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IN THE SUPREME COURT OF THE UNITED STATES

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EARTHY D. DANIELS, JR., :  
Petitioner :  
v. : No. 99-9136  
UNITED STATES :

- - - - -X

Washington, D.C.  
Monday, January 8, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:03 a.m.

APPEARANCES:  
G. MICHAEL TANAKA, ESQ., Deputy Federal Public Defender,  
Los Angeles, California; on behalf of the Petitioner.  
MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 99-9136, Earthy Daniels v. United States.

5 Mr. Tanaka.

6 ORAL ARGUMENT OF G. MICHAEL TANAKA

7 ON BEHALF OF THE PETITIONER

8 MR. TANAKA: Mr. Chief Justice, and may it  
9 please the Court:

10 Mr. Daniels was convicted of being an ex-felon  
11 in possession of a firearm. Normally, that charge carries  
12 a maximum term of 10 years. Where, however, the person  
13 has suffered three qualifying felonies, that term, maximum  
14 term goes up to life, and there's a mandatory minimum term  
15 of 15 years, which Mr. Daniels was sentenced to.

16 Where those convictions are both  
17 unconstitutional and unreliable, the resulting sentence is  
18 likewise unconstitutional, and the issue before this case  
19 is whether section 2255 provides a forum and remedy to  
20 address that unconstitutionality of the sentence.

21 QUESTION: May I ask whether the record shows  
22 whether the petitioner challenged those '78 and '81  
23 convictions in a timely manner on direct appeal at the  
24 State and/or Federal level?

25 MR. TANAKA: I don't believe that's in the

1 record. There is no indication that he has challenged  
2 those at the State level.

3 QUESTION: You know, it seems to me that the  
4 opportunity to make those challenges very likely occurred  
5 when the convictions became final.

6 MR. TANAKA: That's true, Your Honor, and I'm  
7 sure that there was, in California, a procedure for direct  
8 appeal and, lacking that, also collateral review of those  
9 convictions, but that's not what's at issue today. At  
10 issue today is its use in the Federal sentencing  
11 procedure, so --

12 QUESTION: Well, why shouldn't there be a  
13 measure of finality here? I mean, you know, you can go  
14 back and argue was it constitutional, was it accurate, but  
15 also there's an interest in getting things done within a  
16 certain time frame.

17 MR. TANAKA: I agree, Your Honor, and there --  
18 but there is finality with respect to those State  
19 convictions. The State of California, he served those  
20 convictions, he served the prior terms, he served his  
21 imprisonment. Those convictions are final as to the  
22 California judgment.

23 QUESTION: Well, are there statutes of  
24 limitations for habeas actions as well?

25 MR. TANAKA: Certainly there are.

1                   QUESTION: And that being the case, this is an  
2 end run around those, it seems to me.

3                   MR. TANAKA: No, I don't believe so, Justice  
4 O'Connor. The statute of limitation goes to the  
5 underlying conviction, and certainly he had his chance to  
6 challenge those, and that time has long since passed, and  
7 we're not challenging that judgment, that conviction, but  
8 when that conviction is used, again, to increase his  
9 Federal sentence, then necessarily the Federal court must  
10 look at its reliability, otherwise it's a violation of due  
11 process.

12                  QUESTION: Mr. Tanaka, even if you're right that  
13 there's no bar from challenging the Federal, the abuse in  
14 the Federal proceeding, shouldn't the Federal court at  
15 least take into account, in determining whether 2255  
16 really is warranted, that these matters could have been  
17 raised earlier in the State proceedings on direct appeal  
18 or on collateral attack?

19                  MR. TANAKA: No, I don't believe so, Your Honor.  
20 Again, the Federal interest is totally different than the  
21 State interest. The State has no --

22                  QUESTION: Why shouldn't the Federal interest  
23 include did this person have a reason for not bringing  
24 this up earlier? I mean, one can imagine cases where you  
25 might try to knock out for Federal sentencing purposes an

1 earlier State conviction and say, there was a procedural  
2 impediment, or there was a reason I didn't know about this  
3 until much later, like Brady material that wasn't turned  
4 over? Shouldn't there be at least that requirement, that  
5 for the 2255 purpose you would have to show a good reason  
6 for not raising it earlier in the State courts?

7 MR. TANAKA: I agree that that would explain,  
8 and there certainly would be cases where that would  
9 explain why it wasn't raised, and that perhaps presents a  
10 more compelling case, but I don't think it's a  
11 prerequisite, and the reason for that is --

12 QUESTION: But you're -- but I wanted just to be  
13 clear on one thing. You're not saying in this case that  
14 there was any special reason why these matters could not  
15 have been raised earlier?

16 MR. TANAKA: That's correct, I'm not making any  
17 claim that he was prevented by something external to  
18 himself that prevented him from raising this in State  
19 court, but I don't think the argument depends on that.  
20 Again --

21 QUESTION: You said a few times that the -- this  
22 is just a Federal matter, it's final as far as the law of  
23 the State is concerned. Does the State of California have  
24 an interest in the integrity that's accorded to its  
25 judgments in this proceeding?

1                   MR. TANAKA: The State of California has an  
2 interest in the integrity of its judgments. Where -- and  
3 I guess the State of California has some perhaps minimal  
4 interest in whether its judgment is used conclusively as a  
5 Federal sentencing predicate.

6                   QUESTION: Well, I think it would have a very  
7 strong interest. It has its own three-strikes rule, as I  
8 understand, and is this man a resident of the State of  
9 California? I assume he is. It seems to me it has a very  
10 strong interest in having its judgments of criminal  
11 convictions respected.

12                  MR. TANAKA: Well, we --

13                  QUESTION: And to say that, oh, this is just a  
14 Federal matter, it's final so far as the law of the State  
15 is concerned, I'm not sure is a complete answer.

16                  MR. TANAKA: Well, it is respected in the sense  
17 that it has a presumptive validity, and certainly this  
18 Court's case in Custis established that fact, and no one's  
19 suggesting that we go behind that validity once it's  
20 presented, but there's -- I don't know that it has an  
21 interest in a conclusive-type validity, especially where  
22 it's being used as a Federal sentencing predicate. Now --

23                  QUESTION: Well, supposing that there's a  
24 thought, you win on your ability to challenge, and it's  
25 thought there's necessary to be a evidentiary hearing.

1     What incentive does the State have at that point to come  
2     in and try to show that the conviction was properly  
3     obtained?

4             MR. TANAKA:  I don't know that the State would  
5     necessarily be a party.  I don't believe they have very  
6     much incentive --

7             QUESTION:  Then it's a very strange proceeding.  
8     You're challenging the judgment of a State, and yet the  
9     State isn't a party?

10            MR. TANAKA:  But it's the Federal Government  
11    that's seeking to use that judgment as a Federal  
12    sentencing predicate to increase the Federal sentence in  
13    Federal court.

14            QUESTION:  And if you prevail and you go ahead  
15    and have the judgment declared invalid, I -- what would  
16    happen if the State in a subsequent proceeding tried to  
17    use those convictions for its own three-strikes rule?

18            MR. TANAKA:  I would assume that the State could  
19    validly use those convictions in its own three-strike  
20    rule, because the Federal sentence, the Federal procedure  
21    would just invalidate the State conviction, or the use of  
22    the State conviction, not the State conviction itself, as  
23    a means to lengthen the Federal sentence.  The --

24            QUESTION:  Well, if the State uses the  
25    conviction, it's -- the conviction is just as unreliable



1     when the State uses it as when the Feds use it, and I take  
2     it the reason that you concede that the State could use it  
3     is that there was an understanding, or we have to assume  
4     that there was an understanding on the part of the  
5     prisoner that this kind of collateral use and enhancement  
6     of later sentences might be a consequence of that  
7     conviction, and yet he did nothing about it.

8                 Is that essentially your theory? In other  
9     words, he knew what the risks were, and he did not take  
10    any steps to alleviate those risks by bringing a State  
11    collateral attack or by going on with his appeal or  
12    whatnot. Is that essentially your theory?

13                MR. TANAKA: Certainly that's part of it, but  
14    the -- now the --

15                QUESTION: Why doesn't -- I'm sorry. Go ahead.  
16    You -- That was part of it.

17                MR. TANAKA: Yes, I agree --

18                QUESTION: What's the other part?

19                MR. TANAKA: Well, the other part would be that  
20    the State would obviously not be bound by anything that  
21    happened in the Federal proceeding.

22                QUESTION: Well, no, but let's forget Federal  
23    proceedings for a moment. If we just have a State  
24    proceeding and the State is going to use that supposedly  
25    unreliable conviction as a basis for enhancement following

1 a subsequent conviction, nothing unfair about that, I take  
2 it, on your view, because the prisoner knew that such use  
3 could be made of it, and the prisoner let the time for  
4 attacking the conviction pass. That's essentially your  
5 theory?

6 MR. TANAKA: That could well be. There could  
7 well be due process problems associated with its  
8 subsequent use in the State, but it might be that those  
9 problems are --

10 QUESTION: Well, what are they? I mean, I -- if  
11 it's not unfair for the State to use it, despite the  
12 assumption of its unreliability, what would a -- what  
13 other due process problem might arise at the State level?

14 MR. TANAKA: That would be the problem.

15 QUESTION: That would be the problem, and --

16 MR. TANAKA: But it might be that the problem  
17 doesn't rise to a large enough level that the State  
18 necessarily violates due process by refusing to litigate  
19 that anew. In other words --

20 QUESTION: Well, the State -- but I -- the  
21 theory of my question was, he in effect was on notice that  
22 there might be a subsequent use of the conviction for  
23 enhancement purposes. He had an opportunity to litigate.  
24 He didn't litigate. Therefore, it is not unfair, in the  
25 due process sense, for the State to use it, and I thought

1       that was probably what underlay your suggestion that the  
2       State could use it for enhancement purposes.

3               MR. TANAKA: I agree with that.

4               QUESTION: All right. Now, why can't the Fed --  
5       why can't a Federal court use it for enhancement purposes?  
6       He was on notice that there might be a later enhancement.  
7       He did nothing about it. The same reasoning applies at  
8       the Federal level, doesn't it?

9               MR. TANAKA: The -- there is a -- there is no  
10      problem with notice, and -- but that again suggests the  
11      concept of waiver, or maybe even sandbagging.

12              QUESTION: Well, not waiver. Not -- we're not  
13      talking about waiver. We talking about, I think, the fact  
14      that he had an opportunity to litigate it. As you so --  
15      as you conceded a moment ago, there are statutes of  
16      limitations that govern these things in most instances.  
17      You've got to litigate within that time or it's too late,  
18      so he let, in effect, his opportunity to litigate pass.

19              Now, if that -- and therefore it's not unfair,  
20      in a due process sense, to use it against him even if he  
21      does claim later that it was unreliable.

22              Now, if that is a sound argument with respect to  
23      its use for enhancement purposes at the State level, why  
24      isn't it an equally good argument with respect to its use  
25      in this case at the Federal level?

1           MR. TANAKA: I'm sorry, perhaps I didn't  
2 understand the predicate of your question when I first  
3 answered. I believe I answered that there is a due  
4 process problem with using the unreliable conviction  
5 whether you're using it to enhance a State sentence or a  
6 Federal sentence.

7           QUESTION: Then what's left of the statute of  
8 limitations that you concede can be applied?

9           I thought you conceded that the statute of  
10 limitations on this kind of litigation could, consistently  
11 with due process, be applied at the State level. If you  
12 did not concede that, then I will withdraw my question.

13          MR. TANAKA: Okay. It could be applied at the  
14 State level to the initial State conviction. Okay, again,  
15 if, analogous to this case, that conviction was used in a  
16 State proceeding to enhance a subsequent State sentence,  
17 then there might -- there would be a due process right to  
18 examine that conviction anew --

19          QUESTION: Let me ask you --

20          MR. TANAKA: -- with respect to the enhancement  
21 provision --

22          QUESTION: With respect to, at the State level,  
23 let me ask you one more question. Let's assume that the  
24 State had a statute and the statute were made -- was  
25 explained to the defendant at the time of his State

1 sentence, and the statute read as follows:

2 This conviction can be used to enhance sentences  
3 following later convictions. If you wish to challenge the  
4 validity of this conviction, you must challenge it within  
5 1 year, or it's too late.

6 Let's assume that the State had such a statute,  
7 that was explained to the prisoner at the time of the  
8 first sentence, and he didn't litigate within 1 year. The  
9 State then wants to use it to enhance following a  
10 subsequent conviction. Is there a due process problem in  
11 the State's use of it without an opportunity to challenge?

12 MR. TANAKA: There well could be, if there's  
13 some unreliability of the conviction.

14 QUESTION: So there can -- I take it your  
15 theory, then, is that no amount of warning in the world  
16 will ever be enough to allow the State or the Federal  
17 Government to treat the first conviction with finality?

18 MR. TANAKA: No. There -- as long as there's a  
19 procedure, a substantive due process procedure for  
20 litigating that, it could be that, consistent with due  
21 process, there could be some limitations and in that case  
22 that might well be one of them.

23 QUESTION: Well, what about my limitation?  
24 You've got a year to challenge this if you want to  
25 challenge it, and if you don't challenge it within the

1 year it's too late and it can used for enhancement  
2 purposes, and the year expires, it's going to be used for  
3 enhancement purposes, he wants to challenge it, and the  
4 State says no, it's too late, the year is over. Is that  
5 consistent with due process?

6 MR. TANAKA: I think it well could be.

7 QUESTION: Okay.

8 QUESTION: I assume that your theory would apply  
9 not just to enhancement questions but also to any other  
10 disabilities attaching to the prior criminal conviction.  
11 Specifically, I believe that California, like many States,  
12 disqualifies convicted felons from voting. Now, could  
13 your client have presented himself at the registration  
14 booth for voting and, when told that he could not vote  
15 because he was a felon, could he say, oh, but that  
16 conviction was invalid and I want an opportunity to  
17 challenge it?

18 MR. TANAKA: No, I don't believe so, Your Honor.

19 QUESTION: Why not?

20 MR. TANAKA: The difference is this. In this  
21 case -- due process is obviously a flexible concept, and  
22 what's at stake here is 1) an automatic increase in the  
23 sentence and 2) a dramatic increase in the sentence. The  
24 sentence went from presumptively 7 years to more than  
25 double, to a min -- to a minimum of 15 years.

1           QUESTION: The right to vote is worth something,  
2 too. We protect that with many due process and other  
3 restrictions upon what the State can do. Why shouldn't he  
4 have the right to -- you're saying you cannot use the  
5 conviction for anything except sending him to jail upon  
6 the first conviction. If you say you can't use it to  
7 increase his sentence on the later conviction, I don't see  
8 why you also don't have to say you can't use it to disable  
9 him from voting.

10           MR. TANAKA: Oh, I think there's certainly a  
11 greater liberty interest with respect to imprisonment,  
12 but --

13           QUESTION: Mr. Tanaka, in your last series of  
14 answers you seem to be departing from what I thought was  
15 the clear line you took in your brief.

16           That is, for all State purposes you are  
17 accepting that this sentence is good, and you are  
18 distinguishing the Federal enhancement from any other --  
19 from any State law consequence, but now in your answer to  
20 the questions that Justice Souter and Justice Scalia just  
21 asked you seem to be saying it's not just the Federal  
22 enhancement purpose that you're questioning where this can  
23 be brought up but also in the State proceeding as well.

24           MR. TANAKA: No, I don't believe so. Obviously  
25 the only fact at issue here is the -- is its use in the

1 Federal proceeding, and --

2 QUESTION: You kept saying in your brief that  
3 you're not touching the State consequences of this, that  
4 those are a given, and you accept those, but your answers  
5 here depart from that view, so which is it?

6 MR. TANAKA: I'll stick with what I said in the  
7 brief. We're not challenging any State use of this  
8 conviction.

9 QUESTION: But we're trying to understand why  
10 that should be. I -- my understanding of your submission  
11 is that there is a Federal constitutional right under the  
12 Due Process Clause not to have this conviction used in  
13 Federal court. Why is -- why don't you make the same  
14 argument if it's a State three-strike conviction case?

15 MR. TANAKA: One might --

16 QUESTION: It's a Federal due process right not  
17 to have what you call an unreliable or a false conviction  
18 used -- again, it's the same analysis, same Constitution.  
19 What's the difference?

20 MR. TANAKA: And one might, if one were arguing  
21 that case, argue that, and I think there -- but there are  
22 certainly different considerations there, because if the  
23 Federal court is reviewing the State court's use of its  
24 own recidivist provisions, then there are more comity and  
25 finality questions that aren't at issue here.



1           That's what distinguishes this case, is that all  
2 we're doing in this case is looking at the Federal court  
3 examining a Federal sentence under 2255, which explicitly  
4 provides for that review. There's no intrusion in the  
5 State court judgment, and that's the position I took in  
6 the brief and that's the position I take here, that the  
7 State judgment, we're leaving that alone.

8           Nothing that the Federal district court's going  
9 to do in granting that 2255 motion and finding this  
10 conviction too unreliable to automatically sentence this  
11 man to an additional 8 years in prison is going to affect  
12 that State court judgment.

13           QUESTION: What I'm trying to have -- my problem  
14 is -- I agree with you basically. You realize that these  
15 things should be challengeable in a sentencing proceeding.  
16 I wrote an opinion to that effect in *Palleo*, and it was  
17 reversed by this Court, so now what do I do?

18           (Laughter.)

19           MR. TANAKA: Well, you use your --

20           QUESTION: I mean, my problem is, quite  
21 honestly, that I don't see any way, if you're not -- I  
22 think these things -- I think a prior should be  
23 challengeable in the sentencing hearing, all right?  
24 That's clear, simple, done all the time, no problem, fair.  
25 All right.

1           No, but there's an opinion that says no. Now,  
2   given that opinion, I think I'm stuck, unless I were to  
3   accept this argument that the -- I see you make an  
4   argument about the constitutionality, which I think is  
5   interesting, but I'm not sure about that one. Is there  
6   anything else? If I don't accept that constitutional  
7   point, if I would have been with the dissenters in  
8   Custis -- but I believe in stare decisis. I'm stuck,  
9   right?

10           MR. TANAKA: Well, if you don't accept that  
11   constitutional point that the use of an unreliable prior  
12   conviction that doesn't implicate the person -- doesn't  
13   implicate the person's guilt can be automatically used to  
14   dramatically increase the sentence conclusively, then  
15   we're both stuck, unless you can use your powers of  
16   persuasion to change the Court's decision, but --

17           (Laughter.)

18           MR. TANAKA: That's certainly the genesis of  
19   this argument.

20           QUESTION: May I just ask one question? Are you  
21   really making a constitutional argument, or are you  
22   arguing for a construction of section 2255, or is it both?

23           MR. TANAKA: It's both. Certainly the case  
24   depends on a construction of 2255 to remedy what is an  
25   obvious constitutional violation. By its plain language,

1     2255 allows someone sentenced in Federal court to  
2     challenge that sentence as being unconstitutional, and it  
3     gives the sentencing court the power to correct that  
4     sentence as, in fact, a constitutional --

5             QUESTION: But does your position have to rest  
6     on the premise that the sentence would be unconstitutional  
7     if the State conviction were -- that the Federal sentence  
8     would be unconstitutional if the State sentence were  
9     invalid?

10            MR. TANAKA: Not just invalid --

11            QUESTION: You see, it seems to me it would be  
12     theoretically possible to say, for a legislature to say,  
13     we wanted to enhance a sentence if there's a State  
14     conviction out there, and we don't care whether it's  
15     obtained fairly or not. The fellow was at least indicted  
16     and he went to jail for a while, and that's enough for us.  
17     Is it your view that they could not do that?

18            MR. TANAKA: Yes. Where it can be shown that  
19     that conviction doesn't reliably indicate the man's guilt  
20     I believe -- well, it's my position that that violates the  
21     Constitution and the Due Process Clause.

22            QUESTION: Mr. Tanaka, I have a question  
23     concerning a point you made in your brief. You said that  
24     the 2255 forum is accustomed to dealing with questions of  
25     this nature, and you distinguished that from the

1 sentencing forum in Custis, but it seems to me it's the  
2 same forum. It's the same district judge, just a  
3 different proceeding but in the same court, so I did not  
4 follow what you were getting at when you were saying that  
5 the 2255 forum is accustomed to dealing with these kinds  
6 of questions but the sentencing judge is not, when it's  
7 one and the same judge.

8 MR. TANAKA: Well, the point was that normally a  
9 sentencing procedure is rather quick and summary, whereas  
10 a proceeding on a 2255 case, there might be an evidentiary  
11 hearing and the scheduling and so forth would be  
12 different, and also there are rules that govern 2255 cases  
13 that don't govern sentencing, and so it's more  
14 appropriately placed there.

15 But the major point is that 2255 expressly  
16 provides for this type of procedure, whereas you know,  
17 obviously there's nothing in the sentencing statute that  
18 likely, likewise provides for it.

19 QUESTION: Mr. Tanaka, you say that what you  
20 want to challenge is State court convictions that,  
21 judgments that do not reliably indicate guilt. Well, I  
22 take it you would allow a challenge on the basis that a  
23 Miranda warning wasn't given, and that there was some --  
24 it was not harmless error, and yet a Miranda warning  
25 really has nothing to do with guilt.

1           I mean, there are certainly different  
2   constitutional claims which can be vindicated in the  
3   proper forum but don't really bear on guilt or innocence,  
4   so are you limiting your challenges to those which clearly  
5   affect guilt, or to any constitutional claim that would be  
6   sustained if timely brought?

7           MR. TANAKA: No, Mr. Chief Justice. I believe  
8   that the due process analysis leads to the conclusion that  
9   you can only challenge convictions that don't reliably  
10   indicate guilt. There's not an identity between a due  
11   process violation and a constitutional violation.

12           If the Court has no further questions, I'd like  
13   to reserve the remainder of my time for rebuttal.

14           QUESTION: Very well, Mr. Tanaka.

15           Mr. Dreeben, we'll hear from you.

16           ORAL ARGUMENT OF MICHAEL R. DREEBEN

17           ON BEHALF OF THE RESPONDENT

18           MR. DREEBEN: Mr. Chief Justice, and may it  
19   please the Court:

20           In *Custis v. United States* this Court made clear  
21   that at a Federal sentencing proceeding a defendant who  
22   faces recidivist sentencing may not bring a constitutional  
23   challenge to the validity of the underlying enhancement  
24   conviction. We submit that the same principle applies  
25   where it --

1                   QUESTION: With certain exceptions.

2                   MR. DREEBEN: With the exception of a conviction  
3 that was entered in violation of Gideon v. Wainwright,  
4 that's correct, Justice Stevens.

5                   QUESTION: You think that's the only such  
6 exception?

7                   MR. DREEBEN: I think that that is the line that  
8 the Court drew in Custis, Justice O'Connor. It rested  
9 that on a variety of considerations. The first was that  
10 the Court's jurisprudence had recognized Gideon violations  
11 as a unique constitutional defect that rose even to the  
12 level of a jurisdictional defect.

13                   The second two reasons I think are the ones that  
14 most clearly explain the rule that we're espousing here.

15                   QUESTION: Well, how about a so-called Brady  
16 violation, where the facts aren't known until maybe  
17 immediately before the sentencing proceeding in the new  
18 crime?

19                   MR. DREEBEN: Well, there are two distinctions  
20 between that kind of a situation and the Gideon situation.  
21 The one that I think is most applicable to the majority of  
22 cases that are going to come up in this context is that a  
23 Brady violation is a very fact-intensive inquiry. It  
24 can't be resolved, as the Court noted in Custis with  
25 respect to a Gideon claim, simply by looking at the

1 judgment or the judgment role and determining whether the  
2 defendant had counsel.

3 It requires instead a fairly intricate analysis  
4 of whether the Government suppressed and withheld  
5 information that the defendant couldn't with due diligence  
6 have gained access to, and whether there was resulting  
7 prejudice to the defendant as a consequence, and the  
8 administrative costs of adjudicating that are far more  
9 substantial and very intrusive into the sentencing process  
10 as compared to Gideon.

11 QUESTION: Well, what about a DNA claim in a  
12 death case coming up later?

13 MR. DREEBEN: Well, the second -- I think,  
14 Justice O'Connor, that is the second distinction in your  
15 hypothetical, that the hypothetical posits that this was  
16 information about a constitutional claim that could not  
17 with due diligence have been obtained, I'm assuming within  
18 any time for bringing an appropriate appeal or collateral  
19 challenge.

20 The capital context is unique in that area, I  
21 think, and I'm going to set it aside, because questions of  
22 actual innocence in the capital context would be dealt  
23 with under the Eighth Amendment and would implicate  
24 constitutional principles that aren't broadly applicable.

25 But as to the generality of sentencing cases, I

1 think that the basic rule is that there is a system in  
2 place to challenge convictions that balances two  
3 fundamental interests. One is in finality, the other is  
4 in fundamental fairness.

5 Those two interests have always been  
6 accommodated not by giving one total sway over the other,  
7 but by saying that in certain contexts there are claims  
8 that are available and they may be brought, and if they  
9 are brought in a manner that's compatible with the  
10 procedural limitations such as statute of limitations,  
11 procedural default, exhaustion, Teague v. Lane, if they  
12 surmount those hurdles, then the interests of vindicating  
13 the Constitution take precedence over the interests of  
14 finality.

15 But if those procedural hurdles have not been  
16 met, and the defendant did not bring his claim in  
17 accordance with the procedures that are set out, then  
18 society is entitled to take that conviction as  
19 conclusively final, and any further remedy that would be  
20 available would have to come from the executive branch --

21 QUESTION: Do you make that argument even if  
22 it's a Gideon violation? In other words, say that it's a  
23 final sentencing, the defendant had either no counsel or  
24 inadequate counsel, and didn't learn that there was a  
25 Gideon violation before and he'd already served his



1 sentence for the crime where there was the Gideon  
2 violation, could he raise that or not?

3 MR. DREEBEN: Under this Court's decision in  
4 Custis he may at the Federal sentencing raise it, and I --

5 QUESTION: No, no, not at the Federal  
6 sentencing. Say he gets sentence, and then by mistake the  
7 sentencing judge relies on a prior State conviction which  
8 was invalid because there was a Gideon violation, but  
9 nobody called that to the attention of the court.

10 MR. DREEBEN: That would be a procedural  
11 default, Justice Stevens, and I think it would bar the  
12 defendant from coming back even if there were otherwise a  
13 right to come back under applicable procedure.

14 QUESTION: Would that be true even if the  
15 sentence had not been served where there was a Gideon  
16 violation?

17 MR. DREEBEN: The sentence of the -- the  
18 underlying conviction --

19 QUESTION: This would always have to have been  
20 served, wouldn't it?

21 MR. DREEBEN: Well, if the underlying conviction  
22 sentence had not been served, then the defendant's remedy  
23 would be to go back into the jurisdiction that entered it  
24 and see if he can comply with --

25 QUESTION: He couldn't then go in on a 2255 and

1 call that to the court's attention and get relief, in your  
2 view?

3 MR. DREEBEN: I don't think so, Justice Stevens,  
4 because he has the right to do that under Custis at the  
5 Federal sentencing proceeding itself, and the failure to  
6 bring that claim at a timely point in the proceeding, when  
7 it is available, would constitute a default, and then he  
8 would be left with the argument --

9 QUESTION: Even if he had -- even if it was  
10 inadequate assistance of counsel?

11 MR. DREEBEN: Well, inadequate assistance of  
12 counsel isn't even permitted to be brought under this  
13 Court's decision in Custis with respect to the underlying  
14 conviction.

15 With respect to the conviction that -- the  
16 Federal conviction that was entered, ineffective  
17 assistance of counsel claims typically are not brought in  
18 the original sentencing court that imposed the conviction  
19 because the defendant typically has the same counsel and  
20 because the facts haven't been developed, and therefore  
21 there is no procedural default typically in bringing an  
22 ineffective assistance claim directed to the Federal  
23 conviction in a section 2255 proceeding.

24 But as to the underlying enhancement conviction,  
25 which is what we are talking about here, petitioner is

1 saying that I suffered from ineffective assistance of  
2 counsel with respect to a 1978 robbery conviction that is  
3 now being used to enhance my 1992 Federal sentence, and I  
4 should have the right, on 2255, to litigate that 16-year-  
5 old, or 19-year-old claim, and we submit that the Court's  
6 decision in Custis says you can't do that at the Federal  
7 sentencing and you therefore cannot do that on the 2255  
8 proceeding.

9 QUESTION: Yes, but it's the therefore part that  
10 I guess is giving us all the trouble, and the reason it's  
11 giving me trouble is, number 1 -- of course, I was a  
12 dissenter in Custis, so maybe I'm looking for trouble --

13 (Laughter.)

14 QUESTION: -- but the Court in -- the majority  
15 in Custis left the question open whether there could be  
16 another means of challenge other than the challenge at the  
17 Federal sentencing proceeding as such.

18 And number 2, textually, what the petitioner  
19 wants to do can be fitted within the terms of 2255, and  
20 the issue I guess boils -- so I think it's -- I don't  
21 think Custis is controlling, and what the issue boils down  
22 to for me is this. I will -- I accept your argument that  
23 the balance struck on the issues of finality and fairness  
24 require a point at which so far as the service of the  
25 original sentence, the '78 sentence in your example is

1 concerned, the litigation has got to stop.

2 But it seems to me that that balance is entirely  
3 different when you get into the subsequent proceeding in  
4 which, for example, what is at stake in the finality  
5 fairness argument is not, say, a sentence of 5 years or 10  
6 years as under the first conviction, whatever it was, but  
7 a sentence potentially of life, and when suddenly the  
8 stakes change that radically in the Federal proceeding,  
9 then the old finality-fairness balance simply doesn't  
10 apply any more because the terms have changed, and when  
11 the terms change radically, as they have here, why isn't  
12 it possible to reassess that balance and say, okay, now,  
13 even though you couldn't litigate for State purposes, you  
14 can litigate for Federal purposes?

15 MR. DREEBEN: The fundamental problem with that,  
16 Justice Souter, is that those same interests are fully at  
17 stake in the Custis situation itself. When this Court  
18 said --

19 QUESTION: Yeah, but Custis -- that may be true,  
20 but number 1, Custis depended in part on a statutory  
21 construction reason. They looked at the text of the  
22 sentencing enhancement statute and, number 2, Custis left  
23 this question open. The Court said --

24 MR. DREEBEN: If I could address that --

25 QUESTION: -- we're not telling you what we'll

1 do in this subsequent situation, but they left it open.

2 MR. DREEBEN: That actually is not the question  
3 that the Court left open in Custis, Justice Souter. What  
4 the Court left open in Custis is the following scenario.

5 Take Custis himself. After Custis is sentenced,  
6 the question that was raised in Custis was, could he then  
7 go back to the State court that had entered the  
8 enhancement conviction and obtain a judgment that that  
9 conviction was constitutionally invalid, and then come  
10 back to the Federal sentencing court and apply for  
11 reopening of his Federal sentence, and the crucial  
12 difference between that scenario and the scenario that's  
13 presented here is that the litigation over the validity of  
14 that sentence would take place in the State court.

15 QUESTION: Oh, you're entirely right, but  
16 didn't -- I don't have it in front of me. Didn't the  
17 Court also refer to the possibility of litigation on  
18 Federal habeas?

19 MR. DREEBEN: Litigation on Federal habeas  
20 corpus that attacked the State sentence.

21 QUESTION: Right, but the only basis on which  
22 there could be Federal habeas litigation would be Federal  
23 habeas litigation in connection with the later Federal  
24 sentence, even though the subject of that litigation might  
25 be, or would be the validity of the earlier State

1 sentence --

2 MR. DREEBEN: No, I don't think that that is --

3 QUESTION: -- and therefore it seems to me this

4 was left open.

5 MR. DREEBEN: Well, I don't think that that's

6 what the opinion says, because it talks about Custis

7 having been in custody still on his State sentences.

8 QUESTION: The last sentence of the opinion

9 says, may attack his State sentence in Maryland or through

10 a Federal habeas review.

11 MR. DREEBEN: Correct.

12 QUESTION: Okay.

13 MR. DREEBEN: And Federal habeas review is

14 Federal review under 2254 --

15 QUESTION: Four, right.

16 MR. DREEBEN: -- that attacks the State

17 sentence. This is a case under section 2255, attacking

18 the constitutionality of the Federal sentence.

19 QUESTION: Well, did --

20 MR. DREEBEN: The necessary --

21 QUESTION: Didn't we confine it to 2254?

22 MR. DREEBEN: The language says, I think

23 accurately, just what Justice Stevens read, and I would

24 interpret Federal habeas review in that context to mean

25 Federal review under 2254 attacking the prior State

1 sentence.

2 QUESTION: It certainly does include that. I  
3 don't know that it was limited.

4 MR. DREEBEN: If it were not limited to that, it  
5 would be odd to say that the defendant could then come and  
6 apply for reopening of this Federal sentence, because  
7 that's exactly what section 2255 is all about. It is  
8 saying there's something wrong with the Federal sentence  
9 that was imposed, and we know from Custis --

10 QUESTION: But the reason may be the textual  
11 reason in Custis, going to the text of the enhancement  
12 statute itself. It may be that we wanted sentencing,  
13 Congress wanted sentencing to be clean and simple and  
14 leaving any later attack to be worked out afterwards. In  
15 other words, get him shut away and then let him litigate  
16 as long as he wants to.

17 MR. DREEBEN: But the theory behind section 2255  
18 litigation in this case is that there was a constitutional  
19 violation at the Federal sentencing.

20 QUESTION: Right.

21 MR. DREEBEN: Because sentence was imposed based  
22 on a conviction that, although facially valid and never  
23 set aside by any court, might be unreliable if one took  
24 the time to unpack the claim that petitioner is now making  
25 and get the records and litigate it and determine whether

1     it's valid or not, and the Custis court held there is no  
2     constitutional violation in imposing sentence without  
3     adjudicating that claim and, further, by leaving open the  
4     question that we've been discussing, the Court made clear  
5     that it's not inherently indispensable that there be any  
6     place left to litigate a claim that is based on a  
7     conviction that is 16 years old in this case, 19 years  
8     old, that the two convictions the petitioner is raising.

9             QUESTION: Let's assume, though -- and I realize  
10    you don't concede this, of course, but assume that Custis  
11    did leave open the possibility of this litigation. Would  
12    you go back to the, we'll say the balance argument?

13            My point is that the balance between finality  
14    and fairness changes radically when you go from the  
15    limited jeopardy of imprisonment under the State  
16    conviction to the potentiality here of life imprisonment,  
17    and if the balance is that radically affected, why  
18    shouldn't there be, for due process purposes, an  
19    opportunity to litigate at the Federal level, even though  
20    the State proceeding is past and final for State purposes?

21            MR. DREEBEN: Justice Souter, I think the  
22    fundamental answer to that question goes back to the  
23    interests in finality that have been struck in this  
24    Court's post-conviction jurisprudence generally. There is  
25    a recognition that there are fundamental interests in



1     having an unconstitutional conviction overturned, but they  
2     are counterbalanced by other interests such as the  
3     fairness and reliability of the adjudication of that  
4     claim.

5             Now, here we are talking about a claim by  
6     petitioner that when he entered his guilty plea 16 years  
7     ago and 19 years ago he wasn't adequately informed about  
8     one of the elements of the offense and therefore, he says,  
9     he didn't enter a knowing and voluntary guilty plea.

10            Now, that's the kind of claim that can routinely  
11     be made on direct appeal or upon an immediate  
12     post-conviction attack, and it's made with the State that  
13     entered the judgment as a party, and the State can come  
14     back and say we have access to these records, they're very  
15     easy to determine, you can see that the judge went over  
16     him, the various elements, or his lawyer counseled him  
17     about the various elements of the crime and the court can  
18     reach a reliable adjudication promptly on whether that  
19     conviction is valid.

20            A defendant who doesn't challenge his guilty  
21     plea in that fashion at the time that it's available to do  
22     so is essentially saying, I struck a deal with the  
23     Government, the deal allows me perhaps to reduce my time  
24     of imprisonment compared to what it would have been if I  
25     had gone to trial and lost, as I probably would have been,

1 would have lost, therefore I'm going to enter a guilty  
2 plea and establish finality, and I'm not going to take an  
3 appeal, because if I appeal and win at this juncture I'll  
4 probably be back right in the position that I started in,  
5 namely, facing a trial and a potentially longer sentence.

6 QUESTION: And it's perfectly fair for due  
7 process purposes or any others, on any other fairness  
8 standard, to hold the prisoner to that bargain. He knew  
9 what the terms were. The trouble is now, the terms have  
10 changed, and it's not only very difficult to litigate this  
11 later, but it's also very difficult to stay in prison for  
12 life, and when the terms have changed, the calculus that  
13 says, or that said in the first instance it's fair to hold  
14 you to your bargain, doesn't apply any more, because the  
15 terms have changed.

16 MR. DREEBEN: But the risk that he faced,  
17 Justice Souter, was one that he either knew actually or  
18 should have known at the time that he entered that plea.

19 QUESTION: All right, let's -- I understand that  
20 argument, too, and I just don't see how it is sound. The  
21 truth is, in the real world, prisoners, when they enter  
22 these guilty pleas, are not thinking of the possibility of  
23 life in prison 25 years later for a crime that hasn't been  
24 committed yet. I mean, I just don't think that that is  
25 realistic, to say that he knew or should have known that

1       this could happen.

2               MR. DREEBEN: Well, apart from the fact that the  
3 Court in Nichols v. United States said that it's the kind  
4 of thing that prisoners do know when they're sentenced,  
5 that if they're seen back again they're going to face more  
6 serious consequences from it --

7               QUESTION: They -- more serious consequences,  
8 yes, but this is a serious consequence of a different  
9 order of magnitude.

10              MR. DREEBEN: I think that recidivism statutes  
11 are among the most common kind of statutes in the criminal  
12 justice world. All 50 States have them. The Federal  
13 Government has one. There's a great deal --

14              QUESTION: Well, recidivism, yes, but we're --  
15 at least at this point in history we're living at a time  
16 when a great many prior convictions are being considered  
17 under three-strikes laws --

18              MR. DREEBEN: Correct.

19              QUESTION: -- let alone a Federal three-strikes  
20 law which couldn't possibly have been in the contemplation  
21 of the people who entered the guilty pleas or suffered the  
22 convictions 25 years ago.

23              MR. DREEBEN: No, but there has long been a  
24 tradition in this country of recidivism laws that fairly  
25 significantly escalated the potential sentence from some

1 of the cases that I've seen from 5 years to 35 years, and  
2 these are convictions based on statutes that were enacted  
3 long before the current wave of three-strikes statutes.

4 QUESTION: Yes, but I thought what we're  
5 concerned about are people who in 1972 -- something that  
6 appeared fairly minor to the individual who is convicted,  
7 he's told by somebody, go in and plead guilty, it's not  
8 going to be a big deal.

9 He has no idea what he's doing. He doesn't get  
10 correct advice, and he goes in and he pleads guilty, and  
11 he was totally confused at the State proceeding. Now,  
12 that person is going to be in jail for life because of a  
13 later crime, although if you look at what happened it  
14 would be obviously unconstitutional, his earlier  
15 conviction.

16 Now, that's the case we're worried about, and we  
17 get rid of the other cases through strict burden of proof  
18 rules, so all we have in front of us are those cases, and  
19 the question is, why shouldn't a person like that be able  
20 to demonstrate the obvious fact that that earlier  
21 conviction was obviously unconstitutional, and you give me  
22 the answer that Custis says no, but then we could just  
23 reply, well, that was because of the language of the  
24 statute.

25 MR. DREEBEN: I don't think --

1                   QUESTION: Here, although we're running around  
2 Robin's barn or something in some weird procedural way,  
3 better let him do it later than not at all.

4                   MR. DREEBEN: I don't think the constitutional  
5 holding in Custis had anything to do with the language of  
6 the statutes. The Court concluded that the statute in  
7 Custis, which is the same statute at issue here, didn't  
8 authorize these kinds of challenges at the sentencing  
9 proceeding and it then went on to hold that neither did  
10 the Constitution. Now, petitioner's --

11                  QUESTION: At the sentencing proceeding.

12                  MR. DREEBEN: Yes, but there's nothing --

13                  QUESTION: But you could say, I guess -- and I  
14 don't know how much of a stretch this would be. You could  
15 say, but this person who is obviously convicted  
16 unconstitutionally, and I'll underscore obviously, because  
17 I can get rid of the nonobvious cases through strict  
18 burdens of proof, all right, so he was obviously convicted  
19 unconstitutionally, that that person should have some  
20 forum somewhere in which to point that out before he's in  
21 prison for life.

22                  MR. DREEBEN: Justice Breyer, I accept that  
23 you've attempted to carve out the category of obvious  
24 unconstitutionality from what we're dealing with in this  
25 realm, but I submit that as a matter of real-life

1 litigation it doesn't exist. What you in fact get in the  
2 vast majority of cases are records just like this one.  
3 The prisoner comes in --

4 QUESTION: The vast majority, fine, but we also  
5 have a few cases where it was like somebody had robbed a  
6 chicken coop, you know, when he was 18 years old, and now  
7 12 years later this chicken coop has come back to put him  
8 in prison for life, so there are also at least a few cases  
9 where you think maybe he didn't get very good advice the  
10 first time.

11 MR. DREEBEN: Any constitutional rule that says  
12 you can do this but only when it's really obvious is going  
13 to lead to the same sorts of burdens of litigation of  
14 whether it falls into that category or not, and it's going  
15 to require the Government, when confronted with one of  
16 these things, to do exactly what the Court recognized in  
17 Custis was an extremely burdensome and usually  
18 unproductive exercise of running round and trying to find  
19 the prosecutor, the judge, the defense lawyer, the  
20 probation officer who were part of the original sentencing  
21 proceeding, which could go back decades, and attempting to  
22 reconstruct --

23 QUESTION: But that's the prisoner's problem.  
24 The Government doesn't have to do that.

25 MR. DREEBEN: No, it is the Government's

1     problem, because the prisoner comes in with an affidavit  
2     that says, I was there, and I'm going to swear out as a  
3     factual matter no one ever told me that aiding and  
4     abetting liability required that I join in this venture as  
5     if it were something that I intended to succeed. All I  
6     thought is that if I was present and I knew about the bank  
7     robbery, that was enough for the conviction.

8             That is petitioner's claim right here. He's  
9     filed an affidavit, he's sworn it out under oath, and for  
10    the Government to sit back and say to the sentencing  
11    court, well, judge, he has a strong interest in this and  
12    this was 20 years ago, you shouldn't believe him, is  
13    really more than can be expected from us. We need to  
14    respond factually.

15            QUESTION: Of course, you've got a case that has  
16    facts that are very favorable to the Government generally,  
17    but some of these cases are much closer, like the Seventh  
18    Circuit case where the evidence was really quite  
19    disturbing about whether the person actually received a  
20    fair proceeding, but you would apply the same rule  
21    regardless of how strong the proof is.

22            MR. DREEBEN: That's right, Justice Stevens.

23            QUESTION: And regardless of how serious the  
24    violation is, unless it's a Gideon violation.

25            MR. DREEBEN: That's right, and I think that

1       that is the line that the Court drew in Custis, and it  
2       essentially says --

3                QUESTION: Well, but Custis really was a holding  
4       on the meaning of 924(e) on the sentencing proceedings.

5                MR. DREEBEN: Custis was a holding first on the  
6       meaning of 924(e) and then on what the Constitution  
7       required of a sentencing judge, and it held a sentencing  
8       judge may accept a facially valid --

9                QUESTION: That's right.

10               MR. DREEBEN: -- conviction that has never been  
11       set aside, other than --

12               QUESTION: And of course, one reason that's  
13       permissible is that normally there's a second chance to  
14       prove what really happened. That's part of the answer --

15               MR. DREEBEN: Well --

16               QUESTION: -- given in that very case, that  
17       they -- there is this other open question.

18               MR. DREEBEN: There are normally other chances  
19       for a defendant to attack his prior conviction, the direct  
20       appeal from the conviction, post-conviction review in the  
21       State, and post-conviction review federally.

22               QUESTION: That was true in Custis itself,  
23       wasn't it? He could have gone back to the State court?  
24       Yes.

25               MR. DREEBEN: Correct.



1                   QUESTION: It said he could have gone to  
2 Maryland or on 2254 review --

3                   MR. DREEBEN: Correct.

4                   QUESTION: -- of the Maryland conviction.

5                   MR. DREEBEN: That's correct, and the Court  
6 didn't say that this is an indispensable prerequisite of a  
7 valid Federal sentence. What it said was, the Federal  
8 sentencing court can look at the State judgment and say,  
9 on its face there's no Gideon problem here, we're not  
10 required to entertain other constitutional challenges.

11                  QUESTION: Mr. --

12                  MR. DREEBEN: If some other court wants to  
13 entertain them, that's to be presented to that court. The  
14 rendering court --

15                  QUESTION: Mr. Dreeben, I don't know why we  
16 focus upon what the expectation of the defendant was at  
17 the time he pleaded guilty, as opposed to what his  
18 expectation was at the time he committed the later crime.  
19 Do you think it would be unconstitutional for a State to  
20 say that anyone who has a prior conviction on the record,  
21 all right, that has been obtained in any manner so long as  
22 Gideon has been complied with, anyone who has that on his  
23 record who commits a later crime gets a longer sentence?

24                  MR. DREEBEN: No, I don't think that's  
25 unconstitutional.

1                   QUESTION: He knows what the rules are when he  
2 commits the later crime. He knows he pleaded guilty of  
3 the former crime. He knows that anyone who has pleaded  
4 guilty to a former crime will get a longer sentence.  
5 Isn't that the expectation that we should be concerned  
6 about?

7                   MR. DREEBEN: That is a, an expectation that the  
8 prisoner can have that the laws give him notice that  
9 that's what the laws are intended to do.

10                  QUESTION: But then it's your view, I take it,  
11 that even if the prior conviction were set aside in State  
12 proceedings or Federal proceedings, that that would not  
13 justify a reduction in the Federal sentence?

14                  MR. DREEBEN: Justice Stevens --

15                  QUESTION: Is that your view?

16                  MR. DREEBEN: It is a view that the Government  
17 has taken in the lower courts. We have lost it in the six  
18 circuits that have considered it. We're currently  
19 rethinking what our position is on that issue. That issue  
20 is a quite distinct issue from this one.

21                  QUESTION: Correct.

22                  MR. DREEBEN: Because in that situation the  
23 Federal court, instead of saying, I have a facially valid  
24 conviction in front of me and I have a defendant who says  
25 there's something wrong with it but he's never done

1 anything about it, the Federal court in this latter class  
2 of cases has a conviction that it previously relied on and  
3 said, this is a reliable indication that you are a more  
4 serious offender, and it turns out that a later State  
5 court judgment may have set it aside on constitutional  
6 grounds that fundamentally call into question reliability.  
7 That's a distinguishable scenario from this situation, and  
8 the outcome there does not control the outcome here.

9 QUESTION: I agree, but apparently Justice  
10 Scalia would not, is my point.

11 MR. DREEBEN: Well, I think Justice Scalia is  
12 referring to a statute that was premised on the following  
13 theory. If you know you have a conviction on the books  
14 and you are not deterred from the -- by committing another  
15 crime, notwithstanding the fact that you know that your  
16 sentenced will be enhanced, the question is, is that  
17 constitutional apart from Gideon violations.

18 My answer to that is yes, but I don't actually  
19 think that's the sentencing theory that was adopted in  
20 section 924(e).

21 QUESTION: This is a statutory question, though,  
22 and not a constitutional question, whether the statute was  
23 of the sort that I --

24 MR. DREEBEN: Correct. Correct.

25 QUESTION: That I described or not.

1           MR. DREEBEN: Correct, and if it were of the  
2 sort, I would submit that it's constitutional, but the  
3 question is, is it of that sort.

4           QUESTION: Right.

5           MR. DREEBEN: And I think the answer to it is  
6 not.

7           QUESTION: But if you say that it would be  
8 constitutional if it were of that sort, then isn't it  
9 a fortiori true that what the defendant is complaining  
10 about here is likewise constitutional?

11          MR. DREEBEN: I don't think it's a fortiori,  
12 Justice Scalia, although I do think our position is  
13 a fortiori from Custis, and the reason I think they're  
14 distinct is, the theory of the sentencing statute that you  
15 have posited is deterrence, and the theory of the  
16 recidivist sentencing statute, that is 924(e), and of most  
17 recidivist statutes, is reliability of a prior conviction  
18 which shows that this defendant is a more serious offender  
19 because he has committed crimes in the past which  
20 aggravate the current offense, and therefore this  
21 individual warrants greater incapacitation as a matter of  
22 protecting the public because he's clearly not learning  
23 but is going on to commit offense after offense after  
24 offense.

25          QUESTION: I recognize what we said in Custis,

1 but is there any other structural or fundamental area,  
2 other than Gideon, that we should recognize -- the judge  
3 was bribed --

4 MR. DREEBEN: Well, the United States took the  
5 position in Custis that Gideon error belonged to a very  
6 small class of fundamental errors, and the other error  
7 that we identified in Custis was the error that you  
8 identified, Justice Kennedy, of an error that really  
9 deprives the sentencing court of the character of a court  
10 that could render a fair judgment.

11 QUESTION: But that's not subsumed in the  
12 category of facially valid, is it?

13 MR. DREEBEN: No, because this Court in Custis  
14 didn't agree with the position of the Government and held  
15 that Gideon violations are unique.

16 They are unique not only because they have such  
17 a pervasive impact on the fairness of the proceeding, but  
18 they are also unique in that they are fairly easy to  
19 discern from the judgment role or from a motion  
20 accompanying the judgment role, and the Court relied on  
21 the consideration of administrative ease as well as of the  
22 character of the error in defining what you could do when  
23 confronted with a recidivist enhancement and a prior  
24 conviction that is challenged on constitutional grounds,  
25 and so long as the Court adheres to that line, I think

1     that the interest of the State in ensuring that its  
2     judgment carries usual force and effect are just as strong  
3     at the Federal sentencing proceeding as they are on 2255.

4     The State --

5                 QUESTION:  But you're -- but you are leaving  
6     open the possibility, say somebody in this position,  
7     there's a quorum nobis proceeding in the State, gets it  
8     knocked out under State law, you're saying that that's the  
9     situation the Government is rethinking whether then, if  
10    you succeed, even way out of time, to get it knocked out  
11    at the State court, could you then come back to Federal  
12    court on a 2255 and say, now the State has knocked this  
13    out?

14                MR. DREEBEN:  That's correct, Justice Ginsburg.  
15    That's the question that we're revisiting after our  
16    litigation track record in the lower courts, and it's not  
17    presented in this case because petitioner did not do that,  
18    and almost undoubtedly would be out of time to do that  
19    today, and quorum nobis is not apparently available in  
20    California, and our fundamental submission is, that was  
21    the chance that he had.

22                Whatever procedures the rendering court provides  
23    and post-conviction review provides of the underlying  
24    conviction are sufficient for constitutional purposes  
25    absent a Gideon error when the Federal sentencing court is

1 imposing a recidivist sentence.

2 If the Court has no further questions --

3 QUESTION: Thank you, Mr. Dreeben.

4 MR. DREEBEN: Thank you.

5 QUESTION: Mr. Tanaka, you have 7 minutes  
6 remaining.

7 REBUTTAL ARGUMENT OF G. MICHAEL TANAKA

8 ON BEHALF OF THE PETITIONER

9 MR. TANAKA: I'd first like to address the  
10 question of what Custis left open. We've been talking  
11 about the sentence at issue, and it ends, if -- we  
12 recognize -- and this is at page 497 of the Custis  
13 decision. We recognize, however, that Custis, who is  
14 still in custody for purposes of State convictions, at the  
15 time of this Federal sentencing under 924(e) may attack a  
16 State sentence in Maryland or through a Federal habeas  
17 review, and then, importantly, after that the citation is  
18 just see *Maleng v. Cook*.

19 Now, there are two things that suggest that what  
20 that left open was the possibility of reviewing the prior  
21 conviction as it enhanced the later sentence. First is  
22 that it says, or through a Federal habeas review, and  
23 second it says, it cites *Maleng v. Cook*.

24 Now, what *Maleng* decided was that there was  
25 subject-matter jurisdiction in a Federal habeas case where

1     there was an expired conviction, and the petitioner in  
2     that case had attacked an expired conviction directly and  
3     what this Court said was, no, you couldn't attack that  
4     directly, but there was subject-matter jurisdiction on  
5     habeas where that prior conviction was used to enhance a  
6     subsequent sentence.

7             So that strongly suggests that the remedy that  
8     this Court left open in *Custis* is akin to what exactly is  
9     at issue here and that is, a 2255 remedy, by its very  
10    terms, allows the petitioner to attack the  
11    constitutionality of that prior State conviction, as it  
12    was used to enhance his Federal sentence.

13            QUESTION: Maleng, though, was directed just to  
14    whether or not he was in custody.

15            MR. TANAKA: Right, whether he was in custody on  
16    the subsequent sentence, but it suggests that they would  
17    entertain attack on the prior conviction through the  
18    custody of the subsequent sentence and conviction.

19            The other point I wanted to make is, the  
20    Solicitor General mentioned that there was a fairness-  
21    finality balance here, and that this changes where the  
22    conviction, as in this case, is so old, but that fails to  
23    recognize that the finality interests where the conviction  
24    is used in a subsequent proceeding are not the same. In  
25    fact, they're not even close to the same, where we're



1 challenging the challenges to that State conviction  
2 directly, and that is because this Court's jurisprudence  
3 in many of those 2254 cases regarding finality posits the  
4 rationale that the State judgment is a final one, and we  
5 don't want to intrude in the State process. That is, we  
6 don't want to release this person from custody. We don't  
7 want to make the State retry this man. We don't want to  
8 intrude in the State process.

9 In this case, again, that interest is almost  
10 nonexistent. If a Federal sentencing court granted a  
11 2255, there is no impact on that State court judgment.

12 So it really boils down to a question of, is  
13 there a remedy for someone who is going to face a  
14 potential life term --

15 QUESTION: May I just question your last  
16 conclusion? Supposing he had not -- he was still in State  
17 custody on parole or something of that kind, would not  
18 then the Federal 2255 have an impact on the State's  
19 interest in finality?

20 MR. TANAKA: I'm not sure it would --

21 QUESTION: It seems hard to imagine the Federal  
22 judge would conclude the State's conviction was invalid,  
23 and therefore nothing would happen in the State  
24 proceedings after that.

25 MR. TANAKA: Well, certainly the Federal court

1 would have no conclusive effect on any subsequent State  
2 court proceeding, and whatever persuasive value I imagine  
3 that the State court could take it for what it was worth,  
4 but I don't know that it would necessarily intrude on the  
5 State court proceeding.

6 So basically what's at issue, then, is do we  
7 allow 2255, which by its fine language provides a remedy  
8 where the sentence is unconstitutional, do we close that  
9 door on the basis of considerations that aren't at issue  
10 in this case, or do we allow someone who's facing a life  
11 sentence to litigate the validity, and in some cases it's  
12 going to be obvious, of prior convictions that don't  
13 reliably indicate his guilt and, as the Solicitor General  
14 said, the whole purpose between the armed career criminal  
15 act is incapacitation, or --

16 QUESTION: Of course, in this case, Mr. Tanaka,  
17 it's a guilty plea, so you don't have any real question of  
18 whether there's a record to show that he did it or didn't  
19 do it, because you don't get that sort of a record with a  
20 guilty plea.

21 MR. TANAKA: That's correct, Your Honor, and so  
22 the issue then would be, does this record reliably reflect  
23 his guilt, reviewing the record that's presented on the  
24 guilty plea, and that would be an issue for the Federal  
25 district court to decide on remand.

1           If it decided that indeed there's enough  
2       evidence here that we have no question that he was guilty  
3       and there's a reliable indication of that, then I suppose  
4       he's out of court, but the point is, he needs to have that  
5       opportunity.

6           QUESTION: But it's very difficult, as pointed  
7       out in the briefs, when you're dealing with convictions  
8       that are 16 and 19 years old, to go back and show exactly  
9       what happened at a guilty plea.

10          MR. TANAKA: I'll grant that, but again I think  
11       that that concern is addressed by placing the burden of  
12       proof on the petitioner, which -- where it lies, and if  
13       the sentencing court doesn't find that persuasive, then --

14          QUESTION: Well, but as Mr. Dreeben pointed out,  
15       your client can simply file an affidavit saying that, you  
16       know, I wasn't fully advised of what was going on, and  
17       then it's up to the Government to come back. It's very  
18       difficult for someone who is facing that kind of an  
19       affidavit to simply say, well, disbelieve this guy. You  
20       want to collect information showing that he should be  
21       disbelieved.

22          MR. TANAKA: And to the extent that's possible  
23       I'm sure the Government will do that.

24          QUESTION: Yes, with great administrative  
25       burden.

1                   MR. TANAKA: Well, the fact is there just aren't  
2   that many of these cases, but that's a price that we need  
3   to pay in order to make sure that people aren't  
4   unjustly --

5                   CHIEF JUSTICE REHNQUIST: Well, but there comes  
6   a point when the Government should be entitled to say,  
7   this is the way the cookie crumbles. You bought into  
8   this, and you're stuck with it.

9                   Thank you. That's not a question.

10                  Well, the case is submitted.

11                  (Whereupon, at 11:02 a.m., the case in the  
12   above-entitled matter was submitted.)

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