No. 07-6984

In The
Supreme Court of the United States

CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner proved in the Texas courts that his appellate counsel provided him with constitutionally ineffective assistance of counsel. Applying a well-settled procedure under state law, the Texas courts reinstated his appeal. The reinstated proceedings constitute "direct review" of petitioner's criminal case in both name and substance. The Fifth Circuit nonetheless deemed the appeal to be part of the state's *collateral* review process – not "direct review" – and held on that basis that the federal habeas limitations period ran from the much earlier date on which petitioner's initial appeal was dismissed. Petitioner's opening brief demonstrated that the Fifth Circuit's decision is erroneous. Indeed, its construction of the federal habeas statute is so tortured and weak that neither any state nor the federal government has filed in support of it.

A simple hypothetical illustrates the illogic of the Fifth Circuit's rule. Suppose a defendant is denied his right to an initial appeal by his attorney's constitutionally ineffective assistance. Immediately after his appeal is dismissed, he properly raises that claim in a state post-conviction court, which agrees and reinstates the appeal, which takes eighteen months to conclude. Respondent implausibly contends that in this recurring scenario the "conclusion of direct review" nonetheless occurs upon the dismissal of the initial appeal deadline that results from constitutional error, not the termination of the reinstated appeal. But he provides no basis for thinking that Congress would have intended the limitations period to commence (and often expire)

well *before* the state courts even conclude their review of the conviction.

Because the respondent's brief fails to refute petitioner's showing that the ruling below errs in its construction of Section 2244, the judgment should be reversed.

I. ONLY PETITIONER'S CONSTRUCTION OF SECTION 2244(D)(1) RESPECTS THE STATUTE'S TEXT, STRUCTURE, AND PURPOSE.

1. The one-year limitations period for a state prisoner to file a federal habeas petition presumptively runs from "the date on which the judgment became final," which is defined as "the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Because petitioner's reinstated appeal constitutes "direct review," the statute of limitations ran from the date that proceeding became "final" and petitioner's federal habeas petition was timely filed.

a. Petitioner's reinstated appeal constituted "direct review" as that term is commonly understood and is defined by the Texas courts: the ordinary Texas rules of appellate practice and procedure apply; the defendant has a right to court-appointed counsel; the standard and scope of appellate review are the same as on the original appeal; the available relief is the vacatur or reversal of the judgment below; and state post-conviction review is unavailable until the proceedings are completed. *See generally* Pet. Br. Part I.C. *Cf. Mestas v. State*, 214 S.W.3d 1, 4 (Tex. Crim. App. 2007) (holding that when appeal is reinstated, defendant is not limited merely to

pursuing appeal but may also first file a motion for a new trial). *Contra* Resp. Br. 50-51 (placing no weight on the substance of appellate proceedings and relying on dictionary definition of "direct"); *id.* at 29 (asserting without any supporting authority that "an out-of-time appeal like Jimenez's is not considered timely").[1]

Although the Fifth Circuit recharacterized petitioner's reinstated appeal instead as part of the state post-conviction process, respondent does not dispute that the court of appeals was incorrect. If a defendant prevails before the Texas Court of Criminal Appeals on his claim that he received constitutionally ineffective assistance of appellate counsel, that court dismisses any further post-conviction proceedings and directs the defendant to proceed with his direct appeal. In order to pursue any other challenges to his conviction, the defendant must institute a new and separate post-conviction challenge *after* the conclusion of the reinstated direct appeal. *Ex parte Santana*, 227 S.W.3d 700, 704 (Tex. Crim. App. 2007); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

b. Respondent himself notably acknowledges that – contrary to his principal submission – in many

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[1] As explained in petitioner's opening brief (at 22) and not contested by respondent, any other result would raise serious constitutional questions, as the State is obligated "to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of'" a violation of the Sixth Amendment right to counsel. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (citation omitted).

cases, the conclusion of a reinstated appeal *will* trigger a new one-year time to seek federal habeas corpus. He agrees that is the rule whenever the state post-conviction court nominally "vacates" the trial court's judgment. In that circumstance, he contends, "the new judgment[] would have started a new clock for federal habeas" (Resp. Br. 36-37 n.15) because "the 'pertinent judgment' that was the subject of the collateral review no longer exists" (*id.* at 50; *see also id.* at 43). Courts that find ineffective assistance of appellate counsel thus regularly vacate the trial court's judgment in order to permit a new appeal to commence. *See, e.g.*, *Beasley v. State*, 883 P.2d 714, 720 (Idaho Ct. App. 1994); *People v. Antoniou*, 861 N.Y.S.2d 598, 599 (N.Y. App. Div. 2008) . In fact, the consistent practice of the federal courts of appeals in such cases is to vacate the defendant's sentence. *See, e.g.*, *United States v. Snitz*, 342 F.3d 1154, 1159 (10th Cir. 2003); *United States v. Phillips*, 225 F.3d 1198, 1201 (11th Cir. 2000); *United States v. Pearce*, 992 F.2d 1021, 1023 (9th Cir. 1993).

Respondent contends that a different rule applies when, as in this case, the trial court's judgment is not vacated. In that circumstance, he contends that the limitations period runs from the dismissal of the defendant's appeal, often several years earlier. But in many cases, whether the original judgment is vacated is nothing more than happenstance, rather than a considered determination. Thus, in *Rodriquez v. United States*, 395 U.S. 327, 332 (1969), this Court found ineffective assistance of appellate counsel and vacated the judgment by ordering that the defendant "be re-sentenced so that he may perfect an appeal."

By contrast, in *Evitts v. Lucey*, 469 U.S. 387, 390 (1985), this Court affirmed the district court order that the state "either reinstate[] [the defendant's] appeal or retr[y] him." The Texas practice is likewise varied depending on the circumstances, sometimes vacating the sentence, as in *Ex parte Axel*, 757 S.W.2d 369, 375 (Tex. Crim. App. 1988), *Ex parte Beck*, 621 S.W.2d 810, 811 (Tex. Crim. App. 1981), *Ex parte Rains*, 555 S.W.2d 478, 482 (Tex. Crim. App. 1977), and *Ex parte Campbell*, 494 S.W.2d 842, 844 (Tex. Crim. App. 1973), and sometimes, as in this case, reinstating the appeal without directly stating that the underlying conviction had been vacated. There is no support for respondent's view that Congress intended a different habeas limitations period to apply to the similarly situated defendants in these various cases.[2]

Respondent also apparently believes that the one-year limitations period would run from the conclusion of an appeal that is genuinely "reinstated," which he would define as an instance in which the state courts "reopen the old case, with the same cause number, at the point when the ineffective assistance of counsel occurred." Br. 39. But he never explains the logic behind such an entirely formalistic distinction between "reinstated" and "out-of-time appeals."

Respondent's construction of Section 2244 would thus produce an illogical patchwork in which the

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[2] *Rodriquez* and *Evitts* also illustrate that Congress enacted Section 2244 against the backdrop of decisions reinstating direct review as a remedy for ineffective assistance of appellate counsel. *See* Pet. Br. 36.

timeliness of a habeas petition varies depending on the form of judgment that the state post-conviction court happened to adopt from case to case and from state-to-state. Respondent's heavy reliance on "how courts describe" the relief they award (Br. 28; *see also id.* at 39-40 & n.19), directly contradicts his own sensible recognition that Congress did not intend the meaning of "direct review" to turn on "rules that vary from State to State concerning the appropriate remedy for an inmate's lost appeal rights due to ineffective assistance of counsel" (*id.* at 33 (citing *Clay v. United States*, 537 U.S. 522 (2003))). Congress could not logically have intended that the federal habeas deadline would depend on whether the state post-conviction court "reinstated" an appeal as respondent defines that term and whether it directly restarted the appellate deadline (as in this case) rather than formally vacating the defendant's sentence.[3]

c. Respondent also argues that direct review of petitioner's conviction became "final" when the court of appeals dismissed his initial appeal because "§ 2244(d)(1)(A)'s text does not contemplate multiple dates on which a state-court judgment becomes final." Br. 12. But respondent offers no support for that assertion. Nor is there any basis for his

[3] Respondent notes in a footnote that a very small number of states permit courts to remedy claims of ineffective assistance of appellate counsel by deciding the merits of the defendant's appeal in post-conviction proceedings, rather than by instituting a new appeal. Br. 45 n.22. In the few cases arising under those procedures that give rise to federal habeas corpus petitions, the relevant question is whether the proceeding (though it occurs in the post-conviction court) has the hallmarks of direct review.

assumption that when a defendant's conviction becomes "final" because it is dismissed as a result of constitutionally ineffective assistance of counsel, no later event – such as a post-conviction court's order mandating further proceedings to remedy the constitutional violation – can commence a new period of direct review that becomes "final" upon its conclusion. As noted, even respondent concedes that petitioner's habeas petition would have been timely if the state post-conviction court had nominally vacated his sentence to restart the appellate timetable. *See supra* at 3. In any event, the court's order directing further proceedings is better understood as rendering the finality of the prior appeal a nullity, such that a single case does not in fact give rise to "two" final judgments. Instead, until the conclusion of the reinstated appeal ordered by the state post-conviction court, the conviction is "not yet final." *Samarron v. State*, 150 S.W.3d 701,706 n.6 (Tex. App. 2004).

In sum, because the reinstated appeal in this case constituted "direct review" for purposes of Section 2244, the one year limitations period ran from the "conclusion" of those proceedings, and petitioner's federal habeas petition was timely.

2. Beyond the statutory text, only petitioner's reading can be reconciled with the structure of Section 2244. Seemingly recognizing its indefensibility, respondent now abandons the heart of the court of appeals' ruling – *viz.*, that "AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between." *Salinas v. Dretke*, 354 F.3d 425, 429 (5th

Cir. 2004). In fact, Congress plainly contemplated that the limitations period would expire one year after the conclusion of direct review, yet be recommenced by, for example, this Court's recognition of retroactively applicable constitutional rights or the new discovery of the factual predicate of the defendant's claims. *See* Pet. Br. Part II.A (discussing Section 2244(d)(1)(C)-(D)).

Respondent shifts his argument to the assertion – notably made without citation to *any* supporting authority – that "the notion that 'collateral review' of a conviction could end before 'direct review' began is foreign to our jurisprudence" (Br. 43) and "contravenes [a] fundamental principle" of habeas law (*id.*). But respondent does not persuasively address the many counterexamples that disprove that claim. Take, for example, a case in which the state appellate court affirms the conviction and direct review concludes, but a post-conviction court (whether state or federal) finds constitutional error and orders further trial proceedings. *See* Pet. Br. 39 (citing *Penry v. Johnson*, 532 U.S. 782 (2001)); *see also Holmes v. South Carolina*, 547 U.S. 319, 322, 331 (2006) (after defendant's conviction, post-conviction court granted new trial; this Court reviewed and vacated latter judgment); *Richmond v. Lewis*, 506 U.S. 40, 43, 46 (1992) (reviewing habeas petition after final judgment based on state-court ordered resentencing); *Sawyer v. Whitley*, 505 U.S. 333, 337-38 (1992) (similar). In such cases, no one doubts that "direct review" encompasses an ensuing appeal, even when (as is common) the trial court's judgment is left intact (*e.g.*, *Nunez v. State*, 988 So.

2d 695, 697-98 (Fla. Dist. Ct. App. 2008); *Rawlins v. State*, 182 P.3d 1271, 1279 (Kan. Ct. App. 2008)).

Nor can respondent distinguish the related example of a case in which the defendant misses the deadline to file an appeal, but is nonetheless allowed to appeal on the basis of a finding of good cause. Pet. Br. 24 & n.7 (citing, *inter alia*, Fed. R. App. P. 4(a)(5)(A), (b)(4); Tex. R. App. P. 26.3, 68.2). Several states employ an indistinguishable procedure – an application to the state court of appeals or supreme court – for raising a claim that an appeal should be reinstated on the ground that the defendant received ineffective assistance of counsel. *See, e.g.*, ARK. R. APP. P. CRIM. 2(e); MICH. R. CT. 7.205(B); N.C. R. APP. P. 21(a)(1)-(2); *Ewing v. Commonwealth*, 734 S.W.2d 475, 476 (Ky. 1987); *State v. Molina*, 902 A.2d 200, 207 (N.J. 2006) (construing N.J. R. Ct. 2:4–4); *Montana v. Tweed*, 59 P.3d 1105, 1108-10 (Mont. 2005). An appeal reinstated on that ground is no less "timely" than one allowed *nunc pro tunc* for "good cause." The rules governing the appeals are moreover identical: both are reviewed under the same standard and subject to the same deadlines.[4]

Finally, respondent cannot distinguish these examples on the ground that they are part of "the

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[4] Though respondent attempts to distinguish such cases on the ground that courts nominally "*extend*" the deadline to appeal (Br. 27 (emphasis in original)), that does little to distinguish the Texas procedure under which the state courts expressly provide the defendant with a new time period for filing a notice of appeal. *See* Pet. 23; J.A. 27. Moreover, respondent elsewhere acknowledges that the substance of the proceeding, not the terminology, is controlling (*see supra* at 6).

usual direct-review process" and "an ordinary feature of state criminal appeals." Resp. Br. 25-26. As shown in petitioner's opening brief, reinstating direct appeals when necessary to remedy constitutionally deficient representation is also an ordinary feature of both state and federal procedure. Pet. Br. 25-27. There is little reason to think that Congress intended to defer to a state's decision to reopen an appeal that would otherwise be lost because counsel had good cause for missing an appeal deadline, yet intended to override the state's determination to reopen an appeal when an appeal was lost because counsel provided constitutionally deficient representation. A defendant in Texas faces a heavy burden in seeking to have his appeal reinstated (*see* Pet. Br. 53 (citing cases)), but the *process* employed by the state courts in considering such claims is rooted in a statute and governed by a well-established body of precedent. *See* Pet. Br. 52-53.

Respondent also maintains that Section 2244 presumes that defendants will exhaust their state remedies, then pursue federal habeas relief. But that is a strong argument in petitioner's favor. Obviously, if "direct review" concludes upon the erroneous dismissal of the defendant's initial appeal, then the defendant must proceed to federal court well before the conclusion of his reinstated state court appeal and subsequent state collateral proceedings. The hypothetical at the beginning of this Brief illustrates that point. Congress did not intend to deprive the state courts of "the opportunity to consider fully federal-law challenges to a state custodial judgment before the lower federal courts may entertain a

collateral attack upon that judgment." *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). This Court should adhere to its determination not to read into Section 2244 the "serious statutory anomaly" that federal courts must "contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the one-year statute of limitations.)" *Carey v. Saffold*, 536 U.S. 214, 220 (2002).

Respondent finally relies on the assertion that, "because they are derived from postconviction or other collateral-review procedures[, reinstated appeals] cannot be accurately characterized as part of a State's 'direct review' process under § 2244(d)(1)(A)." Br. 42. But respondent's only citation in support of that critical assertion is "[*s*]*ee supra* Part II.A.2," which does not address the issue. If anything, the contrast between "direct" and "collateral" review actually supports petitioner. A reinstated appeal is not part of the state collateral process, and is not subject to any of the constraints applicable to post-conviction proceedings. *See supra* at 2-3. There is accordingly no reason to refuse to afford deference to the Texas courts' own determination that a reinstated appeal is part of its system of "direct review."

3. Petitioner's reading of the habeas statute is moreover most consistent with Congress's purpose in enacting Section 2244. The statute reflects a considered determination to grant state defendants one year from the final conclusion of all direct review proceedings to prepare state and federal habeas

corpus applications. According to respondent, by contrast, when the Texas courts resolved his direct appeal for the *first* time, petitioner had *no* time to seek federal habeas review of his criminal conviction.

The statutory text reflects Congress's determination to permit states to structure their systems of "direct review" in a fashion that accounts for the particular circumstances they confront. It is thus telling that respondent does not dispute the showing of *amici* Texas Fair Defense Project *et al.* that Texas's practice of reinstating appeals was a direct response to grave defects in the representation afforded to criminal defendants in that state. Respondent's reliance on other reforms adopted by the state to mitigate that crisis (Br. 21 n.8) only illustrates that the volume of reinstated appeals which give rise to subsequent federal habeas petitions will be limited in the future, such that it is not necessary to twist the meaning of "direct review" to accomplish that result.

Contrary to respondent's apparent assumption, the statute does not impose on defendants a generalized, free-floating obligation to proceed immediately to federal court. Congress instead sought to preserve the central role of the state courts in first reviewing state convictions. That review process may take many years, as defendants pursue appeals within the state system. *See* Pet. Br. 51. Moreover, state courts through their own collateral review proceedings may order further consideration of the case in the trial court, leading to further periods of direct review. The limitations period imposed by Section 2244 runs from the finality of

"direct review," not earlier. If state appeals take ten years to conclude, that fact has no bearing on whether a subsequent federal habeas application is timely.

It is moreover not disputed that state law protects against the prospect that defendants will unduly delay review of their state court convictions by bringing belated claims that they received ineffective assistance of appellate counsel. Not surprisingly, respondent points to no evidence of a material number of federal habeas petitions filed by defendants who delayed pursuing a claim that they received constitutionally ineffective assistance of appellate counsel.

Most states impose a strict time limit (most often, one year) on such claims. *See, e.g.,* IDAHO CODE ANN. § 19-4902(a); KAN. STAT. ANN. § 60-1507(f); NEV. REV. STAT. ANN. § 34.726; TENN. CODE. ANN. § 40-30-102(a); WASH. R. APP. P. 16.4(d) (citing WASH. REV. CODE § 10.73.090). Those states that do not nonetheless account for the defendant's diligence, generally through the equitable principle of laches. *See* Pet. Br. 53 (citing cases); *see also, e.g.*, *Ex parte Florentino*, 206 S.W.3d 124, 126 (Tex. Crim. App. 2006) (Cochran, J., concurring) (laches did not bar application that state courts failed to process for several years).[5] The Texas courts have thus held that

[5] Respondent's assertion in a footnote that in "many States," "collateral proceedings . . . are not subject to filing deadlines" (Br. 35 n.14) is thus somewhat misleading. The minority of states that impose no formal deadline often assess the timeliness of the application through the doctrine of laches or a requirement of diligence. *See, e.g.*, *Mead v. State*, 875 N.E.2d

a defendant's undue delay is a proper ground for denying a claim of ineffective assistance of appellate counsel because the application is untimely or because the defendant's tardiness undercuts the credibility of his claim that his constitutional rights have been violated. *See* Pet. Br. 53 (citing cases). But laches is a *defense* (*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002); *New Jersey v. New York*, 523 U.S. 767, 806 (1998)), and the Texas courts appropriately hold that the state waives that defense by not raising it (*see Ex parte Steptoe*, 132 S.W.3d 434, 434 (Tex. Crim. App. 2004) (Price, J., concurring)), as occurred in this case. Although respondent now complains that petitioner demonstrated a "marked lack of diligence" in raising his constitutional claim of ineffective assistance of appellate counsel in the state system (Br. 10), he fails to acknowledge that he elected not to assert that argument in the appropriate forum – state court – which would have been in a position to develop an appropriate record and evaluate the reasons for the delay (*see Ex parte Steptoe*, 132 S.W.3d at 434-36 (Price, J., concurring)).[6]

304, 307 (Ind. App. Ct. 2007); *Paxton v. State*, 903 P.2d 325, 326-27 (Okla. Crim. App. 1995); *Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999); *State* ex rel. *Coleman v. McCaughtry*, 714 N.W.2d 900, 908-10 (Wis. 2006).

[6] This case also does not present the question whether laches can be asserted as a defense to a federal habeas petition or whether a habeas petitioner is otherwise required to exercise due diligence in seeking state post-conviction review as a matter of federal law, because respondent has not raised either argument.

To be clear, a belated assertion of ineffective assistance of appellate counsel does not *ipso facto* restart the federal habeas limitations period, and for that reason petitioner's position does not undermine the one-year federal habeas deadline's salutary benefit of encouraging defendants to seek prompt review of their convictions. A defendant has every incentive to assert his state post-conviction claim in less than a year. As noted, the state courts police late filings through their own deadlines and the laches principle. In addition, merely *filing* a claim of ineffective assistance of appellate counsel does not affect the one-year limitations period; the defendant must actually *prevail* on that claim. Experience shows – and state defendants are well aware – that most defendants do not succeed in requests to reinstate their appeals. Thus, a defendant in Texas can secure a reinstated appeal only if he proves that he received constitutionally ineffective assistance of counsel. *See* Pet. Br. 53 (citing cases). It is only in the rare case in which a defendant *succeeds* on post-conviction review – as when the court orders further trial-related proceedings (*e.g.*, *Penry*, *supra*) or reinstates his appeal – that the conclusion of a new period of direct review will trigger the one-year habeas statute of limitations. In the substantial majority of cases – in which the defendant's appeal is not reinstated – the limitations period runs from the conclusion of the original, dismissed appeal.

II. RESPONDENT ERRS IN HIS RELIANCE ON THE STATUTORY TOLLING PROVISIONS OF SECTION 2244.

According to respondent, this case is properly resolved by reference to the tolling provisions of Section 2244, which he contends provide state defendants who have lost their rights to direct appeal with an adequate opportunity to seek federal habeas relief. Br. Part I.A.2. Those arguments, however, do not negate the proper construction of Section 2244(d)(1)(A), which controls the date on which the limitations period commences. Furthermore, respondent cannot reconcile his arguments that Section 2244(d) must be read as a strict limitations period (*see supra* Part I) with his exceptionally defendant-favoring construction of the statute's accompanying tolling provisions.

1. Under Section 2244(d)(2), the limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." Two years after the Fifth Circuit's decision in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), announcing the rule applied in this case, this Court held in *Lawrence v. Florida* that a state post-conviction application is no longer pending once the post-conviction court of appeals "has issued its mandate or denied review" (549 U.S. 327, ___, 127 S. Ct. 1079, 1083 (2007)); *See* Pet. Br. 45. It is uncontested that the Texas Court of Criminal Appeals issues its judgment and mandate after deciding a defendant's post-conviction application to reinstate his appeal. J.A. 28-29 (mandate in this case). The application at that point

is no longer pending, and Section 2244(d)(2) is inapplicable. *See Frasch v. Peguese*, 414 F.3d 518, 522 (4th Cir. 2005) ("We reject the *Salinas* approach because it ignores that two separate proceedings are involved.").

Respondent notably fails to acknowledge *Lawrence*. Instead, he hopes to escape what he disparages as "a hyper-technical reading" of Section 2244(d)(2) (Br. 53) by echoing the Fifth Circuit's view that the period of a defendant's reinstated appeal does not count towards the one-year federal limitations period because it is "associated with . . . collateral review" (*id.* at 51). The relevant inquiry, however, is not whether state court "review" is still pending (*contra id.* at 49), but whether the "*application*" remains "pending." *Lawrence*, 549 U.S. at ___, 127 S. Ct. at 1081. Once the Texas Court of Criminal Appeals granted petitioner's post-conviction petition, that application was no longer pending. After the conclusion of the reinstated appeal, petitioner was required to institute a *new* state post-conviction application. *See supra* at 3. Contrary to Congress's intent, respondent's position thus requires defendants to seek federal habeas review well before the conclusion of a reinstated appeal and subsequent state post-conviction proceedings. *See supra* Part I.

2. Under Section 2244(d)(1)(D), the one-year habeas limitations period runs from "the date on which the factual predicate of the claim or claims presented [in the federal habeas petition] could have been discovered through the exercise of due diligence." Respondent's assertion that the statute tolls the starting date of the limitations period until

defendants learn that their appeals have been dismissed (Br. Part I.A.2) was not adopted by the Fifth Circuit, presumably because it ignores that this provision tolls the deadline only with respect to the discovery of the "claim[] presented" in the federal habeas petition, which is *not* the defendant's claim that he was improperly deprived of his right to an appeal. *That* claim is finally resolved by the state post-conviction court, and is not presented to the federal habeas court, at least when (as here) the defendant prevails on it in the state system. The cases relied upon by respondent – *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007), *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006), and *Wims v. United States*, 225 F.3d 186 (2d Cir. 2000) – thus involve federal habeas claims by petitioners that they were denied effective assistance of counsel on appeal. The "factual predicate" of the distinct federal constitutional claims that petitioner set forth in his federal habeas petition in this case – for example, that he received constitutionally ineffective assistance of *trial* counsel (*see infra* at 28-29) – was not "discovered" when he learned that his direct appeal has been dismissed. *See* Resp. Br. 22 (seemingly recognizing that only Section 2244(d)(1)(B), not (D), would apply to "the claims raised in Jimenez's federal habeas petition").[7]

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[7] Respondent fails to acknowledge that he made precisely that point in the district court. *See* Resp. Answer with Brief in Support 9 ("Jimenez has not shown that he could not have discovered the factual predicate of his claims until a date subsequent to the date his conviction became final [under] 28 U.S.C. 2244(d)(1)(D). In fact, all the claims that Jimenez raises

3. Under Section 2244(d)(1)(B), the statute of limitations begins to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." Advancing yet another argument not adopted by the Fifth Circuit, respondent contends that this provision tolls the limitations period if a defendant is not notified of the dismissal of his appeal. Br. 22. That argument is in substantial tension with his assertions that "an inmate is typically responsible for ensuring that courts have his correct address" (Resp. Br. 19) and that petitioner (who had no reason to suspect that his appeal had been dismissed) "did not act with appropriate diligence to keep advised of his appeal" (*id.* at 20 n.7). Respondent's position would thus, at a minimum, require a *post hoc* case-by-case assessment of the circumstances in which each habeas petitioner received notice of the dismissal of his appeal.

Furthermore, even assuming that the failure to notify a defendant that his appeal has been dismissed "prevent[s]" the filing of a federal habeas petition, the statute only applies to state action that violates the federal Constitution or a federal statute – a requirement respondent omits (*see* Resp. Br. 11, 19, 22) from his quotation of the statutory text. But courts consistently conclude that the "State's failure to notify an inmate of the disposition of a petition for

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in this action were either available to him when he pled guilty in 1991 and was adjudicated guilt and sentenced on November 6, 1995 . . . .").

discretionary review or a habeas application filed pursuant to state law" does not violate the United States Constitution or federal law. *Hicks v. Quarterman*, No. H-06-2208, 2007 U.S. Dist. LEXIS 1478, at *9-*10 (S.D. Tex. Jan. 8, 2007).[8]

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[8] *See also Leggitt v. Palakovich*, No. 05-5845 2006 U.S. Dist. LEXIS 44807, at *12 n.6 (E.D. Pa. Apr. 17, 2006) (citing *Maraj v. Gillis*, No. 04-1544 2005 U.S. Dist. LEXIS 86, at *1-*2 (E.D. Pa. Jan. 4, 2005) ("[A] state court clerk's alleged failure to timely mail an opinion does not constitute a state-action impediment sufficient to trigger § 2244(d)(1)(B)."), *aff'd*, No. 05-5845 2006 U.S. Dist. LEXIS 44813 (E.D. Pa. June 21, 2006); *Jarrett v. Renico*, No. 00-10255-BC 2006 U.S. Dist. LEXIS 790, at *6 (E.D. Mich. Jan. 3, 2006) (noting that Section 2244(d)(1)(B) was not applicable because "[state] trial court's inadvertent failure to inform petitioner that it had denied his habeas corpus complaint did not violate federal law"); *Douglas v. Dretke*, No. H-05-0851 2005 U.S. Dist. LEXIS 43216, at *14 (S.D. Tex. Oct. 26, 2005) (citing *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986)) (finding no action in violation of Constitution or law when court mailed copy of decision denying state habeas petition to prison facility where petitioner was previously housed, and prison officials failed to forward copy); *Grimes v. McDonough*, No. 1:04cv432/MMP/EMT 2006 U.S. Dist. LEXIS 73408, at *17 (N.D. Fla. July 17, 2006) (stating that court's failure to notify petitioner that his submission was not a proper motion for post-conviction relief "not the type of state impediment envisioned in section 2244(d)(1)(B)"), *aff'd*, No. 1:04-cv-00432-MP-EMT 2006 U.S. Dist. LEXIS 73402 (N.D. Fla. Sept. 22, 2006); *Miles v. Dretke*, No. 4:05-CV-0491-Y 2005 U.S. Dist. LEXIS 27353, at *4-*6 (N.D. Tex. Nov. 10, 2005) (noting Section 2244(d)(1)(B) not applicable when court mailed copy of denial of state habeas application to former prison address), *aff'd*, No. 4:05-CV-491-Y 2005 U.S. Dist. LEXIS 31542 (N.D. Tex. Dec. 6, 2005).

These decisions are consistent with cases arising outside of the habeas context. *See, e.g.*, *Pilcher v. McGraw*, No. 7:07-cv-00279, 2007 U.S. Dist. LEXIS 40877, at *4 (W.D. Va. June 5, 2007) (finding that for purposes of Section 1983, negligence in

Nor is Section 2244(d)(1)(B) relevant on the theory that petitioner's appellate counsel unconstitutionally prevented him from seeking federal habeas corpus review. The lower courts recognize that "ineffective assistance of counsel cannot constitute a state-created impediment under § 2244(d)(1)(B)." *Irons v. Estep*, No. 05-1412, 2006 U.S. App. LEXIS 9792, at *4-*5 (10th Cir. Apr. 17, 2006) (quoting *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)); *Finch v. Miller*, 491 F.3d 424, 427 (8th Cir. 2007) (same); *Crawford v. Jordan*, No. 04-CV-346-TCK-PJC, 2006 U.S. Dist. LEXIS 78204, at *12 (N.D. Okla. Oct. 24, 2006) (same); *Dunker v. Bissonnette*, 154 F. Supp. 2d 95, 106 (D. Mass. 2001) (same). That conclusion follows from this Court's holding that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County*, 454 U.S. at 325. "The limited case law applying § 2244(d)(1)(B) has dealt almost entirely with the conduct of state prison officials who interfere with inmates' ability to

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failing to timely mail copy of court order does not violate Constitution even if delay prevented timely appeal), *aff'd*, 252 Fed. Appx. 541 (4th Cir. 2007). Courts have also concluded that Section 2244(d)(1)(B) does not apply to other similar clerical mistakes and negligent actions. *See, e.g.*, *Holloway v. Jackson*, No. 05-10253 2007 U.S. Dist. LEXIS 56695, at *10 (E.D. Mich. July 19, 2007) (losing petitioners' "entire court file" mere "negligent act" that "does not rise to the level of a constitutional violation"); *Jernigan v. Franklin*, No. 02-CV-469-TCK-SAJ 2006 U.S. Dist. LEXIS 62289, at *15 (N.D. Okla. Aug. 30, 2006) (loss of petitioner's pauper's affidavit not "unconstitutional State action"), certificate of appealability denied at 214 Fed. Appx. 816 (10th Cir. 2007).

prepare and to file habeas petitions by denying access to legal materials" *Shannon v. Newland*, 410 F.3d 1083, 1087 (9th Cir. 2005)), and "[ineffective assistance of counsel] is not the type of State impediment envisioned in § 2244(d)(1)(B)" *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005), *aff'd on other grounds*, 549 U.S. 327, 127 S. Ct. 1079 (2007); *see also Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007) (stating that State's appointment of an "incompetent attorney" was "not the type of impediment contemplated by" Section 2244(d)(1)(B))).

III. RESPONDENT'S PROPOSED ALTERNATIVE GROUND FOR AFFIRMANCE LACKS MERIT.

The district court dismissed petitioner's habeas petition as time-barred without addressing the merits of his constitutional claims. J.A. 75-93. It then denied petitioner's application for a Certificate of Appealability (COA) without addressing whether reasonable jurists would debate the validity of petitioner's constitutional claims. J.A. 94-95. The Fifth Circuit likewise denied petitioner's application for a COA – without undertaking the substantive inquiry into the merits of petitioner's claims under *Slack v. McDaniel*, 529 U.S. 473 (2000) – holding only that reasonable jurists would not debate whether "the § 2254 petition is time-barred." J.A. 126. Respondent nonetheless contends that petitioner was not entitled to a COA because reasonable jurists would not find the merits of his habeas claims debatable. Br. 54. That argument has been waived, does not warrant this Court's attention, and provides

no basis for affirming the Fifth Circuit's judgment in any event.

1. Respondent's contention that petitioner cannot satisfy the COA inquiry comes too late in this Court, and should instead be resolved by the lower courts on remand. Respondent did not raise the argument below, as he elected not to respond to petitioner's COA application in the Fifth Circuit. *See* J.A. 6-9 (Fifth Circuit docket); *cf.* 5TH CIR. R. 22 (rules governing responses to COA). Nor did respondent raise this argument as an alternative ground for affirmance in his brief in opposition to certiorari. Respondent has accordingly waived the issue by raising it for the first time in its merits brief in this Court.[9]

Respondent attempts to elide his failure to preserve his alternative ground for affirmance by shoehorning the issue into the question presented, which he broadly characterizes as being "whether [petitioner] was entitled to a certificate of appealability." Resp. Br. 54. But that contention, even if correct, does not excuse respondent's failure to raise the argument in his brief in opposition. In any event, the *pro se* petition's reference to a COA simply reflects the procedural posture of the case. The substantive issue presented was, in the case of a reinstated appeal, "should the 1-year limitations

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[9] *See, e.g.*, *Lee v. Kemna*, 534 U.S. 362, 376 n.8 (2002) (State waived argument by failing to "advance its current contention in [its] Eighth Circuit brief or in its brief in opposition to the petition for certiorari"); *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (deeming *Teague* argument waived by State for failing to raise it below or in opposition to petition for writ of certiorari).

[period] begin to run after [the petitioner] has completed that direct review." Pet. i. Any ambiguity is resolved by the body of the petition, which is directed at the circuit conflict over that question. Put another way, this Court presumably would not have granted certiorari to decide the fact-bound question whether petitioner's substantive constitutional claims were debatable by jurists of reason (*cf. Jimenez v. Quarterman*, 128 S.Ct. 1646 (2008) (limiting grant of certiorari to Question One presented by the petition and declining to decide petitioner's claim of entitlement to tolling of limitations period)) and that issue is not "fairly included" within the question presented (*see, e.g.*, *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Energy*, 127 S. Ct. 1199, 1207 (2007) (rejecting arguments not "'fairly included' within the question presented in [the] petition for certiorari," because "we granted certiorari to re resolve a conflict among lower courts . . . , which is analytically distinct from, and fundamentally at odds with [respondent's] reading of [the statute]")).

This Court should also decline respondent's invitation to invest its resources in deciding the merits of petitioner's underlying constitutional claims in the first instance, an issue that does not merit its attention. In contrast to the circuit conflict over whether the time to seek federal habeas review begins to run from the conclusion of reinstated proceedings, the question whether petitioner can show that reasonable jurists would debate the validity of his constitutional claims is governed by settled law, and respondent has identified no circuit

split implicated by the issue. Furthermore, the question is so narrow and limited to the specific circumstances of petitioner's case that the Court's answer will have little relevance beyond a few factually similar cases. *Cf. Fry v. Pliler*, 127 S. Ct. 2321, 2327-28 (2007) (noting that the Court granted certiorari to resolve a circuit split on the choice between two standards and reading the question presented narrowly so as not to reach "tangential and factbound questions"). Even if the Court were to conclude that respondent has not waived his argument regarding the substantive *Slack* inquiry, it should remand the case to permit the lower courts to address it in the first instance. *Cf. Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 462 (2006).

Remand is also the course charted by *Slack* – this Court's only previous application of § 2253(c) after a district court erroneously dismissed a habeas petition on procedural grounds. In *Slack*, the Court concluded that jurists of reason could disagree with the district court's procedural ruling but declined to decide whether reasonable jurists could debate the validity of the habeas petition's underlying constitutional claim. Because the substantive issue was neither "briefed nor presented below," the Court remanded the case for the lower courts to make that determination in the first instance. *Slack*, 529 U.S. at 485. Here, too, there has been no opportunity to fully brief or present the substantive issues in the lower courts, and no court has considered the substantive *Slack* inquiry. As a result, the Court is "without the benefit of the [lower courts'] analysis" of whether the validity of petitioner's constitutional

claims is debatable. *Anza*, 547 U.S. at 462.

2. In any event, respondent is wrong in asserting that petitioner would not be entitled to a COA. Preliminarily, respondent errs in arguing that, because Fifth Circuit precedent controlled the § 2241(d)(1)(A) issue and bound district courts and circuit court panels, the question was by definition not debatable. In *Slack* itself, the lower courts denied a certificate of probable cause ("CPC"), the pre-AEDPA version of the COA, on the basis of established circuit precedent, but this Court reversed, concluding that the issue was debatable under the COA standard. 529 U.S. at 479-80, 489. This Court was even more explicit in *Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam), in which it reversed the denial of a CPC in one circuit because other circuits had resolved the issue differently. *Id.* at 432; *see Lambright v. Stewart*, 220 F.3d 1022, 1025-26 (9th Cir. 2000) (reading *Lozada* to hold that "even though a question may be well-settled in a particular circuit, the petitioner meets the modest CPC standard where another circuit has reached a conflicting view").[10] Under *Lozada*, even though *Salinas* settled the § 2241(d)(1)(A) issue in the Fifth Circuit, it remained debatable for purposes of the COA standard because the Fourth and Tenth Circuits had reached the contrary conclusions. *See Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005); *Orange v. Calbone*, 318 F.3d 1167 (10th Cir. 2003).

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[10] There is no relevant distinction between CPCs and COAs, as this Court has recognized that the § 2253(c) standard for issuance of a COA is simply a codification of the judge-made standard for issuance of a CPC. *Slack*, 529 U.S. at 483.

Petitioner has moreover satisfied the *Slack* standard, which is a "preliminary" inquiry (*Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003)) that does not require "full consideration of the factual or legal bases adduced in support of the claims" (*id.* at 336). To meet this requirement, petitioner need only show that the validity of his constitutional claims is debatable among reasonable jurists or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Petitioner need not demonstrate that "the appeal will succeed." *Miller-El*, 537 U.S. at 337. Nor must petitioner show that "some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Petitioner has made the requisite showing under *Slack* and *Miller-El*. For example, petitioner alleges that his trial judge exhibited a high degree of antagonism towards him at his probation revocation hearing. J.A. 105 (citing Pet. Resp. to Director Dretke's Ans. with brief in support at 13A-20 (citing, in turn, Fed. Hab. Pet. 7)); *see also* Fed Hab. Pet. 10-12. Petitioner outlines instances where the judge became irate, ridiculed his cognitive abilities, and intimated that petitioner's children would be better off without him. These comments suggest that the judge based petitioner's sentence on his own personal animosity and anger rather than an individual consideration of petitioner's circumstances. Fed.

Hab. Pet. 7, 10-12 (citing 2 RR 6-9, 74-75, 115). As a result, petitioner raises at least a debatable constitutional claim of judicial bias. *See Rowsey v. Lee*, 327 F.3d 335, 341 (4th Cir. 2003) (granting COA where judge made statements expressing personal animosity towards the petitioner); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (noting that a judge's critical, disapproving, or hostile remarks violate due process if they show "a high degree of favoritism or antagonism as to make fair judgment impossible").

Petitioner has likewise raised a debatable claim of ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (extending *Strickland* to plea process). Petitioner alleges that his counsel failed to properly advise him of the factual basis, nature, consequences, and (possibly) even the existence of a plea agreement that his counsel supposedly had made with the State regarding his sentence. *See* J.A. 106 (referencing Pet. Resp. to Director Dretke's Ans. with brief in support at 27-31); *see also* Fed. Hab. Pet. 16-18. Had petitioner properly understood the consequences of the agreement, he would not have pled true to any of the allegations in the State's Motion to Revoke (2 RR 14, ln. 14-25; 15 ln. 1-2), and the court may not have made the same findings. Although probation may be revoked on the basis of a single true plea, jurists of reason could debate whether each additional true plea (including those admitted by petitioner) ultimately increased the sentence imposed. These allegations show at least a debatable denial of the

well-settled right of a defendant considering a plea to be advised correctly by counsel of the available options and possible consequences. *See Brady v. United States*, 397 U.S. 742, 756 (1970); *United States v. Mooney*, 497 F.3d 397, 401-04 (4th Cir. 2007); *Dando v. Yukins*, 461 F.3d 791, 798-800 (6th Cir. 2006); *Lewandowski v. Makel*, 949 F.2d 884, 888-89 (6th Cir. 1991); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981).

CONCLUSION

For the reasons above, as well as those stated in the brief for the petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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