

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL DONALD DODD, :

4 Petitioner :

5 v. : No. 04-5286

6 UNITED STATES. :

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8 Washington, D.C.

9 Tuesday, March 22, 2005

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:12 a.m.

13 APPEARANCES:

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15 Defender, Forth Lauderdale, Florida; on behalf of the

16 Petitioner.

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18 General, Department of Justice, Washington, D.C.; on

19 behalf of the Respondent.

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P R O C E E D I N G S

(11:12 a.m.)

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

Ms. Bergmann.

ORAL ARGUMENT OF JANICE L. BERGMANN
ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

1 very often to begin with.

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

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

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

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

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

10 JUSTICE O'CONNOR: -- very often.

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

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

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

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

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

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

10 JUSTICE SOUTER: Why?

11 JUSTICE O'CONNOR: Why?

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

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

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

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

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

1 district and therefore not bind other litigants.

2 JUSTICE SOUTER: Well --

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

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

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

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

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

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

1 JUSTICE SCALIA: Yes.

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

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

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

22 MS. BERGMANN: That's --

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

24 Is there any other problem?

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

1 problem which the Government actually concedes --

2 JUSTICE BREYER: What?

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

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

15 MS. BERGMANN: With respect to first habeases.

16 JUSTICE BREYER: All right.

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

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

2 MS. BERGMANN: Well, Your Honor --

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

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

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

17 MS. BERGMANN: Yes, I understand that.

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

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

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

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

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

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

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

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

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

1 MS. BERGMANN: That's --

2 JUSTICE GINSBURG: -- that is, the
3 retroactivity?

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

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

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

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

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

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

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

23 JUSTICE SCALIA: Crazy.

24 MS. BERGMANN: Well --

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

1 statute.

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

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

6 (Laughter.)

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

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

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

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

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

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

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

20 (Laughter.)

21 MS. BERGMANN: Yes, Your Honor.

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

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

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

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

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

20 And what it appears that Congress intended was
21 that very circumstance to happen in all cases, that the
22 retroactivity of decisions of this Court be litigated in
23 cases brought within a year of finality, and then once
24 those decisions were made, then litigants under paragraph
25 6(3) would have the opportunity to file when a court of

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

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

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

1 1-year period begins to run within initial --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE O'CONNOR: Yes.

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

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

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

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

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

22 MS. BERGMANN: That's correct.

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

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

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

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

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

14 (Laughter.)

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

17 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
18 Bergmann.

19 Mr. Feldman, we'll hear from you.

20 ORAL ARGUMENT OF JAMES A. FELDMAN

21 ON BEHALF OF THE RESPONDENT

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

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

1 JUSTICE BREYER: It was very --

2 MR. FELDMAN: Our basic position is --

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

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

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

18 MR. FELDMAN: Yes.

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

21 MR. FELDMAN: It would be, but I think we came
22 to the conclusion that it probably wasn't because the
23 words, by the Supreme Court, are not only present in two
24 different places right in this paragraph 6(3), also in
25 8(2), also in 2244 and in 22 -- I think -- 64. And it

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

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

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

14 But if I could move to the --

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

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

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

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

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

25 And I think our primary submission in the case

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

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

9 MR. FELDMAN: Right.

10 JUSTICE STEVENS: That's implicit in it.

11 MR. FELDMAN: And it's not --

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

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

15 JUSTICE STEVENS: -- would be implicit.

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

22 And our primary submission --

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

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

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

10 (Laughter.)

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

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

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

4 JUSTICE SOUTER: But that is --

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: In those cases, would the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE KENNEDY: -- under your view.

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

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

17 MR. FELDMAN: I don't think --

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

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

24 JUSTICE KENNEDY: Yes.

25 MR. FELDMAN: And if the Government itself

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

3 JUSTICE KENNEDY: That's probably right.

4 MR. FELDMAN: -- the Government could.

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

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

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

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

1 6(3) .

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

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

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

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

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

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

9 JUSTICE SCALIA: Right.

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

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

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

17 MR. FELDMAN: But --

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

20 MR. FELDMAN: You could also --

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE STEVENS: There's an only --

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

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

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

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

3 JUSTICE STEVENS: See, it really --

4 MR. FELDMAN: -- that would have --

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

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE SOUTER: So far as first habe goes.

21 MR. FELDMAN: So far as first habeas goes.

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

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

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

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

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

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

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

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

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

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

5 MR. FELDMAN: I -- I --

6 JUSTICE BREYER: But is there any other
7 objection?

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

12 JUSTICE STEVENS: May I ask you --

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

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

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

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

25 MR. FELDMAN: But --

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

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

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

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

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

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

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

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

10 JUSTICE SCALIA: The other way around?

11 (Laughter.)

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

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

16 (Laughter.)

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

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

1 JUSTICE SCALIA: Sure.

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

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

7 MR. FELDMAN: Right.

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

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

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

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

25 I --

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

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

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

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

19 MR. FELDMAN: What Congress wanted --

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

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

25 I think, though, that ultimately what Congress

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

9 I think, in particular, when you're talking
10 about section 2255 motions, frequently the relief, if
11 there is any, is going to be a new trial. And there's a
12 particular cost, as the Court has recognized, of trying to
13 retry somebody many, many years after an initial
14 conviction. Sometimes it means, in effect, it's just an
15 acquittal because you can't find the witnesses or you can
16 no longer prove it beyond a reasonable doubt. And I
17 think, therefore, Congress said, all right, well if
18 there's a new right, that's a sufficiently exceptional
19 circumstance, that we can suspend that finality for a
20 brief period, but 1 year and that's all. These things
21 shouldn't come out 10 years later or 15 years later or
22 20 years later.

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

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

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

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

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

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

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Feldman.

5 Ms. Bergmann, you have 6 minutes remaining.

6 REBUTTAL ARGUMENT OF JANICE L. BERGMANN
7 ON BEHALF OF THE PETITIONER

8 MS. BERGMANN: Just several quick points.

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

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

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

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

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

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

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

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

9 (Laughter.)

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

15 JUSTICE SCALIA: I see your point.

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

1 assumed that it was part of the law of the United States.

2 I don't know. That's what I thought it was.

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

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

11 (Laughter.)

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

25 JUSTICE SCALIA: Not your fault.

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

3 MS. BERGMANN: Thank you, Your Honor.

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

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

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

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

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

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

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

10 MS. BERGMANN: Well --

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

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

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

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

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

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

7 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
8 Bergmann.

9 MS. BERGMANN: Thank you, Your Honor.

10 CHIEF JUSTICE REHNQUIST: The case is submitted.

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