No. 03-9685

In the Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a state court vacates an unconstitutional state conviction used to enhance a federal sentence, is the vacatur of that conviction a "fact supporting the claim" starting the one-year statute of limitations under 28 U.S.C. § 2255(4)?

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Robert Johnson, Jr. was the defendant/appellant in the court of appeals. Respondent United States of America was the plaintiff/appellee in the court of appeals.

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BRIEF FOR PETITIONER

Petitioner respectfully requests that this Court reverse the Opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's denial of Petitioner's motion to vacate pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The Opinion of the court of appeals is reported at 340 F.3d 1219 (11th Cir. 2003) and reproduced at J.A. 22. The opinion of the district court is unpublished and is reproduced at J.A. 18.

JURISDICTION

The court of appeals dismissed the petition for rehearing en banc on December 22, 2003. Petitioner timely filed a petition for a writ of certiorari on March 22, 2004. On September 28, 2004, this Court granted certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute relevant to this proceeding is 28 U.S.C. § 2255, which provides in relevant part:

> A 1-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of --
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The full text of the statute is set forth in the attached Appendix. *See* App. 1 - App. 3.

STATEMENT

A. Facts

Robert Johnson, Jr. ("Petitioner" or "Johnson") and five co-defendants were indicted on March 18, 1994, on drug-related charges. J.A. 23. Johnson pled guilty to one count of distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, based on the sale of approximately nine grams of cocaine worth about $1,000. The district court sentenced Johnson as a career offender under U.S.S.G. § 4B1.1 based on the fact of two prior state convictions attributed to Johnson in his Presentence Investigation Report ("PSI").[1] J.A. 23. Johnson received 188 months in prison, the top end of the sentencing range. J.A. 23, 43.

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[1] The Career Offender enhancement under the Sentencing Guidelines in effect at the time of Johnson's sentencing required that: (1) the defendant was at least 18 years old at the time of the instant offense; (2) the offense of conviction was a felony controlled substance offense; and (3) the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1 (November 1, 1994). The PSI used two prior state convictions -- a July 5, 1989 conviction for distribution of cocaine and a November 13, 1989 conviction for sale of cocaine -- to support the career offender enhancement to Johnson's sentence. (PSI ¶¶ 52, 54; Addendum to PSI at 2).

Had Johnson not been sentenced as a career offender, the appropriate range would have been 70-87 months.[2] The district court enhanced Johnson's adjusted offense level from 25 to 32 under U.S.S.G. § 4B1.1 based on the fact of his two prior state court convictions. J.A. 42. Having been classified as a career offender, Johnson was eligible for the enhanced sentencing range of 151 to 188 months, which the district court employed to impose the 188-month sentence. J.A. 42-43. Johnson initially objected to being classified as a career offender in the PSI, but his counsel at the time subsequently withdrew Johnson's objections to the PSI. J.A. 23, 43.

Following sentencing, Johnson filed a direct appeal to vacate his sentence, arguing that the district court based its decision that he was a career offender on prior state convictions in which his guilty pleas were obtained without a valid waiver of his constitutional rights. J.A. 23. The Eleventh Circuit affirmed Johnson's sentence, and declined to consider the merits of Johnson's argument concerning the invalidity of his prior convictions. J.A. 8. The Eleventh Circuit noted, however, that

> should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

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[2] This assumes that Johnson would have had a criminal history score of 4 in light of the vacatur of all prior convictions in his PSI for which he received criminal history points except his November 13, 1989 conviction.

J.A. 8 n.1. Johnson's petition seeking certiorari from this Court was denied on April 22, 1996. J.A. 24.

On April 25, 1997, the district court received Johnson's *pro se* motion to extend the time to file a § 2255 motion. J.A. 24. The court denied the motion as untimely under § 2255(1).[3] J.A. 24. The district court's Order used language seeming to invite a later filing by Johnson should the state court vacate his state convictions: "[P]etitioner's motion for an extension of time within which to file a § 2255 motion is DENIED WITHOUT PREJUDICE to his right to file a § 2255 motion in the future should he become able to meet one of the other three situations outlined in the statute." (R-174).

Johnson next returned to the state court system, as the Eleventh Circuit had suggested. Johnson filed a pro se petition for a writ of habeas corpus in the Superior Court of Wayne County, Georgia on February 6, 1998. J.A. 24. Johnson argued that his guilty pleas were involuntary because he did not knowingly, intelligently, and voluntarily waive his right to counsel at his guilty plea hearing. J.A. 24. *See Boykin v. Alabama*, 395 U.S. 238 (1969). In support of his petition, Johnson filed copies of the plea petitions accompanying the entry of his state court guilty pleas to support his argument that he had not validly waived his rights in connection with his plea hearing. J.A. 9. The State of Georgia opposed Johnson's habeas petition. J.A. 10.

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[3] Section 2255(1) provides that the one-year statute of limitation begins to run on the date the defendant's conviction became final.

On October 24, 2000, over the State's objection, the Superior Court of Wayne County vacated, *inter alia*, one of the prior convictions used to classify him as a career offender, holding it was unconstitutional in violation of *Boykin*, *supra*. J.A. 9-10 (citing *Clowers v. State*, 272 Ga. 463, 532 S.E.2d 98 (2000); *Bazemore v. State*, 273 Ga. 160, 535 S.E.2d 760 (2000)).

B. Procedural History

Having succeeded on his state habeas petition, Johnson returned to the federal district court and filed the present § 2255 motion on February 13, 2001, approximately four months after the vacatur of his Georgia convictions. Because Johnson no longer qualified as a career offender, he asked the district court to vacate his enhanced sentence and impose a sentence without the career offender enhancement. J.A. 24. The district court denied the § 2255 motion as untimely because it had not been filed within one year after the completion of direct review. J.A. 18-20. The Eleventh Circuit granted a certificate of appealability and appointed the undersigned as counsel on appeal. J.A. 22, 24 n.1.

On August 5, 2003, the Eleventh Circuit affirmed the denial of Johnson's § 2255 petition as untimely in a divided panel decision. The panel majority held that Johnson's motion had not been filed within one year from the date on which "facts supporting the claim or claims presented could have been discovered" under § 2255(4). J.A. 26-28, 33. Accordingly, the panel reasoned, the motion was filed outside the one-year limitations period otherwise applicable in § 2255(1). J.A. 26-28, 33.

The panel majority rejected Johnson's argument that the "fact" supporting his claim for relief under § 2255 was the

fact that his prior state court convictions had been vacated, which eliminated his status as a career offender. J.A. 26-28. Instead, the panel held that the vacatur of Johnson's state court conviction is not a "fact" within the meaning of § 2255(4), but rather a "legal proposition." J.A. 27. In so holding, the panel essentially followed the First Circuit's decision in *Brackett v. United States*, 270 F.3d 60, 68-69 (1st Cir. 2001).

The panel's dissent, following the Fourth Circuit's recent decision in *United States v. Gadsen*, 332 F.3d 224, 229 (4th Cir. 2003), concluded that Johnson's petition was timely. J.A. 40-43 (Roney, J., dissenting). The dissent reasoned that the state court vacatur is a "fact" within the meaning of § 2255(4). J.A. 40. Therefore, "the one-year statute of limitation on the claim asserted did not begin to run until October 24, 2000," the date on which the state court vacated Johnson's predicate conviction. J.A. 40. Like the Fourth Circuit in *Gadsen*, the dissent reasoned that the term "fact," as used in § 2255(4), should have its ordinary meaning: "a thing done" or "something known with certainty." J.A. 40-41. Consistent with *Gadsen*, the dissent concluded that the fact of the state court vacatur was "obviously new and not previously discoverable" until the state court "actually entered the judgment" overturning Johnson's prior state conviction. J.A. 41. And the fact of the vacatur "supported the claim or claims presented" by Johnson within the meaning of § 2255(4) because without the subsequently vacated state convictions, "the undeniable fact" is that Johnson "was not a career offender within the meaning of the Sentencing Guidelines." J.A. 42.

The Eleventh Circuit subsequently denied Johnson's petition for rehearing en banc. J.A. 49. Judge Barkett dissented from the denial and expressed her view that "Judge

Roney's dissent and Judge Wilkinson's opinion for the Fourth Circuit [in *Gadsen*] correctly explicate the relevant law." J.A. 50. Judge Barkett disagreed with the panel's distinction between "legal" facts and "empirical" facts, noting that there is "no metaphysical barrier [that] prevents a legal consequence from sometimes operating as a fact." J.A. 51. As Judge Barkett explained, "the vacatur of [Johnson's] state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible 'legal effect or consequence' of that fact." J.A. 51. Judge Barkett concluded by stating,

> [T]his particular litigant, who followed the instructions of the Supreme Court, who followed the direct instructions of this Court, who followed the proper instructions of the state and was able to have his state convictions timely vacated, and who probably relied on the plain language of § 2255 ¶ 6(4), is unfairly being denied his right to present his habeas petition.

J.A. 53 (footnotes omitted).

The Eleventh Circuit's decision below is part of a split of authority among the courts that have considered the issue of whether the vacatur of a prior state conviction is a "fact" triggering the statute of limitations in § 2255(4).[4] Johnson

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[4] *Compare Johnson v. United States*, 340 F.3d 1219 (11th Cir. 2003), *United States v. Brackett*, 270 F.3d 60 (1st Cir. 2001), *United States v. Pollard*, 290 F. Supp. 2d 153 (D.D.C. 2003), *and Candelaria v. United States*, 247 F. Supp. 2d 125 (D.R.I. 2003) *with United States v. Mobley*, 96 Fed. Appx. 127 (4th Cir. 2004) (per curiam), *United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), *United States v. Hicks*, 286 F. Supp. 2d 768 (E.D. La. 2003), *United States v. Venson*, 295 F. Supp. 2d 630 (E.D. Va.

petitioned this Court for a writ of certiorari, which the Court granted on September 28, 2004.

SUMMARY OF ARGUMENT

In *Custis v. United States*, 511 U.S. 485 (1994), and *Daniels v. United States*, 532 U.S. 374 (2001), this Court held that prior convictions used to enhance a federal sentence generally could not be challenged either at sentencing or on § 2255 review. The point of *Daniels* is that the facts showing a prior conviction is unconstitutional do not (with rare exception) support a claim under § 2255. The Court in *Custis* and *Daniels* suggested that the proper procedure is for the defendant first to attack his state conviction in state court (or through appropriate § 2254 proceedings) and, if successful, use the vacatur of that prior conviction to reopen his federal sentence.

Johnson did just that. He went back to state court and, *pro se*, obtained the vacatur of a prior conviction used to classify him as a "career offender" under the Sentencing Guidelines and to enhance his federal sentence. The question presented in this case is whether that vacatur is a "fact supporting the claim" under § 2255(4), thus triggering the statute of limitations.

The plain meaning of "fact" is "a thing done." The thing done in this case was the vacatur, which could not have been discovered until it was granted by the state court. The Eleventh Circuit's distinction between "facts" and "legal propositions" adds limitations that change the ordinary

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2003), *and United States v. Hoskie*, 144 F. Supp. 2d 108 (D. Conn. 2001).

meaning of the statutory language. The terms "legal proposition" and "fact" are not mutually exclusive. Legal propositions become historical facts when used as predicates in a later proceeding. Under the Eleventh Circuit's rationale, convictions also would be considered "legal propositions," yet prior convictions are treated as historical "facts" in many contexts, including their introduction at trial and sentencing for a variety of purposes. Indeed, this Court repeatedly has referred to the "fact of a prior conviction" in a variety of contexts. If a prior conviction is a "fact," it follows that the vacatur of that conviction also is a "fact."

Importantly, § 2255(4) starts the statute of limitations upon discovery of a "fact supporting the claim." This Court made clear in *Daniels* that the facts underlying allegations that a prior conviction was unconstitutional cannot support a § 2255 claim. The Eleventh Circuit's ruling below creates a logical contradiction: under *Daniels*, the facts underlying the prior conviction cannot support a § 2255 claim, but under the Eleventh Circuit's rule, these same facts support a § 2255 claim for purposes of calculating the statute of limitations. The more consistent and natural reading of § 2255(4) -- and indeed, the only interpretation consistent with *Custis* and *Daniels* -- is that the vacatur of a prior conviction is the fact supporting Johnson's § 2255 claim.

Not only does the Eleventh Circuit's rule conflict with the underpinnings of *Custis* and *Daniels*, it also virtually eliminates the rights established in those cases. As a practical matter, it is nearly impossible for a defendant who files a state habeas proceeding upon being sentenced by the federal court (as suggested in *Daniels*) to complete state habeas review before his federal conviction becomes "final" under § 2255(1). Indeed, had Johnson filed his state habeas proceedings the day he was sentenced by the district court, he

still would not have received the vacatur from the state court before his federal conviction became final. Moreover, the State has an incentive to take appeals (as it did in at least one published case) that prolong the state proceedings and cause the defendant to miss the federal statute of limitations (unless "placeholder" petitions are allowed). Such a construction of § 2255(4) is particularly troublesome because it presumes that Congress, in enacting the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) two years after *Custis*, intended to essentially eliminate the procedure established by this Court merely by using the word "fact" in § 2255(4).

The two considerations motivating *Custis* and *Daniels* -- ease of administration and finality -- are served by adopting Johnson's interpretation of "fact." If the Eleventh Circuit's rule is adopted, the federal courts will be flooded with "placeholder" habeas petitions that are filed within one year of convictions becoming final and then stayed until state habeas has been completed. The vast majority of these federal petitions will be meritless, but district courts will be forced to manage them until petitioners complete state habeas. By contrast, under Johnson's interpretation of § 2255(4), waiting for the rare vacatur of a prior state conviction will mean that more meritorious federal petitions are filed only after they become ripe. Finality will not be served through placeholder petitions -- they will only delay the vast majority of cases, in which the prior convictions will not be vacated.

Finally, AEDPA is designed to further not only finality, but also federalism and comity -- along with balancing the ends of fundamental fairness. Honoring state court rulings furthers federalism through sensitivity to the legitimate interests of the States in managing their post-conviction processes and by giving state-court judgments their full force and effect. Treating the vacatur of a state conviction as a

"fact" triggering the § 2255(4) statute of limitations will help ensure that the Government is not keeping an inmate, such as Johnson, in prison based on a prior conviction the State has conclusively determined was obtained in violation of the Constitution.

ARGUMENT

This case involves interpretation of the statute of limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA added a one-year statute of limitations on federal "habeas" claims challenging a federal sentence under 28 U.S.C. § 2255. This statute of limitations begins to run on one of four enumerated dates. At issue in this case is the fourth trigger of the one-year limitation period:

> A 1-year period of limitations shall apply to a motion under this section. This limitations period shall run from the latest of --
>
> * * *
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(4).

In *Custis v. United States*, 511 U.S. 485, 487 (1994), and *Daniels v. United States*, 532 U.S. 374, 376 (2001), the Court addressed whether prior state convictions used to enhance a federal sentence could be challenged either at sentencing or on § 2255 review. The Court concluded that, as a general matter, prior state convictions may not be attacked at

sentencing or on § 2255 review and indicated that the proper procedure was for a defendant first to attack his conviction in state court (or through an appropriate § 2254 proceeding) and, if successful, then seek to reopen his federal sentence. *Custis*, 511 U.S. at 497; *Daniels*, 532 U.S. at 382. The Court has not addressed how the one-year limitations period in § 2255 squares with the direction in *Custis* and *Daniels* that defendants must first seek to overturn their prior state convictions in state court before seeking to reopen their federal sentence under § 2255.

I. *CUSTIS* AND *DANIELS* REQUIRE DEFENDANTS TO CHALLENGE THEIR PRIOR STATE CONVICTIONS IN STATE PROCEEDINGS OR THROUGH § 2254

A. *Custis* Precludes Most Collateral Attacks Of A Prior Conviction At The Time Of Federal Sentencing

In *Custis*, this Court held that a defendant in a federal sentencing proceeding may not, with one narrow exception, collaterally attack the validity of a previous state conviction that is used to enhance his sentence under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (the "ACCA"). 511 U.S. at 497. The sole exception is that convictions obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), may be challenged at sentencing.

The Court based its conclusion on its determination that the language of the ACCA and the Constitution do not require that a defendant be permitted to collaterally attack prior convictions in the course of a federal sentencing proceeding, with the exception of *Gideon* challenges. *Custis*, 511 U.S. at 490-97; *see also Daniels*, 532 U.S. at 378 ("We held that

with the sole exception of convictions obtained in violation of the right to counsel, Custis had no right under the ACCA or the Constitution 'to collaterally attack prior convictions' in the course of his federal sentencing proceeding.") (citation omitted).

The *Custis* Court supported its conclusion with two considerations: ease of administration and the interest in promoting finality of judgments. *Custis*, 511 U.S. at 496-97. First, as to ease of administration, the Court concluded that resolution of constitutional challenges (other than *Gideon* challenges) "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 states." *Id.* at 496. Second, the Court determined that the interest in promoting finality of state-court judgments militates against permitting a collateral attack of that judgment at federal sentencing. *Id.* at 497. "By challenging the previous conviction, the defendant is asking a district court to deprive the state-court judgment of its normal force and effect in a proceeding that has an independent purpose other than to overturn the prior judgment." *Id.* (quotation and citation omitted).

The upshot of *Custis* is that collateral attacks of prior convictions used as predicate felonies under the ACCA are not cognizable at federal sentencing, with the narrow exception of collateral attacks based on *Gideon* challenges. The *Custis* rule has been extended to bar collateral attacks at sentencing of prior convictions used to enhance a federal sentence under the Sentencing Guidelines and under statutes

other than the ACCA, unless specifically permitted.[5] *See, e.g.*, *Brackett v. United States*, 270 F.3d 60, 65 (1st Cir. 2001); *United States v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996); *United States v. Arango-Montoya*, 61 F.3d 1331, 1336 (7th Cir. 1995); *United States v. Bonds*, 48 F.3d 184, 186-87 (6th Cir. 1995); *United States v. Thomas*, 42 F.3d 823, 824 (3d Cir. 1994); *United States v. Garcia*, 42 F.3d 573, 581 (10th Cir. 1994); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994); *United States v. Jones*, 28 F.3d 69, 70 (8th Cir. 1994) (per curiam); *United States v. Jones*, 27 F.3d 50, 52 (2d Cir. 1994) (per curiam).

Custis expressly recognized, however, that a defendant could attack his state conviction in state proceedings or federal habeas review (§ 2254) and, if successful, seek to reopen his federal sentence. *Custis*, 511 U.S. at 497. "If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application." *Id*.

B. *Daniels* Generally Precludes Collateral Attack Of A Prior Conviction Under § 2255

In *Daniels,* the Court extended the *Custis* rule to § 2255. It held that a prisoner whose sentence was enhanced under the ACCA by prior state convictions generally may not challenge

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[5] For example, 21 U.S.C. § 851(c) specifically permits such a collateral attack because it "sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense." *Custis*, 511 U.S. at 491.

the prior convictions through § 2255.[6] 532 U.S. at 376. The Court grounded its decision in the underlying policy considerations that supported *Custis*. The Court determined that, as in *Custis*, "ease of administration" would be hindered by allowing review under § 2255 because state court materials (e.g., records and transcripts) supporting the state conviction would be difficult to obtain. *Id.* (noting that "institutional competence [of district courts in making factual determinations] does not make decades-old state court records and transcripts any easier to locate"). With regard to finality, the Court concluded that "a State retains a strong interest in preserving the convictions it has obtained." *Id.*; *see also id.* at 380 ("Thus, the State does have a real and continuing interest in the integrity of its judgments.").

As in *Custis*, the Court in *Daniels* noted that a defendant who successfully challenges his underlying state convictions could then apply to reopen his federal sentence:

> After an enhanced federal sentence has been imposed pursuant to the ACCA, the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction. In *Custis*, we noted the possibility that the petitioner there, who was still in custody on his prior convictions, could 'attack his state sentences [in state court] or through federal habeas review.' If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence. As

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[6] A plurality of the Court determined that there may be rare circumstances in which § 2255 would be available. *Daniels*, 532 U.S. at 376.

> in *Custis*, we express no opinion on the appropriate disposition of such an application.

532 U.S. at 382 (citation omitted).

The upshot of *Daniels* is that challenges to prior state convictions generally are not cognizable under § 2255. *Custis* and *Daniels* stand for the proposition that facts demonstrating that prior state convictions are unconstitutional do not support a collateral attack at federal sentencing or in a § 2255 proceeding. Instead, these cases indicate that a defendant should collaterally attack the state conviction in state court and, if successful, then seek to reopen his federal sentence.

All circuits to have addressed the issue have indicated that, under *Custis* and *Daniels*, the proper way to reopen a sentence after the vacatur of a prior conviction is through 28 U.S.C. § 2255. *See United States v. Clipper*, 313 F.3d 605, 608 (D.C. Cir. 2002); *United States v. Doe*, 239 F.3d 473, 475 (2d Cir. 2001) (per curiam); *United States v. Escobales*, 218 F.3d 259, 261 (3d Cir. 2000); *United States v. Walker*, 198 F.3d 811, 813-814 (11th Cir. 1999) (per curiam); *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); *United States v. LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States v. Pettiford*, 101 F.3d 199, 200-02 (1st Cir. 1996); *United States v. Bacon,* 94 F.3d 158, 161 n.3 (4th Cir. 1996); *United States v. Cox,* 83 F.3d 336, 339-40 (10th Cir. 1996); *United States v. Rogers*, 45 F.3d 1141, 1143 (7th Cir. 1995); *United States v. Nichols*, 30 F.3d 35, 36 (5th Cir. 1994) (per curiam).

II. THE PLAIN LANGUAGE OF § 2255(4) SUPPORTS THE CONCLUSION THAT A VACATUR IS A "FACT"

The starting point in a statutory construction case is the plain language of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *see also Artuz v. Bennett*, 531 U.S. 4, 8 (2000). "The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart*, 534 U.S. at 450 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quotation omitted).

It is well settled that courts must give words in a statute their ordinary meaning. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

At issue in this case is the following language of § 2255 triggering the statute of limitations: "the date on which **facts supporting the claim** or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(4) (emphasis added). The key question is whether the vacatur of Johnson's state conviction constitutes a "fact" supporting Johnson's claim within the meaning of § 2255(4).

A. The Ordinary Meaning Of "Fact" Is "A Thing Done"

This Court has looked to dictionary definitions to determine the ordinary meaning of a word in AEDPA. *See, e.g., Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (looking to dictionary to determine ordinary meaning of "pending" in § 2244(d)(2)).

The ordinary meaning of the word "fact" is "a thing done" -- i.e., something that has actually happened. Webster's Third New International Dictionary 813 (1993) (defining "fact," "1: a thing done"); The American Heritage Dictionary of the English Language 46 (1975) (defining "fact," "1. something known with certainty"); *see also* J.A. 50-51. The definition of "fact" in Black's Law Dictionary reflects the ordinary meaning of this word in the English language:

> A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place. A fact is either a state of things, that is, an existence, or a motion, that is, an event. The quality of being actual; actual existence or occurrence.

Black's Law Dictionary 591 (6th ed. 1990) (citation omitted).

The vacatur of Johnson's predicate state conviction is "a thing done." It is an incident that transpired in the historical sense and can be known with certainty. Defendants, like Johnson, must wait until their prior convictions have been vacated before they can assert a § 2255 claim. Until that thing -- the vacatur -- is done, the defendant does not have a

basis for a § 2255 claim to reduce his sentence. *See Daniels*, 532 U.S. at 376, 382 (requiring the vacatur of the prior conviction before seeking to reopen a federal sentence).

Johnson's federal sentence was enhanced based on the presence of two prior Georgia convictions. In determining Johnson's status as a "career offender" under U.S.S.G. § 4B1.1, the district court needed to make a factual determination that, *inter alia*, he had at least two prior felony convictions of either a "crime of violence" or a "controlled substance offense." This can involve questions of whether the Government has established the fact of a requisite prior conviction by a preponderance of the evidence for purposes of § 4B1.1. *See, e.g.*, *United States v. Hernandez*, 218 F.3d 272, 278 (3d Cir. 2000); *United States v. McDonald*, 964 F.2d 390 (5th Cir. 1990) (addressing evidentiary questions and sufficiency of Government's evidence establishing career offender status under U.S.S.G. § 4B1.1). As the Fourth Circuit noted on similar facts: "A critical 'fact' with respect to the operation of the sentencing guidelines in Gadsen's [the defendant's] original federal case was the fact that Gadsen's record included a prior state conviction for assault with intent to kill." *United States v. Gadsen*, 332 F.3d 224, 227 (4th Cir. 2003).

Just as Johnson's conviction was a fact used to enhance his sentence, the vacatur of his conviction is a fact supporting his request to eliminate the enhancement. *See id.* ("In just the same way, the relevant 'fact' with respect to the operation of Gadsen's claim today is the fact that Gadsen's prior state conviction has been conclusively invalidated."). This "fact" could not have been raised in his federal case until Georgia vacated his prior state convictions. *See Custis*, 511 U.S. at 497; *Daniels*, 532 U.S. at 382; *see also Gadsen*, 332 F.3d at 227 ("[T]his fact was not conclusive for our purposes until the

South Carolina Supreme Court denied the government's petition for certiorari.").

Finally, when interpreting a word in a statute, it is important to examine how the word is used in context. *Leocal v. Ashcroft*, ___ U.S. ___, ___, 4 U.S.L.W. 216 (Nov. 9, 2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it.") (citations omitted). Here, the word "fact" is used as part of the phrase: "facts supporting the claim." § 2255(4). The facts underlying Johnson's contention that his prior state convictions were unconstitutional were not facts supporting a § 2255 claim to eliminate the career offender enhancement. *See Daniels*, 532 U.S. at 384 (holding that facts showing priors were unconstitutional do not support § 2255 claim (with rare exception)). The fact supporting Johnson's claim under § 2255 to reduce his sentence is the vacatur of his state conviction.

B. Ordinary Use Of The Word "Facts" In Other Contexts Supports Johnson's Interpretation

Johnson's interpretation of the word "facts" comports with the common or ordinary usage of this term in other contexts. This Court routinely refers to prior convictions as "facts." *See, e.g.*, *Blakely v. Washington*, 124 S. Ct. 2531, 2536 (2004) ("the fact of a prior conviction") (internal quotation marks omitted); *Dretke v. Haley*, 124 S. Ct. 1847, 1853 (2004) ("the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential"); *Nelson v. Campbell*, 124 S. Ct. 2117, 2122 (2004) ("fact of his conviction"); *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) ("the fact of a previous conviction");

McKune v. Lile, 536 U.S. 24, 59 (2002) ("the fact of a valid conviction"); *Republican Party of Minn. v. White*, 536 U.S. 765, 809 (2002) (Ginsburg, J., dissenting) (referring to convictions as an example of a "historical fact"); *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) ("Both the certainty that procedural safeguards attached to any **'fact' of prior conviction**, and the reality that Alendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range.") (emphasis added); *Id.* at 501 (Scalia, J., concurring) ("including the fact of a prior conviction"); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("any fact (other than prior conviction) that increases the maximum penalty for a crime"); *Taylor v. United States*, 495 U.S. 575, 602 (1990) (noting that for purposes of enhancement in a certain context, sentencing court should look only to "fact of conviction").

Indeed, even in *Custis*, the Court referred to prior convictions as "facts" when discussing how the ACCA treats previous convictions: "The statute focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." *Custis*, 511 U.S. at 490-91 (emphasis in original).

The point of these examples is to illustrate that the ordinary usage of the term "facts" includes prior convictions. And if a prior conviction is a "fact" for purposes of enhancement, then it follows that the vacating of that prior conviction also is a "fact" for purposes of eliminating that enhancement. *Gadsen*, 332 F.3d at 227.

C. The Eleventh Circuit's Interpretation Of "Fact" Limits The Ordinary Meaning

The Eleventh Circuit concluded that the vacatur of Johnson's state conviction was not a "fact" within the meaning of § 2255(4) -- instead, it concluded that the vacatur is merely a "legal proposition." J.A. 27. The Court reasoned: "A factual proposition is typically something capable in principle of falsification (or possibly even verification) by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source." J.A. 27; *see also Brackett v. United States*, 270 F.3d 60, 68-69 (1st Cir. 2001).

But this distinction makes little sense. A conviction and a vacatur of that conviction are both legal propositions and facts that may be relevant to later legal proceedings. At sentencing, Johnson's prior state convictions -- while themselves "legal propositions" -- were used as "facts" for purposes of classifying Johnson as a career offender. "[N]o metaphysical barrier prevents a legal consequence from sometimes operating as a fact. With regard to Johnson's federal habeas claim, the vacatur of his state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible 'legal effect or consequence' of that fact." J.A. 51 (Barkett, J., dissenting).

Indeed, it is not unusual to treat past "legal propositions" as "facts" in a different proceeding. For example, prior convictions are routinely submitted for evidentiary purposes at civil and criminal trials. *See, e.g.*, *Burgett v. Texas*, 289 U.S. 109 (1967) (discussing use of prior convictions as evidence in state criminal trial). Such a prior conviction, although a legal proposition in its own right, still must be proven as a fact in a separate legal proceeding. In fact, Rule

609 of the Federal Rules of Evidence is designed specifically to address the use of a prior conviction as evidence.

The First and Eleventh Circuits also reason that the vacatur of a state conviction is not a "fact" within the meaning of § 2255(4) because it was not "discovered" by Johnson. J.A. 28 ("[T]he vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not 'discovered' by him") (citation omitted); *Brackett*, 270 F.3d at 68; *see also* 28 U.S.C. § 2255(4) ("the date on which the facts supporting the claim or claims presented could have been **discovered** through the exercise of due diligence.") (emphasis added).

This argument -- like the Eleventh Circuit's interpretation of "facts" -- limits the ordinary meaning of the statutory terms. The word "discovery" simply means "the act, process, or an instance of gaining knowledge of or ascertaining the existence of something previously unknown or unrecognized." Webster's Third New International Dictionary 813 (1993). In this case, the vacatur of the Georgia conviction could not have been discovered before it was issued. When the vacatur became a fact, it became known -- i.e., was "discovered" -- by Johnson, and the one-year limitation period in § 2255(4) began. It is conceivable that a defendant might not "discover" a vacatur (or other court ruling) when it issues -- e.g., if the prisoner is incarcerated and is not provided notice of the ruling.

In short, the interpretation of the term "fact" pressed by the First and Eleventh Circuits distorts its ordinary meaning. There is no limit in the plain language of § 2255(4) to "empirical facts," as encouraged by the Eleventh Circuit, or anything to suggest that the vacatur could somehow be discovered by Johnson before it occurred.

D. The Eleventh Circuit's Reliance On "Factual Predicate" In 28 U.S.C. § 2244 Is Misplaced

The Eleventh Circuit placed heavy reliance on a comparison of § 2255(4) with 28 U.S.C. § 2244 to bolster its conclusion that Johnson's vacatur was not a "fact." J.A. 28-29. This reliance misses the point by failing to compare "apples to apples." As discussed in greater detail below, in § 2244 cases, the question before the federal court is whether the state conviction is unconstitutional. The operative facts are the underlying historical facts supporting petitioners' constitutional challenges in state court. By contrast, here, the question before the federal court is not whether the state conviction is unconstitutional, but rather, whether the sentence should be recalculated in light of the state court's ruling. The operative fact underlying Johnson's claim is the historical fact of the vacatur, not the underlying facts demonstrating the unconstitutionality of his state conviction. As shown below, the Eleventh Circuit's analysis is misplaced because the § 2244 cases support Johnson's position, not the Government's.

Section 2244, the statute applicable to state prisoners seeking relief under 28 U.S.C. § 2254, provides a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). That limitation period runs from the latest of four events, three of which "closely track corresponding portions of § 2255." *Clay v. United States*, 537 U.S. 522, 528 (2003) (citation omitted). Similar to § 2255(4), § 2244 starts the clock on, *inter alia*:

> the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(D).

The Eleventh Circuit looked to decisions in other circuits that "interpreted 'factual predicate' in § 2244 to mean historical facts, not court rulings or legal consequences." J.A. 29 (citing cases). The Eleventh Circuit concluded that because §§ 2254 and 2255 commonly are interpreted in light of each other, the word "facts" in § 2255(4) should be read to mean historical facts. J.A. 29; *see also Brackett*, 270 F.3d at 69 (noting that "factual predicate" in § 2244(d)(1)(D) has been interpreted to mean "evidentiary facts or events and not court rulings or legal consequences of the facts," and concluding that "facts" in § 2255 should be interpreted the same way).

The Eleventh Circuit is correct that §§ 2254 and 2255 often are interpreted in light of one another, but the cases on which it relies do not undercut Johnson's argument that the vacatur of his state convictions is a fact supporting his claim under § 2255(4) -- indeed, these cases strongly support Johnson's position. The § 2244 cases distinguishing "historical facts" from "legal propositions" deal with different questions. *See, e.g.*, *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000); *Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000) (per curiam). In those cases, the court typically is faced with a state prisoner's claim under § 2254 that his state conviction was unconstitutional. Normally, the statute of limitations in that context begins upon completion of direct review of the state conviction, and is tolled by pending state post-conviction review. 28 U.S.C. §§ 2244(d)(1)-(2). The

statute of limitations begins anew upon the discovery of a factual predicate that previously could not have been discovered through the exercise of due diligence. § 2244(d)(1)(D). Claims under § 2254 must be presented first in the state post-conviction process to comply with the exhaustion rules. § 2254(b)(1)(A). What these petitioners are asking the federal habeas court to review is the state habeas court's determination of a legal question arising out of underlying facts. Thus, it is discovery of the underlying facts that triggers the statute of limitations, not the state habeas court's rulings based on those facts.

For example, in *Ybanez v. Johnson*, a § 2244 case relied upon by the Eleventh Circuit below, two petitioners sought to have the statute of limitations begin running when the state habeas decision became final. 204 F.3d at 646. One of the petitioners contended that the state court's refusal to consider his second state habeas application was the "factual predicate" for his federal claim, and the other asserted that the state court's application of the facts to his ineffective assistance claim was the "factual predicate." *Id.* The Fifth Circuit rejected both arguments: "Behind the petitioners' language is an extraordinary proposition: the factual predicate for their claims consists neither of evidence nor events at trial but in the state court's rulings on their constitutional claims." *Id.* Instead, the Fifth Circuit ruled that the "factual predicates" for the petitioners' claims were the facts underlying their respective unconstitutional jury instruction and ineffective assistance of counsel claims, not the state court's ruling on their claims. *Id.*

Ybanez and similar cases do not alter the conclusion that the term "fact" in § 2255 refers to the vacatur of Johnson's state convictions. In *Ybanez*, the historical facts of how the lawyer represented the petitioners and whether they were

prejudiced by that representation comprise the factual predicate for the ineffective assistance claim. The federal habeas court in *Ybanez* was asked to review the state court's conclusion that the petitioners' trial lawyer rendered ineffective assistance of counsel, and therefore was asked to reach a legal conclusion based on the same underlying facts as the state habeas court. These underlying facts were the facts supporting the petitioners' § 2254 claims.

By contrast, the facts underlying Johnson's vacatur of his state conviction are not the facts supporting his § 2255 claim. *See Daniels*, 532 U.S. at 377. It is the vacatur of his state conviction that forms the basis of his § 2255 claim. In other words, the vacatur is the "factual predicate" analogous to the facts demonstrating ineffective assistance of counsel in *Ybanez*. The federal habeas court here, unlike *Ybanez*, is not being asked to review the correctness of the state habeas court's conclusion that Johnson's prior conviction was obtained in violation of the Constitution. That fact has been conclusively established.

III. THE ELEVENTH CIRCUIT'S RULE CONFLICTS WITH *CUSTIS* AND *DANIELS*

A. The Eleventh Circuit's Rule Squarely Contradicts *Daniels*

In *Daniels*, this Court held that a prisoner whose sentence was enhanced under the ACCA by prior state convictions generally may not challenge the prior convictions through a motion under 28 U.S.C. § 2255. 532 U.S. at 376. The Court concluded that a challenge to the petitioner's prior state convictions was not cognizable under § 2255. *Id.* In other words, the Court ruled that the facts underlying the claim that

the petitioner's prior state convictions were unconstitutional were not facts that could support a § 2255 claim.

Under the Eleventh Circuit's rule, however, the facts underlying the claim that the Petitioner's prior conviction was unconstitutional were "facts supporting the claim" in § 2255(4). J.A. 33. By holding that the one-year limitations period in § 2255(4) began to run when Johnson became aware of the facts supporting his challenge to his state conviction, the Eleventh Circuit necessarily held that these are, in the language of § 2255(4), the "facts supporting the claim or claims presented" in Johnson's § 2255 motion. "Thus, the [Eleventh Circuit] panel-majority paradoxically asserts that federal courts are not the proper forum for litigating facts underlying a state conviction, but these very same facts can trigger the statute of limitations for federal habeas review." J.A. 51 (Barkett, J., dissenting).

By contrast, interpreting the word "facts" in § 2255 to mean the vacatur of Johnson's state conviction comports with *Daniels* and *Custis*. While the facts underlying Johnson's claim that his state conviction was unconstitutional do not create a basis for collateral attack at sentencing or in a § 2255 proceeding, the vacatur of his conviction is the "fact" that gives rise to his present § 2255 attack on his federal sentence.

B. The Eleventh Circuit's Rule Virtually Eliminates The Rights Established By *Custis* and *Daniels* As A Practical Matter

Custis and *Daniels* established a framework in which federal prisoners seeking to challenge state convictions used to enhance their federal sentences were routed first to state court. "After an enhanced federal sentence has been imposed pursuant to the ACCA, the person sentenced may pursue any

channels of direct or collateral review still available to challenge his prior conviction." *Daniels*, 532 U.S. at 382. In the rare event defendants are successful in such challenges, this Court acknowledged that they could return to federal court and apply for reopening of a federal sentence enhanced by the vacated state conviction. *See Custis*, 511 U.S. at 497; *Daniels*, 532 U.S. at 382.

Since this Court's pronouncement in *Custis*, eleven federal courts of appeals -- all of those to have considered the issue -- have allowed (or indicated they would allow) federal defendants to reopen their improperly enhanced federal sentences through § 2255. *See United States v. Clipper*, 313 F.3d 605, 608 (D.C. Cir. 2002); *United States v. Doe*, 239 F.3d 473, 475 (2d Cir. 2001) (per curiam); *United States v. Escobales*, 218 F.3d 259, 261 (3d Cir. 2000); *United States v. Walker*, 198 F. 3d 811, 813-814 (11th Cir. 1999) (per curiam); *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999); *United States v. LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States v. Pettiford*, 101 F.3d 199, 200-02 (1st Cir. 1996); *United States v. Bacon,* 94 F.3d 158, 161 n.3 (4th Cir. 1996); *United States v. Cox,* 83 F.3d 336, 339-40 (10th Cir. 1996); *United States v. Rogers*, 45 F.3d 1141, 1143 (7th Cir. 1995); *United States v. Nichols*, 30 F.3d 35, 36 (5th Cir. 1994) (per curiam).

The Eleventh Circuit's rule unfairly restricts this right to reopen improperly enhanced federal sentences under § 2255 by requiring the challenge to a state conviction to have been completed within one year after direct review of the federal case. As even the First Circuit conceded in *Brackett*, such a framework places a nearly impossible burden on defendants:

> [T]he net result of *Custis* and *Daniels* was to leave federal prisoners in a practical bind. They could not

> bring a § 2255 petition to federal court until they had gotten the state court convictions vacated and [under the *Brackett* court's view of § 2255(4)] they had only one year in which to accomplish that from the date of the federal conviction -- a daunting task.

270 F.3d at 67.

In this case, under the Eleventh Circuit's rule, if Johnson had filed his state habeas action on the day he was sentenced (November 18, 1994), he would have missed the statute of limitations (which, according to the Eleventh Circuit's rule, expired on April 23, 1997) because the state courts took two years and seven months to adjudicate his claim. Similarly, in *Gadsen*, if the defendant had filed his state post-conviction petition on the day he was sentenced, he would have missed the statute of limitations under the Eleventh Circuit's rule because the state courts took more than three years to adjudicate his claim. *Gadsen*, 332 F.3d at 228 ("Even if Gadsen had filed his state challenge the next day 'after [his] enhanced federal sentence [was] imposed,' he would not have been able to bring a § 2255 challenge within a year without violating *Daniels*, since it took more than three years for the South Carolina court system to reach final resolution on his challenge.").

Moreover, under the Eleventh Circuit's rule, state prosecutors have an incentive to drag out state proceedings so as to keep meritorious challenges from becoming final in time to meet the statute of limitations. For example, in *Gadsen*, one year from when the defendant's federal conviction became final fell in August 2000. *See Gadsen*, 332 F.3d at 225; *see also Clay v. United States*, 537 U.S. 522, 525 (2003). The South Carolina habeas court granted the defendant's petition for post-conviction relief on December

20, 1999. Thus, had that been the completion of Gadsen's state habeas case, he could have filed a § 2255 motion and satisfied the Eleventh Circuit's rule. However, the State in *Gadsen* sought review of the vacatur by the South Carolina Supreme Court, which was not denied until January 10, 2001. Thus, it was the State's filing of an appeal that caused the defendant to miss the one-year limitations period under the Eleventh Circuit's rule.

The Eleventh Circuit's rule is particularly troublesome because it means that Congress, in enacting AEDPA two years after *Custis*, intended to essentially eliminate the procedure established by the Court merely by using the word "fact" in § 2255(4). This Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (stating that courts must "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."); *Badaracco v. Comm'r of Internal Revenue,* 464 U.S. 386, 403 n.3 (1984) (recognizing that statutes in derogation of common law are strictly construed). By contrast, Johnson's interpretation assumes that Congress used the word "facts" in § 2255(4) with an understanding of *Custis* and intending that the statute would be read in conformity with the procedure outlined in *Custis*.

Further, the Eleventh Circuit's rule presents litigants with an impossible choice: as a legal matter, they are not permitted to challenge predicate convictions in federal habeas; but as a practical matter, it is virtually impossible for them to challenge those convictions in state court and return to federal

court within the limitations period. The Eleventh Circuit seems to have been aware of this problem by noting that equitable tolling should be used if the petitioner acts with diligence and nonetheless finds that he has been shut out of federal court. J.A. 33 n.6. The Eleventh Circuit's use of equitable tolling, however, implicitly assumes that Congress wrote a flawed statute and that a doctrine such as equitable tolling is necessary to fix it. Such an interpretation should be rejected in favor of one that assumes Congress passed § 2255(4) with an understanding of *Custis* and without the need for equitable tolling. *See United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994) (statute is to be construed to avoid anomalies).

This Court has rejected readings of AEDPA that result in such a statutory anomaly. In *Carey v. Saffold*, 536 U.S. 214 (2002), this Court rejected an interpretation of "pending" in 28 U.S.C. § 2244(d)(2) that would have encouraged "state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review." *Id*. at 220. "This would lead to great uncertainty in the federal courts, requiring them to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations)." *Id*.

IV. THE ELEVENTH CIRCUIT'S RULE UNDERCUTS THE PRINCIPLES OF COMITY AND FEDERALISM

This Court has repeatedly stated that AEDPA is designed "to further principles of comity, finality, and federalism." *See, e.g.*, *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001). The Eleventh Circuit

erred in placing undue emphasis on finality to the exclusion of comity and federalism. Moreover, as discussed in greater detail below, the interests of finality are not served by the Eleventh Circuit's rule.

This Court has defined federalism as "a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . in which the National Government . . . always endeavors to [protect federal rights and interests] in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris,* 401 U.S. 37, 44 (1971). *Younger* defines comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a . . . belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

By exclusively focusing on finality without regard to comity or federalism, the Eleventh Circuit skewed the appropriate statutory analysis of § 2255(4), resulting in an overly narrow reading of the statute. This Court should give effect to AEDPA's additional legislative considerations of comity and federalism.

The Eleventh Circuit's decision effectively ignores the Georgia court's conclusive and final judgment that Johnson's predicate state conviction is invalid. As Judge Barkett stated in her dissent to the denial of the petition for rehearing en banc:

> The Supreme Court has stated that in the habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." *Daniels*, 532 U.S. at 378. This is exactly what the

> panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

J.A. 52-53 (some citations omitted).

Should the Eleventh Circuit rule be allowed to stand, the judgment of the Wayne County Superior Court that Johnson's predicate state conviction is unconstitutional will be denied its normal force and effect. As a result, the State of Georgia's ability to exculpate criminal defendants consistent with its post-conviction statutory scheme would be compromised. This undercuts the goal of honoring state court judgments consistent with the aims of federalism and comity. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. . . . [W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); *see also Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules . . . .")

Although finality is an important principle, it does not always override comity and federalism, or the interest in fundamental fairness. This Court has recognized the importance of "[s]tates' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke v. Haley*, 124 S. Ct. 1847, 1852 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)). In this case, it is undisputed that Johnson presently remains in custody solely on the basis of a now-vacated state conviction, which has been set aside as

unconstitutionally obtained by a final, valid, and conclusive state court judgment. It is undisputed that Johnson followed the applicable state procedural rules in obtaining the vacatur of his prior state conviction. Having complied with the appropriate state process in successfully attacking his predicate conviction, as well as this Court's pronouncement in *Custis* that he should seek relief from the state court system, the Eleventh Circuit's rule would ignore the effect of that hard-won state court judgment and deny Johnson the right to present his § 2255 motion based on that judgment.

Finally, the Eleventh Circuit rule conflicts with the principles of comity and federalism because it improperly abridges a state's right to determine and apply its own system of post-conviction relief. In effect, the Eleventh Circuit's rule imposes on the states the federal one-year limitations period, even though the state systems charged with adjudicating the collateral state challenges routed to them under *Custis* and *Daniels* have rules providing different limitations periods. This is directly contrary to the notion that each state is entitled to establish its own procedures and limitations periods with respect to collateral challenges to prior state convictions, which periods, in many states, exceed one year.[7] Of course,

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[7] *See* Fla. R. Crim. P. 3.850(b) (no time limit), but presumption of laches applies to claims filed after more than five years, *see Mcray v. State*, 699 So.2d 1366 (Fla. 1997); Ind. Code. tit. 35 Post Conviction Rule PC-1 (no time limit); Iowa Code § 822.3 (three years); Ky. R. Crim. P. 11.42(10) (three years); Md. Code Ann. § 7-103(b) (ten years); Mass R. Crim. P. 30(a) (no time limit); Mich. Ct. R. 6.501-6.509 (no time limit); *Sykes v. State*, 578 N.W.2d 807, 814 (Minn. Ct. App. 1998) (no time limit); Neb. Rev. Stat. § 29-3001; N.J. Crim. P. 3:12-12 (no time limit); N.M. Stat. Ann. § 534.31 (no time limit); N.Y. C.P.L.R. § 7002 (no time limit); N.D. Cent. Code § 29-32.1-03 (no time limit); Okla.

in some states, the time available to collaterally challenge prior state convictions is less than one year.[8]

The point is that under *Custis* and *Daniels*, challenges to prior state convictions are first routed to the state court systems to be adjudicated according to state rules and procedures. Having been so routed, the federal courts must then respect the valid judgments that come back from the state courts, consistent with AEDPA's interest in comity and federalism. In addition to promoting the aims of comity and federalism, honoring state court judgments invalidating prior state convictions poses no risk of disrupting the finality of a state action because the state itself has decided to vacate the conviction. *See* J.A. 52.[9]

Stat. § 1089(D) (no time limit for non-capital cases); Tx. Crim. Pro. Art. 11.071 (time limit only for capital cases); Vt. Stat. Ann. tit. 13, § 7131; W. Va. Code § 53-4A-1(e) (no time limit); Wis. Stat. § 7-14-103 (five years). At the time Johnson sought state habeas as to his prior convictions, Georgia did not have a statute of limitations governing the filing his state petition. O.C.G.A. § 9-14-42 (1993). In 2004, Georgia amended its habeas statute by adding a four-year statute of limitations on a petition challenging a state felony conviction. O.C.G.A. § 9-14-42 (2004 Supp.).

[8] *See* Ariz. Rev. Stat. Ann. § 13-4231 (90 days); Ark. R. Cr. P. R. 37.2 (90 days); Mo. Ann. Stat. § 547.360(2) (90 days).

[9] Beyond general policies animating AEDPA, Petitioner is unaware of legislative history that explains in any meaningful way how Congress intended the phrase "facts supporting the claim" to be interpreted.

V. PRACTICAL CONSEQUENCES

A. The Eleventh Circuit's Rule Will Have Negative Consequences

If the Eleventh Circuit's construction of § 2255(4) is adopted by this Court, the statute of limitations for federal habeas will increase the burden on federal courts. Rather than promoting finality, the Eleventh Circuit's rule will force petitioners to file federal "placeholder" petitions so they will not be barred from later seeking relief under § 2255 while they first return to state courts to challenge their predicate state convictions. This will have the effect of flooding the federal courts with such placeholder petitions, the vast majority of which ultimately will be meritless and have no chance of success. *See Brackett v. United States*, 206 F. Supp. 2d 183, 186 n.3 (D. Mass. 2002) ("Thus, rather than have failure in the state court as a natural screen, the courts' approach results in thousands of meritless petitions being filed -- each which requires a case file be opened, orders issued, papers docketed, and the file stored."). The Eleventh Circuit rule shifts the burden back to the federal district courts in the first instance, who must serve as wards to placeholder petitions while state challenges wind their way through the state systems, a process which may take years. This is hardly consistent with this Court's focus on ease of administration and finality, as expressed in *Custis*, 511 U.S. at 496-97. *See Carey v. Saffold*, 536 U.S. 214, 220 (2002).

B. Johnson's Reading Yields Better Results

A much better policy, and one more consistent with the ease of administration rationale in *Custis*, is to construe § 2255(4) to permit petitioners to file challenges to enhanced federal sentences only *after* the convictions forming the basis

for those sentences have been vacated. *Cf. Duncan v. Walker*, 533 U.S. 167, 181 (2001) (noting "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review"). The high rate of failure for habeas petitioners in the various state court systems will act as a natural filter, and only a small portion of the meritorious cases, as determined by the state courts, will ever make their way back to being filed and pursued in the federal courts. This result is also more consistent with the Court's directions *Custis* and *Daniels*: that petitioners must first seek redress in the state system and if they are successful, only then may they apply for the reopening of their federal sentences under § 2255.

In attacking Johnson's interpretation, the Government will no doubt argue that Johnson's suggested rule will result in more motions to reopen under § 2255 because, the argument goes, state vacaturs are relatively easy to obtain. The logic is as follows: the state has no incentive to contest such collateral challenges to prior state convictions, as the sentence associated with such convictions may have already been served. Furthermore, such challenges are often difficult to defend, given the passage of time and the unavailability of state court records. These arguments suffer from several flaws. First, the starting point of the argument -- that state vacaturs are easy to obtain -- is fundamentally incorrect. The Government has not shown that the number of state vacaturs of prior state convictions used to enhance federal sentences is substantial. If anything, the statistics support the contrary conclusion: that the rate of failure on state habeas is extremely high.[10] Again, this militates in favor of fewer § 2255

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[10] For instance, in 1992, the habeas corpus petitioner success rate before the Texas Court of Criminal Appeals was estimated to be

motions, not more. If the Government's supposition was correct -- that motions to reopen would dramatically increase were Petitioner's reading adopted -- one would expect to see such an increase in the Fourth Circuit, where *Gadsen* is the law. However, the number of habeas petitions and § 2255 motions filed in the Fourth Circuit actually decreased from 2003 to 2004.[11]

In addition, this Court already has rejected the notion that states have no real interest in preserving prior convictions. *See Daniels*, 522 U.S. at 379-80 ("[A] State retains a strong interest in preserving the convictions it has obtained. States impose a wide range of disabilities on those who have been convicted of crimes, even after their release. . . . Thus, the State does have a real and continuing interest in the integrity of its judgments."). In this case, such interest was evidenced

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less than eight percent. *See* Victor E. Flango, Habeas Corpus in State and Federal Courts at 61 n.75 (1994), *available at* http://www.ncsconline.org/WC/Publications/KIS_StaFedHabCorpStFedCts.pdf. The Flango study reviewed habeas petitions terminated in 1990 and 1992 in the highest courts in Alabama, California, and Texas; two intermediate appellate courts and a trial court in New York (too few cases reached New York's court of last resort); and two district courts in each state. *See id.* at 27-29, 58. Of the 1,195 petitions reviewed from Alabama, California, and New York, only 51 were granted and 48 of those came from New York. *See id.* at 61.

[11] For the 12-month periods ending on March 31, 2004 the total "habeas corpus general" and "motion to vacate sentence" petitions decreased by almost 2% in the Fourth Circuit in 2004 as compared to 2003. *Compare* Table C-3, Federal Judicial Caseload Statistics 2004 (Mar. 31, 2004), *with* Table C-3, Federal Judicial Caseload Statistics 2003 (Mar. 31, 2003), *both available at* http://www.uscourts.gov/library/statisticsalreports.html.

by the State of Georgia's opposition to Johnson's state habeas petition; if there had been no real interest on the part of the State, the State would not have responded. States have an interest in prior convictions because they, like the federal government, usually have statutes increasing penalties for two or three "strikes" or other laws increasing sentences for recidivists. *See, e.g.*, O.C.G.A. § 17-10-7; Mich. Comp. Laws Ann. § 769.10 *et seq*. Further, states that impose capital punishment often consider a history of certain convictions as an aggravating factor militating in favor of imposing the death penalty. *See, e.g.*, O.C.G.A. § 17-10-30(b)(1); Ariz. Rev. Stat. § 13-703.

Finally, the concern over absent records is unavailing. Unlike *Custis* and *Daniels*, it is not the federal courts that must obtain the state court records to assess the validity of underlying constitutional challenges to prior state court convictions, but the state courts who must retain and review such records to adjudicate collateral challenges. The state courts, as the custodians of such records, are better equipped to retrieve and review such records, a notion underpinning this Court's rationale in *Custis* and *Daniels*. Furthermore, consistent with the aims of comity and federalism, it is up to each individual state and state court system to develop sufficient laws, policies, and procedures for recordkeeping and retention of records in criminal cases.

As discussed *supra*, most states have passed statutes of limitations on state habeas claims -- thus addressing on their own the issue of stale records and delayed collateral attacks. *See supra* note 7. The fact is that, with the growing trend of state habeas statutes of limitations, there is less risk of stale records.

Importantly, however, it is the States that should be permitted to make a policy choice about whether the risk of absent or stale records is outweighed by the risk that someone may be incarcerated on unconstitutional grounds. It should not be the place of the federal courts to second guess state judgments or to penalize prisoners who have faithfully followed the rules established by the legislative or judicial decisions of the individual states.

In the end, Johnson, who has already served the term of imprisonment he would have received without enhancement for his prior conviction, currently is in prison based on a conviction Georgia has conclusively determined was unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the Eleventh Circuit's Opinion, hold that Johnson has complied with the statute of limitations in § 2255(4), and remand the case for consideration of the merits of Johnson's § 2255 motion to vacate.

Respectfully submitted,

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APPENDIX

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28 U.S.C. § 2255 states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme

Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.