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

2 (12:59 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 07-6984, Jimenez v. Quarterman.
5 Mr. Goldstein.

6 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

7 ON BEHALF OF THE PETITIONER

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

10 When the Texas courts in this case
11 reinstated the Petitioner's direct appeal, the Texas
12 Court of Appeals decided that appeal like it would
13 decide any other case on direct review. We filed a
14 petition for discretionary review in the Texas Court of
15 Criminal Appeals, which was denied, and it was
16 considered like any other appeal would be.

17 The question presented by this case is
18 whether the final judgment that indisputably results
19 from those rulings triggers the one-year statute of
20 limitations to file a Federal habeas corpus application.
21 The statute that governs that question is reproduced in
22 the blue brief at page 1.

23 Section 2244(d)(1)(A) prescribes "a 1-year
24 period of limitation that shall apply to an application
25 for a writ of habeas corpus by a person in custody

1 pursuant to the judgment of the State court. The
2 limitation period shall run from the latest of -- and it
3 identifies four dates, the first of which is "the date
4 on which the judgment became final by the conclusion of
5 direct review or the expiration of time for seeking such
6 review."

7 JUSTICE KENNEDY: And you don't think you
8 need to go beyond (A) to resolve the case?

9 MR. GOLDSTEIN: That's right, Justice
10 Kennedy. Subsection (A) resolves this case by its plain
11 terms.

12 Now, the Fifth Circuit decided this case --
13 this issue, I'm sorry -- in 2004 in a case called
14 Salinas, and it thought that the factual scenario of the
15 case was more logically covered by subsection (d)(2) of
16 the statute, which is on page 2 of the blue brief. And
17 that provision is the tolling provision, and it says:
18 "The time during which a properly filed application for
19 State post-conviction or other collateral review with
20 respect to the pertinent judgment or claim is pending
21 shall not be counted toward any period of limitation
22 under the subsection."

23 And the Fifth Circuit's view in that Salinas
24 case was that the better way of looking at this is that
25 when the State post-conviction court awarded relief of

1 further direct review, all of that should be regarded as
2 part of the post-conviction process. But four years
3 after -- three years after the Fifth Circuit decided
4 Salinas, this Court decided Lawrence v. Florida, and
5 Lawrence disposes of the Fifth Circuit's logic in
6 Salinas, because Lawrence says that when the
7 post-conviction court, here the Texas Court of Criminal
8 Appeals, issues its mandate the application for
9 post-conviction review is no longer pending. And so
10 there isn't any reason to believe that Congress thought
11 this factual scenario was covered by the tolling
12 provisions of (d)(2).

13 CHIEF JUSTICE ROBERTS: So, does your
14 position depend upon the proposition that we are not
15 free to consider sort of a second direct appeal as part
16 of the collateral review process?

17 MR. GOLDSTEIN: It doesn't depend on it,
18 Mr. Chief Justice. We don't have to reach that question
19 because, as I have said in answer to Justice Kennedy's
20 question, you can resolve this under (d)(1). But I was
21 just trying to explain why the Fifth Circuit, which
22 struggled with how to handle this scenario, was wrong in
23 thinking it was governed by the tolling provision.

24 CHIEF JUSTICE ROBERTS: I guess it
25 doesn't -- or does it really make a difference? I mean,

1 if you view the direct appeal that is the result of the
2 collateral review process as part of the collateral
3 review process, that time is tolled. And if you take
4 your view and regard it as not final to trigger the
5 process until you have another final decision, it kind
6 of leads to the same result, doesn't it?

7 MR. GOLDSTEIN: In many cases, but not all,
8 including this one. The difference is that if you
9 regard this as governed by tolling, that the second --
10 what we will call for purposes of the argument, just so
11 we know, the second appeal, so the appeal that's granted
12 by the post-conviction report, if you regard the proper
13 way of reading 2244 to be you have to regard that as
14 being tolled and the start date is the dismissal of the
15 original appeal, if the State Petitioner seeks
16 post-conviction review more than one year after the
17 dismissal of the first appeal, his Federal time is done.
18 So, this --

19 CHIEF JUSTICE ROBERTS: But does that really
20 matter? I mean, the whole purpose of the Federal
21 statute of limitations is to make sure these things get
22 done within one year. And if he waits a year before
23 filing, then he's out of time under AEDPA.

24 MR. GOLDSTEIN: It is -- it is the case that
25 Congress wanted it done within one year. The question

1 presented by this case is one year of what?

2 CHIEF JUSTICE ROBERTS: Right.

3 MR. GOLDSTEIN: So, there are four different
4 possible start dates. We know that the Fifth Circuit
5 was wrong in the Salinas case when it said that Congress
6 envisioned only a linear time period stopped only by
7 tolling that would run from the first disposition of the
8 case, because 2244(d)(1)(B), (C), and (D) are all
9 provisions under which the time can expire and then be
10 restarted.

11 So, what we think Congress wanted when it
12 was picking start dates and the start date in (d)(1)(A),
13 the one that usually applies, is it wanted the State
14 courts on direct review to be done with the case, finish
15 it off. Then the State petitioner will have one year to
16 start the State post-conviction process and when that's
17 done go on to Federal court.

18 The reason we think Congress wanted to
19 include the second appeal, the conclusion of the second
20 appeal, as the trigger is that what's going on in the
21 Federal district court is you are trying to decide if
22 the State court's disposition of the case is contrary to
23 clearly established law as established by this Court.
24 And you won't know that, you won't even know what the
25 Federal district court is supposed to be reviewing,

1 until the conclusion of the second appeal.

2 If I could just illustrate that, in the
3 joint appendix at page 43, is the State court opinion in
4 this case. The Texas Court of Appeals decided this case
5 and resolved his, the Petitioner's, Federal
6 constitutional claims. And it only did that in the
7 second appeal. And that's what Congress was concerned
8 with the Federal district court's reviewing. It's --
9 when this opinion is issued and then the Texas Court of
10 Criminal Appeals, which is their highest court in
11 criminal cases, denies review, then it's logical for the
12 time period to start.

13 JUSTICE GINSBURG: In the background of this
14 case, Mr. Goldstein, is that in fact he didn't know the
15 first time that his appeal had been dismissed. He
16 didn't know that his lawyer had filed an Anders brief.
17 But when he found that out, he waited some four and a
18 half years.

19 So why isn't the -- Texas right
20 when it says look at (B) and (D), they would have fit
21 his case? He could have used those to get time starting
22 from the date that he found out. It wouldn't give him
23 four and a half years. But why -- you say we, all we
24 have to consider is (A); you said that in answer to
25 Justice Kennedy. But why shouldn't we say that either

1 (B) or (D) fits his case?

2 MR. GOLDSTEIN: Okay, can I answer that
3 question, Justice Ginsburg, in two parts?

4 First most directly, I want to explain our
5 position with respect to (B) and (D) and then I want to
6 discuss the broad thematic concern that's raised by our
7 case. Here's the troubling fact by our case, and that
8 is the prospect that multiple State defendants will take
9 more than a year, and I would like to deal with that
10 thematic point and explain why I don't think that's a
11 concern.

12 But to start directly with your point, (B)
13 and (D), assuming that they apply for a moment, will
14 only accomplish the following -- and then I want to
15 explain why I don't think they would apply. But even if
16 they apply, what they would do is defer the start date
17 of the one year. So on the facts in this case, one year
18 after -- 11 months or so after the Texas Court of
19 Appeals erroneously dismissed the Petitioner's first
20 direct appeal without giving him the opportunity to file
21 a pro se brief, he found out.

22 On the State's view, the one-year Federal
23 habeas corpus time would be deferred for 11 months, and
24 that is a very generous defendant-favoring position for
25 Texas to take in this Court. If it then starts, it

1 doesn't -- that reading does not accomplish what
2 Congress wanted in 2244, because the State prisoner,
3 though the time will have been deferred for a year, will
4 still have to file for Federal habeas corpus within a
5 year, notwithstanding the fact that he will get a second
6 direct appeal.

7 So he will be proceeding in both courts.
8 His start date will have been deferred for 11 months,
9 but he nonetheless one year later must appear in a
10 Federal district court in Texas, even though on
11 post-conviction review in the State courts he is sent
12 back to direct review.

13 CHIEF JUSTICE ROBERTS: Oh, but is that
14 right? I mean unless you count, as I gather your
15 friends on the other side would do, the period of direct
16 appeal as part of the collateral review process?

17 MR. GOLDSTEIN: That's correct. And that's
18 the argument about Lawrence. That argument is not
19 sustainable in light of Lawrence. Just to say that you
20 have their argument exactly right, Mr. Chief Justice,
21 the State's position is, as the Fifth Circuit held in
22 the Salinas case, that when you get relief on
23 post-conviction review and you are sent back to the
24 State system, (d)(2) continues to apply, but that is not
25 correct. The tolling stops, and that is because, as

1 Lawrence held, the application which is his
2 post-conviction application in the State court, saying
3 that I was deprived of my right to appeal, is no longer
4 pending. The Texas Court of Criminal Appeals has issued
5 its mandate. So that's why this anomaly arises under
6 the application of (B) or (D) that we don't think
7 Congress could have intended.

8 Now, Justice Ginsburg, there is a second
9 part to my answer, and that is the specific point about
10 whether (B) and (D) do by their terms apply; and here we
11 are in the anomalous position that if, again, Texas is
12 arguing very defendant-favoring readings of (B) and (D)
13 and I, representing the habeas Petitioner, am in the
14 unusual role of questioning whether these later start
15 dates apply.

16 But here our -- the lower courts I think it
17 is clear would say that (B) and (D) don't apply. To
18 take you to the textual -- the text of the statute,
19 again, (B) appears at the bottom of page 1 of the blue
20 brief; and that has a start date of the date on which
21 the impediment for filing an application created by
22 State action in violation of the Constitution or laws of
23 the United States is removed, if the applicant was
24 prevented from filing by such State action. And the
25 lower courts, as we explained in our brief, pretty

1 uniformly conclude that the failure to give a defendant
2 notice that his appeal has been dismissed is not an
3 impediment created by State action to him filing a
4 Federal habeas corpus application. And so their attempt
5 to grapple with our unusual facts has -- would
6 substantially broaden the application of subsection (B).

7 CHIEF JUSTICE ROBERTS: What about the State
8 convicting, penalizing the defendant despite the fact
9 that his constitutional right to competent counsel
10 was -- he lost that right because of the failure of
11 notification?

12 MR. GOLDSTEIN: It's just -- it's not
13 regarded as an impediment. The -- the courts -- the
14 lower courts take quite literally that there has to be
15 an impediment. The lower court decisions grappling with
16 what an impediment is deal with the situation where a
17 prison warden, for example, does not allow you access to
18 the prison mails or somehow access to the legal
19 resources you in order to be able to file it. He won't
20 deliver the habeas corpus application.

21 (D) is even easier, I think, and that is the
22 deadline starts from the date on which the factual
23 predicate of the claim or claims presented could have
24 been discovered through the exercise of due diligence.
25 And the reason the State is not right about that

1 provision and does not even really seriously argue it is
2 that the claims referenced in (D) are the claims that
3 are presented in the Federal habeas corpus application.
4 Here that's the claim that he had ineffective assistance
5 of trial counsel and that the judge was biased against
6 him. They are not the claim that he received -- that he
7 was denied the right to an appeal. And so it just --
8 there is no textual basis to say that the later start
9 date would apply under (D).

10 CHIEF JUSTICE ROBERTS: Is this just a
11 dispute about the label? Because Texas chooses to call
12 the proceeding that you get if you are successful on
13 collateral review a second direct appeal, you would
14 count finality one way; if they just switch the label
15 and say that is the collateral review appeal process,
16 then you would agree with them?

17 MR. GOLDSTEIN: No, sir. We think that you
18 have to look at substance. As -- the language that we
19 use in a footnote in our reply brief addressing this is
20 whether the proceeding has the hallmarks of direct
21 review. There are two States that do have a procedure,
22 South Carolina and Delaware, in which you can raise your
23 claim on post-conviction review that you were deprived
24 of your right to a direct appeal. And the
25 post-conviction court has the power to decide that on

1 post-conviction review.

2 We haven't found a case in which they actual
3 exercised the power, but it appears that 48 of the 50
4 States deal with this problem the way Texas does, and
5 that is the relief that you get is that you are sent
6 back into the direct review system. And then we think
7 it's covered quite plainly by the text of (d)(1). When
8 that direct review is over, direct review concludes by
9 its plain terms.

10 Now, Justice Ginsburg, I had said that I
11 wanted to come back and deal with the thematic problem
12 that might concern the Court about our case, and that is
13 the prospect that we will have defendants filing State
14 post-conviction applications more than a year late,
15 which could trouble the Court. As the Chief Justice
16 indicated, Congress had a concern with moving this
17 process along.

18 In addition just to the plain text of the
19 statute which we think is controlling, there are I think
20 three points. The first is there are State limitations
21 principles that get these State prisoners to file their
22 applications in a timely way. Now, in the great
23 majority of States that's set by a number of years. In
24 some States like Texas it's applied by the principle of
25 laches. And the important point and the reason we are

1 here today is that Texas, for whatever reason -- and the
2 time limitations are intended to protect Texas here --
3 decided not to assert that his State post-conviction
4 application was untimely. It didn't object to the
5 granting of relief to the Petitioner at all.

6 The second reason, in addition to the
7 State's own limitations period, is that the AEDPA
8 one-year limitations period has real force. In the
9 great majority of cases in which a State defendant is
10 going to allege that he was deprived of his right to an
11 appeal and raise that claim on State post-conviction
12 review, he's going to lose that claim. The -- the
13 States don't give this stuff out like candy, and the
14 Texas Court of Criminal Appeals is not, you know,
15 constantly reinstating defendant's appeals. And
16 defendants know that.

17 And unless you prevail on this claim, you
18 are stuck with the one-year AEDPA time that runs from
19 the dismissal of your first appeal. And so you have
20 every incentive in the world to get into State court
21 quickly.

22 And the third is just the general notion
23 that defendants in non-capital cases don't have a real
24 incentive to just delay before instituting a State
25 post-conviction review. And --

1 JUSTICE SCALIA: Suppose it is denied by --
2 by the State court. And suppose it's denied by the
3 State court more -- more than a year after the
4 conclusion of the original proceeding. What -- what is
5 the consequence then?

6 MR. GOLDSTEIN: I -- can I just ask one
7 point of clarification? If he instituted it more than a
8 year after the dismissal of the first proceeding, he is
9 out of time, because there is only one final judgment,
10 and that is the original dismissal.

11 JUSTICE SCALIA: Suppose he institutes it,
12 however, within the year.

13 MR. GOLDSTEIN: Okay. If he instituted
14 it -- can I just say six months? So six months' after
15 the first dismissal, the Petitioner appears in the Texas
16 post-conviction court. At that point (d)(2) starts to
17 apply, because he has a properly filed application for
18 State post-conviction relief. The State court -- the
19 State post-conviction court takes three months to
20 dispose of it, a year to dispose of it; it doesn't
21 matter. When the State post-conviction court is done
22 and in your hypothetical denies him relief, he has six
23 months left to go to federal district court. (d)(2)
24 operates as it should. While the case is sitting in the
25 State post-conviction court --

1 JUSTICE KENNEDY: And he can't go to Federal
2 court until that is resolved?

3 MR. GOLDSTEIN: That is correct, because he
4 has not exhausted his claim. When the claim is that you
5 were denied your right to a direct appeal, the only
6 place that you can raise that claim is State
7 post-conviction review. Federal habeas corpus requires
8 you to exhaust your available State remedies. Your
9 available State remedy for that is State post-conviction
10 review. He may not appear in Federal district court.
11 The district court I think would abuse its discretion in
12 staying a plainly unexhausted claim. That wouldn't be
13 good cause, as this Court has said, for it.

14 JUSTICE KENNEDY: If you do prevail, it is
15 rather dramatic, because your client was stunningly
16 negligent. He does nothing for four and-a-half years,
17 then strolls over to the State court.

18 MR. GOLDSTEIN: Well, Justice Kennedy, the
19 State, as I said, did not raise this argument in the
20 place where we think it's appropriate, and that no
21 record was built on laches. It does -- it does have
22 that feel.

23 I do think that the Court's opinion could
24 make clear that this anomaly arises from the fact that,
25 despite the fact that the Texas courts have made clear

1 that there are laches principles and limitations --

2 JUSTICE GINSBURG: May I ask if laches is
3 something that the Texas court could bring up on its
4 own, or is it for the State to raise or not as it
5 chooses?

6 MR. GOLDSTEIN: It is for the State to
7 raise, and we cite our Texas authority for that in our
8 reply brief, Justice Ginsburg.

9 JUSTICE KENNEDY: Is the State statute that
10 allows the early conviction to be set aside and the
11 appeal reinstated -- do we have that statute?

12 MR. GOLDSTEIN: Justice Kennedy, that is
13 section 11 -- article 11.07.

14 JUSTICE KENNEDY: I thought I had it. Do we
15 have it in --

16 MR. GOLDSTEIN: I do not believe you do.
17 And the reason is that article 11.07 is just the general
18 Texas post-conviction regime. The procedure that is
19 used for reinstating direct appeals is developed through
20 caselaw, not by statute.

21 Justice Scalia, there was a final point that
22 I was about to make when I said, look, defendants in
23 non-capital cases have every incentive, if they want to
24 get relief, to move their cases along. The Court may be
25 concerned about capital cases where there is the

1 opposite concern, that defendants will try and keep
2 their cases alive, if you will. And Texas recognizes
3 this point and has a deadline by statute that is quite
4 short for instituting post-conviction relief in capital
5 cases.

6 They simply recognize that laches is the way
7 to handle the prospect of delay in non-capital cases.
8 We don't think there is any reason for this Court to
9 override that determination, to second guess the
10 judgment of the Texas court that the judgment is not
11 final until the reinstated appeal concludes.

12 JUSTICE BREYER: What happens -- just out of
13 curiosity, a prisoner's lawyer doesn't take the appeal,
14 the time expires, bong, the year begins to run. Within
15 that year he files federal habeas. Then he discovers
16 that he had a right to a state appeal. So he goes, just
17 like this man, goes back and, sure enough, he gets his
18 direct appeal, and three years later or a year later
19 they finish the direct appeal. Bong, he can file again.

20 Is that his first habeas or his second
21 habeas?

22 MR. GOLDSTEIN: I have to ask one question,
23 sir, because the answer is it depends.

24 JUSTICE BREYER: Yes.

25 MR. GOLDSTEIN: The question is, when he

1 files for Federal habeas corpus the first time in your
2 hypothetical, I take it he doesn't raise the claim --

3 JUSTICE BREYER: No.

4 MR. GOLDSTEIN: He raises a substantive
5 claim, like the judge was biased against him and the
6 like?

7 JUSTICE BREYER: Yes.

8 MR. GOLDSTEIN: That is regarded as a first
9 habeas application, because the claim did not -- I think
10 the judgment did not arise until later. I don't believe
11 a case like that has arisen. I think --

12 JUSTICE BREYER: I doubt that one -- I mean,
13 one may never arise but --

14 MR. GOLDSTEIN: The strange thing is that it
15 is an exhausted set of claims. So it is a proper
16 Federal habeas corpus application, because he went to --

17 JUSTICE BREYER: The first one is proper and
18 on your view so is the second one proper. So they are
19 both proper, and there are two of them. And --

20 MR. GOLDSTEIN: It's proper in terms of it
21 being exhausted. It would be dismissed, to be clear.
22 So his appeal was denied, right? He doesn't file an
23 appeal in the hypothetical. So when he shows up in
24 Federal district court, it's an exhausted -- it is -- he
25 would be dismissed for failure to exhaust, in fact,

1 because he didn't pursue his --

2 JUSTICE BREYER: No, nobody knows about
3 this.

4 MR. GOLDSTEIN: But he -- but he was --

5 JUSTICE BREYER: No, but nobody knows that
6 the State made a mistake in not giving him a direct
7 review.

8 MR. GOLDSTEIN: Your hypothetical, Justice
9 Breyer, I took it to be --

10 JUSTICE BREYER: Oh, forget my hypothetical.
11 They're never going to come up.

12 MR. GOLDSTEIN: I think, though, I can tell
13 you this with some confidence. The way that this thing
14 happened in Texas is the way that it happens in the
15 States, and the way it happens in Federal courts as well
16 under 2255. You file a post-conviction application.
17 You say: I was denied entirely my right of appeal by
18 something the court did or something my lawyer did, and
19 then you get to pursue your appeal.

20 And that's what Congress wanted the Federal
21 district court on habeas corpus to review. So
22 logically, the one year begins to run after that's done.

23 CHIEF JUSTICE ROBERTS: Well, except that
24 you kind of elide the point that Congress and AEDPA
25 quite clearly wanted these federal claims to be brought

1 within a year. This seems to allow the State processes
2 to trump the one-year requirement.

3 MR. GOLDSTEIN: Well, in many cases,
4 Mr. Chief Justice, of course, the State appeals can take
5 20 years to go up and down and back and forth from State
6 post-conviction review. We also have the rather
7 commonplace case in which a defendant doesn't file a
8 notice of appeal at all, as in Justice Breyer's
9 hypothetical, but the court of appeal says, you know,
10 for good cause we are going to let you file this appeal
11 late.

12 And it's quite clear in that scenario, so
13 your appeal is reinstated there, too, because you were
14 20 days late, 30 days late on the filing deadline. It's
15 quite clear and I think agreed in all of those
16 situations that, while Congress did want you to move
17 expeditiously, the question is move expeditiously from
18 when. And it's from the State court's direct review,
19 finishing the conclusion of direct review.

20 And we know that Congress recognized that
21 that wouldn't always be one year from the end of the
22 case the first time around from the structure of (B),
23 (C), and (D); and the fact that if there were a
24 tie-breaker at all, it is that the statute shall -- the
25 limitation period shall run from the latest of several

1 days. So Congress quite clearly contemplated that there
2 would be multiple possible start dates.

3 CHIEF JUSTICE ROBERTS: You said that it's
4 unusual for the Texas State to grant these. But
5 presumably you could challenge the determination five,
6 ten, 15 years later by the Texas court not to grant you
7 a direct appeal.

8 MR. GOLDSTEIN: I'm not sure I understand
9 the -- the hypothetical, Mr. Chief Justice. If -- if
10 you lose your post-conviction application for it?

11 CHIEF JUSTICE ROBERTS: Yeah. Let's say
12 this fellow -- the State court says, well, you know
13 what, we are not going to give you another direct
14 appeal. And he says, well, that decision was made in
15 violation of my federal constitutional rights. What
16 happens then with respect to federal habeas?

17 MR. GOLDSTEIN: Well, he is challenging his
18 original -- Federal habeas corpus is reviewing the
19 judgment in his case. He has, since there was only one
20 conclusion of direct review in his case, one year
21 measured from the first dismissal, tolled only during
22 the period of pending post-conviction application.

23 CHIEF JUSTICE ROBERTS: But is he
24 challenging the first conviction, or is he challenging
25 the failure of the State court to give him another

1 direct appeal?

2 MR. GOLDSTEIN: He is challenging the fact
3 that he was denied a direct appeal, which is a challenge
4 to his actual conviction. That is a constitutional flaw
5 in his conviction. And so it runs from the conclusion
6 of the direct review, not from anything related to
7 post-conviction review.

8 CHIEF JUSTICE ROBERTS: Well, that's I
9 gather if he is granted the collateral -- the direct --
10 second direct appeal. What if the Court says no, we
11 don't agree that you were denied your right to a direct
12 appeal; we think you had it so you don't get another
13 one. And he says that determination has been made in
14 violation of the Federal Constitution.

15 MR. GOLDSTEIN: The fact that the State
16 post-conviction court did not remedy a violation of his
17 constitutional rights on direct review does not create a
18 new constitutional violation. The constitutional
19 violation in your hypothetical arises on direct review.

20 CHIEF JUSTICE ROBERTS: Well, doesn't it
21 depend upon the allegation he wishes to make? Say he
22 comes in in one of these proceedings four and a half
23 years later and says, you should give me another direct
24 review, I didn't have it. And the court says, well, no,
25 we're not going to give you one. And he says, well, you

1 give it to all the white criminal defendants and you are
2 not giving it to me, so that violates equal protection?

3 MR. GOLDSTEIN: I don't think so. And if I
4 could just explain -- give an analogy. Say he could
5 make the same allegation about ineffective assistance of
6 trial counsel. You can always try and recharacterize
7 your claim as the post-conviction court violated my
8 constitutional rights by not vindicating my original
9 constitutional rights, my right to constitutionally
10 effective counsel at trial or on appeal. And the
11 Federal habeas courts uniformly reject those efforts to
12 recharacterize. The constitutional violation arises in
13 the original criminal case.

14 CHIEF JUSTICE ROBERTS: I guess my
15 hypothetical supposes a new constitutional violation.
16 And I am just suggesting that the fact that Texas
17 doesn't grant this relief freely doesn't mean that
18 that's a sufficient answer with respect to the abuse of
19 federal habeas.

20 MR. GOLDSTEIN: I understand,
21 Mr. Chief Justice. I think that body of cases is
22 relatively narrow as it arises, and it also isn't
23 implicated here.

24 If the Court has no further questions, I
25 will reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Jordan.

3 ORAL ARGUMENT OF SEAN D. JORDAN

4 ON BEHALF OF THE RESPONDENT

5 MR. JORDAN: Mr. Chief Justice, and may it
6 please the Court:

7 Congress's commitment to preventing
8 unnecessary delays in the filing of Federal habeas
9 claims is reflected in section 2244(d)(1)'s strict
10 one-year limitations period. And it did not intend that
11 inmates who wait for years before seeking
12 post-conviction review would obtain a new Federal
13 limitation start date when an out-of-time appeal is
14 awarded.

15 JUSTICE SOUTER: Well, why should that be,
16 given the fact that the day it is going to run from is
17 the day that -- which the State of Texas is willing to
18 take action. And if Texas is willing to let the matter
19 ride as long as it rode here, why shouldn't the one-year
20 statute apply?

21 In other words, I guess what I'm saying is
22 the -- the decision about what is appropriate, that,
23 in effect, would start this period running, is Texas's
24 And as long as Texas is -- is satisfied with it, why
25 does AEDPA have an independent concern?

1 MR. JORDAN: Your Honor, the reason is that
2 in (d)(1)(A) Congress set a uniform Federal rule for
3 finality. And that finality date is either when the --
4 the period of direct review ends by the conclusion of
5 direct review or the expiration of the time for seeking
6 direct review.

7 So when that happens, by statute, Congress
8 has said that the (d)(1)(A) finality date is attached.

9 JUSTICE SOUTER: Yes, but that -- in effect,
10 I think that begs the question, because if -- if Texas
11 says: Okay, we are going to -- we are going to
12 recognize a direct appeal starting -- or a direct-appeal
13 right exercisable now, then (d)(1)(A) applies by its own
14 terms exactly at the -- at the conclusion of the process
15 which Texas has at this date chosen to allow.

16 Texas doesn't have any gripe. It decided it
17 ought to act, and -- and, undoubtedly, it should have.

18 As long as the -- as long as the State is
19 protected, why is there an independent interest in
20 enforcing AEDPA, or enforcing the shortest possible rule
21 under AEDPA?

22 MR. JORDAN: Justice Souter, there is an
23 independent Federal interest that the Court has
24 recognized consistently in avoiding abusive and
25 unnecessary delay in the filing of Federal habeas

1 claims.

2 JUSTICE SOUTER: Yeah, but we are -- we are
3 concerned about State interests, aren't we?

4 MR. JORDAN: Certainly, Justice Souter, and
5 comity and finality are important purposes of AEDPA.
6 But another recognized and important purpose of AEDPA is
7 to avoid, you know, abusive and unnecessary delays in
8 the filing of Federal habeas claims. So even if a State
9 court would allow stale claims years later to be heard,
10 that doesn't mean that Federal courts need to hear those
11 claims 10, 15 or 20 years later.

12 But there is a second point, Justice Souter,
13 that -- that is a problem with interpreting (d)(1)(A) in
14 the manner the Petitioner suggests, which is that it
15 will make it far more difficult for Federal courts to
16 administer that statute. Because if the Court
17 interprets "direct review" to bring in Texas and all the
18 50 States various remedies for ineffective assistance of
19 counsel on appeal, then what that means is you are no
20 longer going to have a uniform Federal rule for finality
21 in any of these cases.

22 What you are going to have is a patchwork of
23 -- of various dates, and the -- the reality is --

24 JUSTICE SOUTER: Well, you have got a -- in
25 a sense, you have got a patchwork now. I mean not --

1 not every State rule for the commencement of a direct
2 appeal in the normal course is -- is identical. So we
3 -- we start with a patchwork.

4 MR. JORDAN: But the difference is stark,
5 Justice Souter, because the -- the dates that the States
6 use for deadlines on initial direct appeal, the vast
7 majority, are within a short timeframe, 20 days to
8 90 days, the vast majority. Whereas, these remedies for
9 out-of-time appeals are genuinely varied, and they vary
10 over time in the States.

11 And if I could give you a couple of examples
12 --

13 JUSTICE SOUTER: But aren't they -- and I
14 will -- you know, I will take the examples, but I mean,
15 aren't they varied because the -- the circumstances of
16 error which led to these late appeals vary, too? And
17 isn't that exactly the way it ought to be?

18 MR. JORDAN: Well, it is correct, Justice
19 Souter, that some States -- the remedy varies with the
20 type of ineffective assistance of counsel, for example,
21 the difference between not filing a notice of appeal or
22 not filing a brief.

23 But my point is that those remedies -- the
24 Petitioner's brief -- opening brief at pages 29 to 32
25 says: This is going to be easy for Federal courts to

1 apply, because what they can do is look at these six
2 different aspects of the nature of the remedy in each
3 State, and they can determine from that whether --
4 when -- whether it should be a new start date or just
5 tolling. The --

6 CHIEF JUSTICE ROBERTS: Can't we leave
7 that -- and you suggest that it is a Federal rule. I am
8 not sure that's right. Why don't we just leave that up
9 to the States? I am not -- if I don't accept your
10 friend's determination that this is a matter of
11 substance rather than form, States have it -- excuse
12 me -- within their control. Here -- your State calls it
13 another direct appeal.

14 Why don't we just take them at their word?
15 And if they don't want to get into the business of
16 having a Federal review of a second direct appeal that
17 they choose to allow, they just call it something else.
18 Call it a -- you know, the collateral review of a
19 successful claim of ineffective assistance of counsel
20 and file whatever. And then, you know, under AEDPA that
21 wouldn't count as a new final judgment.

22 MR. JORDAN: Well, it's -- it's true, Your
23 Honor, that the -- that States can fashion whatever
24 remedy they want. And in terms of the comity and
25 finality interests, it is going to be a responsibility

1 of the States if they want to change their law. But
2 because in -- in these out-of-time appeals -- and most
3 of the States' remedies look somewhat like in --
4 somewhat like Texas in the sense that they are coming
5 through post-conviction review and they -- they are
6 awarding another, if you will, chance for the inmate to
7 assert his claims. There is not a reason for the court
8 to strain the interpretation of (d)(1)(A) to protect the
9 State's interest --

10 JUSTICE BREYER: Why -- why is it a strain?
11 I mean suppose that Texas decided to give every criminal
12 defendant convicted one thousand years to appeal. You
13 know, if they did, I guess they would have one more year
14 after that to go to Federal habeas, right?

15 MR. JORDAN: That's true, Your Honor.

16 JUSTICE BREYER: Okay. Then what's the
17 difference between that, giving them a thousand years,
18 which I doubt they will do, and what they have said
19 here? They said for purposes of the Texas rules all
20 time limits shall be calculated as if the sentence had
21 been imposed on the date that the mandate of this court
22 issues.

23 There they are. The Texas Supreme Court
24 gave him all that time, it's whatever it was, and said
25 that's the time you have. How, how is that different

1 from the legislature decides to give him one
2 thousand years?

3 MR. JORDAN: It's true, Your Honor, that the
4 -- that the -- the Texas court made a decision to give a
5 remedy to this inmate that was meant to duplicate the
6 type of claims he could have raised on direct appeal.
7 Our position is that does not change the finality date
8 under (d)(1)(A), because by statute, Congress has said
9 that that date attaches at the -- at the expiration of
10 direct review. And -- and the natural reading of that
11 language --

12 CHIEF JUSTICE ROBERTS: Well, I -- I was
13 just going to stop you there. It doesn't say that
14 starts to run at the expiration of direct review. It
15 says on the date the judgment became final.

16 MR. JORDAN: That's correct, Your Honor, and
17 it says, it became final by --

18 CHIEF JUSTICE ROBERTS: -- by the conclusion
19 of direct review.

20 MR. JORDAN: Or the expiration of the time
21 for seeking such review. And the importance there, Your
22 Honor, is that it -- it anticipates one of two events
23 occurring. In other words, the natural reading is
24 Congress understood that in some cases there wasn't
25 going to be a conclusion of direct review. There was

1 going to be an expiration of time for seeking review.
2 And at that point finality would attach.

3 JUSTICE GINSBURG: Even though, as in this
4 case, it turned out he found out within a year. But
5 suppose he didn't find out for more than a year; that
6 is, he didn't find out that -- that the appeal had been
7 filed, and he didn't find out about the dismissal? So
8 because either his counsel or the State blundered, he is
9 out in the cold, and he can never present his direct-
10 appeal claim.

11 MR. JORDAN: Not necessarily, Justice
12 Ginsburg, and that's the reason why Congress already
13 provided exceptions in the statute in the form of
14 subsections (b) through (d) that provide later start
15 dates for extenuating circumstances beyond the inmate's
16 control.

17 JUSTICE GINSBURG: Mr. Goldstein just
18 explained to us why those two provisions, the (b) and
19 (d) would not work. That this --

20 MR. JORDAN: I understand, Your Honor. And,
21 respectfully, I disagree -- I disagree with that, and
22 here is the reason why (d)(1)(B) applies. And (d)(1)(B)
23 applies because in -- for example, in this case you had
24 the -- a finding that there was constitutionally
25 ineffective assistance of counsel to the extent of

1 abandoning the inmate on appeal.

2 And this Court's precedent has said that
3 when there is -- in the trial or on direct appeal, when
4 there is ineffectiveness of counsel that amounts to
5 abandonment, that winds up being imputed to the State
6 because it means that the State got or -- or kept a
7 conviction by the violation of the inmate's due-process
8 rights.

9 CHIEF JUSTICE ROBERTS: Do you have a case
10 to cite for that? Because I understood your friend to
11 say the opposite: That wouldn't count as an impediment.

12 MR. JORDAN: I do --

13 CHIEF JUSTICE ROBERTS: How do I resolve
14 that dispute?

15 MR. JORDAN: I do, Your Honor. You -- you
16 need -- need to look no longer than the case that is
17 cited in both briefs. It is *Evitts versus Lucey*, and it
18 is cited in the Petitioner's brief at pages 27 and 37,
19 and it is cited in our brief at pages 36 and 37.

20 It is also in another case not cited in the
21 brief, but it is also noted in *Coleman versus Thompson*.
22 In other words, the Court has consistently said that
23 where there is constructive denial of counsel that
24 amounts to no assistance at all and the State thereby
25 obtains and retains a conviction, there -- that will be

1 imputed to the State. Now, the difficult part in
2 getting (d)(1)(B), a later date under (d)(1)(B), is that
3 you also need the causal connection, because you can't
4 just have the ineffective assistance of counsel. It
5 also has to have caused the inmate not to be able to
6 file his -- his timely Federal habeas. That happened in
7 this case because the ineffective assistance of counsel
8 resulted in the inmate having a lack of notice. The
9 attorney did not serve the Anders brief on the inmate
10 and he gave the wrong address to the court. So the
11 court wound up sending the judgment to the wrong address
12 and the inmate didn't know.

13 That's why we say in those circumstances
14 (d)(1)(B) is implicated. But it's worth noting that
15 even if we measure the date from September of 1997 or we
16 give him a new date under (d)(1)(B), then that's the
17 date that he admits, he acknowledges, he knew his State
18 appeal had failed. From that date, he waited four and a
19 half years to seek any type of post-conviction review.
20 And then -- and the importance of that is that Congress
21 intended to give a year, a strict one-year period. This
22 inmate could have invoked (d)(1)(B) and he did not and
23 he waited four and a half years from the date he could
24 have had.

25 JUSTICE GINSBURG: And Texas could -- and

1 Texas could have gone into the State court and said:
2 Don't give him the direct review; he waited four and a
3 half years after he -- but the State didn't ask for
4 that.

5 MR. JORDAN: That's correct, Your Honor.
6 The State did not assert a laches defense, but I have --
7 there is two points on that: One is that the only case
8 -- there is one case and it's cited in the brief, Ex
9 parte Carrio. It's cited in the Petitioner's brief.
10 There's one case in the last 150 years of Texas
11 jurisprudence where laches has actual been asserted and
12 an appeal has been -- I'm sorry -- habeas has been
13 denied based on that.

14 And we are not talking about -- we are not
15 asserting laches here. We are talking about the running
16 of his Federal limitations period under a Federal
17 statute. And what we are saying is this inmate was
18 clearly not diligent, and this inmate could have had a
19 later start date, but even from that later start date
20 he would -- he would -- the Federal period would have
21 expired.

22 I would like to address quickly the (d)(2)
23 point because I think it's important. The reference was
24 made that (d)(2) doesn't work, In other words (d)(2)
25 tolling won't work in this case because of the Court's

1 decision in Lawrence. And that's -- that's not true,
2 because the situation in Lawrence was different.

3 In Lawrence, the Court's decision said that
4 inmate had exhausted all of his post-conviction review
5 in the Florida courts. He had gone all the way to the
6 top court. There was no State court left for him to go
7 to. And the question was, when he then came to this
8 Court with a cert petition, could that cert petition
9 count as tolling time of review for the State
10 post-conviction review? The Court said no.

11 That's not the case here. This is more like
12 the Court's decision in Carey versus Saffold, where in,
13 Carey, the Court said -- the Court acknowledged that
14 under California law where inmates can, if they lose
15 their habeas in a lower court, they can then file an
16 original writ in a higher court. The Court said that,
17 while the inmate is going through that process, the
18 collateral review of the underlying judgment remained
19 pending, it remained in continuance.

20 And that's what's happening here. If you
21 look at what happened in the Texas court, when the
22 inmate files his habeas petition, the habeas petition
23 itself is not reviewing the pertinent judgment. That's
24 the language of (d)(2), "reviewing the pertinent
25 judgment." That habeas petition asks for a second

1 proceeding to review the pertinent judgment. It says,
2 can you give me another proceeding, the out-of-time
3 appeal, to review the pertinent judgment? And so, when
4 the inmate receives that, when he -- if he gets the
5 out-of-time appeal, then the next step, the out-of-time
6 appeal, is where the judgment is reviewed.

7 So, the Court's rationale in Carey is
8 applicable with even greater force here because the
9 State courts have told him: File another -- you know,
10 continue your proceeding so you can get review of the
11 underlying judgment. And it anticipates a two-step
12 process. So you might say that the out-of-time appeal
13 is the remedy portion of the habeas proceeding in Texas.
14 And that's why the (d)(2) tolling does work and Lawrence
15 does not defeat that. And in this case, that means that
16 the inmate, if he had acted timely, he could have filed
17 his State post-conviction petition. If he had obtained
18 an out-of-time appeal, he could -- the tolling would
19 have gone on while -- throughout the out-of-time appeal.
20 And then if he had lost that, he could have then gone to
21 Federal court. And so --

22 JUSTICE KENNEDY: Well, you're saying that
23 (2) has a negative implication.

24 MR. JORDAN: I'm sorry?

25 JUSTICE KENNEDY: You are saying that (2)

1 had a negative implication. In other words, the time
2 shall not be counted while it's pending and that it
3 should be counted if it's not pending and you are not
4 diligent.

5 MR. JORDAN: That's -- well, that's correct,
6 Your Honor, in the sense that if the State -- some
7 collateral review in State court has to be pending for
8 tolling to be going on. And what we are saying is that
9 for the out-of-time appeal process in Texas, it does
10 remain pending. The reason it remains pending is that
11 that first habeas petition is asking for, and if the
12 inmate gets it is receiving, further collateral review
13 of that judgment because --

14 CHIEF JUSTICE ROBERTS: When you say "the
15 first habeas petition" you mean the first State habeas
16 petition?

17 MR. JORDAN: That's correct, Your Honor.

18 CHIEF JUSTICE ROBERTS: Okay. I'm sorry.

19 MR. JORDAN: And that first State habeas
20 petition -- if you look -- if you look in the record,
21 you will see the State habeas petition doesn't challenge
22 anything about the underlying judgment. It doesn't say,
23 give me relief on any particular claim. What it says
24 is, give me an out-of-time appeal proceeding so that I
25 can challenge the underlying judgment. And so, when the

1 inmate obtains that out-of-time appeal to -- to get
2 review of the underlying judgment, (d)(2) tolling still
3 applies. And that --

4 CHIEF JUSTICE ROBERTS: I'm sorry. What do
5 you mean, "(d)(2) tolling still applies"? That the
6 direct appeal time does not count against his one year?

7 MR. JORDAN: That's correct. The
8 out-of-time appeal time, Your Honor, won't count. So
9 what we'll go on is that if his habeas was granted and
10 he was allowed the out-of-time appeal, he could pursue
11 the out-of-time appeal. The tolling of the Federal
12 limitations period under (d)(2) would remain during that
13 entire time, if he then loses his out-of-time appeal and
14 he comes out of the other side of the process.

15 JUSTICE SCALIA: That's assuming that he
16 files the appeal within one year, right?

17 MR. JORDAN: That's -- I mean, if he does,
18 that's correct, Your Honor.

19 JUSTICE SCALIA: What if he doesn't?

20 MR. JORDAN: If he doesn't file his State
21 habeas within one year?

22 JUSTICE SCALIA: Yes.

23 MR. JORDAN: Your Honor, if he doesn't file
24 --

25 JUSTICE SCALIA: The game is over.

1 MR. JORDAN: Well, it would be, Your Honor,
2 unless he fell into one of the exceptions provided by
3 Congress in (B), (C), or (D).

4 JUSTICE SCALIA: What if he doesn't find out
5 about the fact that notice, proper notice, wasn't given
6 to his counsel, so he doesn't find out about the
7 gravamen for the appeal until after a year?

8 MR. JORDAN: Your Honor, two points in
9 response. The first is that -- is that I'm assuming, in
10 your hypothetical, that it is an inmate who has
11 attempted to be diligent, has attempted to contact the
12 court.

13 JUSTICE SCALIA: Right. Right.

14 MR. JORDAN: And if he has attempted to
15 contact the court and he still had not found out, the
16 circumstances -- I mean, we've looked at a lot of these
17 cases and there is just very few out there where an
18 inmate who is being diligent is not going to be able to
19 find out one way or the other. So, it may be that if he
20 wasn't able to, he might fall under (d)(1)(B). But if
21 he didn't, Your Honor, and it was an unusual -- and it
22 would have to be a very unusual circumstance -- it might
23 be that equitable tolling could apply. But this Court
24 has recognized, in *Dodd v. United States*, in
25 interpreting the similar provisions in the counterpart

1 to 2244(d)(1)(C), in the context of when the Court
2 recognizes a retroactively applicable --

3 JUSTICE SCALIA: I don't think (d)(1)(B)
4 does. It requires an impediment to have been removed.
5 There is no impediment being removed. He just didn't
6 find out the facts.

7 MR. JORDAN: Well, presumably, Your Honor,
8 the reason that he didn't would have -- if he was being
9 diligent, if he was -- because he needs to be diligent.
10 He can't just sit in his cell --

11 JUSTICE SCALIA: Right. Right.

12 MR. JORDAN: -- and say, "I'm not going to
13 do anything." If he is being diligent and if he is
14 really attempting to find out what happened to his case,
15 then probably something has happened, either, you know,
16 through the State system or through the attorney. But
17 if it has not -- you know, again, we've looked at a lot
18 of these cases. We haven't seen cases like that, but --

19 JUSTICE SCALIA: I just made one up. I
20 mean, it's a hypothetical.

21 MR. JORDAN: Yes.

22 JUSTICE BREYER: But it works. Your system,
23 I think, works in that instance, as I understand it.
24 Don't tell me I'm right if I'm wrong, please. But the
25 -- as you understand it, he finishes -- he doesn't get

1 his appeal, you know, and time passes; doesn't take it.
2 Then, five years later, he learns for the first time and
3 the first time he could have learned that his lawyer
4 tore up the notification. At that point, (1)(B) comes
5 into play. So the year begins to run.

6 Then, in your idea, he has -- he has a year
7 to go to Federal court. But wait, it's tolled while he
8 goes to State court. So he goes to State court having
9 just learned it. And now he's under (2) and he files a
10 habeas in State. Now the remedy of the State habeas is
11 to reopen the direct appeal. But we should count that,
12 since it's a remedy of a habeas, as if it were a
13 continuation of the habeas and therefore it would fall
14 within (2). That's your argument.

15 MR. JORDAN: Exactly.

16 JUSTICE BREYER: And it's -- correct? I do
17 not think there is any case ever considered that to my
18 knowledge.

19 MR. JORDAN: No --

20 JUSTICE BREYER: -- and the only difficulty
21 of it is that you have to take a sort of leap of faith
22 of some kind in attaching what everybody's calling the
23 direct appeal as if it were actually part of the State
24 habeas proceeding. That's I think the hardest part of
25 your argument.

1 JUSTICE SCALIA: There is more of a problem
2 than that, as the other side just said. (1)(B), which
3 is the gimmick you are using to get out of this, doesn't
4 speak of not being able to find out in time; it speaks
5 of the date on which the impediment to file an
6 application --

7 JUSTICE BREYER: (D).

8 JUSTICE SCALIA: -- is removed.

9 JUSTICE BREYER: It's not (B), it's (D).

10 JUSTICE SCALIA: Oh, you said (D), not (B).

11 JUSTICE BREYER: (D).

12 CHIEF JUSTICE ROBERTS: Well, I thought,
13 Counsel, that your response to that was when you have a
14 failure of counsel, that that is imputed to the State.
15 So it is a removal of an impediment created by the
16 State.

17 MR. JORDAN: That's -- that's correct,
18 Mr. Chief Justice. That's -- under the Court's decision
19 is cases like *Evitts v Lucey*, if there has been a
20 constructive denial of counsel, an abandonment of
21 counsel to the degree where there was effectively no
22 appeal, then that could be imputed to the State. The
23 reasoning has been that it's because the State was able
24 to get or keep a conviction without the inmate having
25 due process. That would be -- the inmate would still

1 have to have the fact that that impediment actually
2 caused him to -- and this case is a good example.

3 Even though this inmate -- you know, there
4 was ineffectiveness of counsel -- if the court had the
5 right address, and court had sent him the judgment, then
6 there would not have been the causal connection; he
7 wouldn't have been able to get the (d)(1)(D) date.

8 JUSTICE SCALIA: The problem with (1)(D) is
9 that the claim or claims presented that is referred to
10 in (D) is not the denial of the appeal. It's the claim
11 or claims that he wants to bring in his Federal habeas.
12 That's why (1)(D) doesn't work, you have to go back to
13 (1)(B).

14 I'm talking to you.

15 (Laughter.)

16 JUSTICE BREYER: But I think it's a good
17 point.

18 MR. JORDAN: Well, you are exactly right,
19 Justice Scalia, that (d)(1)(D), in this case, because it
20 is claim-specific it only does apply to the ineffective
21 assistance of counsel on appeal. We noted in our brief
22 that it was implicated, but because he got relief on
23 that claim in the State court, there was no reason for
24 him to -- so he wouldn't have -- the (D) was implicated
25 but didn't need to be asserted.

1 We are that saying (d)(1)(B) --

2 JUSTICE SCALIA: (B).

3 MR. JORDAN: -- is -- is -- in play in the
4 case because of the unique circumstances of this -- of
5 this --

6 JUSTICE BREYER: Between your response to
7 the Chief Justice and Justice Scalia, I stand
8 enlightened.

9 MR. JORDAN: It's the interplay of these two
10 -- of these two provisions, because both of them in any
11 particular case could be in play. If the -- - if, for
12 example, this inmate had not gotten relief in the State
13 court for his ineffectiveness of counsel on appeal, then
14 the (d)(1)(D) could have provided a later start date for
15 that claim. It's (d)(1)(B) that applies to the other
16 claims. And the -- you know, the bottom line notion for
17 our position is that it cannot be that Congress intended
18 in this -- this statute to be interpreted such that a
19 non-diligent inmate who waits four and a half years
20 after he knows his appeal has failed to seek any sort of
21 post-conviction relief will obtain a new start date.

22 JUSTICE SCALIA: But that's your fault.

23 JUSTICE GINSBURG: Justice could have -- not
24 only, that don't some States have a limitation period
25 when -- when he finds out that his appeal has been

1 dismissed, without notice to him, aren't there some
2 States, criminal justice systems, that say from the date
3 that you had knowledge, you have X days to file?

4 MR. JORDAN: Yes, Your Honor. There are a
5 number of States that have -- if we are talking about
6 remedies for ineffective assistance of counsel on
7 appeal, there are a number of States that have
8 deadlines; but there are at least 19 States that provide
9 remedies for ineffectiveness of counsel on appeal with
10 no statute of limitations.

11 And in -- and in those States and in many
12 cases what that means is that the inmate, like this
13 inmate, could come five years later, ten years later,
14 and make those claims.

15 CHIEF JUSTICE ROBERTS: So, do I understand
16 correctly that, based on your answers and your friend's
17 answers, there is no difference between the way you two
18 in substance read these provisions? He relies on
19 (d)(1)(A); you rely on the combination of (d)(2) and
20 (d)(1)(B) and (d); except in the situation where you
21 have a non-diligent prisoner, and in that case, his
22 theory leads to a different result than yours.

23 He excuses the non-diligence because the
24 State chooses to label the second opportunity as final.
25 You do not excuse the non-diligence because in the

1 absence of diligence, (d)(1)(B) and (d)(1)(D) do not
2 apply.

3 MR. JORDAN: That's correct, Mr. Chief
4 Justice. And I'd like to address a point that's made in
5 the reply brief, about --

6 CHIEF JUSTICE ROBERTS: Then it comes down
7 -- it does come down to his, where he began his
8 argument, which is he said that this is an unusual case
9 where Texas is being overly generous to convicts,
10 because you choose to label it as direct appeal and
11 therefore that means someone that the States allow to
12 have another direct appeal, even though they have been
13 non-diligent, get the benefit of the -- of a new
14 finality date.

15 MR. JORDAN: That's correct, Your Honor, and
16 our position is that Texas -- not Texas or any State can
17 rewrite the -- this Federal statute and a finality date
18 in this Federal statute. But I want to address quickly
19 the point that's made in a reply brief that the Court
20 not worry about this because there is no incentive for
21 non-capital inmates to -- to sit on their rights. And I
22 have two points I want to make on that.

23 The first is Congress has already made that
24 decision. Obviously Congress was concerned that even
25 non-capital inmates could sit on their rights because

1 they imposed this strict one-year limitation on
2 non-capital inmates. But the second point is that as a
3 practical matter this happens in many, many cases.
4 These cases provide the example. In this case the
5 inmate waited five years. The *Frasch v Peguese* case
6 that is coming out of the Fourth Circuit on an
7 out-of-time appeal, the inmate -- a non-capital inmate
8 waited ten years to seek post-conviction review. And so
9 these are cases that we think are representative of many
10 case that would come through the district courts, and
11 that in fact non-capital inmates, whatever their
12 incentives may be, do as a practical matter sometimes
13 sit on their rights.

14 JUSTICE SCALIA: Convicted felons don't
15 always make intelligent decisions, you are saying.

16 MR. JORDAN: That's correct. And the
17 problem is that when -- when for whatever reason they
18 sit on their rights ten or 15 years, our point is that
19 that doesn't mean they can come back in and have Federal
20 courts hearing stale claims that should have been
21 brought, if the inmate was being diligent, years
22 earlier.

23 And there's -- and this case is a case in
24 point. This inmate has -- has provided no reason why --
25 no legitimate reason why he waited four and a half

1 years. The only reason he provided was I am a pro se
2 inmate and I -- I don't know what the law is. And you
3 can find his data in the joint appendix pages 109 to 112, and
4 those are directly rejected by the court in the Johnson
5 case, Johnson v United States. The court said in that
6 case --

7 JUSTICE STEVENS: Am I correct that on the
8 underlying merits of the basic claims, that each -- his
9 lawyer filed an Anders brief?

10 MR. JORDAN: That's correct, Justice --

11 JUSTICE STEVENS: He's probably not a very
12 -- he's not -- has the greatest in the world of
13 succeeding, I wouldn't suppose.

14 Isn't this characteristic of this category
15 of cases, that really most of them heard are pretty
16 frivolous?

17 MR. JORDAN: Your Honor, a lot of them are.
18 A lot of them are, and in fact there were two Anders
19 briefs filed in this case. To show how -- how weak his
20 claims were, when he got the out-of-time appeal, he was
21 appointed a new attorney and she filed an Anders brief.
22 So you had two attorneys in this case who said --

23 JUSTICE STEVENS: What strikes me about the
24 case is we are fighting about the limitations and
25 whether it applies and so forth; you probably could have

1 disposed of the whole litigation a lot faster by just
2 looking at the merits for about ten minutes.

3 MR. JORDAN: I think that is exactly right,
4 Justice Stevens. But the procedural questions remain --

5 JUSTICE STEVENS: This is all -- this is a
6 product of Congress trying to save us all time.

7 (Laughter.)

8 MR. JORDAN: Indeed. This case, the
9 underlying merits are, there basically are no merits to
10 his underlying claims is a point we have fully briefed
11 and I won't address here unless there are questions from
12 the Court. And unless there are further questions,
13 I'm --

14 CHIEF JUSTICE ROBERTS: Thank you Mr.
15 Jordan.

16 Mr. Goldstein, you have four minutes.

17 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

18 ON BEHALF OF THE PETITIONER

19 MR. GOLDSTEIN: Thank you, sir. A few short
20 points.

21 Justice Stevens, if later on you have an
22 opportunity to look at footnote 15 on page 42 of the
23 blue brief, we cite eight cases, and there are more, in
24 which these out-of-time appeals really did find
25 meritorious claims. And I -- so I don't want the Court

1 to be left with the impression that this is much ado
2 about nothing. The rule of law will actually be quite
3 significant.

4 Two small corrections to things my friend
5 inadvertently said or impressions he may have
6 inadvertently left. He says there are 19 States that
7 have no statute of limitations, but that omits the very
8 many of those States that apply laches, and the fact
9 that the State of Texas here did not assert the
10 untimeliness of the State post-conviction proceeding is
11 pretty much I think why we are ultimately here.

12 He also said that there is only one State
13 opinion finding laches, as if, I think, to create the
14 impression that Texas courts don't take laches
15 seriously. Most of these are disposed of without
16 opinions. But the more relevant important is that there
17 aren't Texas State opinions rejecting claims of laches.
18 What the Texas courts have made is that the Texas A.G.'s
19 office has to assert the defense of laches, as is true
20 everywhere and is true in this Court's jurisprudence as
21 well.

22 The final two points I wanted to make are
23 about (d)(1)(B) and (d)(2), all of which, I think
24 honestly reduced to Justice Kennedy's point, is that the
25 relevant provision is (d)(1), whatever else is going on

1 in the case. But Justice Scalia and the Chief Justice
2 came back to the point about whether this is an
3 impediment, and my friend kept answering it is State
4 action, and the Court would say, but is it an
5 impediment?

6 And at page 20 of our reply brief we must
7 cite eight or ten cases, three of which notably are from
8 Texas; there were litigated by the Texas Attorney
9 General's office, that make it clear that the failure to
10 give the notice of the opinion is not an impediment to
11 filing post-conviction review, and the Court would be
12 rewriting a lot of habeas corpus law to rule for the
13 State of Texas here.

14 CHIEF JUSTICE ROBERTS: What about -- he
15 cited most prominently the Evitts case.

16 MR. JORDAN: That's a State action, but as
17 the Court's questioning indication, the question is, is
18 State action that is an impediment to filing a Federal
19 habeas petition, and all of our cases answered that
20 question.

21 The final point is about (d)(2) and my
22 friend says that this isn't like Lawrence v Florida,
23 because here there is more proceedings. But the Court's
24 holding was this, and it was unambiguous: When the
25 post-conviction court enters its mandate, so that the

1 time to seek cert starts to run, that's when the
2 post-conviction application is no longer pending; and
3 when the Texas Court of Criminal Appeals decided the
4 Petitioner's claim and said he had an out-of-time
5 appeal, it issued its mandate and the mandate is in the
6 joint appendix. And somebody -- the State could have
7 sought cert in that case, and the post-conviction
8 application was no longer pending.

9 And Mr. Chief Justice, you're right, you can
10 the case on the basis of label or substance, but it is
11 unambiguous that this is not post-conviction review in
12 what we have been calling the second appeal. Teague
13 retroactivity does not apply; all the constitutional
14 rights that are announced in the meantime apply; you
15 have a right to a counsel; the usual standards of
16 post-conviction relief in terms of having us show an
17 extra layer of prejudice don't apply.

18 This is just like any other appeal the Texas
19 Court of Appeals and the courts of criminal appeal would
20 decide and that makes it a (d)(1) case.

21 Thank you very much.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

24 (Whereupon, at 1:58 p.m., the case in the
25 above-entitled matter was submitted.)

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