

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   ROBERT JOHNSON, JR.,                   :  
4                   Petitioner                   :  
5               v.                   :   No. 03-9685  
6   UNITED STATES.                   :  
7   - - - - -X  
8                                   Washington, D.C.  
9                                   Tuesday, January 18, 2005  
10               The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:04 a.m.  
13   APPEARANCES:  
14   COURTLAND REICHMAN, ESQ., Atlanta, Georgia; on behalf of  
15       the Petitioner.  
16   DAN HIMMELFARB, ESQ., Assistant to the Solicitor General,  
17       Department of Justice, Washington, D.C.; on  
18       behalf of the Respondent.  
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P R O C E E D I N G S

(11:04 a.m.)

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

Mr. Reichman.

ORAL ARGUMENT OF COURTLAND REICHMAN  
ON BEHALF OF THE PETITIONER

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

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

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

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

1 under 2255, leaving the vacatur as the operative fact.

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

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

11 Let me --

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

15 MR. REICHMAN: Correct.

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

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

1 levels to the response. Let me work through them.

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

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

11 MR. REICHMAN: Yes.

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

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

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

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

25 MR. REICHMAN: The requirement is not found in

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

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

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

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

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

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

25 But it seems to me you have to acknowledge that

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

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

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

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

1 side of your question.

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

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

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

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



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

4 MR. REICHMAN: I --

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

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

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

16 MR. REICHMAN: Well --

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

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

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

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

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

15 JUSTICE SOUTER: Okay, but in -- in six States,  
16 I would have thought that, A, the due diligence language,  
17 together with the general obvious policy of AEDPA, to get  
18 this over with, would have made it very difficult to  
19 conclude that he can sit there without doing anything for  
20 10 years.

21 MR. REICHMAN: Well, I --

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

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

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

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

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

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

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

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

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

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

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

12                  Why isn't that an -- an accommodation of what we  
13  know was the concern of the Federal court -- of the -- of  
14  the Congress that people act diligently? It happens that  
15  2255 wasn't framed with Curtis and Daniels in mind. There  
16  isn't any indication that the drafters of 2255 were aware  
17  of this peculiar situation where you can't make the  
18  challenge in Federal court, you must go back to the State  
19  forum. But we do know they were concerned with diligence.

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

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

1           MR. REICHMAN: Yes, he did.

2           The -- the -- our answer --

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

5           MR. REICHMAN: We believe it was diligent within  
6 the -- the fourth trigger because, again, we rely on the  
7 plain language. And the -- the fall-back position, to  
8 address your question and Justice Souter's question, is  
9 that we don't believe -- we believe this is engrafting a  
10 whole different statutory scheme on top of the one that we  
11 have. The fall-back position of the Government is to say,  
12 all right, let's interpret the statute or rewrite it to  
13 say that we're going to trigger the date on when the  
14 vacatur could have been obtained, not when it could have  
15 been discovered. And to do that, what they're saying is,  
16 well, let's give him a year from the time of the Federal  
17 sentencing. So -- or -- or maybe even earlier, dating  
18 back to the time of the original conviction in State  
19 court. So they add that 1-year statute of limitations.  
20 Then they say then we'll add a provision that tolls during  
21 the pendency of State habeas, and then we'll add another  
22 1-year statute of limitations on top of that after the  
23 vacatur is obtained. So we end up with -- instead of the  
24 plain language, we have two 1-year statutes of limitations  
25 with a tolling provision in between, the type of tolling

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

22 MR. REICHMAN: Yes.

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

1 instance where the laches issue was presented to them?

2 MR. REICHMAN: The latter is more accurate. I'm

3 -- I'm -- I was trying not to overreach, but I went with

4 the cases that States that were clear that laches would

5 apply either by statute or by case law.

6 And why this becomes particularly important to

7 me is because we think the petitioner's rule serves the

8 ends of the Federal court overall, especially when you're

9 talking about finality because it seems to be the tail

10 wagging the dog, in a way, to have a rule that cuts off

11 the possibility of the 10-year scenario for these few

12 cases and then causes thousands of placeholder petitions

13 to be filed and managed. And it has been pointed, you

14 know, average non-merits dismissal, we're talking about

15 roughly 260 days. It's a burden on the court that's

16 unnecessary, particularly to bring it back, when we think

17 that in light of Custis and Daniels, the plain language

18 takes us all the way there.

19 JUSTICE GINSBURG: I know -- I know --

20 JUSTICE KENNEDY: But do you have any

21 explanation of why your client waited so long?

22 MR. REICHMAN: The record doesn't reveal except

23 that he is pro se.

24 JUSTICE KENNEDY: Pro se.

25 MR. REICHMAN: Yes.

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

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

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

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

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

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

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

1 JUSTICE STEVENS: You may. Thank you.

2 Mr. Himmelfarb.

3 ORAL ARGUMENT OF DAN HIMMELFARB

4 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 JUSTICE KENNEDY: Well, as to your first --

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

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

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



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

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

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

17 JUSTICE SOUTER: Mr. Himmelfarb --

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

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

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

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

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

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

16 JUSTICE O'CONNOR: Okay.

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

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

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

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

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

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

7 JUSTICE SOUTER: Mr. --

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

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

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

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

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

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

13 JUSTICE SOUTER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. HIMMELFARB: I think that --

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

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

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

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

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

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

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

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

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

12 JUSTICE BREYER: Yes.

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

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

19 JUSTICE SCALIA: That's true.

20 JUSTICE BREYER: All right.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Our alternative interpretation doesn't depend on

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

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

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

18 JUSTICE STEVENS: Is that right?

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

23 JUSTICE STEVENS: Whether he gets the --

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

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

4                   The -- the --

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

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

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

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

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

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

23                  (Laughter.)

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

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

5           MR. HIMMELFARB: Well, our --

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

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

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



1 MR. HIMMELFARB: Well --

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

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

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

15 MR. HIMMELFARB: Justice --

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

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

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

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

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

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

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

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

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

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

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

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

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

3 The court of appeals --

4 JUSTICE BREYER: You certainly -- wouldn't you  
5 be making the opposite argument if it were a DNA test? If  
6 it were a DNA test, you would certainly be arguing that  
7 even though the results didn't come into existence until  
8 32 years after his Federal conviction, that he could have  
9 discovered it 38 years before because he could have asked  
10 that the test then be performed.

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

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

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

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

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

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

15 JUSTICE STEVENS: Thank you, Mr. Himmelfarb.

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

18 REBUTTAL ARGUMENT OF COURTLAND REICHMAN

19 ON BEHALF OF THE PETITIONER

20 MR. REICHMAN: I hope not.

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

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

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

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

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

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

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

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

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

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

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

17              Thank you.

18              JUSTICE STEVENS:  Thank you, Mr. Reichman.

19              The case is submitted.

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

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