No. 10-895

In The Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
Petitioner,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

28 U.S.C. 2244(d)(1)(A)'s one-year period of limitations for post-conviction habeas corpus petitions begins on "the date on which the judgment became final by the conclusion of direct review *or* the expiration of the time for seeking such review." (Emphasis added).

The question presented is:

When a prisoner declines to seek review in the State's highest court on direct appeal, must section 2244(d)(1)(A)'s limitations period always begin at "the expiration of the time for seeking such review," or must courts also ascertain when "the conclusion of direct review" occurred and start the limitations period on the later of these two dates?

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STATEMENT

I. Procedural History

Petitioner Rafael Gonzalez was convicted of murder and appealed his conviction to the Court of Appeals for the Fifth Court of Appeals District of Texas. After that intermediate state appellate court affirmed his conviction, Gonzalez declined to file a petition for discretionary review with the Texas

Court of Criminal Appeals (CCA), the State's highest criminal court. The window for filing that petition with the CCA closed on August 11, 2006. On September 26, 2006, the intermediate appellate court issued its mandate. After Gonzalez exhausted his state post-conviction remedies, he filed a federal habeas petition on January 24, 2008.

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations on post-conviction habeas corpus petitions, which starts on "the date on which the judgment became final by the conclusion of direct review *or* the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A) (emphasis added). The district court dismissed Gonzalez's petition as time-barred after concluding that the limitations period began running on August 11, 2006—the date of "the expiration of the time for seeking [direct] review." Had the district court instead started the clock on September 26, 2006, the date on which the state appellate court issued its mandate, Gonzalez's petition would have been timely.[1] But Fifth Circuit precedent holds that in cases where prisoners fail to pursue direct appeals all the way through to the Supreme Court of United States, the one-year clock must start at "the expiration of the time for seeking [direct] review." See *Roberts* v. *Cockrell*, 319 F.3d

[1] The statute of limitations excludes the time that Gonzalez spent pursuing state post-conviction relief. See 28 U.S.C. 2244(d)(2).

690, 694 (5th Cir. 2003). On this view, the "conclusion of direct review" prong in section 2244(d)(1)(A) can apply only "when the Supreme Court either rejects the petition for certiorari or rules on its merits." *Ibid.* The district court followed *Roberts* and dismissed the petition.

The Fifth Circuit granted a certificate of appealability (COA) on the following question: "[W]hether *Roberts* has been overruled by *Lawrence* [v. *Florida*, 549 U.S. 327 (2007)] and, if so, whether [Gonzalez's] habeas application was timely filed." *Gonzalez* v. *Thaler*, 623 F.3d 222, 225 (5th Cir. 2010). This COA violates 28 U.S.C. 2253(c), as well as this Court's decision in *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000), because it fails to address whether Gonzalez has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also *Slack*, 529 U.S. at 484 (forbidding courts to issue COAs solely on procedural issues, and requiring habeas applicants to identify a substantial showing of the denial of a constitutional right along with the procedural issue that they wish to appeal). Respondent Thaler, however, failed to object to this defective COA, and the Fifth Circuit allowed Gonzalez to appeal without discussing these problems. On the merits, the Fifth Circuit reaffirmed *Roberts*, holding that in cases where petitioners "do not exhaust their state court rights," the one-year limitations period always begins at "the expiration of the time for seeking

[direct] review," rather than at "the conclusion of direct review." *Gonzalez*, 623 F.3d at 225.

II. Other Courts of Appeals' Interpretations of 28 U.S.C. 2244(d)(1)(A).

Although the Fifth Circuit's decision in this case presents one shallow circuit split, it does not implicate any of the "trio of circuit conflicts" that Gonzalez describes in his petition.

The Eighth Circuit's *en banc* opinion in *Riddle* v. *Kemna*, 523 F.3d 850 (8th Cir. 2008), adopts a construction of section 2244(d)(1)(A) that differs from the Fifth Circuit's interpretation. The facts in *Riddle* resemble the facts of this case: the habeas petitioner pursued a direct appeal to Missouri's intermediate appellate court, but never bothered to seek discretionary review in the Missouri Supreme Court. The time for seeking that review expired on February 7, 2001, 15 days after the intermediate appellate court issued its decision. See Mo. Sup. Ct. R. 83.02. But the intermediate appellate court did not issue its mandate until February 15, 2001. Had this case arisen in the Fifth Circuit, *Roberts* would require courts to start the one-year clock on February 7, 2001—the date of "the expiration of the time for seeking [direct] review." Under the Fifth Circuit's interpretation of section 2244(d)(1)(A), the statute provides one starting point for those who pursue their direct appeals all the way to the Supreme Court of the United States ("the conclusion of direct review"), and another for those who

abandon their direct appeals before the Supreme Court rules on their certiorari petition ("the expiration of the time for seeking such review").

But the Eight Circuit's opinion in *Riddle* applies a last-in-time rule to the separate starting points described in section 2244(d)(1)(A), allowing the habeas petitioner to run the one-year clock from the later of "the conclusion of direct review" or "the expiration of the time for seeking such review." As the *Riddle* Court explains:

> "[T]he expiration of the time for seeking [direct] review" occurred when Riddle did not file the first motion to transfer (15 days after the decision by the Missouri Court of Appeals). * * * The AEDPA statute of limitations, however, does not begin then *if* the alternative trigger, "conclusion of direct review," occurs later. In factual situations like the present case, the conclusion of direct review for purposes of § 2244(d)(1)(A) does occur later, when the Missouri Court of Appeals issues its mandate.

Riddle, 523 F.3d at 856.

In the Fifth Circuit, "the conclusion of direct review" can occur only when the Supreme Court of the United States either denies the certiorari petition on direct appeal or rules on its merits. If the petitioner failed to pursue his direct appeals to the Supreme Court of the United States, the "conclusion of direct review" prong is inapplicable,

and habeas courts look *only* to the date of "the expiration of the time for seeking [direct] review" when applying section 2244(d)(1)(A).[2] The Eighth Circuit, by contrast, requires federal habeas courts to determine the date on which "the conclusion of direct review" occurs in *all* cases—including those in which the petitioner aborted his direct appeals before seeking review in the State's highest court. If this postdates the date of "the expiration of the time for seeking [direct] review," then the one-year clock starts on the later of these two dates.

As far as we are aware, only two other circuits have issued holdings on this question.

The Eleventh Circuit has one decision that appears to agree with the Eighth Circuit, and a later ruling that embraces the Fifth Circuit's approach. The first of these cases, *Tinker* v. *Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001), states that section 2244(d)(1)(A)'s limitations period should begin on the date that the intermediate state appellate court issues its mandate, in cases where the prisoner fails to appeal to the state supreme

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[2] Other Fifth Circuit cases have applied *Roberts*'s either-or framework. See, *e.g.*, *Foreman* v. *Dretke*, 383 F.3d 336, 338 (5th Cir. 2004) ("Direct review, which includes a petition for certiorari to the Supreme Court, occurs 'when the Supreme Court either rejects the petition for certiorari or rules on its merits.' * * * If no petition is filed, then we examine the second method of creating finality, 'the expiration of the time for seeking such review.'") (citing *Roberts*, 319 F.3d at 694).

court. *Id.* at 1333 ("Under Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal. * * * Tinker's mandate issued on February 14, 1997, and thus he had until February 13, 1998, to file his § 2254 petition, absent tolling of the limitations period."). But *Pugh* v. *Smith*, 465 F.3d 1295, 1299 (11th Cir. 2006), adopts the Fifth Circuit's approach to section 2244(d)(1)(A), without mentioning the earlier decision in *Tinker*:

> If a prisoner petitions the Supreme Court for a writ of certiorari, his conviction becomes final when the Supreme Court denies the petition or affirms the conviction. * * * If he does not petition the Supreme Court, the prisoner's conviction becomes final when the time for filing that petition expires.

Ibid. If we treat the later of these pronouncements as the authoritative view of the Eleventh Circuit, then the Eleventh Circuit is aligned with the Fifth, but it is more precise to characterize the Eleventh Circuit as falling on both sides of this issue.

The Ninth Circuit also straddles this circuit conflict. Its ruling in *Wixom* v. *Washington*, 264 F.3d 894, 897-898 (9th Cir. 2001), seems to adopt the Eighth Circuit's last-in-time approach to section 2244(d)(1)(A):

> [B]ecause the denial of his appeal is a decision terminating review, and Wixom did not appeal this denial to the Washington Supreme Court, we conclude that it marks "the conclusion of direct review." This conclusion does not end our inquiry, however. Section 2244(d)(1)(A) provides that the one-year limitation period "shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Because Wixom could have sought review by the Washington Supreme Court, the limitations period did not start until his time to seek such review expired.

Id. at 897-898. Yet *Hemmerle* v. *Schriro*, 495 F.3d 1069, 1073-1074 (9th Cir. 2007), holds, in a case with facts similar to this one, that section 2244(d)(1)(A) triggers the one-year clock "upon the expiration of the time for seeking review of the Court of Appeals decision in the Arizona Supreme Court," and does not even try to ascertain the date on which "the conclusion of direct review" occurred.

REASONS FOR DENYING THE WRIT

Gonzalez's petition presents this Court with a 1-1 circuit split between the Fifth and Eighth Circuits, while the Ninth and Eleventh Circuits each have taken inconsistent positions on the section 2244(d)(1)(A) issue. Further percolation could aid

this Court's eventual resolution by enabling the Ninth and Eleventh Circuits to resolve their intra-circuit tensions and perhaps produce an opinion with more extensive reasoning. Two additional considerations also counsel against a grant of certiorari in this case. First, the issue that Gonzalez presents will rarely arise because it affects only a small subset of habeas petitioners—those who both terminate their direct appeals before reaching this Court while simultaneously preserving an exhausted claim for federal habeas courts to review. Second, Gonzalez's petition is a poor vehicle for resolving this issue because the COA violates both 28 U.S.C. 2253(c) and *Slack*, casting a shadow over the Fifth Circuit's jurisdiction as well as this Court's ability to reach the merits of this case. It is more prudent for this Court to wait for another petitioner who comes with a clean and unassailable COA.

Finally, if this Court decides to grant certiorari in this case, it should not extend the writ to any of the three questions described in Gonzalez's petition. Neither the Fifth Circuit's opinion in this case, nor the earlier *Roberts* opinion on which it relies, purports to apply or interpret the meaning of "the conclusion of direct review" in section 2244(d)(1)(A), so the first and second questions that Gonzalez proffers are not even presented by this case. The third question that Gonzalez proposes—"[w]hether 'expiration of time for seeking [direct] review' under Section 2244(d)(1)(A) includes the ninety-day period

for filing a petition for writ of certiorari with this Court even when the petitioner forewent discretionary review in the state's highest court"—needs more percolation. No court of appeals has analyzed this question, and the circuit split that Gonzalez contrives rests on nothing more than conclusory remarks and offhand dicta.

I. The Issue Rarely Arises Because Habeas Petitioners Who Fail To Pursue Direct Appeals To The State Supreme Court Will Forfeit Their Claims Under *O'Sullivan* v. *Boerckel*.

The circuit split presented in this case affects only a narrow subset of habeas applicants—those who quit on their direct appeals before reaching the State's highest court *and* who nevertheless preserved an exhausted claim for a federal habeas court to review. Few habeas applicants will fall into this category, because 28 U.S.C. 2254(b) requires state prisoners to exhaust their claims before presenting them to federal habeas courts, and exhaustion can occur only if a prisoner "'fairly present[s]' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)." *Baldwin* v. *Reese*, 541 U.S. 27, 29 (2004). A prisoner who spurns an opportunity to present his claims to the state supreme court cannot pursue those claims in federal collateral proceedings; his failure to exhaust permanently bars him from presenting these claims

in a habeas corpus petition. See *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 848-849 (1999).

Baldwin and *O'Sullivan* make clear that any habeas petitioner who (like Gonzalez) fails to seek discretionary review in the highest state court will run headlong into an exhaustion dismissal, unless his petition asserts claims that he could not have raised on direct appeal (such as ineffective assistance of counsel, or claims based on newly discovered evidence). If a petitioner encounters this exhaustion barrier, the statute-of-limitations issues will not matter. His unexhausted claims will be pitched out under 28 U.S.C. 2254(b) regardless of their timeliness, and courts will not need to resolve the section 2244(d)(1)(A) issue presented by this case. See 28 U.S.C. 2254(b)(3) (providing that an exhaustion defense cannot be waived "unless the State, through counsel, expressly waives the requirement"). The only situations in which Gonzalez's proposed interpretation of 28 U.S.C. 2244(d)(1)(A) could make a difference are in cases where a habeas petitioner: (a) neglects to seek direct review in the state supreme court; (b) manages to avoid a dismissal on exhaustion grounds by presenting a claim that was unavailable during the direct-appeal process; and (c) gambles by filing his habeas petition after the earliest possible date on which the period of limitations might expire. Such cases are rare, which may explain why many circuits have never ruled on the issues presented in

Gonzalez's petition in the 15 years since AEDPA's enactment.

Even if Gonzalez is correct to assert that "a significant percentage of state prisoners on direct review forgo discretionary review in their State's highest court," Pet. at 4, the exhaustion doctrine will squelch every claim that the petitioner could have raised before the State's highest court on direct appeal, without any need for a court to engage the statute of limitations. This factor should weigh heavily in this Court's consideration of Gonzalez's petition, as this Court may wish to preserve its scarce resources for issues affecting more than just a small number of habeas petitioners.

II. The Certificate Of Appealability In This Case Fails To Comply With 28 U.S.C. 2253(c) And *Slack* v. *McDaniel*, Presenting Jurisdictional Hurdles To This Court's Involvement.

Even if this Court were inclined to resolve the circuit split presented by this case, this is the wrong case in which to do it. Gonzalez's appeal from the district court's decision is clouded with jurisdictional problems because the Fifth Circuit issued a defective certificate of appealability. This Court cannot resolve the circuit split in this case unless it first resolves whether the Fifth Circuit should have dismissed Gonzalez's appeal in light of this patently inadequate COA. This is no small task, given that the federal courts of appeals hold divergent views on

whether and when a deficient COA deprives them of appellate jurisdiction.

Federal law prohibits state prisoners from appealing their habeas applications unless they make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. 2253(c)(2) (emphasis added). Before a federal appellate court can assert jurisdiction over those appeals, the habeas applicant must obtain a COA that identifies "the specific issue or issues [that] satisfy the showing required" by section 2253(c)(2).

After the district court dismissed Gonzalez's claims as time-barred, the Fifth Circuit granted a COA limited to the following question: "whether *Roberts* has been overruled by *Lawrence* and, if so, whether [Gonzalez's] habeas application was timely filed." See 623 F.3d at 224. This COA states only that the district court's *procedural* ruling dismissing Gonzalez's petition on statute-of-limitations grounds is debatable. It nowhere states that Gonzalez has advanced a substantial *constitutional* claim. Nor does it specify the issues that satisfy section 2253(c)(2)'s "substantial showing" requirement, as required by 28 U.S.C. 2253(c)(3). These omissions violate both the federal habeas statute and this Court's holding in *Slack* v. *McDaniel*, which provides:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying

> constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim for the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. 473, 484 (2000) (emphasis added).

The COA issued in this case ignores *Slack* and spurns its requirements. Presenting only a procedural issue for review, the COA fails even to assert that any of Gonzalez's federal constitutional claims qualifies as "substantial" under section 2253(c)(2). Because section 2253(c)(2) and *Slack* withhold appellate jurisdiction over habeas applications absent a substantial federal constitutional claim, this defective COA cannot allow either the Fifth Circuit (or this Court) to resolve the issues presented in Gonzalez's petition for certiorari. At the very least, this Court will be unable to reach the merits of Gonzalez's certiorari petition without first resolving at least three jurisdictional questions.

First is whether a defective COA *requires* a reviewing court to vacate the COA and dismiss the appeal. In *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003), this Court held that the *absence* of a COA deprives courts of appellate jurisdiction to review a district court's denial of habeas relief. See *id.* at 336

("Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite * * * ."). But it is not clear whether this passage from *Miller-El* requires a *properly issued* COA as a precondition to appellate jurisdiction. And the courts of appeals look both ways on this question.

Three courts of appeals have indicated that appellate courts cannot review the merits of a habeas petition when a certificate of appealability fails to comply with section 2253(c). See *United States* v. *Cepero*, 224 F.3d 256, 259-262 (3d Cir. 2000) (holding that a defective certificate of appealability deprives reviewing courts of appellate jurisdiction); *Muniz* v. *Johnson*, 114 F.3d 43, 45 (5th Cir. 1997) (holding that a certificate that "does not comply with § 2253(c)(3) . . . is insufficient to vest jurisdiction in this court"); *Tiedeman* v. *Benson*, 122 F.3d 518, 522 (8th Cir. 1997) (treating a defective certificate "as if no certificate of appealability had been granted by the District Court").

But five circuits have rejected the notion that a certificate of appealability's failure to comply with section 2253(c) deprives the reviewing court of appellate jurisdiction. See, *e.g.*, *Owens* v. *Boyd*, 235 F.3d 356, 358 (7th Cir. 2001) ("[A] defect in a certificate of appealability is not a jurisdictional flaw."); *United States* v. *Talk*, 158 F.3d 1064, 1065 (10th Cir. 1998) ("[A]lthough the absence of a certificate precludes an appeal, an erroneously-

issued certificate does not deprive us of jurisdiction to hear a certified appeal."); *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999) ("[A] certificate of appealability issued without meeting the 'substantial showing of the denial of a constitutional right' requirement nonetheless suffices to confer appellate jurisdiction."); *Porterfield* v. *Bell*, 258 F.3d 484, 485 (6th Cir. 2001) ("[A] certificate of appealability, even if improvidently granted, vests jurisdiction in the court of appeals."); *James* v. *Giles*, 221 F.3d 1074, 1076 (9th Cir. 2000) ("Once that certificate [of appealability] is issued, we have jurisdiction even if the certificate was arguably 'improvidently granted.'"). Yet some of these circuits still assert the *power* to dismiss appeals that rest on defective certificates of appealability, even though they do not regard themselves as *required* to do so as a matter of appellate jurisdiction. See, *e.g.*, *Phelps* v. *Alameda*, 366 F.3d 722, 728 (9th Cir. 2004) ("[A]lthough a merits panel generally need not examine the propriety of a COA, it nevertheless retains the power to do so."); *United States* v. *Marcello*, 212 F.3d 1005, 1007-1008 (7th Cir. 2000) (holding that "the best approach is to say we have discretion to decide the case by reviewing the validity of the C[O]A").

Second, this Court will have to resolve whether, and in what circumstances, a State forfeits its objection to a defective COA by failing to raise it promptly before the federal court of appeals. Director Thaler (regrettably) did not object to the

certificate of appealability while this case was pending in the Court of Appeals.[3] If this Court were to require a properly issued COA as a jurisdictional prerequisite to appeals in habeas cases, then this oversight should not matter. But if this Court rejects that view, it will have to address any forfeiture issues presented by the State's belated objections to Gonzalez's COA.

Finally, this Court will have to consider whether it can repair a defective COA by locating and specifying a "substantial showing of the denial of a constitutional right." Section 2253(c)(2) allows a "circuit Justice" to issue a COA; perhaps this allows the circuit Justice for the Fifth Circuit to examine Gonzalez's constitutional claims and unilaterally declare one (or more) of them "substantial." As far as we are aware, no circuit Justice has ever attempted to salvage a deficient COA in this manner, and it is not clear whether this maneuver would allow Gonzalez to continue in this Court or require him to return to the Fifth Circuit to start his appeal anew. Either way, this presents another novel issue to resolve, which this Court can avoid by waiting for a petitioner who obtains a proper COA at the outset.

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[3] Because this issue may affect appellate jurisdiction, the State is obligated to mention it now so that this Court may decide how to proceed.

III. If This Court Decides To Grant Certiorari In This Case, It Should Not Extend The Writ To Any Of The Three Questions Presented In Gonzalez's Petition.

Given that this case presents a disagreement between the Fifth and Eighth Circuits over the meaning of section 2244(d)(1)(A), we recognize that this Court might decide to grant certiorari notwithstanding the concerns discussed in Sections I and II. If this Court decides to grant, we urge this Court to limit the writ of certiorari to the following question:

> When a prisoner declines to seek review in the State's highest court on direct appeal, must section 2244(d)(1)(A)'s limitations period always begin at "the expiration of the time for seeking such review," or must courts also ascertain when "the conclusion of direct review" occurred and start the limitations period on the later of these two dates?

That is the issue on which the Fifth and Eighth Circuits disagree, and it is the only circuit split implicated by the Fifth Circuit's decision in this case.

Describing this case as presenting a "three-tiered conflict" may seem like a useful rhetorical device from the standpoint of Gonzalez's lawyers, who want to leave an impression that no reasonable jurist could possibly vote to deny certiorari in this case. But it falls flat as soon as one reads the Fifth

Circuit's opinion in *Roberts*, as well as the opinion below. Neither ruling purports to apply or interpret the meaning of "the conclusion of direct review" in section 2244(d)(1)(A), so the first two questions presented in Gonzalez's certiorari petition are not implicated by this case. The third question presented in Gonzalez's petition has not been analyzed by any of the appellate decisions that he cites, and further percolation is warranted before this Court weighs in on that question.

We consider each of Gonzalez's proposed questions in turn:

> **A. "Whether state law is relevant to determining when the States' direct review processes conclude, as the Seventh, Eighth, and Eleventh Circuits have held, or whether AEDPA dictates a single federally prescribed point in time when all state direct-review processes are deemed to have concluded, as the Fifth and Ninth Circuits have held."**

The Fifth Circuit's opinion never attempts to determine when the State's "direct-review processes" conclude under section 2244(d)(1)(A), and it does not hold that a "single federally prescribed point in time" governs this inquiry. Rather, it holds only that section 2244(d)(1)(A)'s one-year limitations period *must* begin on the date of "the expiration of the time for seeking [direct] review" if the petitioner

does not appeal to the state court of last resort," and that courts need not interpret or apply section 2244(d)(1)(A)'s "conclusion of direct review" prong in those situations. The Fifth Circuit also determined that the date on which "the expiration of the time for seeking [direct] review" occurred was August 11, 2006—"the last date under the Texas Appellate Rules that he could petition for discretionary review of his judgment." 623 F.3d at 224. The latter of these conclusions is unassailable, and there is no circuit split on whether federal- or state-law standards determine "the expiration of the time for seeking [direct] review"—a court simply applies the deadlines for appeal established in the state's rules of appellate procedure. The only point of contention is whether the Fifth Circuit erred by looking exclusively to the "the expiration of the time for seeking [direct] review" clause in section 2244(d)(1)(A), never bothering to calculate or consider the date on which "the conclusion of direct review" occurred. If this Court decides that the Fifth Circuit was wrong to consider only the date of "the expiration of the time for seeking [direct] review," then it should remand for the Fifth Circuit to determine the date of "the conclusion of direct review," rather than decide the issue for itself.

B. "Whether, under AEDPA, the 'conclusion of direct review' occurs upon (i) issuance of an intermediate appellate court's mandate, as the Eighth Circuit has held, (ii) expiration of the time for seeking discretionary review in the state's highest court, as the Fifth Circuit held, or (iii) issuance of the intermediate appellate court's decision, as the Ninth Circuit has held."

Again, the Fifth Circuit's opinion does not reach this issue, and neither does its earlier ruling in *Roberts*. Neither opinion applies the "conclusion of direct review" prong in section 2244(d)(1)(A) because the Fifth Circuit deems this to apply only when prisoners pursue their direct appeals all the way to the Supreme Court of the United States. Gonzalez did not do so; thus his one-year limitations period under section 2244(d)(1)(A) can begin *only* on the date of "the expiration of the time for seeking [direct] review." The Fifth Circuit's decision does not implicate the meaning of "conclusion of direct review" in section 2244(d)(1)(A).

C. "Whether 'expiration of the time for seeking [direct] review' under Section 2244(d)(1)(A) includes the ninety-day period for filing a petition for a writ of certiorari with this Court even when the petitioner forewent discretionary review in the state's highest court, as the Fourth and Seventh Circuits have held, or excludes that time, as the Fifth, Eighth, Ninth, and Eleventh Circuits have held."

To say that these circuits have issued "holdings" on this question is a considerable overstatement. The Fifth Circuit has assumed without any discussion that "the time for seeking [direct] review" expires as soon as a prisoner allows the window for pursuing direct appeals to close. See *Gonzalez*, 623 F.3d at 224; *Roberts*, 319 F.3d at 693 & n.14. None of its opinions even considers whether a prisoner who quits the direct-appeals process before reaching the "state court of last resort" could get a 90-day bonus when he is unable to petition for writ of certiorari.

The Fourth Circuit's opinion in *Hill* v. *Braxton*, 277 F.3d 701 (2002), includes the following sentence, which Gonzalez quotes in his certiorari petition: "If no petition for a writ of certiorari is filed in the United States Supreme Court, then the limitation period begins running when the time for doing so—90 days—has elapsed." *Id.* at 704. But this

statement does not hold, or even imply, that someone like Gonzalez should get an extra 90 days before AEDPA's one-year clock starts. Gonzalez aborted his direct appeals before reaching the State's "court of last resort," so he is unable to petition for writ of certiorari, and the 90-day window described in this Court's Rule 13.1 cannot "elapse" when it was never triggered in the first place. See Sup. Ct. R. 13.1 (requiring filing within 90 days of a state court of last resort entering judgment). Gonzalez notes that the petitioner in *Hill*, like Gonzalez, failed to seek review in the state supreme court. But Gonzalez neglects to mention that the opinion in *Hill* never reaches or resolves any issue involving the meaning of section 2244(d)(1)(A). The court in *Hill* held only that district courts could dismiss habeas petitions for untimeliness sua sponte, but that they must give pro se litigants notice before doing so. See 277 F.3d at 705-708. Any stray comment in *Hill* about the meaning of section 2244(d)(1)(A) is dictum, and cannot be invoked to establish a circuit split.

The Seventh Circuit's opinion in *Balsewicz* v. *Kingston*, 425 F.3d 1029 (2005), likewise fails to reach the section 2244(d)(1)(A) issue. The petitioner in *Balsewicz*, like Gonzalez, never sought discretionary review in the state supreme court. And although the Seventh Circuit did assert that the petitioner's conviction "became final on August 22, 1994, allowing for the ninety days in which Balsewicz could have applied for certiorari," the

court went on to note the petitioner's conviction became final prior to AEDPA's enactment on April 24, 1996, so the Court ran the one-year limitations period from AEDPA's enactment date rather than the moment of finality. Section 2244(d)(1)(A) had no bearing whatever on the court's decision in *Balsewicz*, so the Seventh Circuit's statements about section 2244(d)(1)(A) are nothing more than casual asides that do not qualify as holdings, and they do not create a circuit split that warrants this Court's intervention.

* * * * *

Gonzalez is correct to note that the Fifth Circuit's interpretation of section 2244(d)(1)(A) differs from the Eighth Circuit's, but he mischaracterizes this disagreement and needlessly complicates the issues for this Court. The Fifth Circuit holds that courts must look exclusively to the "expiration of the time for seeking such review" prong in cases where the habeas petitioner failed to pursue a direct appeal to the State's highest court, while the Eighth Circuit requires courts also to ascertain "the conclusion of direct review" and start the one-year clock from the later of these two dates. *That* is the circuit split presented by this case, and it is the only potentially certworthy issue for this Court.

CONCLUSION

Because of the vehicle problems presented by the defective COA and the small number of habeas

applicants affected by this issue, the petition for writ of certiorari should be denied. If the Court decides to grant certiorari, it should limit the writ to the following question:

> When a prisoner declines to seek review in the State's highest court on direct appeal, must section 2244(d)(1)(A)'s limitations period always begin at "the expiration of the time for seeking such review," or must courts also ascertain when "the conclusion of direct review" occurred and start the limitations period on the later of these two dates?

Respectfully submitted.

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