

BREYER, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 99–9136

EARTHY D. DANIELS, JR., PETITIONER  
*v.* UNITED STATES

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

[April 25, 2001]

JUSTICE BREYER, dissenting.

I believe that Congress intended courts to read the silences in federal sentencing statutes as permitting defendants to challenge the validity of an earlier sentence-enhancing conviction *at the time of sentencing*. See *United States v. Paleo*, 967 F. 2d 7, 11–13 (CA1 1992), implicitly overruled by *Custis v. United States*, 511 U. S. 485 (1994). That was the practice typically followed in the lower courts before *Custis*. See *id.*, at 498–499, and n. 2, 511 (SOUTER, J., dissenting). The courts now follow a comparable practice in respect to other sentence-enhancing factors. See, e.g., *United States v. Dunnigan*, 507 U. S. 87, 95–97 (1993) (perjured testimony enhancement). And, given appropriate burden of proof rules, see, e.g., *United States v. Gilbert*, 20 F. 3d 94, 100 (CA3 1994); *United States v. Wicks*, 995 F. 2d 964, 978 (CA10), cert. denied, 510 U. S. 982 (1993); *Paleo*, *supra*, at 13 (citing *United States v. Henry*, 933 F. 2d 553, 559 (CA7 1991), cert. denied, 503 U. S. 997 (1992), *United States v. Gallman*, 907 F. 2d 639, 643 (CA7 1990), cert. denied, 499 U. S. 908 (1991), and *United States v. Taylor*, 882 F. 2d 1018, 1031 (CA6 1989), cert. denied, 496 U. S. 907 (1990)), that practice need not prove unusually burdensome, see *Custis*, *supra*, at 511 (SOUTER, J., dissenting).

Having rejected that procedural approach in *Custis*,

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*supra*, at 496–497, the Court now must face the alternative— a later challenge to the earlier convictions in a collateral proceeding that attacks the present conviction or sentence. To resolve that challenge the plurality has devised a broad rule immunizing the earlier conviction with a possible exception for “rare” circumstances. See *ante*, at 9. The rule may well prove unduly “restrictiv[e],” *ante*, at 2 (SOUTER, J., dissenting). Or, through exceptions, it may well bring about additional delay, still greater litigation complexity, and (insofar as the plurality ties Congress’ hands by resting its exception upon constitutional grounds) legal inflexibility. And, given the restrictions *Custis* placed on sentencing courts, the inclination to grant a 28 U. S. C. §2255 (1994 ed., Supp. V) hearing in the rare circumstances hypothesized by the majority is subject to JUSTICE SCALIA’s criticism that §2255 may be an inappropriate forum for such a challenge. See *ante*, at 3 (opinion concurring in part).

The legal problem lies at the source. While we do not often overturn a recently decided case, in this instance the Court’s earlier decision will lead to ever-increasing complexity, for it blocks the simpler procedural approach that Congress intended.

Consequently, I believe this is one of those rare instances in which the Court should reconsider an earlier case, namely, *Custis*, and adopt the dissenters’ views. For that reason, I dissent.