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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

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

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici are the National Association of Criminal Defense Lawyers ("NACDL") and the Innocence Network ("the Network"). NACDL is a non-profit corporation with 10,000 members nationwide, joined by 90 state and local affiliate organizations totaling more than 40,000 private criminal defense attorneys, public defenders and law professors. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL has a keen interest in assuring that the Antiterrorism and Effective Death Penalty Act ("AEDPA") is applied in an even-handed and readily understood way.

The Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The Network's members represent hundreds of prisoners with innocence claims in all 50 states, the District of Columbia, and numerous foreign countries. In many cases, the Network has helped to establish prisoners' innocence through federal habeas petitions. The Network has a strong interest in ensuring that the application of AEDPA's procedural requirements does not frustrate the Great Writ's ability to vindicate the

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

rights of prisoners who may be actually innocent of the charges for which they were convicted.

INTRODUCTION AND SUMMARY

The writ of habeas corpus affords prisoners, including those convicted in state court, the critical opportunity to petition the federal courts to challenge the legality of their ongoing detention. When, in AEDPA, "Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000)). The important function that the Great Writ serves in ensuring the respect of constitutional rights in our judicial system, including vindicating the claims of the innocent, should inform the Court's resolution of each question presented.

1. The requirement that a certificate of appealability ("COA") be issued in AEDPA cases should not be applied in a technical manner. Nor should the Court treat as "jurisdictional" aspects of the COA that Congress has not designated as such.

As this Court's precedent regarding notices of appeal, which are also jurisdictional, makes clear, the jurisdictional nature of a COA does not mandate that rules regarding its content be applied in a strict or unforgiving fashion. The threshold requirements of a COA should be construed with special leniency because of the nature of habeas proceedings, in which most petitioners act *pro se*, and the danger that worthy constitutional claims would fail to obtain review if a formalistic standard were applied.

The requirement that a judge "indicate" in the COA the substantial constitutional question that is presented by the petition is not, itself, a jurisdictional requirement. The technical error (assuming it is error) of the judge or other court personnel who prepares the COA by failing to restate the debatable constitutional question does not vitiate the court's appellate jurisdiction. AEDPA does not make the language of the COA, which is issued by the court, jurisdictional, and this Court has often noted that jurisdiction over a party's appeal should not depend upon matters over which the party lacks control.

Even if the COA in this case were deficient, and even if that deficiency were of jurisdictional significance, this Court could cure that deficiency and proceed to address the merits of the procedural question on which the Court granted certiorari.

2. Section 2244(d)(1) triggers the one-year period of limitation for filing an application for a writ of habeas corpus on "the latest of" several events, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). Based on the plain text of Section 2244(d)(1)(A) and this Court's previous constructions of the statute, a judgment cannot become final until the *later of* "the conclusion of direct review" *or* "the expiration of the time for seeking such review."

The court of appeals' holding that petitioner's state conviction became "final" upon the expiration of time to seek discretionary review of the appellate court's decision, but before the state court of appeals issued its mandate, cannot be squared with the text of the sta-

tute. The court of appeals' view that a state conviction has a "conclusion" only if the defendant petitions this Court for a writ of certiorari is contrary to the plain meaning of the word "conclusion," which means "termination." Moreover, the court of appeals erred in treating the state conviction as becoming "final" on the *earlier* of the two triggers in Section 2244(d)(1)(A). The plain meaning of the statutory text makes clear that petitioner's time for filing a federal habeas petition could not begin to run before direct appellate review had concluded.

Direct review should be deemed to conclude when a state court issues its mandate or the equivalent. Only at that point is it clear that the state conviction is no longer subject to modification on direct review. This interpretation provides a uniform federal rule that is consistent with the principle of federalism underlying AEDPA and respects the state court's own announcement of its conclusion of direct review.

Beginning the one-year period of limitations before state-court review has concluded would, moreover, be inconsistent with Congress's purposes in AEDPA. Those purposes include encouraging a defendant to exhaust all available state court remedies. Yet, under the court of appeals' decision, the limitations clock could start running—and possibly even expire—before a defendant could even initiate state collateral proceedings.

The court of appeals' rule would create a trap for the unwary. State court defendants whose appeals are still pending before the state appellate courts have no reason to believe that their time for filing a federal habeas petition has started to run. AEDPA should not be

construed in so counter-intuitive a fashion, especially when its text does not fairly support such a reading.

I. Appellate Jurisdiction Under Section 2253(c) Does Not Depend Upon A COA's Conformity With Technical Formalities

A. Although The Issuance Of A COA Is "Jurisdictional," The Requirements For Its Issuance Should Be Applied Liberally, Consistent With The Critical Role Of Habeas Review In Preventing Unjust Convictions

This Court's precedents make clear that a COA's "jurisdictional" character does not mandate that the statutory requirements be applied in a strict or demanding fashion. Even when a filing or other action is a prerequisite to a court's exercise of jurisdiction, it is often appropriate to take a functional, rather than highly formalistic, approach to determining whether the prerequisite has been satisfied. Liberal application of the requirements of a COA is particularly appropriate in light of the critical function that habeas review serves, and the fact that many applicants proceed *pro se*. Just as documents that fail to meet the formal criteria for a notice of appeal can nonetheless satisfy the jurisdictional requirement, a certificate of appealability that fails to conform to the technical requirements of Section 2253(c)(3) will nonetheless serve to confer appellate jurisdiction if the purposes of the statute have been met.

The Court's treatment of the requirements for filing a notice of appeal demonstrates that the requirements for the contents of a jurisdictional document may be applied in a liberal fashion. The timely filing of a no-

tice of appeal is, without question, an act of "jurisdictional significance." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). The filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* at 58; see also *Bowles* v. *Russell*, 551 U.S. 205, 209-211 (2007) ("[T]he taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'") (quoting *Griggs*, 459 U.S. at 61).

Despite the notice of appeal's jurisdictional nature, this Court has rejected a formalistic approach to determining whether the requirements for its contents have been met. Even where an appellant fails to comply with the technical specifications of a notice of appeal under Rule 3 of the Federal Rules of Appellate Procedure, for example, a court "may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992) (quoting *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 316-317 (1988)). In *Smith*, this Court held that a *pro se* inmate's submission of an informal appellate brief could serve the function of a notice of appeal. *Id.* at 248-249. The Court explained that courts should "liberally construe" Rule 3's requirements for a notice of appeal. *Id.* at 248. As long as "the filing provides sufficient notice to other parties and the courts," it satisfies the Rule's purpose and should be deemed adequate. *Ibid.*

The Court has similarly applied a liberal construction to the "filing" requirement for notices of appeal where prisoners act *pro se*, as is often the case in habeas appeals. In *Houston* v. *Lack*, 487 U.S. 266 (1988), the Court deemed a *pro se* habeas petitioner's notice of

appeal to have been timely "filed" when he submitted the notice of appeal to prison authorities three days before expiration of the 30-day filing period. *Id.* at 270-271. The Court reasoned that the purposes of the time limitation were served by that liberal construction because "the moment at which *pro se* prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities, not receipt by the clerk." *Id.* at 275. Accordingly, the Court found that the prisoner had properly complied with the jurisdictional requirement of a timely notice of appeal even though his notice was received by the clerk a day after the filing deadline. *Id.* at 276.

As the foregoing demonstrates, there is no call to apply the requirements for a COA in a strict or demanding way simply because a COA has jurisdictional significance. Liberal application of the COA requirements is particularly appropriate in light of the essential role that habeas review fulfills in the criminal justice system, as well as the *pro se* nature of many COA applications.

This Court has long recognized that "[m]eticulous insistence upon" compliance with procedural intricacies "is foreign to the purpose of habeas corpus," *Gibbs* v. *Burke*, 337 U.S. 773, 779 (1949), and, thus, "a petition for habeas corpus ought not to be scrutinized with technical nicety," *Holiday* v. *Johnston*, 313 U.S. 342, 350 (1941). And, subsequent to AEDPA's enactment, the Court has reaffirmed that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000); *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack* and noting that habeas corpus is "the only writ explicitly protected by the Constitution"). In light

of the critically important function that habeas review serves in protecting those who have been convicted in violation of constitutional protections, including many who are innocent of the charges against them, the Court has emphasized that it would be inappropriate to interpret AEDPA to "close [the courts'] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti* v. *Quarterman*, 551 U.S. 930, 946 (2007) (quoting *Castro* v. *United States*, 540 U.S. 375, 381 (2003)). These same concerns warrant applying a liberal standard to COA requirements, so as to avoid erecting a barrier to meritorious habeas claims that Congress has not itself created.

A more forgiving attitude is especially appropriate in light of the fact that many habeas petitions and COA applications—including those of petitioner Gonzalez in this case—are prepared by prisoners acting *pro se*. A "*pro se* document is to be liberally construed." *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). Where, as is true of the majority of habeas petitioners, the prisoner prepares his application for a certificate of appealability without the assistance of counsel, this Court's decisions require that filings be evaluated under "less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).

Indeed, this Court's cases already reflect this more forgiving approach to the jurisdictional requirement of a COA. In *Slack*, for example, the Court held that it was appropriate to treat a notice of appeal "as an application for a COA," as provided in Rule 22 of the Federal Rules of Appellate Procedure. 529 U.S. at 483 (citing *Hohn* v. *United States*, 524 U.S. 236, 240 (1998)). In *Hohn*, moreover, the Court had similarly treated the

filing of a notice of appeal as an application for a certificate of appealability, even though Rule 22 did not by its own terms apply to the applicant's federal habeas proceedings. 524 U.S. at 240, 243-244.

B. Appellate Jurisdiction Exists If, At Any Point, A Judge Or Justice Issues A COA After Determining That The Threshold Requirements Have Been Met; Jurisdiction Is Not Defeated By A Defect In The COA's Contents

Consistent with Congress's purposes, this Court has construed AEDPA as establishing only a threshold requirement of a "debatable" constitutional question in order for a COA to issue. *Slack*, 529 U.S. at 484. That approach is also consistent with general principles that distinguish the court's jurisdiction to hear a case from the ultimate merits of the underlying claim, and is particularly appropriate where, as here, the district court's rulings precluded full development of the underlying constitutional claim.

Nothing in the text of Section 2253(c) suggests that the failure of a judge to restate the substantial constitutional issue presented by the petition vitiates the court's jurisdiction over the appeal. In light of the serious consequences of a requirement's "jurisdictional" character, the Court should hesitate to declare "jurisdictional" something that Congress has not clearly identified as such. It would be particularly inappropriate to deem a "jurisdictional" requirement something over which the applicant has no control, such as the COA drafter's compliance with technical rules. In the habeas context in particular, the Court has made clear that a prisoner's appellate rights cannot be de-

feated by the "procedural error" of a judge. *Id.* at 483. Moreover, even if "jurisdictional," any defect in the COA's form is subject to later correction, including by this Court.

1. *In order for a COA to issue, it is only necessary that a single judge or Justice find that the petition states a "debatable" constitutional question*

This Court's precedent clearly distinguishes between the jurisdiction of a court to consider a claim and the ultimate merits of the underlying claim. As the Court has explained, "a COA determination is a separate proceeding, one distinct from the underlying merits." *Miller-El* v. *Cockrell*, 537 U.S. 322, 342 (2003). Because the COA serves only as an initial screening filter, the Court repeatedly stressed that the "substantial showing" requirement does not involve a determination of the petition's ultimate merits, but only whether the question is one "that reasonable jurists could debate" or that is "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)). See *Barefoot*, 463 U.S. at 893 n.4 (stressing that to make a "substantial showing," "obviously the petitioner need not show that he should prevail on the merits") (quoting *Gordon* v. *Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). Indeed, the Court has stressed that "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." *Miller-El*, 537 U.S. at 338.

In other contexts, the Court has stressed the distinction between jurisdiction to hear a claim, and the

claim's ultimate success on the merits. To invoke the courts' federal question jurisdiction, for example, it is enough that the complaint "pleads a *colorable claim* 'arising under' the Constitution or laws of the United States." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 (2006) (emphasis added). See *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("[T]he failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction."). Likewise, under AEDPA, the threshold inquiry "does not require full consideration of the factual or legal bases adduced in support of the claims," which can occur only in *exercise* of the court's jurisdiction, but instead asks only whether the district court's resolution of petitioner's constitutional claims "was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

Imposing an exacting standard of review to evaluate the underlying merits of a claim would be particularly inappropriate where, as here, the district court's dismissal of the petition on threshold grounds has sharply limited the prisoner's ability to develop the claim fully. To fault a prisoner for the relatively undeveloped nature of his constitutional claim in such circumstances would impermissibly "allow trial court procedural error" to frustrate the prisoner's ability to vindicate his constitutional rights. *Slack*, 529 U.S. at 483.

The relatively low standard for issuing a COA is further reflected in the fact that Congress has provided that this threshold requirement is satisfied as long as any single judge or Justice determines that the standard is met. The text of AEDPA uses the singular, stating that a COA can be issued by a "circuit justice or judge." 28 U.S.C. 2253(c)(1). As this Court has confirmed, Congress's conspicuous use of the singular form

means that an individual judge or Justice can issue a COA of behalf of the members of the court on which he or she sits. See *Hohn*, 524 at 241-242. Indeed, at least one court of appeals has institutionalized this rule by expressly providing that as long as "*any* judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. R. 22.3 (emphasis added). In light of the low threshold standard, requiring only that a reasonable jurist would find the constitutional issue "debatable," it wastes judicial resources for the court to debate a single judge's decision to issue a COA, rather than simply proceed to the merits of the appeal. See *Young* v. *United States*, 124 F.3d 794, 799 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998). Requiring an appellate court to second-guess the issuance of a COA would thwart the interest in conserving judicial resources by forcing the court of appeals to serve "as a gate keeper for the gate keeper." *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999).

2. *A defect in the COA, such as a failure of the issuing judge to indicate the substantial constitutional issue, does not defeat appellate jurisdiction*

In contrast to the jurisdictional requirement that a judge or Justice issue a COA, without which "an appeal may not be taken to the court of appeals," 28 U.S.C. 2253(c)(1), nothing in the text of Section 2253(c)(3) suggests that the issuing judge's failure to specify the issues as to which the applicant has made a "substantial showing" is a matter of jurisdictional significance. To the contrary, both the text and structure of Section 2253, as well as general principles distinguishing jurisdictional limitations from claims-processing rules, point

to the conclusion that an error by the issuing judge does not defeat the courts' appellate jurisdiction.

Because of the significant consequences of designating a requirement as "jurisdictional," see, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011), this Court has cautioned that, unless Congress "clearly states" a statutory limitation in jurisdictional terms, it should not be treated as such, *Arbaugh*, 546 U.S. at 515. See *id.* at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *Henderson*, 131 S. Ct. at 1204-1205 (holding that statute providing 120-day deadline for filing notice of appeal of decision of Board of Veterans' Appeals is non-jurisdictional because it failed to include mandatory language defining deadlines for permissible judicial review).

In sharp contrast to the language of paragraph (1), the text of Section 2253(c)(3) imposes no conditions on a court's power to hear an appeal. The latter provision states only that a "certificate of appealability * * * shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. 2253(c)(3). This requirement, directed at the issuing judge, is in the nature of a claims-processing rule that assists parties and the court of appeals in focusing the appeal. Even a COA that does not fully comply with subsection (c)(3), in other words, is still a "certificate" within the meaning of subsection (c)(1), and thus confers jurisdiction.

Absent a clear expression to the contrary, Congress should not be presumed to have conditioned jurisdiction to review the denial of a habeas petition on

matters outside the control of petitioner himself, such as the inadvertence of a single judge. As a general matter, limits on appellate jurisdiction are construed so that they do not depend on the conduct of third parties over which the appellant has a "lack of control." See *Houston*, 487 U.S. at 273 (explaining that the "filing" of a notice of appeal is deemed to occur when the appellant lacks control over further delay). Where treating a requirement as jurisdictional would harm one "who likely bear[s] no responsibility for the" error, that "provides a strong indication that Congress did not intend" the requirement to be jurisdictional. *Dolan* v. *United States*, 130 S. Ct. 2533, 2535-2536 (2010). More particularly, in the habeas context, the Court has observed that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights," and that Congress has "expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Slack*, 529 U.S. at 483. Likewise, nothing in Section 2253(c) suggests that the court of appeals' jurisdiction over the appeal from denial of a habeas petition can be defeated by the procedural error of the judge who issues the COA.

Congress's use of the relatively vague term "indicate" in paragraph (3) further suggests that the requirement is not of jurisdictional significance. To "indicate" something is "to point out or point to or toward with more or less exactness." Webster's Third New International Dictionary 1150 (1993). The COA may "indicate" the substantial constitutional issue with greater or lesser degrees of specificity or by reference to another document, such as the application or the opinion below. Indeed, where the petition raises only a single constitutional issue, the COA implicitly "indi-

cates" the substantial nature of that constitutional issue merely by the fact of the COA's issuance. Cf. *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200-201 (1993) (commenting that Congress's use of "indicates" reflects that the standard is to be applied "with something less than syllogistic force").

3. *Even if a defect in the COA were jurisdictional, it could be corrected by this Court*

Even if the failure of the issuing judge sufficiently to identify a substantial constitutional question in the COA were a jurisdictional defect, it would be subject to correction by this Court. To hold otherwise would have the paradoxical consequence of putting prisoners whose applications for COAs were initially rejected in a better position than those who were initially granted COAs.

Under Section 2253(c)(1), if the court of appeals erroneously denies issuance of a COA, this Court, or a Justice thereof, can subsequently grant one, thereby certifying appellate jurisdiction over the habeas petitioner's appeal. See 28 U.S.C. 2253(c)(1). In numerous cases, this Court has reviewed and reversed the court of appeals' denial of a COA. See, *e.g.*, *Tennard* v. *Dretke*, 542 U.S. 274, 288-289 (2004) (finding that petitioner was entitled to COA and remanding for consideration of claim challenging state sentencing scheme); *Banks* v. *Dretke*, 540 U.S. 668, 703-705 (2004) (remanding following finding that COA should have issued for petitioner's *Brady* claim); *Miller-El*, 537 U.S. at 348 (granting COA and remanding for consideration of equal protection claims). If the circuit court's initial erroneous denial of a COA does not permanently divest the courts of appellate jurisdiction, then a technical de-

fect in the *granting* of a COA is likewise subject to later correction.

Where the court of appeals has not yet considered the merits of the appeal because the application for a COA was improperly rejected, this Court's practice is to correct the erroneous denial of a COA and remand to the court of appeals to address the underlying merits of the appeal in the first instance. Here, by contrast, the court of appeals has already ruled on the merits of petitioner's appeal after granting the purportedly defective COA. If this Court concludes that the COA was insufficient for failure to identify the substantial constitutional issue, the appropriate course is to correct the COA and proceed to address the underlying merits of the district court's procedural ruling.

C. The Inequitable Consequences Of Deeming Section 2253(c)(3) Jurisdictional Are Demonstrated In This Case, Where Petitioner Met The Standard For Obtaining A COA

In *Slack*, the Court held that, when a habeas petition has been dismissed on procedural grounds, a COA should issue where (i) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (ii) jurists of reason would find it debatable whether the district court was correct in its procedural ruling. 529 U.S. at 484. Petitioner has satisfied this standard by alleging facts that raise at the very least the prospect of a debatable constitutional claim for denial of a speedy trial. Additionally, the district court's procedural ruling is clearly debatable, as evidenced by the disagreement it has engendered among the courts of appeal.

1. *It is at least debatable that the habeas petition states a valid claim for denial of a constitutional right*

Petitioner's underlying claim centers on an alleged violation of his speedy trial rights. In assessing a speedy trial claim under the Sixth Amendment, this Court balances four factors: (1) the length of the delay; (2) the reason for the delay; (3) the petitioner's assertion of his right to a speedy trial; and (4) purported prejudice to the petitioner. See *Doggett* v. *United States*, 505 U.S. 647, 651 (1992) (citing *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972)). Here, where the district court's procedural ruling denied petitioner the opportunity to further develop his claim, petitioner has made a sufficient showing as to each factor.

As to the first factor, this Court has held that an "extraordinary 8 ½ year lag" between indictment and arrest "clearly suffices" to signal a potential violation of the defendant's speedy trial rights. *Doggett*, 505 U.S. at 652. Here, petitioner states that he was initially indicted for murder on June 12, 1995. Pet. for Habeas Corpus, No. 3:08-cv-151-D, at 7 (N.D. Tex. Jan. 31, 2008); Pet'r's *Pro Se* Pet. for COA at 3. The state waited more than ten years before bringing petitioner to trial, *ibid.*, longer even than the delay at issue in *Doggett*.

Second, the petition at least raises concerns about the diligence of the police investigator's search for petitioner when he was in Guatemala. Petitioner notes that the investigator assigned to his case had actual knowledge of his whereabouts during the period of delay, including the specific village in Guatemala where he lived. Pet'r's *Pro Se* Pet. for COA at 5, 6. Jurists of

reason could conclude that the extent of the state's knowledge and failure to timely investigate gives rise to reasonable debate regarding the ten-year delay's effect on petitioner's constitutional rights. See *Doggett*, 505 U.S. at 652-653.

Third, it is at least debatable that petitioner asserted his speedy trial rights in a timely fashion. This Court has noted that a petitioner who has knowledge of his indictment but fails to raise his speedy trial rights cannot later claim the protection. See *id.* at 653. However, petitioner states that he had no knowledge of his 2001 indictment and claimed a violation of his speedy trial rights in a timely manner. See Pet'r's *Pro Se* Pet. for COA at 7, 11. Whether to penalize petitioner for failing to move to dismiss the indictment in Texas while petitioner was in Guatemala, and before he was provided counsel, presents, at the very least, a debatable question.

Finally, reasonable judges at least could debate whether respondent was prejudiced by the delay. The case against petitioner relied exclusively on eyewitness testimony. See *Gonzalez* v. *State*, No. 05-05-01140-CR, 2006 WL 1900888 at *1 (Tex. Crim. App. July 12, 2006) (noting the testimony of two eyewitnesses in identifying petitioner as the victim's assailant). In light of the recognized failings of memory with the passage of time, the prosecution's heavy reliance on witness testimony rather than forensic evidence in convicting petitioner raises a substantial question whether the delay in petitioner's trial prejudiced his defense. See *Barker*, 407 U.S. at 532 (noting prejudice a petitioner faces due to the potential for disappearance of witnesses and imperfect recollections with the passage of time).

As the foregoing demonstrates, petitioner's constitutional claim is at the very least one that reasonable jurists could debate, and therefore "substantial" within the meaning of 28 U.S.C. 2253(c)(2).

2. ***Whether the district court's procedural ruling was correct is also subject to debate among reasonable jurists, as demonstrated by the existing circuit conflict***

The procedural issue in the present case is clearly one on which reasonable jurists can disagree. In fact, at least two courts of appeals would have held petitioner's habeas petition to be timely under Section 2244(d)(1)(A) because the issuance of the state court's mandate—if later than the expiration of the time for seeking further review—marks the conclusion of the direct review process and thus serves as the touchstone for finality of the state court's judgment. See *Riddle* v. *Kemna*, 523 F.3d 850, 856 (8th Cir. 2008); *Tinker* v. *Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001), cert. denied, 534 U.S. 1144 (2002). For these reasons, petitioner has presented evidence to show that reasonable jurists would debate the accuracy of the district court's ruling that Gonzalez's petition was time-barred.

II. DIRECT REVIEW OF A STATE CRIMINAL CONVICTION CANNOT CONCLUDE FOR PURPOSES OF 2244(d)(1)(A) BEFORE THE HIGHEST COURT TO REVIEW THE CASE RELINQUISHES JURISDICTION BY ISSUING A MANDATE OR ITS EQUIVALENT

In AEDPA, Congress expressly allowed a state prisoner a full year within which to file a petition for a writ of habeas corpus, beginning on the "latest of" separately enumerated potentially triggering events. 28 U.S.C. 2244(d)(1). Among the possible triggering events, subparagraph (A) identifies "the date on which the judgment became final" and then states two different ways such finality can occur: "by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). In this case, petitioner filed his habeas petition within one year of the "conclusion of direct review," which occurred when the state intermediate court of appeals issued its mandate relinquishing control over the appeal from petitioner's conviction. See Tex. R. App. P. 18.1; *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). Because, under the plain language of Section 2244(d)(1)(A), a state criminal conviction does not become "final" before direct review has reached its "conclusion," petitioner's filing was timely.[2]

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[2] Because the habeas petition was timely under the first prong of Section 2244(d)(1)(A), the Court need not reach petitioner's additional argument that the petition was also timely under the second prong of Section 2244(d)(1)(A) because it was brought within a year of the expiration of petitioner's time to seek certiorari review in this Court from his state conviction. See Pet. Br. 51-57. As long as petitioner's filing was timely under *either* prong, that is sufficient to satisfy Section 2244(d)(1).

The lower courts rejected this straight-forward application of the statutory text in a misguided pursuit of narrow uniformity in AEDPA's application. While Congress has supplied a uniform federal rule for determining the timeliness of state habeas petitions, that rule requires reference to state procedures to determine when the federally identified triggers occurred. A failure to take account of the realities of state proceedings would be inconsistent with Congress's intent to encourage exhaustion of state collateral relief before pursuing federal habeas review. Even if strict uniformity were achievable, and desirable, that would provide no basis to disregard the statutory text. Congress has expressly provided that the one-year period for filing a federal habeas petition does not begin to run until "the latest" of the specified dates. A state conviction does not become "final" under Section 2244(d)(1)(A) as long as direct appellate review has not reached its "conclusion" or the time to seek further review has not yet expired, whichever is later. In either event, the state conviction is still subject to revision, and federal habeas review is premature.

A. Under The Plain Text of Section 2244(d)(1), A State Judgment Is Not "Final" Until *The Later Of* (1) The Conclusion Of Direct Review *Or* (2) The Expiration Of The Time For Seeking Such Review

In Section 2244(d)(1), Congress specified that the beginning of the one-year period of limitation is determined by "the latest of" the specified points in time, including "the date on which the judgment became final by [(i)] the conclusion of direct review or [(ii)] the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). Here, the court of appeals held that the

time limitation began running upon the expiration of time for seeking review, which was *earlier than* the conclusion of direct review. Because that holding is contrary to Congress's express textual direction that the statutory period start running after "the latest of" the possible triggers, this Court's analysis need not proceed any further, and the judgment of the court of appeals must be reversed. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("When the words of a statute are unambiguous, then, this first canon" of construction, that Congress means what it says in a statute, "is also the last: judicial inquiry is complete").

1. *The court of appeals' holding relies on the absurd premise that there is no "conclusion" to a state direct appeal unless the defendant petitions for certiorari*

The court of appeals' analysis effectively reads one of the two prongs of Section 2244(d)(1)(A) out of the statute in all but a small percentage of cases. The court of appeals first defined the phrase "the conclusion of direct review" to mean "when the Supreme Court either rejects the petition for certiorari or rules on its merits." *Roberts* v. *Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). The court reasoned that when a defendant does not pursue his appeal through to a petition for certiorari, then "the conviction does not become final by the conclusion of direct review" and can only "become[] final by 'the expiration of the time for seeking such review.'" *Ibid.*; see *ibid.* (if a defendant does not exhaust state appeals, "the conviction becomes final when the time for seeking further direct review in the state court expires"). In other words, the court of appeals concludes that, except for the small minority of state crim-

inal cases in which a petition for certiorari is filed, the first prong of Section 2244(d)(1)(A) is irrelevant. William J. Sabol *et al.*, U.S. Dep't of Justice, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2006, at 3, http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf (676,952 state prisoners admitted in 2005); Chief Justice John Roberts, 2007 Year-End Report on the Federal Judiciary, at 9, http://www.supremecourt.gov/public info/year-end/2007 year-endreport.pdf (8,857 cases filed in the Supreme Court in the 2006 Term). But there is no textual basis for the court of appeals' holding that "the conclusion of direct review" can *only* mean a ruling—either on the merits or denying a petition for certiorari—by this Court.

Under any ordinary meaning of the words, there must be a "conclusion of direct review" in *every* case in which a state defendant takes an appeal. The word "conclusion" is defined to mean the "close, termination, [or] end" of something. See Webster's Third New International Dictionary 471 (1993). Every case in which a state criminal defendant takes an appeal must have a "close, termination, [or] end," even if the appeal is not pursued through to a petition for certiorari. The court of appeals' reasoning, which depends on the premise that a criminal appeal that stops short of a petition for certiorari does not have a "conclusion" simply cannot be squared with the plain meaning of the text Congress enacted.

2. ***The court of appeals erroneously focused the earlier, rather than later, of the finality triggers in Section 2244(d)(1)(A)***

The court of appeals disregarded the "conclusion of direct review" prong because it was looking to deter-

mine the *earlier* of the two triggers under Section 2244(d)(1)(A), rather than the later of them. The court reasoned, for example, that "the limitations period *can begin* on 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review'" and that, for defendants "who do not exhaust their state court rights, the 'expiration of the time for seeking [direct] review' is clearly when the petitioner can no longer timely file for further state court review, not when the mandate issues." Pet. App. 6a (emphasis added). Because the court of appeals was trying to determine the earliest date on which "the limitations period can begin" under sub-paragraph (A), the court deemed it irrelevant that the first prong of that sub-paragraph was not satisfied until a later date than the expiration of time to seek discretionary review in the state's highest court.

Contrary to the court of appeals' approach, Congress specified that the limitations period would not begin until the "latest of" the potential triggers identified in Section 2244(d)(1). Even within sub-paragraph (A) Congress indicated that it was the later of the two prongs that would govern. The triggering date under sub-paragraph (A) is when the state court "judgment became final by" the first "or" second prong. Given that the prongs are different ways in which a proceeding might become "final," it is only reasonable that the later of the two possibilities should govern when they diverge. The structure of the provision, along with the plain meaning of the terms, makes clear that Congress did not regard a state court judgment as "final" as long as *either* direct review had not reached its "conclusion" *or* the time for seeking further review had not yet run.

The court of appeals' approach of applying the earliest date on which the limitations period "can begin" to run cannot be squared with Congress's expressed intent to ensure that direct review was truly and surely completed before starting the one-year clock running. As this Court made clear in *Jimenez* v. *Quarterman*, 555 U.S. 113 (2009), the finality required under Section 2244(d)(1)(A) cannot exist when the conviction is still "capable of modification" on direct review. *Id.* at 120. In *Jimenez*, the Court determined that, once the state courts had reopened the defendant's direct appeal from his conviction, the conviction was no longer "final" for purposes of Section 2244(d)(1)(A). *Id.* at 119-120. Although the deadline to seek further appellate review from his initial direct appeal had passed years earlier, the Court reasoned that "direct review cannot conclude for purposes of § 2244(d)(1)(A) until the availability of direct appeal to the state courts and to this Court has been exhausted." *Id.* at 117, 119 (internal citations omitted). In other words, the Court recognized that "conclusion of direct review" prong prevents a state conviction from becoming final until "the process of direct review" has "come to an end," and the state conviction is no longer "capable of modification" on direct appeal. *Id.* at 119-120 (quotation marks omitted).

The Court's decision in *Clay* v. *United States*, 537 U.S. 522 (2003), also makes clear the Court's understanding that Section 2244(d)(1)(A) is triggered by the *later* of its two finality formulations. In *Clay*, the Court analyzed Section 2244(d)(1)(A) in the course of construing the one-year limitations period in 28 U.S.C. 2255(f)(1) for seeking federal habeas review. The Court rejected an argument that a federal "conviction becomes final" for purposes of Section 2255(f)(1) when the

court of appeals' mandate issued, but did so in a context where the mandate had issued *before* the time for filing a petition for certiorari had expired. *Id.* at 525. The Court noted that the proposed rule would hold "the § 2255 petitioner to a tighter time constraint than the petitioner governed by § 2244(d)(1)(A)," and ruled instead that the clock started at the expiration of the time for filing a petition for certiorari with this Court, which was the later of the two dates. *Id.* at 529-530.[3] In the process of so holding, the Court explained that the argument, made by the Court-appointed amicus---that a conviction is "final" when the mandate issues, though the time to seek certiorari has not yet expired---would be "a stronger argument if" Section 2255 had "explicitly incorporated the first of § 2244(d)(1)(A)'s finality formulations *but not the second*." *Id.* at 529 (emphasis added). In other words, the Court recognized that, if Section 2255 had incorporated both of "the two finality triggers set forth in § 2244(d)(1)(A)," a federal conviction would become final only after the later of the two had transpired. *Ibid.* Implicitly, therefore, the Court rejected in *Clay* the court of appeals' view that the one-year period "can begin" to run upon the earlier of the two triggers in Section 2244(d)(1)(A).

[3] In the federal system, the court of appeals' mandate will generally issue before the expiration of the period within which to file a petition for certiorari. See Fed. R. App. P. 41(b). If the mandate is stayed pending a petition for certiorari, the rule ties the length of the stay to the Supreme Court's process, specifying that the stay "must not exceed 90 days" without good cause and, if a petition for certiorari is filed, the mandate must issue "immediately" upon the petition being denied or, if it is granted, upon "the Supreme Court's final disposition." *Id.* at 41(d)(2).

B. The "Conclusion Of Direct Review" Cannot Occur Before The Appellate Court Relinquishes Authority Through Issuance Of The Mandate Or Its Equivalent

"[T]he process of direct review" does not reach its conclusion until the state conviction is no longer "capable of modification" on direct appeal. *Jimenez*, 555 U.S. at 119-120 (quotation marks omitted). Because an appellate court retains authority to review and modify the judgment until the court has issued its mandate or similar act that returns jurisdiction to the district court, the "conclusion of direct review" cannot occur before the court of appeals' mandate has issued.

The issuance of a mandate is well recognized as marking the conclusion of appellate review. In the federal system, there is broad agreement that an appellate court retains authority to revise its judgment until it relinquishes its jurisdiction by issuing its mandate. See, *e.g.*, *Charpentier* v. *Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007); *Wilson* v. *Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004), cert. denied, 542 U.S. 923 (2004); *Flagship Marine Servs., Inc.* v. *Belcher Towing Co.*, 23 F.3d 341, 342 (11th Cir. 1994). Indeed, the Federal Rules of Appellate Procedure expressly provide that the mandate will not generally issue until a week *after* the time for filing a petition for rehearing, in recognition of the fact that, until the mandate issues, the court of appeals' judgment is subject to modification. See Fed. R. App. P. 40, 41(b).

By contrast, after the appellate court has issued its mandate, the court of appeals may no longer freely modify the judgment. Because the mandate transfers authority back to the district court and ends the appel-

late court's review, parties have an acknowledged "profound interest[] in repose attaching to the mandate of a court of appeals." *Calderon* v. *Thompson*, 523 U.S. 538, 550 (1998) (quotation marks omitted). Thus, while the court of appeals has the power to recall the mandate, the circumstances in which it can do so are greatly circumscribed. *Ibid.*[4]

This Court has frequently focused on the issuance of a court's mandate as an indication of finality, specifically in the context of AEDPA's one-year statute of limitations. In *Clay*, for example, the Court observed that the court-appointed amicus would have had "a stronger argument" that a judgment becomes final at the issuance of the mandate if the text of Section 2255 had read simply "becomes final *by the conclusion of direct review*." 537 U.S. at 529. And in the context of AEDPA's tolling provision, the Court found in *Lawrence* v. *Florida*, 549 U.S. 327 (2007), that the issuance of a mandate by the state's highest court marked the conclusion of the state's review of the defendant's application for post-conviction relief: "After the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open." *Id.* at 332. The Court identified the issuance of the mandate or denial of review as the point at which "the state court's postconviction review is complete." *Ibid.*

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[4] The mere "possibility that a state court may reopen direct review" by recalling its mandate "'does not render convictions and sentences that are no longer subject to direct review nonfinal'" for purposes of Section 2244(d)(1)(A). *Jimenez*, 555 U.S. at 120 n.4 (quoting *Beard* v. *Banks*, 542 U.S. 406, 412 (2004)).

Deference to state-court rules about when the appellate court is divested of jurisdiction to modify the judgment is also consistent with Congress's purposes in enacting AEDPA. In enacting AEDPA, Congress sought "to further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). While Section 2244(d)(1)(A) establishes a uniform federal rule for determining finality, *Clay*, 537 U.S. at 530-531, that rule, consistent with Congress's other purposes, requires in its application that the federal courts consult state procedures. Construing the phrase "the conclusion of direct review" to mean the issuance of the state court's mandate fulfills these congressional objectives.

By specifying that the statutory period begins to run only on the "latest of" the identified events, including the later of the "conclusion" of the direct appeal or the expiration of time to seek further appeal, Congress has ensured federal uniformity. A state may not, for example, start the statutory period under Section 2244(d)(1) before the expiration of time for seeking certiorari by specifying an earlier event as the point when the state judgment becomes "final." See *Clay*, 537 U.S. at 530-531 (by defining "the date on which the judgment became final" Congress ensured that finality assessments are not made "by reference to state-law rules that may differ from the general federal rule and vary from State to State"). Reference to state procedures is, however, unavoidable in assessing the various finality triggers in a given case. For example, even under the court of appeals' rule, the federal court must consult state law to determine when the time for seeking discretionary state review expired if the defendant

did not exhaust his state appellate avenues. See Pet. App. 6a.

Specifying that state direct review does not conclude before the appellate court has issued its mandate or taken similar action to transfer the case back to the trial court would provide even greater uniformity and clarity. Although terminology and details vary, each state specifies a procedural point at which the appellate court relinquishes its jurisdiction over the judgment, and thus the issuance of the mandate provides a uniform time to determine "the conclusion of direct review" while still respecting state procedures. [5]

C. Failure To Defer To State Rules To Determine When Direct Review Concludes Would Undermine Congress's Goal Of Encouraging Exhaustion of State Remedies And Create A Trap For Unsophisticated Defendants

[5] See, *e.g.*, Pet. Br. 47 (collecting cases and statutes from 27 states that define finality by issuance of the mandate or its equivalent). Some states call this event the mandate, whereas others use different terminology. See, *e.g.*, *Siebert* v. *State*, 778 So. 2d 842, 848-849 (Ala. Crim. App. 1999), disapproved of on other grounds by *State* v. *Hutcherson*, 847 So. 2d 378 (Ala. Crim. App. 2001) ("certificate of judgment"); *Johnson v. State*, 900 S.W.2d 940, 951 (Ark. 1995) ("mandate"); *Yetman* v. *Greer*, 483 S.E.2d 878, 881 (Ga. Ct. App. 1997) ("remittitur"); *Polk* v. *State*, 789 N.W.2d 437 (Iowa Ct. App. 2010) (unpublished table decision) ("procedendo"); *Foxworth* v. *St. Amand*, 929 N.E.2d 286, 291 (Mass. 2010) ("rescript"). It is the functional reality, rather than state terminology, that marks when direct review has concluded. See *Carey* v. *Saffold*, 536 U.S. 214, 223 (2002) ("Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears.").

Although the Court need look no further than the statutory text to resolve the question presented in petitioner's favor, the policies behind AEDPA also counsel in favor of finding that the "conclusion of direct review" of a state conviction does not occur before direct review has, in fact, terminated. AEDPA reflects a careful congressional balance between many competing goals. One of those goals is to encourage state court defendants to exhaust state remedies, often including state post-conviction review. The court of appeals' rule would frustrate that purpose by making the time to file a federal habeas petition begin before the defendant could even initiate state collateral proceedings. In so doing, the court of appeals' rule would create a trap for many *pro se* prisoners who must already navigate a confusing maze of procedural rules in order to seek relief in federal court.

In Section 2254(b)(1), Congress has specifically provided that relief cannot be granted to a state habeas petitioner unless he has "exhausted the remedies available in the courts of the State," which includes "any available procedure" for raising the question presented. 28 U.S.C. 2254(b)(1)(A), (c). In order to permit exhaustion of state remedies *before* filing a federal habeas petition, Congress provided that the time during which a state post-conviction or other collateral proceeding is pending does not count toward the one-year limitations period for the federal application. 28 U.S.C. 2244(d)(2).

The court of appeals' rule undermines the careful balance that Congress sought to strike. In many states, as petitioner has noted, a defendant cannot initiate collateral review proceedings until his conviction has become "final" on direct appeal. Pet. Br. 43 n.12 (identifying 16 states in which a defendant may not pursue state

post-conviction remedies until the conviction is "final" as defined by state law). Because most states define finality on direct review for this purpose by the issuance of the mandate or its equivalent, the court of appeals' rule would mean that the one-year period for filing a federal habeas petition would start to run for many defendants before they could even start the often-necessary process of exhausting state collateral remedies. Indeed, that was true in this very case, because in Texas, a court "does not have jurisdiction to consider an application for writ of habeas corpus pursuant to Art. 11.07 until the felony judgment from which relief is sought becomes final." *Johnson*, 12 S.W.3d at 473.

In the most extreme case, it is even possible that, under the court of appeals' rule the time for filing a federal habeas petition would *expire* before the state appeals process concludes or the state defendant could even initiate the prerequisite state collateral proceedings. A state appellate court might, for example, grant rehearing *sua sponte* after the time for seeking discretionary appeal to a higher state court has expired, but fail to issue an amended decision for over a year, while the court waits for a ruling by this Court on a controlling issue of law. It is, as this Court has made clear, "highly doubtful" that Congress intended a time limit on pursuing a habeas claim to "begin to run (and may[be] even expire) before the [habeas] claim and its necessary predicate even exist." *Johnson* v. *United States*, 544 U.S. 295, 305 (2005); *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (citing same). Yet, the court of appeals' rule would have precisely that bizarre result.

Finally, and most disturbingly, the court of appeals' rule would create a trap for unsophisticated defendants, including those who are innocent of the crimes with which they were charged. A defendant whose direct state appeal is still pending because the appellate court has withheld the mandate in order to further review the judgment has no reason to believe that his time for seeking federal habeas review is already running. He is likely to believe that, because his direct appeal has not yet concluded and there is as yet no opportunity to file state collateral proceedings, the time for seeking federal habeas has not yet started to run either. Nothing in AEDPA suggests that Congress intended to create such a trap that might preclude federal habeas review.

As the Court has recently observed, Congress did not in AEDPA pursue the objective of eliminating delay "at all costs" or "los[e] sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Slack*, 529 U. S. at 483). The court of appeals' ruling subverts the balance Congress sought to achieve.

CONCLUSION

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

Respectfully submitted,

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