No. _____

IN THE

Supreme Court of the United States

DETLEF F. HARTMANN,

Petitioner,

vs.

THOMAS CARROLL,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There is a split among the circuits with respect to the following question:

Whether a motion filed in state court for discretionary review of a sentence is an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Antiterrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal *habeas corpus* petition.

LIST OF PARTIES

Petitioner Detlef F. Hartmann is an inmate incarcerated in Delaware pursuant to a sentence of a Delaware state court. Respondent is Thomas Carroll, the warden of the facility in which Mr. Hartmann is incarcerated.

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Petitioner Detlef F. Hartmann respectfully requests that a writ of *certiorari* issue to resolve a split among the federal courts of appeals.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at *Hartmann* v. *Carroll,* 492 F.3d 478 (CA3 2007). The opinion of the district court (Appendix B) is unreported but available at *Hartmann* v. *Carroll,* No. 03-cv-00796, 2004 U.S. Dist. LEXIS 25165 (D. Del., Nov. 16, 2004).

JURISDICTION

The court of appeals entered its judgment on July 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2254.

STATUTORY PROVISIONS INVOLVED

Section 2244 of Title 28, United States Code, and Delaware Superior Court Criminal Rule 35(b) are excerpted in relevant part in Appendices C and D, respectively.

STATEMENT OF THE CASE

Factual Background

In March 2001, Detlef F. Hartmann pleaded guilty in the Delaware Superior Court to felony charges.[1] The Superior Court sentenced Mr. Hartmann on March 29, 2001, to an aggregate 19

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[1] This description of the facts is drawn from the opinions of the Third Circuit and the district court.

years of incarceration. Mr. Hartmann did not appeal his conviction or sentence. He is currently incarcerated in the Delaware Correctional Center in Smyrna, Delaware.

Proceedings Below

Pursuant to Delaware Superior Court Criminal Rule 35(b),[2] Mr. Hartmann filed in the Delaware Superior Court two motions for sentence reconsideration, reduction or modification: one on June 29, 2001, and the other on July 26, 2001.[3] The Superior Court denied both motions on June 25, 2002.

On November 12, 2002, Mr. Hartmann filed a motion in the Superior Court titled "Motion to Dismiss," arguing, among other things, that the Superior Court did not have jurisdiction over the charges in the indictment, that his counsel had been ineffective for failing to address this defect and that his constitutional rights had been violated. The Superior Court, in a November 19, 2002, letter order to Mr. Hartmann, struck the motion.

Mr. Hartman timely appealed the Superior Court's November 19, 2002, letter order to the Delaware Supreme Court. On March 20, 2003, the Delaware Supreme Court affirmed the order. Noting that it was "clear" that, in his "Motion to Dismiss," Mr. Hartmann was seeking relief pursuant to Delaware Superior Court Criminal Rule 61, the court explained that the Superior

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[2] The text of the rule appears in Appendix D to this petition.

[3] The Delaware trial court granted Mr. Hartmann an extension of time in which to file his motions, and so they were timely filed under Delaware court rules.

Court did not abuse its discretion in striking the motion as a nonconforming document "to the extent that" the motion did not comply with Rule 61. The Delaware Supreme Court also held that Mr. Hartmann's substantive argument was without merit.

On August 4, 2003, Mr. Hartmann filed a petition for federal collateral relief under 28 U.S.C. § 2254. The district court dismissed the petition as time-barred under the one-year limitations period in 28 U.S.C. § 2244(d)(1). The district court found that Mr. Hartmann's conviction became final on April 30, 2001, and that he did not file his Section-2254 petition until August 4, 2003 – more than two years later.

Although the application would have been timely had the limitations period been tolled both by the Delaware Superior Court Criminal Rule 35(b) motion and by the "Motion to Dismiss," the district court determined that Mr. Hartmann's "Motion to Dismiss" could not toll the limitations period because it was not a "properly filed" application for state post-conviction relief under Section 2244(d)(2). Thus, the district court held that Mr. Hartmann's Section-2254 petition was untimely regardless of whether his Rule 35(b) motion tolled the limitations period. The district court therefore declined to address the tolling effect of Mr. Hartmann's Rule 35(b) motion.

Mr. Hartmann appealed. The Third Circuit entered a certificate of appealability and appointed counsel. In the certificate, the court requested briefing on "whether Appellant's motions to reduce sentence are 'applications for State post-conviction

or other collateral review' under 28 U.S.C. § 2244(d)(2).[4]

At oral argument, the Third Circuit panel questioned counsel almost exclusively about the Rule 61 issue, and the judges seemed uncertain about its resolution. In the written opinion, however, the panel set aside that difficult issue and focused solely on the Delaware Superior Court Criminal Rule 35(b) issue.

The Third Circuit held that a motion under Rule 35(b), which allows for a reduction of sentence without regard to the legality of the sentence, is not an "application for State post-conviction or other collateral review" that would allow statutory tolling of the one-year limitations period in the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). *See* 28 U.S.C. § 2244(d)(2). In so holding, the Third Circuit followed the holdings of the Fourth and Eleventh Circuits with respect to analogous state rules in West Virginia and Georgia, respectively. The Third Circuit agreed with the Fourth Circuit that a motion for reduction of sentence without regard to the legality of the sentence is not an application for review that is "collateral" to the original judgment. *Hartmann*, 492 F.3d at 483, citing *Walkowiak* v. *Haines*, 272 F.3d 234, 237-38 (CA4 2001). The Third Circuit

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[4] In the certificate of appealability, the court also requested briefing on

> (2) whether Appellant's motion to dismiss the indictment was not "properly filed" and did not toll the AEDPA statute of limitations. As to issue (2), the parties are also directed to include in their briefs a discussion of whether the Delaware Supreme Court's opinion in Hartmann v. State of Delaware, 818 A.2d 970 (Table), 2003 WL 1524623 (Del. March 20, 2003) constitutes a ruling on the merits on the motion to dismiss the indictment.

also cited approvingly to the Eleventh Circuit's conclusion that tolling for leniency motions does not promote exhaustion and finality of state court judgments by reducing the time in which federal review is sought. *Id.* at 483, citing *Bridges* v. *Johnson*, 284 F.3d 1201, 1203 (CA11 2002).

Noting that the decisions of the circuit courts are "discordant," the Third Circuit expressly declined to follow the Tenth Circuit, which had reached the opposite conclusion with respect to analogous state rules in Colorado and New Mexico. The Tenth Circuit based its decisions on comity because the state court, like the Delaware Superior Court in this case, had retained jurisdiction of the leniency proceeding during its pendency. *Hartmann*, 492 F.3d at 483, discussing *Robinson* v. *Golder*, 443 F.3d 718, 720-21 (CA10), *cert. denied*, __ U.S. __, 127 S. Ct. 166 (2006) and *Howard* v. *Ulibarri*, 457 F.3d 1146, 1149-50 (CA10 2006). The Third Circuit explained that "we are not persuaded by the reasoning of the Tenth Circuit," and it concluded that the AEDPA's limitations period is "tolled only by 'state post-conviction or other collateral review' – not by just any pending state-court proceeding." 492 F.3d at 483.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are now split on the issue presented in this case: whether a motion filed in a state trial court seeking discretionary review of a state-court sentence without regard to the legality of the sentence qualifies as an "application for State post-conviction or other collateral review" such that the AEDPA's limitations period is tolled during the pendency of such a motion. Three courts of appeals, including the Third Circuit in this case, now hold

that such a motion does not toll the running of the statute of limitations. One court of appeals has reached the contrary conclusion. The split among these four circuits is longstanding and entrenched.

Moreover, there remain eight circuits that have not yet resolved this purely legal issue.

Given that more than half of the states have such discretionary-review provisions, the existing circuit split and the unresolved state of the issue in the remaining circuits create uncertainty and inconsistency in application of what should be a straightforward procedural issue that has great importance to inmates seeking federal *habeas* review. This Court should step in to bring uniformity to the issue.

I. THE COURTS OF APPEALS ARE SPLIT OVER WHETHER A POST-CONVICTION MOTION FOR DISCRETIONARY REVIEW OF A STATE-COURT SENTENCE TOLLS THE AEDPA'S LIMITATIONS PERIOD.

The holding of the court below that a motion for a discretionary reduction of sentence is not an "application for State post-conviction or other collateral review" that tolls AEDPA's limitations period is in direct conflict with two decisions of the Tenth Circuit. In adopting the position previously accepted by the Fourth and Eleventh Circuits, and expressly disagreeing with the Tenth-Circuit rule, the Third Circuit has thus expanded a clear conflict among the courts of appeals in an area of law in which this Court has said that "uniformity among federal courts is important . . . ." *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995).

Just last year, the Tenth Circuit held that the AEDPA limitations period is tolled by a motion

for reduction of sentence under Colorado Rule of Criminal Procedure 35(b), a rule nearly identical to the Delaware rule at issue in this case. *Robinson* v. *Golder*, 443 F.3d 718, 720-21 (CA10 Cir. 2006). Citing two of its previous unpublished decisions addressing the issue, the Tenth Circuit reasoned in *Robinson* v. *Golder* that there is no authority that "application[s] for State post-conviction or other collateral review," as those words are used in 28 U.S.C. § 2244(d)(2), should be limited to those containing "constitutional challenges to the defendant's conviction." *Martin* v. *Embry*, No. 99-1203, 1999 U.S. App. LEXIS 32147 (CA10 Dec. 8, 1999); and *Upshur* v. *Hickock*, No. 99-1156, 1999 U.S. App. LEXIS 22090 (CA10 Sept. 13, 1999). Additionally, the court concluded that to "hold otherwise would raise questions of comity, because it appears that Colorado retain[s] jurisdiction over the case during the pendency of [a] Rule 35(b) motion." *Id.* at 721 (quoting *Martin*).

A few months later, the Tenth Circuit reaffirmed this position, expressly disagreeing with a prior decision of the Fourth Circuit and holding unanimously (and without oral argument) that a motion for modification of sentence under New Mexico Rule of Criminal Procedure 5-801(B) tolls AEDPA's limitations period. *Howard* v. *Ulibarri*, 457 F.3d 1146, 1149-50 (CA10 2006) (opinion by McConnell, J.) (citing *Truelove* v. *Smith*, 9 Fed. Appx. 798, 802 (CA10 2001)(unpublished opinion holding same)). In *Howard* v. *Ulibarri*, the court agreed that New Mexico's rule is "substantively identical" in all relevant respects to the Colorado rule addressed in *Robinson*. The New Mexico rule allows a defendant to file a motion for a reduction of his sentence within 90 days after the conviction and sentence are final. *See* N.M. R. Crim. P. 5-801(B); Colo. R. Crim. P. 35(b); Del. Super. Ct. Crim. R. 35.

Decisions by the Fourth, Eleventh and now the Third Circuit are in direct conflict with the Tenth Circuit's decisions in *Robinson* and *Howard*. In *Walkowiak* v. *Haines*, 272 F.3d 234 (CA4 2001), the Fourth Circuit determined that a motion for "correction or reduction of sentence" pursuant to West Virginia Criminal Procedure Rule 35(b) did not toll AEDPA's limitations period. *Walkowiak*, 272 F.3d at 239. The court reasoned that the "plain language interpretation of the section" requires that it be limited to post-conviction review that is "collateral." *Id.* It then concluded that because the consideration of the Rule 35(b) motion is not separate and distinct from the original proceeding in which the defendant was sentenced and does not entail a legal challenge to the original sentence, such a proceeding is not "collateral" within the meaning of AEDPA. *Id.* at 237-38.

In *Bridges* v. *Johnson*, 284 F.3d 1201, 1204 (CA11 2002), the Eleventh Circuit held that petitioner's application to a state sentence review panel pursuant to Georgia Code Section 17-10-6 seeking discretionary sentence review did not constitute a post-conviction proceeding for the purposes of tolling AEDPA's limitations period. The court noted that the "sentence review panel's sole task is to determine whether the sentence . . . [is] excessively harsh," and thus reasoned that "viewing [Georgia Code Section 17-10-6] as a means to toll the limitations period would not enhance exhaustion of state review or finality of state court judgments." *Id.* at 1203-04.

In sum, the conflict among the circuits is clear and direct, and it evidences an explicit and mutually acknowledged disagreement on a pure issue of law.

II. THE CIRCUIT SPLIT PRODUCES INCONSISTENT HOLDINGS ON THE RIGHTS OF STATE INMATES TO PURSUE FEDERAL *HABEAS* RELIEF, INTOLERABLE UNCERTAINTY IN THOSE CIRCUITS THAT HAVE NOT YET DECIDED THE ISSUE AND UNSEEMLY OVERLAP OF STATE AND FEDERAL PROCEEDINGS.

There are more than one million prisoners incarcerated by the states. *See* William J. Sabol *et al.*, Bureau of Just. Stat., U.S. Dep't of Just., Bulletin No. NCJ 217675, Prison and Jail Inmates at Midyear 2006, at 2 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf. All state prisoners have the right to pursue federal *habeas* remedies. A majority of the states allow prisoners to file a motion for discretionary sentence review.[5] Thus, the conflict among the circuits on the issue of the tolling effect of state discretionary sentence review proceedings is a real issue for hundreds or perhaps thousands of state prisoners each year. This conflict among four circuits creates an intolerable level of uncertainty on an important recurring issue of procedure. The uncertainty and disruption is most egregious in the eight circuits that have yet to address the issue.

In view of the existing split in the circuit courts, a state prisoner – depending on the law of the circuit he is in – may or may not lose his right to pursue federal *habeas* review if he waits to file his petition until after the state court's determination of his motion for discretionary sentence reduction. In the Tenth Circuit, such a motion for discretionary sentence review tolls the one-year limitation period. In the Third, Fourth and Eleventh Circuits, it does not. Of still greater

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5 *See, infra,* note 6.

concern, in the majority of circuits where the issue has yet to be resolved, there is no way to know what the governing law is or will be, and prudence counsels inmates to file their federal *habeas* petitions within a year even if a state-court motion for discretionary sentence review remains unresolved.

The result is thus to make unavoidable a pattern of unseemly and wasteful simultaneous state and federal proceedings pertaining to the same state prisoners. This result is not only inefficient, it is in substantial tension with numerous decisions of this Court that evidence great concern about avoiding state and federal proceedings – especially relating to law enforcement – that overlap and concern the same subject matter. *E.g., Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 433–34 (1982); *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977); *Steffel* v. *Thompson*, 415 U.S. 452, 460 (1974); *Younger* v. *Harris*, 401 U.S. 37, 43 (1971).

No fewer than half the states (and the District of Columbia), and at least one state in every circuit, have provisions nearly identical to Delaware Superior Court Criminal Rule 35(b).[6]

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[6] *See, e.g., See, e.g.*, Mass. R. Crim. P. 29 (CA1.); N.Y. R. Crim. P. 450.15, 450.30 (CA2); N.J. Ct. R. 3:21-10 (CA3); Va. Ann. § 19.2-303 (2003) (CA4); La. Code Crim. Proc. Ann., art. 881.1 (CA5); Tenn. R. Crim. P. 35 (CA6); Wis. Stat. § 973.195 (2006) (CA7); N.D. R. Crim. P. 35 (CA8); Alaska R. Crim. P. 35 (CA9); Colo. R. Crim. P. 35 (CA10); Fla. R. Crim. P. 3.800 (CA11); D.C. Sup. Ct. R. Crim. P. 35 (CADC); *see also,* Conn. Gen. Stat. Ann. § 53a-39 (West 2001); Del. Super. Ct. Crim. R. 35, D.C. Sup. Ct. R. Crim. P. 35; Haw. R. Pen. P. 35(b); Idaho Crim. R. 35; 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2007); Ind. Code Ann. § 35-38-1-17 (West Supp. 2007); Me. R. Crim. P 35(c); Md. R. 4-344, 4-345; N.M. R. Crim. P 5-801; Okla. Stat. Ann. tit. 22, § 982a (West 2003); Pa. R. Crim P. 720; R.I. Super. R. Crim. P. 35; S.D. Codified Laws § 23A-31-1 (1998); Tenn. R. Crim. P. 35; 13 Vt. Stat. Ann. § 7042

Thus the specter of state prisoners being heard or excluded from federal court by the application of flatly inconsistent constructions of AEDPA's tolling provision is truly a problem of national proportions.

In recent years, this Court has repeatedly recognized the need for uniformity in the interpretation of AEDPA's tolling provision. In the past two terms alone, the Court has resolved four cases dealing with the application of the statute of limitations in *habeas* cases. *See Lawrence* v. *Florida*, 127 S.Ct. 1079, 1081 (2007) (tolling effect of petition for *certiorari*); *Day* v. *McDonough*, 547 U.S. 198, 202 (2006) (effect of miscalculation by state court of the elapsed time under AEDPA's limitations period); *Evans* v. *Chavis*, 546 U.S. 189, 192 (2006) (timeliness of an appeal filed three years after the lower court's judgment); *Pace* v. *DiGugliemo*, 544 U.S. 408, 410 (2006) (tolling effect of an untimely state post-conviction petition for *habeas*).

The flat inconsistency in circuit rules, the resulting great uncertainty confronting inmates, government attorneys, and courts alike about the tolling effect of discretionary state sentence review proceedings and the inevitable consequence of widespread simultaneous state and federal litigation concerning the same inmate, call out for review by this Court at least as clearly as the issues presented in those cases.

(1998); Va. Code Ann. § 19.2-303 (Supp. 2007); W. Va. R. Crim. P. 35(b).

III. THE THIRD CIRCUIT'S DECISION IS UNSUPPORTED BY THE PLAIN LANGUAGE OF SECTION 2244(d)(2), AND IT CONFLICTS WITH LONGSTANDING PRINCIPLES OF COMITY AND FEDERALISM

This case presents the straightforward question of whether an application to a state court for the reduction of a state-imposed sentence is an "application for State post-conviction or other collateral review with respect to the pertinent judgment" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2). The court below erred by holding—contrary to the plain language of Section 2244(d)(2) and the principles of comity and federalism underlying the AEDPA—that it is not.

As a threshold matter, a motion pursuant to Delaware Rule of Criminal Procedure 35(b) is a [1] "post-conviction" application for [2] "review with respect to the pertinent judgment." First, Rule 35(b) provides that "[t]he court may reduce a sentence of imprisonment on a motion made within 90 days *after the sentence is imposed*" (emphasis added). There is thus no question that the rule describes a "post-conviction" proceeding. Second, a motion pursuant to Rule 35(b) is one for "review with respect to the pertinent judgment." In common usage, "review" means simply "to examine again." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1944 (1993) (definition 2). In legal usage, "review" likewise means the "[c]onsideration, inspection, or reexamination of a subject or thing." BLACK'S LAW DICTIONARY 1345 (2004) (definition 1). Because a Rule-35(b) motion asks the court to review a sentence in the ordinary sense of examining it again, it is one for "review" within the meaning of Section 2244(d)(2).

A motion to reduce a sentence furthermore initiates "collateral" review under Delaware law. In general, collateral review denotes proceedings "other than a direct appeal" that nonetheless draw the outcome of a prior proceeding into question. BLACK'S LAW DICTIONARY 278 (2004) (defining "collateral attack"). Rule 35(b) provides that the deadline for filing the motion "shall not be interrupted or extended by an appeal," and that "[t]he court may decide the motion or defer decision while an appeal is pending." The rule thus contemplates a separate, distinct and ancillary proceeding—one that is "collateral" according to the plain meaning and common usage of that term. *Id.*

To be sure, Congress could have restricted Section 2244(d)(2) to the most common type of collateral review, state *habeas* proceedings. The statute's broad language, however, does not support so restricted a construction. *Cf. Duncan* v. *Walker*, 533 U.S. 167, 177 (2001) ("[T]he tolling provision applies to all types of state collateral review available after a conviction and not just to those denominated 'post-conviction' in the parlance of a particular jurisdiction."). "A petition for a writ of habeas corpus is *one type* of collateral attack." BLACK'S LAW DICTIONARY 278 (2004) (emphasis added). And, as this Court has observed, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citations omitted).

In addition to disregarding the plain language of Section 2244(d)(2), the decision below conflicts with the basic principles underlying the AEDPA—"comity, finality, and federalism." *Duncan*, 533 U.S. at 178. As this Court has explained, the AEDPA's tolling provision strikes a

balance between exhaustion and finality: the provision "promotes the exhaustion of state remedies," while "limiting the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for State post-conviction or other collateral review." *Duncan*, 533 U.S. at 179–80.

Construing the provision to include a state's review of a sentence respects that balance. First, tolling the limitations period quite plainly promotes the exhaustion of state remedies by "encourag[ing] state prisoners to seek full relief first from the state courts." *Rose* v. *Lundy*, 455 U.S. 509, 518–19 (1982). While the exhaustion requirement operates principally to allow state courts to correct constitutional error, the line between constitutional error and a misuse of discretion in a sentencing proceeding is not always obvious. *See, e.g.*, *Cunningham* v. *California*, 127 S. Ct. 856, 862-63, 869 n.14 (2007) (noting disagreement with Justice Alito and Justice Kennedy as to whether finding a "circumstance in aggravation" violates the Sixth Amendment). *See, also,* John Gleeson, *The Road to Booker and Beyond: Constitutional Limits on Sentence Enhancements*, 21 TOURO L. REV. 873, 881 (2006) (describing confusion in "every federal court" as to which sentencing enhancements violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). Because it may give the petitioner all the relief he seeks, state review may avert federal *habeas* review altogether, a longstanding goal of the exhaustion requirement.

Second, tolling the AEDPA's limitations period during a state's review of a sentence avoids the specter of simultaneous proceedings challenging the same sentence in both state and federal court. As discussed above, this Court has often counseled against federal interference in

state-court proceedings. Yet interference is exactly what the decision below demands. A petitioner might file a motion under Rule 35(b) 60 days after his conviction became final. If, during the subsequent 305 days the petitioner exhausted his other state-court remedies and the state court did not resolve the Rule 35(b) motion, the petitioner would be required to file a federal *habeas* corpus petition to preserve his right to federal review. 28 U.S.C. §§ 2244(d), 2255. As the Tenth Circuit reasoned, allowing this result "would raise questions of comity," because the state court "retain[s] jurisdiction over the case during the pendency of [a] Rule 35(b) motion." *Robinson* v. *Golder*, 443 F.3d 718, 721 (CA10 2006) (citation omitted).

Finally, construing Section 2244(d)(2) to extend to a state's review of a sentence does not threaten the finality of state sentences. Delaware's Rule 35(b), like analogous state rules, requires that an application for the reduction of sentence be made shortly after sentence is imposed. *See* Del. Super. Ct. Crim. R. 35(b) (90 days); *see, e.g.*, Ariz. Crim. Proc. R. 24.3 (60 days); N.J. Crim. Proc. R. 3:21-10 (60 days). The Third Circuit's concern that construing Section 2244(d)(2) to include a state's review of a sentence would "create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic" *Hartmann*, 492 F.3d at 484. is thus misplaced. Delaware designed its system of criminal procedure with finality in mind. Federal deference to that system will promote, not threaten, the finality of state judgments.

Most important, however, is that Congress has already balanced the interests of exhaustion and finality by providing that all forms of "state post-conviction or other collateral relief" toll the limitations period. The only permissible

interpretation of Section 2244(d)(2)'s broad language is that it tolls the limitation period during a state court's review of a sentence. That language "may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000). The decision below, which added to a growing circuit split on the scope and application of the AEDPA's limitations period, ignored Congress's resolution of the issue and was accordingly in error.

The Third, Fourth and Eleventh Circuits have incorrectly held that state motions for discretionary sentence review do not toll the AEDPA's limitations period under Section 2244(d)(2). Their reasoning runs counter to the language of the statute and to the principle of comity. The Tenth Circuit correctly held to the contrary. In any event, the circuits are now plainly split on the question, and this Court should accept review to resolve the legal question presented in this petition.

CONCLUSION

The Court should grant this petition for a writ of *certiorari.*

Respectfully submitted,

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