IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL DONALD DODD, :

Petitioner :

v. : No. 04-5286

UNITED STATES. :

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Washington, D.C.

Tuesday, March 22, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

JANICE L. BERGMANN, ESQ., Assistant Federal Public Defender, Forth Lauderdale, Florida; on behalf of the Petitioner.

JAMES A. FELDMAN, 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

(11:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 04-5286, Michael Dodd v. United States.

Ms. Bergmann.

ORAL ARGUMENT OF JANICE L. BERGMANN

ON BEHALF OF THE PETITIONER

MS. BERGMANN: Good morning. Mr. Chief Justice, and may it please the Court:

The Court today is presented with two strikingly different interpretations of when the 1-year period of limitation found in paragraph 6(3) of 28 U.S.C., section 2255 begins to run.

If paragraph 6(3) is read in a manner that is consistent with both Congress' use of verb tense and this Court's decision in Tyler v. Cain, then the Government's interpretation of when the 1-year period begins to run is absurd because it reduces paragraph 6(3) to a near nullity. This is so because, as even the Government admits, retroactivity decisions almost always come more than a year after a decision of this Court initially recognizing a right.

CHIEF JUSTICE REHNQUIST: When you say it's a nullity, what you really mean is it allows for very -- very little relief.

MS. BERGMANN: That's correct, Your Honor. Very few cases would -- would have a retroactivity decision within a year of initial recognition.

CHIEF JUSTICE REHNQUIST: And why is that an argument in your favor?

MS. BERGMANN: The -- it would -- the argument is in my favor, Your Honor, because this Court should not read acts of Congress in a manner that would render them absurd.

CHIEF JUSTICE REHNQUIST: Well, to say that it doesn't grant as much relief as it might have doesn't render the statute absurd.

MS. BERGMANN: Well, in -- in this case, Your Honor, it does in two ways. It does because the relief that it would allow has only occurred, in my estimation, once in the post-Teague world since 1989 when Teague v. Lane was decided, and the only other instance would be when this Court would find a right is both -- initially recognize a right and find that right retroactive in the same case, which in my understanding --

JUSTICE O'CONNOR: Well, we've had very few instances in recent years I think where this Court has found some right to be retroactive.

MS. BERGMANN: That's correct, Your Honor.

JUSTICE O'CONNOR: So it just doesn't happen

very often to begin with.

MS. BERGMANN: That's correct, Your Honor.

JUSTICE O'CONNOR: And it would be further limited if the Government's position is adopted here.

MS. BERGMANN: That's correct, Your Honor. It would basically be --

JUSTICE O'CONNOR: But it doesn't happen anyway --

MS. BERGMANN: It -- it does not --

JUSTICE O'CONNOR: -- very often.

MS. BERGMANN: It does not happen very often, Your Honor, but there have been several instances. The situation in Bousley where the Court found that the rights in Bailey applied retroactively. I think most people would consider the Court's recent decision in Atkins v. Virginia would apply retroactively in light of this Court's earlier decision in Penry v. Lynaugh. So it does, indeed, happen and because it happens and because the rights involved in those types cases are so important --

JUSTICE O'CONNOR: How -- how do we read this statute concerning what court may find the retroactivity? It's not limited, I assume, under either your view or the Government's to a finding by this Court, a determination that it's retroactive.

MS. BERGMANN: That's -- that's correct, Your

Honor. The parties agree that a lower court can make the retroactivity decision as well, and that's because of --

JUSTICE O'CONNOR: And it could be a court in another circuit presumably if you're in the Federal system.

MS. BERGMANN: Well, Your Honor, I would argue that it would have to be a court in the -- in the circuit in which the prisoner would be filing the 2255 motion because that --

JUSTICE SOUTER: Why?

JUSTICE O'CONNOR: Why?

MS. BERGMANN: Because that court would have jurisdiction over the proceedings in his case and it would be an adequate way of providing notice to that litigant. It -- a decision of another --

JUSTICE O'CONNOR: Well, I guess a litigant can read decisions from other courts, as a lawyer can.

MS. BERGMANN: That's correct, Your Honor, but they would have no precedential effect in his case.

JUSTICE SOUTER: Why -- why shouldn't the litigant be put on notice by a district court decision? Let's assume it's in his own circuit.

MS. BERGMANN: Well, Your Honor, a district court decision would have no precedential value with respect to -- would not bind other district courts in that

district and therefore not bind other litigants.

JUSTICE SOUTER: Well --

JUSTICE O'CONNOR: But there's -- there's just nothing in the statute that says what level court it has to be.

MS. BERGMANN: Well, actually, Your Honor, the statute does say that the ruling would have to be made retroactively applicable to cases on collateral review. It does not say a case. And a decision of a district court would make that retroactivity applicable only to one case not to cases.

CHIEF JUSTICE REHNQUIST: Well, but that may be just a generic use of the term cases.

MS. BERGMANN: Well, it could be, Your Honor, but I -- Congress included the language. I think this Court could give meaning to it by interpreting the statute to mean that you would be looking at a decision of the court of appeals rather than a decision from a district court.

JUSTICE SCALIA: Of course, if -- if you said a district court, one district judge could -- could trigger the thing for the whole country. That --

MS. BERGMANN: It would be very complicated, Your Honor, given the fact that district courts often issue rulings in unpublished decisions as well.

JUSTICE SCALIA: Yes.

JUSTICE BREYER: So look at the trouble we get into when we take your interpretation. Suppose we take the Government's interpretation and think only of first habeas. Leave second habeas out of it for a moment. But if it were only first habeas and those were all the habeases in the world, wouldn't theirs be better? Every prisoner would know that when you get the right, you file. Okay, no problem. And you're going to win if, and only if, you get a court to say it was retroactive. So that's fine. We all know. All the prisoners know we've got to file within a year. It would cause no problem if there were only first habeases.

MS. BERGMANN: If there were only first habeas, Your Honor, and if the lower courts always made the correct retroactivity --

JUSTICE BREYER: No. They sometimes don't, but then if they don't, you appeal, just like anything else. And you might lose and you might not get your case taken in the Supreme Court. That's always true for every litigant.

MS. BERGMANN: That's --

JUSTICE BREYER: So -- so that's a problem.

Is there any other problem?

MS. BERGMANN: Well, Your Honor, there is also a

problem which the Government actually concedes --

JUSTICE BREYER: What?

MS. BERGMANN: -- which is if you read the statutory language of the second clause as being stated in the past tense, and the initial -- and the statute of limitations begins to run with initial recognition, it -- it doesn't respect Congress' intent to provide a 1-year limitation period.

JUSTICE BREYER: Well, but that's -- that's linguistic. I'm -- I'm looking for practical problems for prisoners, which was your initial argument. And in respect to a practical problem for a prisoner, I couldn't think of one, and that's why I'm asking. In respect to first habeases.

MS. BERGMANN: With respect to first habeases.

JUSTICE BREYER: All right.

Then if your only problem is second habeas, there I'd agree with you. There's a big problem. But it says here the date on which the right asserted was initially recognized. Now, I guess a person who's filed a habeas doesn't have a right until the Supreme Court has made the -- the rule retroactive. And therefore, until the Supreme Court makes it retroactive, there was no right recognized for a second habeas person. And therefore, for that case it does begin to run when the Supreme Court says

it's retroactive because prior to that he had no right --

MS. BERGMANN: Well, Your Honor --

JUSTICE BREYER: -- given -- given paragraph 8.

MS. BERGMANN: The -- the same would be true though, Your Honor, then for initial motions that there would be no right available unless a court at some point had held the right applied retroactively to collateral cases because under Teague v. Lane, there is no right to collateral relief simply based on the decision of this Court unless that decision has also been held retroactively applicable.

JUSTICE BREYER: Well, it's all -- the word right in (3) quite plainly doesn't cover the last six words of the -- of the sentence. Well, whether the word right -- I'm trying to fix it up. I'm trying to figure out --

MS. BERGMANN: Yes, I understand that.

JUSTICE BREYER: -- how do we get to that conclusion.

Now, it seems to me what you've done is say either use my ad hoc mechanism, or let there be chaos, or we take your approach which produces the kind of chaos we've just been discussing.

MS. BERGMANN: Well, Your Honor, I agree with -- that -- that this is not the best drafted statute that

Congress has ever come up with, but I think that respecting Congress' use of verb tense and this Court's decision in Tyler v. Cain, to read paragraph 8(2) and paragraph 6(3) together, that -- that it's important that all three of the prerequisites in the statute have been met before the limitation period begins to run. Otherwise --

JUSTICE GINSBURG: Why -- why is that important, given what this petitioner did himself? He didn't wait for there to be a retroactivity decision to file the 2255 motion. He filed the 2255 motion before the Ross case was decided. Isn't that right?

MS. BERGMANN: That's correct, Your Honor.

JUSTICE GINSBURG: So perfectly -- the -- the prisoner is perfectly able to file the 2255 motion after the first clause is satisfied, the date on which the right asserted was initially recognized. This movant was too late, if you measured the year from that right but he wasn't -- he wasn't waiting for any retroactivity decision. He filed before the retroactivity case.

MS. BERGMANN: That's correct, Your Honor. He was early under our interpretation --

JUSTICE GINSBURG: So on your view of it, his complaint, when it was filed, should have been dismissed as not ripe because he didn't have the final element --

MS. BERGMANN: That's --

JUSTICE GINSBURG: -- that is, the retroactivity?

MS. BERGMANN: That's correct, Your Honor. At the time he filed, there had not been a retroactivity decision on which he could rely. During the course of litigation in the district court, the Eleventh Circuit decided the Ross case, and at that point, his right to relief became ripe and the -- and he then had a window open under paragraph 6(3), such as he could file timely.

JUSTICE SOUTER: Of course, if we're -- if -- if admittedly, as Justice Breyer said, we're trying to figure out some way to make this work in circumstances in which it's -- it's never going to work smoothly, I suppose one answer would be to take the Government's position and say you've -- your -- your year runs from the moment the right is recognized, but to the -- to the extent that there is a retroactivity question, a -- a court should simply stay the proceeding, hold it in abeyance to see whether, particularly in -- in second habeas where you have the -- the second petition where you have the problem, to see whether some court will, in fact, recognize retroactivity or whether the -- your circuit will recognize retroactivity. Then if it does, then you can go forward.

MS. BERGMANN: Well, the problem with that, Your

Honor, is that it -- it encourages, as the Government's rule in general does -- encourages numerous frivolous filings.

JUSTICE SOUTER: Oh, there's no question there's a Rube Goldberg character of the whole thing, I -- I realize. But -- but that would be a way of -- of solving the second habeas problem and still accepting the Government's position on the -- on the date at which the -- the 1 year for filing starts.

MS. BERGMANN: Well, a procedure that the Seventh Circuit has adopted -- and the Seventh Circuit agrees with -- with Mr. Dodd's interpretation of the statute that it begins to run with the retroactivity decision. Their solution for these premature filings is to review the case on the merits, and if they feel that the motion would lose on the merits, they dismiss it with prejudice, and if they feel there's some viable claim being stated, then they dismiss it without prejudice to refiling at a later time. That's --

JUSTICE O'CONNOR: It would -- it would potentially violate the 1-year limit. That won't necessarily work.

JUSTICE SCALIA: Crazy.

MS. BERGMANN: Well --

JUSTICE O'CONNOR: I mean, it's a very odd

statute.

MS. BERGMANN: Yes, it is, Your Honor. It's very odd.

JUSTICE SCALIA: You -- you don't know who's responsible for writing this, do you?

(Laughter.)

MS. BERGMANN: Actually my understanding is that much of it was written by the Attorney General in California at the time.

JUSTICE GINSBURG: Can -- do you understand the -- the difference between what is a right initially recognized and then what is a right newly recognized? The statute is supposed to have three requirements: initially recognized, newly recognized, and made retroactive.

MS. BERGMANN: Yes, Your Honor. My understanding of when a right is newly recognized is -- is when it is new in the sense that this Court has adopted under Teague v. Lane, that it's not dictated by prior precedent. A right can be initially recognized by this Court but not new in the Teague sense.

JUSTICE BREYER: Actually Justice Souter's approach might work here because you -- you -- all the second habeases file immediately. Now, the Seventh Circuit, you say, well, gets to those second habeases right away, and it says dismissed. Very well. When they

say dismissed, then they ask for cert. And when they ask for cert, we take or we don't. If we don't, then they're out of luck. And if we take it, people would hold all the other cases waiting to see what we decide. So they wouldn't lose out in any case where we really were going to make it collaterally -- applicable on collateral review.

MS. BERGMANN: But then, Your Honor, you run up against your decision in Tyler v. Cain, and that was the circumstance of the litigant in Tyler v. Cain. No -- this Court had not previously determined that the right at issue in Tyler v. Cain was retroactively applicable, and under the second or successive statute that -- in the way the Court read this, the Court said that this Court could not determine the retroactivity of, I believe it was, Cage v. Louisiana in that very case because it was contrary to the language in the statute.

JUSTICE BREYER: I mean, I'm sure my dissent was correct in that case, but the --

(Laughter.)

MS. BERGMANN: Yes, Your Honor.

JUSTICE BREYER: The -- the -- still -- it still would work because the first case has come down. Okay? The first case has come down. Now all the prisoners read about these cases, and even if they've already filed a

habeas, they go file another. And the Seventh Circuit, you say, then looks at that first one that they get to, and they say, dismissed.

Oh, you're saying that then he comes he here and we say the reason you lose is not because you're wrong. The reason you lose is because you're not yet ripe.

MS. BERGMANN: Yes, that's correct, Your Honor. What Congress appears to have intended in this -- in this statute, as -- as much as anyone can tell, is that retroactivity decisions be -- be litigated in cases that are brought under paragraph 6(1) which is those cases that are within a -- a year of when the judgment of conviction became final. That's exactly what happened here.

And the Ross case that litigated the question of the retroactivity of Richardson, that was a case brought under paragraph 6(1). Mr. Ross was within a year of when his judgment of conviction became final, and -- and the issue of retroactivity was -- was litigated straight and up in that case.

And what it appears that Congress intended was that very circumstance to happen in all cases, that the retroactivity of decisions of this Court be litigated in cases brought within a year of finality, and then once those decisions were made, then litigants under paragraph 6(3) would have the opportunity to file when a court of

appeals issued a retroactivity ruling. And then litigants under paragraph 8(2) would have a -- the ability to file --

JUSTICE BREYER: But we -- we still might be able to deal with it. That person files his petition for cert. He puts in the petition there are 4,000 prisoners who are trying to file second habeases, and if you decide retroactivity, collateral, all of them but me will be able to proceed. But you have to have enough sense, Supreme Court, to take my case to decide if you're going to decide retroactivity, that it is and give me the benefit of the decision.

MS. BERGMANN: Well, then, Your Honor, I guess the Court would have to -- to totally reconsider its decision in Tyler v. Cain to reach that conclusion. And I don't know what to say. I mean, since Tyler v. Cain was enacted for -- I'm sorry -- decided 4 years ago, Congress has made no effort to overturn that decision, and it appears Congress believed that the Court had -- had read the statute correctly in that case. And so if you interpret the made retroactivity -- made retroactively applicable language in paragraph 6(3) in the way that this Court read the language in paragraph 8(2), such that the retroactivity decision has to be made before a motion can be filed, it becomes very complicated to do that if the

1-year period begins to run within initial --

CHIEF JUSTICE REHNQUIST: The problem with your argument, Ms. Bergmann, seems to be addressed to the idea that Congress intended to sweep quite broadly here. But I don't think that's the necessary inference at all. We're dealing with a situation, as Justice O'Connor points out, where we have very rarely held that a decision is retroactive. So it's already a very small class of cases, and the Government's view makes it an even smaller class of cases. But that doesn't mean the statute doesn't work. It just means it doesn't work for a lot of people who are excluded from it.

MS. BERGMANN: Well, Your Honor, I -- I agree that this involves a very small class of cases. The problem with the Government's reading is that they say that they are narrowly constricting the statute, but the procedural mechanism that they set up allows for a vast number of cases that would never fall within the statute of limitations to be filed and requires the court to deal with each and every one of those cases in the first instance.

Whereas, my reading of statute has the benefit of allowing a -- a test case to proceed. Given the fact that there are very few number of these rights that are made retroactively applicable, it -- it makes more sense

in terms of judicial resources to allow there to be this situation where is -- there is a test case --

JUSTICE GINSBURG: But on your theory, there wouldn't be much in the way of resources because you say there's no ripe claim until the retroactivity decision comes down. Why wouldn't a district judge, faced with this dilemma, simply say, well, I'll just hold this complaint until the -- the court of appeals or the Supreme Court rules on retroactivity?

MS. BERGMANN: Well, certainly the district courts would do that. The more appropriate course of action would probably be to find the motion at that point untimely because it does not fall within any of the -- it -- if it is outside the initial year from finality but doesn't fall within any of the other exceptions stated in paragraph 6, then it -- it would be untimely and the court could dismiss it as such.

I mean, by doing so, if the court dismisses it, it could well count as a first motion so that any motion filed thereafter would be a second or successive motion. And this would be -- preclude litigants from filing prematurely and burdening the courts with premature filings until it is clear they have a cause of action.

I mean, what's strange about the Government's reading of the statute is that they believe Congress

intended for a limitations period to begin to run before the litigant had any right to relief. No one has a right to relief in the collateral proceeding until the right at issue has been made retroactively applicable to collateral cases. And so that this kind of disjoinder of the statute of limitations and the cause of action creates this problem where people will be -- feel compelled to file protective motions.

JUSTICE STEVENS: May I ask this question? The words, made retroactively applicable to cases on collateral review, don't have a modifier such as telling us by whom it's made retroactive. Has any court considered what seems to me a fairly normal reading that the -- the words, by the Supreme Court, should apply to that phrase as well as the preceding language?

MS. BERGMANN: Well, actually, Your Honor, every lower court to consider the language has found that the retroactivity decision need not be made by this Court, and the reason for that is the difference between the language in paragraph 6(3) and in the second or successive provision in paragraph 8(2). In paragraph 8(2), it explicitly states that it has to be made retroactive to cases on collateral review by the Supreme Court.

JUSTICE STEVENS: It seems to me that cuts in the other direction, that when Congress thought about the

entity that makes it retroactive, they thought about us. And that's why -- and that's the only language that seems to fit. I mean, the by the Supreme Court seems to fit that concept.

MS. BERGMANN: If -- if you apply --

JUSTICE STEVENS: But I guess nobody has come up with this suggestion other than this question.

MS. BERGMANN: Well, various lower courts have considered that possibility and have latched onto the different -- differences in language where paragraph 8(2) explicitly states it has to be made by the Supreme Court, but paragraph 6(3) says it does not. And -- and the court below said the same thing, and the parties agree that the retroactivity decision need not be made by this Court.

JUSTICE O'CONNOR: Well, if we disagree and think it should be, I guess that would open a door down the road for people after this Court made such a determination.

MS. BERGMANN: That's correct, Your Honor. It would make paragraph 6(3) much more consistent with paragraph 8(2), if -- if the --

JUSTICE O'CONNOR: Yes.

MS. BERGMANN: But again, it would work only if the 1-year period began to run from this Court's retroactivity decision. If it begins to run from initial

recognition, then that would turn paragraph 6(3) into an absolute nullity because I know of no case where this Court has made a retroactivity decision within a year of when it initially recognizes a right.

JUSTICE STEVENS: But that fits the language, the date on which the right was initially recognized by the Supreme Court if and only if it's been made retroactively by the Supreme Court. It seems to me a very normal reading of the language. But nobody else agrees with it.

MS. BERGMANN: Yes, Your Honor, that no one else has -- has agreed with thus far.

JUSTICE BREYER: Yes, but there -- it's -- I'm now taken with this. I'm jumping from one thing to another here. But that does get rid of the problems that were initially plaguing your position because it's precise and definite. And it also gets rid of whatever problems were produced by Tyler because a person could easily get to the Supreme Court in that rare case without his petition, if it's a first petition, being improperly filed because he's not bound by paragraph 8.

MS. BERGMANN: That's correct.

JUSTICE BREYER: So it's a first position. So all that he does is he files a petition. He can file it before any court -- nothing says he can't file it before a

court has decided it's retroactive. He files the petition. He seeks cert here. He gets us to say it's retroactive in that rare instance, and everyone else has a year from that moment.

And as far as the -- the second people are concerned, they don't -- the second petition people don't have to file it until a year from that moment, and they have a good claim under paragraph 8. There's quite a lot -- now -- now, I'm jumping to that because it sounds like it might be good.

MS. BERGMANN: I -- I'm sorry, Your Honor. I think you may have lost me. You would have the --

JUSTICE BREYER: Well, don't worry about it.

(Laughter.)

MS. BERGMANN: Okay. If the Court has no other questions, I'll reserve the rest of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Bergmann.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE RESPONDENT

JUSTICE O'CONNOR: Would you address that last suggestion first, Mr. Feldman?

MR. FELDMAN: I'm not sure I completely held it in -- in my mind.

JUSTICE BREYER: It was very --

MR. FELDMAN: Our basic position is --

JUSTICE O'CONNOR: Well, to -- to interpret as meaning only this Court could make the retroactivity determination and the 1 year wouldn't run until and unless there was a new rule and subsequently in whatever case this Court said it was retroactive.

MR. FELDMAN: I -- I have two comments about that. That was a position which actually a footnote in our brief in Tyler against Cain I think suggested, although that wasn't the issue before the Court in that case. But since that time, this has been litigated in a number of courts of appeals and district courts, and as far as I'm aware, no court has accepted that. And the reason they haven't --

JUSTICE O'CONNOR: Well, that's true, but I assume it is, nonetheless, open for us to do so --

MR. FELDMAN: Yes.

JUSTICE O'CONNOR: -- if we thought it was correct. What is your view?

MR. FELDMAN: It would be, but I think we came to the conclusion that it probably wasn't because the words, by the Supreme Court, are not only present in two different places right in this paragraph 6(3), also in 8(2), also in 2244 and in 22 -- I think -- 64. And it

does seem to be a pattern that where the Congress expected a decision by this Court in the whole series of statutes, they said, by the Supreme Court. And it's notably missing from the phrase that says, made retroactive to cases on collateral review.

JUSTICE STEVENS: It is noticeably missing because it -- it has a blank there and the words, by the Supreme Court, are the only time limitation in that whole provision after the word if.

MR. FELDMAN: It -- that -- it -- what it says -- it says newly recognized by the Supreme Court and made retroactive. It doesn't say by the Supreme Court. That's the rationale the courts have used.

But if I could move to the --

JUSTICE BREYER: But if you don't -- aren't -- I mean, the language is open, and it's sort of like the virtue of this -- suddenly it's like tinkers to Everest chance. I mean, it seems to put everything together. What was worrying you most about their position was it produced uncertainty, a kind of a mess. You don't know which court you're talking about. People would be filing things all over the place. They'll be waiting. That -- it's a mess.

This stops that. What's worrying them is that the second habeas person, given Tyler, could never file,

not even in that -- you know, not even in that -- in that really unusual situation where we're going to make it a collateral review. And now, what this does is it produces the certainty, the definiteness of when your time clock begins to tick, and it eliminates all the uncertainty, et cetera, and confusion, difficulty from their position.

MR. FELDMAN: I -- I think the other -- the other problem that I actually am -- that I think the Court should be worried about is that this statute sets one -- it doesn't say anything about the date on which something is made retroactive. It says it runs from the later of four dates and it then sets forth what those dates are. And it says, the date on which the right asserted was initially recognized by the Supreme Court, if certain conditions are satisfied.

Now, that if clause may well raise some -- it does raise, I think, some interpretative issues. But however you interpret the if clause, that just tells you whether the petitioner can use that date on which the right was initially recognized or not. If he can't use it, if the if clause is not satisfied, then he's -- he only has to show he's timely under one of the other three provisions. The normal one is 1 year from the date that the conviction became final.

And I think our primary submission in the case

is however you construe the if clause, it can't possibly be read to -- whatever interpretative problems there are there, it can't be possibly be read to alter the totally plain language that Congress --

JUSTICE STEVENS: Yes, it could because you could say what the Congress intended to say. If the right had X, Y, and Z, it shall in that event run from that date.

MR. FELDMAN: Right.

JUSTICE STEVENS: That's implicit in it.

MR. FELDMAN: And it's not --

JUSTICE STEVENS: Just like the words, by the Supreme Court --

MR. FELDMAN: It's not -- it's not --

JUSTICE STEVENS: -- would be implicit.

MR. FELDMAN: -- it doesn't. But even then, it's not -- it doesn't run from that date, and the -- he's -- and the -- the petitioner has the -- the applicant has no date on -- if he's past his 1 year from the date the conviction became final, he has no date on which he can rely to make his application timely.

And our primary submission --

JUSTICE SOUTER: Well, on Justice Stevens' analysis, he does not have a date until the retroactivity decision is made, and he has to sit there and wait. But

when the retroactivity decision is made, he's got his date.

MR. FELDMAN: But this statute doesn't -- it's not worded the way the -- the -- paragraph 6 as a whole says you have the later of four dates. It names four different things. But subparagraph (3) doesn't say, well, the later of any of these things. It -- it tells you if the condition is satisfied then you -- the question is -- okay, the if condition is satisfied. I can use paragraph (3). What's my time limit? And it says the date on which -- 1 year from the date on which the right was initially recognized by the Supreme Court, and that's the date he has. If the -- if -- if it turns out that he can't use it because the appropriate thing doesn't happen till later, then he just can't use that date. He has three other possible dates to use under paragraph (6) --

JUSTICE SOUTER: I -- I follow your linguistic -- Justice Stevens follows the linguistic analysis. I think the question that he's raising, the question I'm raising is, do we have a good reason here to doubt that the linguistic analysis is getting us to -- to what Congress would have intended?

The proposed good reason or the best reason I think is that if we read it your way, then as Justice Breyer said in Tyler, as a practical matter, second habeas

is -- is -- a second habeas petitioner is -- is almost never going to -- or probably, in fact, never will get the benefit of the new rule. Well, maybe one answer to that is, so what.

The reason that cannot be dismissed, I think, that way is this. As has been pointed out here, we do not under our rules often make a new rule retroactive, but when we do under the conditions which we impose for that, it's -- it's one humdinger of a rule.

(Laughter.)

JUSTICE SOUTER: And it is -- it is unlikely -- or at least there's a good argument that it's unlikely -- that Congress would have wanted to exclude all the potential second habeas people from it, particularly because they're second habeas people because they got in in time on first habeas. They played by the rules, and on your theory basically they're out of the game on a very important rule. So that's the argument for saying that your linguistic analysis may not be pointing to what Congress intended.

MR. FELDMAN: Well, I -- I disagree with that. First, on second habeas, the -- this Court, I think all three opinions, in Tyler against Cain recognized that there can be cases where this Court recognizes a new right and it is retroactive at the same time where it's the

combination of some earlier decision that said all rules of a certain type are retroactive and then in the second --

JUSTICE SOUTER: But that is --

MR. FELDMAN: -- the Court said we are recognizing a rule of that type.

JUSTICE SOUTER: That is a highly exceptional case, and the problem with that is -- I mean, if -- if we're going to -- if you're going to be linguistic about it, you'd have to say, well, that really is not very sound reasoning because that is not a holding because the -- you -- you've got not merely to have recognized it under the statute, but you've got to have held it. And that's -- that's pretty unlikely.

MR. FELDMAN: It -- it says actually made retroactive, and I -- all of --

JUSTICE SOUTER: Well, I guess we've said you've got to do it with --

MR. FELDMAN: -- all three of the opinions in Tyler recognized that that sort of thing can happen, and I think that that actually is by far the most common kind of case because that's likely to be a case where the Court has said, for example, where Teague doesn't apply at all where the Court has narrowed the scope substantially of a Federal criminal statute such as in the Bailey case where

-- where the question was whether it has to be active use or mere possession of a firearm. And those kinds of cases are very possibly, at least if the Court has made it clear that they're narrowing the -- the Court is narrowing the conduct that was thought to be criminal in construing a criminal statute, those are the kinds of cases that are likely to arise most often. In those kinds of cases, that is likely to be the kind of the thing the Court was talking about in Tyler against Cain.

With respect to the other class of cases, which would -- the only other class of retroactive cases would be those that come within the second -- what used to be called the second Teague exception for bedrock principles that have the primacy or centrality of Gideon against Wainwright. Now, the Court has suggested -- it has said that it may be doubted that any such rules remain to -- to be discovered. But if there were, I think a court of -- a case of that level of centrality and primacy and importance, I think that this Court and other courts could take steps to decide whatever pending section 2255 motions they have or whatever ones could be filed by someone who still has their 1 year to go from date of finality of conviction to decide those quite quickly because that would be --

JUSTICE KENNEDY: In those cases, would the

Government ever on its own motion have a defendant retried or released? Has that ever happened?

MR. FELDMAN: I -- you know, I -- for instance, I don't know what the history was.

JUSTICE KENNEDY: I don't think it has. If -- let me ask you this. If -- if a decision says that what was a crime, as defined to the jury, is no longer a crime -- the conduct was no longer a crime -- I take it Teague doesn't necessarily apply to that, but this is still a substantive rule that's retroactive. Is that the way it works?

MR. FELDMAN: I think the -- what the Court has said and clarified most recently in the Summerlin case last year is that those -- Teague doesn't apply. It's not an exception to Teague, but Teague doesn't apply because those cases are retroactive without going through a particular analysis under Teague.

JUSTICE KENNEDY: But what -- what interest does the Government have in holding somebody when the conduct for which he was convicted is no longer a crime?

MR. FELDMAN: The Government doesn't have any interest in doing that. And I -- I think if the Government --

JUSTICE KENNEDY: Why don't you let the guy go?

MR. FELDMAN: I would -- I would recommend the

Government do that if we found a case. What actually happens, of course, in real life is there's argument about what were -- what -- how was the jury actually instructed. Did the jury find the necessary fact? Was it just harmless error because this case was tried on a theory that made it totally clear that he did commit the crime even as narrowed by this Court and those kinds of questions arising.

JUSTICE KENNEDY: Let's say he's being --

MR. FELDMAN: I can't say how they would work themselves out.

JUSTICE KENNEDY: Let's say he's being held because the Government insists that it's not retroactive and the Government is then proven wrong. Would that let him qualify under (2) because then the -- the impediment to making the motion was the fact that he thought it was not retroactive, but then -- and that was Government action because that's what you insisted on. But then that's removed. So does -- so would -- does entitlement under (2) apply?

MR. FELDMAN: I don't -- I don't think -- I don't think so because I would only think --

JUSTICE KENNEDY: I -- I don't think this is going to work.

MR. FELDMAN: Yes. I don't think the Government

holding somebody pursuant to a hitherto valid judgment would be seen as an impediment to making an -- a motion. I think that would be the Government --

JUSTICE KENNEDY: Well -- well, but it is because he -- it hasn't been found retroactive yet and he can't file --

MR. FELDMAN: Well, but the -- the defendant --

JUSTICE KENNEDY: -- under your view.

MR. FELDMAN: The fact that the Government is holding him doesn't prevent him from file. If the Government did actually prevent him from filing something, said you -- we're not going to take your mail that you're trying to send to the court, I think that's the kind of thing --

JUSTICE KENNEDY: Well, you prevented him from filing effectively. I mean --

MR. FELDMAN: I don't think --

JUSTICE KENNEDY: -- the petition has to be dismissed.

MR. FELDMAN: I don't think the Government has. I think the Government has said, go ahead and file whatever you want to file, and if you can obtain relief, then you should get it.

JUSTICE KENNEDY: Yes.

MR. FELDMAN: And if the Government itself

concludes that someone should be released, there are mechanisms to do that --

JUSTICE KENNEDY: That's probably right.

MR. FELDMAN: -- the Government could.

JUSTICE BREYER: The language -- the language is on your side, I think there's no doubt. But it's not unambiguous. Imagine a prison rule that says that the -- after the prison board, the -- the prisoner has 2 weeks to appeal to the warden from the time of the decision of the board if the prisoner has been notified. The prisoner isn't notified for 3 weeks. I think we'd read that to say he has 2 weeks from the time of notification. You -- you can use can if in that way. It's not impossible. And once I begin to think it could be open, I think, well, let's look for the most practical approach.

MR. FELDMAN: I think under that -- those circumstances, there may be circumstances under which equitable tolling would be appropriate in a particular case. That's the kind of thing that also --

JUSTICE BREYER: You -- you'd say, well the language is clear -- clear, but let's go -- let's go on equitable tolling.

MR. FELDMAN: But I don't -- I wouldn't go here on equitable tolling. In other words, I think maybe -- I don't -- I can't imagine all the possible cases under

6(3).

JUSTICE BREYER: No, no. What you're saying is the language.

MR. FELDMAN: But where the event that you're relying on for tolling would be an event that is anticipated in the statute and would be across the board and would really have nothing to do with the particular conduct of the petitioner's case, but whether someone else has gone and gotten a retroactivity ruling, I think it would be unprecedented in those circumstances to just rewrite the statute to come to a different date than what Congress had set. Congress set the date on which the right initially was recognized by this Court.

JUSTICE BREYER: Mr. Dreeben, could I bring you back to the -- the issue? I'm sorry. Yes. Can I bring you back to the issue of whether the Court that recognizes the right has to be the Supreme Court or not? You say there are three other instances in which it is specified that it be the Supreme Court, and it's not specified here. But does any of those other three instances involve language like this which -- which has the Supreme Court mentioned immediately previously?

I mean, when I read that the first time, has been newly recognized by the Supreme Court and made retroactively applicable to cases, I mean, I think what it

envisions is the -- the very decision of the Supreme Court that newly recognized it made it retroactively applicable. Is -- is any of the other ones phrased this way so that the word, the Supreme Court, is immediately preceding the and made retroactively applicable?

MR. FELDMAN: You know, I'd -- I'd have to look at the -- I can tell you where the statutes are. One is 8(2), of course, which is right in 2255.

JUSTICE SCALIA: Right.

MR. FELDMAN: The other is in 2244 which I think is worded exactly the same as this is. The third is I think 2264, which I -- I just would have to look at the specific wording of each of those.

But I think the -- you know, and this --

JUSTICE SCALIA: The proximity of the reference to the Supreme Court there really --

MR. FELDMAN: But --

JUSTICE SCALIA: -- when you read it the first time, you think they're talking about the Supreme Court.

MR. FELDMAN: You could also --

JUSTICE SCALIA: Has been newly recognized by the Supreme Court and made retroactively applicable.

MR. FELDMAN: You could also -- you -- you could, but you -- and we did take that position in Tyler. You could also read it, though, the -- the presence of the

word Supreme Court right before and the absence of the words, the Supreme Court, here and the presence of the Supreme Court in the first one -- you could certainly draw the inference that this was not something -- this part of it didn't have to be made by the Supreme Court. And perhaps Congress was recognizing that it -- it does take this Court a longer time to reach a retroactivity decision than it would take the lower courts hearing cases. Once --

JUSTICE STEVENS: Is there anything in any of these statutes or legislative history or any -- anyplace else where Congress ever thought of the possibility that some other court might make a new rule retroactive?

MR. FELDMAN: I don't think there's any statement one way or another, but I do think there are holdings. There are holdings as -- as the petitioner relies on by the Eleventh --

JUSTICE STEVENS: I think the other reading is -- the assumption was -- and I think it's incorrect -- that we would simultaneously identify the new right and decide it is or is not retroactive. That was the assumption I think.

MR. FELDMAN: I -- I just -- I think that would be unlikely because this Court's practice has certainly not since Teague and even going decades before Teague --

JUSTICE STEVENS: No. I realize it's wrong, but I think that's probably the assumption Congress made. That's what I'm suggesting.

MR. FELDMAN: I -- I guess I -- I would just think it's unlikely because although this statute has some drafting -- it certainly raises some drafting issues, I think they likely -- that basic element of this Court's retroactivity jurisprudence, which has been true for decades, I think likely --

JUSTICE STEVENS: See, the only thing about your reading of the statute that troubles me is you're -- you're reading the word only. If it's a 1-year statute, but only if Congress -- the Supreme Court has already done the next two things. 1 year is the maximum.

MR. FELDMAN: Just -- I'm reading it has an if. If is a condition. If --

JUSTICE STEVENS: There's an only --

MR. FELDMAN: What if does is states a condition.

JUSTICE STEVENS: It's not an if, but if that happens, then it shall be --

MR. FELDMAN: Right, because Congress didn't say it. If Congress had phrased this the way it phrased the -- the 6(3) as a whole and said it shall it run from the later of three dates, the date that the Supreme Court

holds it -- recognizes the right or the date it holds it retroactive, that would have -- that would have been --

JUSTICE STEVENS: See, it really --

MR. FELDMAN: -- that would have --

JUSTICE STEVENS: -- would accomplish your objective if you just struck the whole clause after the word if. You don't really need that.

MR. FELDMAN: I -- I don't think so. I think what the clause does is it makes it clear that in 6(3), which is a -- you know, intended to be a narrow exception from the -- the rule of finality -- that in 6(3) what Congress was doing was saying this is the only class of cases that we want this to apply to. And if they had just said the date on which the right was initially recognized by the Supreme Court, I think there might have been some inference that they were not -- they were trying to extend that beyond cases that are retroactive under Teague, or perhaps someone might have read that and said, you know, Teague is no longer applicable. Now Congress has a new standard that it's enacted here.

And I think Congress wanted make clear -- the people who drafted this -- that that was not what they were trying to do. And by saying made retroactive -- if it has been newly recognized and made retroactive to cases on collateral review, what they were plainly referring to

was this Court's jurisprudence under Teague so that no one would think this deadline is supposed to somehow open the door to cases that would otherwise be barred by Teague.

JUSTICE KENNEDY: Well, what courts in -- in your view have to make the retroactivity finding? The district court? The circuit where he's -- which has jurisdiction over his case? Any circuit?

MR. FELDMAN: I think every court that has addressed that question has come to the conclusion that it can be -- it has to be the circuit with territorial jurisdiction over the applicant's case. That's generally the jurisdiction of courts of appeals and the area in which their rulings are effective.

It also could be, in our view, the district court that's hearing the particular defendant's case because that's --

JUSTICE GINSBURG: If it's not that -- if it isn't the district court in that case, then you -- the district court has to take this complaint and just freeze it until some other -- a higher court rules on it.

MR. FELDMAN: Yes. I don't see any -- I don't think that that would be the appropriate thing to do. I think if -- if the view was that this had to -- it couldn't be filed until a court with jurisdiction over the case had actually held that the right was retroactive,

then I think the correct course for the district court would be to dismiss it because it's -- it's not -- it's not a timely petition. At the time when it's filed, there's -- it's -- we're assuming 1 year past the date that the conviction became final, and there's no other provision at that point that can render it timely. And at that point, the correct course for the district court would be just to dismiss it.

JUSTICE KENNEDY: So that if 10 other circuits have ruled on this but not his own, there's nothing he can do until somebody within the 1-year window files.

MR. FELDMAN: Our view -- well, that -- that -- if -- if the -- the made retroactive has to occur before he files, that would be the consequence. But our view is it can be made retroactive in his own case, and therefore, anyone can file. They have a 1-year window from the time when a new right is recognized, and if in their own case it's held to be retroactive, then they were timely and they may well get relief depending --

JUSTICE SOUTER: So far as first habe goes.

MR. FELDMAN: So far as first habeas goes.

JUSTICE SOUTER: Second habe, he's out cold.

MR. FELDMAN: I -- I think that it's -- I don't -- second habeas is definitely a narrower window, and I think Congress intended it to be a narrower window. But

for the reasons I said, there are decisions where the Court holds -- where this Court recognizes, in effect, the retroactivity of a new rule at the same time as it announces it, as the Court said in Tyler. And there are -- this Court and lower courts can act quickly on these kinds of things. If the kind of bedrock principle with the primacy and centrality of Gideon against Wainwright came up, I think the lower courts would see we have to act very quickly on this.

I -- one point of note is that Richardson itself, which the Government doesn't believe is retroactive, but that's not before the Court here -- the first decision holding Richardson retroactive came down 7 months after this Court decided Richardson. The second -- and that was where no one was thinking they had to particularly rush on that.

But if this Court were to recognize a new right under -- a -- a new right that satisfied the second Teague exception, I think it can be expected because it would necessarily be -- have a certain primacy and centrality and sweep that there would probably be cases pending in the courts of appeals, in the district courts raising that issue, and I think the courts involved, if they -- this Court said, look, this is -- this is the way the thing has to be understood in accordance with --

JUSTICE BREYER: What it would do -- let's take a case which I guess we -- Apprendi. I mean, you know, Apprendi, a big sort of an issue in the courts. And -- and this would put tremendous pressure on us to decide it immediately, wouldn't it? We'd have to say immediately whether it was going to be retroactive or not retroactive because it's only likely to come along in some major, major matter like that, other than the kind Justice Kennedy said, which is another kind of problem.

I mean, I don't see a way, if we take your approach, of getting out of this tremendous pressure. Maybe it would be a good thing. But I don't think there's a way of getting out of it.

MR. FELDMAN: I think this Court has -- has to take cases and plan its docket in accordance with a wide variety of considerations and that may be something that the Court would want to take into consideration.

JUSTICE BREYER: Well, what do you think about the -- it seems to me we've tried three approaches, each of which try to get us out of this problem of the pressure, call it. And we have Justice Stevens' and then -- but there were certain problems with Justice Souter's, which still I'm not certain might -- then I had started with one that I guess the objection to it would be it's laughable. But -- but is there -- is there any -- I mean,

you see, it's -- it's reading -- it's reading the word right in 6 to encompass all of the paragraph in 8. Is there anything -- I mean, it's a pretty good objection that really that just goes too far.

MR. FELDMAN: I -- I --

JUSTICE BREYER: But is there any other objection?

MR. FELDMAN: I think essentially the same one, that -- that they use the term right in 6 and they didn't intend that term to mean something different, whether it was a first habeas or a second habeas.

JUSTICE STEVENS: May I ask you --

MR. FELDMAN: They were talking about the right that was asserted.

JUSTICE STEVENS: May I ask you this question? Isn't it true that under some of the other references they refer to a constitutional right?

MR. FELDMAN: That's right. That's another --

JUSTICE STEVENS: Whereas this just refers to a right and it includes statutory rights. And, of course, the odd thing about that is that normally when we construe a statute, we say it always meant that. It's not -- it's not a new right in the sense as a right as of the date of enactment.

MR. FELDMAN: But --

JUSTICE STEVENS: So the difference between the Constitution and statutes sometimes is rather significant.

MR. FELDMAN: Yes. In paragraph 8(2) only -- only -- it does require a constitutional right. But in -- in 6(3) it refers just to right. But, as I said, that would, I think, encompass the class of cases such as Bailey where this Court interprets a Federal statute and narrows it and makes conduct that was thought to violate the statute earlier -- it means that conduct no longer violates it. Those kinds of decisions may well under -- if the Court has made those points clear, if that clearly is what this Court decided, those cases may well be retroactive at the time they're announced under the rationale that all the opinions in Tyler against Cain accepted.

JUSTICE SCALIA: Mr. Feldman, is there any case in which the Supreme Court newly recognizes a right in which it does not initially recognize the right?

MR. FELDMAN: I think there's sound -- those seem to me to be synonymous and --

JUSTICE SCALIA: Well, they're -- they're -- I thought your position was newly recognized means that it -- it has to be the kind of a right that would -- would overcome our usual bar to -- to, you know, rights that existed before.

MR. FELDMAN: That's correct. But I think initially recognizing may well be another way of saying the same thing.

JUSTICE SCALIA: Every -- every newly recognized is an -- is an initially recognized, although every initially recognized is not necessarily a newly recognized. Is that it?

MR. FELDMAN: I was actually thinking of it the other way around.

JUSTICE SCALIA: The other way around?

(Laughter.)

MR. FELDMAN: Which -- but that -- that -- where this Court has --

JUSTICE SCALIA: You don't know who wrote this either, do you?

(Laughter.)

MR. FELDMAN: No, I don't. No, I don't. No, I don't.

But I think the point of the newly -- in fact, if you look at -- if you kind of flip it, the point of this provision can -- maybe becomes a little bit clearer. It's if -- if you start with the if, if the petition is based on a right that is newly recognized and made retroactive to cases on collateral review, that's the class. If that happened --

JUSTICE SCALIA: Sure.

MR. FELDMAN: -- then the time runs from the date on which it was initially recognized. In other words --

JUSTICE SCALIA: Which would have been the date on which it was newly recognized.

MR. FELDMAN: Right.

JUSTICE SCALIA: So why couldn't they say, the date on which the right asserted was newly recognized by the Supreme Court if it has been made retroactively applicable? Wouldn't that have been a more --

MR. FELDMAN: That -- that would have been better. I would definitely agree with that.

JUSTICE GINSBURG: But what about -- I think the principal argument that Ms. Bergmann made was your reading means people -- you're encouraging filings that inevitably will be thrown out because the right will be made retroactive?

MR. FELDMAN: I think I just have a couple of answers to that. One is that when Congress enacts a statute of limitations, any statute of limitations has the effect of pushing people into court who might otherwise like to wait. And that was a predictable result that Congress would have surely known when it enacted this.

I --

JUSTICE GINSBURG: But the other -- the other way avoids loading the district court with filings that are futile.

MR. FELDMAN: But -- and which -- many of which may be quite easy to -- to dismiss.

But I would say Ms. Bergmann's reading has a kind of -- the opposite problem with it, which is under her reading the -- no one -- when a court holds something retroactive can -- is an unpredictable matter. And under her reading, nobody -- even where there's a right that's rather important and that should be retroactive, no one could get relief until an appropriate court has held it retroactive, which could take years. It could be never. And if the Court -- and I think that that reading of that -- therefore, I think that that -- that reading has just the opposite problem.

JUSTICE GINSBURG: You see, you're -- you're saying --

MR. FELDMAN: What Congress wanted --

JUSTICE GINSBURG: -- that the district court should take these filings, should not hold them. It should itself make the retroactivity determination.

MR. FELDMAN: It can do that subject to appeal and ultimately certiorari in this Court.

I think, though, that ultimately what Congress

wanted was a 1-year period after this Court initially recognizes a new right. When the -- for that -- that period of time the finality that is so important to the criminal law is -- does -- is suspended to a certain degree. People can litigate the issue. After that, the criminal law can go back to its retributive, deterrent purposes which can only be achieved if finality is recognized.

I think, in particular, when you're talking about section 2255 motions, frequently the relief, if there is any, is going to be a new trial. And there's a particular cost, as the Court has recognized, of trying to retry somebody many, many years after an initial conviction. Sometimes it means, in effect, it's just an acquittal because you can't find the witnesses or you can no longer prove it beyond a reasonable doubt. And I think, therefore, Congress said, all right, well if there's a new right, that's a sufficiently exceptional circumstance, that we can suspend that finality for a brief period, but 1 year and that's all. These things shouldn't come out 10 years later or 15 years later or 20 years later.

And that was the purpose, I think a perfectly reasonable purpose that Congress intended to serve here. And I think that actually the language of it, which says 1

year from the date on which the right asserted was initially recognized by this Court, accomplishes that purpose.

JUSTICE KENNEDY: Your -- your position is strengthened by the other three provisions of the statute that mentioned this, but it's not controlled by that, I take it. You think it's unambiguous just as it read -- as it's read on its own.

MR. FELDMAN: I think that the date -- there's only one possible date that can be found in this language. Unless the Court felt that it had to completely rewrite it, there's only one date, the date on which the right asserted was initially recognized by this Court. And even if -- whatever problems the if clause have -- has, that may mean that this -- not very many people -- the worst it would mean is that not many people can take advantage of that date.

But unless it's -- that date is -- there's something unconstitutional, which no one has suggested, about Congress picking that date and that limitations period for people who have had the chance to litigate things on direct review -- in any event, it had 1 year from the date their conviction became final. Unless there's something wrong with that, I think that the Court should follow the terms of the statute, and the time

should run 1 year from the date on which the right was initially recognized.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Feldman.

Ms. Bergmann, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF JANICE L. BERGMANN

ON BEHALF OF THE PETITIONER

MS. BERGMANN: Just several quick points.

I'd like to start with the last point that Mr. Feldman made saying that there is only possible date under which the limitation period can run and -- and cautioning the Court about rewriting that date. What the Government neglects to mention is that it's asking this Court to rewrite the if clause by changing Congress' use of verb tense from a past tense to -- to something that could happen in the future. They want this Court to read that language contrary to Tyler, contrary to the use of verb tense and allow a district court to make a retroactivity decision at some time in the future in every case in which a motion is filed under paragraph 6(3).

The second point I'd like to make is that the -- in situations such as this that involve these kinds of important rights, interests in finality are at an ebb. These are the types of rights where someone may well be innocent of the crime for which they are incarcerated,

that involve important rights that go to the accuracy of the underlying adjudication. It seems to me in these circumstances, there is -- it is a situation where Congress' need or -- or the need of the courts to enforce finality to keep people in jail are at their lowest point. These are very special rights and Congress went to the trouble of drafting and enacting paragraph 6(3) and paragraph 8(2) to protect these rights. And -- and I think the Court should read them as broadly as possible in order to protect those rights.

Justice Scalia asked a question about the difference between newly recognized and initially recognized. I wanted to go back to that for a minute.

There are circumstances where a -- let me see if I can get this right -- where a -- a right may be newly recognized but not yet initially recognized. And I would -- I would point the Court's attention -- the decision in Penry. In Penry v. Lynaugh, this Court stated that if there was an Eighth Amendment bar to the execution of mentally retarded individuals, that would be a new right that would be retroactively applicable to collateral cases. But then the Court declined to initially recognize the Eighth Amendment right. It wasn't until Atkins was decided that the Eighth Amendment right was initially recognized. And so --

JUSTICE SCALIA: Well, it didn't newly -- it didn't newly recognize it either, did it?

MS. BERGMANN: Well, it -- it -- I would say that it -- it recognized that it was new and that seems to be the way the courts have interpreted --

JUSTICE SCALIA: It was -- it recognized that when it would be initially recognized, it would be newly initially recognized.

(Laughter.)

MS. BERGMANN: That's correct, Your Honor, but I would say that there would be no additional decision of this Court that would be necessary for -- for someone to conclude that all three provisions of paragraph 6(3) had been met.

JUSTICE SCALIA: I see your point.

JUSTICE BREYER: I thought it could be, if you want to play games, there is an imaginary right to which Blackstone has referred 48 times. Yet, for some odd reason, that right has never come to the Supreme Court of the United States. But one day it does. It is a right of constitutional dimensions embedded in the law of stoppage in transitu. And although it's well recognized, we've never had a case. Finally, we get one, and it is initially recognized here, but it is not newly recognized for every treatise on stoppage in transitu has long

assumed that it was part of the law of the United States. I don't know. That's what I thought it was.

MS. BERGMANN: Well, yes, Your Honor. There -- there are -- every time this Court issues a decision, someone could argue that it initially recognizes a right, and whether that right is new in the Teague sense or old --

JUSTICE BREYER: I take it that what I've just said is of total irrelevance to everything. Is -- is that right?

(Laughter.)

MS. BERGMANN: No. I disagree, Your Honor. I mean, there are circumstances where this Court initially recognizes rights, but then later on determines that they are not new, that they are indeed old. That happened in Simmons v. South Carolina. The Court recognizes -- recognized a right to present certain types of mitigation evidence in the penalty phase of a capital case, but then the Court later determined that that was not a new right. It was an old right in the Teague sense, and so it, therefore, applied retroactively because it was an old right but it did not newly recognize it at the time that it initially recognized it. And I'm sorry for the linguistic -- but it -- it is complicated.

JUSTICE SCALIA: Not your fault.

JUSTICE SOUTER: I'm laughing at the statute, not at you.

MS. BERGMANN: Thank you, Your Honor.

I just wanted to say in closing that -- that it is a difficult statute, but I think that Mr. Dodd's interpretation of the statute best respects Congress' use of tense and is consistent with the reading of paragraph 8(2) that this Court gave in Tyler.

It also respects Congress' intention to create a specific exception for new rights that apply retroactively and by allowing for the realistic possibility of -- of success in either an initial or a second or successive motion premised on such rights.

It also, as we've discussed, promotes judicial efficiency by eliminating from it frivolous motions because litigants would not file until it was clear that they actually had a right to collateral relief.

In sum, this Court should conclude that the triggering date is when all three of the prerequisites have been met. In this case, that would be when the Eleventh Circuit decided Ross v. Richardson.

I guess my -- my final concern is for my client. If the Court constructs a rule where the Supreme Court would have to be the court that makes the retroactivity decision, I hope the Court will consider the effect of

such a rule on someone like my client who filed prematurely on -- in -- in hopes that at some point his arguably meritorious Richardson claim would be heard. Whether the Court decides that those premature filings should be dismissed without prejudice or if there's some kind of analysis the lower courts should take in resolving those claims --

JUSTICE BREYER: How -- how is -- how does that work? I mean, can you explain that a little?

MS. BERGMANN: Well --

JUSTICE BREYER: Suppose he did -- he hasn't violated the statute of limitations. He -- he filed it before a year ran from the time that we finally recognized it because we haven't even recognized it yet.

MS. BERGMANN: Well, that would be my argument, Your Honor, that he was premature.

JUSTICE BREYER: But what is premature? What prevents a person from being premature? They just might lose on the merits of their claim is all, and he might anyway.

MS. BERGMANN: That's -- that's if the Court would allow the retroactivity decision to be made in the -- on an initial motion by the district court in that particular case. Am I correct? Maybe I'm misunderstanding you, Your Honor.

JUSTICE BREYER: No. I -- I was the one who's having a problem. I -- I didn't see how your client would be hurt if we adopted Justice Stevens' --

MS. BERGMANN: Well, the problem is that some lower courts have held that if you -- you file a motion that's untimely --

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Bergmann.

MS. BERGMANN: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:11 p.m., the case in the above-entitled matter was submitted.)