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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether there was jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal.

II. Whether the application for a writ of habeas corpus was out of time under 28 U.S.C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 623 F.3d 222. The district court's opinion (Pet. App. 9a-10a) and the magistrate judge's report and recommendation (Pet. App. 11a-21a) are not reported.

JURISDICTION

The court of appeals entered its judgment on October 6, 2010. Pet. App. 1a. A timely petition for a writ of certiorari was filed on January 4, 2011, and

the petition was granted by this Court on June 13, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant constitutional and statutory provisions and court rules are reproduced at Pet. App. 22a and Addendum, *infra,* 1a-10a.

STATEMENT OF THE CASE

1. Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to "further the principles of comity, finality, and federalism," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), "without undermining basic habeas corpus principles," *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). Accordingly, Congress crafted AEDPA's provisions in a manner that preserved the historic "importance of the Great Writ," *id*., in ensuring that the federal courthouse "doors" remain open to "habeas petitioners seeking" in a timely manner their one opportunity for federal review of their constitutional claims, *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007*).* *See also* H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (Feb. 9, 1995) ("This reform will curb the lengthy delays in filings that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.").

As relevant here, AEDPA provides that, if a federal habeas petition has been dismissed in district court, "an appeal may not be taken to the court of appeals" "[u]nless a circuit justice or judge issues a

certificate of appealability." 28 U.S.C. § 2253(c)(1). The statute further states that "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Finally, AEDPA instructs that, when issuing a certificate of appealability, the judge or circuit justice "shall indicate which specific issue or issues satisfy the showing required by" Section 2253(c)(2). 28 U.S.C. § 2253(c)(3).

AEDPA separately imposes a one-year "period of limitation" for state prisoners to apply for a federal writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The limitation period begins running when the judgment of conviction becomes "final," which (as relevant here) is defined as "the latest of" "the conclusion of direct review or the expiration of the time for seeking such review." *Id.* That limitation period is tolled for "the time during which a properly filed application for State post-conviction or other collateral review * * * is pending." 28 U.S.C. § 2244(d)(2).

2. On June 2, 1995, Robert Velasquez was killed near an apartment complex in Irving, Texas. J.A. 107. Two automobiles were seen at the scene of the shooting. Witnesses said petitioner, Rafael Arriaza Gonzalez, was in one car, and two other Hispanic males were in the other. J.A. 275-276.

Petitioner was indicted for murder on June 28, 1995. J.A. 107. Officers attempted to execute a warrant for his arrest at his last known addresses. *Id.* When they did not find petitioner, the officers made no further effort to locate him. J.A. 43-45.

Approximately six weeks later, the victim's sister, Luz Del Cid, informed the investigating

officer, Detective Harold Renfroe, that petitioner was in Marajuma, a small village in his native Guatemala. J.A. 47. Petitioner had been there since at least the time of the murder. He had no knowledge that he had been indicted, and it is undisputed that he was making no attempt to evade detection. J.A. 115. Indeed, while living in Marajuma, he sought a visa from the United States Embassy in Guatemala to return to the United States. *Id.*

On August 3, 1995, Detective Renfroe informed embassy officials that petitioner had been located in Guatemala. But neither he nor anyone else involved in the investigation took any further steps to have petitioner apprehended. J.A. 47, 49.

Six years later, the Dallas District Attorney's Office began extradition proceedings. Petitioner was extradited in July 2004. J.A. 110. His trial commenced on July 11, 2005, almost ten years after his indictment. J.A. 111.

3. At trial, petitioner moved for dismissal on the ground that the prosecution's unjustified ten-year delay in apprehending him and bringing him to trial violated the Sixth and Fourteenth Amendments' guarantee of a "speedy" trial. U.S. Const., Amends. VI & XIV. Petitioner further contended that, because he had been unaware of the charges against him for much of that time, the inordinate delay in prosecution substantially prejudiced his ability to investigate the charges effectively or to mount a defense at trial. J.A. 26. The trial court denied the motion to dismiss. J.A. 111. The identity of the shooter (petitioner or one of the other Hispanic males at the scene) was the central issue at trial, and the

proof turned critically on witnesses' memories of events that had occurred a decade earlier. J.A. 26, 68, 265.

Petitioner was convicted and sentenced to thirty years' imprisonment. Pet. App. 2a. His court-appointed counsel filed a timely appeal to the Texas intermediate court of appeals, raising, *inter alia*, his speedy trial claim. J.A. 213. The court of appeals affirmed his conviction on July 12, 2006. *Gonzalez v. State*, No. 05-05-01140-CR, 2006 WL 1900888 (Tex. App. July 12, 2006).

Petitioner's counsel then terminated his representation without filing a petition for discretionary review with the Texas Court of Criminal Appeals. Pet. App. 2a; J.A. 325. The time for filing that petition expired on August 11, 2006. Pet. App. 4a. The intermediate court of appeals issued its mandate on September 26, 2006, *id*. at 2a, which concluded direct review of his conviction in the state court system, *see* Tex. R. App. P. 18.1. *See also Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). Prior to that date, any application for state postconviction relief would have been premature. *Johnson*, 12 S.W.3d at 473 ("This Court does not have jurisdiction to consider an application for writ of habeas corpus pursuant to Art. 11.07 until the felony judgment from which relief is sought becomes final.").

4. On July 19, 2007, petitioner filed *pro se* in Texas state court a timely and proper petition for a writ of habeas corpus, Tex. R. Crim. P. Art. 11.07. Pet. App. 2a. Petitioner raised, *inter alia*, his constitutional speedy trial claim. J.A. 88, 106. The state court recommended that his petition be denied,

J.A. 131, and forwarded the petition to the Texas Court of Criminal Appeals, *see* Tex. Code Crim. P. Art. 11.07 § 3(b). That court denied the petition on the merits on November 21, 2007. J.A. 133.[1]

5. On January 24, 2008, petitioner filed *pro se* a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, raising, as relevant here, his Sixth and Fourteenth Amendment speedy trial claim. Pet. App. 2a; J.A. 134.

Excluding the time during which his properly filed state habeas petition was pending, 28 U.S.C. § 2244(d)(2), petitioner's federal habeas petition was filed 360 days after the state court of appeals issued its mandate, and 346 days after the time period for filing a certiorari petition on direct review expired. The filing, however, was 406 days after expiration of the time to seek discretionary review by the Texas Court of Criminal Appeals.

A magistrate judge recommended that the petition be dismissed as untimely. Pet. App. 11a-21a. Petitioner timely filed objections, *id.* at 10a, but the district court adopted the recommendation and entered an order dismissing the petition as untimely, *id*. at 9a-10a. In so ruling, the court acknowledged

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[1] Petitioner's first state habeas petition, which was submitted on February 8, 2007, was dismissed as improperly filed because petitioner stated his grounds for relief in his brief instead of in the required form. Pet. App. 2a, 4a n.2; *see* Tex. R. App. P. 73.1(c). That petition thus did not toll the running of AEDPA's limitation period. *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

that its decision would cause AEDPA's one-year limitation period to run for almost seven weeks before state law would deem the conviction final and permit the filing of an application for postconviction relief. *Id*. at 10a.

6. Petitioner filed a timely notice of appeal on September 4, 2008. J.A. 155. That filing also requested a certificate of appealability from the district court. *See* Fed. Rules Governing Section 2254 Cases ("Habeas Rules"); Fed. R. App. P. 4(a)(2). The district court rejected that request. J.A. 164.

Petitioner then filed a request for a certificate of appealability in the court of appeals, in accordance with Federal Rule of Appellate Procedure 22 and Habeas Rule 11. J.A. 165. Petitioner raised his speedy trial claim in his brief in support of his application for a certificate of appealability, J.A. 178, including copies of the state appellate court's opinion on the speedy trial claim, J.A. 190, his state appellate brief, J.A. 208, relevant excerpts from the state speedy trial hearing, J.A. 235, his objections to the magistrate judge's recommendation that his federal habeas petition be denied, J.A. 327, and his reply to the State's response to his federal habeas petition, J.A. 337. The district court then submitted its full record, including petitioner's habeas petition, to the court of appeals for its consideration in conjunction with petitioner's application for a certificate of appealability. J.A. 7.

Judge Garza granted the certificate of appealability, identifying as a qualifying issue the question "whether *Roberts* [*v. Cockrell*, 319 F.3d 690 (5th Cir. 2003)] has been overruled by *Lawrence* [*v. Florida*, 549 U.S. 327 (2007)] and, if so, whether

[petitioner's] habeas application was timely filed." J.A. 347.

7. The court of appeals then affirmed dismissal of the petition as untimely. Pet. App. 1a-8a. The court held that "state court definitions" cannot "determine finality" under 28 U.S.C. § 2244(d)(1)(A), and thus a "uniform federal rule" had to be applied to decide when "the conclusion of direct review" occurred, since petitioner did not seek discretionary review of his conviction in the Texas Court of Criminal Appeals. Pet. App. 8a.

The court of appeals further held that, under Section 2244(d)(1)(A), the uniform federal rule for determining when direct review becomes final would be the expiration of the time for seeking discretionary review from the State's highest court. Pet. App. 4a. As required by circuit precedent, the court also excluded from its calculation the ninety-day period for seeking certiorari review in this Court. Pet. App. 4a; *see Roberts*, 319 F.3d at 693 & n.14.

SUMMARY OF ARGUMENT

I. The court of appeals had jurisdiction to issue a certificate of appealability and to adjudicate this case. Petitioner properly invoked the court's jurisdiction through the timely filing of a notice of appeal and applications for a certificate of appealability. A certificate of appealability, moreover, was issued, thereby satisfying AEDPA's jurisdictional precondition to appeal. 28 U.S.C. § 2253(c)(1).

Section 2253 separately requires that the habeas petitioner make a "substantial showing of the denial of a constitutional right" for a certificate to issue. 28

U.S.C. § 2253(c)(2). That requirement does not affect the court's jurisdiction either to issue a certificate of appealability or to decide the underlying appeal. Section 2253(c)(2) lacks the express references to the courts' power to act that Congress commonly includes when it intends a provision to have jurisdictional consequence and, indeed, that were included in the neighboring provision (subsection 2253(c)(1)) but were tellingly omitted from subsection (c)(2). Nor does subsection (c)(2)'s character warrant jurisdictional status, given its emphasis on the threshold legal viability of the underlying constitutional claim. Such merits-based showings are not traditionally accorded jurisdictional significance.

But this Court need not even decide that question in this case because, jurisdictional or not, petitioner's constitutional speedy trial claim amply met the "substantial showing" requirement. Petitioner documented what appears to be the longest gap between indictment and trial in any speedy trial case that has ever come before this Court. That gives rise to a strong presumption of prejudice. Combined with the admissions of key state officials that much of the delay was due to their self-chosen inactivity, and the fact that the trial turned entirely on the time-strained recall of witnesses, petitioner stated a valid and reasonably debatable constitutional claim.

Finally, the court of appeals' failure to recite petitioner's substantial constitutional claim in the certificate of appealability is not jurisdictional either. AEDPA requires only that the court "indicate" the underlying constitutional question supporting

issuance of the certificate. 28 U.S.C. § 2253(c)(3). Given that a certificate was issued in this case on the basis of a public record that documented a substantial constitutional question, any oversight in the certificate's written content is not a misstep of jurisdictional consequence. Nothing in AEDPA's text suggests that, when diligent habeas petitioners have made the required statutory showing and have done everything within their power to timely present their claims in federal court, Congress intended a court's drafting errors to deprive them of their first—and likely only—opportunity for federal habeas review of substantial constitutional claims.

II. This Court has lamented that, "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Court interpretations of AEDPA's text should not make that problem worse. But that is what the court of appeals did here. Congress, quite straightforwardly and with uncommon (for AEDPA) silk-purse clarity, directed that the one-year limitation period for filing federal habeas petitions does not commence until "the latest of" two dates: "the conclusion of direct review" of the state judgment of conviction, or "the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

The moment of Texas's "conclusion of direct review" of petitioner's judgment of conviction is a known date: September 26, 2006, the day the intermediate appellate court's mandate issued. The expiration of time for seeking further direct review is also readily calculable: August 11, 2006 for review in the Texas Court of Criminal Appeals, and October 10,

2006 for review in this Court. And a calendar easily answers which of those dates is "latest."

Rather than read AEDPA as written, however, the court of appeals ruled that the *earliest* date controlled. Pushing aside the plain meaning of the governing text, the court held that AEDPA superimposes a homogenized federal date of finality that means exclusively the "expiration of time for seeking * * * review" in the next state court. In the court's and respondent's view, when a defendant does not seek discretionary direct review in the State's highest court, AEDPA's "conclusion of direct review" prong evaporates.

That is not how this Court reads statutes. The "latest of" does not mean the earliest of, and two disjunctive timeframes—(i) the conclusion of direct review, or (ii) the expiration of time to seek review—cannot be judicially melded into a single inquiry. Whether or not a defendant seeks discretionary review from a State's highest court, his direct review process still has a conclusion. And if the date that direct review concludes is later than the expiration of time for seeking further review, AEDPA plainly says that the later date *controls*; it certainly cannot be ignored.

That is particularly true because Congress crafted AEDPA's timing provision to be respectful of the States' judicial processes and to give them a full opportunity to complete their own review before the federal habeas process intervenes. The court of appeals' scheme, however, casts state processes aside in favor of a standardized federal model. Still worse, the court's artificially crafted endpoint for state direct review starts the federal limitation period running at

a time when state law still forbids the prisoner from filing for state postconviction review. That puts state and federal law at cross-purposes, confounding Congress's aims of promoting federalism and comity.

ARGUMENT

Congress enacted AEDPA to promote federalism principles while ensuring that the Great Writ continues to provide diligent habeas petitioners one full and fair opportunity for federal judicial review of their constitutional claims. The Fifth Circuit's decision upends both of those goals. Under the court of appeals' decision, AEDPA pays no heed to the States' own laws governing when their own direct review processes conclude and when their own avenues for postconviction relief open to prisoners. Moreover, the court's disregard for state processes locks many state prisoners in a procedural vise, with AEDPA's timing requirements demanding that they seek state postconviction review at a time when state law forbids it.

To make matters worse, respondent now argues that AEDPA slams the courthouse doors shut on petitioner's first and only chance for federal consideration of a substantial constitutional speedy trial claim not because of anything petitioner did, but because of a federal court's mistake in drafting his certificate of appealability. While AEDPA tightened the rules for federal habeas review, it did not squeeze all common sense out of the law.

I. THE COURT OF APPEALS HAD JURISDICTION TO ISSUE THE CERTIFICATE OF APPEALABILITY AND TO ADJUDICATE THE APPEAL

AEDPA's requirement that a certificate of appealability issue, 28 U.S.C. § 2253(c)(1), is a jurisdictional prerequisite to appellate review. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court addressed how the certificate of appealability requirement should apply when, as here, a district court denies a habeas petition solely on procedural grounds, without addressing the underlying constitutional claims. This Court held that, in those circumstances, a certificate "should issue (and an appeal of the district court's order may be taken) if the prisoner shows * * * that jurists of reason" both (i) "would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (ii) "would find it debatable whether the district court was correct in its procedural ruling." *Id*. at 478.

In this case, the jurisdictional requirement of Section 2253(c)(1) was satisfied when the certificate of appealability issued. However, while the court's certificate identified the procedural question meriting appellate review (timeliness), it did not expressly identify the substantive constitutional claim that supported its issuance, as *Slack* requires. That omission was a non-jurisdictional misstep by the appellate court over which petitioner had no control. While that error might have been subject to challenge in petitioner's merits appeal or in a separate government appeal from the certificate's issuance, it

was waived by respondent when not raised below. *See* Cert. Opp. 16-17 (admitting failure to object to certificate). Accordingly, because issuance of the certificate vested the court of appeals with jurisdiction under Section 2253(c)(1), gaps in the content of the certificate did not strip the court of appeals of the power to act.

A. The Court Of Appeals Had Jurisdiction To Issue The Certificate Of Appealability

1. All Jurisdictional Prerequisites Were Satisfied

The plain text of AEDPA Section 2253(c)(1) makes the issuance of a certificate of appealability a jurisdictional precondition to appellate review because it says that "an appeal may not be taken" without it. 28 U.S.C. § 2253(c)(1); *see Miller-El*, 537 U.S. at 335-336. When Congress so "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," this Court will give it the intended jurisdictional effect. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006).

That jurisdictional prerequisite was met in this case because a circuit judge issued petitioner a certificate of appealability. J.A. 346-347; Pet. App. 3a. The court of appeals, moreover, had jurisdiction to enter that order. Section 2253(c)(1) authorizes a "circuit justice or judge [to] issue[] a certificate of appealability." 28 U.S.C. § 2253(c)(1).

In addition, petitioner properly invoked the appellate court's jurisdiction. He filed a timely notice of appeal on September 8, 2008, within thirty days of the district court's order dismissing his habeas

petition. 28 U.S.C. §§ 1291, 2253(a); Fed. R. App. P. 4(a); Habeas Rule 11(b).

In addition, when the district court denied his request for a certificate of appealability, J.A. 162-164, petitioner timely renewed his request for a certificate with the Fifth Circuit 23 days after the district court's denial. *See* Habeas Rule 11; J.A. 165-166. The court of appeals thus had jurisdiction to issue the certificate of appealability, and issuance of that certificate, in turn, vested the court with jurisdiction to adjudicate the appeal.[2]

2. Petitioner Satisfied Section 2253(c)(2)'s "Substantial Showing" Requirement

Section 2253(c)(2) of AEDPA separately provides that a "certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court did not address in *Miller-El* whether that "substantial showing" requirement was jurisdictional. Nor need the Court do so here because, even if it were, petitioner's application for a certificate of appealability met that standard by stating a substantial constitutional speedy trial claim. In any event, AEDPA's language and

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[2] Petitioner's application in the district court for a certificate of appealability had no adverse effect on the notice of appeal. Indeed, under the federal appellate rules, a request for issuance of a certificate of appealability is embedded in every notice of appeal. Fed. R. App. P. 22(b)(2). Beyond that, Federal Rule of Appellate Procedure 4(a)(2) provides that the notice of appeal took effect upon the district court's disposition of the post-order motion.

structure do not make the "substantial showing" requirement jurisdictional, as every court of appeals to address the issue, save one, has recognized.[3]

a. Petitioner made a substantial showing of a Sixth Amendment speedy trial violation

There is no serious dispute that, with respect to the procedural question identified in the certificate of appealability, petitioner made a "substantial showing" that reasonable jurists could dispute whether his federal petition was time-barred, given that the law in multiple federal circuits would have found his petition to be timely. *See* Pet. 11-31.

Petitioner's application for a certificate of appealability, his petition for habeas corpus, the numerous record materials attached, and the other documents submitted to the Fifth Circuit in conjunction with the certificate of appealability determination, Fed. R. App. P. 22(b), likewise "show[ed], at least, that jurists of reason would find it debatable" whether his petition "states a valid claim of the denial of [his] constitutional right" to a speedy trial, *Slack*, 529 U.S. at 478. *See also Miller-El*, 537 U.S. at 336 ("The COA determination under § 2253(c)

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[3] *Compare Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997) (nonjurisdictional); *Buie v. McAdory*, 322 F.3d 980, 981-982 (7th Cir. 2003) (same); *Soto v. United States*, 185 F.3d 48, 51-52 (2d Cir. 1999) (same); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001) (same); *Phelps v. Alameda*, 366 F.3d 722, 726 (9th Cir. 2004) (same); *with United States v. Cepero*, 224 F.3d 256, 260, 267 (3d Cir. 2000) (en banc) (jurisdictional).

requires an overview of the claims in the habeas petition and a general assessment of their merits.").

In *Doggett v. United States*, 505 U.S. 647 (1992), this Court identified four factors to be weighed in evaluating a speedy trial claim under the Sixth Amendment: (1) "whether delay before trial was uncommonly long," (2) "whether the government or the criminal defendant is more to blame for that delay," (3) "whether, in due course, the defendant asserted his right to a speedy trial," and (4) "whether he suffered prejudice as the delay's result," *id*. at 651 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (Fourteenth Amendment speedy trial claim)). Petitioner "state[d]" a reasonably debatable claim that satisfied the *Doggett* test or that "at least" "deserve[d] encouragement to proceed further." *Slack*, 529 U.S. at 484.

First, petitioner showed that ten years passed between his indictment and trial, an "extraordinary" length of time that far surpasses this Court's one-year threshold for "presumptively prejudicial" delay. *Doggett*, 505 U.S. at 652 & n.1; *id*. at 658 (delay of more than one year "generally sufficient to trigger judicial review"); *Barker*, 407 U.S. at 533 (five years was "extraordinary" delay). Because "the presumption that pretrial delay has prejudiced the accused intensifies over time," *Doggett*, 505 U.S. at 652, petitioner's showing of a ten-year delay—which appears to be longer than this Court has ever encountered in a constitutional speedy trial claim—by itself states a substantial showing of a constitutional violation.

Second, petitioner showed that it is reasonably debatable whether the State bears the greater

responsibility for that delay. Time and again, Detective Renfroe admitted that, for five years, he "never followed up" on information he possessed about petitioner's location. J.A. 53-54, 60 ("Q: You never followed up with them [the U.S. Embassy]? A: No. Q: Did you ever consider Interpol? A: No. * * * I just didn't do it." * * * Q: Did you ever contact anyone I guess regarding any procedures you would have to take? A: No. Q: You just had one fax and one phone call. A: Yes, sir. Q: And then after that, in '96, it went unmonitored, correct? A: Yes. * * * Q: After that, between 1996, March 6th, 1996 and March 30th, 2001, did you do anything to try to find the defendant? A: No. Q: Did you ever attempt to follow up to see if anyone had taken any action on the information you provided through [Luz Del Cid]? A: No. Q: If Guatemala was looking for him, anything of that sort? A: No. Q: And you didn't give any information to the Dallas Sheriff's Office that he was in Guatemala, correct? A: No. Q: Did you give any information to the DA? A: No."). Because the Constitution's "toleration of such negligence varies inversely with its protractedness," *Doggett*, 505 U.S. at 657, petitioner stated a reasonably debatable speedy trial claim under the Constitution.[4]

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[4] The state trial court record, including the transcript from petitioner's speedy trial hearing, was provided to the Fifth Circuit in accordance with Federal Rule of Appellate Procedure 22, and thus was before the court when it considered the petition for a certificate of appealability. J.A. 11. Excerpts were also attached to petitioner's application for a certificate. J.A. 235-252.

Third, it is reasonably debatable that petitioner timely asserted his claim by moving to dismiss his indictment on March 14, 2005. J.A. 14-28. Petitioner could not have been expected to raise his objection for the first six years following indictment when he was unaware of the arrest warrant against him. *See Gonzalez v. State*, No. 05-05-01140-CR, 2006 WL 1900888, at *7 (Tex. Ct. App. July 12, 2006). Even then, petitioner had no capacity to raise the claim until after he was extradited and thus both within the jurisdiction of the Texas court and provided an attorney to make the motion. Moreover, petitioner did not know of the extent of the government's negligence until he received Detective Renfroe's notes on March 7, 2005 documenting that, by August 1995, the detective had already acquired the name of petitioner's village in Guatemala and received credible intelligence that petitioner was there. J.A. 25.

Finally, because the government's case turned critically on the testimony of individual witnesses, the delay was far more prejudicial than likely would have been in a case with some forensic evidence connecting the defendant to the crime. The "'most serious'" form of prejudice is "'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence * * * 'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Doggett*, 505 U.S. at 654 (alteration in original) (quoting *Barker*, 407 U.S. at 532). Here, there was nothing to link petitioner to the shooting—no gun, no identifying forensic analysis, no cameras or objective evidence of his presence—just the time-affected recall of witnesses. *See* J.A. 68.

This Court, moreover, has long recognized that the prejudice prong must be applied circumspectly. "[I]mpairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655 (quoting *Barker*, 407 U.S. at 532). Accordingly, "affirmative proof of particularized prejudice is not essential to every speedy trial claim," *Doggett*, 505 U.S. at 655, because defendants have no realistic capacity to prove what witnesses have forgotten.

Given that commonsensical approach to the prejudice showing, the evidence of adverse impact that petitioner documented, combined with the fact that this case turned entirely on witness memory, together crossed the *Slack* "reasonably debatable" threshold. After all, the test at this juncture is not whether petitioner proved an actual violation of his constitutional rights, or even whether it is more likely than not that he will prevail on his claim in habeas. The question is only whether the petitioner "state[d]" a claim that is "debatable." *Slack*, 529 U.S. at 478. As long as "reasonable jurists could debate" the issue, or the issues presented "were adequate to deserve encouragement to proceed further," Section 2253(c)(2) is satisfied. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (internal quotations omitted).

That standard was met based on the strong presumption of prejudice arising from the unprecedented length of the delay, the record evidence of negligence from the State's own detective, and the inherently significant impact of delay on a trial that turned entirely on witness recall.

b. Section 2253(c)(2) is not jurisdictional

The court of appeals' jurisdiction to issue the certificate of appealability was secure for the additional reason that the "substantial showing" requirement is not jurisdictional.

"'Jurisdiction,' this Court has observed, '"is a word of many, too many, meanings."' *Arbaugh*, 546 U.S. at 510 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). That is a problem, this Court has warned, because the over-labeling of statutory requirements as jurisdictional can have "drastic" consequences. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). The enforcement of statutory criteria as jurisdictional "alters the normal operation of our adversarial system" by compelling the courts to raise an issue *sua sponte*. *Id.* It can also "result in the waste of judicial resources and may unfairly prejudice litigants" because a disappointed litigant can upend "months of work on the part of the attorneys and the courts" by successfully challenging jurisdiction at any later stage. *Id.*

Accordingly, in determining whether Section 2253(c)(2)'s "substantial showing" requirement is jurisdictional, this Court applies a "readily administrable bright line" test that requires Congress to "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh*, 546 U.S. at 515-516. Where "Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516; *see Stern v. Marshall*, 131 S. Ct. 2594, 2607 (2011) ("[W]e are

not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such.").

Section 2253(c)(2) contains no express jurisdictional reference and lacks the indicia commonly associated with jurisdictional elements.

First, in sharp contrast to Section 2253(c)(1)'s express reference to the ability of an appeal to "be taken," Section 2253(c)(2) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." *Arbaugh*, 546 U.S. at 515. Congress's selective inclusion and omission of jurisdictional language in the two provisions must be given effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Instead, subsection (c)(2) speaks in terms of what a petitioner must "show[]," which is more analogous to the nonjurisdictional pleading requirements in Federal Rules of Civil Procedure 8(a) and 12(b)(6), or the pre-litigation registration requirement at issue in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010). A statutory requirement that "requires a party to take some action before filing a[n] [appeal]," "says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims." *Id.* at 1245-1246; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (Title VII's EEOC filing requirement is nonjurisdictional).

Indeed, the almost complete overlap in content between the "substantial showing" requirement and the ultimate merits of the appeal—the difference is only one of degree of proof—strongly reinforces subsection(c)(2)'s non-jurisdictional character. *See Reed*, 130 S. Ct. at 1246 ("[T]he jurisdictional analysis must focus on the 'legal character' of the requirement.") (quoting *Zipes*, 455 U.S. at 395).

To be sure, Section 2253(c)(2) cross-references subsection (c)(1)'s jurisdictional requirement. But the same interrelationship arises with notices of appeal and their specified content. *See* Fed. R. App. P. 3 & 4. What is jurisdictionally critical is that a notice of appeal with the bare minimum of identifying information be timely filed. Other components, while required by rule, *see* Fed. R. App. P. 3(c), can be omitted without jurisdictional consequence. *See, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-317 (1988) (notice of appeal vests jurisdiction if it is "the functional equivalent of what the rule requires" and is therefore jurisdictionally sufficient); *accord Smith v. Barry*, 502 U.S. 244, 248 (1992). Similarly, *Arbaugh* noted that, although 42 U.S.C. § 2000e-5(f)(3) extends federal jurisdiction to actions "brought under" Title VII, that cross-reference did not make the numerosity requirement jurisdictional. 546 U.S. at 514-515.

Second, while the mandatory nature of the "substantial showing" requirement underscores the importance of its enforcement, "rules, even if important and mandatory * * *, should not be given the jurisdictional brand" without more specific reference. *Henderson*, 131 S. Ct. at 1203; *see also Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010)

(mere use of word "shall" does not render statutory deadline jurisdictional).

Nor is jurisdictional status necessary to enforce the "substantial showing" requirement because the State can always challenge an insufficient "substantial showing" as part of the ensuing appeal, or it can attack the issuance of the certificate itself through panel rehearing of the single judge's decision under local circuit rules. *See, e.g.,* 5th Cir. R. 27.2; 6th Cir. R. 27(f); *see generally* Fed. R. App. P. 27(c); *cf. Dolan*, 130 S. Ct. at 2541 (deadline for imposing criminal restitution not jurisdictional because, *inter alia*, defendant had opportunity to contest belatedly ordered restitution amount). The Third, Seventh, Eighth and Ninth Circuits all recognize that a merits panel of the court of appeals may revisit the issuance of a certificate of appealability; only the Tenth Circuit has held to the contrary. *See Buie v. McAdory*, 322 F.3d 980, 981-982 (7th Cir. 2003) (collecting cases).

Third, unlike the notice of appeal held to be jurisdictional in *Bowles v. Russell*, 551 U.S. 205 (2007), there is no long history of treating procedural limitations on habeas petitions as jurisdictional. Quite the opposite, this Court has frequently "treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" under AEDPA. *Reed*, 130 S. Ct. at 1246-1247; *see, e.g.*, *Day v. McDonough*, 547 U.S. 198, 205 (2006) (one-year limitation period); *Trest v. Cain*, 522 U.S. 87, 89 (1997) (procedural default); *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (exhaustion of state remedies).

Beyond that, what is critical to fulfill AEDPA's purposes is that the court of appeals actually find

that constitutional issues are present about which reasonable jurists could disagree. Whether the genesis of that determination is the petitioner's showing or the court's independent knowledge of a procedural problem that has developed in the law should not be jurisdictionally determinative.

B. The Court Had Jurisdiction To Adjudicate The Appeal Because Section 2253(c)(3)'s Requirement That The Court "Indicate" The Qualifying Issues For Appeal Is Not Jurisdictional

Section 2253(c)(3) provides that, when issuing a certificate of appealability, the court "shall indicate" which issues it determined to be eligible for appellate review. The question in this case is whether, when the court specifies a procedural issue qualifying for review but not a substantive constitutional claim, the court's omission is a jurisdictional barrier to the prisoner's opportunity for federal habeas review. It is not.[5]

To begin with, Section 2253(c)(3) does not require that courts recite or list the issues qualifying for appeal in any particular manner; the certificate need only "indicate" the appropriate issue. 28 U.S.C. § 2253(c)(3). To "indicate" is a less stringent

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[5] Three courts of appeals have held that, once a certificate of appealability issues, defects in its content do not deprive the appellate court of the jurisdictional power to act. *See* Pet. Cert. Reply Br. 12 (citing cases). While petitioner had included the Tenth Circuit in that list, further review now suggests that the Tenth Circuit is agnostic on the issue. *See United States v. Harms*, 371 F.3d 1208, 1210 (10th Cir. 2004).

statutory directive than to identify or specify, and commonly means to "point to or toward with more or less exactness." *Webster's Third New Int'l Dictionary* 1150 (1993); *see id.* (further defining "indicate" as "to point out"; to "give fair evidence of"; "to show the general outlines of in advance"); *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) ("'indicate[]' certainly imposes less of a burden than, say, 'requires' or 'necessitates'"). The phraseology thus lacks the precision and specificity that would normally be associated with jurisdiction-defining directives.

Where, as here, a certificate is issued on a public record that contains a substantial showing of a reasonably debatable constitutional claim, the existence of the certificate itself points toward that record as Section 2253(c)(3)'s indicator of a valid constitutional claim. Reading the record as a whole to support the court's issuance of a certificate, moreover, comports with the "presumption of legitimacy accorded to the Government's official conduct." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Because *Slack* has been on the books for more than a decade now, the courts of appeals are fully familiar with the two-part determination required for issuance of a certificate of appealability in cases disposed of on procedural grounds.

Thus, under *Favish*, the logical assumption is that, when the court omitted reference to a constitutional claim in the certificate, the mistake was simply an oversight in processing, rather than

an effort to exercise appellate review forbidden by *Slack*.[6] And that oversight could be remediated by construing the certificate as necessarily indicating the constitutional issue for which the petitioner made a "substantial showing" in his application. Throwing the habeas petitioner's case out because of the error of the court is neither necessary nor appropriate.

Congress, in other words, would not have intended the insufficiency of a court's "indicat[ion]" of an issue to cut off the court's power to act on a properly presented habeas petition. Nothing in subsection (c)(3)'s text employs "jurisdictional terms" or speaks to the court's "adjudicatory capacity" or power to entertain a case. *Henderson*, 131 S. Ct. at 1202. Nor does the relevant text provide "any 'clear' indication that Congress wanted the rule to be 'jurisdictional,'" rather than an important case processing rule. *Id.* at 1203 (internal quotations omitted).[7]

Rather, the requirement to indicate issues operates like one of the "'many statutory requisitions

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[6] *See Beyer v. Litscher*, 306 F.3d 504, 506 (7th Cir. 2002) (noting that "the task of drafting the [certificate of appealability] order's language often is delegated to staff attorneys, who may lack appreciation of the pitfalls in collateral-review practice").

[7] To be sure, Congress's use of the mandatory word "shall" underscores the importance of the indication, but this Court "ha[s] rejected the notion that 'all mandatory prescriptions, however emphatic, are * * * properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pacific R. Co. v. Locomotive Engineers & Trainmen General Comm. of Adjustment*, 130 S. Ct. 584, 596 (2009)).

intended for the guide of officers in the conduct of business devolved upon them'" that "'do[es] not limit their power or render its exercise in disregard of the requisitions ineffectual.'" *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)); *accord United States v. Montalvo-Murillo*, 495 U.S. 711, 717-718 (1990); *see also Dolan*, 130 S. Ct. at 2539 (court retained jurisdiction to award victim restitution even after statutory deadline was missed).

More importantly, nothing in subsection (c)(3) "specif[ies] a consequence for noncompliance with" its dictate, let alone supports judicial imposition of a "coercive sanction" on the habeas petitioner who "bear[s] no responsibility" at all for the court's omission. *Dolan*, 130 S. Ct. at 2539, 2540. After all, petitioner, who was proceeding *pro se*, did everything that the law asked of him and, having made a substantial showing on both the procedural and constitutional issues, had absolutely no control over how the court wrote up its certificate of appealability. Protecting the Great Writ from the consequences of such judicial oversight would comport with the "equitable principles" that "have traditionally governed" habeas corpus, not to mention basic fairness. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010).[8]

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[8] Underscoring subsection (c)(3)'s nonjurisdictional character, two courts of appeals have declined to treat the indicated issues as jurisdictionally constraining. *See, e.g.*, *Rodriguez v. Scillia*, 193 F.3d 913, 920-921 (7th Cir. 1999) (considering claim made in petitioner's appellate brief that was not in

Finally, because Sections 2253(c)(2) and 2253(c)(3) are nonjurisdictional, respondent's failure to argue below that the content of the certificate of appealability was defective waived that argument. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (refusing to consider argument waived in lower court).

C. Regardless Of The Court Of Appeals' Jurisdiction, This Court Has Jurisdiction To Decide The Procedural Issue

By its plain text, AEDPA's certificate of appealability requirement does not apply to this Court. Section 2253(c)(1) refers to the certificate as a precondition only to "an appeal." 28 U.S.C. § 2253(c)(1). The inapplicability of the requirement to this Court's jurisdiction is why this Court was able to hold in *Hohn v. United States*, 524 U.S. 236 (1998), that a lack of appellate jurisdiction at the circuit level due to the court's refusal to issue a certificate of appealability did not cut off this Court's certiorari jurisdiction. *Id.* at 246-247. If this Court retains certiorari jurisdiction even when no certificate of appealability was issued, then it equally possesses jurisdiction to decide a case when a certificate of appealability was issued, albeit with a gap in its

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certificate); *Phelps*, 366 F.3d at 727-728 (court has power to expand scope of certificate to address additional issues). *But see Sixta v. Thaler*, 615 F.3d 569, 573 (5th Cir. 2010) ("We have jurisdiction to address only the issue specified in the COA.") (internal quotation marks omitted); *Hines v. Miller*, 318 F.3d 157, 162 (2d Cir. 2003) (similar).

content. In addition, this Court can issue a certificate of appealability itself, 28 U.S.C. § 2253(c), and thus could issue a corrected certificate for petitioner if that were deemed necessary to facilitate resolution of the important questions raised by his case.

Indeed, this Court has repeatedly exercised its power of review in cases where the lower courts' certificates of appealability contained the same defect as this case: identification of a procedural question for review, but omission of the underlying constitutional issue for which habeas relief was sought. In *Slack v. McDaniel*, for example, after the district court dismissed a habeas petition on procedural grounds, the court of appeals refused to issue a certificate of probable cause (the pre-AEDPA version of a certificate of appealability). 529 U.S. at 479-480. After ruling that AEDPA applied and that a certificate of appealability was therefore required, *id.* at 481-485, the Court did not simply stop because of the appeals court's jurisdictional defect. Instead, the Court went on to resolve the procedural question presented and reversed the district court. *Id.* at 485-489. The Court then remanded for the lower court to determine whether the petitioner was "otherwise entitled to the issuance of a COA" once the procedural obstacle had been removed. *Id.* at 485, 489-490.

Similarly, in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), the district court dismissed the habeas petition as time-barred, and the court of appeals declined to issue a certificate of appealability, *id.* at 117-118. This Court reversed the district court's procedural dismissal, *id.*, and remanded for the lower

courts to decide "the merits of petitioner's federal constitutional claims." *Id*. at 118 n.3.[9]

This Court's consistent pattern of reviewing important procedural rulings by the lower courts even when the certificate of appealability fails to indicate the constitutional claim reflects a wise exercise of this Court's authority to promote uniformity in the law. AEDPA is an exceptionally complex statute, often navigated by individuals proceeding *pro se*. And it operates in an area of acute importance, where life and liberty interests intersect with the States' federalism-rooted interests in the finality of their criminal convictions. Particularly when, as here, a *pro se* prisoner with a substantial constitutional claim has done everything that the law requires of him to present his case for decision, this Court's intervention is critical to ensure that missteps by the *courts* do not slam the courthouse

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[9] *Compare Holland*, *supra* (deciding procedural question of equitable tolling under AEDPA), *with Holland v. Florida*, 539 F.3d 1334, 1338 (11th Cir. 2008) (certificate of appealability confined to procedural question); *compare Lawrence v. Florida*, 549 U.S. 327 (2007) (deciding statutory tolling question under AEDPA), *with Lawrence v. Florida*, 421 F.3d 1221, 1224 (11th Cir. 2005) (describing the purely procedural certificate of appealability issued); *compare Day v. McDonough*, 547 U.S. 198 (2006) (deciding timing question under AEDPA), *with Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) (certificate of appealability confined to procedural question); *see also Peguero v. United States*, 526 U.S. 23 (1999) (deciding whether counsel's failure to inform defendant of right to appeal can be heard on collateral review, without a properly issued certificate of appealability, even after being informed of the defect, *see* U.S. Br. at 6 n.5, *Peguero, supra* (No. 97-9217)).

doors shut on petitioners' one and likely only opportunity for federal habeas review of constitutional claims. "Congress," after all, "expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Slack*, 529 U.S. at 483. Accordingly, regardless of the court of appeals' jurisdiction, this Court should address the timeliness of petitioner's habeas petition and then remand for consideration of his constitutional claims.

II. PETITIONER'S SECTION 2254 PETITION WAS TIMELY FILED

As relevant here, AEDPA's one-year limitation period for the filing of habeas corpus petitions by state prisoners runs from "the latest of * * * the date on which the judgment [of conviction] 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). The question in this case is when a judgment of conviction becomes "final" for defendants who do not seek discretionary review in the State's highest court.

The statute's plain text answers that question: the judgment becomes final at "the latest of" "the conclusion of direct review," which, under Texas law, was issuance of the intermediate appellate court's mandate, or at the expiration of time for seeking review. 28 U.S.C. § 2244(d)(1)(A). The court of appeals, however, discarded that straightforward reading of the statutory text and enforced in its place an inflexibly "uniform federal" rule that defines for all 50 States the end of direct review as the expiration of time for appeal, heedless of when their direct review processes actually conclude. Pet. App.

8a. That decision to throw out half of the relevant statutory text lacks any foundation in settled principles of statutory construction, this Court's precedent, AEDPA's purposes, or the statute's logical operation.

A. Direct Review Concluded When The Appellate Court's Mandate Issued

1. State Law Determines The "Conclusion of Direct Review"

There is no dispute that, as a matter of Texas law, the date on which the intermediate court of appeals issued its mandate was the date on which petitioner's judgment of conviction became final by the conclusion of direct review in the state court system. *See, e.g.*, *Ex parte Johnson*, 12 S.W.3d at 472; *In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (per curiam). Nor has respondent ever disputed that, if the "conclusion of direct review" under Section 2244(d)(1)(A) means when the State's direct review actually concludes, petitioner's habeas petition was timely filed. *See* Pet. 6. At bottom, respondent's position and the court of appeals' decision depend critically on pretending that Section 2244(d)(1)(A) does not mean what it says. But that is not how statutory construction works.

a. The plain textual meaning incorporates state law

In applying AEDPA's limitation period, this Court "must presume that [the] legislature says in [AEDPA] what it means and means in [AEDPA] what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (construing 28 U.S.C. § 2255) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Accordingly, when Congress said

that AEDPA's limitation period does not begin to run until "the conclusion of direct review," it must have meant the *actual* conclusion of direct review. And the actual conclusion of petitioner's direct review was the issuance of the intermediate appellate court's mandate on September 26, 2006.

There is no reason to depart from that straightforward meaning. The text is not ambiguous. "Direct review" has a settled meaning as the appellate process within the criminal case itself that directly reviews the judgment of conviction, *see Wall v. Kholi*, 131 S. Ct. 1278, 1283-1285 (2011), and "conclusion" means "the last part of anything," the "close, termination, end." *Webster's Third New International Dictionary* 471 (1993) (capitalization omitted). Because there was no review by this Court on direct appeal, *Jimenez*, 555 U.S. at 685, direct review concluded when "the last part" of state appellate consideration in the criminal case was "close[d], terminat[ed], [and] end[ed]" by issuance of the mandate. *Id.*

Nor is the phrase "conclusion of direct review" a term of art with any settled federal meaning that Congress would have employed to supplant state law. The phrase "conclusion of direct review" appears nowhere else in the U.S. Code, and is not a phraseology that this Court's prior cases had ever employed. Moreover, when Congress wanted to prescribe its own single, uniform definition for the conclusion of the state court's direct-review process in AEDPA, it said precisely what the procedural termination point was. *See* 28 U.S.C. § 2263(a) (time limitation in certain capital cases runs from "final State court *affirmance* of the conviction and sentence

on direct review") (emphasis added); *cf.* S. Ct. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance of the mandate (or its equivalent under local practice.")). Thus, when Congress wants to specify a particular moment for direct review to conclude, "it knows how to say [so]." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 329 n.22 (1981). Employing undefined language like "conclusion of direct review" that has variable meaning in different state procedural contexts is not such a statement.

Instead, Congress employed language that had no established federal meaning and that, by its content, straightforwardly references state-law processes. Congress did so, moreover, within a statutory provision the sole function of which is to attach legal consequences to state law's operation. And it did that within a statute, AEDPA, that is specifically designed to promote respect for those State laws and processes. Thus the logical conclusion is that Congress meant for its state-law-referencing language to incorporate those state-law rules in determining when the federally prescribed finality test is met.

To be sure, Section 2244(d)(1) provides a "uniform federal" definition of when a judgment of conviction becomes "final." *Clay v. United States*, 537 U.S. 522, 530-531 (2003). As relevant here, that federal definition is the later of two selected dates: "[i] the conclusion of direct review or [ii] the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). But what is critical is that Congress did *not* dictate a uniform federal answer for

when either prong of its two-part finality test is met. Rather, those prongs draw their core meaning from state law, and turn only to federal law if and when this Court's certiorari review comes into the picture. *See Jimenez*, 555 U.S. at 685-686. That is because, "[o]rdinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions." *Carey v. Saffold*, 536 U.S. 214, 223 (2002) (construing AEDPA); *see Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946) (determining whether a state judgment is final may require "resort to the local law to determine what effect the judgment has under the state rules of practice").

AEDPA's structure and purpose confirm the appropriateness of that reference to state law. After all, the whole purpose of the inquiry is to determine when the conclusion of the States' own direct review processes occurs. Indeed, looking to state law to determine how federal tests and standards are met is commonplace under AEDPA. Under Section 2244(d)(1)(A) itself, state law both defines what "direct review" is and the state courts—and state procedures—that it includes. In *Jimenez*, for example, this Court held that the distinct state process for reopening direct appeals determined when direct review concluded. 555 U.S. at 686.

State law, moreover, determines when state postconviction review ends under subsection (d)(1)(A)'s neighboring tolling provision, 28 U.S.C. § 2244(d)(2). *See Lawrence*, 549 U.S. at 331-333 (state-law rule, which was issuance of the mandate, determines when state postconviction review concludes). That is particularly significant because

this Court has recognized that the tolling provision "work[s] together" with Section 2244(d)(1)(A) to promote exhaustion, *id.* at 332-333, and thus the two provisions' deference to state-law rules and processes should be consistent.

State law also determines whether an application for state postconviction review was "properly filed" for purposes of Section 2244(d)(2)'s tolling provision. *See Pace v. DiGuglielmo*, 544 U.S. 408 (2005); *Artuz v. Bennett*, 542 U.S. 4, 8 (2000). In addition, state law generally governs whether an appeal remains "pending" after a lower court decision on collateral relief but before the filing of an appeal or request for discretionary review. *Carey*, 536 U.S. at 220-225 (collateral relief remains "pending" when the appeal is timely under state rules).

State law even works its way into the Fifth Circuit's purportedly "uniform federal" approach by defining when the time for appealing to the State's highest court expires. Pet. App. 4a, 8a. But there is no textual or logical basis for such a heads-the-State-wins-tails-the-habeas-petitioner-loses view of state law's role under Section 2244(d)(1)(A). To the contrary, it would be passing strange to hold that, when federal law measures its operation by reference to long-established state processes, the law was meant to ignore how those processes actually work.

b. Precedent has employed the state-law rule

Precedent reinforces the text's respect for state-law processes. Most directly, in *Jimenez v. Quarterman*, *supra,* this Court recognized that determining Section 2244(d)(1)(A)'s "uniform date of finality" required resort to state-law rules to

determine when the "conclusion of direct review" occurs. 555 U.S. at 686. The Court held that, when a state court "in fact reopened direct review" approximately seven years after it had originally concluded, that state-law procedure "rendered" the conviction "nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal." *Id*. at 686 n.4.

In so holding, this Court specifically rejected the argument that Section 2244(d)(1)(A) "'pinpoints' a uniform federal date of finality that does not 'vary from State to State,'" holding instead that AEDPA requires federal courts "to make use of the date on which the entirety of the state direct appellate review process was completed" in actuality under state law. 555 U.S. at 686.[10]

Respondent's and the court of appeals' insistence on a woodenly "linear limitations period" that prescribes a homogenized federal "date of finality" is just as wrong here as it was in *Jimenez*, 555 U.S. at 684, 686. Section 2244(d)(1)(A) prescribes no uniform "date" when finality occurs, but instead prescribes a uniform, two-prong test for measuring when judgments become "final." Congress, however, did not prescribe a uniform answer under each prong. Instead, Congress left it to state law to determine when a State's own direct review process concluded

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[10] *See also Wall,* 131 S. Ct. at 1286 n.3 (noting that a sentence-reduction proceeding under state law could be defined by state law to constitute part of the "direct review" process, rather than collateral review, for purposes of Section 2244(d)).

and when its own time periods for seeking review within the state court system expired.[11]

Respondent's and the court of appeals' approach fails for yet another and even more basic reason. It throws out half of the statutory text whenever review is not sought by a defendant in the State's highest court. Under their view, the expiration of time for seeking review in that higher state court becomes the sole criterion for determining finality in such cases. Pet. App. 4a; *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003); Cert. Opp. 19-20. The "conclusion of direct review" prong simply drops out of the picture.

But that is not how this Court reads statutes. This Court "'must give effect to every word of a statute wherever possible.'" *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)). And that rule applies with particular force when, as here, the two clauses are disjunctive, joined by "or", and Congress has commanded that "the latest of" the two controls. *See Clay*, 537 U.S. at 529 (noting that the "or" in Section 2244(d)(1)(A) is "disjunctive"). That disjunctive mandate to select the latest of two points in time demands that the statute not be read to "rob" the direct-review prong of its "'independent and

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[11] States employ a wide variety of deadlines for pursuing relief in their highest courts. The shortest deadline is Georgia's, which is 10 days after the court of appeals' opinion, Ga. Ct. App. R. 8.500, and the longest is Tennessee's 60-day period. Tenn. R. App. P. 11. Most States use a 30-day deadline. *See, e.g.*, Neb. Rev. Stat. § 24-1107; Ind. R. App. P. 57(C)(1). *See generally Carey*, 536 U.S. at 219, 222 (noting the differing time periods for state appeals).

ordinary significance.'" *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1403 (2010) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979)).

Nor is the court of appeals' approach consistent with reality. Even if a defendant does not file for discretionary review in the State's highest court, his direct review process does not suddenly evaporate. It still exists and has its own, definitive conclusion. And Congress gave significant and independent legal effect to the point in time when that direct review concludes in Section 2244(d)(1)(A).

Accordingly, AEDPA's plain text commands that courts determine both when direct review concludes and when the time for seeking further review expires, and enforce the later time as the date on which the judgment became final. To be sure, the expiration of the time for seeking review will frequently be the later date. But, given that more than half of the States define the conclusion of direct review as the issuance of the mandate or similar process, *see* Pet. 26-27 n.7; Va. S. Ct. R. 5A:31, there will also be many times when (as here) the conclusion of direct review postdates the time for filing an appeal to the State's highest court. When that happens, respondent cannot simply wish the later finality date away when Congress clearly said to count it.

c. Deference to state law comports with AEDPA's purpose

Employing state law to inform when Section 22244(d)(1)(A)'s two-prong test is met accords with AEDPA's purposes and intended operation.

First, Congress devised Section 2244(d)(1)(A)'s two-part finality test to parallel the well-established

test for finality under this Court's postconviction retroactivity jurisprudence, as laid out in *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). *See, e.g.*, *Jimenez*, 555 U.S. at 685; *Clay*, 537 U.S. at 527-529. It is thus significant that two courts of appeals have held that, when direct review was not sought in a State's highest court, *Caspari*'s rule for finality looks to state law to determine when the direct review process ends. *See Losh v. Fabian*, 592 F.3d 820, 824 (8th Cir. 2010) (applying state-law time period for seeking review in state supreme court, and concluding that "Minnesota's highest court is plainly competent to determine that a type of appellate review under its law is not direct" review); *id.* at 825 (noting that *Jimenez* made state law determinative of whether a reinstated appeal constituted direct review); *Wheeler v. Jones*, 226 F.3d 656, 659 (6th Cir. 2000) (relying on state law to determine that "long-delayed appeals are not regarded as part of a defendant's direct appeal" for purposes of *Teague v. Lane*, 489 U.S. 288 (1989), and *Caspari*).

Second, the disregard for state law that the court of appeals prescribed makes no sense under a statute so heavily animated by federalism principles and respect for the integrity of state processes. *See Duncan v. Walker*, 533 U.S. 167, 178 (2001) (AEDPA was designed to promote principles of "comity, finality, and federalism"). By giving effect to state-law rules governing the conclusion of direct review, AEDPA enforces respect for the autonomy and dignity of state criminal processes and fosters comity by abstaining from interposing federal jurisdiction until the State courts have, from their own perspective, finished their work and disengaged from the case. *Cf. Duncan*, 533 U.S. at 178-179 (AEDPA's

exhaustion requirement "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment."). Patience for the State's ability under state law to rehear or reconsider a decision, even *sua sponte*, costs relatively little in terms of time (generally measured in weeks, not years), and demonstrates respect for the state courts' role in the enforcement of federal law. *See id*. at 179.

A wooden federal rule, on the other hand, wrests control of the case from a state court of appeals before that court has said it is done, and creates the "unseemly" possibility that state and federal courts could be disagreeing over when the state court ended its own review process. *Duncan*, 533 U.S. at 179.

Third, while AEDPA seeks to promote finality, Congress carefully balanced that interest with the equally imperative goal of ensuring that diligent litigants would be afforded one full and fair opportunity to obtain federal habeas review of their constitutional claims. Indeed, in *Rhines v. Weber*, 544 U.S. 269 (2005), this Court recognized that a "petitioner's interest in obtaining federal review of his claims [can] outweigh[] the competing interests in finality and speedy resolution of federal petitions," *id*. at 278. Thus, in crafting AEDPA's provisions, Congress never "los[t] sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights," and strove to implement its reforms "without undermining basic habeas corpus principles." *Holland*, 130 S. Ct. at 2562 (internal quotation marks omitted).

Importantly, respecting state-law rules for the conclusion of direct review guarantees prisoners the full benefit of the one-year filing period set out in Section 2244(d)(1) by ensuring that the limitation period does not begin running before state law would permit a state habeas filing. Under its externally imposed definition of finality, however, the court of appeals started the one-year clock running on petitioner's federal habeas deadline *before* state law rendered his judgment of conviction final and *before* state law permitted him to file for state postconviction relief to toll the limitation period, 28 U.S.C. § 2244(d)(2). And Texas is not the only State whose law would leave prisoners in such a procedural bind. More than half of the States define when direct review ends by issuance of a mandate or some marker other than expiration of the time for appeal. *See* Pet. 13 n.2, 26-27 n.7. And at least 16 States forbid prisoners to file for state postconviction relief until after direct review concludes under state law.[12]

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[12] *See Ex parte Hargett*, 772 So. 2d 481, 482 (Ala. Crim. App. 1999) (if filed before conviction is final, habeas petition will be held in abeyance); Ariz. Rev. Stat. Ann. 13-4232(a)(1) ("A defendant is precluded from relief under this article based on any ground: (1) still raiseable on direct appeal or on a post-trial motion."); Del. Super. Ct. R. Crim. P. 61(b)(4) ("A motion may not be filed until the judgment of conviction is final."); *Jones v. State*, 602 So. 2d 606, 607-608 (Fla. Dist. Ct. App. 1992) ("[A] judgment and sentence become final for purposes of filing a motion for post-conviction relief when appellate proceedings have concluded, *i.e.*, upon issuance of the mandate."); *Brigham v. State*, 950 So. 2d 1274, 1275 (Fla. Dist. Ct. App. 2007) ("Implicit in the rule [governing postconviction relief] is the requirement that the judgment and sentence be final before the motion is filed."); *Horton v. Wilkes*, 302 S.E.2d

The court of appeals' uniform federal date thus would take a significant bite out of the one-year limitation period for a large number of state prisoners. There is no evidence that Congress intended such lopsided protection for the Great Writ, or to use Section 2244(d)(1)(A) in a way that would

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94, 95 (Ga. 1983) ("[A] person imprisoned * * * cannot institute a petition for habeas corpus until the conviction is final."); Haw. R. Pen. P. 40 (requiring that petition be brought after final judgment); *Crowell v. Commonwealth*, 225 N.E.2d 330, 330 (Mass. 1967) ("Habeas corpus cannot be employed as a substitute for ordinary appellate procedure, and so, in general, is not available where there is a remedy by writ of error or appeal."); Minn. Stat. § 590.01, subdiv. 1 ("Except at a time when direct appellate relief is available, a person convicted of a crime * * * may commence a proceeding * * *."); Nev. Rev. Stat. § 34.726(1) ("Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur."); *Sleeper v. Warden, N.H. State Prison*, 920 A.2d 1200, 1202 (N.H. 2007) ("When court action results in the loss of a constitutionally protected liberty interest, it may be collaterally attacked by way of petition for writ of habeas corpus after the time for direct appeal has expired.") (internal quotations omitted); N.J. Ct. R. 3:22-3 ("[A petition for postconviction review] is not * * * a substitute for appeal from conviction or for motion incident to the proceedings in the trial court, and may not be filed while such appellate review is pending."); Pa. Consol. Stat. § 9545 (collateral review is available when the conviction or appeal becomes final); *Commonwealth v. Johnson*, 841 A.2d 136, 139 (Pa. Super. Ct. 2003); Tex. R. Crim. P. Art. 11.07 § 3; Utah Code § 78B-9-106 (collateral review is not available for claims that "may still be addressed at trial or on appeal"); W. Va. Stat. § 53-4A-1 (same); Wis. Stat. § 974.06 (same).

"'trap the unwary *pro se* prisoner.'" *Slack*, 529 U.S. at 487; *see Carey*, 536 U.S. at 220 (rejecting interpretation of tolling provision that would "encourag[e] state prisoners to file federal habeas petitions *before* the State completes a full round of collateral review").

By contrast, if an intermediate appellate decision becomes final at a single, common point for both state postconviction and AEDPA timing purposes, the one-year limitation period for federal habeas will be preserved evenhandedly for all state prisoners. In addition, utilizing state law facilitates a seamless transition between the governing state and federal rules that petitioners commonly must navigate *pro se*, while protecting petitioners' reasonable reliance on state law to determine when their state review process ends. Lastly, a state-sensitive rule fosters consistency between AEDPA's tolling and accrual provisions. *See, e.g.*, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (avoiding interpretation of "second or successive" petition rules that would allow "dismissal * * * for technical procedural reasons * * * [to] bar the prisoner from ever obtaining federal habeas review").[13]

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[13] The Fifth Circuit in *Roberts* suggested that exclusive reference to the "expiration of time" prong had the benefit of ensuring notice to the defendant because, in Texas, "[t]he state appeals court notifies the defendant when its judgment is entered, but it sends the mandate to the trial court, not the defendant." *Roberts*, 319 F.3d at 694 n.23. That is simply incorrect as a matter of Texas procedure. Under Texas Rule of Appellate Procedure 18.1, copies of the mandate are sent to all parties to the appeal. Thus, using some fixed period after the

Fourth, enforcement of state rules also reduces "'the potential for delay on the road to finality,'" *Rhines*, 544 U.S. at 276 (quoting *Duncan*, 533 U.S. at 179), and encourages state prisoners to "file their federal habeas petitions as soon as possible," *Duncan*, 533 U.S. at 181. Just as a blunt, inflexible rule would cause many petitioners' judgments of conviction to be declared final *too early*, the rule would also cause other prisoners' finality date to come *too late* if State law concludes direct review before the superimposed federal rule would.[14] Deference to State law rules governing the conclusion of direct review, by contrast, ensures that finality occurs at exactly the right time—no later or earlier than state postconviction review becomes available.

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decision date provides no more notice to the defendant than using the mandate and, in fact, would simply contribute to confusion for all parties as they try to sort out and administer contradictory state and federal timelines for conclusion of the same state direct review process in the same case.

[14] *See, e.g., Sanders v. State*, 791 N.W.2d 126, 129 (Minn. 2010) (noting that judgment was final upon entry of appellate court judgment because petitioner's "time to file his petition for postconviction relief" would have lapsed two years from that date had he not qualified for a safe harbor) (citing Minn. Stat. § 590.01 (2008)); *Hickey v. Riera*, 774 N.E. 2d 1, 10 (Ill. App. Ct. 2001) ("Where there has been an appeal from a circuit court judgment, the judgment of the appellate court becomes final when entered."); *Gillis v. F & A Enterprises*, 934 P.2d 1253, 1255-1256 (Wyo. 1997) (judgment of appellate court is final so as to start the time limit for state habeas filings when "the written opinion is filed with the clerk").

2. If a Uniform Federal Rule Governs When Direct Review Concludes, It Should Be the Mandate

If Section 2244(d)(1)(A) were to impose not just a uniform federal definition of finality, but also a "uniform federal rule" for when direct review concludes in each State, then the measure most consistent with precedent and AEDPA's purposes would be the appellate court's issuance of its mandate.

First, issuance of the mandate (or its variously named equivalent) is the most common state-law denominator of when direct review ends, as it is employed by more than half (27) of the States. *See* Pet. 13 n.2; *Beckner v. Friendly Ice Cream Corp.*, No. 219047, 2004 WL 1662290, at *3 n.35 (Va. Cir. Ct. 2004) (unpublished) (explaining that, because decision of Virginia Supreme Court "will not be final until that Court issues its mandate, this case, having neither been stayed nor yet mooted, remains on this Court's docket and thus ripe for decision"); Va. S. Ct. R. 5A:31 (providing that the mandate shall mark finality for both Supreme Court and Court of Appeals proceedings).

Second, the mandate is also a sensible test for identifying the conclusion of the appellate direct review process. Traditionally, issuance of the mandate is the judicial act that formally concludes a case, deprives the appellate court of jurisdiction to alter its order, and constitutes the appellate court's binding directive for disposition of the case to the lower court. *See* 16 Charles Alan Wright & Arthur R. Miller*, Federal Practice & Procedure* § 3987 n.1 (4th ed. 2011) ("[T]he effect of the mandate is to bring the

proceedings in a case on appeal to a close and to remove it from the jurisdiction of the appellate court.") (quoting *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978)).[15] The mandate both functionally and "formally marks the end of appellate jurisdiction," *Johnson v. Bechtel Assoc. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986), and thus the clear "conclusion" of the appellate process.

Third, this Court's AEDPA precedent has repeatedly referred to the mandate as the point when state direct review concluded, underscoring its widespread recognition as the traditional marker of appellate closure. In both *Lawrence*, *supra*, and *Holland*, *supra,* this Court referred to the state courts' issuance of their mandates as the point when the state postconviction proceedings were no longer "pending" for purposes of tolling the limitation period, 28 U.S.C. § 2244(d)(2). Indeed, in language that applies with equal logic to the termination point for state direct review, this Court explained in *Lawrence* that, after the state court "has issued its mandate * * * no other state avenues for relief remain open" and the previously pending "application for state post conviction review no longer exists." 549 U.S. at 332; *see id.* at 330-331 (thrice identifying the mandate's issuance as the trigger that commenced running of the Section 2244(d)(1) federal habeas

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[15] *See also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (mandate marks when "lengthy federal proceedings have run their course"); *Deering Milliken, Inc. v. Federal Trade Comm'n*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) ("[A]s long as the appellate court retains its mandate it maintains its jurisdiction over the case.").

limitation period); *see also Holland*, 130 S. Ct. at 2556 ("[T]he court issued its mandate, making its decision final."); *id.* at 2559; *Clay*, 537 U.S. at 529 (noting that the mandate might well be the appropriate reference point for "the conclusion of direct review," standing alone).

Fourth, at the time AEDPA was enacted, the mandate would have been a logical reference point for Congress because "several lower courts ha[d] held that finality attends issuance of the appellate court's mandate" under the then-governing text of Federal Rule of Criminal Procedure 33's new-trial provision. *Clay*, 537 U.S. at 527; *see* Fed. R. Crim. P. 33 (1996).[16] A Senate Report, moreover, referenced Rule 33 when discussing AEDPA's time limitation provisions. *See* S. Rep. No. 226, 98th Cong., 1st Sess. 9-10 (Sept. 14, 1983).

In addition, under the Speedy Trial Act, 18 U.S.C. §§ 1361 *et seq.*, the circuit courts are unanimous in interpreting finality, for purposes of the conclusion of appellate court proceedings, as occurring upon the court's issuance of its mandate. *See* Pet. 29 (listing cases); *Clay*, 537 U.S. at 527 (noting that mandate determines finality for purposes of Speedy Trial Act when an appeals court orders a new trial).

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[16] *See United States v. Reyes*, 49 F.3d 63, 66-68 (2d Cir. 1995); *United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983); *United States v. Gross*, 614 F.2d 365,366 n.2 (3d Cir. 1980); *United States v. Granza*, 427 F.2d 184, 185 n.3 (5th Cir. 1970); *Casias v. United States*, 337 F.2d 354, 356 (10th Cir. 1964).

Finally, if state law does not control as argued above, *see* Section II.A.1, *supra*, then marking finality by issuance of the appellate court's mandate is the next best means of preserving the balance of interests that Congress struck in crafting AEDPA. State law would rarely, if ever, conclude its direct review process at a point *after* issuance of the mandate because the mandate marks the appellate court's surrender of the case to the lower court. That is particularly true for intermediate appellate courts, because there appears to be no State that issues its mandate before the time for seeking review in a higher state court has expired. Accordingly, measuring finality by the mandate would ensure that all state habeas petitioners receive the full one-year limitation period that Congress provided in AEDPA and thus that the Great Writ can continue to "play[] [its] vital role in protecting constitutional rights." *Holland*, 130 S. Ct. at 2562.

To be sure, shorter markers could be devised to truncate direct review, but none of them would have the widespread acceptance of the mandate, and all of them would risk leaving habeas petitioners trapped between the commencement of the federal limitation period due to finality, on the one hand, and a state-law ban on prematurely seeking postconviction relief to stop the running of that time, on the other hand.[17]

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[17] The availability of equitable tolling under AEDPA is no answer because equitable tolling cannot be applied to unravel a deliberate timing determination by Congress embodied in statutory text. *See Holland*, 130 S. Ct. at 2563.

B. The Petition Was Timely Because The "Expiration Of Time For Seeking Review" Prong Includes The 90-Day Period For Filing A Petition For Writ Of Certiorari

1. This Court Has Repeatedly Held That Section 2244(d)(1)(A) Includes The 90-Day Certiorari Timeframe

The petition was not only timely under the "conclusion of direct review" prong, but also under the "expiration of time for seeking * * * review" prong of Section 2244(d)(1)(A). "[T]his Court's consistent understanding of finality in the context of collateral review" is that "a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." *Clay*, 537 U.S. at 524-525. The Court has repeatedly ruled that Section 2244(d)(1)(A) embodies that "unvarying understanding of finality." *Id.* at 527-528; *see Jimenez*, 555 U.S. at 685. Adoption of that "uniform federal rule" of finality ensured—as state law otherwise might not have—that judgments of conviction do not become final until *both* the direct review *and* the time for appeal prongs have each ended, including in particular the time for seeking certiorari review by this Court. *Clay*, 537 U.S. at 531; *see id.* at 532 (holding, by analogy to Section 2244(d)(1)(A)'s inclusion of certiorari time, that the limitation period for federal prisoners under 28 U.S.C. § 2255 does not commence until the time for seeking certiorari has expired).

The text of Section 2244(d)(1)(A) thus built upon the "long-recognized, clear meaning" of "finality" employed by this Court for "post-conviction relief,"

which "attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527 (citing *Caspari*, 510 U.S. at 390); *see also Caspari*, 510 U.S. at 390 ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

Confirming the point, this Court ruled unanimously in *Jimenez*, *supra*, that a judgment of conviction does not become final under Section 2244(d)(1)(A) "until the 'availability of direct appeal to the state courts,' * * * and to this Court * * * has been exhausted." 555 U.S. at 685 (internal citations omitted). Accordingly, if a "prisoner chooses not to seek direct review in this Court, then the conviction becomes final when the time for filing a certiorari petition expires." *Id.* (internal quotation marks omitted).

That certiorari-time rule accords with this Court's longstanding precedent holding that direct review of a state court decision necessarily includes the right to seek review by this Court. *See Griffith v. Kentucky*, 479 U.S. 314, 321 (1987) ("direct review" included Griffith's petition for a writ of certiorari); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("[T]he process of direct review * * *, if a federal question is involved, includes the right to petition this Court for a writ of certiorari."); *Bell v. Maryland*, 378 U.S. 226, 232 (1964) (review by the United States Supreme

Court is included in the "direct review" of a state decision).

Notwithstanding the explicitness of this Court's repeated holdings that Section 2244(d)(1)(A) includes the 90-day period for filing a petition for certiorari and notwithstanding the court of appeals' preference for a "uniform federal rule" (Pet. App. 8a), the court excluded those 90 days in determining when AEDPA's one-year limitation period began to run for petitioner. *See* Pet. App. 4a. In applying Section 2244(d)(1)(A)'s "expiration of the time for seeking such review" prong, the court of appeals included only expiration of the 30-day period for seeking review in the Texas Court of Criminal Appeals. *Id.*; *see Roberts*, 319 F.3d at 693-695 & n.14. Had that 90 days been included, as *Jimenez*'s and *Clay*'s "uniform federal rule" indicates, *Clay,* 537 U.S. at 531, petitioner's federal habeas petition would have been timely filed. *See* Pet. 6.

2. The Jimenez/Clay *90-Day Rule Applies Regardless Of Whether Discretionary Review Is Sought In The State's Highest Court*

The Fifth Circuit categorically ruled that the 90-day certiorari period that this Court has repeatedly included under Section 2244(d)(1)(A) does not apply when a prisoner's attorney fails to apply for discretionary review in the State's highest court on direct review. *Roberts*, 319 F.3d at 693 n.14. That was mistaken.

To be sure, as a general rule, under 28 U.S.C. § 1257(a), certiorari review must be sought from a "state court of last resort," not intermediate appellate courts. But this Court has recognized exceptions to

that rule under which identification of the relevant state high court may not be discernible from the face of a certiorari petition. *See Brown v. Texas*, 443 U.S. 47, 50 (1979) (state-law limits); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 & n.1 (1967) (next highest state court "apparently" lacked jurisdiction); *Metlakatla Indian Cmty. Annette Island Reserve v. Egan*, 363 U.S. 555, 559-560 (1960) (higher court not functioning). In addition, this Court retains the authority to review intermediate court decisions under the All Writs Act, 28 U.S.C. § 1651(a). *See Hohn*, 524 U.S. at 250-251.

There accordingly is no inflexible bar to certiorari petitions from intermediate state courts receiving this Court's review. And deciding which certiorari petitions to include and exclude under the Fifth Circuit's rule would require a case-by-case inquiry into the substantive merits and viability of filed and never-filed certiorari petitions to determine which ones *deservedly* affected the finality of the conviction. That rule would entail such a substantial devotion of court and governmental resources to administer that Congress may well not have considered it worth the candle, preferring instead uniform inclusion of the certiorari period at the end of the direct review process.

Indeed, nothing in Section 2244(d)(1)(A)'s text, precedent, or practice has hinged the availability of the 90-day certiorari period on the meritorious content of the certiorari petition or even its jurisdictional viability. Quite the contrary, there is nothing less viable than a non-existent, never-filed certiorari petition. But Section 2244(d)(1)(A) includes the 90-day certiorari timeframe without

regard to the merits of the prisoner's case or even an announced intent not to seek certiorari. *See, e.g.*, *Snook v. Wood*, 89 F.3d 605, 608 (9th Cir. 1996) (petitioner asked that his direct appeal be dismissed upon remand to the intermediate appellate court, evincing his intent not to seek certiorari). Cases in which only *Anders* briefs were filed (*see Anders v. California*, 386 U.S. 738 (1967)), or in which only jurisdictionally deficient claims are presented—such as state-law claims, claims resting on adequate and independent state-law grounds, or "wholly insubstantial and frivolous" federal claims—get the same 90-day certiorari time as those presenting trailblazing constitutional questions for this Court's review.[18]

What is critical for finality purposes is that nothing in the language of Section 2244(d)(1)(A) makes "expiration of the time for seeking [direct] review" conditional upon *any* action by the habeas petitioner, let alone upon the merits of his certiorari petition. Instead, the language of Section 2244(d)(1)(A) provides a petitioner the benefit of the period remaining for seeking direct review with the explicit understanding that the petitioner need do nothing at all to trigger it. That is because Section 2244(d)(1)(A) "is concerned solely with the question of time, not whether a defendant's appeal qualifies on the merits for review by the Supreme Court." *Nix v.*

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[18] *See Arbaugh*, 546 U.S. at 513 n.10 (federal question jurisdiction is lacking over "wholly insubstantial and frivolous" claims) (quoting *Bell v. Hood*, 327 U.S. 678, 682-683 (1946)); *see* Oral Arg. Tr. 50-51, *Jimenez, supra* (Nov. 4, 2008) (*Anders* briefs filed in both appeals on merits of constitutional claims).

Secretary for the Dep't of Corrs., 393 F.3d 1235, 1237 (11th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

Furthermore, for purposes of retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989), at least two courts have included the 90-day certiorari timeframe under *Caspari*, 510 U.S. at 390, even when the habeas petitioner stopped the appellate process before discretionary review in a State's highest court. *See Snook*, 89 F.3d at 608 (direct appeal voluntarily withdrawn in court of appeals); *Barron v. Howes*, No. 1:07-CV-620, 2008 WL 3539788, at *3 (W.D. Mich. Aug. 12, 2008). That is important because this Court has held that Section 2244(d)(1)(A) parallels this Court's *Caspari* definition of finality for *Teague* purposes in postconviction relief proceedings. *See Clay*, 537 U.S. at 527.

Finally, opening the door to merits-based scrutiny of the viability of appeals or certiorari petitions would destroy the clarity and easy administrability of AEDPA's otherwise uniform inclusion of the 90-day certiorari window. Indeed, courts presumably would also have to start policing whether appeals taken within the state court system were permissible on the merits or jurisdictionally, as well. States, for example, may limit appellate review by those who enter guilty pleas. *See* Md. Code Ann. § 12-204(4) (no review by State's highest court allowed without permission); Ca. R. Ct. 8.304 (prohibiting appeals from guilty pleas absent a certificate of probable cause). Administering the Fifth Circuit's rule would require courts, often years after the fact, to dissect the procedural, legal, and factual viability of appeals and certiorari petitions actually filed or hypothetically fileable on direct

review. The simplicity, clarity, and ready administrability of Section 2244(d)(1)(A)'s automatic inclusion of the certiorari period, under *Clay* and *Jimenez*, by contrast, affords both habeas petitioners and States plain notice while promoting the resource-efficient calculation of AEDPA time limits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

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CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * * * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances

what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

FEDERAL RULES OF APPELLATE PROCEDURE

VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the

district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C.A. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.