

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**

—————◆—————

BRIEF FOR RESPONDENT

—————◆—————

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant
Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General
for Criminal Justice

JAMES C. HO
Solicitor General

SEAN D. JORDAN
Deputy Solicitor General
Counsel of Record

RANCE L. CRAFT
ADAM W. ASTON
Assistant Solicitors General

MARTA McLAUGHLIN
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

QUESTION PRESENTED

Should a certificate of appealability have issued on whether the granting of an out-of-time appeal through a State's postconviction process restarts the one-year limitations period under 28 U.S.C. § 2244(d)(1)(A) or tolls the limitations period under § 2244(d)(2)?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	vii
Statement	1
A. Jimenez’s Plea Bargain and Subsequent Revocation of Probation.....	1
B. Dismissal of Jimenez’s Direct Appeal	3
C. Jimenez’s State Habeas Applications and Out-of-Time Appeal.....	4
D. Jimenez’s Petition for Federal Habeas Relief	7
Summary of the Argument.....	10
Argument	14
I. Jimenez’s Lack of Diligence Rendered His Federal Habeas Petition Untimely	14
A. Section 2244(d)’s One-Year Limitations Period Generally Begins on the Date That a State Judgment Became Final Under § 2244(d)(1)(A), Subject Only to Later Start Dates Provided in § 2244(d)(1)(B)-(D).....	14

TABLE OF CONTENTS – CONTINUED

	Page
1. Under § 2244(d)(1)(A), a state-court judgment becomes final when the Court denies certiorari review of the judgment or affirms the judgment on the merits, or when the time for the inmate to seek further review of the judgment expires.....	16
2. In the unusual circumstances of Jimenez’s case, § 2244(d)(1)(B) and (D) provided a later start date for his federal habeas limitations period.....	18
B. Because Jimenez Was Not Diligent in Seeking Postconviction Relief, He Failed to Meet Any Applicable Limitations Period Under § 2244(d)(1).....	22
II. Jimenez’s Interpretation of § 2244(d)(1)(A) Is Inconsistent with AEDPA’s Text and Structure.....	23
A. Section 2244(d)(1)(A)’s Text Does Not Allow for Multiple Finality Dates for State-Court Judgments.....	24
1. Resetting the deadline to file a petition for a writ of certiorari is not analogous to calculating when a judgment became final under § 2244(d)(1)(A).....	24

TABLE OF CONTENTS – CONTINUED

	Page
2. An extension of the time to file a direct appeal under state or federal appellate rules is not analogous to postconviction relief permitting an out-of-time appeal	27
B. The “Conclusion of Direct Review” and “the Expiration of Time for Seeking Such Review” Cannot Both Occur in the Same Case	30
C. Jimenez’s Interpretation of § 2244(d)(1)(A) Rests on a Mischaracterization of the States’ Various Remedies for Ineffective Assistance of Counsel on Appeal	37
1. Procedures for remedying ineffective assistance of counsel on appeal vary considerably among the States	38
2. Jimenez’s interpretation of § 2244(d)(1)(A) contravenes the fundamental principle of criminal procedure that the end of “collateral review” does not precede “direct review”	41

TABLE OF CONTENTS – CONTINUED

	Page
3. Conditioning the limitations start date under § 2244(d)(1)(A) on the nature of these varying state procedures would undermine Congress’s intent that the start date be defined by a uniform federal rule.....	44
III. The Lower Courts’ Interpretation of § 2244(d) Serves All of AEDPA’s Purposes and Ensures That Inmates Have a Fair Opportunity to Vindicate Their Constitutional Rights	46
A. Tolling Limitations Under § 2244(d)(2) During the Completion of an Out-of-Time Appeal That Was Secured Through State Collateral Procedures Helps Advance AEDPA’s Purposes.....	46
B. Tolling Through the Completion of an Out-of-Time Appeal Is Consistent with § 2244(d)(2)’s Text.....	49
IV. A Certificate of Appealability Should Not Have Issued in This Case	54
A. Circuit Precedent Established That Jimenez’s Claims Were Time-Barred ...	54
B. Jimenez Failed to State a Valid Claim of the Denial of a Constitutional Right	56

TABLE OF CONTENTS – CONTINUED

	Page
1. Jimenez’s judicial-bias allegations fail to state a valid constitutional claim.....	58
2. Jimenez’s ineffective-assistance allegations also fail to state a valid constitutional claim.....	60
Conclusion.....	63

TABLE OF AUTHORITIES

Page

CASES

<i>Anders v. California</i> , 386 U.S. 738 (1967).....	<i>passim</i>
<i>Barnett v. State</i> , 497 So. 2d 443 (Miss. 1986)	39, 40, 42
<i>Beasley v. State</i> , 883 P.2d 714 (Idaho Ct. App. 1994)	42
<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997).....	58
<i>Bridges v. Johnson</i> , 284 F.3d 1201 (11th Cir. 2002).....	17, 34
<i>Campbell v. Sonat Offshore Drilling, Inc.</i> , 979 F.2d 1115 (5th Cir. 1992).....	55
<i>Carey v. Saffold</i> , 536 U.S. 214 (2002).....	53
<i>Clay v. United States</i> , 537 U.S. 522 (2003).....	<i>passim</i>
<i>Commonwealth v. Halley</i> , 870 A.2d 795 (Pa. 2005)	42
<i>Davis v. State</i> , 877 S.W.2d 93 (Ark. 1994)	40, 41
<i>Day v. McDonough</i> , 547 U.S. 198 (2006).....	31, 35, 53
<i>DiCenzi v. Rose</i> , 452 F.3d 465 (6th Cir. 2006)	21
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	47, 49, 51, 54

TABLE OF AUTHORITIES – CONTINUED

<i>Estep v. People</i> , 753 P.2d 1241 (Colo. 1988).....	39
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	36, 37
<i>Ex parte Sturdivant</i> , 460 So. 2d 1210 (Ala. 1984)	40, 42
<i>Fielder v. Varner</i> , 379 F.3d 113 (3d Cir. 2004)	33
<i>Fleming v. Evans</i> , 481 F.3d 1249 (10th Cir. 2007)	20
<i>Foote v. State</i> , 751 P.2d 884 (Wyo. 1988)	39, 41
<i>Frasch v. Peguese</i> , 414 F.3d 518 (4th Cir. 2005)	52
<i>FTC v. Cement Inst.</i> , 333 U.S. 683 (1948).....	58
<i>Gonzalez v. Sec’y, Dept. of Corr.</i> , 366 F.3d 1253 (11th Cir. 2004).....	56
<i>Gordon v. Sec’y, Dept. of Corr.</i> , 479 F.3d 1299 (11th Cir. 2007).....	55
<i>Hargesheimer v. State</i> , 182 S.W.3d 906 (Tex. Crim. App. 2006).....	3, 4
<i>Hibbs v. Winn</i> , 542 U.S. 88 (2004).....	25
<i>Hudson v. State</i> , 603 S.E.2d 242 (Ga. 2004)	35
<i>Jimenez v. Quarterman</i> , 128 S. Ct. 1646 (2008).....	10, 54

TABLE OF AUTHORITIES – CONTINUED

<i>Johnson v. United States</i> , 544 U.S. 295 (2005).....	23
<i>Kargus v. State</i> , 162 P.3d 818 (Kan. 2007)	39, 41
<i>Khaimov v. Crist</i> , 297 F.3d 783 (8th Cir. 2002)	57
<i>Lawrence v. Florida</i> , 127 S. Ct. 1079 (2007).....	18
<i>Limtiaco v. Camacho</i> , 127 S. Ct. 1413 (2007).....	26
<i>Liteky v. United States</i> , 510 U.S. 540 (1994).....	60
<i>Loop v. Solem</i> , 398 N.W.2d 140 (S.D. 1986).....	39
<i>Lopez v. Wilson</i> , 426 F.3d 339 (6th Cir. 2005)	29
<i>Mayle v. Felix</i> , 545 U.S. 644 (2005).....	15, 31
<i>Middlebrook v. State</i> , 815 A.2d 739 (Del. 2003).....	40, 45
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	57
<i>Moore v. State</i> , 605 S.W.2d 924 (Tex. Crim. App. [panel op.] 1980).....	62
<i>Olivo v. State</i> , 918 S.W.2d 519 (Tex. Crim. App. 1996).....	27, 28

TABLE OF AUTHORITIES – CONTINUED

<i>Orange v. Calbone</i> , 318 F.3d 1167 (10th Cir. 2003).....	52
<i>O’Neal v. Kenny</i> , 501 F.3d 969 (8th Cir. 2007)	51, 52
<i>O’Sullivan v. Boerckel</i> , 526 U.S. 838 (1999).....	47, 52
<i>Pace v. DiGuglielmo</i> , 544 U.S. 408 (2005).....	19
<i>Panetti v. Quarterman</i> , 127 S. Ct. 2842 (2007).....	36
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987).....	43
<i>People v. Ross</i> , 891 N.E.2d 865 (Ill. 2008).....	42
<i>Ponder v. State</i> , 400 S.E.2d 922 (Ga. 1991)	40, 41
<i>Roberts v. Cockrell</i> , 319 F.3d 690 (5th Cir. 2003)	8, 17, 31, 34, 48
<i>Rodriquez v. United States</i> , 395 U.S. 327 (1969).....	36
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982).....	47
<i>Rowell v. Dretke</i> , 398 F.3d 370 (5th Cir. 2005)	56
<i>Salinas v. Dretke</i> , 354 F.3d 425 (5th Cir. 2004)	<i>passim</i>
<i>Santiago Salgado v. Garcia</i> , 384 F.3d 769 (9th Cir. 2004)	56

TABLE OF AUTHORITIES – CONTINUED

<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000).....	54, 55, 56, 57
<i>Soffar v. Cockrell</i> , 300 F.3d 588 (5th Cir. 2002)	56
<i>State v. Counterman</i> , 475 So. 2d 336 (La. 1985).....	40, 41
<i>State v. Gross</i> , 760 A.2d 725 (Md. Ct. Spec. App. 2000)	39, 40, 41
<i>State v. Knight</i> , 484 N.W.2d 540 (Wis. 1992).....	42
<i>State v. Long</i> , 126 P.3d 284 (Colo. Ct. App. 2005)	39, 41
<i>State v. McCracken</i> , 615 N.W.2d 902 (Neb. 2000)	39, 40, 41
<i>State v. Stubblefield</i> , 97 S.W.3d 476 (Mo. 2003)	39, 41
<i>State v. Trowell</i> , 739 So. 2d 77 (Fla. 1999)	40, 41
<i>State v. Tweed</i> , 59 P.3d 1105 (Mont. 2002).....	40, 46
<i>State v. Weber</i> , 602 A.2d 963 (Conn. 1992).....	42
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	61, 62
<i>Teas v. Endicott</i> , 494 F.3d 580 (7th Cir. 2007)	30, 52
<i>Thomas v. United States</i> , 328 F.3d 305 (7th Cir. 2003)	56

TABLE OF AUTHORITIES – CONTINUED

<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	59
<i>United States v. Nichols</i> , 534 F.2d 202 (9th Cir. 1976)	28
<i>United States v. Torres</i> , 115 F.3d 1033 (D.C. Cir. 1997).....	55
<i>Vidaurri v. State</i> , 49 S.W.3d 880 (Tex. Crim. App. 2001).....	4
<i>Wallace v. State</i> , 121 S.W.3d 652 (Tenn. 2003)	39, 41
<i>Watson v. State</i> , 924 S.W.2d 711 (Tex. Crim. App. 1996)	3, 4
<i>Whiteman v. State</i> , 643 N.W.2d 704 (N.D. 2002)	42
<i>Wims v. United States</i> , 225 F.3d 186 (2d Cir. 2000).....	21
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975).....	58
<i>Young v. Harper</i> , 520 U.S. 143 (1997).....	28
<i>Young v. State</i> , 902 P.2d 1089 (Okla. Crim. App. 1994)	40, 42

STATUTES

28 U.S.C. § 2101(c)	24, 25, 26
28 U.S.C. § 2244(d).....	7, 47
28 U.S.C. § 2244(d)(1).....	<i>passim</i>

TABLE OF AUTHORITIES – CONTINUED

28 U.S.C. § 2244(d)(1)(A).....	<i>passim</i>
28 U.S.C. § 2244(d)(1)(B).....	<i>passim</i>
28 U.S.C. § 2244(d)(1)(D)	<i>passim</i>
28 U.S.C. § 2244(d)(2).....	<i>passim</i>
28 U.S.C. § 2253(c)(2)	57
28 U.S.C. § 2254(b)	47, 48
ALASKA STAT. § 12.72.010(9)	42
COLO. REV. STAT. ANN. § 16-5-402.....	35
IDAHO CODE § 19-4901	42
725 ILL. COMP. STAT. 5/122-1	42
MD. CRIM. PROC. CODE § 7-103	35
N.D. CENT. CODE § 29-32.1-03(2).....	35, 42
NEB. REV. STAT. ANN. § 29-3001.....	35
S.D. CODIFIED LAWS § 21-27-3.1.....	35
TEX. PENAL CODE § 12.42(c)(1).....	1, 59
TEX. PENAL CODE § 30.02	1, 59

RULES

ARIZ. R. CRIM. P. 32.1(f)	35, 42
ARIZ. R. CRIM. P. 32.4(a).....	35
COLO. R. APP. 4(b)(1)	29
FED. R. APP. P. 4(a).....	28
FED. R. APP. P. 4(a)(5)	28
FED. R. APP. P. 4(a)(6)	28

TABLE OF AUTHORITIES – CONTINUED

FED. R. APP. P. 4(b)(4)	24
FED. R. APP. P. 40(a).....	29
HAW. R. APP. P. 4(b)(5)	29
ILL. SUP. CT. R. 606(c).....	29
IND. POST-CONVICTION R. 2 § 3.....	35, 43
MASS. R. APP. P. 4(c).....	29
N.D. R. APP. P. 4(b)(4)	27, 28, 29
N.J. CT. R. 2:4-4(a)	29
OHIO R. APP. P. 26(B)(2)(b).....	29
TEX. R. APP. P. 25.2(a)(2).....	3
TEX. R. APP. P. 25.2(d).....	21
TEX. R. APP. P. 26.3	24, 27, 29
TEX. R. APP. P. 40(b)(1) (1997)	3
TEX. R. APP. P. 68	8, 48
UTAH R. APP. P. 4(e).....	29

OTHER AUTHORITIES

THE NEW OXFORD AMERICAN DICTIONARY (2001).....	51
---	----

STATEMENT**A. Jimenez's Plea Bargain and Subsequent Revocation of Probation**

In August 1991, Petitioner Carlos Jimenez was indicted in Texas state court for felony burglary, enhanced by his prior felony conviction for aggravated assault with a deadly weapon. SCR.1.¹ If convicted, Jimenez faced a prison sentence ranging from 15 years to life. *See* TEX. PENAL CODE §§ 12.42(c)(1), 30.02.

Jimenez, his counsel, and the State reached a plea agreement, SCR.8, under which Jimenez pled guilty to the burglary offense and “true” to the prior felony enhancement. SCR.15-19; 1.RR.4-5. Per that agreement, the court entered an order in November 1991, deferring adjudication and placing Jimenez on probation for five years. SCR.15-19.

Before entering the deferred-adjudication order, the judge advised Jimenez orally and in writing of the charges against him and the applicable punishment range. SCR.9-10; 1.RR.2-4. The judge also explained the conditions of his probation and the consequences

¹ “SCR.” refers to the clerk’s record for Jimenez’s first appeal (Cause No. 3-96-123-CR in the Austin Court of Appeals); “CCR.” to the record for his first state habeas application (Cause No. 74,433 in the Texas Court of Criminal Appeals); “1.RR.” to the reporter’s record of his 1991 deferred-adjudication hearing; and “2.RR.” to the reporter’s record of his 1995 probation-revocation hearing.

of a violation. 1.RR.9-12, 14-25. Jimenez confirmed orally and in writing that he understood his plea bargain. *See* SCR.11-13; 1.RR.2-25.

In March 1995, the State moved to revoke Jimenez's probation based on his violations of four probation conditions: Jimenez intentionally injured Teresa Barron, failed to properly report his arrest for assaulting Barron, failed to report to his probation officer on numerous occasions, and failed to pay probation fees. SCR.26-27, 32-33.

At the November 1995 hearing on the revocation motion, Jimenez, again advised by counsel, admitted that he had failed to report to his probation officer and to pay his probation fees. 2.RR.10-15. The court heard testimony concerning the remaining charges from, among others, Jimenez himself, Barron, and the police officers who arrested Jimenez. *See* 2.RR.23-50, 76-108. The court concluded that Jimenez had violated his probation conditions on all four counts. 2.RR.113.

The court noted that, although Jimenez was given deferred-adjudication probation, a jury could not have given him probation if he was convicted as charged. 2.RR.114. The court also observed that Jimenez had "a long and regular criminal history," including his prior aggravated assault with a deadly weapon, the burglary charge, and, most recently, family violence. 2.RR.117; J.A.46. The court found him guilty, sentenced him to 43 years in prison, and denied his motion for new trial. SCR.35-38, 47-48.

B. Dismissal of Jimenez's Direct Appeal

The trial court appointed appellate counsel for Jimenez, SCR.54, who timely filed a notice of appeal, SCR.49.

In July 1996, Jimenez's counsel filed an *Anders* brief in the court of appeals, concluding, after a diligent review of the record, that Jimenez had no grounds for appeal. J.A.77.² But he did not serve the brief on Jimenez, as required by *Anders*. J.A.22-23. Nevertheless, the state court of appeals incorrectly stated that the brief met all the *Anders* requirements and noted that no *pro se* brief was filed. J.A.11.

In September 1996, the court of appeals dismissed Jimenez's appeal. J.A.10-12. Under then-existing Texas law, Jimenez could appeal nonjurisdictional errors in his revocation proceedings only if he had raised those errors by written motions filed and ruled on before trial; otherwise, he was required to obtain permission from the trial court to appeal. *Watson v. State*, 924 S.W.2d 711, 714-15 (Tex. Crim. App. 1996), *overruled by Hargesheimer v. State*, 182 S.W.3d 906, 912-13 (Tex. Crim. App. 2006).³

² See *Anders v. California*, 386 U.S. 738, 744 (1967).

³ *Watson* had extended a procedural rule restricting appeals from judgments on plea bargains to govern appeals from judgments revoking deferred-adjudication probation. 924 S.W.2d at 714-15 (applying TEX. R. APP. P. 40(b)(1) (1997) [now TEX. R. APP. P. 25.2(a)(2)]). *Watson's* holding was later limited to appeals regarding the adjudication of guilt; appeals concerning, for example, the *sentence* imposed upon revocation were no longer

(Continued on following page)

Finding that Jimenez’s notice of appeal satisfied none of these conditions and that there was “no basis for challenging the district court’s jurisdiction,” the court dismissed his appeal. J.A.11.

C. Jimenez’s State Habeas Applications and Out-of-Time Appeal

The court of appeals timely sent copies of its opinion and dismissal judgment to Jimenez, but at the wrong address. *See* CCR.42.⁴ The documents apparently were not forwarded to him. *See id.* Although Jimenez had heard nothing from his attorney since at least July 1996 (when the *Anders* brief was filed), he waited over a year—until September 1997—to contact the court regarding the status of his appeal. *See* CCR.27. He then learned that the appeal had been dismissed. J.A.23.

restricted by the rule. *See Vidaurri v. State*, 49 S.W.3d 880, 883-85 (Tex. Crim. App. 2001). In 2006, *Watson* was overruled, so the rule no longer restricts appeals from judgments revoking deferred-adjudication probation. *Hargesheimer*, 182 S.W.3d at 912-13.

⁴ At the time he filed his *Anders* brief, Jimenez’s appointed counsel advised the court of appeals that he had served the brief on Jimenez at the jail in Tom Green County. J.A.21-22; CCR.32-41. But Jimenez had already been moved to another prison. J.A.22. Thus, when the court of appeals sent its opinion and judgment to Jimenez, it incorrectly believed Jimenez was at the jail in Tom Green County, and Jimenez—who had not received the *Anders* brief—was unaware that the court had an incorrect address for him.

Four and a half years later, in April 2002, Jimenez filed a state habeas application, arguing that he had been denied the right to appeal based on the failure of his appointed counsel to serve him with a copy of his *Anders* brief. J.A.77. On September 25, 2002, the Texas Court of Criminal Appeals granted Jimenez permission to file an out-of-time appeal. J.A.26-29.

Jimenez’s newly appointed counsel for the out-of-time appeal—like his previous counsel—determined that he had no legitimate grounds for appeal and filed an *Anders* brief. J.A.30-42. She observed that, with “ample evidence in the record that [Jimenez] was advised of the range of punishment,” J.A.41, Jimenez nonetheless admitted that he had violated two probation conditions. J.A.40-41. Citing Texas’s established rule that even a single proven probation violation supports revocation, Jimenez’s attorney could find no “legitimate grounds for appeal.” J.A.41.

Jimenez filed a *pro se* brief arguing, among other things, that he was denied his due-process right to a neutral judge during the probation-revocation proceedings. J.A.45. The court of appeals found this claim baseless, J.A.45-46, concluding that “nothing in the record . . . arguably support[s] [Jimenez’s] appeal,” J.A.47.

In December 2004, Jimenez filed his second state habeas application, which included claims related to the probation-revocation proceedings and specifically reurged the “neutral judge” claim. J.A.66. The trial

court rejected this claim, noting that a judge may be disqualified only for extrajudicial bias—an allegation that Jimenez had not made. J.A.68-70.

Jimenez also claimed that his counsel in the revocation proceedings was ineffective in failing to object and request the judge's disqualification and in allegedly inducing Jimenez to plead "true" to two of the State's allegations by representing that Jimenez would receive at most 15 years in prison. J.A.70, 73-74. Having concluded that Jimenez's bias claim was meritless, the court determined that objecting to the judge would not have been in Jimenez's best interest. J.A.74. As to the claim that counsel improperly induced Jimenez to plead "true" to probation violations, the court observed that: (1) there was no record evidence of counsel's alleged statement that Jimenez would receive no more than 15 years; (2) the prosecutor stated in open court that no plea agreement existed; and (3) the judge gave Jimenez an opportunity to renounce his plea of "true" to probation violations. J.A.70-73.

Concluding that none of the claims raised in Jimenez's second habeas application merited an evidentiary hearing, the court recommended dismissal of the application. J.A.74. In June 2005, the Texas Court of Criminal Appeals denied Jimenez's application without written order. J.A.78.

D. Jimenez's Petition for Federal Habeas Relief

In July 2005, Jimenez filed his federal habeas petition, reasserting his claims that he was denied his due-process right to a neutral judge during his probation-revocation proceedings, and that he received ineffective assistance of counsel in those proceedings. J.A.75-93. The district court dismissed the petition as time-barred without addressing the merits. J.A.80-93.

The court's decision turned on its application of § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to Jimenez's claims. For persons in custody pursuant to a state-court judgment, the limitations period for filing a federal habeas petition is one year. 28 U.S.C. § 2244(d)(1). That period begins on the latest of four possible dates, the first of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).

Although § 2244(d)(1)(A) provides the generally applicable limitations start date for federal habeas petitions, Congress anticipated that, because of certain circumstances beyond an inmate's control, habeas claims could not always be timely asserted under that provision's strict timeline. For those exceptional circumstances, § 2244(d)(1)(B)-(D) provide later limitations start dates. And the limitations periods in § 2244(d)(1) will be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect

to the pertinent judgment or claim is pending.” *Id.* § 2244(d)(2).

In Jimenez’s case, the court noted that the state court of appeals dismissed Jimenez’s appeal of the judgment revoking his probation on September 11, 1996. J.A.89. The court concluded that this conviction became final thirty days later, on October 11, 1996, when his time for seeking further direct review expired. *Id.*⁵ Thus, the court calculated that, under § 2244(d)(1)(A), Jimenez had to file his federal petition on or before October 11, 1997. *Id.* Because Jimenez did not file his federal petition until July 19, 2005, and he failed to demonstrate any statutory or equitable tolling of the limitations period for these claims, the court held that his claims were time-barred. J.A.91-92.

Jimenez argued that his federal petition was timely because the limitations period under § 2244(d)(1)(A) “restarted” when the Texas Court of Criminal Appeals granted him permission to file an out-of-time appeal. J.A.81-82. Thus, according to Jimenez, under § 2244(d)(1)(A) finality did not actually attach to the judgment revoking his probation until January 2004, when the time for him

⁵ In Texas, once an inmate’s direct appeal has failed in an intermediate court of appeals, he can file a petition for discretionary review (PDR) in the Texas Court of Criminal Appeals. TEX. R. APP. P. 68. When an inmate fails to file a PDR, his conviction becomes final 30 days after the intermediate court of appeals’s decision. *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003).

to file a certiorari petition following his out-of-time appeal expired. J.A.90.

The district court rejected Jimenez’s argument that his out-of-time appeal “restarted” the federal habeas limitations period, citing *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004). J.A.89-92. In *Salinas*, the Fifth Circuit determined that, “[o]n its face, AEDPA provides for only a linear limitation period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between.” 354 F.3d at 429. *Salinas* applied this principle to the granting of an out-of-time PDR to a Texas inmate, holding that this form of relief “tolls the AEDPA’s statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA’s limitations period altogether.” *Id.*

The court held that *Salinas* applied equally to an out-of-time appeal—which, like an out-of-time PDR, is “‘necessarily the product of state habeas review.’” J.A.91 (quoting *Salinas*, 354 F.3d at 431). The court concluded that the revocation of Jimenez’s deferred-adjudication probation became final on October 11, 1996, when his time for seeking further direct review expired. *Id.* And because the out-of-time appeal did not “restart” the limitations period, the court concluded that the one-year period for Jimenez to file his federal petition regarding claims related to the 1995 revocation order expired on October 11, 1997. Noting that Jimenez had filed both of his state habeas applications years after October 11, 1997, the

court held that he was not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2). J.A.91-92.

The district court denied a certificate of appealability for the reasons stated in its prior dismissal order. J.A.94-95. The Fifth Circuit agreed, concluding that reasonable jurists would not debate the correctness of the district court's conclusion that Jimenez's federal habeas petition was time-barred. J.A.124-25. The Court granted certiorari review. *Jimenez v. Quarterman*, 128 S. Ct. 1646 (2008).

SUMMARY OF THE ARGUMENT

Jimenez asserts that the lower courts' purported misinterpretation of the federal habeas limitations period has deprived him of a fair opportunity to vindicate his constitutional rights and has endangered the rights of similarly situated inmates. This narrative is a fallacy. Jimenez waited four and a half years to seek relief on his habeas claims, necessarily foreclosing his opportunity to obtain federal review. To overcome this marked lack of diligence, Jimenez now advances an interpretation of AEDPA that is at odds with the statute's text and structure, and that would thwart its important purposes. The lower courts' decisions are consistent with AEDPA's requirement that inmates promptly assert their rights, while affording inmates who timely assert their rights—unlike Jimenez—a fair opportunity to obtain federal habeas review.

1. Jimenez's case arises from the revocation of his probation. On appeal, Jimenez's appointed counsel filed an *Anders* brief but failed to provide a copy to Jimenez or notify him that he could file a *pro se* brief. Jimenez's appeal was dismissed in September 1996, and his state-court conviction became final in October 1996 when the time to seek further direct review expired (per § 2244(d)(1)(A)). Thus, under § 2244(d)(1)(A), Jimenez was required to file his federal habeas petition by October 1997, subject to tolling under § 2244(d)(2) during any state postconviction proceedings.

But Jimenez did not discover that his appeal had failed until almost a year later, in September 1997. The *Anders* brief filed by Jimenez's appointed appellate counsel, which was not served on Jimenez, gave the court of appeals an incorrect address for Jimenez. When the court of appeals dismissed his appeal shortly thereafter, it accordingly sent a copy of the decision to the wrong address. And because Jimenez had not received the *Anders* brief, he was unaware that the court had an incorrect address for him at that time.

Because of these unusual circumstances, Jimenez could have invoked § 2244(d)(1)(B) and (D), which provide later limitations start dates than § 2244(d)(1)(A) when an inmate belatedly discovers the factual predicate of his habeas claim or when a state-created impediment delays the timely filing of federal habeas claims. These provisions would have afforded Jimenez a full year, beginning in September

1997, to file his federal claims—and that period would have been tolled while he pursued his state habeas remedies. *See* 28 U.S.C. § 2244(d)(2). Inexplicably, however, Jimenez chose to wait four and a half years—from September 1997 until April 2002—before seeking state habeas relief. By that time, well more than one year had passed since the later limitations start dates available under § 2244(d)(1)(B) and (D).

2. In September 2002, Jimenez was granted an out-of-time appeal in state court, which allowed him to pursue a new appeal of his probation revocation. Jimenez contends that the granting of this out-of-time appeal “restarted” the federal limitations period under § 2244(d)(1)(A) by initiating a new “direct review.” But § 2244(d)(1)(A)’s text does not contemplate multiple dates on which a state-court judgment becomes final. Rather, the statute provides a single, pinpointed finality date, based on a uniform federal rule, that finality “attaches when the Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” *Clay v. United States*, 537 U.S. 522, 527 (2003).

Jimenez’s contrary interpretation, which envisions more than one finality date under § 2244(d)(1)(A), is problematic for several reasons. First, Jimenez’s interpretation of § 2244(d)(1)(A) compromises *Clay*’s uniform federal rule for finality in favor of a finality assessment based on varying state remedies for ineffective assistance of appellate counsel. Second, under Jimenez’s interpretation of § 2244(d)(1)(A), in

any case in which an inmate receives an out-of-time appeal, that appeal is unsuccessful, and the inmate does not seek certiorari review in this Court, the “time for seeking direct review” under § 2244(d)(1)(A) will expire *twice* in the same case—a result surely not envisioned by Congress. Third, by effectively placing state-court convictions into an indefinite “limbo” period under § 2244(d)(1)(A) whenever an out-of-time appeal might, years later, be granted by a state court, Jimenez’s interpretation thwarts AEDPA’s goals of curbing abusive delay and promoting judicial efficiency. Finally, Jimenez’s theory also illogically assumes that Congress crafted § 2244(d)(1)(A), the background rule for finality, to address the exception that arises when an inmate learns months or years later that his direct appeal failed due to ineffective assistance of counsel.

3. Regardless of the merits of Jimenez’s interpretation of § 2244(d)(1)(A), the answer to the question presented—whether the courts below should have issued a certificate of appealability (COA)—is “no.”

A COA issues only to resolve questions that are “debatable” among “jurists of reason.” And Jimenez was required to present a debatable question not only on the limitations issue, but also on his underlying constitutional claims.

He failed to do so. Because circuit precedent established that Jimenez’s federal habeas petition was time-barred, it was not debatable that the lower

courts were bound to follow that precedent. And Jimenez's judicial-bias and ineffective-assistance claims are baseless in law and fact. Thus, the courts below properly denied Jimenez's application for a COA.

ARGUMENT

I. JIMENEZ'S LACK OF DILIGENCE RENDERED HIS FEDERAL HABEAS PETITION UNTIMELY.

A. Section 2244(d)'s One-Year Limitations Period Generally Begins on the Date That a State Judgment Became Final Under § 2244(d)(1)(A), Subject Only to Later Start Dates Provided in § 2244(d)(1)(B)-(D).

AEDPA provides that, for persons in custody pursuant to a state-court judgment, the limitations period for filing a federal habeas petition is one year. 28 U.S.C. § 2244(d)(1). That period begins to run on the latest of four possible dates, as explained in § 2244(d)(1):

- (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) 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;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Section 2244(d)(2) tolls § 2244(d)(1)'s one-year limitations period during the time that an inmate's "properly filed application for State post-conviction or other collateral review" concerning the underlying judgment is pending. *Id.* § 2244(d)(2).

Thus, § 2244(d)(1) "adopt[s] a tight time line" that "ordinarily run[s]" from the date on which the judgment became final under § 2244(d)(1)(A), *Mayle*

v. Felix, 545 U.S. 644, 662 (2005), subject to tolling under § 2244(d)(2). But § 2244(d)(1) also provides later start dates for claims that could not be timely asserted under § 2244(d)(1)(A)'s strict timeline because of circumstances beyond the inmate's control. Those specific exceptions are described in § 2244(d)(1)(B)-(D), and they reflect Congress's recognition of—and prescribed remedy for—exceptional circumstances justifying a later limitations start date for certain habeas claims.

- 1. Under § 2244(d)(1)(A), a state-court judgment becomes final when the Court denies certiorari review of the judgment or affirms the judgment on the merits, or when the time for the inmate to seek further review of the judgment expires.**

The Court has explained that § 2244(d)(1)(A)'s words “by the conclusion of direct review or the expiration of the time for seeking such review” mean that finality “is to be determined by reference to a *uniform federal rule*” that the Court has fixed: “Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” *Clay*, 537 U.S. at 527, 531 (emphasis added). If the inmate stops the direct-review process in the lower courts, then finality attaches when the deadline for the next stage of

review expires. *E.g.*, *Roberts*, 319 F.3d at 694; *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2002). This definition of finality applies to the limitations period for review of state-court judgments of conviction under § 2244(d)(1)(A) as well as to federal convictions under 28 U.S.C. § 2255(f). *Clay*, 537 U.S. at 528-31.

Two interrelated aspects of finality under § 2244(d)(1)(A) bear emphasis here. First, § 2244(d)(1)(A) provides for a single point when finality attaches to a state-court judgment. *See* 28 U.S.C. § 2244(d)(1)(A); *see also Clay*, 537 U.S. at 528-31. The benefit of this standardized “pinpointed” date is 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.” *Clay*, 537 U.S. at 530-31.

Second, because the statute contemplates a single point when finality attaches, its language necessarily does not provide for more than one date when a state-court judgment “became final.” A hypothetical scenario illustrates this principle. Suppose a state-court judgment unquestionably became final in year 1, when the time for seeking certiorari review expired. Ten years later, a state court allowed the inmate to pursue a new, out-of-time appeal, and that out-of-time appeal concluded two years later, in year 13. Nothing in § 2244(d)(1)(A)’s language supports a determination that, for purposes of § 2244(d)(1)’s uniform federal rule, the state-court judgment “became final” in year 1, generating one limitations start date, and then, ten years later,

“became unfinal” in year 11, leading to a second limitations start date when the judgment once again “became final” in year 13.

Rather, § 2244(d)(1)(A)’s directive that finality occurs upon “the” conclusion of direct review “or” “the” expiration of the time for seeking such review reflects two discrete, mutually exclusive events. Only one of those two events will happen: either the inmate will pursue direct review to its “conclusion” (the Court denies certiorari review or grants review and affirms the conviction⁶), or the inmate will stop seeking direct review at some point earlier in the process and the time for seeking direct review will “expir[e].” When one of these two events occurs, the judgment is “final” under § 2244(d)(1)(A).

2. In the unusual circumstances of Jimenez’s case, § 2244(d)(1)(B) and (D) provided a later start date for his federal habeas limitations period.

Congress anticipated that certain circumstances could prevent an inmate, through no fault of his own, from filing federal habeas claims within one year of

⁶ The circuit courts “have uniformly interpreted ‘direct review’ in § 2244(d)(1)(A) to encompass review of a state conviction by this Court.” *Clay*, 537 U.S. at 528 n.3. The Court later endorsed that interpretation in *Lawrence v. Florida*, 127 S. Ct. 1079, 1083-84 (2007).

§ 2244(d)(1)(A)'s finality date. To address those situations, § 2244(d)(1)(B)-(D) provide for later limitations start dates when a state-created impediment prevents the otherwise timely filing of federal claims (§ 2244(d)(1)(B)), when a newly recognized constitutional right is made retroactively applicable to cases on collateral review (§ 2244(d)(1)(C)), or when an inmate later discovers the factual predicate of his claim (§ 2244(d)(1)(D)). As the Court has observed, § 2244(d)(1) thus “provides one means of calculating the limitation with regard to the ‘application’ as a whole [§ 2244(d)(1)(A)] . . . but three others that require claim-by-claim consideration.” *Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005).

Jimenez's case demonstrates the type of circumstance addressed by Congress in § 2244(d)(1)(B) and (D). On direct appeal of his state-court judgment, Jimenez's appointed counsel filed an *Anders* brief, but failed to deliver the brief to Jimenez or notify him that he could file a *pro se* brief. J.A.22-23. Further, the *Anders* brief provided an incorrect address for Jimenez to the court of appeals. *See supra* n.4. And while an inmate is typically responsible for ensuring that courts have his correct address, because Jimenez had not received the *Anders* brief he was unaware that the court did not have his correct address or that he was no longer represented by counsel. *See id.* Thus, when the court of appeals dismissed his case in September 1996, two months after the filing of the *Anders* brief in July 1996, it sent Jimenez's copy of the dismissal to an incorrect address. *See id.* Jimenez

only discovered that his appeal failed in September 1997, nearly one year after the state-court judgment became final through dismissal of his appeal. J.A.23; Pet. Br. 6.⁷

When, as in this case, an inmate only belatedly becomes aware that he received ineffective assistance of counsel on appeal, he may assert that the federal habeas limitations period for this claim should be calculated under § 2244(d)(1)(D), not § 2244(d)(1)(A). And under these circumstances, § 2244(d)(1)(D) will govern because an inmate like Jimenez could not have asserted a habeas claim based on ineffective assistance of counsel until “the date on which the factual predicate of [that claim] could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D); *see also Fleming v. Evans*, 481 F.3d 1249, 1255 (10th Cir. 2007) (recognizing that inmate properly invoked § 2244(d)(1)(D) when his counsel failed to move to withdraw guilty plea and file an appeal, but he did not learn of counsel’s ineffective assistance until two and a half years

⁷ Jimenez did not act with appropriate diligence to keep advised of his appeal. According to Jimenez, he received no information about his appeal from his appointed counsel from the filing of the notice of appeal in January 1996 through the filing of the *Anders* brief in July 1996. *See* CCR.48. But Jimenez did not attempt to contact the court to learn the status of his appeal until September 1997, approximately 20 months after his appeal commenced. *See* CCR.27. Jimenez’s prolonged delay in seeking information about the status of his appeal is inconsistent with AEDPA’s mandate that inmates act diligently to preserve their rights.

later); *DiCenzi v. Rose*, 452 F.3d 465, 469-72 (6th Cir. 2006) (recognizing that § 2244(d)(1)(D) applied when an inmate’s counsel was ineffective by not advising him of his appeal rights); *cf. Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000) (holding that § 2255(f)(4)—§ 2244(d)(1)(D)’s counterpart provision applicable to federal convictions—provided a later limitations start date when an inmate’s counsel failed to file his appeal and the inmate exercised due diligence to discover this failure five months later).

Section 2244(d)(1)(D) addresses the practical problem that arises when a defendant reasonably presumes that his counsel is pursuing an appeal, but in fact the attorney has failed to do so—for example, by failing to file a brief or a notice of appeal.⁸ In those cases, even the diligent inmate may not be aware of these facts until after the state-court conviction “became final” under § 2244(d)(1)(A) when the time to file the appeal or seek further review expired. Thus, § 2244(d)(1)(D) would provide a later state date.

⁸ Jimenez’s *amici* assert that the ineffective assistance of his counsel was symptomatic of Texas’s indigent-defense system. *See* Brief for *Amici Curiae* Texas Fair Defense Project and Texas Criminal Defense Lawyers Association, at 6-10. But as *amici* properly note, *id.* at 16, the Texas Court of Criminal Appeals has acted to address this form of ineffective assistance of counsel. Now, under Texas Rule of Appellate Procedure 25.2(d), the *trial court* must advise the inmate of “his rights concerning an appeal, as well as any right to file a *pro se* petition for discretionary review.” TEX. R. APP. P. 25.2(d).

Regarding the claims raised in Jimenez's federal habeas petition—judicial bias and ineffective assistance in his probation-revocation proceedings—Jimenez could have invoked § 2244(d)(1)(B). Section 2244(d)(1)(B) provides a later limitations start date when a state-created impediment prevents the timely filing of federal claims. *See* 28 U.S.C. § 2244(d)(1)(B). Jimenez was not provided timely notification that his appeal was dismissed because, through no fault on Jimenez's part, the notice was sent to the wrong address. Any later limitations start date under § 2244(d)(1)(B), however, would also have begun no later than September 1997, when Jimenez learned that his appeal was dismissed.

B. Because Jimenez Was Not Diligent in Seeking Postconviction Relief, He Failed to Meet Any Applicable Limitations Period Under § 2244(d)(1).

After learning that his state appeal was dismissed, Jimenez inexplicably waited four and a half years, until April 2002, to seek postconviction relief. J.A.23, 77; Pet. Br. 6. Under § 2244(d)(1) (B) or (D), the one-year limitations period for Jimenez to file a federal habeas claim ended in September 1998. Jimenez could have tolled this limitations period if he had filed an application for state postconviction relief any time during the year following his discovery that he had lost the opportunity to file his own state

appeal due to ineffective assistance of counsel. *See* 28 U.S.C. § 2244(d)(2). Not only did he fail to do so, but he waited 54 months to seek such relief. J.A.23, 77. That considerable delay foreclosed his opportunity to seek federal habeas review.

The explanation Jimenez has offered for belatedly asserting his rights is that he was an unsophisticated inmate proceeding *pro se*. Pet. Br. 7 n.2; *see also* J.A.109-14. But the Court has expressly rejected this explanation as an excuse for unreasonable delay in meeting AEDPA's limitations periods. *See Johnson v. United States*, 544 U.S. 295, 311 (2005) (holding that inmate's 21-month delay in attacking his sentence enhancement through state habeas "fell far short of reasonable diligence" and rejecting inmate's excuse "that he was acting *pro se* and lacked the sophistication to understand the procedures"). Jimenez's 54-month delay is no more excusable than the 21-month delay in *Johnson*.

II. JIMENEZ'S INTERPRETATION OF § 2244(d)(1)(A) IS INCONSISTENT WITH AEDPA'S TEXT AND STRUCTURE.

Because Jimenez waited 54 months before seeking relief on his ineffective-assistance claim, the limitations period for federal habeas review expired under § 2244(d)(1). *See supra* Part I. Jimenez challenges that result, and the lower courts' decisions in this case, by interpreting § 2244(d)(1)(A) to

contemplate multiple points when finality attaches to a state-court judgment. Pet. Br. 33-37. But this interpretation of § 2244(d)(1)(A) is inconsistent with the text and structure of the statute, which contemplates a single finality date under § 2244(d)(1)(A), subject to later limitations start dates for claims falling within the exceptions reflected in § 2244(d)(1)(B)-(D).

A. Section 2244(d)(1)(A)'s Text Does Not Allow for Multiple Finality Dates for State-Court Judgments.

Jimenez's primary argument that § 2244(d)(1)(A) contemplates multiple finality dates turns on analogizing it to other instances when the finality of a judgment is suspended, particularly: (1) when the actions of a lower court or party reset the 90-day period to file a petition for a writ of certiorari, Pet. Br. 33-34; and (2) when a court "reopens" the time to appeal under a rule like Texas Rule of Appellate Procedure 26.3 or Federal Rule of Appellate Procedure 4(b)(4), Pet. Br. 34, 36-37. Neither analogy supports his argument.

1. Resetting the deadline to file a petition for a writ of certiorari is not analogous to calculating when a judgment became final under § 2244(d)(1)(A).

Jimenez's comparison of the timeliness of petitions for writs of certiorari, governed by 28 U.S.C.

§ 2101(c), and the operation of § 2244(d)(1)(A) ignores important differences in their language. Section 2101(c) provides that the 90 days to file a certiorari petition begins to run from “the *entry* of [the] judgment or decree.” 28 U.S.C. § 2101(c) (emphasis added). But because the judgment can potentially be altered after it is entered—through rehearing sought by the parties or initiated by the court of appeals—it is possible that (1) the judgment ultimately reviewed by the Court will be different; or (2) the parties’ rights will be altered, which may affect whether they seek certiorari review.

Accordingly, the Court has defined “entry of such judgment” in § 2101(c) through its Rule 13.3, as well as *Hibbs v. Winn*, 542 U.S. 88, 97-98 (2004), to occur only after the risk of altering the judgment has passed—*i.e.*, only when there is “a genuinely final judgment.” *Id.* at 98.

But “final judgment” under § 2244(d)(1)(A) needs no such definition by rule or case law because Congress has already defined it in this context: the limitations period runs from when the judgment becomes final “by the conclusion of direct review or the expiration of the time for seeking such review.” This definition ensures that the limitations period will not begin to run until the risk of altering the judgment through the usual direct-review process is exhausted. For example, this definition—unlike the language of § 2101(c)—accounts for a request for rehearing from a state court because, while that request is pending, neither the “conclusion of direct

review” nor “the expiration of the time for seeking such review” will occur. Thus, the additional definition that the Court has given to § 2101(c) would be redundant here.⁹

Jimenez essentially argues that the Court should add to Congress’s definition of a final judgment in § 2244(d)(1)(A)—much the way it further defined “entry of such judgment” in § 2101(c)—by holding that out-of-time appeals suspend a judgment’s finality. But the situations are not analogous. Because petitions for rehearing are a usual feature of circuit-court practice, the Court reasonably defined “entry of judgment” in § 2101(c) to accommodate this standard procedure. By contrast, out-of-time appeals are not such an ordinary feature of state criminal appeals that the Court should alter Congress’s explicit definition of when a judgment becomes “final”—particularly when Congress has already provided a mechanism to address justifiably untimely

⁹ Jimenez’s reliance on *Limtiaco v. Camacho*, 127 S. Ct. 1413 (2007), *see* Pet. Br. 33-34, is also misplaced. In *Limtiaco*, a party timely appealed to an intermediate court that later dismissed the appeal when Congress divested the court of its appellate jurisdiction. 127 S. Ct. at 1417. Concluding that the case’s pendency in the intermediate court suspended the judgment’s finality for purposes of calculating the certiorari deadline, the Court appropriately noted that “our holding is limited to the unique procedural circumstances presented here.” *Id.* at 1418. Even if *Limtiaco* could generally be extended beyond its peculiar facts, the circumstances here are so dissimilar that the analogy is inapt.

appeals in the same statute (for example, in § 2244(d)(1)(D)). *See supra* Part I.

2. An extension of the time to file a direct appeal under state or federal appellate rules is not analogous to postconviction relief permitting an out-of-time appeal.

Jimenez suggests that granting an out-of-time appeal through intervening postconviction proceedings years after a state-court conviction became final under § 2244(d)(1)(A) is no different than extending the deadline to file a notice of appeal under rules such as Texas Rule of Appellate Procedure 26.3 or Federal Rule of Appellate Procedure 4(b)(4). *See* Pet. Br. 24, 34. Classifying both situations as ones in which a court “exercises its discretion to reopen the time to appeal,” he reasons that, if a conviction is not treated as final under § 2244(d)(1)(A) when an appeal is filed within a deadline extended under these rules, a conviction is likewise not final when an out-of-time appeal is granted as postconviction relief. *Id.*

But Jimenez’s analogy rests on a mischaracterization of these rules’ purpose and effect. The rules permit courts to *extend* the time to perfect an appeal by a short period that immediately follows the initial period during which a defendant may appeal. *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) (not only must extension motion be

filed “within 15 days after the deadline for filing the notice of appeal,” but the notice of appeal *itself* must be filed “within fifteen days of the last day allowed for filing”); FED. R. APP. P. 4(b)(4) (extended period for filing notice cannot “exceed 30 days from the expiration of the time otherwise prescribed”). That is, the time for appealing does not close and then “reopen” under these rules, as Jimenez suggests. Pet. Br. 34.¹⁰

This distinction manifests in how courts describe the timeliness of appeals filed in these different circumstances. When a court extends the time to file a notice of appeal, the notice is considered “timely.” See *Olivo*, 918 S.W.2d at 522 (holding that “a late notice of appeal may be considered timely” if the court grants a properly filed Rule 26.3 motion); *United States v. Nichols*, 534 F.2d 202, 204 (9th Cir. 1976) (per curiam) (stating that, when district court properly grants a Rule 4(b) motion, “the appeal is timely”); cf. *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997) (holding that “both the petition for rehearing and the subsequent petition for certiorari were timely

¹⁰ The distinction is also apparent from the fact that Federal Rule of Appellate Procedure 4(a) (which governs civil cases) uses both the term “extending” the time to file a notice of appeal and the term “reopening” the time to file an appeal, indicating that these are two distinct concepts. Compare FED. R. APP. P. 4(a)(5) (court can “extend” time to file notice of appeal for 30 days after initial appeal deadline), with FED. R. APP. P. 4(a)(6) (court can “reopen” time to appeal upon motion filed within six months of judgment if party did not receive notice of judgment).

filed” because the court of appeals extended the time for filing a petition for rehearing under Federal Rule of Appellate Procedure 40(a)). By contrast, when a court “reopens” a long-expired period to appeal through postconviction relief, the resulting “delayed,” “belated,” or “out of time” appeal is, by definition, untimely.¹¹

Because an appeal filed within an extended deadline is considered timely filed in the first instance, direct review has not concluded, nor has the time for seeking direct review expired. Consequently, the judgment being appealed is not final under § 2244(d)(1)(A), and the federal habeas limitations period has not started.

But because an out-of-time appeal like Jimenez’s is not considered timely, the time for seeking direct review necessarily has elapsed. Moreover, an out-of-time appeal results from postconviction or

¹¹ Jimenez’s misunderstanding of Texas Rule of Appellate Procedure 26.3 as “reopening” an appeal mirrors his misperception of other States’ similar rules, which he views as permitting “reinstated” appeals. Pet. Br. 24. But most of the rules Jimenez cites, like Texas’s Rule 26.3, simply authorize short extensions of time to file notices of appeal. *E.g.*, COLO. R. APP. 4(b)(1); HAW. R. APP. P. 4(b)(5); ILL. SUP. CT. R. 606(c); MASS. R. APP. P. 4(c); N.D. R. APP. P. 4(b)(4); N.J. CT. R. 2:4-4(a); UTAH R. APP. P. 4(e). These rules, like Rule 26.3, do not “reopen” or “reinstate” an appeal. Indeed, only one rule cited by Jimenez indicates that an appeal is “reinstated” or “reopened,” *see* OHIO R. APP. P. 26(B)(2)(b), and that rule functions as part of Ohio’s postconviction proceedings for AEDPA’s purposes, not part of its direct-review framework. *Lopez v. Wilson*, 426 F.3d 339, 352 (6th Cir. 2005).

collateral-review procedures that *presuppose* the conclusion of direct review. Thus, when an out-of-time appeal is granted, the time for direct review has already expired—which means that the judgment has become final under § 2244(d)(1)(A) and the federal habeas limitations period has commenced. And because nothing in § 2244(d)(1)(A) suggests that “the ‘conclusion of direct review’ in state court can happen twice (or more often)” in the same case, *Teas v. Endicott*, 494 F.3d 580, 581 (7th Cir. 2007), an out-of-time appeal does not “restart” § 2244(d)(1)(A)’s deadline.¹²

B. The “Conclusion of Direct Review” and “the Expiration of Time for Seeking Such Review” Cannot Both Occur in the Same Case.

Jimenez also argues that the use of the disjunctive “or” in § 2244(d)(1)(A)’s reference to “the conclusion of direct review *or* the expiration of the

¹² Jimenez inaccurately describes § 2244(d)(1)(B)-(D) as “break[s] in the ‘linear’ progression of the federal limitations period,” which he cites as evidence that § 2244(d)(1)(A)’s alternative finality dates contemplate similar breaks in the limitations period. *See* Pet. Br. 35-36. But § 2244(d)(1)(B)-(D) do not change the “pinpoint” date when the state-court 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). Rather, they provide start dates *later* than § 2244(d)(1)(A)’s finality date based on circumstances beyond the inmate’s control.

time for seeking such review,” indicates that Congress intended to ensure that the limitations period would run from the *later* of these two events. Pet. Br. 35. But this construction is likewise untenable.

First, by suggesting that one of these events—“the conclusion of direct review” or “the expiration of the time for seeking such review”—will happen later than the other, Jimenez incorrectly presumes that both events ordinarily occur in the same case. They do not. If “direct review” reaches its “conclusion”—*i.e.*, the inmate pursues direct review until this Court denies the inmate’s certiorari petition or grants the petition and affirms the conviction—it follows that the inmate never allowed the “time for seeking such review” to expire. But if the inmate stops seeking direct review before filing a certiorari petition, then direct review does not reach its “conclusion,” and the “time for seeking such review” expires at the filing deadline for the next stage of review. *Day v. McDonough*, 547 U.S. 198, 203 (2006) (because inmate did not seek certiorari review of the final state-court decision on direct appeal, federal habeas limitations began running from the expiration of time to seek certiorari review); *Roberts*, 319 F.3d at 694 (“If the defendant stops the appeal process before [the certiorari stage], the conviction becomes final when the time for seeking further direct review in the state court expires.”).

Second, although adding words to a statute to reach a certain interpretation is disfavored, *see Mayle*, 545 U.S. at 661 n.6, Jimenez’s argument

effectively inserts the words “whichever is later” into § 2244(d)(1)(A). *See* Pet. Br. 35. Jimenez apparently believes that this language is implicit in the statute because Congress could not have intended that the limitations period run from the *earlier* of the “conclusion of direct review or the expiration of the time for seeking such review.” Pet. Br. 35 n.13. This reasoning fails, however, because it still incorrectly presumes that both events occur in the same case, and that it is therefore necessary to read the qualifier “whichever is later” into the statute.

Rather, as noted above, § 2244(d)(1)(A) refers to two mutually exclusive events, only one of which occurs in a case: if direct review reaches a conclusion, the time for seeking direct review necessarily never expired; but if the inmate does not pursue direct review to its conclusion, he allows the time to seek review to expire at an earlier stage. Because only one of these two conditions will occur, it is not necessary to read “whichever is later” into the statute.

And Jimenez cannot support his interpretation by arguing that the phrase “the latest of” in § 2244(d)(1) modifies the two events listed in § 2244(d)(1)(A). *See* Pet. Br. 36. That phrase applies to the four events listed in § 2244(d)(1)(A)-(D). The relevant event in § 2244(d)(1)(A) is when the judgment becomes final. The phrase “by the conclusion of direct review or the expiration of the time for seeking such

review” simply “spell[s] out the meaning of ‘final’ in § 2244(d)(1)(A).” *Clay*, 537 U.S. at 530.¹³

Anticipating these problems with his interpretation of § 2244(d)(1)(A), Jimenez argues that both “the conclusion of direct review” and “the expiration of the time for seeking such review” actually do occur in the same case, albeit “uncommon[ly].” *See* Pet. Br. 35-36. As examples, Jimenez cites cases in which an inmate’s direct appeal failed due to ineffective assistance of counsel, and the inmate ultimately obtained a remedy in state court that resembles or recreates direct-appeal review. *See id.*

But, for several reasons, the Court should not stretch the language of § 2244(d)(1)(A) to reach “uncommon” cases like Jimenez’s. First, doing so would cast aside the uniform federal rule for finality under § 2244(d)(1)(A), described in *Clay*, in favor of a rule that assesses finality based 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. *See infra* Part II.C.

Second, Jimenez’s theory is based on the notion that, when an out-of-time appeal is granted, the “conclusion of direct review” will occur later than “the

¹³ The Third Circuit has rejected a similar construction. *Fielder v. Varner*, 379 F.3d 113, 118 (3d Cir. 2004) (holding that the phrase “the latest of” in § 2244(d)(1) cannot be read into one of that provision’s subsections, § 2244(d)(1)(D)).

expiration of the time for seeking such review.” *See* Pet. Br. 35-36. But if this proposition could ever be true, it certainly would not be true in any case in which an inmate’s out-of-time appeal is unsuccessful and the inmate either fails to seek further discretionary review in the State’s highest court or fails to seek certiorari review in this Court. Direct review only “concludes” when the Court denies a certiorari petition or affirms or denies the lower court on certiorari review; otherwise finality attaches when the time for seeking review at an earlier stage expires. *See Clay*, 537 U.S. at 527, 531; *Roberts*, 319 F.3d at 694; *Bridges*, 284 F.3d at 1202.

Thus, under Jimenez’s theory, whenever an inmate’s out-of-time appeal is unsuccessful and he either fails to seek further review in state court or fails to seek certiorari review in this Court, what would actually occur is not the “conclusion of direct review” years after “the expiration of the time for seeking such review”—as suggested by Jimenez. Rather, in these circumstances “the time for seeking [direct] review” will expire *twice* in the same case. There is nothing in § 2244(d)(1)(A)’s language indicating that Congress intended this result. And Jimenez’s textual fix—reading the phrase “whichever is later” into § 2244(d)(1)(A)—does not even address this problem.

Third, another unworkable but necessary consequence of Jimenez’s interpretation is that the limitations period under § 2244(d)(1)(A) will never begin to run so long as an out-of-time appeal remains

a possibility in state court. Direct review will not conclude (because it never started) and the time for seeking such review will not expire (because the inmate still has time to seek an out-of-time appeal). Congress surely did not intend a statute designed to “promote judicial efficiency” and to “safeguard[] the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh,” *Day*, 547 U.S. at 205-06, to place § 2244(d)(1)(A)’s limitations period in “limbo” whenever an out-of-time appeal might, at some later date, be granted by a state court.¹⁴

Finally, Jimenez’s theory illogically assumes that Congress crafted § 2244(d)(1)(A), the background rule for finality under § 2244(d)(1), to address the *exception* that arises when an inmate learns months

¹⁴ In many States, out-of-time appeals may be obtained through postconviction or other collateral proceedings that are not subject to filing deadlines. *See, e.g.*, ARIZ. R. CRIM. P. 32.4(a) (Rule 32.1(f) claims not subject to limitations); COLO. REV. STAT. ANN. § 16-5-402 (no time limit for collaterally attacking class-one felonies); NEB. REV. STAT. ANN. § 29-3001 (motion for postconviction relief may be filed at any time); N.D. CENT. CODE § 29-32.1-03(2) (postconviction proceedings may be commenced at any time); S.D. CODIFIED LAWS § 21-27-3.1 (habeas application permitted at any time); *Hudson v. State*, 603 S.E.2d 242, 243 (Ga. 2004) (“mere passage of time [does] not preclude a defendant from pursuing an out-of-time appeal” (internal citation and quotation marks omitted)); *see also* IND. POST-CONVICTION R. 2 § 3 (no specific deadline, but rule requires diligence); *cf.* MD. CRIM. PROC. CODE § 7-103 (in non-capital cases, permitting ten years to file postconviction petition, and longer when extraordinary cause is shown).

or years later that his direct appeal failed due to ineffective assistance of counsel. *Cf. Panetti v. Quarterman*, 127 S. Ct. 2842, 2853 (2007) (noting that “Congress did not intend the provisions of AEDPA addressing ‘second or successive’ petitions to govern a filing in the unusual posture presented here”). Because Congress anticipated exceptional circumstances that might prevent an inmate from timely filing a federal habeas petition, and it carved out specific exceptions for those circumstances in § 2244(d)(1)(B)-(D), there is no reason to believe that Jimenez’s strained interpretation of § 2244(d)(1)(A) reflects Congress’s intent.¹⁵

¹⁵ Jimenez also argues that, when Congress enacted AEDPA, “it was well established that the ‘conclusion of direct review’ would sometimes post-date the ‘expiration of time for seeking such review’ . . . in ineffective assistance of counsel cases under the aegis of this Court’s 1969 and 1985 decisions in *Rodriguez* [*v. United States*, 395 U.S. 327 (1969),] and *Evitts* [*v. Lucey*, 469 U.S. 387 (1985)].” Pet. Br. 36-37.

But neither decision supports his interpretation of § 2244(d)(1)(A). First, in neither case was the remedy at issue. Rather, in both cases, the Court’s point was simply that inmates required some method to vindicate their appellate rights when their criminal appeals were frustrated by ineffective counsel. The Court was not addressing whether that method would constitute “direct review.” Because this remedy issue was a minor point in both cases, it is highly unlikely that these cases somehow informed Congress’s drafting of § 2244(d)(1)(A).

And even if Congress considered these cases, they would not have been examples of the “conclusion of direct review” and “expiration of the time for seeking direct review” occurring in the same case for federal habeas purposes. In *Rodriguez*, the inmate was “resentenced.” 395 U.S. at 332. And in *Evitts*, the

(Continued on following page)

C. Jimenez’s Interpretation of § 2244(d)(1)(A) Rests on a Mischaracterization of the States’ Various Remedies for Ineffective Assistance of Counsel on Appeal.

Jimenez asserts that “both state and federal courts commonly reinstate direct appeals when the right to appeal was lost as a result of constitutionally ineffective assistance of counsel.” Pet. Br. 25-26. He further asserts that, whenever this occurs, the federal limitations period under § 2244(d)(1)(A) “restarts.” *See* Pet. Br. 34-36.

This argument suffers from three related flaws. First, although Jimenez aggregates the various procedures that States use to remedy ineffective assistance on appeal into the generic category “reinstated appeals,” Pet. Br. 4 n.1, those procedures actually vary considerably from State to State—and most of them do not, in fact, “reinstate” a prior appeal. Second, many States award out-of-time appeals through collateral-review procedures which, under foundational principles of criminal procedure, typically commence after an inmate’s “direct review” proceedings ended. Jimenez’s theory requires that these principles be turned upside down, such

examples of postconviction relief cited involved vacating the judgment and entering a new one. 469 U.S. at 399 n.10. In both cases, the new judgments would have started a new clock for federal habeas; these would not have been cases where “the judgment became final” both by the “conclusion of direct review” and the “expiration of the time for seeking such review” in the same case.

that—for purposes of out-of-time appeals under § 2244(d)—“collateral review” will end before “direct review” begins. Finally, because Jimenez interprets § 2244(d)(1)(A)’s finality date to turn on whether the State’s procedure functions like “direct review,” Pet. Br. 27-32, the differences in those procedures (which he ignores) would manifest in different finality determinations in different States’ federal courts. That result defeats Congress’s very purpose in defining finality in § 2244(d)(1)(A): to establish a “uniform federal rule” for limitations. *Clay*, 537 U.S. at 531.

1. Procedures for remedying ineffective assistance of counsel on appeal vary considerably among the States.

Jimenez’s repeated use of the term “reinstated appeals” fails to acknowledge the varying remedies actually afforded by States when inmates receive ineffective assistance of appellate counsel. Indeed, Jimenez ignores diverse state practices regarding what relief is available and how it may be sought.

States provide a broad array of remedies for ineffective assistance of counsel on appeal, some of which resemble the out-of-time appeals used in Texas, but many of which function quite differently.¹⁶

¹⁶ Jimenez’s assertion that his own out-of-time appeal “reinstated” his prior appeal is also incorrect. In fact, it afforded him significantly broader appellate rights than he was entitled to when his initial appeal failed. Whereas his initial appeal

(Continued on following page)

Jimenez references 17 States that he believes commonly “reinstate” direct appeals, Pet. Br. 25-26, 26 n.11, but the vast majority of his cited cases do not purport to “reinstate” the inmate’s initial appeal.¹⁷ To “reinstate” an appeal, States presumably would reopen the old case, with the same cause number, at the point when the ineffective assistance of counsel occurred.¹⁸ But the majority of the cases cited by Jimenez explain that the relief granted is a new appeal—not a “reinstated” appeal.¹⁹ Indeed, *State v.*

would have been limited to jurisdictional errors, his out-of-time appeal commenced shortly after Texas law had changed in his favor, allowing him to raise his claims that judicial bias and ineffective assistance of counsel affected his sentence. *See supra* n.3 and accompanying text. Thus, Jimenez profited from his own lack of diligence.

¹⁷ In several decisions cited by Jimenez, the courts awarded no appeals at all. Rather, they remanded for a determination whether there was an ineffective-assistance violation. *See Kargus v. State*, 162 P.3d 818, 831 (Kan. 2007); *State v. Long*, 126 P.3d 284, 287 (Colo. Ct. App. 2005); *Footte v. State*, 751 P.2d 884, 887 (Wyo. 1988); *Barnett v. State*, 497 So. 2d 443, 444 (Miss. 1986). And another provided no relief because the court found that there had been no ineffective assistance of counsel. *State v. Gross*, 760 A.2d 725, 742-43, 773 (Md. Ct. Spec. App. 2000).

¹⁸ The only jurisdiction cited by Jimenez that “reinstates” appeals when there has been ineffective assistance of counsel does so by requiring the court of appeals to accept as timely the inmate’s previously refused notice of appeal—not by initiating a brand new appeal. *See Estep v. People*, 753 P.2d 1241, 1248-49 (Colo. 1988).

¹⁹ *Wallace v. State*, 121 S.W.3d 652, 656, 660 (Tenn. 2003) (“delayed appeal”); *State v. Stubblefield*, 97 S.W.3d 476, 477 (Mo. 2003) (per curiam) (providing “a new period for filing an appeal”); *Loop v. Solem*, 398 N.W.2d 140, 143 (S.D. 1986)

(Continued on following page)

McCracken directly refutes Jimenez’s argument, expressly stating that the remedy for ineffective assistance of counsel on appeal is not to “reinstate a past [appeal],” but rather to grant a new one. 615 N.W.2d 902, 914 (Neb. 2000) (cited at Pet. Br. 26 n.11).

Other cases referenced by Jimenez likewise demonstrate that the remedy provided is not properly termed a “reinstated appeal.” *See, e.g., Middlebrook v. State*, 815 A.2d 739, 742-43 (Del. 2003) (courts can either (1) vacate the underlying sentence, necessarily creating a new judgment with new appellate deadlines, or (2) permit the issues that would have been raised on direct appeal to be raised in a postconviction proceeding); *State v. Tweed*, 59 P.3d 1105, 1110 (Mont. 2002) (an out-of-time appeal is proper when the ineffective assistance was the failure to file a notice of appeal or an appellate brief, but a petition is proper when the appellate attorney abandons the appeal by withdrawing the notice of appeal); *Ponder v. State*, 400 S.E.2d 922, 923-24 (Ga. 1991) (the granting of an out-of-time appeal actually permits the inmate a limited time to pursue *even broader relief* than he could have sought in a timely

(permitting “a new appeal” to run following resentencing); *Gross*, 760 A.2d at 755 (Maryland) (“belated appeal”); *State v. Trowell*, 739 So. 2d 77, 78 (Fla. 1999) (same); *Davis v. State*, 877 S.W.2d 93, 94 (Ark. 1994) (per curiam) (same); *Young v. State*, 902 P.2d 1089, 1091 (Okla. Crim. App. 1994) (“out-of-time appeal”); *Barnett*, 497 So. 2d at 444 (Mississippi) (same); *State v. Counterman*, 475 So. 2d 336, 338, 340 (La. 1985) (same); *Ex parte Sturdivant*, 460 So. 2d 1210, 1211 (Ala. 1984) (same).

direct appeal, specifically allowing him to pursue postconviction remedies, including a motion for new trial); *Foote*, 751 P.2d at 887 (if the trial court finds that counsel was ineffective, it may invoke the common-law writ of certiorari to review the case as a way to (1) avoid violating the jurisdictional requirement of a timely notice of appeal, and (2) not insist that a postconviction proceeding be pursued). These remedies cannot be fairly described as “reinstating” a direct appeal.

2. Jimenez’s interpretation of § 2244(d)(1)(A) contravenes the fundamental principle of criminal procedure that the end of “collateral review” does not precede “direct review.”

The majority of States referenced by Jimenez afford out-of-time appeal remedies for ineffective assistance of counsel solely or primarily through postconviction procedures.²⁰ Jimenez argues that

²⁰ State habeas proceedings are used in four States. *Kargus*, 162 P.3d at 820 (Kansas); *Stubblefield*, 97 S.W.3d at 477 (Missouri); *Trowell*, 739 So. 2d at 78-79 (Florida); *Ponder*, 400 S.E.2d at 923 (Georgia). Petitions or motions for postconviction relief are used in five States. *Long*, 126 P.3d at 285 (Colorado); *Wallace*, 121 S.W.3d at 655 (Tennessee); *Gross*, 760 A.2d at 773 (Maryland); *McCracken*, 615 N.W.2d at 910 (Nebraska); *Counterman*, 475 So. 2d at 340 (Louisiana).

Other States use different postconviction procedures. *Davis*, 877 S.W.2d at 94 (Arkansas) (motion for belated appeal in the Supreme Court, which was filed as a result of a *federal*

(Continued on following page)

these out-of-time appeals function as a part of these States' direct-review processes. *See* Pet. Br. 27-32.

But because they are derived from postconviction or other collateral-review procedures that presuppose the conclusion of direct review, they cannot be accurately characterized as part of a State's "direct review" process under § 2244(d)(1)(A). *See supra* Part II.A.2.²¹ A bedrock principle of criminal procedure is

habeas proceeding); *Sturdivant*, 460 So. 2d at 1211 (Alabama) (petition for writ of error *coram nobis*); *Barnett*, 497 So. 2d at 444 (Mississippi) (motion for out-of-time appeal); *Young*, 902 P.2d at 1089 (Oklahoma) ("Application for an Appeal Out of Time").

²¹ Indeed, States commonly provide postconviction or other collateral-review procedures for the pursuit of an out-of-time appeal. *See supra* n.18; *see also, e.g.*, ALASKA STAT. § 12.72.010(9) (inmate may seek postconviction relief for ineffective assistance of appellate counsel); *People v. Ross*, 891 N.E.2d 865, 869, 874 (Ill. 2008) (ineffective-assistance-of-appellate-counsel claim reviewed in petition for postconviction relief under 725 ILL. COMP. STAT. 5/122-1); *Commonwealth v. Halley*, 870 A.2d 795, 798, 801 (Pa. 2005) (providing, as a postconviction remedy, reinstatement of the right to pursue a direct appeal); *Whiteman v. State*, 643 N.W.2d 704, 709, 712 (N.D. 2002) (new direct appeal sought through application for postconviction relief under N.D. CENT. CODE § 29-32.1); *State v. Knight*, 484 N.W.2d 540, 544 (Wis. 1992) (inmate deprived of effective assistance of appellate counsel may seek writ of habeas corpus); *State v. Weber*, 602 A.2d 963, 964 (Conn. 1992) (habeas petition available to seek new appeal); *Beasley v. State*, 883 P.2d 714, 717 (Idaho Ct. App. 1994) (claim of ineffective assistance of appellate counsel properly raised under postconviction procedures in IDAHO CODE § 19-4901); ARIZ. R. CRIM. P. 32.1(f) (if the failure to timely file notice of appeal is not the defendant's fault, he may seek

(Continued on following page)

that “postconviction review” procedures generally follow the conclusion of “direct review.” *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) (“Postconviction relief is even further removed from the criminal trial than is discretionary direct review . . . It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.”). Although there are limited circumstances in which direct-review and collateral-review proceedings may proceed concurrently, the notion that “collateral review” of a conviction could end before “direct review” began is foreign to our jurisprudence.

Yet that is precisely how Jimenez argues that § 2244(d) should apply when an out-of-time appeal is granted. According to Jimenez, even when—as here—the underlying conviction remains in place (*i.e.*, the court does not order a new judgment when granting the out-of-time appeal), the new appellate path provided in the out-of-time appeal means that “collateral review” of the underlying conviction has ended and “direct review” has commenced or recommenced. *See* Pet. Br. 45-46. Because this construction of § 2244(d) contravenes the fundamental principle that the end of collateral

postconviction relief); IND. POST-CONVICTION R. 2 § 3 (permitting petition in appellate court seeking a belated appeal).

review cannot *precede* direct review, it should be rejected.

3. Conditioning the limitations start date under § 2244(d)(1)(A) on the nature of these varying state procedures would undermine Congress’s intent that the start date be defined by a uniform federal rule.

As noted above, the usual start date for the federal habeas limitations period is when 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). In *Clay*, the Court explained that, if Congress had simply set the start date at when a judgment “became final,” without elaboration, that “might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State.” 537 U.S. at 530-31. But by “spell[ing] out” in § 2244(d)(1)(A) when a judgment became final, the Court observed, Congress intended to “make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule.” *Id.* at 530, 531.

Jimenez’s argument would defy Congress’s intent by interjecting “state-law rules that . . . vary from State to State” back into the § 2244(d)(1)(A) calculus. He insists that federal district courts conduct “an examination of state law” to determine “whether a

particular state [out-of-time appeal] proceeding is part of the state's system of 'direct review.'" Pet. Br. 19. In that inquiry, he would have a court defer to however a State has characterized its out-of-time appeal procedure. *Id.* at 27-29.

But if state law is inconclusive on that point, Jimenez would have the federal court probe the nature of the state procedure. *See* Pet. Br. 29-32. If the court concludes that the state procedure looks sufficiently like "direct review"—regardless of whether it is derived from collateral or other postconviction-review procedures—the inmate's federal habeas limitations period would restart under § 2244(d)(1)(A). Otherwise, the procedure is necessarily "collateral review," and the inmate's limitation period under § 2244(d)(1)(A) is calculated from the appeal deadline that his attorney missed or failed to relay. Thus, inmates in the same circumstances but in different States would have different federal habeas limitations periods depending on how the State chooses to remedy their ineffective-assistance claims.²²

²² That is, Jimenez's interpretation creates an arbitrary distinction under which inmates who receive ineffective assistance of counsel will receive a "revived" start date under § 2244(d)(1)(A) when they obtain an out-of-time-appeal remedy, but similarly situated inmates will not enjoy this benefit in jurisdictions where the failure of appellate counsel is remedied by having the inmate's direct-appeal claims reviewed within a postconviction proceeding. *See, e.g., Middlebrook*, 815 A.2d at 743 (Delaware's postconviction courts have the option to remedy

(Continued on following page)

III. THE LOWER COURTS' INTERPRETATION OF § 2244(d) SERVES ALL OF AEDPA'S PURPOSES AND ENSURES THAT INMATES HAVE A FAIR OPPORTUNITY TO VINDICATE THEIR CONSTITUTIONAL RIGHTS.

Jimenez complains that the lower courts' decisions are inconsistent with AEDPA's purposes—particularly its goal of furthering comity with state courts. Pet. Br. 41-46. But nothing about those courts' resolution of Jimenez's case, or their application of the Fifth Circuit's decision in *Salinas*, offends that goal. Indeed, *Salinas* promotes comity because it confirms that § 2244(d)(1)'s limitations period is tolled during all state-court proceedings associated with postconviction or collateral review.

A. Tolling Limitations Under § 2244(d)(2) During the Completion of an Out-of-Time Appeal That Was Secured Through State Collateral Procedures Helps Advance AEDPA's Purposes.

Comity in the context of habeas proceedings means to “reduce[] friction between the state and federal court systems by avoiding the ‘unseem[liness]’ of a federal district court’s overturning a state court

the ineffective assistance of appellate counsel by permitting the issues that could have been raised in an out-of-time appeal to be raised in a postconviction proceeding); *Tweed*, 59 P.3d at 1110 (when counsel abandons an appeal by withdrawing the notice of appeal, remedy is through postconviction petition).

conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (quoting *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982)). AEDPA furthers this goal by providing that federal habeas relief may not be granted unless the inmate has already exhausted state-court remedies. 28 U.S.C. § 2254(b).

There is some tension, however, between the goal of comity and AEDPA’s equally important aim of securing the finality of state-court judgments within a reasonable time. Section 2244(d)’s provisions reflect Congress’s intent to accomplish both goals by tempering a strict one-year limitations period in § 2244(d)(1) with § 2244(d)(2)’s tolling provision.

Section 2244(d)(1) “reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review,” and thus “quite plainly serves the well-recognized interest in the finality of state court judgments.” *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Section 2244(d)(2), which tolls § 2244(d)(1)’s limitations period during state postconviction or other collateral-review proceedings, “promotes the exhaustion of state remedies by protecting a state prisoner’s ability later to apply for federal habeas relief while state remedies are being pursued.” *Id.* Thus, § 2244(d)(2) “balances the interests served by [§ 2254(b)’s] exhaustion requirement and [§ 2244(d)(1)’s] limitation period.” *Id.* And, working together, § 2244(d)(1)’s limitations period and § 2244(d)(2)’s tolling provision, combined

with § 2254(b)'s exhaustion requirement, "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Id.* at 181.

In *Salinas*, the Fifth Circuit applied § 2244(d)(2) when the Texas Court of Criminal Appeals granted an out-of-time PDR as a remedy on state habeas review. *Salinas*, 354 F.3d at 430.²³ The Fifth Circuit reasoned that, because the out-of-time PDR was awarded as a result of the collateral-review process, the one-year limitations period in § 2244(d)(1) should be tolled under § 2244(d)(2) while the inmate pursued that relief. *Id.*

Under *Salinas*, when an inmate receives ineffective assistance of counsel on appeal and timely pursues his postconviction or collateral-review remedies in state court, the limitations period under § 2244(d)(1) will not commence until all state-court proceedings associated with that review have ended.²⁴ *Salinas* thus correctly applies § 2244(d)(2) to balance § 2244(d)(1)'s limitations period with § 2254(b)'s

²³ In Texas, once an inmate's direct appeal has failed in an intermediate court of appeals, he can file a PDR. TEX. R. APP. P. 68. When an inmate fails to file a PDR, his conviction becomes final 30 days after the intermediate court of appeals' decision. *Roberts*, 319 F.3d at 694.

²⁴ In *Salinas*, the inmate did not invoke § 2244(d)(1)(B) or (D), but instead relied on § 2244(d)(1)(A) and equitable-tolling arguments. 354 F.3d at 429-32. Accordingly, the court did not consider whether § 2244(d)(1)(B) or (D) provided a later limitations start date. *See id.*

exhaustion requirement, “ensur[ing] that the state courts have the opportunity fully to consider federal law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment.” *Duncan*, 533 U.S. at 178-79.

B. Tolling Through the Completion of an Out-of-Time Appeal Is Consistent with § 2244(d)(2)’s Text.

Jimenez asserts that, regardless of whether it effectuates AEDPA’s purposes, *Salinas*’s application of § 2244(d)(2) should be rejected because it is incompatible with the section’s text. He argues that once an out-of-time appeal is granted in a postconviction proceeding, that proceeding is no longer “pending,” and the out-of-time appeal cannot properly be considered further “post-conviction or other collateral review” under § 2244(d)(2). Pet. Br. 45-46.

Section 2244(d)(2)’s language does not compel the result that Jimenez urges. His argument might have more force if the statute tolled limitations while a properly filed application for state postconviction or other collateral “relief” or “writ” is pending. But § 2244(d)(2) actually tolls limitations while an application for state postconviction or other collateral “review” is pending. The term “review” is broader than “relief” or “writ.” And when a state court grants an application for an out-of-time appeal,

postconviction or collateral “review” is ongoing with respect to “the pertinent judgment” because that judgment is still being reviewed by the state courts, albeit in a separate proceeding.

Jimenez resists this conclusion, contending that a reinstated appeal “is no more a part of the state habeas process than a new state trial is part of the federal habeas process when ordered by a federal district court.” Pet. Br. 46. But a new trial, necessarily predicated on vacating the pertinent judgment under which an inmate has been confined, is substantially different than an out-of-time appeal that does not disturb the judgment but merely provides a new appellate path to challenge that judgment. When collateral review results in a new trial, or even just a new judgment, then the “pertinent judgment” that was the subject of the collateral review no longer exists, and thus it is accurate to say that the application for collateral review is no longer pending. The vacatur of the judgment does in fact place the inmate back in a direct-review posture because the judgment under collateral attack no longer exists.

Further, for AEDPA’s purposes, out-of-time appeals must be considered either part of a State’s direct-review process or its collateral-review process. They are best understood as part of the latter. Although AEDPA does not define the term “direct review,” the term “direct” has been defined as “extending or moving from one place to another by the shortest way without changing direction or

stopping”; “without intervening factors or intermediaries.” THE NEW OXFORD AMERICAN DICTIONARY 483 (2001). And there is nothing “direct” about an out-of-time appeal obtained through postconviction or other collateral-review proceedings. Rather, these out-of-time appeals necessarily involve intervening habeas or other postconviction proceedings and are awarded as a method of relief associated with that collateral review. *E.g.*, *O’Neal v. Kenny*, 501 F.3d 969, 970-71 (8th Cir. 2007); *Salinas*, 354 F.3d at 430.²⁵

For these reasons, out-of-time appeals awarded through postconviction or collateral review are not part of the “direct review” process under AEDPA and cannot “restart” § 2244(d)(1)(A)’s limitations period. *See Salinas*, 354 F.3d at 430 (“If . . . an ‘out of time’

²⁵ Jimenez also complains that *Salinas*’s tolling rule purportedly “would not apply in states that reinstate appeals outside of habeas,” forcing inmates to file federal habeas petitions “while their reinstated appeals remained under consideration.” Pet. Br. 46. But this concern is misplaced. Jimenez presumes that tolling under § 2244(d)(2) would apply only when an out-of-time appeal is awarded through a proceeding denominated as “habeas.” But the statute’s text contains no such limitation. Rather, the “properly filed application for State post-conviction or other collateral review” referenced in § 2244(d)(2) fairly encompasses the variety of terms that States use “to represent the different forms of collateral review that are available after a conviction.” *Duncan*, 533 U.S. at 177. Jimenez’s unduly narrow construction of § 2244(d)(2) fails to recognize that the limitations period is tolled not only for “habeas” proceedings, but for any “collateral review” proceedings permitted under state law.

PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief.”²⁶ *see also O’Neal*, 501 F.3d at 970-71 (holding that a new direct appeal awarded as part of state postconviction relief did not “restart” the limitations period under § 2244(d)(1)(A)); *Teas*, 494 F.3d at 582 (holding that a belated “direct” review granted as relief on collateral review did not renew the limitations period under § 2244(d)(1)(A)).²⁷ Rather, being part of collateral review, such out-of-time appeals toll the applicable limitations period until they are finally resolved. *See* 28 U.S.C. § 2244(d)(2); *Salinas*, 354 F.3d at 430.

²⁶ Jimenez suggests that the text of § 2244(d)(1)(A) provides no support for *Salinas* on this point because the statute refers only to the “conclusion of direct review,” making no mention of “how the defendant secured the right to pursue that direct review.” Pet. Br. 37-38. But the term “direct review” itself suggests the ordinary course of review by succeeding higher courts through proceedings in the Supreme Court. It does not naturally contemplate review “secured” through some collateral or extraordinary process. *Cf. O’Sullivan*, 526 U.S. at 845 (holding that § 2254(c)’s exhaustion requirement mandates that the petitioner seek discretionary review in a State’s supreme court because such a petition “is a normal, simple, and established part of the State’s appellate review process”).

²⁷ *Contra Frasch v. Peguese*, 414 F.3d 518, 521-25 (4th Cir. 2005) (holding that an out-of-time appeal obtained through postconviction proceedings was nonetheless “direct review” for purposes of § 2244(d)(1)(A) and “restarted” § 2244(d)(1)(A)’s limitations period); *Orange v. Calbone*, 318 F.3d 1167, 1170-71 (10th Cir. 2003) (same).

In this regard, *Salinas's* application of § 2244(d)(2) heeds the Court's guidance that the statute should be interpreted broadly to effect AEDPA's goal of comity—*i.e.*, giving the States the opportunity to address constitutional error in the first instance. In *Carey v. Saffold*, for example, the Court applied this principle when it held that an application for state collateral review was “pending” under § 2244(d)(2) in the time interval between a lower court's disposition of the application and the filing of an appeal from that disposition—even though, strictly speaking, no application is “pending” before any court during that interval. 536 U.S. 214, 219-21 (2002). And the Court extended this interpretation to California's postconviction system, in which inmates file new “original” writs—as opposed to appeals—in higher courts. *Id.* at 221-25. This reading carried out AEDPA's purpose of “giv[ing] States the opportunity to complete one full round of review, free of federal interference.” *Id.*

Carey shows that a reasonable reading of § 2244(d)(2) that fulfills AEDPA's purposes is preferable to a hyper-technical reading that thwarts those purposes. The same principle applies here. The Fifth Circuit's interpretation of § 2244(d)(2) is consistent with AEDPA's framework and goals. It properly applies AEDPA's requirement that an inmate act promptly and diligently once he learns of his ineffective-assistance claim, thereby avoiding unnecessary delay, promoting judicial efficiency, and securing the finality of state-court judgments within a reasonable time. *See Day*, 547 U.S. at 205-06. At the

same time, this reading also meets AEDPA's comity goal by tolling the federal limitations period until all state proceedings addressing the inmate's claims have been exhausted. *Duncan*, 533 U.S. at 179. And because it fulfills AEDPA's goals while still allowing inmates a full and fair opportunity to obtain first federal habeas review, it respects the rights of inmates like Jimenez.

IV. A CERTIFICATE OF APPEALABILITY SHOULD NOT HAVE ISSUED IN THIS CASE.

Although the dispute underlying this case concerns the calculation of § 2244(d)(1)'s limitations period, the question presented is whether Jimenez was entitled to a certificate of appealability (COA). *Jimenez v. Quarterman*, 128 S. Ct. 1646 (2008). He was not.

Because the district court denied Jimenez's habeas petition solely on procedural grounds, *see* J.A.80-93, a COA should have issued only if Jimenez had shown that "jurists of reason would find it debatable" whether (1) the district court's procedural ruling was correct; and (2) his petition stated a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Jimenez made neither showing.

A. Circuit Precedent Established That Jimenez's Claims Were Time-Barred.

Jimenez's federal habeas petition "d[id] not argue that [§ 2244(d)(1)'s] one-year limitations period was

triggered by the circumstances listed in Sections 2244(d)(1)(B), (C), or (D).” J.A.82. Rather, it asserted that “because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process,” in January 2004. J.A.89.

The courts below recognized that circuit precedent foreclosed this argument. J.A.90-92, 124-25. *Salinas* established that remedies derived from collateral review, like an out-of-time appeal, toll AEDPA’s limitations period under § 2244(d)(2) but do not “restart” the period under § 2244(d)(1)(A). *Salinas*, 354 F.3d at 430. Thus, the district court dismissed Jimenez’s petition, J.A.93, and denied his COA application, J.A.94-95. The Fifth Circuit agreed. J.A.124-25.

These decisions applied the settled principle that circuit precedent binds district courts and circuit panels. *E.g.*, *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 (5th Cir. 1992); *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). That is, although the COA standard asks whether the procedural ruling is “debatable among jurists of reason,” *Slack*, 529 U.S. at 484, it is not “debatable” that district and circuit courts must follow circuit precedent in reviewing COA applications. *E.g.*, *Gordon v. Sec’y, Dept. of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007) (“If the petitioner’s contention about the procedural ruling against him is foreclosed by a binding decision . . . the attempted appeal does not present a substantial question, because

reasonable jurists will follow controlling law.”); *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) (“[R]easonable jurists would not be able to debate whether this issue should have been resolved in a different manner by the district court [because]. . . . [c]ircuit precedent has specifically rejected the argument. . . .”).

Because the district court correctly applied circuit precedent to dismiss Jimenez’s claims, “a reasonable jurist could not conclude either that the district court erred in dismissing the petition,” *Slack*, 529 U.S. at 484, or that a COA should issue.²⁸

B. Jimenez Failed to State a Valid Claim of the Denial of a Constitutional Right.

Where, as here, a district court denies a habeas petition on procedural grounds without reaching the

²⁸ Binding precedent does not foreclose a circuit court from reconsidering that precedent’s resolution of issues posed in a COA application because the court can always revisit that precedent through en banc rehearing of a COA denial. *E.g.*, *Gonzalez v. Sec’y, Dept. of Corr.*, 366 F.3d 1253, 1260, 1262 (11th Cir. 2004) (en banc) (granting rehearing en banc to address two panels’ COA denials); *Soffar v. Cockrell*, 300 F.3d 588, 590 & n.1 (5th Cir. 2002) (en banc) (after en banc review, reinstating panel’s COA grants and denials); *see also Santiago Salgado v. Garcia*, 384 F.3d 769, 775 (9th Cir. 2004) (explaining that inmates denied COA may seek rehearing en banc); *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003) (noting that “[o]ccasionally the denial of a request for a certificate of appealability will present the sort of legal question that justifies rehearing en banc”).

inmate's underlying claim, a COA should issue only when the inmate *also* establishes "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Id.* at 484. Thus, a COA should not issue to resolve a procedural question when the inmate's constitutional claim lacks merit. *Id.*; *see also Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002) ("[E]ven if the procedural default is not clear, if there is no merit to the substantive constitutional claims, the certificate should not be issued."). Courts must analyze the claim's merit under AEDPA's heightened standards for granting habeas relief, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)—*i.e.*, there must be "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2).

Jimenez's federal habeas petition alleged the deprivation of two constitutional rights at his 1995 revocation and sentencing hearing: (1) his due-process right to a neutral judge; and (2) effective assistance of counsel. Fed. Habeas Pet. at 7, 10-12, 16-21. Both claims were adjudicated in state court and properly denied. J.A.45-47, 66-74, 78. Neither assertion debatably states a valid constitutional claim.

1. Jimenez's judicial-bias allegations fail to state a valid constitutional claim.

Jimenez asserted that he was denied his due-process right to a neutral judge at his revocation and sentencing hearing. J.A.79. This claim presented the oddly paired contentions that (1) the judge had predetermined his 43-year sentence, and (2) the judge imposed this sentence because he became angry with Jimenez at the revocation hearing. *See* Fed. Habeas Pet. at 7, 10-12.

The Due Process Clause “requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case.” *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (citation omitted). But inmates raising judicial-bias claims must “overcome a presumption of honesty and integrity in those serving as adjudicators.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Moreover, “most matters relating to judicial disqualification [do] not rise to a constitutional level.” *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948).

Jimenez's bias claims are not credible because they are mutually contradictory. On one hand, Jimenez asserted that the judge was biased because, at the 1991 deferred-adjudication hearing, he “predetermined” that Jimenez would receive a 43-year sentence if he violated his probation. *See* Fed. Habeas Pet. at 7, 10-12. But Jimenez also alleged that the same judge was biased because he sentenced

Jimenez to 43 years after becoming angry with Jimenez during the revocation hearing. *See id.* Because Jimenez’s petition recites two irreconcilably conflicting versions of the purported “facts” supporting his bias allegation, that allegation lacks credibility.

Jimenez’s bias assertions also cannot independently withstand scrutiny. His “predetermination” assertion hinges solely on the judge’s comment at the deferred-adjudication hearing that he had a habit of “mainly” using prime numbers in sentencing. *See id.*; *see also* 1.RR.11. This remark does not implicate the principle that punishing an offender at a predetermined level—without consideration of his individual circumstances—violates due process. *See United States v. Booker*, 543 U.S. 220, 237-39 (2005). The range of punishment for Jimenez’s crime was 15-99 years. *See* TEX. PENAL CODE §§ 12.42(c)(1), 30.02. The judge’s indication that he would likely use one of the 19 prime numbers within that range to determine a sentence was not a “predetermination” of Jimenez’s ultimate sentence or a due-process violation.

Further, the record establishes that the judge did not “predetermine” Jimenez’s sentence at the plea hearing. Indeed, the judge advised Jimenez that he did not know what punishment Jimenez would receive in the event of revocation because he was then unfamiliar with all of the facts of Jimenez’s case. J.A.45-46. And at the revocation hearing, the judge recited the specific factors and evidence that

he considered in determining an appropriate punishment. J.A.46; 2.RR.116-17.

Jimenez's contention that the judge was biased because he purportedly grew angry with Jimenez during the revocation hearing is equally baseless in law and fact. The mere fact that a judge became annoyed or angry cannot support a bias claim. *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). And nothing in the record indicates that the judge behaved improperly toward Jimenez. When he imposed the sentence, the judge understandably expressed disappointment with Jimenez's inability to meet his probation conditions and Jimenez's propensity for violence, *see* 2.RR.113-17, but these statements do not suggest judicial bias jeopardizing Jimenez's due-process rights.

2. Jimenez's ineffective-assistance allegations also fail to state a valid constitutional claim.

Jimenez alleged that he received ineffective assistance of counsel at his 1995 revocation hearing. *See* Fed. Habeas Pet. at 7, 16-21. To establish constitutionally deficient assistance of counsel, a habeas petitioner must demonstrate both "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. . . . [and] that counsel's errors were so serious as to deprive the defendant of

a fair trial, a trial whose result is reliable.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Jimenez’s ineffective-assistance claim turns principally on his contention that counsel misled him into pleading “true” to two allegations of probation violations. *See* Fed. Habeas Pet. at 15-18. According to Jimenez, his attorney assured him that if he pled “true” to violating probation in not reporting to his probation officer and not paying his probation fees, a “conditional” plea bargain would take effect, so that even if his probation were revoked, his sentence would not exceed 15 years. Fed. Habeas Pet. at 16-18.

Even assuming that this alleged representation occurred, the State confirmed in open court that there was no plea agreement with Jimenez. 2.RR.16. He nonetheless pled “true” to two probation violations, 2.RR.16-18, even after the judge cautioned that his probation could be revoked based on a “true” plea to even one probation violation and that the sentencing range was 15-99 years. 2.RR.2-5, 15-16.

Indeed, Jimenez testified that his pleas (both true and false) were not based on any agreement, 2.RR.16-17, and that he was aware of all potential consequences of his pleas. 2.RR.2-5, 14-16. Thus, even if Jimenez misperceived that he had a plea agreement with the State, or that such an agreement circumscribed his potential prison term to 15 years, that misperception was extinguished at the revocation hearing.

Further, the court ruled against Jimenez on the two contested probation-violation allegations, holding that he violated probation by intentionally injuring Teresa Barron and by failing to timely report his arrest to his probation officer. 2.RR.10-15, 113. Thus, the court determined that all four of the State's allegations in its revocation motion were true. 2.RR.113. A "true" finding on even one of the allegations was sufficient to revoke Jimenez's probation. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [panel op.] 1980).

Because Jimenez's purported misperception of the effect of a "true" plea to violating two probation conditions could not possibly have prejudiced him at his revocation hearing, his federal petition failed to state a valid constitutional claim under *Strickland*.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

GREG ABBOTT

Attorney General of Texas

KENT C. SULLIVAN

First Assistant Attorney General

ERIC J.R. NICHOLS

Deputy Attorney General for
Criminal Justice

JAMES C. HO

Solicitor General

SEAN D. JORDAN

Deputy Solicitor General
Counsel of Record

RANCE L. CRAFT

ADAM W. ASTON

Assistant Solicitors General

MARTA McLAUGHLIN

Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL

P.O. Box 12548

Austin, Texas 78711

(512) 936-1700

September 5, 2008