No. 10-895

IN THE
Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

In response to the three, recurring, multi-circuit conflicts presented by the petition (Pet. 8-24), respondent admits (BIO 12) that a "circuit split [is] presented by this case." But respondent then tries to dilute the degree of conflict by collapsing the conflicts identified in the first two questions presented into a single, reformulated question for this Court's review.

That respondent proposes yet another question for this Court's review simply underscores the necessity of granting certiorari in this case. Beyond that, respondent's attempted narrowing of the circuit conflict cannot survive a straightforward reading of its own brief or the Fifth Circuit's open and repeated acknowledgments that its law squarely conflicts not just with that of the Eighth Circuit, but also the Eleventh Circuit, while according with Ninth Circuit law.

In any event, respondent's proposed question presented simply papers over the critical predicate questions on which the circuits are squarely conflicted. Indeed, this Court could not answer respondent's proposed question without resolving *both* the conflict over whether state law plays any role in determining when direct review terminates, and, if not, the separate conflict over the uniform federal rule to be applied in the absence of state law.

In other words, subsuming petitioner's first two questions presented into a single umbrella question, as respondent proposes, does nothing to avoid the multi-circuit conflicts presented.

However articulated, the law in this area is deeply fractured. That makes intervention by this Court imperative, both for States, who find that the finality of their criminal convictions and AEDPA's respect for their state processes vary across state lines, and for habeas petitioners, who find that availability of the Great Writ under AEDPA now turns on geographic accident.

Confronted with an acknowledged lack of uniformity in AEDPA's application, respondent contends (BIO 10) that the issue is nevertheless too infrequently recurring to merit review because it will only affect those habeas petitioners who allege "ineffective assistance of counsel, or claims based on newly discovered evidence." (BIO 11). Those, however, are highly common claims, not the rarities that respondent supposes.

Finally, respondent, having waived the issue below, now objects to the terms of the certificate of appealability. The short answer is that the certificate's formulation has no bearing on this Court's certiorari jurisdiction and, in fact, this Court has repeatedly reviewed AEDPA procedural questions in identical circumstances, including in respondent's flagship case, *Slack v. McDaniel*, 529 U.S. 473 (2000).

I. RESPONDENT'S ARTICULATION OF A FOURTH WAY IN WHICH THE CIRCUITS ARE SPLIT FURTHER SUPPORTS REVIEW

A. The Circuit Split is Wide

Respondent's insistence (BIO 18-25) that this case presents a conflict only between the law of the Fifth and Eighth Circuits is at war with the Fifth Circuit itself. That court has openly acknowledged that its law applying 28 U.S.C. § 2244(d)(1)(A) conflicts with the law of both the Eleventh Circuit and the en banc Eighth Circuit. Pet. App. 7a-8a; *Roberts v. Cockrell*, 319 F.3d 690, 694 & n.16 (5th Cir. 2003); *see Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008) (en banc); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001).

The Fifth Circuit has also recognized that Ninth Circuit law comports with its own. *Roberts*, 319 F.3d at 694 & n. 17 (citing *Wixom v. Washington*, 264 F.3d 894, 897-898 (9th Cir. 2001)); *see Flores v. Quarterman*, 467 F.3d 484, 486 & n.4 (5th Cir. 2006) ("[a] split exist[s] among circuits").

Respondent's attempt to contain the conflict to just two circuits also cannot survive a reading of his own brief. *See* BIO 8 (acknowledging that the Ninth Circuit sides with the Fifth Circuit, citing *Wixom* and *Hemmerle v. Schriro*, 495 F.3d 1069, 1073-1074 (9th Cir. 2007)). The circuit conflict is thus as wide as petitioner—and the Fifth Circuit—have said it is.

B. The Conflicts Over State Law's Role and the Finality Trigger

The reason that respondent's reworking of the circuit conflict fails is that its reformulated question presented simply assumes away the conflicts over the role of state law and the different finality triggers under Section 2244(d)(1)(A). Respondent argues (BIO 18) that the *real* question on which the circuit courts are in conflict is whether the "direct review" provision of Section 2244(d)(1)(A) drops out whenever a habeas petitioner fails to seek review in the State's highest court, leaving the "expiration of time" for seeking review as the sole trigger of finality. In respondent's view, Fifth Circuit law renders the "direct review" provision unavailable to such petitioners, because "the conclusion of direct review" can occur only when this Court rejects a certiorari petition or disposes of a case on the merits. *See* BIO 4-8 (failure to appeal to the United States Supreme Court renders the "direct review" prong "inapplicable").

At best, that simply articulates a fourth way in which the circuit courts are in conflict—an argument that underscores the need for this Court's review. But, at bottom, respondent's articulation of the split simply subsumes the first two questions presented in the petition.

1. Conflict over the Role of State Law

Embedded in respondent's question presented is the critical assumption that "the conclusion of direct review" under state law

must occur at a single federally dictated point. The States' varying delineations of when state direct review ends are entirely irrelevant in respondent's view because the "conclusion of direct review" can occur only upon disposition (certiorari or merits) by this Court.

The assumption that Section 2244(d)(1)(A) dictates a single federal-law termination point for direct review, however, is very much disputed by other courts of appeals. Pet. 15-17. Indeed, the Fifth Circuit in this case explained that the central point of departure between the circuits was its refusal—and the Eighth Circuit's willingness—to "rely[] on state court definitions to determine finality under § 2244(d)(1)." Pet. App. 8a; *see Flores*, 467 F.3d at 486 (acknowledging that *Roberts* took sides in the circuit split between Ninth and Eleventh Circuits on the role of federal and state law).

It is precisely because the Eighth and Eleventh Circuits consider state law when applying AEDPA's finality test that the "conclusion of direct review" prong of Section 2244(d)(1)(A) retains vitality as an "alternative trigger" of finality, even when a prisoner does not seek review in the State's highest court. *Riddle*, 523 F.3d at 856. And it is precisely because the Fifth Circuit cuts state law out of the picture that it ends the "direct review" prong's relevance prematurely. In other words, it is the Fifth Circuit's refusal to look beyond its single, federal-law point (Supreme Court review) for terminating direct review that causes it to render the "direct review" prong

irrelevant when defendants halt their direct appeals early.

The relevance of state law in turning off the "direct review" prong thus is exactly where the Fifth, Ninth, Eighth, and Eleventh Circuits part company.[1] Respondent's proposed question simply assumes its preferred answer to that conflict, while the petition properly presents it for this Court's review.

2. Conflicting Finality Triggers Under Federal Law

With respect to Gonzalez's second question presented, respondent's argument merely states the problem a different way. Respondent's articulation of Fifth Circuit law dictates one universal finality trigger—the expiration of time for appeal—whenever defendants forgo further state review, and another trigger—disposition of a certiorari petition—when they pursue such review. BIO 5-6.

Right or wrong, that view of the Fifth Circuit's law squarely conflicts with the holding of the en banc Eighth Circuit that the single, federal rule must be the state court's mandate, given this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007). *See Riddle,* 523 F.3d at 856 (alternative holding). The Fifth

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[1] *See also Balsewicz v. Kingston*, 425 F.3d 1029, 1032 (7th Cir. 2005), cert. denied, 546 U.S. 1144 (2006) (applying Wisconsin law, so that conviction became final when "Remittitur issue[d]").

Circuit here looked at *Lawrence* and came to the opposite conclusion, in acknowledged conflict with the Eighth Circuit. Pet. App. 7a. And, as respondent's quotation of the Ninth Circuit notes, that court of appeals picked yet a third marker: the intermediate appellate court's issuance of its decision. BIO 8 (quoting 264 F.3d at 897-898).

The conflict thus is direct, concrete, and fully considered, given the Eighth Circuit's en banc review and the Fifth Circuit's reexamination and reaffirmation of its own conflicting rule in this case. Respondent's rewording of the conflict does not make it go away. Only this Court's review can do that.

C. The Conflict Over Inclusion of the Certiorari Period

With respect to the entrenched, five-circuit conflict over whether "expiration of the time for seeking [direct] review" under Section 2244(d)(1)(A) includes the 90 days for seeking certiorari review in this Court, respondent disputes (BIO 22) whether the other courts' decisions are "'holdings.'" The courts of appeals say otherwise.

Sitting en banc in *Riddle*, all eleven members of the Eighth Circuit unanimously acknowledged the existence of a circuit conflict in the law on this question. 523 F.3d at 855; *see Pierson v. Dormire*, 484 F.3d 486, 494 (8th Cir. 2007) ("Circuits are split on whether a state prisoner who fails to appeal to a discretionary state court of last resort is entitled to the ninety-day period," noting that

the Seventh Circuit "has held" differently from what the Fifth and Tenth Circuits "have held"). That is not a "casual aside[]." (BIO 24).

Respondent dismisses (BIO 23-24) the Seventh Circuit decision in *Balsewicz v. Kingston*, 425 F.3d 1029 (2005), because the conviction "became final" before AEDPA's enactment. But the way the Seventh Circuit determined when the conviction "became final" was by applying Section 2244(d)(1)(A)'s definition and including the 90-day certiorari period, notwithstanding the habeas petitioner's failure to seek review in the State's highest court. *Id.* at 1031-1032. Moreover, the Seventh Circuit has subsequently followed that holding. *See Lo v. Endicott*, 506 F.3d 572, 574 (7th Cir. 2007).

Likewise, the Fourth Circuit in *Hill v. Braxton*, 277 F.3d 701 (2002), could not have spoken more clearly: "If no petition for a writ of certiorari is filed in the United States Supreme Court, then the limitation period begins running when the time for doing so—90 days—has elapsed." *Id.* at 704. That the court ultimately remanded for the district court to apply equitable tolling does not change the fact that the certiorari period would be counted in the timeliness calculation.

Likewise, the Fifth Circuit in *Roberts* specifically held that, "by failing to file a petition for discretionary review," Roberts sacrificed the inclusion of the 90-day period in his limitations calculation. 319 F.3d at 693 & n.14. And the Fifth Circuit has treated that

holding as conclusive. *See United States v. Plascencia*, 537 F.3d 385, 388 & n.10 (5th Cir. 2008) (extending *Roberts* to federal prisoners who did not file a notice of appeal).

Moreover, respondent completely ignores conflicting cases that the petition cited from the Eighth Circuit and Tenth Circuit, further documenting the persisting circuit split. *See* Pet. at 23-24 (citing *Riddle*, *supra* and *Wesley v. Snedeker*, 159 Fed. App'x. 872, 873-74 (10th Cir. 2005)).

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND PROPERLY PRESENTED

A. The Questions Presented Are Critical and Recur Frequently

Content to leave AEDPA law in a state of disarray, respondent contends that the multiple conflicts are not of sufficient significance to warrant this Court's review. That blinks reality.

First, the circuit conflicts span six different circuits, and the sheer volume of appellate decisions implicating these same finality issues document the importance of the questions presented. That is why the Eighth Circuit addressed each issue en banc, and the Fifth Circuit felt compelled to revisit and reaffirm its law in this case.

The issues, moreover, are important not just to habeas petitioners in those six circuits, but to respondent's eighteen sister States in the Fourth, Seventh, Eighth, and Eleventh Circuits

who labor under interpretations of AEDPA that postpone the finality of their convictions longer than for States in the Fifth and Ninth Circuits. AEDPA was enacted to promote uniform rules of finality and to respect federalism principles. The current regime of contradictory rules defeats both ends.

Second, the central predicate of respondent's argument is flawed. Respondent contends (BIO 11) that the problem rarely arises because, when a prisoner's counsel forgoes direct review in the State's highest court, exhaustion principles limit AEDPA's applicability to "ineffective assistance of counsel" and "newly discovered evidence" claims. That, however, is a large volume of cases because claims of ineffective assistance and newly discovered evidence have never been in short supply in habeas petitions.[2]

Third, respondent's exhaustion argument is just wrong. In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), this Court held that, to exhaust a prisoner's state remedies properly, the prisoner need only give the State's highest court "one

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[2] *See* Nancy J. King *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, at 28-30 (2007) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (81% of capital and 50.4% of non-capital petitions include ineffective assistance claims; 25.5% of capital and 18.9% of non-capital petitions include new evidence claims).

full opportunity" to consider the substance of a prisoner's claims before they can be raised in federal habeas, *id*. at 844-45. A prisoner can satisfy that requirement *either* by pursuing direct review *or* state collateral review to the state's highest court. The latter, in fact, is what Gonzalez did when he filed his petition under Section 11.07 of the Texas Code of Criminal Procedure. *See, e.g.*, *Payne v. Thaler*, No. 4:10-CV-307-A, 2010 WL 4739364, at *1 (N.D. Tex. Nov. 21, 2010).[3]

B. The Certificate of Appealability Permits this Court's Review

Respondent also contends (BIO 12) that the certificate of appealability issued by the Fifth Circuit counsels against review. That is wrong.

First, the argument has been waived because, as respondent acknowledges (BIO 16-17), it was not raised below.

Second, the law is well settled that any alleged defect in a certificate of appealability has no effect on this Court's certiorari jurisdiction. Indeed, the plain text of AEDPA imposes the certificate requirement only on "an appeal * * * to the court of appeals," not

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[3] In any event, this Court has granted review to address even "narrow but recurring" questions of AEDPA's application, *Clay v. United States*, 537 U.S. 522, 524 (2003), because of the importance of protecting habeas corpus and the States' interest in the finality of their convictions.

certiorari review by this Court. 28 U.S.C. § 2253(c)(1).

Nor did the alleged error affect the court of appeals' jurisdiction. While the complete absence of a certificate of appealability deprives appellate courts of jurisdiction, *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the same rule does not apply when a certificate identifies a question for review, but contains other defects. *See Owens v. Boyd*, 235 F.3d 356, 358 (7th Cir. 2001); *United States v. Talk*, 158 F.3d 1064, 1065 (10th Cir. 1998); *Soto v. United States*, 185 F.3d 48, 52 (2d Cir. 1999); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001); *James v. Giles*, 221 F.3d 1074, 1076 (9th Cir. 2000). [4]

Proving the point, this Court has repeatedly granted certiorari to resolve procedural questions dividing the lower courts under AEDPA when, as here, the courts of appeals had granted certificates of appealability limited

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[4] Respondent invokes (BIO 15) *United States v. Cepero*, 224 F.3d 256 (3d Cir. 2000), but that case addressed whether courts of appeals could review a district court's issuance of a certificate, *id.* at 259-262. It did not hold that any alleged defect in the certificate stripped the court of jurisdiction. It was only when the court concluded that no certificate should have issued at all that the decision took on jurisdictional consequence under *Miller-El*. *Id.* at 267. *Tiedeman v. Benson* 122 F.3d 518, 522 (8th Cir. 1997), and *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997), are similarly of no help to respondent because they involved certificates that failed to identify *any* issue at all for review, and thus were the functional equivalent of no certificate.

to procedural grounds. Even worse for respondent, in *Slack v. McDaniel*, 529 U.S. 473 (2000) itself, this Court granted review of a question concerning successor habeas petitions, 525 U.S. 1138 (1999) (Mem.), even though *no* certificate of appealability had been issued at all, 529 U.S. at 480. *Compare also Holland v. Florida*, 130 S. Ct. 2549 (2010) (granting review and 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 issued).

Importantly, those grants of review did not overlook the narrowness of the certificate of appealability. In *Lawrence*, the State made the same argument that respondent makes here in its brief in opposition, *see* Respondent's Brief in Opposition, *Lawrence v. Florida*, 549 U.S. 327 (2007) (No. 05-8820), 2006 WL 816746 at *5., at *5. It was no barrier to this Court's review and power to address circuit conflicts there, and neither is it here. Indeed, to hold otherwise would empower circuit courts to insulate their precedential rulings from this Court's review by

granting plausibly defective certificates of appealability.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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