

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 LACKAWANNA COUNTY DISTRICT :
4 ATTORNEY, ET AL., :
5 Petitioners :
6 v. : No. 99-1884
7 EDWARD R. COSS, JR. :
8 - - - - -X

9 Washington, D.C.
10 Tuesday, February 20, 2001

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:14 a.m.

14 APPEARANCES:

15 WILLIAM P. O'MALLEY, ESQ., Assistant District Attorney,
16 Scranton, Pennsylvania; on behalf of the Petitioners.
17 ROBERT M. RUSSEL, ESQ., Assistant Solicitor General,
18 Denver, Colorado; on behalf of Colorado, et al., as
19 amici curiae, supporting the Petitioners.
20 JAMES V. WADE, ESQ., Federal Public Defender, Harrisburg,
21 Pennsylvania; on behalf of the Respondent.

22
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	WILLIAM P. O'MALLEY, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	ROBERT M. RUSSEL, ESQ.	
7	On behalf of Colorado, et al., as amici curiae,	
8	supporting the Petitioners	19
9	ORAL ARGUMENT OF	
10	JAMES V. WADE, ESQ.	
11	On behalf of the Respondent	28
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:35 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in Number 99-1884, Lackawanna County District
Attorney v. Edward R. Coss, Jr..

Mr. O'Malley.

ORAL ARGUMENT OF WILLIAM P. O'MALLEY
ON BEHALF OF THE PETITIONERS

MR. O'MALLEY: Mr. Chief Justice, and may it
please the Court:

Essentially involved in this case is the failure
of the Third Circuit Court to apply the rationale espoused
by this Court in Custis v. United States, to conclude that
constitutional deprivations other than deprivation of the
right to counsel can be addressed in habeas corpus
proceedings as constituting a collateral effect enhancing
the sentence of someone in custody under a conviction that
they are seeking to attack in the Federal habeas corpus
proceedings.

In this case, Edward Coss had been convicted in
the mid-eighties of simple assault and institutional
vandalism and had been sentenced to incarceration, and he
had completely served his sentence.

QUESTION: Had he filed an appeal from that
conviction, ever?

1 MR. O'MALLEY: Yes, he did, Your Honor.
2 QUESTION: A direct appeal?
3 MR. O'MALLEY: Yes. He filed a direct appeal
4 from that conviction.
5 QUESTION: And what happened? Does the record
6 say what happened to the direct appeal?
7 MR. O'MALLEY: The conviction was affirmed.
8 QUESTION: And then he filed for State post-
9 conviction relief?
10 MR. O'MALLEY: He did, Your Honor.
11 QUESTION: On the inadequate assistance of
12 counsel claim?
13 MR. O'MALLEY: Yes, Your Honor, that's correct.
14 QUESTION: And does the record tell us why the
15 State courts never dealt with that?
16 MR. O'MALLEY: No, the record does not tell us
17 why the State courts did not deal with that. It just
18 wasn't dealt with.
19 QUESTION: So we can assume that it may have
20 been because the State court just neglected to get around
21 to it?
22 MR. O'MALLEY: All assumptions are possible, and
23 that certainly is one of them. It slipped through the
24 cracks somehow, and I've not been able to determine how,
25 Ypur Honor.

1 QUESTION: But you agree that the respondent was
2 not at fault in failing to have the State court review
3 that claim?

4 MR. O'MALLEY: Well, I wouldn't go quite that
5 far, Your Honor, because the respondent could have
6 requested that the matter be brought up for a hearing. He
7 just filed his post-conviction collateral petition and
8 then --

9 QUESTION: And there was an answer, I
10 understood.

11 MR. O'MALLEY: I don't think it was answered,
12 Your Honor. An answer is not required under the
13 Pennsylvania post-conviction --

14 QUESTION: Right, and it just sat. Then it just
15 sat.

16 MR. O'MALLEY: It sat. He could have called it
17 up, but in the meantime his conviction -- his sentence
18 expired, and that's an equally reasonable inference as to
19 why no action was taken, because he got out of jail, and
20 the purpose of --

21 QUESTION: Well, but the conviction has
22 subsequent consequences, as we see from this case, so it
23 still could be a matter of significance to the respondent.

24 MR. O'MALLEY: Yes, it could be a matter of
25 significance to that extent, Your Honor.

1 QUESTION: Was he entitled, under Pennsylvania
2 law, after release from custody, to continue the
3 collateral attack on his conviction?

4 MR. O'MALLEY: No. I believe, Your Honor, under
5 the Pennsylvania law he would have to be in custody to
6 continue his attack on that conviction.

7 QUESTION: All right. So then, at that point,
8 there's nothing he can do to attack his conviction?

9 MR. O'MALLEY: That would be correct, Your
10 Honor.

11 QUESTION: Do you have authority for that, that
12 you've cited, that there is nothing that the Pennsylvania
13 courts could have done at that juncture, when he was out
14 of custody?

15 MR. O'MALLEY: Your Honor, I think that's to be
16 found in the Pennsylvania Post-Conviction Relief Act. I
17 think the requirement of custody is implicit in the Act,
18 or is --

19 QUESTION: Not just for filing, but for --

20 MR. O'MALLEY: -- is expressed in the Act.

21 QUESTION: -- resolving it?

22 MR. O'MALLEY: For obtaining the relief. I
23 think it's in the Act, but I do know, Your Honor, that
24 Pennsylvania cases have construed that if you're not in
25 custody you don't get-post conviction relief, Act relief.

1 Following the completion and full service of his
2 sentence for that conviction in the eighties, Mr. Coss got
3 in trouble with the law again and was found guilty of
4 assault and was sentenced to a separate term. The record
5 indicates that the sentence for his earlier 1980's
6 conviction and sentence was considered by the court. It
7 doesn't quantify the extent to which it was considered.
8 It was just noted by the court. That was found both by
9 the district court and by the Third Circuit Court.

10 Coss filed his petition pro se. His Federal
11 habeas corpus petition was filed pro se, and the district
12 court, according due deference to his 19 -- or, to his
13 Federal habeas corpus petition, construed it as an attack
14 on his later conviction in the 1990's, as well as an
15 attack on his 1980's conviction, and denied Mr. Coss
16 relief based upon the fact that, although ineffective
17 assistance of counsel was made to appear from the evidence
18 that Mr. Coss suffered no prejudice.

19 Mr. Coss then appealed to the Third Circuit and
20 the Third Circuit reversed the district court, finding
21 that prejudice was shown by Mr. Coss and finding also, or
22 ruling also that because Coss' claim of ineffective
23 assistance of counsel in his 1980's conviction was -- had
24 an effect upon the sentence he received for his 1990's
25 conviction, that he was entitled to Federal habeas relief.

1 And the means by which the Third Circuit reached
2 that conclusion is the principal matter that I believe
3 needs to be addressed here this morning, because what the
4 Third Circuit did was relied principally upon
5 jurisprudence developed in the Third Circuit which, for
6 all intents and purposes, reverses district court judges
7 that don't treat attacks on subsequent convictions that
8 were enhanced, sentences of which were enhanced by prior
9 convictions.

10 The Third Circuit reverses those judges and
11 says, you should have found that this collateral
12 enhancement on grounds other than Gideon violations is
13 something that we will not tolerate in this Circuit.

14 QUESTION: Mr. O'Malley --

15 MR. O'MALLEY: Yes.

16 QUESTION: You say in your brief that your
17 argument is decided, divided into two parts.

18 MR. O'MALLEY: Yes, Your Honor.

19 QUESTION: One is a question left over, left
20 open in *Maleng v. Cook* as to whether the custody
21 requirement of the Federal statute is satisfied here.

22 MR. O'MALLEY: Yes, Your Honor.

23 QUESTION: And then the second is I guess what
24 you've been talking about during most of your argument,
25 what kinds of claims may you make if the *Maleng* question

1 is decided against you. Are you going to say anything
2 about the question left open in Maleng v. Cook, or are you
3 going to leave that to your briefs?

4 MR. O'MALLEY: Well, no, I am going to say
5 something about the question left open by Maleng v. Cook.
6 It is our position that the holding of Maleng v. Cook has
7 been misunderstood by the Third Circuit.

8 The holding of Maleng v. Cook clearly seems to
9 say that a person may not attack, or a person is not in
10 custody under a prior conviction once he has fully served
11 that conviction, but the Third Circuit reaches a different
12 conclusion by looking at the result that was reached in
13 Maleng, because in Maleng the Court will recall that the
14 petitioner was granted relief, but in that case the basis,
15 as I read Maleng, for the petitioner being granted relief
16 was principally that there was a custodial nexus between
17 the earlier conviction and sentence and that which he was
18 attacking in his Federal habeas corpus petition, that
19 custodial nexus being the hold that was placed upon him
20 for the State conviction that he would be obliged to
21 serve.

22 In this case, however, there is no custodial
23 nexus to connect the fully expired sentence to the
24 sentence that the Court construed he was attacking in his
25 Federal habeas corpus petition.

1 QUESTION: Well, how can you say there's no
2 connection when the second sentence, the length of the
3 second sentence is determined by the fact that there was
4 an earlier conviction?

5 MR. O'MALLEY: Your Honor, yes, but I was
6 talking about a custodial nexus, and I believe that the
7 determinative factor in Maleng v. Cook was the custodial
8 nexus. I think the question of the simple enhancement --

9 QUESTION: Well, but this --

10 QUESTION: He was in custody on the prior
11 conviction, not just because of the prior conviction. He
12 was serving the sentence that had been imposed for the
13 prior conviction, that's what the hold produced; whereas
14 in this case he may well be serving additional time
15 because of the prior conviction, but he is not serving the
16 time of the prior conviction.

17 MR. O'MALLEY: If I understand your question
18 correctly, Your Honor, that is our position.

19 QUESTION: Isn't it also in the case in Maleng
20 that if the hold had not been placed, he would have been
21 released under the prior conviction?

22 MR. O'MALLEY: That is correct, Your Honor, and
23 that is the factor that I think the Third Circuit
24 overlooked, and overlooks in its holdings on cases of this
25 type.

1 QUESTION: But even if this case is different
2 from Maleng, how can you say he was not in custody in this
3 case? He's in prison.

4 MR. O'MALLEY: He definitely is in custody in
5 this case, Your Honor.

6 QUESTION: Right.

7 MR. O'MALLEY: He's in custody under a 1990
8 conviction.

9 QUESTION: Right, so the custody requirement of
10 section 2244 is satisfied?

11 MR. O'MALLEY: Well, he wasn't attacking his
12 1990 conviction. He was attacking his 1984 conviction.
13 There's nothing wrong with his 1990 conviction. The only
14 thing wrong --

15 QUESTION: Well, if you're right on the merits,
16 that's true, but if he's right, the thing that's wrong
17 with it is that the length of the sentence was based on a
18 prior unconstitutional -- a violation of the Federal
19 Constitution.

20 MR. O'MALLEY: That is --

21 QUESTION: If he's right. I don't know whether
22 he is or not.

23 MR. O'MALLEY: That would be correct. That
24 would be a correct statement.

25 But the Court in Custis v. The United States

1 adopted a line of reasoning which, while it may not
2 directly apply to Federal habeas cases, Custis having been
3 a case under the sentence -- the Federal Sentencing Act,
4 the rationale of those cases clearly seems to announce a
5 constitutional declaration that, in considering prior
6 convictions and sentences, the only constitutional
7 violation that the court will consider, the courts should
8 consider, are Gideon violations, where counsel was totally
9 absent, and that ineffective assistance of counsel cases
10 do not fall under that umbrella and, therefore, are not to
11 be considered as supplying a basis for Federal habeas
12 attacks on subsequent convictions and sentence, enhanced
13 by a sentence in which there may have been ineffective
14 assistance of counsel.

15 QUESTION: Would you say that that rationale
16 would have -- also would apply even if the Pennsylvania
17 court had acted within the time period and set aside the
18 earlier conviction?

19 MR. O'MALLEY: If the Pennsylvania court had
20 acted within the time period and set aside the earlier
21 conviction, we wouldn't have the problem, Your Honor, as I
22 see it.

23 QUESTION: Why not? I think your rationale
24 would be, we shouldn't look at that, regardless of whether
25 there's merit to the earlier case or not.

1 Would you agree, then, that the Third Circuit
2 would have been correct in this case if, after Mr. Coss
3 had served his sentence, the Pennsylvania court, contrary
4 to what you say the Pennsylvania law is, had decided,
5 well, we will take a look at the earlier conviction, and
6 we now conclude that he was not given effective assistance
7 of counsel?

8 Supposing they entered such an order, would that
9 mean that this -- that the result in this case would be
10 different?

11 MR. O'MALLEY: I think that would mean the
12 result in this case would be different, because the only
13 basis for complaint that Coss had in this case dealt only
14 with the earlier conviction and sentence, not with his
15 19 --

16 QUESTION: So then you're not saying that it's
17 only a Gideon violation that gives rise to a claim.
18 You're saying it's only an unresolved non-Gideon violation
19 that gives rise --

20 QUESTION: I think you --

21 MR. O'MALLEY: I don't know that I'm saying
22 that, Your Honor.

23 QUESTION: I hope you're not. In -- I assume in
24 that hypothetical just posited there would have been no
25 basis for increasing the sentence. You could attack the

1 second sentence on its face as being improper because
2 there was no prior conviction.

3 QUESTION: No, no. I'm assuming the second
4 sentence is entered before the Pennsylvania court rules.

5 QUESTION: Oh, before the Pennsylvania court --

6 QUESTION: The second sentence is entered, then
7 the Pennsylvania court rules that, oh, the first case is
8 invalid. Would that mean the second case falls, or
9 wouldn't it?

10 MR. O'MALLEY: I think it would certainly take a
11 great deal of the weight out of the second case, because
12 it would --

13 QUESTION: But your basic position is, only
14 Gideon violations count. That's what I understood your
15 argument to be, and I'm suggesting we have a non-Gideon
16 violation that set aside the second -- set aside the first
17 conviction after the second sentence was imposed. Would
18 you count it or not? It's not a Gideon violation.

19 MR. O'MALLEY: I think we would count it, but I
20 think that count would come only on the basis of comity,
21 on the basis of the Federal court giving due recognition
22 to what Pennsylvania had done with its own --

23 QUESTION: Well, these are all Pennsylvania
24 sentences, are they not, that we're talking about here?

25 MR. O'MALLEY: Yes. Yes, they are, Your Honor.

1 QUESTION: If the Pennsylvania Supreme Court had
2 set aside the first sentence, surely the Pennsylvania
3 courts would recognize the fact that it was no longer
4 valid.

5 MR. O'MALLEY: That is correct, Your Honor.

6 QUESTION: You don't have to get to any Federal
7 habeas there.

8 MR. O'MALLEY: That's my -- that's why I'm
9 having trouble with the question, because you really don't
10 have to get to Federal habeas there. I think the basis
11 for Federal habeas would evaporate in that situation.

12 QUESTION: Well, what if the --

13 QUESTION: Well, I don't know why you -- my
14 hypothetical is just the opposite. I -- my hypothetical
15 is that they set aside the first sentence, but they didn't
16 set aside the second one. We had a case like that not
17 long ago.

18 MR. O'MALLEY: Well, I think the answer to that
19 hypothetical, then, Your Honor, would depend upon the
20 extent to which the second sentence was actually enhanced
21 by the first sentence.

22 QUESTION: Well, I'm assuming it was. It was
23 enhanced an extra year because of the prior conviction.
24 The court now knows the first conviction was invalid, but
25 it decides, well, we think he really did it anyway, so

1 we're going to leave the second sentence in place.

2 MR. O'MALLEY: Well, we do not --

3 QUESTION: Would there be grounds for Federal
4 habeas relief?

5 MR. O'MALLEY: We do not have that basis in this
6 case because the courts have recognized that in the second
7 sentencing the first conviction and sentence were
8 considered, but there's no way to quantify the extent to
9 which, if any, enhancement actually took place.

10 QUESTION: But you have to deal with his
11 hypothetical, and don't you have to acknowledge at least a
12 second exception besides utter absence of counsel, and the
13 second sentence being that, in fact, the prior conviction
14 has, by the jurisdiction that imposed it, been held to be
15 invalid?

16 MR. O'MALLEY: Yes. If the second sentence was
17 held invalid by the jurisdiction which imposed it, we have
18 the question of comity, which I think would oblige the
19 Federal courts to give the appropriate deference to that
20 one situation.

21 QUESTION: Well, let's go one step further and
22 ask, what happens if the defendant has done everything he
23 can to get a resolution on the validity of the first
24 conviction and, through no fault of the defendant's, the
25 State refuses to deal with the question, and nonetheless,

1 in the second proceeding, reliance is placed on the first
2 conviction that the defendant has tried to challenge but
3 couldn't? That comes closer to this case, doesn't it?

4 MR. O'MALLEY: It comes closer to this case,
5 Your Honor, and I would say that in that situation the
6 only basis for Federal relief that the defendant would
7 have would be a Gideon violation, utilizing the rationale
8 that was expressed by this Court in Custis v. The United
9 States, and that Gideon violations, the court has drawn
10 the line --

11 QUESTION: Well, Custis acknowledged that a
12 Gideon violation still was open, but did it necessarily
13 conclude that there is no other exception?

14 MR. O'MALLEY: I think it did. It says, Custis
15 asks us to extend the rule to cases other than Gideon
16 violations, and this the Court refuses to do.

17 QUESTION: But if you assume there was some
18 constitutional violation in the first conviction, you say
19 the defendant can be deprived by the State of any chance
20 to correct that --

21 MR. O'MALLEY: No, I --

22 QUESTION: -- and the subsequent court can use
23 the unconstitutionally-obtained prior conviction to
24 enhance the later sentence?

25 MR. O'MALLEY: What I'm saying is, the vehicle

1 for Federal habeas corpus is not available to examine into
2 the collateral effect of any deprivations other than
3 Gideon violations.

4 QUESTION: But you know, in Custis, one of the
5 things, one of the values that the Court was basing its
6 decision on was the value of finality, and it said comity
7 requires us to respect that finality.

8 MR. O'MALLEY: Yes, sir.

9 QUESTION: And you are now saying that that same
10 value, and hence the same comity concern, would be
11 implicated when a State in effect says, we are going to
12 stonewall a constitutional claim, even though that claim
13 is brought within a time period that our law specifies for
14 it, and you're saying the result should be the same. Do
15 you really think the values involved are the same values
16 that Custis respected?

17 MR. O'MALLEY: If we had a situation where the
18 State actually did say, we are going to stonewall, I think
19 we would have an entirely different --

20 QUESTION: So that the only distinction between
21 that case and this case is that the State was simply
22 silent and did nothing, as opposed to announcing in
23 advance that it would do nothing. That's the only
24 distinction?

25 MR. O'MALLEY: That's the principal distinction,

1 coupled with the passage of time and the expiration of the
2 sentence.

3 Thank you.

4 QUESTION: Thank you, Mr. O'Malley.

5 Mr. Russel, we'll hear from you.

6 ORAL ARGUMENT OF ROBERT M. RUSSEL
7 ON BEHALF OF COLORADO, ET AL., AS AMICI CURIAE,
8 SUPPORTING THE PETITIONERS

9 MR. RUSSEL: Mr. Chief Justice, and may it
10 please the Court:

11 We believe that this case is controlled by the
12 constitutional principle announced by this Court in
13 Custis. Custis found that it is permissible to enhance a
14 defendant's sentence with prior convictions that were
15 themselves infected with constitutional error and, because
16 that's so, a prisoner may not bring a habeas corpus attack
17 under 2254 on his current sentence and hope to reopen the
18 validity of his prior convictions except when the prior
19 convictions are obtained in violation of Gideon.

20 QUESTION: Mr. Russel, there was a factor in
21 Custis itself that the forum that rendered judgment that
22 was considered defective was still open, and it seemed to
23 me an example of the ordinary rule that you go back where
24 the judgment was rendered if that door is still open.

25 MR. RUSSEL: Absolutely, Your Honor. I believe

1 that Custis does express the preference for the forum,
2 which is to say that all these constitutional attacks need
3 to be made in the rendering State or in the habeas corpus
4 petition that follows, while the defendant is in custody,
5 so while Custis, in that particular case the Court
6 recognized that a habeas corpus avenue was available, that
7 observation was premised on the underlying observation
8 that he was still in custody and could go back to his home
9 State and attack his convictions there.

10 Otherwise, once the convictions are final and
11 the defendant is not in custody, then the only violation
12 that the defendant can raise in a complaint about his
13 prior conviction is that the prior conviction was obtained
14 in violation of Gideon.

15 QUESTION: Well --

16 QUESTION: But in this case, the person in
17 custody is in the position where he simply can't get State
18 collateral review. There could have been another case, in
19 all respects similar to this petitioner, with the one
20 difference that a week before his custody in the State for
21 the first sentence, a week before the custody expired, the
22 State Supreme Court said, oh, you're right, there's a
23 constitutional violation.

24 It seems rather quixotic to deprive the
25 petitioner of that opportunity here, simply because his

1 sentence was served before the court got around to ruling
2 on the issue.

3 MR. RUSSEL: I have two observations for you,
4 Justice Kennedy. First, we believe that the petitioner in
5 this case could actually have obtained relief, review of
6 his earlier case while he was in custody.

7 Now, admittedly the State courts do not -- under
8 the Alhorn case we -- the cite -- the question, the answer
9 to Justice O'Connor's question was, the -- in our brief,
10 the green brief, at page 3 on footnote 3 there's the case
11 of Pennsylvania v. Alhorn, and that's the authority for
12 the proposition that once the petitioner is released from
13 custody in Pennsylvania, he cannot bring a PCR attack on
14 his sentence.

15 The -- I think what it amounts to is that
16 Pennsylvania --

17 QUESTION: Well, he couldn't file it, but could
18 it be resolved if he had previously filed it while in
19 custody? That's the question.

20 MR. RUSSEL: I believe not, Your Honor. I
21 believe that essentially Pennsylvania --

22 QUESTION: Well then, my question stands.

23 MR. RUSSEL: Yes. Yes, it does, and the
24 ultimate thing is that, irrespective of what Pennsylvania
25 law would do, the imminent release of the prisoner from

1 custody would have allowed him to file a habeas corpus
2 petition under 2254 while he was still in custody, and he
3 would have had an excellent argument, under futility, that
4 he wouldn't be able to exhaust his State remedies and
5 could have achieved a Federal review of his Strickland
6 claim back in the rendering State.

7 Now, at this --

8 QUESTION: Oh, you mean you could file a Federal
9 habeas corpus action saying, you know, my custody is about
10 to expire, the State court is a little slow, it's just
11 time for you to get into this? I've never heard -- I
12 think we would immediately say that it's been unexhausted.

13 MR. RUSSEL: Well, Your Honor, I mean, the
14 question for that --

15 QUESTION: That's a strange proposition.

16 MR. RUSSEL: The question -- I think the
17 question would be whether the State remedies were going to
18 be availing at that point and if, in fact, the State
19 remedies were going to be concluded a week later because
20 of State law, then I thought the petitioner would have an
21 avenue for relief under the Federal habeas corpus while he
22 was in custody.

23 Even if that's wrong, even -- assuming for the
24 sake of argument that I'm wrong about that, and I think
25 there will be --

1 QUESTION: Well, excuse me, would that Federal
2 relief still be available when he was out of custody? Can
3 you get 2254 when the custody is over?

4 MR. RUSSEL: No, Your --

5 QUESTION: Wouldn't you face the same problem in
6 the Federal habeas court that you faced in the State
7 habeas court?

8 MR. RUSSEL: If he had filed, Your Honor, his
9 petition while he was in custody in Federal court, then
10 under this Court's mootness analysis of *Karafas v.*
11 *LaVallee* and *Cibron v. New York*, the case would not be
12 moot, and the Court would have jurisdiction to consider
13 the merits of the petition, even though he had been
14 released from custody, precisely because this Court is
15 concerned about the future possibility of collateral
16 consequences.

17 QUESTION: What is the Pennsylvania law? Leave
18 all this Federal law out of it. Pennsylvania has some
19 kind of a guideline system, and so if you come into a
20 Federal court, the defendant's convicted, he's now going
21 to be sentenced, he has a prior conviction obtained 30 years
22 ago when he was robbing some chicken coops. He would like
23 to say that that confession was beaten out of me. It's
24 totally wrong. Can he do it, or does the judge, like the
25 Federal system after *Custis*, just say we won't even

1 listen?

2 MR. RUSSEL: I believe, Your Honor, that under
3 Pennsylvania law the judge says, we won't even listen. I
4 think that's the way it works in Pennsylvania, and so our
5 rule definitely, while calling for application of the
6 Custis principle, we certainly think that this may exclude
7 some defendants from achieving relief in State court
8 first, but we think that the line drawn in Custis is a
9 fair and equitable balancing of the competing concerns
10 between fairness and finality, and it's certainly a rule
11 that can be applied uniformly throughout the States.

12 I would like to point out that in substance our
13 position tracks very closely to the argument advanced by
14 the United States last month in the Daniels case and,
15 while we think the Government's right there, we believe
16 that this case presents even stronger reasons for
17 application of the Custis principle.

18 One chief difference is that, whereas in Daniels
19 this case came to us through an application of a mandatory
20 sentence enhancement scheme, this involved the
21 discretionary use of a prior conviction by a sentencing
22 court, and that's something that happens much more often.
23 It happens in every sentencing court in the country every
24 single day, and so to the extent the Custis majority was
25 motivated by concerns about finality, and of the burden of

1 conducting endless derivative collateral attacks, that
2 concern, those concerns are implicated to a far greater
3 degree here.

4 It would simply be unworkable if we had to go
5 investigate Strickland claims about trials that took place
6 in a different State many years ago every time a prior
7 conviction was used in a discretionary proceeding. We
8 couldn't --

9 QUESTION: Why wouldn't that be taken care of if
10 you had a requirement you have to show cause in prejudice
11 for not knocking it out earlier? You're talking about
12 stale evidence, and if you had a requirement that the
13 petitioner had to present it at the earliest opportunity,
14 then you wouldn't have the problem of people coming in 20
15 years later when they could have come in 2 years later, so
16 why doesn't your horribles -- why isn't the answer to that
17 simply, we put a timeliness requirement on?

18 MR. RUSSEL: Well, because -- certainly the
19 cause in prejudice, I think that without -- even with the
20 cause in prejudice rule there will be defendants who are
21 trying to raise the validity of their prior convictions
22 many years after the fact. Perhaps they were precluded
23 because the law didn't allow the attack. Perhaps they
24 only learned of the violation late, as in the case of a
25 Brady or a newly discovered evidence rule, and in all of

1 those cases we'll be opening up a collateral review, often
2 in a different State, and trying to discuss the relevance,
3 or the reliability of a prior conviction that was obtained
4 many years earlier.

5 QUESTION: You'll have cause in prejudice
6 proceedings --

7 MR. RUSSEL: Yes.

8 QUESTION: -- as a regular matter.

9 MR. RUSSEL: Yes.

10 QUESTION: Evidence claimed to have been found
11 later --

12 MR. RUSSEL: Yes.

13 QUESTION: -- when it was too late to do it, and
14 so forth.

15 MR. RUSSEL: And the burden of that litigation
16 would just add to the same litigation problems we're going
17 to have.

18 A second difference between our case and the
19 Daniels case is that there's a federalism component here
20 that was not present in Daniels. We think it is one thing
21 for the Federal system to say to the States, we will not
22 use your convictions for our sentencing purposes, but it's
23 quite a different thing for the Federal system to say, you
24 may not use your convictions for your sentencing purposes.

25 And finally, we note that from the transcript of

1 the Daniels argument, some members of the Court at least
2 entertained the possibility that the text of 2255 -- 2255
3 may allow for collateral attacks on grounds that are
4 themselves not mandated by the Constitution, and to the
5 extent that's a possibility, we think that's a difference
6 in our case as well, because this Court repeatedly has
7 stated that 2254 exists solely to remedy the errors of
8 constitutional dimension.

9 In short, we believe that this application of
10 the Custis rule would be totally proper here because it is
11 a workable rule, and that the respondent's position, in
12 contrast, is totally unworkable. It would subject us to
13 endless collateral reviews, and we would ask that the
14 Third Circuit be reversed on that ground.

15 While I have a few moments, I do want to
16 approach my first issue and explain why this Court can and
17 should address the main issue, even though we've raised
18 what appears to be a jurisdictional defect. When we
19 looked at this case, following this Court's decision in
20 Maleng, we expected to see the habeas corpus litigation
21 follow a particular pattern, which was that the defendant
22 would exhaust his state remedies and then he would bring a
23 habeas petition, styled as an attack on the new
24 conviction, complaining about the use of the old
25 conviction.

1 Well, what we saw instead was something that was
2 quite different. The defendant here never raised this
3 issue in State court. He brought his petition while
4 his -- excuse me.

5 QUESTION: Thank you, Mr. Russel.

6 MR. RUSSEL: Thank you.

7 QUESTION: Mr. Wade, we'll hear from you.

8 ORAL ARGUMENT OF JAMES V. WADE

9 ON BEHALF OF THE RESPONDENT

10 MR. WADE: Mr. Chief Justice, and may it please
11 the Court:

12 There are three reasons why this Court should
13 permit Federal habeas review of Mr. Coss' sentence.
14 First, there's a constitutional interest in reliability at
15 sentencing. Second, Federal habeas corpus review is
16 necessary to protect that interest. And third, the State
17 interests are adequately protected by the habeas corpus
18 doctrines of procedural default, exhaustion, and burden of
19 proof.

20 QUESTION: Would you give us some background
21 information? Did your client file a direct appeal from
22 the '86 conviction and sentence?

23 MR. WADE: I did not see that in the record,
24 Your Honor. It appears that there's some evidence that he
25 asked his counsel to --

1 QUESTION: We assume, then, that no direct
2 appeal was filed?

3 MR. WADE: That's correct, Your Honor.

4 QUESTION: And the only relief from that '86
5 sentence that was requested was the State post-conviction
6 relief petition that was filed?

7 MR. WADE: That's correct, Your Honor.

8 QUESTION: And that was filed while he was in
9 custody under the '86 proceeding?

10 MR. WADE: Yes, it was, Your Honor.

11 QUESTION: And was an answer filed to that?

12 MR. WADE: Yes, there was.

13 QUESTION: And nothing else happened, is that
14 it? He was released from custody?

15 MR. WADE: That's correct, Your Honor.

16 QUESTION: And no further action was taken?

17 MR. WADE: No further action.

18 QUESTION: And why is that, do we know?

19 MR. WADE: We do not know from this record. We
20 don't know why.

21 QUESTION: Is that typical in Pennsylvania, that
22 these things languish for years at a time?

23 MR. WADE: I wouldn't call it typical. It does
24 happen that various post-trial motions, motions to modify
25 sentences do not --

1 QUESTION: Did the Pennsylvania courts lose
2 jurisdiction to consider the post-conviction relief
3 petition once he was discharged from custody?
4 MR. WADE: Yes, they did, Your Honor.
5 QUESTION: That is the Pennsylvania law?
6 MR. WADE: That is Pennsylvania law clearly
7 forecloses this.
8 QUESTION: So this man had no -- it was final --
9 MR. WADE: It was final.
10 QUESTION: -- as a matter of Pennsylvania law at
11 the time of the 1990 charges?
12 MR. WADE: Yes, it was.
13 Turning to my first point about the
14 constitutional interest and reliability of sentencing, Mr.
15 Coss had the burden of proving that his prior conviction
16 was unreliable. He did --
17 QUESTION: Why -- does the Constitution of the
18 United States stop a State from saying, for example, for
19 the future, not for the past, new law, if you commit an
20 assault, and if you have a bad, violence-prone
21 disciplinary record in high school you're going to get a
22 longer sentence?
23 MR. WADE: There's nothing that would prevent a
24 State --
25 QUESTION: All right. Well, is there anything

1 preventing a State from saying, if you are convicted of an
2 assault, and you have an arrest record, you're going to
3 get a longer sentence?

4 MR. WADE: You can make such a law. I think you
5 always have to have the availability to show that the
6 later sentence was not --

7 QUESTION: Well, there's -- the later -- sorry.
8 I'm sorry.

9 MR. WADE: Well, I didn't expect that the later
10 sentence wasn't improperly enhanced by the --

11 QUESTION: No, I'm saying the lawyers, if you
12 commit an assault in the future, and you are a person
13 who's been arrested several times, you're going to get a
14 higher sentence.

15 MR. WADE: They do that by State recidivist
16 statutes, and those are constitutional.

17 QUESTION: Is that all right?

18 MR. WADE: That's okay.

19 QUESTION: Okay. If that's all right, then
20 what's wrong about saying, if you are going to commit an
21 assault, and you are a person who has on his record some
22 convictions, we no more care about whether those
23 convictions were right or wrong, than we do about whether
24 the arrest was right or wrong, than we do about whether
25 the discipline in high school was right or wrong.

1 We're just saying, if you are a person like
2 that, and you commit a crime in the future, you will get a
3 higher sentence. Then, why could that be
4 unconstitutional, if the first are not?

5 MR. WADE: Well, the reason it's
6 unconstitutional, where the first, I guess, would depart
7 from the statutory scheme, is that there has to be a place
8 to litigate the constitutional issue, and the --

9 QUESTION: Why does there have to be? Are you
10 saying --

11 MR. WADE: Well --

12 QUESTION: The constitutionality of that earlier
13 offense is for purposes of your present crime totally
14 irrelevant, says the state.

15 MR. WADE: Well --

16 QUESTION: All we're interested in is whether
17 you are a person who has written down on a piece of paper
18 somewhere three words, conviction, conviction, conviction,
19 and if you're that kind of a person and you go out and
20 commit another crime, you will get a higher sentence. We
21 don't care whether it was constitutional or not, any more
22 than we care about whether the arrest was right or wrong,
23 or the disciplinary --

24 MR. WADE: Well, the -- then I would say that
25 statute's unconstitutional.

1 QUESTION: Well then, is the other -- are the
2 others unconstitutional too?

3 MR. WADE: Yes, if that's --

4 QUESTION: Because?

5 MR. WADE: Because there has to be a forum to
6 litigate the reliability principle.

7 QUESTION: In other words, the Constitution of
8 the United States requires a State to litigate the
9 accuracy of any fact upon which it bases a sentence?

10 MR. WADE: The Constitution of the United States
11 doesn't want people sentenced on their subsequent cases on
12 misinformation of a constitutional magnitude, the Tucker
13 principles.

14 QUESTION: Well, what if, following up Justice
15 Breyer's hypothetical, what if the State says that this
16 conviction has been set aside, but one of our guidelines
17 says, we can take into consideration prior acts, prior
18 similar acts, and we now say that this conviction
19 represented prior acts whether or not you were convicted?
20 Is there anything wrong with that?

21 MR. WADE: Well, I would say if it's
22 misinformation of a constitutional magnitude --

23 QUESTION: Well, I'm not talking -- we're not
24 talking about constitutional magnitude.

25 MR. WADE: Okay.

1 QUESTION: The State says, here, we have a
2 witness, and the same witness who came forth at the trial
3 says, yes, he did slug this guy and slugged him five
4 times, and the defendant is allowed to contest that in the
5 sentencing proceeding, but the judge says, well, I find as
6 a fact that you did slug the guy, and so I'm taking that
7 into consideration in sentencing. Is there anything wrong
8 with that?

9 MR. WADE: I don't think there's anything wrong
10 with that, Your Honor.

11 QUESTION: Now, here, as I understand it, the
12 defendant had an opportunity to appeal from the 1986
13 conviction and sentence, and did not do so, as far as this
14 record discloses.

15 MR. WADE: That's correct, Your Honor.

16 QUESTION: Well, why isn't that the end of the
17 matter, then?

18 MR. WADE: Well, normally, ineffectiveness
19 claims, normally you'd have the same attorney on appeal,
20 and you would normally bring ineffectiveness claims in
21 post-conviction proceedings.

22 We're basing our --

23 QUESTION: You see what I was worried -- I'm
24 worried about a new Jackson-Denno line of cases now
25 applying to sentences.

1 MR. WADE: The -- we are suggesting that you
2 cannot use invalid -- misinformation of a constitutional
3 magnitude, inaccurate information, based on the cases of
4 Tucker, Burke, Townsend v. Burke, Burgitt, in sentencing
5 proceedings, because you don't want to sentence someone
6 that's not -- may not be really guilty of a prior --

7 QUESTION: Those were all failure to appoint
8 counsel cases, were they not?

9 MR. WADE: They were, Your Honor, that's
10 correct, but they also have been read to include a broader
11 principle of --

12 QUESTION: Read by this Court?

13 MR. WADE: Disputed, I think, by this Court. I
14 mean, there's some of this Court that would hold it
15 strictly to the Sixth Amendment.

16 QUESTION: Well, I mean, majority opinions of
17 the Court?

18 MR. WADE: The majority opinions seem to hold
19 it to the Sixth Amendment, I think.

20 But if we're going to have a due process
21 principle, a fairness principle at sentencing, that
22 interest has to come down to reliability through
23 fundamental fairness. Mr. Coss proved that his attorney
24 did not interview witnesses at his 1986 case, did not
25 subpoena them to trial, and the Third Circuit found that

1 the result would have been different had he not -- had
2 those things been done, had he received effective
3 assistance of counsel.

4 The State's interest -- there's a lot of, you
5 know, worry about protecting the State's interest, and
6 that's a legitimate worry, but all this Court would have
7 to be doing would be balancing the State's interests and
8 the defendant's interest in reliability --

9 QUESTION: Coss has had a string of convictions,
10 hasn't he?

11 MR. WADE: He has had a string of convictions,
12 Your Honor, I mean, if you refer to his juvenile record
13 forward.

14 This is a limited right. We're not asking for a
15 broad principle. It applies to constitutional claims and
16 constitutional claims that go to reliability. It may not
17 necessary -- all constitutional claims will not fall
18 within this rubric, and the issue of which claims do or
19 which claims don't are not at issue here. We're here on a
20 Strickland claim, which is as close as you can get to a
21 Gideon claim.

22 Mr. Coss has tried to do everything he could
23 possibly do to remedy the situation by filing a State
24 post-conviction, and then he finds himself in the
25 Pennsylvania legal system as being foreclosed from raising

1 it at the next sentencing and on post-conviction. He's
2 done everything he can do, and if he doesn't get the
3 Federal -- if he doesn't get to raise this issue in
4 Federal habeas corpus he gets to litigate it nowhere, and
5 I submit that his sentence for the 1990 conviction would
6 be improper. It's on the basis of an improper valid
7 conviction.

8 QUESTION: Well, if that's what's driving this,
9 I mean, you think the best remedy is to simply open up all
10 of these convictions to subsequent Federal habeas corpus?
11 Why not just -- if this is the horrible event that we're
12 trying to avoid, why not just adopt a constitutional rule
13 that it is not proper for a State to foreclose habeas
14 corpus relief.

15 You say that's the only practical way to
16 challenge ineffective assistance. It's just not
17 constitutional for a State that forecloses habeas corpus
18 relief to use it in subsequent sentence enhancement. That
19 would be a lot easier than --

20 MR. WADE: It may be easier, but I don't believe
21 the Constitution requires the States to have a
22 post-conviction process at all, so from that standpoint I
23 don't see how we could --

24 QUESTION: Well, but you're saying that there's
25 something unconstitutional about sentencing on the basis

1 of a prior sentence that could not be challenged in State
2 habeas.

3 MR. WADE: I'm -- yes, under the --

4 QUESTION: Okay. So just say, the State
5 sentence is simply unconstitutional, you cannot use that
6 prior conviction when there's been no ability to challenge
7 it in habeas? I'd much rather do that than muck up
8 Federal habeas corpus.

9 MR. WADE: I see that we're not mucking up
10 Federal habeas corpus, that the way that we're applying
11 the same rules in Federal habeas corpus to sentence
12 enhancement-type cases, and we're used to applying those
13 rules, it is -- and those rules protect State interests,
14 such as exhaustion, procedural default, and burden of
15 proof.

16 Much of the digging up of the record is going to
17 be on the petitioner.

18 QUESTION: Yes, but it requires Federal courts
19 to look into the matter. The rule that I propose would
20 require the States to do the job themselves.

21 MR. WADE: And --

22 QUESTION: It would be a much more efficient way
23 to handle it, it seems to me.

24 MR. WADE: I think, Your Honor, that what will
25 happen is that we are going to see a California claim in a

1 Pennsylvania Federal court. You're going to have the
2 problems of, that the State that's involved with the
3 process is not there, but I think that's -- the problem
4 with that is solved by limiting the remedy to the
5 sentence, so that for the purposes -- if we -- the
6 Pennsylvania Federal court declared a California
7 conviction unconstitutional because of a sentencing in
8 Pennsylvania, then it applies just to that sentencing. It
9 cannot really --

10 QUESTION: The inquiry still is a very difficult
11 inquiry for a Federal court in California to make. It
12 would be much more easy for a Pennsylvania court to make.

13 MR. WADE: The -- it may be difficult, but that
14 difficulty will be on the petitioner. He'll have to
15 respond to that initially, when he files his habeas corpus
16 petition.

17 QUESTION: What is the -- I'm asking because I'm
18 interested in your view. That is, a State prisoner goes
19 into Federal habeas court and he says, one of the reasons
20 I got a longer sentence was because somebody thought that
21 I hit one of the bystanders, but I want to tell you,
22 there's no evidence of that at all in the record, none,
23 zero. Can he get Federal habeas relief from that extra
24 sentence?

25 MR. WADE: Yes, I think he can get Federal

1 habeas relief from that extra sentence, and I think
2 Tucker --

3 QUESTION: Same principle as a conviction? I've
4 never seen one. I've never seen a case --

5 MR. WADE: Well, I don't know that if the Court
6 would have to make some kind of finding, like a -- in
7 Grayson, where they said, I heard you testify on the
8 witness stand and you testified falsely, I'm going to
9 enhance your sentence by 5 years because of that
10 testimony. I mean, in that type of situation then we
11 would -- if we knew that it affected the sentence I think
12 I could answer that, you know, the question the way I did,
13 yes.

14 In summary, we seek a limited and narrow rule.
15 We seek a rule that will require the petitioner, or Mr.
16 Coss, to exhaust his State claims, to meet his burden of
17 proof, and when you have a case where he's met his burden
18 of proof, has shown that his counsel was ineffective, and
19 has shown that the subsequent sentence was enhanced or at
20 least influenced by the prior improper conviction, that
21 this Court should not base the sentence on that, they
22 should not let a sentence be founded on an unreliable
23 foundation, and that the judgment of the court of appeals
24 should be affirmed.

25

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wade.
2 The case is submitted.
3 (Whereupon, at 12:00 noon, the case in the
4 above-entitled matter was submitted.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25