted in Coleman versus Thompson. In other words, the Court has consistently said that where there is constructive denial of counsel that amounts to no assistance at all and the State thereby obtains and retains a conviction, there -- that will be

imputed to the State. Now, the difficult part in getting (d)(1)(B), a later date under (d)(1)(B), is that you also need the causal connection, because you can't just have the ineffective assistance of counsel. It also has to have caused the inmate not to be able to file his -- his timely Federal habeas. That happened in this case because the ineffective assistance of counsel resulted in the inmate having a lack of notice. The attorney did not serve the Anders brief on the inmate and he gave the wrong address to the court. So the court wound up sending the judgment to the wrong address and the inmate didn't know.

That's why we say in those circumstances (d)(1)(B) is implicated. But it's worth noting that even if we measure the date from September of 1997 or we give him a new date under (d)(1)(B), then that's the date that he admits, he acknowledges, he knew his State appeal had failed. From that date, he waited four and a half years to seek any type of post-conviction review. And then -- and the importance of that is that Congress intended to give a year, a strict one-year period. This inmate could have invoked (d)(1)(B) and he did not and he waited four and a half years from the date he could have had.

JUSTICE GINSBURG: And Texas could -- and

Texas could have gone into the State court and said: Don't give him the direct review; he waited four and a half years after he -- but the State didn't ask for that.

MR. JORDAN: That's correct, Your Honor. The State did not assert a laches defense, but I have -- there is two points on that: One is that the only case -- there is one case and it's cited in the brief, Ex parte Carrio. It's cited in the Petitioner's brief. There's one case in the last 150 years of Texas jurisprudence where laches has actual been asserted and an appeal has been -- I'm sorry -- habeas has been denied based on that.

And we are not talking about -- we are not asserting laches here. We are talking about the running of his Federal limitations period under a Federal statute. And what we are saying is this inmate was clearly not diligent, and this inmate could have had a later start date, but even from that later start date he would -- he would -- the Federal period would have expired.

I would like to address quickly the (d)(2) point because I think it's important. The reference was made that (d)(2) doesn't work, In other words (d)(2) tolling won't work in this case because of the Court's

decision in Lawrence. And that's -- that's not true, because the situation in Lawrence was different.

In Lawrence, the Court's decision said that inmate had exhausted all of his post-conviction review in the Florida courts. He had gone all the way to the top court. There was no State court left for him to go to. And the question was, when he then came to this Court with a cert petition, could that cert petition count as tolling time of review for the State post-conviction review? The Court said no.

That's not the case here. This is more like the Court's decision in Carey versus Saffold, where in, Carey, the Court said -- the Court acknowledged that under California law where inmates can, if they lose their habeas in a lower court, they can then file an original writ in a higher court. The Court said that, while the inmate is going through that process, the collateral review of the underlying judgment remained pending, it remained in continuance.

And that's what's happening here. If you look at what happened in the Texas court, when the inmate files his habeas petition, the habeas petition itself is not reviewing the pertinent judgment. That's the language of (d)(2), "reviewing the pertinent judgment." That habeas petition asks for a second

proceeding to review the pertinent judgment. It says, can you give me another proceeding, the out-of-time appeal, to review the pertinent judgment? And so, when the inmate receives that, when he -- if he gets the out-of-time appeal, then the next step, the out-of-time appeal, is where the judgment is reviewed.

So, the Court's rationale in Carey is applicable with even greater force here because the State courts have told him: File another -- you know, continue your proceeding so you can get review of the underlying judgment. And it anticipates a two-step process. So you might say that the out-of-time appeal is the remedy portion of the habeas proceeding in Texas. And that's why the (d)(2) tolling does work and Lawrence does not defeat that. And in this case, that means that the inmate, if he had acted timely, he could have filed his State post-conviction petition. If he had obtained an out-of-time appeal, he could -- the tolling would have gone on while -- throughout the out-of-time appeal. And then if he had lost that, he could have then gone to Federal court. And so --

JUSTICE KENNEDY: Well, you're saying that (2) has a negative implication.

MR. JORDAN: I'm sorry?

JUSTICE KENNEDY: You are saying that (2)

had a negative implication. In other words, the time shall not be counted while it's pending and that it should be counted if it's not pending and you are not diligent.

MR. JORDAN: That's -- well, that's correct, Your Honor, in the sense that if the State -- some collateral review in State court has to be pending for tolling to be going on. And what we are saying is that for the out-of-time appeal process in Texas, it does remain pending. The reason it remains pending is that that first habeas petition is asking for, and if the inmate gets it is receiving, further collateral review of that judgment because --

CHIEF JUSTICE ROBERTS: When you say "the first habeas petition" you mean the first State habeas petition?

MR. JORDAN: That's correct, Your Honor.

CHIEF JUSTICE ROBERTS: Okay. I'm sorry.

MR. JORDAN: And that first State habeas petition -- if you look -- if you look in the record, you will see the State habeas petition doesn't challenge anything about the underlying judgment. It doesn't say, give me relief on any particular claim. What it says is, give me an out-of-time appeal proceeding so that I can challenge the underlying judgment. And so, when the

inmate obtains that out-of-time appeal to -- to get review of the underlying judgment, (d)(2) tolling still applies. And that --

CHIEF JUSTICE ROBERTS: I'm sorry. What do you mean, "(d)(2) tolling still applies"? That the direct appeal time does not count against his one year?

MR. JORDAN: That's correct. The out-of-time appeal time, Your Honor, won't count. So what we'll go on is that if his habeas was granted and he was allowed the out-of-time appeal, he could pursue the out-of-time appeal. The tolling of the Federal limitations period under (d)(2) would remain during that entire time, if he then loses his out-of-time appeal and he comes out of the other side of the process.

JUSTICE SCALIA: That's assuming that he files the appeal within one year, right?

MR. JORDAN: That's -- I mean, if he does, that's correct, Your Honor.

JUSTICE SCALIA: What if he doesn't?

MR. JORDAN: If he doesn't file his State habeas within one year?

JUSTICE SCALIA: Yes.

MR. JORDAN: Your Honor, if he doesn't file --

JUSTICE SCALIA: The game is over.

MR. JORDAN: Well, it would be, Your Honor, unless he fell into one of the exceptions provided by Congress in (B), (C), or (D).

JUSTICE SCALIA: What if he doesn't find out about the fact that notice, proper notice, wasn't given to his counsel, so he doesn't find out about the gravamen for the appeal until after a year?

MR. JORDAN: Your Honor, two points in response. The first is that -- is that I'm assuming, in your hypothetical, that it is an inmate who has attempted to be diligent, has attempted to contact the court.

JUSTICE SCALIA: Right. Right.

MR. JORDAN: And if he has attempted to contact the court and he still had not found out, the circumstances -- I mean, we've looked at a lot of these cases and there is just very few out there where an inmate who is being diligent is not going to be able to find out one way or the other. So, it may be that if he wasn't able to, he might fall under (d)(1)(B). But if he didn't, Your Honor, and it was an unusual -- and it would have to be a very unusual circumstance -- it might be that equitable tolling could apply. But this Court has recognized, in Dodd v. United States, in interpreting the similar provisions in the counterpart

to 2244(d)(1)(C), in the context of when the Court recognizes a retroactively applicable --

JUSTICE SCALIA: I don't think (d)(1)(B) does. It requires an impediment to have been removed. There is no impediment being removed. He just didn't find out the facts.

MR. JORDAN: Well, presumably, Your Honor, the reason that he didn't would have -- if he was being diligent, if he was -- because he needs to be diligent. He can't just sit in his cell --

JUSTICE SCALIA: Right. Right.

MR. JORDAN: -- and say, "I'm not going to do anything." If he is being diligent and if he is really attempting to find out what happened to his case, then probably something has happened, either, you know, through the State system or through the attorney. But if it has not -- you know, again, we've looked at a lot of these cases. We haven't seen cases like that, but --

JUSTICE SCALIA: I just made one up. I mean, it's a hypothetical.

MR. JORDAN: Yes.

JUSTICE BREYER: But it works. Your system, I think, works in that instance, as I understand it. Don't tell me I'm right if I'm wrong, please. But the -- as you understand it, he finishes -- he doesn't get

his appeal, you know, and time passes; doesn't take it. Then, five years later, he learns for the first time and the first time he could have learned that his lawyer tore up the notification. At that point, (1)(B) comes into play. So the year begins to run.

Then, in your idea, he has -- he has a year to go to Federal court. But wait, it's tolled while he goes to State court. So he goes to State court having just learned it. And now he's under (2) and he files a habeas in State. Now the remedy of the State habeas is to reopen the direct appeal. But we should count that, since it's a remedy of a habeas, as if it were a continuation of the habeas and therefore it would fall within (2). That's your argument.

MR. JORDAN: Exactly.

JUSTICE BREYER: And it's -- correct? I do not think there is any case ever considered that to my knowledge.

MR. JORDAN: No --

JUSTICE BREYER: -- and the only difficulty of it is that you have to take a sort of leap of faith of some kind in attaching what everybody's calling the direct appeal as if it were actually part of the State habeas proceeding. That's I think the hardest part of your argument.

JUSTICE SCALIA: There is more of a problem than that, as the other side just said. (1)(B), which is the gimmick you are using to get out of this, doesn't speak of not being able to find out in time; it speaks of the date on which the impediment to file an application --

JUSTICE BREYER: (D).

JUSTICE SCALIA: -- is removed.

JUSTICE BREYER: It's not (B), it's (D).

JUSTICE SCALIA: Oh, you said (D), not (B).

JUSTICE BREYER: (D).

CHIEF JUSTICE ROBERTS: Well, I thought, Counsel, that your response to that was when you have a failure of counsel, that that is imputed to the State. So it is a removal of an impediment created by the State.

MR. JORDAN: That's -- that's correct, Mr. Chief Justice. That's -- under the Court's decision is cases like Evitts v Lucey, if there has been a constructive denial of counsel, an abandonment of counsel to the degree where there was effectively no appeal, then that could be imputed to the State. The reasoning has been that it's because the State was able to get or keep a conviction without the inmate having due process. That would be -- the inmate would still

have to have the fact that that impediment actually caused him to -- and this case is a good example.

Even though this inmate -- you know, there was ineffectiveness of counsel -- if the court had the right address, and court had sent him the judgment, then there would not have been the causal connection; he wouldn't have been able to get the (d)(1)(D) date.

JUSTICE SCALIA: The problem with (1)(D) is that the claim or claims presented that is referred to in (D) is not the denial of the appeal. It's the claim or claims that he wants to bring in his Federal habeas. That's why (1)(D) doesn't work, you have to go back to (1)(B).

I'm talking to you.

(Laughter.)

JUSTICE BREYER: But I think it's a good point.

MR. JORDAN: Well, you are exactly right, Justice Scalia, that (d)(1)(D), in this case, because it is claim-specific it only does apply to the ineffective assistance of counsel on appeal. We noted in our brief that it was implicated, but because he got relief on that claim in the State court, there was no reason for him to -- so he wouldn't have -- the (D) was implicated but didn't need to be asserted.

We are that saying (d)(1)(B) --

JUSTICE SCALIA: (B).

MR. JORDAN: -- is -- is -- in play in the case because of the unique circumstances of this -- of this --

JUSTICE BREYER: Between your response to the Chief Justice and Justice Scalia, I stand enlightened.

MR. JORDAN: It's the interplay of these two -- of these two provisions, because both of them in any particular case could be in play. If the -- - if, for example, this inmate had not gotten relief in the State court for his ineffectiveness of counsel on appeal, then the (d)(1)(D) could have provided a later start date for that claim. It's (d)(1)(B) that applies to the other claims. And the -- you know, the bottom line notion for our position is that it cannot be that Congress intended in this -- this statute to be interpreted such that a non-diligent inmate who waits four and a half years after he knows his appeal has failed to seek any sort of post-conviction relief will obtain a new start date.

JUSTICE SCALIA: But that's your fault.

JUSTICE GINSBURG: Justice could have -- not only, that don't some States have a limitation period when -- when he finds out that his appeal has been

dismissed, without notice to him, aren't there some States, criminal justice systems, that say from the date that you had knowledge, you have X days to file?

MR. JORDAN: Yes, Your Honor. There are a number of States that have -- if we are talking about remedies for ineffective assistance of counsel on appeal, there are a number of States that have deadlines; but there are at least 19 States that provide remedies for ineffectiveness of counsel on appeal with no statute of limitations.

And in -- and in those States and in many cases what that means is that the inmate, like this inmate, could come five years later, ten years later, and make those claims.

CHIEF JUSTICE ROBERTS: So, do I understand correctly that, based on your answers and your friend's answers, there is no difference between the way you two in substance read these provisions? He relies on (d)(1)(A); you rely on the combination of (d)(2) and (d)(1)(B) and (d); except in the situation where you have a non-diligent prisoner, and in that case, his theory leads to a different result than yours.

He excuses the non-diligence because the State chooses to label the second opportunity as final. You do not excuse the non-diligence because in the

absence of diligence, (d)(1)(B) and (d)(1)(D) do not apply.

MR. JORDAN: That's correct, Mr. Chief Justice. And I'd like to address a point that's made in the reply brief, about --

CHIEF JUSTICE ROBERTS: Then it comes down -- it does come down to his, where he began his argument, which is he said that this is an unusual case where Texas is being overly generous to convicts, because you choose to label it as direct appeal and therefore that means someone that the States allow to have another direct appeal, even though they have been non-diligent, get the benefit of the -- of a new finality date.

MR. JORDAN: That's correct, Your Honor, and our position is that Texas -- not Texas or any State can rewrite the -- this Federal statute and a finality date in this Federal statute. But I want to address quickly the point that's made in a reply brief that the Court not worry about this because there is no incentive for non-capital inmates to -- to sit on their rights. And I have two points I want to make on that.

The first is Congress has already made that decision. Obviously Congress was concerned that even non-capital inmates could sit on their rights because

they imposed this strict one-year limitation on non-capital inmates. But the second point is that as a practical matter this happens in many, many cases. These cases provide the example. In this case the inmate waited five years. The Frasch v Peguese case that is coming out of the Fourth Circuit on an out-of-time appeal, the inmate -- a non-capital inmate waited ten years to seek post-conviction review. And so these are cases that we think are representative of many case that would come through the district courts, and that in fact non-capital inmates, whatever their incentives may be, do as a practical matter sometimes sit on their rights.

JUSTICE SCALIA: Convicted felons don't always make intelligent decisions, you are saying.

MR. JORDAN: That's correct. And the problem is that when -- when for whatever reason they sit on their rights ten or 15 years, our point is that that doesn't mean they can come back in and have Federal courts hearing stale claims that should have been brought, if the inmate was being diligent, years earlier.

And there's -- and this case is a case in point. This inmate has -- has provided no reason why -- no legitimate reason why he waited four and a half

years. The only reason he provided was I am a pro se inmate and I -- I don't know what the law S. And you can his data in the joint appendix pages 109 to 112, and those are directly rejected by the court in the Johnson case, Johnson v United States. The court said in that case --

JUSTICE STEVENS: Am I correct that on the underlying merits of the basic claims, that each -- his lawyer filed an Anders brief?

MR. JORDAN: That's correct, Justice --

JUSTICE STEVENS: He's probably not a very -- he's not -- has the greatest in the world of succeeding, I wouldn't suppose.

Isn't this characteristic of this category of cases, that really most of them heard are pretty frivolous?

MR. JORDAN: Your Honor, a lot of them are. A lot of them are, and in fact there were two Anders briefs filed in this case. To show how -- how weak his claims were, when he got the out-of-time appeal, he was appointed a new attorney and she filed an Anders brief. So you had two attorneys in this case who said --

JUSTICE STEVENS: What strikes me about the case is we are fighting about the limitations and whether it applies and so forth; you probably could have

disposed of the whole litigation a lot faster by just looking at the merits for about ten minutes.

MR. JORDAN: I think that is exactly right, Justice Stevens. But the procedural questions remain --

JUSTICE STEVENS: This is all -- this is a product of Congress trying to save us all time.

(Laughter.)

MR. JORDAN: Indeed. This case, the underlying merits are, there basically are no merits to his underlying claims is a point we have fully briefed and I won't address here unless there are questions from the Court. And unless there are further questions, I'm --

CHIEF JUSTICE ROBERTS: Thank you Mr. Jordan.

Mr. Goldstein, you have four minutes.

REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Thank you, sir. A few short points.

Justice Stevens, if later on you have an opportunity to look at footnote 15 on page 42 of the blue brief, we cite eight cases, and there are more, in which these out-of-time appeals really did find meritorious claims. And I -- so I don't want the Court

to be left with the impression that this is much ado about nothing. The rule of law will actually be quite significant.

Two small corrections to things my friend inadvertently said or impressions he may have inadvertently left. He says there are 19 States that have no statute of limitations, but that omits the very many of those States that apply laches, and the fact that the State of Texas here did not assert the untimeliness of the State post-conviction proceeding is pretty much I think why we are ultimately here.

He also said that there is only one State opinion finding laches, as if, I think, to create the impression that Texas courts don't take laches seriously. Most of these are disposed of without opinions. But the more relevant important is that there aren't Texas State opinions rejecting claims of laches. What the Texas courts have made is that the Texas A.G.'s office has to assert the defense of laches, as is true everywhere and is true in this Court's jurisprudence as well.

The final two points I wanted to make are about (d)(1)(B) and (d)(2), all of which, I think honestly reduced to Justice Kennedy's point, is that the relevant provision is (d)(1), whatever else is going on

in the case. But Justice Scalia and the Chief Justice came back to the point about whether this is an impediment, and my friend kept answering it is State action, and the Court would say, but is it an impediment?

And at page 20 of our reply brief we must cite eight or ten cases, three of which notably are from Texas; there were litigated by the Texas Attorney General's office, that make it clear that the failure to give the notice of the opinion is not an impediment to filing post-conviction review, and the Court would be rewriting a lot of habeas corpus law to rule for the State of Texas here.

CHIEF JUSTICE ROBERTS: What about -- he cited most prominently the Evitts case.

MR. JORDAN: That's a State action, but as the Court's questioning indication, the question is, is State action that is an impediment to filing a Federal habeas petition, and all of our cases answered that question.

The final point is about (d)(2) and my friend says that this isn't like Lawrence v Florida, because here there is more proceedings. But the Court's holding was this, and it was unambiguous: When the post-conviction court enters its mandate, so that the

time to seek cert starts to run, that's when the post-conviction application is no longer pending; and when the Texas Court of Criminal Appeals decided the Petitioner's claim and said he had an out-of-time appeal, it issued its mandate and the mandate is in the joint appendix. And somebody -- the State could have sought cert in that case, and the post-conviction application was no longer pending.

And Mr. Chief Justice, you're right, you can the case on the basis of label or substance, but it is unambiguous that this is not post-conviction review in what we have been calling the second appeal. Teague retroactivity does not apply; all the constitutional rights that are announced in the meantime apply; you have a right to a counsel; the usual standards of post-conviction relief in terms of having us show an extra layer of prejudice don't apply.

This is just like any other appeal the Texas Court of Appeals and the courts of criminal appeal would decide and that makes it a (d)(1) case.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 1:58 p.m., the case in the above-entitled matter was submitted.)