No. 99-9136

In the Supreme Court of the United States

EARTHY D. DANIELS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant whose sentence was enhanced under a federal recidivist provision because of his prior state convictions, and whose state convictions have not been set aside by any court, may challenge his federal sentence under 28 U.S.C. 2255 based on the claim that the prior state convictions are constitutionally invalid.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255 (App., *infra*, 1a-5a[1]) is reported at 195 F.3d 501. The opinion of the court of appeals affirming petitioner's conviction is unpublished, but the decision is noted at 86 F.3d 1164 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1999. A petition for rehearing was denied

[1] The opinion of the court of appeals was not reprinted in the joint appendix. Accordingly, we have reprinted it as an appendix to this brief.

on January 13, 2000. The petition for a writ of certiorari was filed on April 12, 2000, and was granted on September 8, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 922 provides in pertinent part:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 924(a)(2) provides in pertinent part:

> Whoever knowingly violates subsection * * * (g) * * * of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the

> court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

28 U.S.C. 2255 provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced, pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 176 months' imprisonment. The court of appeals affirmed, 86 F.3d 1164 (1996) (Table), and this Court denied review. 519 U.S. 1094 (1997). Petitioner then filed a motion under 28 U.S.C. 2255 to set aside his sentence, arguing that two of the four prior state convictions that were used to enhance his federal sentence were invalid. The district court denied the motion. The court of appeals affirmed. App., *infra*, 1a-5a.

1. In the early morning hours of October 11, 1992, police officers approached an apartment building where

drug activity was known to be common. J.A. 2; Tr. 32-33, 44-45, 54. When two officers drove up to the front of the building, they saw several people standing there, one of whom fled as soon as the officers stopped and opened the doors of the car. Tr. 32-34. The officers pursued the fleeing man—later identified as petitioner Daniels—and called out "Stop. Police" several times. The man did not stop, but ran along the side of the building and ducked through a hole in a fence. Tr. 9-13, 35-36. Two other officers were on the other side of the fence, in the alley behind the apartment building. In the light from flashlights they were holding, three of the officers saw the man as he came through the fence with a gun in his hand. Tr. 12-13, 49, 63-64. One officer called out to the man to stop and drop the gun. Petitioner dropped the gun, and the officers arrested him. Tr. 43-50.

Petitioner pleaded guilty to a state charge of possession of a firearm by a convicted felon and was sentenced to 16 months' imprisonment. State authorities referred the case to the United States Attorney's Office because petitioner fit the criteria for a career offender under the ACCA.[2] *United States* v. *Daniels*, No. 95-50044, 1996 WL 292231, at *1 (9th Cir. June 3, 1996) (86 F.3d 1164 (Table)). A federal grand jury then charged petitioner with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 2-3. The government sought an enhanced sentence pursuant to

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[2] Federal prosecutors obtained a waiver of the *Petite* policy (see *Petite* v. *United States*, 361 U.S. 529 (1960)), under which the Department of Justice generally refrains from bringing a successive prosecution after a state prosecution for substantially the same acts or transactions. See United States Attorneys' Manual § 9-2.031 (Sept. 1997).

the ACCA, which requires a fifteen-year mandatory minimum term of imprisonment for any person who violates 18 U.S.C. 922(g) and who has three previous convictions for a violent felony or serious drug offense or both. J.A. 4-5.

In April 1994, a jury found petitioner guilty of violating Section 922(g)(1). J.A. 58. He was sentenced on January 11, 1995. The district court determined that petitioner was subject to sentencing under the ACCA because he had four qualifying predicate convictions from state courts in California: two for robbery and two for burglary. J.A. 13-18; Gov't C.A. Br. 2-3. Petitioner appealed, arguing that his two California burglary convictions were not qualifying ACCA predicates. The court of appeals rejected that argument, holding that petitioner's burglary convictions satisfied the test set forth in *Taylor* v. *United States*, 495 U.S. 575 (1990). *Daniels*, 1996 WL 292231, at *3-*4. On January 21, 1997, this Court denied a petition for a writ of certiorari. 519 U.S. 1094.

2. On January 16, 1998, petitioner filed a motion under 28 U.S.C. 2255, in which he challenged his federal ACCA sentence. He claimed that the two California robbery convictions used to enhance his federal sentence were unconstitutionally obtained. J.A. 20-57. Petitioner's motion did not state whether he had previously challenged the validity of either of those convictions in state court or on federal habeas corpus. *Ibid.*

Petitioner alleged that the first robbery conviction, which dated from 1978, was unconstitutionally obtained because his guilty plea was not intelligent and voluntary. According to petitioner, the only basis for his liability was aiding and abetting the robbery, and he did not know at the time of his guilty plea that he could

be convicted as an aider and abetter only if he intentionally assisted the commission of the crime. J.A. 37-40. Petitioner's counsel stated that the transcript of the proceeding at which petitioner pleaded guilty to the 1978 robbery is not available. J.A. 38 n.3.

Petitioner alleged that the second robbery conviction, which dated from 1981, was unconstitutionally obtained for two reasons. First, as with his 1978 conviction, petitioner claimed that his guilty plea was not intelligent and voluntary. Second, petitioner claimed that his counsel for the 1981 conviction rendered ineffective assistance by failing to move to suppress a statement made by petitioner following an arrest that allegedly violated the Fourth Amendment. J.A. 40-51. Petitioner did not tender the transcript of the proceeding at which petitioner pleaded guilty to the 1981 robbery, and it is not in the record in this case.

3. The district court denied petitioner's motion under Section 2255 in a written opinion, holding that petitioner was precluded from collaterally attacking his expired state convictions in Section 2255 proceedings. J.A. 58-67. The district court relied on this Court's decision in *Custis* v. *United States*, 511 U.S. 485 (1994), and on later Ninth Circuit decisions applying the rationale of *Custis* to Section 2255 motions. J.A. 60-66. *Custis* holds that a federal defendant may not bring a collateral attack at his ACCA sentencing to the validity of prior state convictions used to enhance the ACCA sentence, with the sole exception of a claim that his prior conviction was obtained in violation of his right to counsel under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). As the district court noted, in *Clawson* v. *United States*, 52 F.3d 806, 809 (9th Cir.) (per curiam), cert. denied, 516 U.S. 897 (1995), and *Contreras* v. *Schiltgen*, 151 F.3d 906, 907 (9th Cir. 1998), the Ninth

Circuit applied *Custis* to preclude attacks on prior state convictions made through the vehicle of a Section 2255 challenge to the federal ACCA sentence. J.A. 64-66.

4. The court of appeals affirmed, reiterating its holdings in *Clawson* and *Contreras* that "[i]n § 2255 proceedings, *Custis* bars federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." App., *infra*, 5a (internal quotation marks omitted). The court found that the rationale of *Custis* extends both to sentencing proceedings in general and to collateral challenges to recidivist sentences based on alleged defects in the prior conviction. *Id.* at 3a.

SUMMARY OF ARGUMENT

In *Custis* v. *United States*, 511 U.S. 485, 487 (1994), this Court held that "a defendant has no * * * right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions" used to enhance a federal sentence. *Custis* involved a defendant's attempt to challenge prior convictions at his federal sentencing proceeding. But the principles of *Custis* apply with equal force in this Section 2255 case, in which petitioner, like the defendant in *Custis*, seeks to collaterally attack his federal sentence on the ground that prior convictions used to enhance that sentence were unconstitutionally obtained.

Neither the statute under which petitioner was sentenced, 18 U.S.C. 924(e), nor any other federal statute or rule provides a basis for permitting the collateral attack he seeks to mount. Accordingly, petitioner may mount his challenge only if it would violate the Constitution to enhance a sentence based on a facially valid prior conviction that a defendant claims was uncon-

stitutionally obtained. But the Court in *Custis* expressly rejected a similar claim by the defendant in that case that the Constitution required that the sentencing court permit his attack on his prior convictions. The Court in *Custis* did recognize a single exception from that rule—convictions assertedly obtained in violation of the right to counsel recognized in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). But the Court explained that exception as based on the unique features of the *Gideon* rule. The exception is therefore of no use to petitioner, who (like the defendant in *Custis*) presents no *Gideon* claim.

The *Custis* holding necessarily applies when a defendant attempts to make a post-conviction collateral attack on an enhanced sentence. If the Constitution prohibited enhancing a defendant's sentence based on facially valid but assertedly unconstitutional prior convictions, it would do so not merely on collateral attack, but at sentencing as well. Indeed, there could be no reason to prohibit claims like petitioner's at sentencing, but to require courts to adjudicate those claims a day—or even an hour—after the sentencing proceedings have been completed. Basic principles that have long governed federal collateral review of criminal convictions make clear that a defendant does not have greater rights to attack his conviction on collateral attack than he would have had on direct review.

The concerns that supported this Court's decision in *Custis* also fully apply in this case. The Court in *Custis* noted that permitting challenges to enhanced sentences based on the fact that the prior enhancing convictions were unconstitutionally obtained would require locating court records and witnesses from other jurisdictions regarding cases that had become final years—or even, as here, decades—earlier. Those difficulties are at least

as serious in a collateral attack (like petitioner's) as in a challenge made at the sentencing proceeding itself (as in *Custis*). Indeed, permitting challenges like those petitioner attempts to bring threatens to provide a way for defendants to circumvent the statutory one-year limitations period that would apply to their prior convictions if they attempted to challenge them directly under Section 2254 or 2255.

The Court in *Custis* also recognized that the defendant's attack on the validity of facially valid prior convictions in a sentencing proceeding for a later crime implicated powerful interests in the finality of criminal convictions. Those same interests are implicated here, since petitioner, like the defendant in *Custis*, attempts to challenge convictions that had long since become final. Moreover, in both cases, the fact that the State whose convictions are at issue is not even a party to the federal proceedings makes fair adjudication of the claim particularly difficult, and it makes invalidation of the conviction a particular affront to finality interests.

Finally, petitioner attempts to rely on appellate decisions that have permitted a Section 2255 challenge to an enhanced sentence when the defendant has already obtained the invalidation of his prior convictions in state court proceedings or federal habeas. Those decisions, however, do not support petitioner's claim here, because petitioner's prior convictions remain facially valid. Petitioner also argues that he should be permitted to challenge the constitutionality of his prior convictions in his Section 2255 proceeding because he is no longer "in custody" on those convictions and it is therefore too late to mount a state or federal collateral attack on them. Petitioner's argument once again challenges the rationale of *Custis*. If petitioner's argument were accepted, there would be no reason to prevent him

from mounting his challenge in the sentencing court; it would serve no purpose to require him to wait to attack his enhanced sentence in a Section 2255 motion. More fundamentally, petitioner may not obtain greater rights to challenge the validity of his prior convictions simply by letting a significant period of time pass and thereby losing the opportunity he once had, under state and federal habeas provisions, to mount such a challenge.

ARGUMENT

A FEDERAL SENTENCE ENHANCED BY A PRIOR CONVICTION THAT HAS NEVER BEEN INVALIDATED BY ANY COURT MAY NOT BE COLLATERALLY ATTACKED UNDER 28 U.S.C. 2255 ON GROUNDS THAT THE PRIOR CONVICTION WAS UNCONSTITUTIONALLY OBTAINED

In *Custis* v. *United States*, 511 U.S. 485 (1994), this Court held that 18 U.S.C. 924(e)—the statute under which petitioner was sentenced—authorizes enhancement of a defendant's sentence on the basis of a facially valid prior conviction, even if the defendant claims that the prior conviction was unconstitutionally obtained. In *Custis*, the defendant argued that, as a matter of statutory construction, Section 924(e) "should be read to permit defendants to challenge the constitutionality of convictions used for sentencing purposes." *Id.* at 490. The Court rejected that claim, noting that Section 924(e) "applies whenever a defendant is found to have suffered 'three previous convictions' of the type specified." *Ibid.* Section 924(e) therefore "focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted" to enhance a defendant's sentence. *Id.* at 491. See also *id.* at 492 (Congress "did not intend to give

defendants the right to challenge the validity of prior convictions under this statute.").

Petitioner accepts the Court's conclusion in *Custis* that, as a matter of statutory construction, Section 924(e) embodies Congress's intent that prior convictions that have not yet been invalidated may be used for sentence enhancement—even if the defendant claims that those prior convictions were unconstitutionally obtained. See Pet. Br. 13 ("As petitioner does not posit section 924(e) as the source of his right to challenge the constitutionality of the predicate priors, that part of *Custis* does not foreclose the argument."). His basic claim in his Section 2255 motion is that enhancing his sentence under Section 924(e) based on facially valid convictions violates the Constitution, because of constitutional errors in those prior convictions. See J.A. 34 (petitioner's "enhanced Armed Career Criminal Act sentence is constitutionally invalid because it is based on two constitutionally invalid prior convictions"). Petitioner concludes that, because his ACCA "sentence is * * * unconstitutional, * * * section 2255 by its express terms lies to remedy a sentence 'imposed in violation of the Constitution.'" Pet. Br. 15-16.[3] See also *id.* at 4 ("A motion under 28

[3] Petitioner also briefly refers (Br. 16) to the fact that Section 2255 lies to remedy a sentence "otherwise subject to collateral attack." Whatever scope that provision may have, it could not include petitioner's claim in this case. This Court in *United States* v. *Addonizio*, 442 U.S. 178 (1979), held that a nonconstitutional error provides a basis for collateral attack only if the "error constituted a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* at 185 (internal quotation marks omitted); see also *Reed* v. *Farley*, 512 U.S. 339, 353-354 (1994). If the use of a facially valid but assertedly unconstitutional prior conviction to enhance a sentence would create such a "funda-

U.S.C. § 2255 to vacate a sentence imposed in violation of the Constitution provides both an appropriate and necessary vehicle for litigating petitioner's claim.").

Petitioner accordingly may prevail in this case only if he demonstrates that it violates the Constitution to enhance a sentence based on a prior conviction that a defendant alleges to have been unconstitutionally obtained. Our central contention is that, except where the defendant claims that the prior conviction resulted from *Gideon* error, the Constitution is not violated when a conviction that is facially valid is used to enhance a sentence for committing another crime.

A. This Court's Decision In *Custis* Established That, Absent A Claim Of A *Gideon* Violation, Use Of A Facially Valid Prior Conviction To Enhance A Sentence Is Not Unconstitutional

This Court in *Custis* rejected the claim that the Constitution would be violated if a facially valid but assertedly unconstitutional conviction were used to enhance the defendant's sentence. Accordingly, aside from the exception recognized in *Custis* for uncounseled prior convictions obtained in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), it does not violate the Constitution to use facially valid prior convictions (such as petitioner's) to enhance a later sentence, even if the defendant claims (as does petitioner) that the prior convictions are constitutionally defective. As the court below explained, "a § 2255 petition asserts that there

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mental defect," the Court's holding in *Custis* that the sentencing court must overlook that defect would be inexplicable. Thus, if petitioner's ACCA sentence is authorized by statute and if his ACCA sentence is not unconstitutional, then there could be no other "fundamental defect" that could warrant collateral relief under Section 2255.

was some error at sentencing, which must be corrected, and we know from *Custis* that there could not have been any error whatsoever." App., *infra*, 3a-4a; accord *Ryan* v. *United States*, 214 F.3d 877, 877-878 (7th Cir. 2000) ("A sentence imposed following the approach of *Custis* is lawful and thus not subject to collateral attack under 28 U.S.C. § 2255 as long as the prior convictions remain undisturbed."), petition for cert. pending, No. 00-6554.

1. The defendant in *Custis*, like petitioner here, argued that, "regardless of whether § 924(e) permits collateral challenges to prior convictions, the Constitution requires that they be allowed." 511 U.S. at 493. Like petitioner here, the defendant in *Custis* argued that this Court's decisions in *Burgett* v. *Texas*, 389 U.S. 109 (1967), and *United States* v. *Tucker*, 404 U.S. 443 (1972), established that principle. See Pet. Br. 8 (*Burgett* and *Tucker* "forbid the use of an unconstitutional prior conviction to enhance a sentence.").

This Court, however, squarely rejected that argument in *Custis*. The Court acknowledged that, for purposes of applying a recidivist statute, *Burgett* and *Tucker* require the conclusion that "admission of a prior criminal conviction that is constitutionally infirm under the standards of *Gideon* is inherently prejudicial and * * * would undermine the principle of *Gideon*." *Custis*, 511 U.S. at 495. But, after noting that the defendant "invite[d] [the Court] to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*," the Court responded that it "decline[d] to do so." *Id.* at 496. The Court's holding was unequivocal: "We hold that a defendant has no * * * right (with the *sole* exception of convictions obtained in violation of the right to counsel) to

collaterally attack prior convictions." *Id.* at 487 (emphasis added).

The Court explained that "since the decision in *Johnson* v. *Zerbst*, [304 U.S. 458 (1938),] and running through our decisions in *Burgett* and *Tucker*, there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect." *Custis*, 511 U.S. at 496. See also *id.* at 494 ("There is * * * a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique."). Such a violation "rises to the level of a jurisdictional defect," and accordingly triggers extraordinary measures. *Id.* at 496. But the claims advanced by the defendant in *Custis*—"denial of the effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial," *ibid.*—were not claims of *Gideon* violations. Accordingly, it did not violate the Constitution touse facially valid prior counseled convictions—as to which there was no claim of a *Gideon* violation—to enhance the defendant's sentence.[4]

The same conclusion follows here. Petitioner has alleged that two of his prior convictions are consti-

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[4] *Tucker* fails to support petitioner's argument for another reason as well. The defendant in *Tucker*, unlike petitioner, did not attempt to challenge the use of facially valid prior convictions to enhance his federal sentence. Instead, the defendant obtained invalidation of his prior convictions in a state court proceeding, see 404 U.S. at 445, and only then, in a motion under Section 2255 in federal court, argued that his federal sentence was invalid because it was based on a prior state conviction that had already been held invalid by the State involved. Such a claim is distinct from the indirect collateral attack on his prior, facially valid convictions that petitioner seeks to bring here. See pp. 25-26, *infra*.

tutionally invalid. He alleges that his 1978 guilty plea to a robbery charge was not "intelligent and voluntary." J.A. 37. He also alleges that his 1981 guilty plea to another robbery charge was tainted both because it was not "intelligent and voluntary," J.A. 50, and because he received ineffective assistance from his counsel, who failed to file an allegedly meritorious Fourth Amendment suppression motion, *ibid.* Those grounds—lack of a knowing and voluntary guilty plea and ineffective assistance of counsel—are identical to two of the claims advanced by the defendant in *Custis* as the reasons for the invalidity of his prior convictions. See 511 U.S. at 496. The Court held in *Custis*, however, that "[n]one of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Ibid.* On that basis, the Court held that the Constitution did not prohibit the use of facially valid—though assertedly unconstitutional—prior convictions to enhance the defendant's ACCA sentence. That holding disposes of petitioner's claim that his sentence is unconstitutional and hence subject to attack on that basis under Section 2255.

2. If a defendant who is concededly barred by *Custis* from using his federal sentencing proceeding to attack prior state convictions could nevertheless use Section 2255 to accomplish that same objective, *Custis* would be reduced to a curiously futile gesture. A defendant could simply wait for his federal sentencing proceedings to be completed, and then—a day, or perhaps an hour, later—file a Section 2255 motion mounting the same attack on his prior convictions that he was precluded from mounting in his federal sentencing proceeding.[5]

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[5] Petitioner argues (Br. 25) that "[f]ederal courts, conducting section 2255 proceedings, are well-suited for resolving the issues

There is no justification for insulating the sentencing court under *Custis* from adjudicating the validity of the prior state convictions, while requiring it to address the same attack as soon as the sentence has become final.

B. Core Principles Governing Collateral Attack On Criminal Convictions Demonstrate That Punishment May Be Imposed Based On A Facially Valid Conviction

1. Basic principles governing collateral review also establish that, aside from cases in which there is a claim of *Gideon* error, the Constitution does not preclude the use of a facially valid but assertedly unconstitutional prior conviction to enhance a sentence. This Court has "reaffirm[ed] the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States* v. *Frady*, 456 U.S. 152, 166 (1982); see also *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979) ("[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack."). Indeed, any defendant who contests a final judgment of conviction in a subsequent proceeding confronts the principle that when a defendant's "chance to appeal has been waived or exhausted, [a court is] entitled to

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raised by these challenges." Of necessity, federal courts adjudicating collateral attacks do resolve constitutional claims. But there is no basis for petitioner's apparent belief that district courts are in a better position to resolve attacks on prior convictions on collateral review of a sentence than they would be in the sentencing proceeding itself. To the contrary, the district court's focus in the sentencing proceeding on the defendant, his past criminal history, and a wide variety of other potentially relevant subjects makes the sentencing proceeding a far more appropriate time to raise all challenges, including constitutional challenges, to a sentence.

presume he stands fairly and finally convicted." *Frady*, 456 U.S. at 164. See also *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) ("the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment"). The presumption attaches, moreover, "even when a collateral attack on a final conviction rests on constitutional grounds." *Parke* v. *Raley*, 506 U.S. 20, 31 (1992).

Contrary to those principles, petitioner claims that a defendant in his position has significantly greater freedom to attack his sentence on collateral review than in the trial court or on direct appeal. Although *Custis* precludes a defendant sentenced as a recidivist from challenging a facially valid prior conviction on constitutional grounds (other than *Gideon* grounds) in the sentencing court or on direct appeal from his sentence, petitioner argues that the identical challenge may be mounted on collateral attack. That argument is inconsistent with the *Frady* principle.

2. More generally, this Court has regularly recognized that there are circumstances in which defendants may suffer consequences from a facially valid final conviction notwithstanding a claim that the conviction was unconstitutionally obtained. For example, this Court has held in a wide variety of settings that defendants may lose the ability to challenge their sentences on constitutional grounds if they have not preserved their claims at trial, on appeal, or on state collateral attack, see *Edwards* v. *Carpenter*, 120 S. Ct. 1587, 1591 (2000), if they have failed to properly exhaust their state remedies, see *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), if they have brought previous federal collateral attacks, see *McCleskey* v. *Zant*, 499 U.S. 467 (1991), or if their attack is based on a new rule of constitutional law, see *Teague* v. *Lane*, 489

U.S. 288 (1989) (plurality opinion). Congress too has imposed strict deadlines for collateral challenges to convictions and other limitations on the availability of federal collateral attack. See, *e.g.*, 28 U.S.C. 2255 (Supp. IV 1998) (one-year statute of limitations and limitations on second and successive Section 2255 motions).

Petitioner had ample opportunity to challenge his prior convictions on constitutional or other grounds at the time those convictions were entered, on appeal, or on federal or state collateral review while he was in custody on those convictions.[6]

His failure to do so resulted in those convictions passing beyond the reach of judicial review.[7] All that is left is an outstanding, facially valid judgment. The

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[6] We have no reason to disagree with petitioner's contention (Br. 16 n.8) that coram nobis does not lie in California for his particular challenges to his prior convictions. Some States, however, do permit coram nobis in a variety of circumstances, thus permitting even defendants no longer in custody to bring their constitutional challenges to prior convictions. See generally Morgan Prickett, *The Writ of Error Coram Nobis in California*, 30 Santa Clara L. Rev. 1 (1990); *Skok* v. *Maryland*, 760 A.2d 647 (Md. 2000).

[7] Petitioner argues (Br. 21 n.12) that the ACCA itself was not enacted until after the dates of the prior convictions used to enhance his sentences. A defendant's criminal history, however, is "as typical a sentencing factor as one might imagine," *Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998), regardless of whether it is taken into account as a result of a statute, a sentencing guidelines system, or merely the court's exercise of sentencing discretion. Accordingly, anyone convicted of a crime is on notice that the conviction may someday be used in a variety of ways to enhance a sentence for a future crime. See *Nichols* v. *United States*, 511 U.S. 738, 748 (1994) (noting that a warning to a defendant "that if he is brought back into court on another criminal charge, [he] will be treated more harshly * * * would merely tell him what he must surely already know").

sentencing court was therefore entitled to take into account defendant's prior facially valid convictions in imposing the ACCA sentence on petitioner.

C. Important Interests In Ease Of Administration And Promoting The Finality Of Judgments Also Refute Petitioner's Claim

This Court in *Custis* referred to two important rationales—"[e]ase of administration" and "[t]he interest in promoting the finality of judgments"—that supported its conclusion that challenges (except for *Gideon* violations) to prior convictions used to enhance a federal sentence may not be brought when that sentence is imposed. 511 U.S. at 496-497. Those rationales provide even greater support for the conclusion that such challenges may not be brought on collateral review of an enhanced sentence.

1. With respect to administrability, the Court explained in *Custis* that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order," but, in contrast, the "determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." 511 U.S. at 496. Moreover, prosecutors, defense lawyers, and witnesses who could provide evidence crucial to the constitutional claims asserted may be deceased or difficult to locate in distant jurisdictions, and those who are available are likely to have only dim memories of events that may have occurred (as here) decades earlier. Those administrative difficulties will be at least as serious in a collateral attack on an

enhanced federal sentence (as here) as in an attack on an enhanced federal sentence at the time it is imposed (as in *Custis*). Petitioner's claims themselves illustrate some of the difficulties.

a. Petitioner has argued that the sentence he is currently serving should not have been enhanced on the basis of his 1978 robbery conviction, because his guilty plea to that robbery charge "was not intelligent and voluntary." J.A. 37, 51. The logical starting place to evaluate that claim would be the transcript of his guilty plea colloquy from two decades ago, but his counsel has acknowledged that the transcript cannot be located. J.A. 38 n.3. That problem is likely to be a common one, since transcripts frequently are not prepared in cases (like many of those resolved by guilty pleas) in which no appeal is taken, and those transcripts that are prepared are likely to be difficult or impossible to locate decades after the event. See *Parke*, 506 U.S. at 30 ("The circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old.").

Petitioner has also argued that his 1981 robbery conviction is invalid both because his guilty plea was again allegedly "not intelligent and voluntary," J.A. 50, and because his counsel allegedly rendered ineffective assistance in failing to move to suppress his confession on Fourth Amendment grounds, J.A. 44-50. Once again, petitioner has not tendered the transcript of his 1981 guilty plea colloquy, and it is therefore not clear whether it is presently available. Petitioner's ineffective assistance claim is based on the assertion that his confession was suppressible as the fruit of an arrest without probable cause. Untangling the facts of that arrest many years later to determine whether a Fourth Amendment suppression motion would have been

meritorious—and whether there may have been strategic advantages to petitioner in accepting a plea bargain rather than litigating the admissibility of his confession—poses a daunting challenge. In short, petitioner's claims present even more serious practical problems than did the defendant's claims in *Custis*.

b. The staleness of the claims presented is not an idiosyncratic feature of this particular case. Congress has provided for a one-year statute of limitations for both Section 2254 habeas petitions and Section 2255 motions. See 28 U.S.C. 2244(d), 2255 (Supp. IV 1998). The one-year period generally runs from the date the conviction became final, with exceptions that would not be applicable to petitioner's claims.[8] That limitations period represents Congress's judgment that those with meritorious grounds for collateral attack should act promptly, that claims that fall outside the limitations period are too stale to be fairly litigated, and that "long-deferred challenges that were never presented to the state courts are no longer appropriate grounds of federal relief." *Ryan*, 214 F.3d at 882.

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[8] A different starting date applies under Section 2244 to cases in which "the applicant was prevented from filing [a habeas petition] by * * * State action," 28 U.S.C. 2244(d)(1)(B) (Supp. IV 1998), cases in which the right asserted "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2244(d)(1)(C) (Supp. IV 1998), cases in which there is a later date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. 2244(d)(1)(D) (Supp. IV 1998), and cases in which federal habeas was delayed during the pendency of state post-conviction or other collateral review, 28 U.S.C. 2244(d)(2) (Supp. IV 1998). With the exception of the last ground, Section 2255 provides for similar exceptions.

In cases in which a defendant seeks to collaterally challenge a sentence on the ground that it was enhanced by prior facially valid but assertedly unconstitutional convictions, the prior convictions will ordinarily fall far outside the one-year limitations period. A prior conviction may be used to enhancea sentence under the ACCA only if it was entered before the commission of the felon-in-possession offense. *United States* v. *Talley*, 16 F.3d 972, 977 (8th Cir. 1994). By the time the ACCA defendant has committed the felon-in-possession offense and been apprehended, convicted, and sentenced under the ACCA, any such prior conviction is almost certain to have been final for more than one year.[9] Petitioner's claim, if accepted, would thus lead to the anomalous result that prior convictions that were far too stale to be subject to collateral attack under Sections 2254 and 2255, regardless of their claimed unconstitutionality, would routinely be subject to such attack in the guise of an attack on a federal sentence that used them for enhancement. Petitioner's argument entails that a defendant who is still in custody on a state conviction that has been final for more than a year is time-barred from attacking it, but a defendant who is no longer in custody on such a conviction may

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[9] Consider petitioner's own case. He committed the instant offense in October 1992. J.A. 2. He was convicted of the offense in April 1994, see J.A. 58, and he was sentenced in January 1995. See J.A. 7. His conviction became final when this Court denied certiorari on January 21, 1997. 519 U.S. 1094. By that date in 1997, any prior conviction that was entered before his commission of the instant offense in 1992 (and therefore could have been used to enhance that sentence under ACCA) would be very likely to have been final for more than a year. Accordingly, any such conviction would be too stale to come within the one-year limitations period for collateral attacks under Sections 2254 and 2255.

attack it when it is used to enhance his sentence on another offense. That kind of circumvention of the time limits in Sections 2254 and 2255 should not be permitted.

2. The Court in *Custis* also explained that the "interest in promoting the finality of judgments provides additional support for our constitutional conclusion." 511 U.S. at 497. Indeed, "principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing." *Ibid.* As the Court noted in *Parke*, 506 U.S. at 30, a successful challenge to a prior conviction used to enhance a conviction would "deprive [the state-court judgment] of [its] normal force and effect," thus making inroads on the finality that attaches to expired prior convictions. And principles of finality "bear extra weight in cases in which the prior convictions * * * are based on guilty pleas, because when a guilty plea is at issue, 'the concern with finality served by the limitation on collateral attack has special force.'" *Custis*, 511 U.S. at 497 (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979)).

The Court's rationale in *Custis* applies with equal force in this case. Petitioner, who pleaded guilty to the two challenged convictions, has launched a collateral attack on his present sentence, rather than a direct attack as in *Custis*. That difference, however, does not mitigate the costs of reopening the validity of his old convictions. See *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). So long as petitioner's prior convictions remain facially valid, sentencing courts are entitled to rely on them.

Permitting challenges such as petitioner's places the State in a particularly difficult position. A court

adjudicating petitioner's underlying claims would have to pass on the validity of petitioner's prior state convictions in a case in which neither the State whose conviction is at issue nor any state official is a party. The State is in the best position to marshal the factual and legal material necessary to defend its conviction. The absence of the State as a party to the federal proceeding will therefore further increase the risk of an erroneous judgment by federal courts. See *Parke*, 506 U.S. at 31-32 (citing *Loper* v. *Beto*, 405 U.S. 473, 500-501 (1972) (Rehnquist, J., dissenting)). Moreover, a defendant or prisoner who attacks a conviction on grounds like those advanced by petitioner—lack of a knowing and intelligent guilty plea, ineffective assistance of counsel—ordinarily would face a trial and the risk of conviction if the attack is successful; the constitutional error in the proceedings would not immunize the defendant from liability. In this setting, however, a prisoner who prevails on a collateral attack like that of petitioner would reap an undeserved windfall. The State would likely have little incentive to retry the defendant and, if it did, it would have to confront a double jeopardy challenge. Even if retrial were sought and were successful, it is not clear that there would be any means to reinstate the defendant's enhanced ACCA sentence.[10]

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[10] In *United States* v. *Clark*, 203 F.3d 358 (5th Cir. 2000), petition for cert. pending, No. 00-122, the Fifth Circuit noted "the apparent anomaly of determining the validity of one jurisdiction's conviction later used for enhancement of another jurisdiction's sentence, without a representative of the jurisdiction of the initial conviction being a party." *Id.* at 365. The court stated, however that the anomaly "is ameliorated by the rule that the determination does not bind the former jurisdiction." *Ibid.* That solution, however, does not ameliorate the problem. In contrast to

D. Petitioner's Other Reasons For Permitting His Indirect Collateral Attack On His Prior Convictions Are Unpersuasive

1. Petitioner notes that a number of courts of appeals have held "that pursuant to federal habeas corpus, a district court may reopen and reduce a federal sentence, once a federal defendant has, in state court, successfully attacked a prior state conviction, previously used in enhancing the federal sentence." Pet. Br. 15 (quoting *United States* v. *Walker*, 198 F.3d 811, 813 (11th Cir. 1999)).[11] This case, however, arises in a different setting. Petitioner has not alleged that he has already obtained a judgment from some other court invalidating the prior convictions used to enhance his

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habeas corpus litigation under 28 U.S.C. 2254, in which the State has an opportunity to be heard in defense of its judgment, in this setting the federal court would deprive the state court judgment of its usual significance without ever hearing from the State. Finding that the State has violated the Constitution without the participation of the state representatives in the case is inconsistent with the respect for state court judgments that is a fundamental premise of our federal system. Cf. U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause); 28 U.S.C. 1738. See also *Calderon*, 523 U.S. at 555-556. In addition, taking that course would still lead to anomalous situations in which a prior conviction may not be used to enhance a federal sentence (because it has been proven to be invalid in a Section 2255 proceeding) but it may be used to enhance a later state sentence (since it remains valid as against the State). It is unclear whether a defendant in that situation would be able to obtain relief in a still later Section 2254 attack on the subsequent enhanced state sentence.

[11] See also *United States* v. *LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999); *United States* v. *Pettiford*, 101 F.3d 199, 201-202 (1st Cir. 1996); *United States* v. *Bacon*, 94 F.3d 158, 161 n.3 (4th Cir. 1996); *United States* v. *Cox*, 83 F.3d 336, 339 (10th Cir. 1996); *United States* v. *Nichols*, 30 F.3d 35, 36 (5th Cir. 1994).

federal sentence. From all that appears in the record, petitioner either failed to employ the procedures available to attack those convictions or failed to win relief. Instead, he seeks to employ Section 2255 itself to bring a collateral attack on his expired prior convictions. *Custis* holds that he could not bring that challenge during the federal sentencing proceedings. The logic of *Custis* dictates that he may not bring his collateral challenge to his prior convictions under Section 2255 either.

2. Petitioner argues (Br. 14) that *Custis* "did not bar challenges to [prior] convictions in forums other than the sentencing hearing." Petitioner refers to the end of the Court's opinion in *Custis*, where the Court stated that it "recognize[d] * * * that Custis, who was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in [state court] or through federal habeas review." 511 U.S. at 497. The Court also stated that "[i]f Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." *Ibid.* The Court added, however: "We express no opinion on the appropriate disposition of such an application." *Ibid.*

The Court's statements in *Custis* are not an endorsement of petitioner's position. Pet. Br. 14. To the contrary, the Court's careful language states only that, if the defendant could obtain invalidation of his prior convictions in another forum, he "may then *apply* for reopening of any federal sentence enhanced by the state sentences." 511 U.S. at 497 (emphasis added). Far from deciding whether such an application could result in relief from the enhanced federal sentence, the Court "express[ed] no opinion on the appropriate

disposition of such an application." *Ibid.* And in any event, because petitioner has not been "successful in attacking [his] state sentences," resolution of the question reserved by the Court in *Custis* could not assist him. See *Turner* v. *United States*, 183 F.3d 474 (6th Cir. 1999), cert. denied, 120 S. Ct. 1255 (2000); *Arnold* v. *United States*, 63 F.3d 708, 709-710 (8th Cir. 1995).

3. Petitioner argues (Br. 16) that "[w]here no other forum exists to litigate the constitutionality of the prior convictions," such as where the defendant is no longer "in custody" on those convictions and thus may not attack them under Section 2254, see *Maleng* v. *Cook*, 490 U.S. 488, 491-492 (1989) (per curiam), collateral challenges like his should be permitted. See *United States* v. *Clark*, 203 F.3d 358, 363 (5th Cir. 2000), petition for cert. pending, No. 00-122.

Petitioner's argument is inconsistent with *Custis*. Petitioner argues that the fact that an ACCA defendant is no longer "in custody" on prior enhancing convictions is sufficient to warrant permitting him to challenge those prior convictions through an attack on his ACCA sentence. If that is correct, however, then there would be no reason to require him to wait for a collateral attack on his ACCA sentence, rather than bringing the challenge at the time of sentencing. Accordingly, petitioner's argument, if correct, would directly challenge this Court's holding in *Custis* that such challenges cannot be brought at the time of sentencing.

Petitioner errs (Br. 17) in stating that *Maleng* v. *Cook*, *supra*, "sanctioned the use of habeas corpus * * * to challenge the constitutionality of an expired prior conviction—on grounds other than the denial of counsel—to the extent it is used to enhance a current

sentence." That is not the holding or implication of this Court's decision in *Maleng*. The Court's *per curiam* opinion in *Maleng* held that a state habeas petitioner's constitutional challenge to prior state convictions on which the petitioner was no longer in custody "can be read as asserting a challenge to [later, still custodial] sentences, as enhanced by the allegedly invalid prior conviction." 490 U.S. at 493. On that basis, the Court concluded that the habeas petitioner "has satisfied the 'in custody' requirement for federal habeas jurisdiction." *Id.* at 494.

Petitioner, like the prisoner in *Maleng*, is "in custody" under his ACCA sentence. But the Court in *Maleng* pointedly stated that its "holding is limited to the narrow issue of 'custody' for subject-matter jurisdiction of the habeas court." 490 U.S. at 494. And the Court then expressly declined to rule on the question presented in this case, noting that it "express[ed] no view on the extent to which the [expired] conviction itself may be subject to challenge in the attack upon the [later] sentences," *ibid.* Accordingly, *Maleng* provides no support for petitioner's argument.

More fundamentally, petitioner's argument turns principles of collateral review on their head. Petitioner's argument is that, because he is barred from one form of collateral relief (a Section 2254 attack on his prior state conviction), he should be permitted to obtain another form of collateral relief (an indirect attack on that conviction through a Section 2255 attack on his enhanced federal conviction) that would otherwise be unavailable. The purpose of the "in custody" requirement of Section 2254, however, is in part to set forth an outer bound on the availability of federal collateral relief for a state criminal conviction. See *Ryan*, 214 F.3d at 882 ("Honoring judgments that remain out-

standing after full opportunity for direct and collateral review does not *dis*honor the constitutional claims the defendant wishes to make. It simply establishes rules for presenting these claims to the right court, and in a timely fashion."). A defendant's failure to satisfy the "in custody" requirement accordingly means that Congress intended that his prior conviction has attained a degree of finality that puts it beyond the reach of federal collateral attack; it does not suggest that he should thereby be granted the right to challenge his prior conviction (which he could not challenge at sentencing) through a later collateral attack.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-55097

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

EARTHY D. DANIELS, JR.,
DEFENDANT-APPELLANT

Argued and Submitted Sept. 30, 1999
Decided Oct. 21, 1999

Before: O'SCANNLAIN, FERNANDEZ, and T.G. NELSON, Circuit Judges

FERNANDEZ, Circuit Judge:

Earthy D. Daniels, Jr., appeals the denial of his 28 U.S.C. § 2255 motion in which he sought to challenge the constitutionality of two state convictions, which were used in sentencing him under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). We affirm.

BACKGROUND

Daniels was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court determined that Daniels, who had four prior convictions, was subject to the ACCA and sentenced him to imprisonment for 176 months. Daniels appealed to this court. He asserted that the district court's conclusion that his two California burglary convictions constituted predicate offenses under the ACCA was incorrect. In an unpublished disposition, we rejected that assertion. *See United States v. Daniels*, No. 95-50044, 86 F.3d 1164, 1996 WL 292231, at * 3-4 (9th Cir. June 3, 1996).

Daniels then filed a § 2255 motion to set aside, vacate or correct his federal sentence, and collaterally attacked his two California robbery convictions, which were also used to enhance his sentence. Although he claimed that he had been unconstitutionally convicted, he did not contend that he was denied the right to counsel as guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), in either case.

The district court denied his motion on the ground that he could not maintain that collateral attack under § 2255. He then appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 22 U.S.C. § 2253(a). We review denials of petitions under 28 U.S.C. § 2255 *de novo*. See *Sanchez v. United States*, 50 F.3d 1448, 1451 (9th Cir. 1995).

DISCUSSION

In *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L.Ed.2d 517 (1994), the Supreme Court declared that, except for *Gideon*[1] challenges, a defendant may not collaterally attack prior state convictions in sentencing proceedings where the ACCA is being used to enhance the sentence. The statute does not permit it. *See id.* at 490, 114 S. Ct. at 1735. The Constitution does not require it. *See id.* at 497, 114 S. Ct. at 1739. Concomitantly, ease of administration and the interest in finality argue against it. *See id.* at 496-97, 114 S. Ct. at 1738-39.

We have recognized the force of the *Custis* reasoning and have, therefore, expressly determined that it applies to sentencing proceedings in general. *See,* e.g., *United States v. Ricardo*, 78 F.3d 1411, 1415 (9th Cir. 1996); *United States v. Price*, 51 F.3d 175, 177 (9th Cir. 1995); *United States v. Alexander*, 48 F.3d 1477, 1494-95 (9th Cir. 1995); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir. 1994). In the same vein, we have decided that, on other than *Gideon* grounds, a defendant may not collaterally challenge a state conviction through the medium of a motion seeking dismissal of his indictment. *See United States v. Zarate-Martinez*, 133 F.3d 1194, 1199-1200 (9th Cir.), *cert. denied*, 525 U.S. 849, 119 S. Ct. 123, 142 L.Ed.2d 99 (1998).

But, says Daniels, we have not yet decided that collateral attacks on state convictions cannot be brought under § 2255. If he were correct, we would doubt that they could be brought. Among other things, a § 2255

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[1] See *Gideon*, 372 U.S. at 342-45, 83 S. Ct. at 795-97.

petition asserts that there was some error at sentencing, which must be corrected, and we know from *Custis* that there could not have been any error whatsoever. As it is, Daniels is not correct.

In *Clawson* v. *United States*, 52 F.3d 806 (9th Cir. 1995), a defendant brought a § 2255 motion and asserted that his federal sentence under the ACCA "was improperly enhanced through use of a state conviction that later became nonfinal when his appeal from the state judgment was reopened, *and* was unconstitutionally obtained." *Id.* at 807 (emphasis added). We responded:

> We hold that there is no finality requirement in the version of the ACCA under which Clawson was sentenced, and that under *Custis*, there is no constitutional right to collaterally attack the validity of a state conviction in a federal sentencing hearing on any basis other than denial of the right to counsel. . . .

Id. (emphasis added). If that were not clear enough, we returned to the topic in a case which, though not a § 2255 matter, called upon us to expatiate on *Clawson*. We explained that, in *Clawson*, "[w]e read *Custis* to bar federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras v. Schiltgen*, 151 F.3d 906, 907 (9th Cir. 1998).

We believe that we have spoken with a good deal of clarity, but because Daniels does not find it so, perhaps others are of the same mind as he. We hesitate to leave

uncertainty hovering about an issue that is so quotidian. Therefore, we restate our position here.[2]

CONCLUSION

We return to the § 2255 locale in order to clear away any bosk that still obscures our position regarding collateral attacks on prior convictions.

In § 2255 proceedings, *Custis* bars "federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras*, 151 F.3d at 907.

AFFIRMED.

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[2] Incidentally, Daniels's invocation of our decision in *Brock v. Weston*, 31 F.3d 887, 889-91 (9th Cir. 1994), does not alter the result. That case dealt with a 28 U.S.C. § 2254 petition, which can be a vehicle for challenging state convictions in proper circumstances. *See id.* at 890-91 & nn. 6 & 7; *see also Allen v. Oregon*, 153 F.3d 1046, 1049-50 (9th Cir. 1998); *Gretzler v. Stewart*, 112 F.3d 992, 1004-05 (9th Cir. 1997), *cert. denied*, 522 U.S. 1081, 118 S. Ct. 865, 139 L.Ed.2d 763 (1998); *Price*, 51 F.3d at 177. It is not relevant to this proceeding.