Federal Postconviction Relief and 28 USC § 2255(4): Are State Court Decisions “Facts”?

Terrell J. Iandiorio†

After being convicted of a federal crime, a defendant can contest his conviction or sentence under two broad categories of relief: direct appeals and “postconviction” appeals. Direct appeals generally can be made on the basis of “any nonharmless legal error,” whereas postconviction appeals are typically allowed only on the basis of more egregious (such as constitutional or jurisdictional) error. Until recently these two forms of relief also differed in that, while direct appeals usually must be sought within a relatively short period after judgment, postconviction appeals could be filed at any time.

In 1996, however, after several years of debate about the abuses and delays of the federal appeals process, and spurred into action by the Oklahoma City bombing, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). Among other things, AEDPA amended 28 USC § 2255 to provide for a one-year statute of limitations for those seeking postconviction relief from their federal conviction or sentence. While the default rule was that a § 2255 petition had

† B.A. 1993, Harvard University; J.D. Candidate 2005, The University of Chicago.

1 See Donald E. Wilkes, Jr., Federal Postconviction Remedies and Relief § 1-3 at 9-10 (Harrison 1996). While both are generally “available,” in most cases postconviction relief cannot be sought until direct relief opportunities have been exhausted. See id § 1-5 at 13 (“There have, however, been inroads on this principle in recent years in a number of states.”).

2 Id § 1-4 at 10.

3 Id § 1-5 at 12. For example, due process violations, violations of the Confrontation Clause, and inadequate representation by counsel are all legitimate bases for postconviction appeals. See id § 1-5 at 12-13. See also Charles Alan Wright, Nancy J. King, and Susan R. Klein, 3 Federal Practice and Procedure § 594 at 701-10 (West 3d ed 2004) (listing grounds on which § 2255 petitions (federal postconviction appeals) can be brought).

4 See Wilkes, Federal Postconviction Remedies § 1-5 at 13 (cited in note 1) (stating that although “there generally have been no fixed time limits on applying for or obtaining postconviction relief[,] . . . in recent years a number of jurisdictions have placed a statute of limitations on applications for their principal postconviction remedy”).

5 See Burke W. Kappler, Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel, 90 J Crim L & Criminol 467, 484-88 (2000) (discussing the long legislative history of AEDPA and the role the Oklahoma City bombing played in its enactment).


7 See id § 105 at 1220, codified at 28 USC § 2255 (providing also that a second motion for relief could be granted only under narrow circumstances).

1141
to be filed a year from "the date on which the judgment of conviction becomes final," the amendment also provided for a limited set of exceptions to that rule, allowing the one-year clock to be restarted at a later date under certain circumstances. One such exception, provided for in § 2255(4), applied when "the facts supporting the claim or claims presented" could not have been discovered "through the exercise of due diligence" until after the date of final judgment. For example, if a convicted defendant was unable to have discovered that his lawyer had provided constitutionally ineffective counsel until some time after final judgment had been passed, § 2255(4) would delay the start of the one-year statute of limitations until the day on which that fact could have been "diligently" discovered.

In most cases, courts have had few problems applying § 2255(4), and have merely been asked to decide when exactly the petitioner could have discovered the facts supporting his or her claim through the exercise of "due diligence." However, for a small group of § 2255(4) petitioners, the issues have been trickier. Unlike in most § 2255 cases, these petitioners seek to reduce their sentences rather than overturn their convictions. In particular, they argue that because the state conviction that enhanced their federal sentence, as per the Federal Sentencing Guidelines, has been vacated, their sentence should be adjusted accordingly. Furthermore, they argue that the "fact" supporting their claim is the fact that their state conviction was vacated, and that therefore, under § 2255(4), they should have a year from the date of that vacatur in which to file their § 2255 petition.

8 28 USC § 2255(1)-(4) (providing for the tolling of the statute of limitations at the latest of any of four circumstances).
9 28 USC § 2255(4).
10 See, for example, Aron v United States, 291 F3d 708, 710-14 (11th Cir 2002) (holding that a § 2255(4) petitioner was entitled to a hearing on the question of whether he exercised due diligence in discovering appellate counsel's allegedly deficient failure to file an appeal).
11 See, for example, Wims v United States, 225 F3d 186, 190 (2d Cir 2000) (finding that when a § 2255(4) petitioner claims that his counsel was ineffective due to the failure to file an appeal, the court's "proper task ... is to determine when a duly diligent person in petitioner's circumstances would have discovered that no appeal had been filed").
12 These guidelines provide that, among other things, the length of federal sentences for some crimes can depend on the existence of prior state convictions. See Federal Sentencing Guidelines § 4B1.1(a) (2003), codified at 28 USC § 994(h) (2000) (providing that "career offenders" convicted of two previous stipulated crimes receive at or near the maximum allowed for the crime); Phylis Skloot Bamberger and David J. Gottlieb, eds, 1 Practice under the Federal Sentencing Guidelines §§ 3.01-3.02(A) at 3-3 to 3-6 (Aspen 4th ed 2001) ("The [Sentencing] Commission concluded that a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."). See, for example, 18 USC § 924(e)(1) (2000) (allowing the sentence for unlawful firearm possession under 18 USC § 922(g), normally a maximum of ten years, to be increased to a minimum of fifteen years if the defendant has sufficient prior convictions).
13 For example, on December 17, 2001, Robert Gadsen filed a § 2255 petition in federal court, challenging the length of a federal sentence that had been enhanced due to a subsequently
deed, to interpret §2255(4) otherwise, these petitioners contend, would require them to serve out an enhanced sentence based on crimes of which they were not legally convicted. Unfortunately, it is not at all clear how §2255(4) applies to such a claim, as perhaps best illustrated by the fact that the three courts of appeals that have addressed this question have split: the First and Eleventh Circuits have adopted a narrow interpretation under which vacaturs of state convictions do not count as "facts," while the Fourth Circuit, reading §2255(4) more broadly, has found that they do.¹⁴

After analyzing the arguments supporting each of the conflicting interpretations of §2255(4), this Comment concludes that the most appropriate resolution would be to treat vacaturs of state convictions as facts. Part I provides a brief history of §2255 and its statute of limitations, and discusses the particular ambiguities at issue. Part II outlines the circuit split and the arguments that each side offers in support of its particular interpretation of §2255(4). Finally, Part III argues that the best resolution of this issue would be to include vacaturs of state convictions as "facts" when applying §2255's statute of limitations. Ideally, this resolution would be effected by a congressional amendment to §2255. However, in the meantime, this Comment argues, federal courts should interpret §2255(4) to extend the statute of limitations to a year from the day that a relevant state conviction was overturned.

I. BACKGROUND

A. Postconviction Appeals in General

Postconviction relief for federal prisoners has been available in one form or another since 1789, when the Judiciary Act granted federal courts the power to hear appeals from state convictions. Although he filed this petition more than a year after final federal judgment, Gadsen argued that the vacatur of his state conviction was the relevant "fact supporting his claim," such that §2255(4) gave him a year from the date of that vacatur in which to file his §2255 petition. The government, on the other hand, argued that (a) the relevant "fact" was the fact that his "no contest" plea to his state charge was not knowing and voluntary, and that (b) Gadsen's §2255 petition was filed more than a year since that fact could have been discovered, such that his §2255 petition did violate the statute of limitations. See United States v Gadsen, 332 F3d 224, 225-27 (4th Cir 2003) (agreeing with petitioner that vacaturs of state convictions did count as "facts" under §2255(4) and that therefore he had not violated §2255's statute of limitations).

¹⁴ Compare Johnson v United States, 340 F3d 1219, 1223 (11th Cir 2003) ("[W]e conclude the vacatur of Appellant's prior state convictions is not a 'fact' from which the one-year statute of limitations may run."); Brackett v United States, 270 F3d 60, 68 (1st Cir 2001) ("We hold that the operative date under §2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction."); with Gadsen, 332 F3d at 227 (noting the court's disagreement with the holding in Brackett).
eral courts the power to issue writs of habeas corpus.\textsuperscript{15} However, the Act limited habeas exclusively to federal prisoners,\textsuperscript{16} and while the Act itself was silent regarding the substantive scope of the writ, courts understood it to apply only to jurisdictional challenges.\textsuperscript{17} Under the Habeas Corpus Act of 1867,\textsuperscript{18} Congress extended the application of habeas corpus to state prisoners,\textsuperscript{19} but courts continued to view the writ as merely a jurisdictional tool.\textsuperscript{20} It was not until the 1930s and 1940s that courts began to expand the scope of habeas corpus to permit challenges to nonjurisdictional flaws such as violations of due process, the right to counsel, and other constitutional rights.\textsuperscript{21}

B. 28 USC § 2255


Perhaps not surprisingly, this judicial broadening of the scope of habeas led to a marked increase in the volume of appeals filed, and it quickly became clear that the old system of handling those appeals was inadequate and inappropriate. The primary problem was that the existing habeas statute, 28 USC § 2241,\textsuperscript{22} required that habeas appeals “be brought in the district of confinement,” rather than the district in which the original trial took place.\textsuperscript{23} As a result, the few courts in districts that contained federal correctional facilities were handling far

\textsuperscript{15} See Judiciary Act of 1789 § 14, 1 Stat 73, 81–82 (stating that habeas corpus was “for the purpose of an inquiry into the cause of commitment”).

\textsuperscript{16} See id at 82 (providing that the writ of habeas corpus extended only to prisoners in United States custody or prisoners who will be tried in United States courts).

\textsuperscript{17} See Wilkes, \textit{Federal Postconviction Remedies} § 3-1 at 115 (cited in note 1) (noting that in the nineteenth century, it became settled that “[a] federal conviction was void for lack of jurisdiction if the convicting court did not have jurisdiction of the person of the defendant or of the subject matter”). See, for example, \textit{Ex Parte Watkins}, 28 US 193, 202–03 (1830) (“An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous.”).

\textsuperscript{18} Habeas Corpus Act of 1867, 14 Stat 385.

\textsuperscript{19} See id § 1 at 386 (“[A]ny proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State . . . under and by virtue of such writ of habeas corpus, shall be deemed null and void.”).

\textsuperscript{20} See \textit{Stone v Powell}, 428 US 465, 475 (1976) (noting that, even after the passing of the Habeas Corpus Act, “the limitation of federal habeas corpus jurisdiction to consideration of the jurisdiction of the sentencing court persisted”).

\textsuperscript{21} \textit{Waley v Johnston}, 316 US 101 (1942), is the seminal case. See Wilkes, \textit{Federal Postconviction Remedies} § 3-1 at 117 (cited in note 1) (observing that \textit{Waley} made it “no longer necessary to resort to the pre-1942 legal fiction that a violation of a constitutional right would strip the court of subject matter jurisdiction”).

\textsuperscript{22} 28 USC § 2241 (2000).

\textsuperscript{23} \textit{United States v Hayman}, 342 US 205, 213 (1952). See also Wright, King, and Klein, 3 \textit{Federal Practice and Procedure} § 589 at 670 (cited in note 3) (“Since a habeas corpus proceeding must be brought in the district of confinement, many applications had to be decided on the records of a distant sentencing court, which were not readily available to the habeas corpus court.”).
more than their share of cases. In addition, since these courts were often not the original trial courts, their access to the witnesses, records, and other evidence from those original trials was limited, raising doubts about their ability to properly adjudicate the appeals brought before them. In response to these concerns, in 1948 Congress passed 28 USC § 2255, which specifically provided federal postconviction relief for federal prisoners (and only federal prisoners) in the court in which they had originally been sentenced, rather than the court of the district in which they were presently confined.

While § 2255 clearly usurped § 2241 as the major vehicle of postconviction relief for federal prisoners (at least in the majority of cases), its drafters did not intend for it to curtail the rights to relief that prisoners had enjoyed under the previous regime. Rather, § 2255 was meant “to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined.”

25 Id (citing as an example Walker v Johnston, 312 US 275 (1941), in which a habeas hearing was held in the Northern District of California, even though the relevant witnesses and evidence were in Texas, and noting in general that courts were being forced to hear habeas corpus actions “far from the scene of the facts, the homes of the witnesses and the records of the sentencing court”).
26 See Act of June 25, 1948, Pub L No 80-773, 62 Stat 869, 869, 967-68, codified as amended at 28 USC § 2255. Section 2255 was actually one of several postconviction reforms passed in this Act pursuant to the recommendations of a Judicial Conference Committee that had been formed in 1942 to address the increase in postconviction appeals. See John J. Parker, Limiting the Abuse of Habeas Corpus, 8 FRD 171, 173 (1948–1949) (discussing the goals and recommendations of that Committee, and noting that § 2255 in particular was enacted to make prisoners seek postconviction relief in the sentencing court).
27 See 28 USC § 2255 (“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.”) (emphasis added).
28 See id (stating that relief under § 2241 was available to petitioners only if § 2255 was “inadequate or ineffective to test the legality of [their] detention”). In practice, the cases for which § 2255 is actually considered “inadequate or ineffective” such that relief could be sought under § 2241 involve only a rare and unusual set of claims. See Wright, King, and Klein, 3 Federal Practice and Procedure § 591 at 680–82 (cited in note 3) (asserting that the “inadequate or ineffective” exception applies only if “failure to allow for collateral review would raise serious constitutional questions, as when the prisoner is imprisoned for a nonexistent offense”). See also Wilkes, Federal Postconviction Remedies § 5-2 at 304 (cited in note 1) (stating that it is only in “the rarest of cases” that courts will allow a prisoner who can proceed under § 2255 to appeal under § 2241 instead).
29 Hill v United States, 368 US 424, 427 (1962). See also Hayman, 342 US at 219 (“Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.”); Parker, 8 FRD at 175, 178 (cited in note 26) (“It is believed that the effect of these provisions . . . will be to protect the courts . . . from the delays, harassments and unseemly conflicts of jurisdiction which have arisen under the recent habeas corpus decisions, without in anywise impairing the rights which it was the purpose of those decisions to protect.”).
Pursuant to this purpose, § 2255 has consistently been interpreted to allow a wide range of grounds for relief. In addition, and most relevant to this Comment, § 2255 continued to allow petitions to be filed "at any time," setting no statute of limitations on relief.

2. AEDPA amendment to 28 USC § 2255.

For the most part, § 2255 and its sister amendments achieved their drafters' goals. Although the number of petitions for postconviction relief continued to rise after 1948, the fact that § 2255 no longer required petitions to be heard in the district of incarceration helped ensure a far more equitable apportionment of this burden among the district courts, and ensured that the relevant evidence and records would be more easily available to the courts hearing those petitions. Nevertheless, many began to feel that the ever-expanding scope of postconviction relief simply encouraged "repetitive and never-ending litigation, despite often obvious guilt." Such concerns were further fueled by the findings of the "Powell Committee," a federal judicial committee charged with investigating the abuse of postconviction remedies, which determined that the existing system was plagued by "unnecessary delay and repetition."

30 See Hill, 368 US at 428 n 5 (remarking that, "at least since the Hayman decision," courts have "understood the substantive scope of § 2255 to be the same as that of habeas corpus"). Section 2255 itself lists four grounds on which petitioners may challenge their sentence or conviction: (1) that their sentence was imposed in violation of the Constitution or laws of the United States, (2) that the court was without jurisdiction to impose the sentence, (3) that the sentence was in excess of that allowed by law, and (4) that the sentence was "otherwise subject to collateral attack." 28 USC § 2255. In practice courts have read this already broad language generously to include claims of improper jury selection, perjured testimony, coerced guilty pleas, and ineffective assistance of competent counsel, among other claims. See Wright, King, and Klein, 3 Federal Practice and Procedure § 594 at 701-10 (cited in note 3) (listing a number of examples of the kinds of claims that courts have recognized as legitimate grounds for § 2255 appeals).

31 Act of June 25, 1948, 62 Stat at 967. In fact, as late as 1977, Congress considered, but refused to adopt, a five-year statute of limitations. See Wright, King, and Klein, 3 Federal Practice and Procedure § 597 at 742-43 (cited in note 3).

32 This continued rise was due both to courts' continued expansion of the grounds on which postconviction petitions could be filed and to the simple fact of the rising prison population. See Wright, King, and Klein, 3 Federal Practice and Procedure § 589 at 671-72 (cited in note 3) (noting, for example, that after one particularly important Supreme Court decision in 2000, petitions increased by 30 percent).

33 See id ("The purpose of the 1948 reform was, on the whole, achieved.").

34 Kappler, 90 J Crim L & Criminol at 478 (cited in note 5) (noting that many also favored limiting habeas review because they saw its "stays of execution [as] functionally preventing the states from carrying out death sentences").

35 See Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim L Rptr (BNA) 3239 (Sept 27, 1989). The Powell Committee, created by Chief Justice William H. Rehnquist and made up of federal judges from a variety of appellate and circuit courts, was named for its chairman, former Supreme Court Justice Lewis F. Powell, Jr. See Kappler, 90 J Crim L & Criminol at 479-85 (cited in note 5).
This mounting pro-reform sentiment was catalyzed into action by the Oklahoma City bombing in 1995.\(^3\) Almost exactly a year later, following floor debates that made frequent reference to the Oklahoma tragedy,\(^3\) Congress passed the AEDPA,\(^3\) which included a number of postconviction reform measures.\(^3\) Among those reforms was a one-year statute of limitations for postconviction relief.\(^4\) In particular, the statute of limitations for § 2255 provides that:

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.\(^5\)

At first read, the provisions of this statute of limitations seem unexceptional and straightforward: § 2255 petitioners must file their motion a year from the date of their "final conviction" unless they qualify

---

\(^3\) See Kappler, 90 J Crim L & Criminol at 487 (cited in note 5) ("In the end, it was the bombing of the Alfred P. Murrah Building in Oklahoma City that supplied that needed political will to reform habeas corpus."). See also Joseph L. Hoffman, Justices Weave Intricate Web of Habeas Corpus Decisions, 37 Trial 62, 62 (Dec 2001) ("[T]he Oklahoma City bombing provided the political cover for the habeas corpus, prison litigation, and immigration restrictions contained in [AEDPA].").

\(^3\) See, for example, Statement of Representative Lucas, 104th Cong, 2d Sess, in 142 Cong Rec H 2141 (Mar 13, 1996) (arguing that postconviction reform would aid the survivors' "healing process" by ensuring that "those who committed this heinous crime are punished"); Statement of Senator Hatch, 104th Cong, 1st Sess, in 141 Cong Rec S 7481 (May 25, 1995) (stating that postconviction reform would protect the families of the victims of the Oklahoma City bombing, and introducing into the record a number of letters from such victims supporting the bill).

\(^3\) Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat 1214 (covering a variety of topics including postconviction appeal reform, international terrorism, alien removal and exclusion, and nuclear, biological, and chemical weapons).

\(^4\) See id §§ 101--08 at 1217–26 (amending preexisting postconviction statutes and adding new ones).

\(^4\) This one-year statute of limitations, with only slight variation, was added to both § 2244 and § 2255. See id §§ 101, 105 at 1217, 1220, respectively.

\(^4\) Id § 105 at 1220, codified at 28 USC § 2255.
for one of three exceptions. In practice, however, applying this text has proven remarkably difficult.

C. Ambiguity of § 2255(4)

In fact, a good deal of litigation has been generated by federal prisoners challenging statute of limitations–based dismissals of their § 2255 petitions. Most often, it is the provisions of § 2255(1) that are challenged. However, a smaller set of petitioners appeal under § 2255(4), arguing that, while they did violate the one-year limitation of § 2255(1), it was only because they could not, through due diligence, have discovered "the facts supporting [their] claim" (for example, the fact that counsel failed to file an appeal) until after their judgment of conviction became final. Under § 2255(4), a petitioner who can successfully demonstrate such a circumstance can extend his window of opportunity to a year from the day those facts could have been so discovered. In most of these § 2255(4) cases, the question has been a factual one: did the petitioner indeed act with due diligence?

However, for a small, particular subset of § 2255(4) challenges, the issue is rather one of statutory interpretation. These cases involve petitioners who have been convicted of a federal crime and who wish to challenge sentences that have been enhanced pursuant to the Federal Sentencing Guidelines due to prior, but allegedly improper, state convictions. Because § 2255 may not be used to directly challenge state convictions in federal courts, however, this subset of petitioners must first return to state court to get their state convictions vacated.

---

42 See, for example, Kapral v United States, 166 F3d 565, 567 (3d Cir 1999) (holding that under § 2255(1) a judgment becomes final only upon "expiration of the time allowed for certiorari review by the Supreme Court," not simply when an appeals court affirms conviction). Debate on this issue has recently been settled, however, by Clay v United States, 537 US 522 (2003), in which the Supreme Court held that "a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." Id at 525.

43 See, for example, Montenegro v United States, 248 F3d 585, 592–93 (7th Cir 2001) (finding that petitioner did not qualify for the due diligence exception to § 2255 as, despite the conditions of his imprisonment and a language barrier, he should have been able to discover that his lawyer had not filed an appeal), revd on other grounds as Ashley v United States, 266 F3d 671, 674–75 (7th Cir 2001).

44 See note 12.

45 See, for example, United States v LaValle, 175 F3d 1106, 1108 (9th Cir 1999) (holding that federal convicts who succeed in vacating state convictions may petition a district court under § 2255 to reconsider their enhanced federal sentencing in light of that vacatur); United States v Pettiford, 101 F3d 199, 200 (1st Cir 1996) (holding the same).

46 See Daniels v United States, 532 US 374, 376 (2001) (holding that a petitioner may not "challenge his federal sentence through a motion under 28 U.S.C. § 2255 . . . on the ground that his prior [state] convictions were unconstitutionally obtained").
Only then can they make a § 2255 claim that their federal sentence was invalidly imposed. 47

Unfortunately, it is not at all clear whether vacatur of a state conviction constitutes a new “fact” under § 2255(4) such that § 2255’s one-year clock would be reset once the vacatur was granted. As in the more typical cases above, § 2255(4) resets the statute’s one-year clock to the day that a petitioner should (or actually did) discover the “facts supporting the claim.” However, in these prior state conviction cases, it is unclear whether the “fact supporting the claim” is (a) the “fact” that the petitioner no longer has a state conviction, in which case he has a year from the day his state conviction is overturned; or (b) the “fact” that formed the basis of the vacatur of his state conviction in the first place (for example, the fact that his “no contest plea” was not knowing and voluntary), in which case he has a year from the day he should have become aware of that underlying fact.48

Indeed, perhaps indicative of this ambiguity, the three federal courts of appeals that have interpreted § 2255(4) have come to differing conclusions: two have found that § 2255(4)’s “facts” do not include vacaturs of state convictions,49 and one has found that they do.50 The relevant question, then, is how broadly the scope of § 2255(4)’s “facts” should be read—specifically, whether vacaturs of state convictions are or are not to be counted as “facts.”51

II. TWO INTERPRETATIONS OF “FACTS” UNDER § 2255(4)

A. The Majority View: “Facts” under § 2255(4) Do Not Include Vacaturs of State Convictions

Both the First Circuit, in Brackett v United States,52 and the Eleventh Circuit, in Johnson v United States,53 have held that the vacatur of a state conviction does not qualify as a “fact supporting the claim” un-

47 See id at 382 (holding that if a “challenge to the underlying [state] conviction is successful, the defendant may then apply for reopening of his federal sentence”).
48 See, for example, Brackett v United States, 270 F3d 60, 64 (1st Cir 2001) (discussing the possible alternative interpretations of § 2255(4)).
49 See id at 68 (“We hold that the operative date under § 2255(4) is not the date the state conviction was vacated.”); Johnson v United States, 340 F3d 1219, 1226 (11th Cir 2003) (“[W]e hold with the First Circuit and contra the Fourth Circuit that the purported ‘fact’ of a state court’s vacatur ... is not a ‘fact supporting the claim or claims’ under [§ 2255(4)].”).
50 See United States v Gadsen, 332 F3d 224, 229 (4th Cir 2003) (“[T]he federal statute of limitations begins running when [a] state court conviction is conclusively invalidated.”).
51 See Johnson, 340 F3d at 1229 (Roney dissenting) (noting the perplexing result that, depending on the circuit where their appeal is located, some defendants will have their sentences reduced while others will serve their full sentences, even though both have had their state convictions vacated).
52 270 F3d 60 (1st Cir 2001).
53 340 F3d 1219 (11th Cir 2003).
These courts justified their interpretation of § 2255(4) on three general grounds: (1) the language of § 2255; (2) the language and accepted interpretation of 28 USC § 2244, a closely analogous statute also amended by AEDPA; and (3) the congressional intent behind § 2255 and AEDPA in general.

First, both Brackett and Johnson held that the language of § 2255 as a whole makes most sense when § 2255(4) is read not to apply to vacatur of a state conviction. To begin with, these courts concluded that the word "fact" in § 2255(4)'s "fact supporting the claim" is more naturally read as a historical fact, as opposed to a legal proposition, such as vacatur of conviction. For example, the courts noted that the use of "discover" in § 2255(4) would seem inappropriate if the vacatur of a conviction were meant to count as a "fact." Vacaturs of conviction are intentionally and knowingly "obtained at the behest of the petitioners"; it would be a particularly odd usage of "discover," these courts argued, to apply the word to a "fact" whose existence was knowingly brought about by the "discoverer" in the first place. In addition, both courts pointed out that Congress did use explicit legal proposition terms in other parts of § 2255: § 2255(1) refers to the date a "judgment of conviction becomes final," and § 2255(3) speaks of the date on which "the right asserted" was recognized. The implication is that if Congress had wanted § 2255(4) to apply to legal propositions as well as "facts," it could and would have used language that more clearly indicated that intent.

In addition to examining the language of § 2255 itself, Johnson and Brackett also compared § 2255(4) to a closely analogous statute, 28 USC § 2244, which addresses the statute of limitations on postcon-

---

54 See id at 1226; Brackett, 270 F3d at 68. See also note 49. Instead, Brackett and Johnson hold that the facts relevant under § 2255(4) are those facts that supported the petitioner's challenge of his underlying state conviction(s), not the resultant vacatur of that conviction. See Brackett, 270 F3d at 68 (noting that the "operative date" under § 2255(4) is not the date the state conviction was vacated, but the date "on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction"); Johnson, 340 F3d at 1226.

55 See 28 USC § 2244 (2000) (providing a similar statute of limitations as that in § 2255 but using "factual predicate of the claim" instead of "facts supporting the claim").

56 See Johnson, 340 F3d at 1223-24 (noting that the text, structure, and legislative intent point in the opposite direction of the reading that the state court vacatur can be the fact supporting the claim); Brackett, 270 F3d at 68 (noting the same).

57 See, for example, Johnson, 340 F3d at 1223 ("Common sense [] dictates that we distinguish legal propositions and results from the 'facts' referred to in § 2255.").

58 Brackett, 270 F3d at 68.

59 28 USC § 2255(1), (3) (emphases added).

60 See Brackett, 270 F3d at 68-69 ("The use of the term 'facts' in subsection (4) is in contrast to both the language about the recognition of rights asserted recognized by a court in subsection (3) and a court's judgments in subsection (1).").
viction relief for state prisoners. In particular, the courts noted that the language of § 2244's one-year statute of limitations, also added by AEDPA, differed only marginally from that of § 2255; rather than § 2255(4)'s "facts supporting the claim or claims presented," § 2244(d)(1)(D) referred to the "factual predicate of the claim or claims presented." Furthermore, Brackett observed, several courts had specifically interpreted § 2244's "factual predicate" language not to include court decisions. Given the near identity of the language of the two provisions, the fact that they had both been drafted under the same Act, and that the Supreme Court has generally interpreted the state and federal postconviction statutes in light of each other, Brackett and Johnson argued that, like § 2244, § 2255(4) should also not be interpreted to apply to court decisions.

Finally, Brackett and Johnson looked to the general purpose behind the AEDPA amendments that created § 2255's statute of limitations provisions in the first place. In particular, the courts observed that allowing vacatur of a state conviction to count as a "fact" would undermine one of AEDPA's "signal purposes": finality. If the one-year clock did not start ticking until an underlying state conviction was vacated, the incentives set up by the statute of limitations would be destroyed, as prisoners could delay and even repeat their state appeals without penalty. Even worse, prisoners would have incentives to take advantage of that extra time, in the hopes that the evidence surrounding the state conviction (such as trial and plea records) would eventually be destroyed or lost. As a result, appeals, even if not meritorious, would be more likely to succeed.

---

61 See 28 USC § 2244(d) (providing, as does § 2255, a one-year statute of limitations).
62 See AEDPA § 101, 110 Stat at 1217, codified at 28 USC § 2244(d) (emphasis added).
63 See Ybanez v Johnson, 204 F3d 645, 646 (5th Cir 2000) (holding that a state court decision cannot be considered a factual predicate under § 2244); Owens v Boyd, 235 F3d 356, 359 (7th Cir 2000) (noting that "the trigger in § 2244(d)(1)(D) is (actual or imputed) discovery of the claim's 'factual predicate', not recognition of the facts' legal significance").
64 See Brackett, 270 F3d at 66, citing Lackawanna County District Attorney v Coss, 532 US 394, 402 (2001) (extending a holding with regard to federal postconviction appeals to state postconviction appeals).
65 See Brackett, 270 F3d at 69 (arguing that because the two compared provisions are "analogous to one another, the way the state habeas provisions are interpreted should be used to interpret § 2255(4)"). Johnson also makes this argument, and further notes that if the court were to "adopt [the opposite] interpretation of § 2255 and apply it to the parallel provision in § 2244, [it] would render redundant the word 'factual' in § 2244, because all such predicates would be functionally 'factual' in nature." Johnson, 340 F3d at 1223 (citing to circuit courts that have interpreted "factual predicates" not to mean court rulings).
66 See Brackett, 270 F3d at 69; Johnson, 340 F3d at 1224 ("Appellant's interpretation of § 2255(4) is contrary to the clear legislative purpose of AEDPA. It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions.").
67 See Brackett, 270 F3d at 70 ("On [appellant's] reading, federal prisoners would be given incentives to delay or repeat their challenges to their state court convictions, and particularly to
B. The Minority View: “Facts” under § 2255(4) Include Vacaturs of State Convictions

In contrast, the Fourth Circuit’s opinion in *United States v Gadsen* held that the vacatur of a state conviction is a “fact supporting the claim” under § 2255(4). In supporting its position, this minority view primarily pursues two lines of argument: first, that the language of § 2255(4) does not preclude vacaturs of state convictions from counting as “facts”; and second, that to interpret the provision as the majority view does would run counter to a clear Supreme Court mandate.

First, *Gadsen*, as well as the dissent in *Johnson*, conclude that *Brackett* and *Johnson* have mischaracterized what the relevant “fact” is in these cases. According to this minority view, the fact at issue is not the vacatur of the state conviction per se, but the fact that the factor on which the federal sentence was enhanced no longer exists. This is the “fact” upon which the petitioner is basing his § 2255 request to reconsider his sentence, and is, therefore, the “fact” on which the discussion should focus. Having so defined the kinds of “facts” in question, *Gadsen* and the *Johnson* dissent have no problem concluding that this particular fact, vacatur of state conviction, can be “discovered.”

In addition to these linguistic points, the *Gadsen* court also observed that to interpret § 2255(4) as *Brackett* and *Johnson* did would preclude an avenue of appeal that the Supreme Court clearly meant to protect in its ruling in *Daniels v United States*. In *Daniels*, the

wait until the state had destroyed the trial or plea records, thus making it easier in some instances to obtain an order vacating the conviction.”).

68 332 F3d 224 (4th Cir 2003).
69 Id at 229 (“[I]n cases like Gadsen’s, the federal statute of limitations begins running when the state court conviction is conclusively invalidated.”). In addition, the dissent from the Eleventh Circuit's *Johnson* opinion specifically supported *Gadsen*'s interpretation of § 2255(4). See *Johnson*, 340 F3d at 1228–29 (Roney dissenting) (“I think a decision of a state court reversing a state criminal conviction is a ‘fact’ within the meaning of § 2255(4).”). In other circuits, several district courts have also supported this view. See, for example, *United States v Hicks*, 286 F Supp 2d 768, 770–71 (ED La 2003) (finding that a “better and more realistic analysis of § 2255(4)) is found in *United States v. Gadsen*”); *United States v Hoskie*, 144 F Supp 2d 108, 111 (D Conn 2001) (“[T]he one-year statute of limitations starts to run on the date the state convictions are vacated, not an earlier date when the defendant discovered the facts forming the basis for the attack on the state convictions.”).
70 See *Gadsen*, 332 F3d at 227 (“[T]he relevant ‘fact’ with respect to the operation of Gadsen's § 2255 claim today is the fact that Gadsen's prior state conviction has been conclusively invalidated.”); *Johnson*, 340 F3d at 1229 (Roney dissenting) (“Without Johnson's vacated ... state conviction for distribution of cocaine, the undeniable fact is that he was not a career offender within the meaning of the Sentencing Guidelines.”).
71 See *Gadsen*, 332 F3d at 227 (“[B]y definition, Gadsen could not have ‘discovered’ this ‘fact’ ... until it became clear that the lower court’s decision was the last word on the matter.”); *Johnson*, 340 F3d at 1229 (Roney dissenting) (“As a ‘fact’ within the meaning of § 2255(4), the state court decision] is obviously new and not previously discoverable.”).
Court considered an attempt to challenge the constitutionality of a state conviction via a § 2255 petition. Relying on, among other things, a federalism-based concern that the integrity of state court judgments would be compromised by such challenges, the Court rejected the petition and held that a federal prisoner could not appeal state convictions under § 2255. However, Daniels also explicitly noted that, after successfully challenging a state conviction in the appropriate venue, a defendant may then apply for reopening of his federal sentence [under § 2255]. According to Gadsen, in making this second ruling, the Daniels Court clearly intended that, despite its ban on attacking state convictions under § 2255, petitioners would still be able to refile § 2255 petitions once their state convictions were dealt with through the proper channels. However, Gadsen argued, the majority interpretation of § 2255(4) would in effect preclude such subsequent petitions in many cases, given the length of the state appeals process. For example, in many cases, even if the petitioner files an appeal of his state conviction the day his federal “judgment of conviction becomes final,” the state appeals process will take longer than a year, which, under Brackett and Johnson, would prohibit him from filing a § 2255 appeal under § 2255(4). The majority interpretation then, Gadsen concluded, would in effect punish “Gadsen petitioners” for having “faithfully followed [the Supreme Court’s] instructions,” both undercutting Daniels’s attempt to respect the integrity of state court judgments and working significant injustice on the petitioners themselves. Given

73 Id at 379–80.
74 Id at 376 (holding that a federal prisoner may not “challenge his federal sentence through a motion under 28 U.S.C. § 2255 . . . on the ground that his prior [state] convictions were unconstitutionally obtained”).
75 Id at 382 (noting, however, that the Court expressed “no opinion on the appropriate disposition of such an application”). See also Custis v United States, 511 US 485, 497 (1994) (holding that a defendant cannot attack prior state convictions during a sentencing proceeding for a federal conviction, but may, if successful in attacking those state convictions in another forum, apply for a “reopening” of the federal sentence based on those convictions).
76 See Gadsen, 332 F3d at 228 (noting that the instant petitioner’s state court appeal took three years to be decided).
77 For the sake of brevity, for the rest of this Comment I will refer to our paradigmatic petitioner (one bringing a § 2255(4) challenge to a federal sentence that has been based on a subsequently vacated state conviction) as a “Gadsen petitioner.”
78 Id.
79 Id (“The entire point of Custis and Daniels was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination.”).
80 Id (observing that Gadsen was denied § 2255 relief through no fault of his own, but rather because Daniels required him to return to South Carolina state court, which took over three years to decide his state appeal). Indeed, the Fourth Circuit observed, “[i]t would be an illogical, if not cruel, gesture for the Supreme Court to invite prisoners to attack their predicate convictions and then inform them that their efforts must go for naught.” Id, quoting United States v Payne, 894 F Supp 534, 543 (D Mass 1995).
this incongruous result, the Gadsen court concluded, the "logic of the Supreme Court’s opinion in Daniels" requires that the statute of limitations under § 2255(4) start running when the "state court conviction is conclusively invalidated.”

III. A DEFENSE OF INCLUDING VACATURS OF STATE CONVICTIONS AS "FACTS" UNDER § 2255(4)

As presented by the Brackett and Johnson courts, the majority view that § 2255(4)’s “facts” do not include vacaturs of conviction certainly seems persuasive. At first blush the text, the legislative history, and concerns about preserving finality all argue for a narrow reading. However, a more thorough investigation reveals not only several reasons to discount the majority’s arguments, as I will discuss in Part III.A, but also two particularly compelling reasons why the minority’s broader view of § 2255(4) is the more attractive option, as I will discuss in Part III.B.

Of course, the ideal resolution of this split would be for Congress to explicitly amend § 2255(4), thereby avoiding this judicial turmoil altogether. As I will briefly argue in Part III.C, many of the arguments for broadly interpreting the present text of § 2255(4) also argue for amending § 2255 such that it would have exactly the same practical effect.

A. Rebutting the Majority’s Arguments for a Narrow Interpretation of § 2255(4)

The majority view offers a number of arguments for its narrow interpretation of § 2255(4): that the language of § 2255(4) cannot support a broader interpretation of “facts”; that the legislative history of § 2255’s statute of limitations indicates a general purpose to limit federal appeals; that the structure of AEDPA creates a supportive “negative inference”; and that adopting a broader interpretation would undermine important policy goals such as “finality” and the avoidance of perverse counter-incentives.82 However, upon closer inspection, none of these justifications is as strong as it initially appears.

1. Textual counterarguments.

First, the majority view holds that “[t]he most natural reading” of § 2255(4)’s text would be to interpret “facts supporting the claim” as merely “basic, primary, or historical facts,” not legal propositions like

---

81 Gadsen, 332 F3d at 229.
82 See generally Part II.A.
the vacatur of a conviction. When one focuses, as the Brackett court does, on the drafters’ use of “discover,” this narrow interpretation has intuitive appeal: to say that one “discovers” that a court has overturned a conviction does seem an “odd usage.” On the other hand, however, it is important to note that, for Gadsen petitioners, the vacatur of a state conviction is the only kind of fact their claim could be based on. In these cases, the claim being brought is that the basis for the enhancement of their federal sentence no longer exists; the “fact” that supports that claim is that their state conviction has been vacated. Therefore, if “fact” doesn’t include a vacatur of state conviction, these petitioners are peremptorily excluded from seeking relief under § 2255(4). When viewed in this light, a textualist reading of § 2255(4) may not be appropriate.

Second, “facts,” in the “basic, primary, or historical” sense, are indeed generally differentiated from legal propositions such as vacatur of convictions. This is true not only within AEDPA in general, but also in other areas of the law dealing with statutes of limitations. Given this generally accepted differentiation, the argument goes, if the drafters had meant to include vacatur of conviction as “facts supporting the claim,” they would not have used the term “facts” in the statutory text.

The differentiation of “legal propositions” from “facts” in these other areas of law, however, are not truly analogous to the kinds of

83 Brackett, 270 F3d at 68–69.
84 Id at 68.
85 See Gadsen, 332 F3d at 227 (stating that this fact could not be discovered until “it became clear that the lower court’s decision was the last word on the matter,” that is, certiorari was denied); Johnson, 340 F3d at 1229–30 (Roney dissenting) (noting that the overturning of the state sentence could not be a fact until it actually occurred).
86 See, for example, Brackett, 270 F3d at 68 (“In the law, ‘facts’ are usually distinguished from court decisions.”).
87 See, for example, Owens v Boyd, 235 F3d 356, 359 (7th Cir 2000) (noting that “the trigger in § 2244(d)(1)(D) is (actual or imputed) discovery of the claim’s ‘factual predicate’, not recognition of the facts’ legal significance”). See also Ybanez v Johnson, 204 F3d 645, 646 (5th Cir 2000) (holding that state court decisions are not “factual predicates” in the context of § 2244(d)(1)(D)). And even other § 2255(4) cases have made this distinction. See, for example, United States v Pollard, 161 F Supp 2d 1, 10 (D DC 2001) (holding that the kind of “fact” relevant to § 2255(4) is the fact that the petitioner’s attorney failed to file an appeal, not that that failure constituted legally insufficient representation of counsel, which the petitioner discovered much later).
88 See, for example, United States v Kubrick, 444 US 111, 121–22 (1979) (holding that the statute of limitations for bringing a medical malpractice claim began to run on the date that the plaintiff could or should have been aware of the fact upon which his claim was based—the allegedly improper administering of an antibiotic—rather than the date on which the plaintiff could or should have known that fact constituted legal malpractice). See also Catrone v Thoroughbred Racing Associations of North America, Inc, 929 F2d 881, 885 (1st Cir 1991) (noting, in the context of a libel case, that “[u]nder the Massachusetts discovery rule, the running of the statute of limitations is delayed while ‘the facts,’ as distinguished from the ‘legal theory for the cause of action,’ remain ‘inherently unknowable’ to the injured party”), quoting Gore v Daniel O’Connell’s Sons, Inc, 17 Mass App 645, 461 NE2d 256, 259 (1984).
cases we are addressing here. For example, in United States v Kubrick, a medical malpractice case, the Supreme Court held that the statute of limitations starts to run as soon as the plaintiff should have been aware of the "fact" that antibiotics had been improperly administered, not at the later date when he should have become aware of the "legal proposition" that that improper administration actually constituted a legal claim. But in Kubrick, the "fact supporting the claim"—the administration of the antibiotic—and the "legal proposition"—that that administration constituted a legal claim—were two different entities. In the fact patterns of Brackett, Gadsen, and Johnson, however, the legal proposition—the vacatur of a state conviction—is the "fact supporting the claim": the petitioner's claim, that his federal sentence should be reduced, is supported by the "fact" that the state conviction upon which that sentence was originally enhanced has been vacated. Given this identity between the "fact supporting the claim" and the "legal proposition" in the cases at issue, the minority position that one term, "fact," could apply to both "basic, historical" facts and legal propositions becomes far less objectionable.

2. Legislative history counterarguments.

In addition to their textual arguments, Brackett and Johnson also grounded their interpretation of § 2255(4) on the congressional intent behind that provision's parent act, AEDPA. Specifically, those courts argued that their narrow interpretation was required by AEDPA's "signal purpose" of promoting "finality" in criminal judgments. Although neither court actually cites any legislative history to support this presumed purpose, a quick review of that history seems to confirm that assertion. For example, the Joint Conference Committee's "Explanatory Statement" declared that AEDPA's postconviction reforms were meant to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of delay and abuse in capi-

90 See id at 121–22 ("We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment.").
91 See Part II.B.
92 See Johnson, 340 F3d at 1224 ("[W]e cannot accept an alternative interpretation that would run directly counter to the general congressional intent behind AEDPA and indefinitely extend the opportunity for post-conviction challenges."); Brackett, 270 F3d at 70 ("To read [§ 2255(4)] as [Petitioner] does would be to create strong counter-incentives working against finality.").
93 Brackett and Johnson do however cite to several Supreme Court decisions proclaiming such a purpose. See, for example, Williams v Taylor, 529 US 420, 436 (2000) (stating that AEDPA's purpose was "to further the principles of comity, finality and federalism"); Duncan v Walker, 533 US 167, 178 (2001), citing Williams. Unfortunately, in neither case does the Supreme Court cite the basis for its claim.
In addition, the relevant House and Senate floor debates were replete with commentary indicating that Congress was concerned with frivolous, repetitive, and dilatory abuses of postconviction appeals. Likewise, the testimony given before both the House and Senate Judiciary Committees, which influenced those floor debates, repeatedly noted similar concerns.

However, even if Congress was indeed generally concerned with limiting postconviction appeals, a closer examination of the legislative history suggests that Congress was not at all concerned about these issues as applied to Gadsen petitioners in particular. To begin with, the overarching focus of AEDPA's reform of postconviction relief was not "enhanced sentence" cases like Gadsen, but rather capital cases. In the floor debates regarding AEDPA and its precursors, proponents of those bills repeatedly cited the recommendations of the Powell Committee and its "Report on Habeas Corpus in Capital Cases" as the template for the bills being discussed, and supported their arguments with tales of long delays in the execution of capital convicts. Even

95 See, for example, Statement of Senator Thurmond, 104th Cong, 2d Sess, in 142 Cong Rec S 3367 (Apr 16, 1996) ("The habeas appellate process has become little more than a stalling tactic used by death row inmates to avoid punishment for their crimes."); Statement of Senator Hatch, 104th Cong, 1st Sess, in 141 Cong Rec S 7479 (May 25, 1995) ("[F]rivolous appeals ... have been driving people nuts throughout this country and subjecting victims and families of victims to unnecessary pain for year after year after year.").
96 See, for example, Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing on S. 623 before the Senate Committee on the Judiciary, 104th Cong, 1st Sess 6 (1995) (statement of Lee Chancellor, Vice President, Citizens for Law and Order) (arguing that habeas reform is necessary in order to "eliminate unnecessary delay and repetitive litigation" and provide "finality of judgment," thereby allowing the families of victims to end their "perpetual agony and pain"). See also Habeas Corpus, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong, 1st and 2d Sess 103 (1993–1994) (statement of Daniel E. Lungren, Attorney General of California) (arguing that habeas reform is needed in order to avoid "the further undermining of public confidence in our criminal justice system," to protect "finality in the enforcement of state law," and to prevent victims' families from enduring "rounds of unnecessary litigation before closure and finality can be obtained").
97 Indeed, some commentators have implied that this overarching desire to address delay in capital cases may have inappropriately spilled over into limitations on postconviction relief in all cases, and that a better system would treat these two categories of appeals differently. See Hoffman, 37 Trial at 65 (cited in note 36).
99 See, for example, Statement of Representative McCollum, 104th Cong, 1st Sess, in 141 Cong Rec H 1400 (Feb 8, 1995) ("The essence of H.R. 729 comes from the recommendations of the Habeas Corpus Study Committee, chaired a few years ago by retired Supreme Court Justice Lewis Powell."). See also Statement of Senator Hatch, 104th Cong, 1st Sess, in 141 Cong Rec S 7480–81 (May 25, 1995) (highlighting a letter to President Clinton prepared by a group of State Attorneys General, who cited the Powell Committee's Report in their argument for habeas corpus reform).
100 See, for example, Statement of Senator Nickles, 104th Cong, 2d Sess, in 142 Cong Rec S
those Representatives who opposed AEDPA's postconviction reforms did so in terms of its effects on capital appeals. Furthermore, of the sixty-five written or oral statements presented in habeas corpus hearings before Senate and House committees, more than forty-five were specifically addressed to the effect of the present or proposed postconviction relief system on capital cases, and the others discussed the effects on noncapital cases only in passing. Finally, on those few occasions when legislators' attention did turn to noncapital appeals, there is absolutely no indication that any consideration was given to the particular variety of noncapital appeals presented by\textit{Gadsen}\ petitioners.

Congress may well have enacted AEDPA to promote "finality" in capital cases. However, the legislative history offers little basis for concluding that Congress also intended to promote finality in noncapital cases, and no basis at all for such a conclusion as to noncapital cases of the \textit{Gadsen} variety. Given that there is no reason to think that finality in \textit{Gadsen}-style cases in particular was actually a "signal purpose" of AEDPA, there is similarly no justification to rely on that purpose in applying § 2255(4) to \textit{Gadsen} petitioners.

3. Structural "negative inference" arguments.

A third argument in favor of a narrow interpretation of § 2255(4) is that a comparison of § 2255 with a parallel and analogous AEDPA amendment seems to imply that Congress did not in fact intend the minority's broader reading.\footnote{See, for example, Statement of Senator Kennedy, 104th Cong, 2d Sess, in 142 Cong Rec S 3473 (Apr 17, 1996) (arguing that S 735 "denies death row inmates a full opportunity to raise claims of innocence based on newly discovered evidence," and "will therefore increase the likelihood that innocent people will be executed"); Statement of Representative Stokes, 104 Cong, 1st Sess, in 141 Cong Rec H 1401-02 (Feb 8, 1995) (strongly opposing HR 729 because it, among other things, "fails to address the true cause of any delay in the capital system," "greatly expand[s] the reach of the Federal death penalty," and "fails to include any provisions to end the repugnant practice of the disproportionate application of the death penalty on minorities").} The Supreme Court has repeatedly held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally
presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.\(^\text{104}\) In this case, a comparison of § 2255’s one-year statute of limitations and that of the statute governing state postconviction appeals, found in § 2244(d), seems to indicate just such a purposeful exclusion. While the two AEDPA-enacted provisions contain nearly identical text,\(^\text{105}\) they differ in one notable respect. Namely, § 2244(d) explicitly sets out exactly the kind of tolling provision that the text of § 2255 does not contain, but that the broader minority interpretation would create: “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”\(^\text{106}\)

The “negative inference” to draw, then, is that if Congress had intended for § 2255’s statute of limitations to toll while petitioners’ appeals of prior state convictions were pending, they could and would have included language similar to that used in § 2244(d)(2).

As much as the Supreme Court has condoned such “negative inference” arguments, however, it has also cautioned that the applicability of this interpretive canon depends on the support of the legislative history of the compared provisions.\(^\text{107}\) Generally speaking, the more doubt there is that the compared provisions were drafted in cognizance of each other, the less likely it is that the drafters’ exclusion or inclusion of the pertinent text was deliberate, rather than simply an oversight.

In this case, the relevant legislative history provides several reasons to question the applicability of the negative inference canon. First, although the compared provisions are from the same act, the quality of AEDPA’s drafting is notoriously poor.\(^\text{108}\) As Justice Souter

---


\(^\text{105}\) 28 USC § 2244(d)(1) and paragraph six of 28 USC § 2255 (containing § 2255(1)–(4)) are textually identical except for § 2244(d)(1)(D)’s substitution of “factual predicate of” for § 2255(4)’s “facts supporting,” as discussed in Part III.A.1.

\(^\text{106}\) 28 USC § 2244(d)(2). See, for example, Ariuz v Bennett, 531 US 4, 4, 8–10 (2000) (holding that, even if there is some question as to the merits of the claims of a state postconviction appeal, § 2244(d)’s one-year statute of limitations is still tolled while that state appeal is pending, starting from the day it is delivered to and accepted by the “appropriate [state] court officer”).

\(^\text{107}\) See, for example, Cort v Ash, 422 US 66, 82–83 n 14 (1975) (dismissing a negative inference argument because the legislative history demonstrated that (a) the two provisions being compared had been drafted years apart, and (b) Congress had not actually discussed the issue in question).

\(^\text{108}\) See Lindh v Murphy, 521 US 320, 330 (1997) (recognizing the “familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted”), citing Field v Mans, 516 US 59, 75 (1995) (“The more apparently deliberate the contrast, the stronger the inference.”).

\(^\text{109}\) See, for example, James S. Liebman, An “Effective Death Penalty”? AEDPA and Error...
has dryly noted, "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting." In addition, as noted above, there is every indication that in considering the AEDPA amendments, Congress did not give much, if any, consideration to how they would affect petitioners seeking to vacate state convictions. It would seem inappropriate at best to interpret textual differences between two provisions of a quickly and ill-drafted act, which addressed issues that Congress did not actively consider, as implying anything at all about the congressional intent behind their enactment.

4. Policy counterarguments.

Finally, even if Congress did in fact intend AEDPA to promote finality and generally limit delays in federal appeals, interpreting § 2255(4) broadly will not significantly undermine those goals. First of all, such an interpretation would have no effect at all on the vast majority of § 2255 petitioners. Second, the nature of the petitioners whom a broader interpretation would affect is such that they are highly unlikely to bring frivolous claims. Third, contrary to the majority's concerns, the extant incentives work to encourage these petitioners to expedite, rather than delay their § 2255 appeals. Fourth, even if a § 2255(4) petitioner nevertheless wanted to delay his state appeal, in many cases state statutes of limitations would preclude him from doing so. Finally, when properly understood, not only does a broad interpretation not undermine the underlying principles of AEDPA, it actually supports and promotes them.

a) Most § 2255 petitioners would not be affected. First, as noted above, the petitioners to whom this broad interpretation of § 2255(4)
will apply are a tiny subset of the universe of § 2255 petitioners in general, the great bulk of whom are appealing their federal conviction or sentence simply on the basis of events relating to their federal trial, not on the basis of prior state court decisions. Therefore, even if the interpretation simply did away with the statute of limitations for this class of petitioners altogether, the net impact on the federal appeals process as a whole would be negligible.

b) *Frivolous claims are unlikely.* Furthermore, a broader interpretation of § 2255(4) is highly unlikely to increase the frivolous appeals that AEDPA sought to limit, as it applies only to a set of situations that, by definition, involve meritorious claims. The petitioners asking for a vacatur of a state conviction to count as a “fact” under § 2255(4) will only be those who have successfully obtained such a vacatur. If such a petitioner has in fact successfully overturned his state conviction, his claim that his federal sentence should not have been enhanced based on a (now) void state conviction can hardly be considered frivolous.

c) *The extant incentives encourage expediting, not delaying, appeals.* Contrary to the majority’s claims, in the final weighing, the extant incentives would in fact encourage § 2255(4) petitioners to expedite, not delay, their state appeals. The majority’s concern is based on the fact that, over time, state court trial records can get lost or destroyed, making it “easier in some instances to obtain an order vacating the [state] conviction.” Given this fact, the *Brackett* court worried that if § 2255’s statute of limitations were tolled until the state court appeals process was complete, as a broad interpretation of § 2255(4) would provide, *Gadsen* petitioners would be able to purposefully sit on their state appeals until this erosion of records occurred, not only delaying both the state and federal appeal process, but also earning themselves a vacatur they might not really deserve.

However, while such strategic manipulation of the state appeals process is certainly possible, the incentives for a petitioner to accelerate his state appeal are at least equally powerful. First of all, the longer petitioners delay, the longer they spend in prison,” serving out the very invalid sentence they seek to challenge.” In addition, while in

---

115 *Brackett*, 270 F3d at 70. See also *Johnson*, 340 F3d at 1223 n 3, quoting *Lackawanna County District Attorney v Coss*, 532 US 394, 403 (2001) ("As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially.").

116 See *Brackett*, 270 F3d at 70.

117 Because § 2255 applies only to “prisoners in custody,” every § 2255 petitioner will pay this price for delaying.

118 See *Report on Habeas Corpus*, 45 Crim L Rptr (BNA) at 3240 (cited at note 35) (observing that, unlike prisoners under capital sentence, “prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain re-
The University of Chicago Law Review

some cases the erosion of state court records may well be to the petitioner's advantage, it seems equally likely that such erosion would be to his disadvantage. For example, a petitioner's claim of ineffective representation based on his counsel's actions at trial would certainly suffer if the records of that trial were lost or destroyed. If anything then, given these counterincentives, one would expect petitioners in this position to expedite, not delay, their appeals.

d) State statutes of limitation will prohibit delays in many cases. Even if a petitioner wanted to delay his state appeal, this tactic would often simply not be available, as most states strongly restrict the availability of appeals through their own statutes of limitation. Direct remedy in particular is rigidly circumscribed, with almost all states requiring such appeals to be filed within ninety days of final judgment (including many that set the limit at thirty days, and some at as little as ten days) after which such remedy becomes permanently unavailable. While postconviction appeals are generally granted a larger window of opportunity than direct appeals, even those limits leave little time for state records to erode: many such statutes of limitation range from one to three years (with some offering as little as six months), and most allow no more than five years. Indeed, even some of those that allow as many as five years directly address Brackett's concerns by allowing courts to dismiss an appeal before that five-year term is up if they determine the delay has prejudiced the state in its "ability to conduct a retrial of the petitioner."

lief"). The Powell Report contrasted these prisoners with capital prisoners, who have "every incentive to delay the proceedings that must take place before the sentence is carried out." Id. See also Habeas Corpus, Hearing before the Subcommittee on Civil and Constitutional Rights at 4 (cited in note 96) (statement of Judge Sarokin) (noting that "[o]nly in death penalty cases is the lack of finality a real . . . problem," since in noncapital cases, "the punishment being imposed by the State is being carried out while the petitions are being considered").

119 See, for example, Larry W. Yackle, Postconviction Remedies § 114 at 436 (Lawyers Cooperative 1981 & Supp June 1989) ("It is in the interest of both the petitioner and the respondent to begin the necessary investigation of claims at the earliest opportunity.").

120 See Wilkes, Federal Postconviction Remedies § 1-4 at 10 (cited in note 1). See, for example, Mich Comp Laws Ann § 770.2 (West 2000) (providing for a sixty-day statute of limitations for petitions for a new trial); Ga Code Ann § 5-6-38 (Michie 1995) (requiring that notice of appeal be filed within thirty days after entry of the appealable decision); La Code Cr Proc Ann art 914 (West 1997 & Supp 2003) (requiring a motion to appeal to be filed thirty days from the final judgment); 17 Ariz Rev Stat Ann, Rule Cr Proc 24.1(b) (West 1998) (requiring motion for a new trial to be made no later than ten days after rendering of the verdict).

121 See, for example, Idaho Code § 19-4902 (1997) (creating a one-year statute of limitation on postconviction appeals); Wash Rev Code Ann § 10.73.090 (West 2002) (granting a one-year time limit on collateral attacks); Fla Stat Ann, Rule Cr Proc 3.850 (West 1999) (requiring non-capital postconviction appeals to be filed within two years of final judgment).

122 Nev Rev Stat § 34.800 (1997). See also SD Cod Laws § 21-27-3.2 (Michie 1987 & Supp 1989) (allowing dismissal of a postconviction appeal before the five-year statute of limitations is up if it appears that the state has been prejudiced by the delay in filing).
In the end, the feared delays in state court appeals are simply unlikely to occur, either because delaying is against the petitioner’s interest, or because it is precluded by state statutes of limitation.

e) A broad interpretation actually promotes the goals of AEDPA. Finally, not only does a broad interpretation of § 2255(4) not undermine AEDPA, it actually supports it, by ensuring that the underlying principles of the AEDPA amendments, at least in regard to § 2255, apply equally to all § 2255 petitioners. For the vast majority of petitioners, § 2255’s statute of limitations guarantees at least a year from final judgment to prepare and file an appeal. However, under the majority view’s narrow interpretation of § 2255(4), Gadsen petitioners are denied the full extent of that guarantee. Since at least some (if not all) of the year after their final federal judgment will be spent in state court getting their state convictions overturned, and that time, according to the majority view, does not toll § 2255’s statute of limitations, they are necessarily left with less than the full year that everyone else gets. While Congress certainly intended to limit postconviction appeals in general, there is no indication that they intended to extend more stringent limitations to Gadsen petitioners in particular (nor is there any readily apparent reason why they might have wanted to). A broad interpretation of § 2255(4) merely insures that § 2255’s general statute of limitations is not applied in an inequitable fashion that is unjustified by the purposes behind AEDPA.

B. Arguments for a Broad Interpretation of § 2255(4):
The Avoidance of Injustice and Giving Appropriate Effect to the Daniels Ruling

In addition to offering powerful rebuttals of the majority’s arguments, the minority view also offers compelling affirmative arguments. First, the broad interpretation of § 2255(4) prevents the unjust denial of § 2255 relief to Gadsen petitioners, and second, such an interpretation allows the Supreme Court’s ruling in Daniels to be given its full, logical effect.

1. Preventing unjust denial of § 2255 relief to Gadsen petitioners.

From “the earliest days of the Republic,” the Supreme Court has taken great care to avoid interpreting statutes in such a way that

---

123 See 28 USC § 2255(1)–(4) (setting a one-year limit and then providing for exceptions in which the start of that one-year clock may be postponed).

124 John F. Manning, The Absurdity Doctrine, 116 Harv L Rev 2387, 2388 (2003) (“From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce
would produce "absurdity or gross injustice." To adopt the majority's narrow interpretation of § 2255(4), however, would produce just such an absurd and unjust result: under such an interpretation, the availability of § 2255 relief for Gadsen petitioners would be allowed to depend upon a factor over which those petitioners have no control, and which in many cases will operate to deny them relief.

Pursuant to the holding of Daniels, Gadsen petitioners must challenge their state conviction in a separate, state court action before filing their § 2255 motion. At the same time, the narrow interpretation of § 2255(4) essentially holds that § 2255(4)'s tolling provision does not apply to Gadsen petitioners: the time they spend in state court appealing their state conviction counts toward § 2255's one-year statute of limitations. As a result, the length of the state appeals process becomes a pivotal issue in determining whether these petitioners will actually have the opportunity to seek relief under § 2255. Regrettably, in many states, delays in the appeals process typically consume the majority, if not all, of a Gadsen petitioner's one-year window, essentially foreclosing that opportunity. While the Brackett court does suggest two "safety valves" that could be employed to avoid this unjust result, upon inspection these remedies prove largely inadequate. In the end then, given the systemic delays in the state appeals process, the majority's narrow interpretation of § 2255(4) presents a serious risk that Gadsen petitioners will, through no fault of their own, be unable to pursue otherwise meritorious petitions under § 2255.

1. Manning goes on, however, to argue against "continued adherence to the absurdity doctrine in its conventional form." Id at 2393.

125 Cass R. Sunstein, Problems with Rules, 83 Cal L Rev 953, 986 (1995) (“Language will never, or almost never, be interpreted so as to apply in ways that would produce absurdity or gross injustice.”).

126 In Holy Trinity Church v United States, 143 US 457 (1892), the seminal "absurdity doctrine" case, the Court refused to interpret a statute such that it would "transgress bedrock social values concerning religion." Manning, 116 Harv L Rev at 2403 (cited in note 124). To interpret a statute such that appellate relief depends on factors beyond the appellant's control seems at least as absurd, since it transgresses equally fundamental social values, in this case regarding criminal justice rather than religion.

127 See Brackett, 270 F3d at 65–66 ("The [Daniels] Court said that a defendant may raise the issue of the validity of a state conviction in state court ... But the Court would not permit leaptoggling of those state procedures to attack the state conviction initially by a federal § 2255 petition.").

128 Brackett held that § 2255's one-year statute of limitations begins on the day the defendant "learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction." 270 F3d at 68. Therefore, the time consumed by a state appeal, which necessarily occurs after the defendant learns of the grounds for that appeal, will count toward the one-year time limit.

129 Id at 70–71 (arguing that FRCrP 32 and the doctrine of "equitable tolling" could provide courts with the means to avoid any unjust denials of § 2255 relief that a narrow interpretation of § 2255(4) might otherwise require).
a) Delay in state courts of appeals. Dependence on the alacrity of state courts creates two problems. First and foremost, the state appeals process is such that, in many if not most cases, it takes state courts over a year to decide appeals, peremptorily denying Gadsen petitioners any chance at § 2255 relief. One obvious example of such a case is Gadsen himself, as the Fourth Circuit noted:

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.

If the court had applied the majority interpretation of § 2255(4), Gadsen would have been denied § 2255 relief due to circumstances fully beyond his control.

Unfortunately, Gadsen's state appeals experience is not uncommon. According to a comprehensive study conducted by Roger A. Hanson for the National Center for State Courts ("the Hanson study"), half of the appeals heard before the average state court of last resort take more than 333 days to resolve, and a quarter of the criminal appeals heard before the average state intermediate appellate court take over 539 days. In addition, when one also considers that a Gadsen petitioner may, if in a state with both an intermediate and a state court of last resort, have to go through two sets of state appeals to get his state conviction vacated, it becomes highly unlikely that many such petitioners will get out of state court within their one-year window. Finally, even if the state appeals process does not take an individual petitioner a full year, it will still leave him with less than a year to prepare and file his § 2255 petition, even though Congress apparently felt a year was the proper amount of time to grant to those who do not have to deal with the state appeals process at all.

130 See, for example, United States v Hoskie, 144 F Supp 2d 108, 110–11 (D Conn 2001) (questioning whether the combination of the prohibition on challenging state convictions in federal court and a Brackett-like reading of § 2255(4) will mean petitioners will be “effectively precluded” from bringing a § 2255 appeal).

131 Gadsen, 332 F3d at 228.

132 See Roger A. Hanson, Time on Appeal 9–25 (National Center for State Courts 1996). Hanson’s study examined criminal and civil appeals in thirty-five intermediate state courts of appeals, and in the state courts of last resort in twenty-two states and Puerto Rico. See id at 5. The study did not break down the intermediate court data below the 75th percentile, so it is unclear how long it takes these courts to deal with half of their appeals, but given that a quarter of them take 539 days (double the ABA’s recommendation), it seems reasonable to infer that the majority of cases are not decided in less than a year.

133 See 28 USC § 2255.
In addition to being prohibitively slow in general, another problematic feature of the state appeals landscape is the considerable variation in speed across states. The Hanson study found that among intermediate courts, the least efficient court took nearly a year and a half longer to resolve 75 percent of its criminal appeals than the most efficient court. Amongst courts of last resort, the range was even greater, with the least efficient court taking over two and a half years longer to decide half of its appeals than the most efficient court. The end result is that, under the narrow interpretation, an individual petitioner's ability to seek § 2255 relief may depend on something as arbitrary as which state convicted him of his prior offense.

b) Brackett “safety valves” provide inadequate protection. To its credit, the Brackett court did recognize the potential for injustice that its narrow interpretation of § 2255(4) created, and particularly noted the existence of two “safety valves” that might address such concerns. For example, the court suggested that petitioners who had been disadvantaged by a delay in their state appeal could “argue for a rule of equitable tolling,” a judicially drafted doctrine that allows a court to “preserve[] a plaintiff's claims when strict application of the

---

134 See Hanson, Time on Appeal at 14-17 (cited in note 132). The most efficient court was Minnesota's Court of Appeals, deciding 75 percent of its criminal appeals in 286 days or less, while the Washington Court of Appeals, Second Division, was least efficient, taking 801 days to do so. See id. It should be noted that the Hanson study actually records these two courts' figures differently in different places: In Table 1, the Minnesota Court of Appeals is listed as taking 286 days to resolve 75 percent of its criminal appeals, and the Washington Court of Appeals, Second Division, is listed as taking 801 days. See id at 14, 16. But in Table 2, the Minnesota Court of Appeals is listed as taking 209 days to resolve 75 percent of its appeals, while the Washington Court of Appeals, Second Division, is listed as taking 954 days. See id at 17. As Hanson offers no explanation for the difference, and I could discern none, I simply chose the figures for each court that would create the smallest difference between them. Even so, the difference between these two extremes is striking.

135 See id at 21. The most efficient court, the Minnesota Supreme Court, was able to resolve half of its cases in 91 days or less, while the least efficient, the Arizona Supreme Court, took 1,109 days. See id at 21–22. It should be noted that there is a discrepancy in the reported figures for the Arizona Supreme Court. In Table 3, the court is reported to resolve half its cases in 1,109 days, but in the text, it is reported to take 1,189 days. See id at 21–22. Again, I chose the figure that creates the smallest disparity between the compared courts, and again, that disparity is still striking.

136 As Hanson notes, some of the variation, at least for courts of last resort, may be due to the fact that not all courts deal with death penalty appeals, which generally take longer than other appeals, and therefore inordinately skew the statistics for courts in states with the death penalty. See id at 21–24.

137 See Brackett, 270 F3d at 70 (acknowledging that even those petitioners who “move promptly in state court to vacate the conviction [may be] unable to obtain a state decision vacating the conviction until more than one year after they learn of the facts, and so cannot bring a petition within the time limit in § 2255(4)”).

138 See id (“In situations of potential injustice, there may be mechanisms, both before and after the federal sentencing, which act as safety valves.”).

139 Id at 71.
statute of limitations would be inequitable." In order to qualify for such relief, petitioners generally have to show that their failure to comply with a statute of limitations was due to "truly extraordinary circumstances," or circumstances that were "both beyond [the petitioner's] control and unavoidable even with due diligence." Alternatively, Brackett suggested that refuge could be sought under FRCrP 32(b)(2), which allows a judge pronouncing a federal sentence to postpone that sentencing "for good cause."

However, while these "safety valves" might well prevent unjust denials of § 2255 relief in some cases, they are far from the miracle cure Brackett holds them out to be. First of all, it is not clear that these safety valves will even be available in all cases. Secondly, even when they are available, their employment still depends on the court's discretion, and is therefore hardly ensured.

**Equitable tolling.** While some circuit courts have found equitable tolling to apply to § 2255's statute of limitations, other circuits remain undecided. For example, the Seventh Circuit, while "declining to reach the issue," observed that § 2255, like § 2244, already had "express tolling provisions incorporated in the statute," making it "unclear what room remain[ed] for importing the judge-made doctrine of equitable tolling.

In addition, echoing an argument against

---

140 Lambert v United States, 44 F3d 296, 298 (5th Cir 1995), citing Burnett v New York Central Railroad Co, 380 US 424, 428 (1965) ("[The] policy of repose [behind the statute of limitations], designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights.").

141 Johnson, 340 F3d at 1226.

142 Sandvik v United States, 177 F3d 1269, 1271 (11th Cir 1999).

143 Brackett actually cited FRCrP 32(a), which at the time provided that "[t]he time limits prescribed [for sentencing] may be either shortened or lengthened for good cause." See FRCrP 32(a) (1994). However, in 2002, after Brackett, Rule 32 was amended such that this discretionary provision was moved to FRCrP 32(b)(2), which now provides that "the court may, for good cause, change any time limits prescribed in this rule." FRCrP 32(b)(2). The amendment seems not to have altered the scope of the court's discretion in this matter. In any case, the Brackett court felt that postponement while a defendant challenged a pertinent prior state conviction would qualify as "good cause" under FRCrP 32. See Brackett, 270 F3d at 70-71 ("It would be within the power of the federal sentencing judge to continue the sentencing hearing for a reasonable period to permit the conclusion of the state court proceedings.").

144 See, for example, Dunlap v United States, 250 F3d 1001, 1007 (6th Cir 2001) (finding that § 2255's statute of limitations is "subject to the doctrine of equitable tolling"). See also United States v Patterson, 211 F3d 927, 928 (5th Cir 2000) (concluding that "the limitations provision in § 2255 may be equitably tolled in rare and exceptional circumstances").

145 See, for example, Brackett, 270 F3d at 71 ("The First Circuit has yet to adopt [an equitable tolling rule for § 2255]."); United States v Cicero, 214 F3d 199, 202-03 (DC Cir 2000) (finding that the case at hand did not require the circuit to make a decision on the question of equitable tolling).

146 Montenegro v United States, 248 F3d 585, 594 (7th Cir 2001). But see United States v Marcello, 212 F3d 1005, 1010 (7th Cir 2000) (noting that "§ 2255's period of limitation is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling").

147 See id, quoting Taliani v Chrans, 189 F3d 597, 598 (7th Cir 1999), and finding that the
Gadsen's broad interpretation of § 2255(4), some lower courts have noted that allowing equitable tolling to apply to § 2255 would "run[] contrary to the purpose" of AEDPA, which was to "put an end to the unacceptable delay in the review of prisoners' habeas petitions."

Furthermore, even if we could be sure that the undecided circuits would eventually apply equitable tolling to § 2255 in general, the fact that "the threshold necessary to trigger equitable tolling is very high" raises doubt as to whether courts would actually grant such relief to Gadsen petitioners in particular. Indeed, the only case that has officially considered whether equitable tolling applied to a Gadsen petitioner, Johnson, held that it did not. The only real evidence indicating that courts would apply equitable tolling to Gadsen petitioners comes from courts' speculations as to how they might rule under circumstances other than those of the cases before them. For example, the Johnson court noted, though only in dicta, that it would have granted equitable tolling in a fact pattern like that in Gadsen. Similarly, in Trenkler v United States, the First Circuit, in denying Trenkler's request for equitable tolling, pointed to petitioners in situations generally similar to those of Gadsen petitioners as having stronger arguments for the requisite "extraordinary circumstances" than the case at hand.

Taliani argument regarding § 2244's statute of limitations was equally applicable to § 2255's statute of limitations. The D.C. Circuit, though similarly reserving judgment, has noted the Seventh Circuit's concerns approvingly. See Cicero, 214 F3d at 203 (pointing out the Seventh Circuit's concerns about applying equitable tolling, but holding that the court "need not decide today whether § 2255 is subject to equitable tolling"). The District Court of the District of Columbia, however, has not been so bashful. In Pollard, 161 F Supp 2d at 1, 12, that court decided that equitable tolling does not apply to § 2255, as Congress's choice "to expressly enumerate the circumstances that would start and stop the statute of limitations" strongly indicates that it "did not intend for the courts to interpret the statute as permitting other open-ended means of tolling the statute of limitations." Id at 12.

149 Marcello, 212 F3d at 1010.
150 See Johnson, 340 F3d at 1228 ("We cannot allow equitable tolling of the AEDPA limitations period on the facts of this case."). The Brackett court addressed the issue in dicta only (and even then found that, even if the doctrine applied, Brackett would not qualify, see Brackett, 270 F3d at 71), and the Gadsen court never addressed equitable tolling at all, as its broad interpretation of § 2255 provided sufficient tolling on its own, see Gadsen, 332 F3d at 227-29.
151 See Johnson, 340 F3d at 1227-28 (noting that circumstances in a case like Gadsen, in which failure to conform to § 2255's statute of limitations was due to delays in state court appeals, would qualify for equitable tolling).
152 268 F3d 16 (1st Cir 2001).
153 See id at 25-26. The petitioner in Trenkler argued that he deserved to have § 2255's statute of limitations equitably tolled because his initial appeal under FRCrP 33, based on new evidence, had taken over two years to get through district court. Recognizing that such an argument "might have some force if Trenkler were, in fact, barred from filing a motion under § 2255 while his Rule 33 motion was pending," the First Circuit was unsympathetic given that Trenkler had not in fact filed his § 2255 motion as early as he could have. Id. Since Gadsen petitioners are
Unfortunately, these hypothetical speculations that courts might, under the right circumstances, apply equitable tolling to a *Gadsen* petitioner are cast into grave doubt when one examines the kinds of equitable tolling claims that courts have actually denied. For example, both the fact that a petitioner was unable to understand crucial court documents due to a language barrier\(^{154}\) and the fact that a petitioner's lawyer misadvised him as to when to file a § 2255 motion\(^{155}\) have been found insufficiently "extraordinary" to warrant equitable tolling. But if these claims, which would seem no less beyond the control of a petitioner than the speed of a state court appeal, are not sufficient, there seems good reason to question whether equitable tolling can be realistically relied on as a safety valve for *Gadsen* petitioners, no matter what courts claim.

**FRCrP** 32. Unlike equitable tolling, there is no question that Rule 32(b)'s provision for "good cause" delay of sentencing applies to § 2255 cases generally. However, perhaps even more so than in the case of equitable tolling, Rule 32 precedent supplies very little indication of whether courts will find the rule to apply to the particular claims of *Gadsen* petitioners. No court has directly addressed a Rule 32(b) motion for delay of sentencing in order to pursue vacatur of a prior state conviction. In generally analogous situations, however, courts have come to conflicting conclusions. For example, courts have allowed delays in order to assess the defendant's post-offense rehabilitation and examine alternative punishment possibilities,\(^{156}\) and to allow a defendant to testify in another case, as a defendant's "substantial assistance" to the government would be an important factor for the court to weigh in sentencing.\(^{157}\)

On the other hand, courts have denied requests for a Rule 32 continuance in order to uncover additional evidence that would potentially influence sentencing, even though doing so would have been barred from filing a motion under § 2255 while their state court appeals are pending, one might infer that the First Circuit would look sympathetically upon such requests for equitable tolling.

\(^{154}\) See *Montenegro*, 248 F3d at 594.

\(^{155}\) See *United States v Riggs*, 314 F3d 796, 799–800 (5th Cir 2002) (noting that unintentional attorney error or neglect does not warrant equitable tolling). See also *Helton v Secretary for the Department of Corrections*, 259 F3d 1310, 1313 (11th Cir 2001) ("An attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling.").

\(^{156}\) See *United States v Flowers*, 983 F Supp 159, 172–73 (ED NY 1997) ("Judges can fulfill their responsibilities under the [Federal Sentencing] Guidelines only by utilizing the various kinds of sentences available that ensure protection of society and fairness to defendants—particularly defendants who are first-time offenders amenable to rehabilitation.").

\(^{157}\) See *United States v Lopez*, 26 F3d 512, 523 (5th Cir 1994) (recognizing that Rule 32(a)(1) dictates that a "sentences shall be imposed without unnecessary delay," but that it also provides that "the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved").
“simple and . . . virtually painless.” Overall, at least as far as can be inferred from the holdings of similar cases, the Rule 32 case law and precedent seems marginally more sympathetic to Gadsen petitioners than that of equitable tolling. However, in the end, as with equitable tolling, this is far too fragile a basis on which to assume that Gadsen petitioners will be able to avoid the potential injustice caused by the narrow interpretation of § 2255(4).

2. Giving full, logical effect to the Daniels ruling.

In addition to producing absurd and unjust results, interpreting “facts” not to include vacaturs of conviction would also prevent the Supreme Court’s ruling in Daniels from being given its full and most logical effect. Daniels held that § 2255 could not be used to challenge prior state convictions in a federal court. Indeed, as the Gadsen court noted, the “entire point” of Daniels was that “litigants should not bypass state courts” if their claims involved state convictions. Nevertheless, the Daniels Court just as clearly intended for those litigants to be able to return to federal court once their state convictions were addressed in the proper venue. To interpret § 2255(4) narrowly, however, will, as demonstrated above, often frustrate these judicial intentions: Gadsen petitioners who follow the Daniels Court’s instructions and do not “bypass” state courts will in many cases be time-barred from then returning to federal court with their § 2255 claim, leaving the second part of the Daniels Court’s vision unfulfilled. In order to allow the Daniels Court’s full intentions to be realized, and to avoid the conclusion that that ruling “illogical[ly], if not cruel[ly]” extended a dead-end invitation to Gadsen petitioners, § 2255(4)’s “facts” must be interpreted to encompass vacaturs of conviction.

158 See United States v Knorr, 942 F2d 1217, 1222 (7th Cir 1991) (recognizing that a continuance would have been relatively costless, but nevertheless deferring to the district court’s judgment in denying the motion because the district judge had been in a “unique position” to examine the relevant factors).
159 In addition, even if it would surely apply to Gadsen petitioners, the Rule 32 “safety valve,” unlike equitable tolling, has a limited window of application: only those who realize they have a good state case before they are sentenced can use it.
160 Gadsen, 332 F3d at 228.
161 Daniels, 532 US at 382 (“If any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence.”).
162 See Part III.B.1.
163 See Gadsen, 332 F3d at 228 (“[I]t would be an illogical, if not cruel, gesture for the Supreme Court to invite prisoners to attack their predicate convictions and then inform them that their efforts must go for naught and their enhanced sentences must stand.”), quoting United States v Payne, 894 F Supp 534, 543 (D Mass 1995).
C. Amending $2255: A Proposal

In the final weighing, there is little doubt that the broad interpretation of § 2255(4) is preferable. The text of § 2255(4) is ambiguous at best, its legislative history is largely irrelevant, and not only would a broad interpretation not meaningfully undermine § 2255(4)'s goals, it would actually avoid serious injustice. However, the best resolution of this issue would be a congressional amendment of § 2255 that would explicitly instruct courts as to how to dispose of Gadsen appeals. Ideally, given the arguments above, such an amendment would essentially codify the minority view's broad interpretation of § 2255(4)'s present language. One straightforward way to do so would be to add the following provision directly after § 2255(4), such that the start of the one-year statute of limitations could also be delayed until:

(5) the date on which a petitioner's prior state conviction is vacated, if that vacatur is the basis for the petitioner's § 2255 challenge of an enhanced noncapital federal sentence.

Like the broad interpretation of § 2255(4) that it mirrors, § 2255(5) would prevent Gadsen petitioners from being denied § 2255 relief due to time spent challenging underlying convictions in state appeals courts. Likewise, § 2255(5) would ensure that the Daniels ruling is given its full intended effect, by ensuring that those who dutifully follow its instructions are in fact allowed to return to federal court.

To be sure, this amendment also would provide the same potential for abuse, in that state appeals could, in theory, similarly be delayed indefinitely, and for any reason. However, in practice this potential for abuse seems unlikely to be realized in most cases and impossible to realize in many of the rest. Furthermore, § 2255(5) would specifically prevent the abuse with which AEDPA was most concerned, as it excludes capital cases from its scope. In the end, as was the case in assessing the broad interpretation of § 2255(4), the benefits this amendment would provide easily outweigh the marginal risks of abuse.

CONCLUSION

Unfortunately, in the case of § 2255(4), the usual interpretive tools—the text, structure, and legislative history—give courts little leverage in finding an appropriate resolution to the provision's ambiguity. Instead, one is left to a large degree with simply assessing the effects of each interpretation. In making that assessment, the majority

164 See Parts III.A and III.B.
165 See Part III.A.4.
view's concerns about the risks of a broad interpretation are certainly compelling. The prospect of allowing lazy or perhaps manipulative prisoners a chance nevertheless to challenge their federal sentences is not a pleasant one. Even less pleasant, however, and far more realistic, is the prospect that a narrow interpretation would deny that chance to a petitioner who had in fact obtained a vacatur of his state conviction, but had failed to meet § 2255's one-year statute of limitations due to delay in his state court appeals. Such a petitioner would be left to serve out a federal sentence that he had unquestionably proven to be illegally enhanced. In order to avoid such a result, even at the price of letting the occasional lazy or even devious prisoner off the hook, § 2255(4) should be interpreted, or ideally amended, to include state vacaturs of conviction as "facts."