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

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

The Government's complicated arguments boil down to proposing that the facts underlying a state vacatur used to enhance a federal sentence support a claim under § 2255 -- i.e., exactly the opposite of the Court's ruling in *Daniels v. United States*, 532 U.S. 374 (2001). Instead, the fact supporting the claim under § 2255 is the state court vacatur of a prior conviction. The Government no longer appears to dispute that a vacatur is a "fact," instead focusing on the terms "discover" and "due diligence" in § 2255(4). Petitioner's interpretation of § 2255(4) relies on the ordinary meaning of these terms read in context. In context, it is a straightforward exercise to ask and answer the following question: "What was the date on which the vacatur could have

been discovered through the exercise of due diligence?" Here, the date was the date the vacatur was issued.

Petitioner's interpretation of § 2255(4) serves the ends of finality in most cases by eliminating the need for costly and time-consuming federal placeholder petitions, which would have to be filed and then stayed under the Government's proposed rule. The vast majority of these placeholder petitions will be meritless because the States ultimately reject most habeas challenges. The net result of the Government's proposed rule will be to needlessly extend the road to finality in the vast majority of cases so as to shorten the road to finality in the small subset of cases in which a prior conviction is vacated.

Not only does Petitioner's interpretation promote finality, it serves the ends of comity, federalism, and fundamental fairness. The Court made an administrative decision in *Custis v. United States*, 511 U.S. 485 (1994), and *Daniels* to route challenges to prior state convictions back to the state courts -- a decision that both acknowledges the State's competence to adjudicate such challenges and affords appropriate deference to the State's decision-making process. Having routed such challenges to the States, comity and federalism are best served by respecting the State's resolution of those challenges.

The Government's concern that this scheme creates an incentive for delay is misplaced. The Government's concern rests on the premise that the State has little interest in preserving a conviction when the sentence has already been served. This premise is at odds with the conclusion in *Daniels* that States retain a strong interest in preserving their convictions even after the term of imprisonment has been served. Further, the concern over stale records expressed in *Custis*, *Daniels*, and *Lackawanna County District Attorney v.*

Coss, 532 U.S. 394, 403 (2001), is not present because the State's strong interest in preserving its convictions should cause it to preserve necessary documents for at least the duration of its statute of limitations.

Finally, the Government's new fallback position -- i.e., that the language in § 2255(4) should be changed to read that the limitations period is triggered by the date the vacatur could have been obtained -- is unworkable. It would require an unseemly inquiry into the state court's decision-making process to determine when the vacatur could have been obtained. Moreover, the Government's new fallback position apparently has two one-year periods of limitation (one for the State and another for the federal government), with a tolling period in between. This new scheme is well beyond the statutory language, and unnecessary in light of the clear language chosen by Congress.

In contrast, Petitioner's interpretation fits comfortably within the plain language of § 2255(4). *Daniels* held that the facts underlying the vacatur do not support a claim under § 2255. It is the vacatur that is the "fact" within the plain meaning of the phrase "facts supporting the claim." Accordingly, the triggering date of § 2255(4) in this type of case is the date the vacatur could have been discovered through the exercise of due diligence -- here, the date it was issued.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION CONFLICTS WITH *DANIELS* AND THE PLAIN LANGUAGE OF THE STATUTE

A. Under *Daniels*, the Underlying Facts Do Not Support A Claim Under § 2255

The Government concedes, as it must, what *Daniels* teaches: that facts showing a prior state conviction is unconstitutional (with rare exception) do not give rise to a claim under § 2255. *See* Brief For The United States ("Resp. Br.") at 3. Yet the crux of the Government's argument is that "[a]lthough a fact that forms the basis for challenging the State conviction is not a sufficient condition for challenging the federal sentence, it is a necessary condition, and therefore it does support the claim." Resp. Br. at 25.

Through these verbal gymnastics, the Government urges the Court to adopt a rule that squarely contradicts *Daniels*. Under the Government's proposed rule, the "facts supporting the claim" under § 2255(4) are the same facts that *Daniels* held do not support a claim under § 2255.

The Government essentially concedes that the state court vacatur is a "fact" supporting the claim, but contends that "the order alone is not the **sole** 'fact' that supports the motion under Section 2255 …." Resp. Br. at 26 (emphasis added). This argument seeks to add language that does not exist in the statute -- i.e., the statute says "facts supporting the claim" not "the sole fact supporting the claim." It does not matter if the vacatur is the "sole" fact that supports the claim, it is the operative fact, without which there is no claim. Section 2255(4) only makes sense if the statute is triggered by the date

on which the last necessary fact could have been discovered.

Of course, there are other facts that may be pleaded along with the vacatur to make out a claim under § 2255, but they do not trigger the limitations period under § 2255(4) because, until the vacatur issues, the facts supporting the claim do not exist. Use of the plural "facts" (as opposed to the singular "fact") in § 2255(4) means that the statute is triggered on the date when all necessary facts supporting the claim could have been discovered through the exercise of due diligence. The Government's argument makes little sense because it triggers the limitation period by some earlier fact and not the presence of all facts necessary to support a claim under § 2255.

In advancing its new position, the Government apparently abandons two of the principal bases for the Eleventh Circuit's decision below. First, the Government does not attempt to classify vacaturs as solely "legal propositions," as opposed to facts. *See* Brief For Petitioner ("Pet. Br.") at 23-24. Clearly, a vacatur is an historical fact, just as is a conviction. Pet. Br. at 18-24. Second, the Government does not contend, as did the Eleventh Circuit, that the cases interpreting § 2244 show that a vacatur cannot be a "fact." These § 2244 cases are perfectly consistent with the rule advocated by Petitioner. *See* Pet. Br. at 25-28.

In sum, the Government's position is that the "facts supporting the claim" under § 2255(4) are the facts underlying the State vacatur -- in direct contradiction with *Daniels*. The more reasonable interpretation, which is consistent with *Custis* and *Daniels*, is that the State vacatur is the fact supporting the claim under § 2255(4).

B. Petitioner's Interpretation Is Consistent With The Plain Meaning Of The Terms "Discover" And "Due Diligence"

1. "Discover"

The Government argues that "even if petitioner is correct that the vacatur is a fact supporting his claim, it does not follow that the vacatur of the conviction is the event from which the limitation period runs under paragraph 6(4)." Resp. Br. at 16. According to the Government, it is not the fact that triggers the claim under § 2255(4), but the "discovery" of the fact. *Id.* The Government urges that a vacatur cannot be "discovered" because it was not pre-existing, and what is "discovered" is the factual basis underlying the State vacatur.

To reach this conclusion, which contradicts *Daniels*, the Government plucks the word "discover" from the context of the statute, then interprets it in isolation from the other statutory language. This interpretation is incorrect for several reasons.

First, the language chosen by Congress makes sense when read in context. It is perfectly reasonable and understandable to ask and answer the question: "What was the date on which the vacatur could have been discovered through the exercise of due diligence?" It could have been discovered, at the earliest, when it was issued (or becomes final). It is possible, however, in rare cases that the vacatur could not have been discovered until later. *See, e.g.*, *Knight v. Schofield*, 292 F.3d 709, 710 (11th Cir. 2002) (state court order not sent to prisoner by the state supreme court).

Second, the phrase chosen by Congress -- "the date on which the facts supporting the claim … could have been discovered" -- is broad and was not meant to cover only vacaturs, but a variety of facts that can support a claim under § 2255. As recognized by the Fourth Circuit: "The use of a general categorical term ('facts') to refer to the spectrum of specific examples of that category (the universe of potential factual predicates for a § 2255 challenge) is an ordinary technique in the drafting of statutes." *United States v. Gadsen*, 332 F.3d 224, 227 n.2 (4th Cir. 2003). As the Government concedes, cases involving a vacatur of a prior conviction are but a small subset of the many types of cases covered by § 2255(4).

Third, the definition of "discover" does not require that the fact previously existed. Instead, the term "discover" also includes making "known . . . something . . . unknown." *Webster's Third New International Dictionary* 647. A vacatur cannot be known until it is issued.

The Government's argument that the other triggers involving legal judgments (*see* § 2255(1) & (3)) do not use the word "discover[]" is a red herring. Congress chose broad language in § 2255(4) to cover a variety of circumstances -- from facts showing *Brady*[1] violations to state court vacaturs and many other facts. In § 2255(1) and (3), a much more specific event was addressed. It is understandable that § 2255(4) is treated differently from than § 2255(1) and (3) because Congress used different language in § 2255(4). This choice of different language makes perfect sense because vacaturs are historical facts.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

2. "Due Diligence"

The Government asserts that Petitioner's interpretation "deprives the requirement of 'due diligence' of virtually all its force." Resp. Br. at 19-20. To the contrary, the Government reads the phrase "due diligence" for more than it is worth. Again, the statute uses broad language, meant to cover a variety of circumstances. *See Gadsen*, 332 F.3d at 227 n.2. The statute simply uses "due diligence" to fix the date triggering the limitations period. Again, it makes perfect sense to ask and answer the question: "What was the date on which the vacatur could have been discovered through the exercise of due diligence?" Here, the Petitioner was charged with discovery on the date the vacatur issued, because it was mailed to him as a party and he received it. This will be the normal course, unless the petitioner can show that the order could not be discovered through the exercise of due diligence.[2]

In sum, the Government presses a distorted reading of the terms "discover" and "due diligence" that is unnecessary in the context of § 2255(4) to support its conclusion that "facts supporting the claim" should be read contrary to *Daniels*.

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[2] Contrary to the Government's statement (Resp. Br. at 17, 25), Petitioner does contend that his interpretation of § 2255(4) is consistent with the plain meaning of "discover" and "due diligence," and that these terms make just as much sense applied to a vacatur as to other facts.

II. PETITIONER'S INTERPRETATION SERVES THE ENDS OF FINALITY, AS WELL AS COMITY, FEDERALISM, AND FAIRNESS

A. Finality Is Better Served Through Petitioner's Rule

Petitioner's interpretation of § 2255(4) furthers the policy of finality in most cases. The Government's interpretation will certainly promote finality in this particular case because it cuts off the opportunity for challenging an illegal federal sentence through § 2255. But it will also needlessly extend the vast majority of cases, in which the conviction and sentence already would have become final but for the Government's proposed rule.

Under the Government's proposed rule, defendants will be encouraged to file a "placeholder" § 2255 motion prior to the expiration of one year after direct review. Experience teaches that it usually takes longer to complete state court habeas proceedings (including appeals), than it does for direct review of a criminal sentence plus the one year period under § 2255(1). *See United States v. Venson*, 295 F. Supp. 2d 630, 634 (E.D. Va. 2003) ("[A] meritorious challenge to a predicate state court conviction may take well in excess of one year to reach a final state resolution.").[3] When a state habeas

[3] Petitioner disagrees with the Government's statement that "state courts often take only a few months to decide a post-conviction motion." Resp. Br. at 29. For example, in this case, the state court took nearly three years to resolve Petitioner's motion to vacate. In *Gadsen*, it was over three years after the motion for vacatur was filed that his conviction was conclusively vacated. And perhaps the most extreme example is found in this Court's *Lackawanna County* decision, in which the motion for state postconviction relief remained pending for 14 years without a ruling. *See* 532 U.S. at 397-98. The need for placeholder petitions

petition challenging a prior conviction is still pending or yet to be filed at the end of one year limitations period in § 2255(1), the prudent petitioner will file a placeholder petition and ask the district court to stay the proceedings as state habeas is completed. The Government's proposed rule will, therefore, have the deleterious effect of encouraging a flood of placeholder petitions in federal court so as to preserve petitioners' rights. This will needlessly increase the time to finality of perhaps thousands of convictions and sentences when they otherwise would not be subject to challenge (because the state courts reject the vast majority of habeas challenges). *See Brackett v. United States*, 206 F. Supp. 2d 183, 186 n.3 (D. Mass. 2002) (because the Government's approach forces the federal motion to be filed before the state challenges are resolved, it "**results in thousands of meritless petitions being filed** -- each of which requires a case be opened, orders issued, papers docketed, and the file stored") (emphasis added).

As the Government acknowledges, there are relatively few cases in which a prior conviction is vacated. *See* Resp. Br. at 31 ("Cases involving the vacatur of a prior conviction are a small subset of the cases covered by [§ 2255(4)] . . . ."). Accordingly, the Government's proposed rule would result in shortening the road to finality for a few cases, but extending it in thousands of cases for no good reason.

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under the Government's proposed rule is illustrated by *Venson*, 295 F. Supp. 2d 630 (placeholder petition filed), and *United States v. Hoskie*, 144 F. Supp. 2d 108 (D. Conn. 2001) (attempts to delay resolution of federal case in light of state habeas).

B. The "Incentive For Delay" Argument Does Not Make Sense

The Government argues that Petitioner's reading of § 2255(4) increases incentives for delay because the State has little interest in preserving a prior state conviction, especially where the accompanying sentence has already been served. Resp. Br. at 4, 12, 21-22, 24 (State may be "unwilling" or "uninterested" in defending collateral attacks to prior convictions). The suggestion here is that States cannot be trusted to handle challenges to prior convictions adequately -- a concept wholly at odds with the *Custis* and *Daniels* framework directing such challenges to the States.

This Court in *Daniels* squarely rejected "the State has no interest in stale convictions" logic. There, petitioner argued that the State of California would not be prejudiced by his federal challenge to two prior state convictions, because they were more than two decades old and the sentences had been served. 532 U.S. at 379. This Court disagreed:

> Even after a defendant has served the full measure of his sentence, **a State retains a strong interest in preserving convictions it has obtained**. States impose a wide range of disabilities on those who have been convicted of crimes, even after their release . . . [such as being] barred from possessing firearms . . . . Further, each of the 50 states has a statute authorizing enhanced sentences for recidivist offenders . . . . **Thus, the State does have a real and continuing interest in the integrity of its judgments**.

Id. at 379-80 (emphasis added).

Additionally, given the State's continuing interest in the integrity of its judgments, the Government's reliance on the specter of stale or absent records (Resp. Br. at 12, 21-22) is unavailing. If States have a strong and continuing interest in preserving prior convictions, then they also have a strong and continuing interest in preserving the documents necessary to protect those prior convictions, consistent with their statute of limitations for collateral challenges. The records problem in *Custis*, *Daniels*, and *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 403 (2001), was different. In those cases, the issue was potentially allowing a collateral attack in federal court beyond the state statute of limitations. The risk of absent records was more palpable because the State would have little reason to preserve its records relating to a prior conviction beyond the State's statute of limitation for challenges to that conviction.

C. State Limitation Periods Limit The Ability To Challenge Prior Convictions

The Government argues that Petitioner's interpretation "effectively eliminates any meaningful statute of limitations for motions of this type." Resp. Br. at 21. This argument ignores the fact that the great majority of states have limitations periods on collateral challenges.[4] Indeed, the trend

[4] *See* Ala. R. Crim. P. 32.2 (providing that where a habeas petition does not raise constitutional grounds or involve an appeal that was untimely through no fault of the petitioner, the petition must be filed within one year); Alaska Stat. § 12.72.020 (one or two years, depending upon the petitioner's grounds); Ariz. Rev. Stat. Ann. § 13-4231 (90 days); Ark. R. Civ. P. 37.2 (60 or 90 days); *In re Sanders*, 21 Cal. 4th 697, 704 (1999) (petitions not entitled to a presumption of timeliness if filed more than 90 days after due date for appellant's final reply brief in a direct appeal); Colo. Rev. Stat. § 16-5-402 (three years for many felonies); Del.

since the enactment of the AEDPA is toward relatively modest limitation periods for collateral challenges.[5]

Super. Ct. Crim. R. 61 (three years); O.C.G.A. § 9-14-12 (four years); Idaho Code § 19-2719 (for non-capital cases, one year; for capital cases, 42 days after judgment imposing death sentence); 725 Ill. Comp. Stat. 5/122-1(c) (six months after conclusion of direct appeal; three years from conviction if no direct appeal); Iowa Code § 822.3 (three years); Kan. Stat. Ann. § 60-1507(f)(2) (one year); Ky. R. Crim. P. 11.42(10) (three years); La. Code Crim. Proc. Ann. art. 930.8(A) (two years); Me. Rev. Stat. Ann. tit. 15, § 2128(5) (one year); Md. Code Ann. Crim. Proc. § 7-103(b) (ten years in non-capital cases; 210 days in capital cases); Miss. Code Ann. § 99-39-5(2) (one year for capital cases; three years for non-capital cases); Mo. Ann. Stat. § 547.360(2) and Mo. Sup. Ct. R. 24.035(b), 29.15(b) (90 or 180 days, depending upon the circumstances); Mont. Code Ann. § 46-21-102 (one year); Nev. Rev. Stat. Ann. § 34.726 (one year); N.C. Gen. Stat. § 15A-1415(a) (120 days in capital cases); Ohio Rev. Code Ann. § 2953.21 (180 days); Okla. Stat. tit. 22, § 1089(D) (90 days for capital cases); Or. Rev. Stat. § 138.510(3) (two years); 42 Pa. Cons. Stat. § 9545(b) (60 days or one year, depending upon the circumstances); S.C. Code Ann. § 17-27-45 (one year); S.D. Codified Laws § 23A-31-1 (120 days in capital cases); Tenn. Code Ann. § 40-30-102(a) (one year); Tex. Crim. Proc. Art. 11.071(4) (180 days in capital cases); Utah Code Ann. § 78-35a-107(1) (one year); Va. Code Ann. § 8.01-654(A)(2) (one or two years); Wash. Rev. Code § 10.73.090 (one year); Wis. Stat. Ann. § 809.30(2)(b) (notice of intent to pursue post-conviction or post-disposition relief due within 20 days); Wyo. Stat. Ann. § 7-14-103(d) (five years).

[5] *See* Ala. R. Crim. P. R. 32.2 (amended in 2002 to shorten the time in which to file a state habeas petition from two years to one year); O.C.G.A. § 9-14-12 (in 2004, imposing a new four-year limitations period for collateral attacks on felony convictions); Kan. Stat. Ann. § 60-1507(f) (in 2003, amending the post-conviction relief statute from allowing petitions to be filed "at any time" to

Finally, any inroads on finality are a necessary part of the administrative decision in *Custis* and *Daniels* about how to handle challenges to prior state convictions. The road to finality for federal recidivist sentences based on state prior convictions could have been much shorter -- i.e., challenges to prior convictions could have been handled at federal sentencing. But this Court made the prudential decision to send these challenges back to the state courts, due in part to concern over allowing challenges that the States themselves would not permit (because they were untimely under a state limitations period or otherwise barred). The Court concluded such challenges would be contrary to finality, comity, and federalism because they would deprive state court judgments of their normal force and effect. Such direct challenges would also risk absent records because the federal sentencing court may not be able to retrieve state records of a conviction that is beyond state collateral challenge. Any resulting delay to finality is a function of the framework established by *Custis* and *Daniels* routing such challenges to the States.[6]

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requiring such petitions to be filed within one year); La. Code Crim. Proc. Ann. art. 930.8(A) (shortened in 1999 to reduce the limitations period from three years to two years); Me. Rev. Stat. Ann. tit. 15, § 2128(5) (adding an express one-year limitations period in 1997); Miss. Code Ann. § 99-39-5(2) (amended in 2000 to shorten the limitations period for capital cases from three years to one year); Mont. Code Ann. § 46-21-102 (amended in 1997 to change the period from five years to one year).

[6] For all of the Government's concern over stale or absent records, its proposed rule does not address the issue of a challenge to an old state prior conviction that is only instituted after a federal recidivist sentence has been imposed. For example, a defendant could challenge a fifteen-year-old drug conviction the day after his federal sentence is imposed, and the relevant state records would be no more available under the Government's proposed rule.

D. Comity, Federalism, and Fairness Are Better Served By Petitioner's Rule

The Government takes issue with Petitioner's statement that the Eleventh Circuit's rule strips the state court of its ability to exculpate criminal defendants. Petitioner's point is that this Court in *Custis* and *Daniels* made the administrative decision to send challenges to prior convictions back to the state courts. This decision was motivated by, *inter alia*, the Court's concern that challenges should not be permitted where the States would not allow them because this would threaten to "deprive [a] state court judgment of its normal force and effect." *Daniels*, 532 U.S. at 378. Having so routed the challenges to the States -- a decision that both acknowledges the States' competence to adjudicate such challenges and implies a certain deference to the States' decision-making processes as to the validity of prior convictions -- it would deprive the vacatur of the force and effect acknowledged in *Custis* and *Daniels* to disregard it once issued. While the federal government has an interest in preserving the federal sentence (thus explaining why it is permissible to have a one-year limitations period in the first place), the State is put in control of adjudicating the validity of the prior state conviction under *Custis* and *Daniels*.

Finally, it is important to remember the interests in "fundamental fairness" served by the Great Writ. *See Engle v. Isaac*, 456 U.S. 107, 126 (1982) (recognizing the writ of habeas corpus serves as "a bulwark against convictions that violate fundamental fairness") (citations and internal quotation marks omitted). It offends fundamental fairness to add years to a sentence based on a prior conviction that was obtained in violation of the Constitution. In a very real sense, Petitioner is incarcerated today based on a conviction that violated the Constitution. This Court in *United States v. Tucker* called a

sentence based on a later-vacated prior conviction "misinformation of a constitutional magnitude." 404 U.S. 443, 446 (1972). Similarly, in *Johnson v. Mississippi*, this Court said "it would be perverse" to use an invalid prior conviction as an aggravating circumstance in a capital case. 486 U.S. 578, 586 (1988).

III. RELIANCE ON EQUITABLE ESTOPPEL IS MISPLACED

The Government, like the Eleventh Circuit, seeks a firm rule: the facts supporting the claim under § 2255(4) are the facts underlying the vacatur. However, the Government seems to recognize that there is a problem with this rigid interpretation because a petitioner could initiate his state challenge prior to federal sentencing or immediately thereafter and still not satisfy the bright-line one-year limitations period, due to no fault of his own. *See*, *e.g.*, *Gadsen*, 332 F.3d at 228 (state court took more than three years to adjudicate state claim).

Such a rigid application is inconsistent with the notion that improperly enhanced sentences may be reopened under § 2255 and is inconsistent with the framework established by *Custis* and *Daniels* routing petitioners back to state courts.

To solve the problem of an overly rigid rule, the Government (like the Eleventh Circuit) relies on a case-by-case application of equitable tolling. But this version of equitable tolling provides insufficient guidance to most movants under § 2255. The Government is not willing to say precisely how it will apply, only that it "may" apply in certain cases. How meaningful any such mechanism will be is dubious, especially given that the Government does not even concede that the Petitioner in *Gadsen* -- who filed his state

collateral challenge before his federal conviction became final -- was entitled to equitable tolling. *See* Resp. Br. at 31 n.12 (Gadsen "might well" or "might have" been eligible for equitable tolling).

Given this uncertainty, prudent petitioners will not rely on equitable tolling and will instead file placeholder petitions. As discussed *supra*, this is an undesirable result and as a practical matter will place an unnecessary burden on the federal district courts. In any event, there is no need for this soft and complex equitable tolling rule when the plain language of the statute allows treating a vacatur as a "fact." Such a reading eliminates the need to assume that Congress wrote a flawed statute and that equitable tolling is necessary to fix it.

There is no need to fix what is not broken: it is well within the plain meaning of § 2255(4) to interpret "facts" to include vacaturs. And the practical consequences of Petitioner's rule are much more favorable. Such a rule, consistent with the ease of administration rationale stressed by this Court in *Custis* and *Daniels*, would only permit § 2255 challenges to be filed *after* the state court has conclusively invalidated the prior conviction. There would be no need for meritless placeholder petitions, thereby eliminating the needless expenditure of resources that inevitably accompanies them. The high rate of failure in the State system will screen out the vast majority of petitions.[7]

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[7] In the end, the Government contends that if both parties have presented views of § 2255(4) that are equally compatible with the text, then the Government's view should be adopted because it serves the legislative purpose -- i.e., any "tie" should go to the Government. Resp. Br. at 26. As shown *supra*, the Government's premises are incorrect. Petitioner's rule is more compatible with the plain language of the statute and better serves finality, comity, federalism, and fairness. If, however, there is a "tie," any

IV. THE GOVERNMENT'S NEW FALLBACK POSITION IS UNWORKABLE AND CONTRARY TO THE PLAIN MEANING OF THE STATUTE

For the first time, the Government argues a new fallback position: even if the vacatur is a fact supporting the claim, the trigger should be the date the vacatur could have been obtained. Resp. Br. at 32-33. This approach is impractical because it creates a need for evidentiary findings that are unworkable and unseemly, and because it is grounded in speculation. It also engrafts a new statutory scheme on top of § 2255(4)'s plain language.

The Government's fallback position would require, at a minimum, a factual inquiry into when the vacatur could have been obtained if it had been filed earlier. The Government would have the district court impose a presumption that the state court would have taken the same amount of time to decide the motion if it were filed at an earlier date. This presumption, no doubt, would be rebuttable, like most presumptions. One can only imagine what the proceedings could entail -- the deposition of the state court judge to see if the motion would have been decided on the same timeline; a deposition of the state court administrators to see if the same judge would have been assigned the motion if it had been filed earlier; or perhaps a deposition of the State attorneys to see what its position would have been on the motion, especially if

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ambiguity should be interpreted in Petitioner's favor because the statute of limitations in § 2255 is in derogation of the common law. *See Badaracco v. Comm'r of Internal Revenue*, 454 U.S. 386, 403 n.3 (1984) (recognizing that statutes in derogation of common law are strictly construed); *see also* Resp. Br. at 4 (acknowledging that "no statute of limitations governed motions for collateral relief under" § 2255 before AEDPA).

different attorneys would have been assigned. Such a rule would involve too many "what ifs" and would be extremely unworkable as an exercise in speculation, and a burdensome and intrusive one at that.

Further, it appears that the Government's fallback plan engrafts a new statutory framework on the existing language of § 2255(4). The proposed fallback rule seems to operate as follows. The petitioner has one year to file his state habeas claim -- and this one year period is triggered by the facts on which the state habeas claim is based. Resp. Br. at 33 n.13, 35 ("[P]risoners can be given a full year from the date on which the factual basis for the motion could have been discovered through the exercise of due diligence . . . ."). Then, the court is to toll the period during which the state habeas case is pending. Resp. Br. at 33 ("[T]he period during which the motion is pending is excluded from the calculation."). Then, if the state court vacates the prior state conviction, the federal prisoner would have another year in which to bring his § 2255 motion. *See* Resp. Br. at 33 n.13. In all, it appears that the Government would have two one-year periods of limitation (one for the State and another for the federal government), with a tolling period in between. Needless to say, this scheme is not within the plain language of § 2255(4). If such a statute would be good policy, it is for Congress to pass.

The statute Congress chose to enact speaks in terms of the date on which the facts supporting the claim could have been discovered. The critical fact is the vacatur, and it could not have been discovered until it was issued. The Government seeks to change the language of the statute to say "when the vacatur could have been obtained" but that is simply not what the statute says.

CONCLUSION

Accordingly, 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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