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 THE PETITIONER

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June 17, 2008

QUESTION PRESENTED

When a court finds that a defendant lost his right of direct appeal because of a violation of his Sixth Amendment right to effective assistance of counsel, and accordingly reinstates his appeal, does the time to seek federal habeas review run from the conclusion of the reinstated proceedings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

Rules

Other Authorities

BRIEF FOR THE PETITIONER

Petitioner Carlos Jimenez respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Fifth Circuit (J.A. 6-9, 126-27) and the district court (J.A. 1-5, 76-96) are unpublished. The relevant orders and opinions of the Texas courts (J.A. 13-28, 43-75) are also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2007. J.A. 8, 124-25. Petitioner filed a timely petition for a writ of certiorari on August 21, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244(d) of Title 28 of the United States Code provides in relevant part:

> **(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.

(2) The 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 shall not be counted toward any period of limitation under this subsection.

STATEMENT

I. Introduction

Federal law requires that before seeking federal habeas relief, a state prisoner must exhaust his available state remedies. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); 28 U.S.C. § 2254(b). To accommodate that requirement, while at the same time encouraging prompt resolution of federal habeas claims, Congress has provided that individuals challenging state convictions must file their federal habeas petitions within one year of the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The limitations period is stayed during the pendency of state court collateral proceedings. *Id.* § 2244(d)(2) .

Ordinarily, the expiration of the time for seeking an appeal marks the end of the direct review process and establishes the finality of a criminal judgment. *See*, *e.g.*, *Clay v. United States*, 537 U.S. 522, 527 (2003). However, in some cases, "the actions of a party or a lower court suspend the finality of a judgment and thereby reset" the time for seeking further review. *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1418 (2007). For example, both the Texas and Federal Rules of Appellate Procedure allow courts to extend or reopen the time for filing a notice of appeal within a certain time period, even after the initial deadline has passed. Tex. R. App. P. 26.3; Fed. R. App. P. 4(a)(6). It appears undisputed that in such cases, the defendant's conviction is not considered "final" for any purpose – including for purposes of the

federal habeas limitations period – until review of the reinstated appeal has run its course.

Following a practice approved by this Court, *see*, *e.g.*, *Rodriquez v. United States*, 395 U.S. 327, 328 (1969), state and federal courts also reinstate direct appeals when a defendant lost his right of appeal because of the constitutionally deficient representation of his court-appointed counsel.[1] While the modes and time limits for seeking such reinstatement may vary from those established by rules like Fed. R. App. P. 4(a)(6) and Tex. R. App. P. 26.3, the result is the same: an appeal that is in all respects indistinguishable from the direct appeal to which the defendant was entitled, but lost due to the violation of his constitutional rights.

Without questioning that other kinds of reinstated appeals constitute "direct review" for purposes of Section 2244(d)(1)(A), the Fifth Circuit has held that appeals reinstated by Texas courts as a remedy for the violation of a defendant's right to effective assistance of counsel do not. That holding has no basis in the text of the statute and contravenes the principles of comity and federalism Congress intended Section 2244(d)(1)(A) to foster.

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[1] Texas courts generally label such proceedings "out-of-time appeals." J.A. 27. Other states use different labels. *See*, *e.g.*, *State v. Fuller*, 870 N.E.2d 255, 261-62 (Ohio Ct. App. 2007) ("delayed appeal"); *State v. Gross*, 760 A.2d 725, 755 (Md. 2005) ("belated appeal"). This brief uses the generic term "reinstated appeal."

II. Facts And Procedural History

1. In November 1991, petitioner Carlos Jimenez pleaded guilty in a Texas trial court to a felony burglary charge and admitted an enhancement based on a prior conviction. J.A. 76. As a result of his plea, Jimenez was placed on deferred adjudication probation for five years, leaving open the possibility that the charges against him could ultimately be dismissed. *Id*. Jimenez did not appeal. In November 1995, at the prosecutors' request, the state trial court revoked Jimenez's deferred adjudication and sentenced him to forty-three years in prison. *Id*. at 76-77.

2. A new attorney, Duke Hooten, was appointed to represent Jimenez on appeal and, on January 24, 1996, filed a notice of appeal on Jimenez's behalf. *Id*. at 55, 77.

While the appeal was pending in the spring of 1996, Jimenez wrote his counsel that he had been transferred from the Tom Green County Jail to a state prison in Abilene. *See* Order of Trial Court Recommending Grant of Out of Time Appeal ("Recommendation #1"), Ex. 1 to Attachment 2. Jimenez also sought information regarding his pending appeal from both Hooten and the Texas Third Court of Appeals. *Id*., Ex. 1 & Ex. 3. Hooten did not respond, while the Court of Appeals wrote back to tell Jimenez that his letter had been misaddressed and had been forwarded to the appropriate court clerk. *Id.*, Ex. 2.

On July 12, 1996, Hooten filed a brief with the Third Court of Appeals in which he advised the court,

pursuant to *Anders v. California*, 386 U.S. 738 (1967), that petitioner lacked any grounds for appeal and, on that ground, sought to withdraw from his representation of petitioner. J.A. 19, 77. Hooten also certified to the Court of Appeals that he had hand-delivered a letter informing Jimenez of his right to file a pro se brief to the Tom Green County Jail. *Id*. at 22. However, because Jimenez had been transferred to a state facility months earlier, he did not receive either the letter or a copy of the *Anders* brief. *Id*. at 23. As a result, he did not file his own appellate brief. *Id*. at 11.

On September 11, 1996, having granted Hooten's motion to withdraw and not having received any pro se brief from his client, the Third Court of Appeals dismissed Jimenez's appeal. *Id*. at 10-12. Jimenez did not at that time receive copies of the opinion and judgment, which were mailed to him at the Tom Green County Jail. *Id*. at 23. Jimenez was thus unaware of the result of his appeal on October 11, 1996, when the time for seeking further review from the Texas Court of Criminal Appeals expired. *Id*. at 23. In fact, it was not until a year later, in September 1997, that Jimenez learned from the Third Circuit, in a response to his further inquiry, that his appeal had been dismissed. *Id.*

3. On April 11, 2002, Jimenez filed a pro se habeas corpus petition in state court, arguing among other things that Hooten's failure to properly notify him of his motion to withdraw deprived Jimenez of his right to an appeal. *Id*. at 20-21. After reviewing the evidence, the court found that Jimenez had repeatedly "inquire[d] . . . as to what was filed in the

appeal and what happened to the appeal after the appeal was dismissed," and that "[n]either the copy of the *Anders* brief or the letter dated July 12, 1996 was ever delivered by attorney Duke Hooten to the petitioner." *Id*. at 22-23. As a result, the court found, Jimenez "did not learn of the dismissal of his appeal until September 1997," *id*. at 23, and "was not afforded the right to examine the record, and the right to file a pro se brief." *Id*. at 24. Accordingly, the court held that Hooten's conduct had deprived petitioner of his right to appeal and recommended that Jimenez be granted a reinstated appeal as a remedy. *Id.* at 24-25.

Although a number of years had passed between the dismissal of petitioner's original appeal and his request for reinstatement,[2] the State raised no laches defense to his petition. In fact, the State filed no objection to the petition in either the trial court or the Court of Criminal Appeals. Accordingly, on September 25, 2002, the Court of Criminal Appeals accepted the trial court's recommendation and granted Jimenez's petition. In so doing, it ordered Jimenez "returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal." *Id*. at 27. The court also specifically ruled that "[f]or purposes of the Texas Rules of Appellate

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[2] As outlined in greater detail in his petition for certiorari, *see* Pet. 18-21, Jimenez's filing of his first state habeas petition was substantially delayed by the difficulties he experienced, despite his best efforts, in obtaining legal assistance.

Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues." *Id.*

Subsequently, Jimenez and his new court-appointed counsel, Shawntell McKillop, filed a timely notice of appeal in October 2002. *Id.* at 57. After McKillop filed an *Anders* brief in December 2002, Jimenez filed a *pro se* brief with the Third Court of Appeals, which affirmed his conviction and sentence in May 2003. *Id*. at 43-47. Jimenez timely sought discretionary review from the Texas Court of Criminal Appeals, which denied his petition on October 8, 2003 without written order. *Id*. at 78. Jimenez did not seek review from this Court.

4. On December 6, 2004, Jimenez filed a state habeas petition in which, among other things, he raised claims alleging ineffective assistance by his trial counsel. *Id*. at 61-63. The trial court addressed the merits of petitioner's ineffectiveness claim and recommended that relief be denied. *Id*. at 73-74. The Court of Criminal Appeals agreed and denied Jimenez's petition without written order on June 29, 2005. *Id*. at 79.

5. Having exhausted his remedies in the state courts, Jimenez immediately sought relief in the federal courts, filing a habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Texas on July 19, 2005. J.A. 78. Among other things, the federal petition claimed that petitioner received ineffective assistance of counsel at trial and at his revocation hearing. *Id*. at 79.

In response, the state argued that the petition was time-barred under 28 U.S.C. § 2244(d)(1)(A), which establishes a one-year limitations period to file a federal habeas petition, accruing on the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." In the State's view, "direct review" of Jimenez's judgment of conviction and sentence ended when the court of appeals dismissed his original appeal and he failed to petition for discretionary review from the Court of Criminal Appeals or this Court.

Jimenez countered that his federal habeas petition was not time-barred because AEDPA's statute of limitations ran from the conclusion of his direct appeal, as reinstated. Relying on the Fourth Circuit's decision in *Frasch v. Peguese*, 414 F.3d 518 (2005), Jimenez argued that the one-year limitations period did not begin to run until January 6, 2004, when the time expired for filing a petition for certiorari to this Court from the denial of discretionary review of his reinstated appeal, and was then tolled while his state habeas application was pending.

On October 23, 2006, the district court dismissed Jimenez's habeas petition as untimely. J.A. 80-93. It deemed itself bound by the Fifth Circuit's holding in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir.), *cert. denied*, 541 U.S. 1032 (2004), that when a Texas prisoner is granted the right to file a reinstated petition for discretionary review in the Texas Court of Criminal Appeals, "the 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." J.A. 90-91 (citation omitted). Thus, the district court concluded, "for purposes of the AEDPA's statute of limitations, the revocation of Petitioner's deferred adjudication community supervision became final on October 11, 1996, when his time for seeking direct review expired, and the granting of permission to file a reinstated appeal did not 'restart' the limitations period. The one-year limitations period expired on October 11, 1997, and the instant petition is clearly time-barred unless Petitioner demonstrates that he is entitled to statutory or equitable tolling," *id.* at 91, which, in the district court's view, he was not, *id*. at 92-93.

6. Both the district court and the Fifth Circuit denied Jimenez's request for a certificate of appealability. *Id*. at 94-95, 124-25. Jimenez then filed a petition for certiorari, which this Court granted on March 17, 2008. 128 S. Ct. 1646 (2008).

SUMMARY OF ARGUMENT

The federal habeas statute allows state defendants to challenge their judgment of conviction in federal court within one year of the "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). The statute then defines finality in traditional terms, providing that the state judgment becomes final upon "conclusion of direct review or the expiration of the time for seeking such review." *Id*.

In this case, the Texas courts found that petitioner was denied his right to a direct appeal by the constitutionally inadequate representation afforded him by the State. Under this Court's decisions, the established remedy for such Sixth Amendment violations is the reinstatement of the defendant's direct appeal. This eliminates one of the harms of the constitutional violation by allowing the defendant a new opportunity for direct review of his conviction and sentence. But, according to the Fifth Circuit, Congress has precluded states from remedying another harm created by the Sixth Amendment violation – the diminishment, and sometimes complete elimination, of the defendant's right to seek federal habeas review.

That is so, the Fifth Circuit says, because the reinstated appeal is not a form of "direct review" within the meaning of Section 2244(d)(1)(A) and, therefore, the defendant's time to seek federal habeas does not run from its completion. Instead, the Fifth Circuit has held, time for seeking federal review runs from the conclusion of the initial botched appeal. That reading is impossible to square with the text of

the statute, traditional conceptions of finality, and the purposes of the federal habeas provisions.

1. A reinstated appeal is indistinguishable in purpose and operation from any other form of direct review. The Texas courts have held that reinstatement restores the pendency of the direct appeal and that while the appeal is pending the judgment is not final (so that, for example, a state habeas challenge to the conviction is premature). The appeal is heard by the state intermediate court of appeals, which only has jurisdiction to decide cases on direct appeal. During the appeal, the defendant has a right to court-appointed counsel, a right afforded to non-capital defendants only for direct appeals. And the proceedings are treated as a direct appeal for purposes of *Teague v. Lane*, 489 U.S. 288 (1989), and the state's general prohibition against resolving ineffective assistance of counsel claims on direct appeal.

2. The Fifth Circuit has nonetheless declared that reinstated appeals are not a form of direct review because they are granted after the initial deadline for pursuing a direct appeal has expired. Once the federal limitations period begins, the court of appeals has said, Congress intended it to run continuously, subject to interruption only by operation of the federal tolling provision.

That assumption has no basis in the text, which provides that the limitations period begins from the expiration of the time for seeking direct review *or* the conclusion of direct review. 28 U.S.C. § 2254(d)(1)(A). When a court accepts a case for direct review after the time for seeking such review has expired, the

eventual appellate decision still constitutes the "conclusion of direct review" under any reasonable construction of those words.

There is nothing unusual about a limitations period that may, on occasion, be restarted. This Court has recognized that sometimes a court may suspend the finality of a seemingly final judgment by ordering further consideration of the defendant's judgment of conviction. That is what happens when a court reopens the time for taking an appeal after the initial deadline has already passed. And in that circumstance, no one thinks that the judgment remains final even while the court is considering the belated appeal. Nor does anyone believe that the federal limitation period commences to run before the reinstated appeal runs its course.

The break in the linear progression of the limitations period is no more problematic here, where permission to take an otherwise untimely appeal was granted to remedy a constitutional violation. A contrary rule would lead to absurd results. In the Fifth Circuit's view, the federal one-year limitations period begins to run as soon as the defendant loses his right of appeal (in this case, for example, when without his knowledge or participation, petitioner's appeal was dismissed and the time to seek further review expired). Even if the defendant discovers the loss quickly, and obtains reinstatement of his appeal without delay, in many cases the federal limitations period will run out before the reinstated state appeal is finally decided. When that happens, the defendant will be forced to file his federal habeas petition even before he has exhausted state review. That result is

entirely incompatible with the assumptions and purposes of the federal habeas statute, which requires federal courts to await the completion of state review and then to defer substantially to its results.

The Fifth Circuit's solution to this problem is to label the reinstated appeal a form of "collateral review," thereby invoking the federal tolling provision while the reinstated appeal is pending. *See* 28 U.S.C. § 2244(d)(2). There are two serious problems with this proposal. First, it provides no solution in states that do not reinstate appeals through a collateral proceeding. Second, even in states that reinstate appeals through habeas, the tolling provision on its face does not apply to the time spent pursuing the reinstated appeal. Section 2244(d)(2) tolls only the time during which "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). And this Court has made clear that once a petition for collateral review is granted (and the time for appealing that decision has expired), the application is no longer pending and the limitations period begins to run again. As a result, once a state grants a habeas petition – either by ordering a new trial or granting a new appeal – the tolling provision no longer applies. Instead, the federal clock starts over upon the completion of the direct review arising from the new proceedings ordered by the habeas court.

2. The Fifth Circuit disagrees, asserting that if an appeal is the "product of state habeas review, it does not arise under the 'direct review' procedures of

the Texas judicial system" within the meaning of Section 2244(d)(1)(A)." *Salinas*, 354 F.3d at 431.

Again, this assertion finds no support in the text of Section 2244(d)(1)(A), which simply asks whether the appeal itself constitutes "direct review," and gives no relevance to the means by which that review is obtained. States employ all manner of mechanisms for deciding whether to consider an otherwise untimely appeal. As reflected in the text of the statute, Congress did not intend to allow reinstated appeals to restart the federal limitations clock in Montana (which grants reinstatement by motion to the state supreme court) but not in Texas (which considers such requests through habeas petitions).

In any event, there is nothing strange about habeas petitions leading to a remedy that restarts the federal habeas clock. Indeed, such an outcome is common when a state habeas court orders a new trial. No one doubts that when that trial leads to a new round of direct review, the defendant will have a full year from the conclusion of that direct review to file his federal petition. There is no reason for a different result when the state court tailors the habeas remedy to the constitutional harm by ordering only a new appeal.

3. Treating reinstated appeals as a form of direct review under the federal limitations period is consistent with the purposes of the federal habeas statute, which was designed with principles of comity and federalism foremost in mind. The Fifth Circuit's contrary rule contravenes those purposes by short-circuiting the state direct review process and disregarding states' considered determination that in

some instances a direct appeal should be allowed despite the passing of the ordinary appeal deadline.

At the same time, the court of appeals' construction of the statute diminishes, and sometimes eliminates entirely, the states' ability to fully remedy the unconstitutional deficiencies in the counsel they appoint to represent indigent defendants.

Allowing states the leeway to decide when and how to remedy Sixth Amendment violations does not unduly infringe on their interests in the finality of their criminal judgments. To the contrary, under petitioner's construction of the statute, states are empowered to decide for themselves how best to balance the need for finality and the equally important need to remedy violations of their citizens' constitutional rights. Some states may decide to impose short, determinate deadlines for seeking reinstatement of an appeal lost by counsel's deficient performance. Others, like Texas, may choose a more flexible approach, applying doctrines like laches to judge the timeliness if such requests. By design, Section 2244(d)(1)(A) leaves that choice to each state, commanding simply that once direct review has concluded under whatever rules a state may adopt, the defendant must file his federal petition within a year.

ARGUMENT

I. A Reinstated Appeal Constitutes "Direct Review" For Purposes Of The Federal Habeas Statute Of Limitations.

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), Congress provided that 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." 28 U.S.C. § 2244(d)(1). This period begins to run at the latest of four events, the first of which is at issue in this case: "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).

In this case, it is undisputed that if the Texas courts' consideration of petitioner's reinstated appeal qualifies as "direct review" within the meaning of Section 2244(d)(1)(A), his federal habeas petition was timely.[3] On the other hand, if the one-year period

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[3] Review of petitioner's reinstated appeal concluded on January 6, 2004, ninety days after the Texas Court of Criminal Appeals denied his petition for discretionary review. *See Clay v. United States*, 537 U.S. 522, 527-28 & n.3 (2003) (direct review concludes upon expiration of time for seeking certiorari); S. Ct. R. 13.1 (petition for certiorari due ninety days after entry of judgment); J.A. 79 (Texas Court of Criminal Appeals denied habeas petition on October 8, 2003). Three hundred and thirty-five days later, on December 6, 2004, Jimenez filed his habeas petition in state court, J.A. 79, thereby tolling the federal limitations period until June 29, 2005, when the Texas Court of

instead is computed from a date before the conclusion of his reinstated appeal, the federal petition was untimely.

A. Whether A State Proceeding Is Part Of The State's System Of "Direct Review" Turns On A Question Of State Law.

Under Section 2244(d)(1)(A), the federal limitations period is measured from the date on which a criminal judgment becomes "final." The provision then defines finality in terms of the conclusion of "direct review," consistent with this Court's traditional understanding of the finality of state court judgments in the habeas context. *See*, *e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); *see also Clay*, 537 U.S. at 527 (same).

Section 2244(d)(1)(A) does not define what constitutes "direct review" for purposes of the federal limitations period. But the term has a common understanding and must be construed in light of the traditional notions of finality AEDPA codified. *Cf. Clay*, 537 U.S. at 527-28 ("Because we presume that

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Criminal Appeals' denied his petition. *See* 28 U.S.C. § 2244(d)(2); J.A. 29. At that point, petitioner had thirty days remaining in the federal limitations period, making his petition due on July 30, 2005. The petition was filed on July 19, 2005. J.A. 79.

Congress expects its statutes to be read in conformity with this Court's precedents, our unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of 'becomes final' in § 2255.") (quotation marks and citation omitted). Direct review, used in this context, distinguishes the process by which courts review in the first instance the validity of a defendant's conviction and sentence, as distinguished from habeas or other forms of collateral review, which provide a secondary and more limited opportunity to challenge the validity of a judgment that has already survived scrutiny under direct review. *See*, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (discussing differences between direct and collateral review); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (same). Congress followed that basic distinction in Section 2244(d), delaying the commencement of the federal limitations period until the completion of direct review, 28 U.S.C. § 2244(d)(1)(A), and tolling it for the time "during which a properly filed application for State post-conviction or other collateral review . . . is pending," *id*. § 2244(d)(2).

Deciding whether a particular state proceeding is part of the state's system of "direct review" necessarily requires an examination of state law. *See Salinas*, 354 F.3d at 430 n.5; *Frasch v. Peguese*, 414 F.3d 518, 522 (4th Cir. 2005); *see also Carey*, 536 U.S. at 223 ("Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions . . ."); *Richfield Oil Corp. v. State Bd. of Equalization*, 329

U.S. 69, 72 (1946) (determining whether a state judgment is final may require "resort to the local law to determine what effect the judgment has under the state rules of practice"). Moreover, the question turns on "how [the] state procedure functions, rather than the particular name that it bears." *Carey*, 536 U.S. at 223.[4]

As discussed next, in Texas, a reinstated appeal functions as a part of the State's system of direct review and, therefore, the federal limitations period begins to run only after the reinstated appeal has run its course.

B. Texas Allows Defendants To Pursue Direct Review Through Reinstated Appeals In Certain Limited Circumstances.

In Texas, a criminal defendant may seek direct review of his conviction and sentence by filing a notice of appeal within thirty days after his sentence is imposed. Tex. R. App. P. 26.2(a).[5] Like most

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[4] Thus, in a related context, this Court has repeatedly held that whether a state habeas petition is "properly filed" for purposes of federal tolling provision, turns on a question of state law. *See*, *e.g.*, *Allen v. Siebert*, 128 S. Ct. 2, 4 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005); *Evans v. Chavis*, 546 U.S. 189 (2006).

[5] Defendants also may seek discretionary review of the court of appeals' decision by filing a petition for discretionary review with the Texas Court of Criminal Appeals (the State's court of final resort on criminal matters) within thirty days after the court of appeals' judgment is rendered. *Id*. R. 68.2.

jurisdictions, however, Texas appellate courts may nonetheless consider direct appeals in certain additional circumstances as well.

1. Otherwise untimely appeals may be considered, for example, under Texas Rule of Appellate Procedure 26.3. Under that rule, the court of appeals may grant an extension of time to file a notice of appeal even after the time for appealing has expired, so long as the defendant files his motion "within 15 days of the deadline for filing the notice of appeal." *See also* Tex. R. App. P. 68.2 (same for reinstated petitions for discretionary review by the Texas Court of Criminal Appeals).

2. In addition, as illustrated by this case, Texas courts will order that a direct appeal be reinstated beyond those fifteen days when the defendant lost his right to appeal because of the constitutionally deficient performance of counsel.

That practice helps to fulfill the State's Sixth Amendment obligations. While states need not provide appellate review of criminal convictions, when they do, they may not "grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas v. California*, 372 U.S. 353, 355 (1963). As a result, indigent defendants are entitled to the assistance of counsel on direct appeal. *Id*. at 355-56. Moreover, because "the right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel," defendants have a constitutional right to effective assistance of counsel on appeal. *Evitts v. Lucey*, 469

U.S. 387, 397 (1985); *see also Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

When that right is violated, and defendants lose their right to appeal altogether, the only constitutionally adequate remedy is one that places "persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of'" the violation. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (citation omitted); *see also United States v. Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation . . .").

In light of these principles, when a defendant loses his right to pursue a direct appeal as a result of the constitutionally ineffective assistance of his counsel, Texas courts remedy the violation by allowing the defendant to file a new notice of appeal. *See*, *e.g.*, *Radcliff v. Texas*, 126 S.W.3d 534, 536 (Tex. App. 2003); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

This is accomplished through the State's habeas regime. Tex. Code Crim. Proc. Art. 11.07. A defendant seeking reinstatement of his appeal first files a habeas petition with the court of conviction. That court makes a recommendation to the Texas Court of Criminal Appeals. *Id*. § 3. The Court of Criminal Appeals then decides whether to order the relief. *Id*.; *see also*, *e.g.*, *Reyes v. Texas*, 883 S.W.2d 291, 293 n.2 (Tex. App. 1994) (explaining this process). The defendant can secure a reinstated appeal only by demonstrating that the

constitutionally deficient performance of his counsel "result[ed] in the deprivation of . . . an appeal." *Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005); *see also Ex parte Owens*, 206 S.W.3d 670, 675 (Tex. Crim. App. 2006) (noting Texas applies standard derived from *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (establishing test for constitutional violation of right to counsel in context of denial of access to appeal)); *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) (burden of proving entitlement to relief is upon the defendant); *Ex parte Galvan*, 770 S.W.2d 822, 823 (Tex. Crim. App. 1989) (same). If the defendant sustains his burden, the Texas Court of Criminal Appeals will "return [the] Applicant to the point at which he can give notice of appeal." *Mestas v. State*, 214 S.W.3d 1, 2 (Tex. Crim. App. 2007). Accordingly, an order allowing a reinstated appeal usually states:

> For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the conviction had been entered on the day that the mandate of this Court issues. We hold that Applicant, should he desire to prosecute an appeal, must take affirmative steps to see that notice of appeal is given within thirty days after the mandate of this Court has issued.

Id.; *see also id.* at 2 n.1 (noting that the court "often use[s] this or similar language in opinions granting out-of-time appeals"); J.A. 27 (order in this case).

Although the Texas courts and the State Legislature have declined to impose a determinate time limit to seek the reinstatement of an appeal in

non-capital cases,[6] ordinary principles of laches nonetheless apply. Thus, a defendant's unreasonable delay will lead to the dismissal of his application if the delay prejudices the State's ability to respond. *See Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999).

2. Texas is far from alone in permitting reinstatement of otherwise untimely direct appeals.

Other states, and the federal courts, allow defendants who have missed appeal deadlines to apply for post-hoc extensions of time or permission to reopen the time to appeal. Like Texas, numerous jurisdictions permit extensions even after the time for appealing has already expired, often based on simply "good cause," so long as the request is made promptly. *See*, *e.g.*, Tex. R. App. P. 26.3, 68.2;[7] Fed. R. App. P. 4(a)(5)(A), (b)(4).[8] Many jurisdictions also

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[6] *See Ex parte Galvan*, 770 S.W.2d 822, (Tex. Crim. App. 1989) (noting that "[s]uch a rule would be arbitrary and probably unconstitutional") (citing Tex. Const. Art. I, § 12). The legislature *has* established a deadline for appeal reinstatement petitions in capital cases. *See* Tex. Code. Crim. Proc. Art. 11.071.

[7] For other states, see also, *e.g.*, Colo. App. R. (4)(b)(1); Haw. R. App. Proc. 4(b)(5); Ill. R. Crim. App. Proc. 606(c); Mass. R. App. Proc. 4(c); N.D. R. App. Proc. 4(b)(4); N.J. Ct. R. 2:4-4(a); Utah R. App. Proc. 4(e).

[8] The rules governing reinstated appeals in federal court are illustrative of the basic appellate practices Congress must have had in mind in formulating Section 2244(d)(1)(A). They are also relevant because AEDPA also created a one-year limitations period for habeas review of federal convictions, and provided that it shall run from "the date on which the judgment

allow courts to revive an otherwise forfeited appeal even after longer delays, or impose no fixed time limits at all.[9] In most instances, the practice governed by court rule. *See supra* n.7. In others, the practice is established by judicial doctrines. *See, e.g., In re Welfare of S.M.E.*, 725 N.W.2d 740, 744 (Minn. 2007) (allowing reinstated appeal based on court's "inherent authority"). [10]

Likewise, both state and federal courts commonly reinstate direct appeals when the right to appeal was lost as a result of constitutionally ineffective

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of conviction becomes final." 28 U.S.C. § 2255(f)(1). And in *Clay v. United States*, 537 U.S. 522 (2003), this Court concluded that the phrase "becomes final . . . calls for a reading surely no less broad than . . . § 2244(d)(1)(A)'s specification 'becomes final by the conclusion of direct review or the expiration of the time for seeking such review.'" *Id*. at 530.

[9] *See*, *e.g.*, Ark. R. App. P. Crim. 2(e) (allowing court to reopen time for appeal as much as eighteen months after judgment issued); Ill. R. Crim. App. Proc. 606(c) (six months); Mass. R. App. Proc. 14(b) (up to one year); Mich. Ct. R. 7.205(F) (same); Mont. R. App. Proc. 4(6) (no time limit); Ohio R. App. Proc. 26(b)(2)(B) (ninety days, or longer if "good cause" for delay shown); Wash. R. App. Proc. 18.8(a)-(b) (no time limit); Okla. R. Ct. Crim. App. 2.1(E) (eighteen months); Fed. R. App. P. 4(a)(6)(B) (rule applicable to federal habeas appeals) (180 days).

[10] At the time Congress enacted AEDPA, this Court allowed equitable tolling of the time for filing a notice of appeal in federal court in certain "unique circumstances." *See Bowles v. Russell*, 127 S. Ct. 2360 (2007) (discussing and overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964)).

assistance of counsel.[11] In doing so, they follow the

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[11] **State cases:** *Kargus v. Kansas*, 162 P.3d 818, 831 (Kan. 2007); *Colorado v. Long*, 126 P.3d 284, 287 (Colo. App. 2005); *Wallace v. Tennessee*, 121 S.W.3d 652, 660 (Tenn. 2003); *Missouri v. Stubblefield*, 97 S.W.3d 476, 477 (Mo. 2003); *Middlebrook v. Delaware*, 815 A.2d 739, 743 (Del. 2003); *Montana v. Tweed*, 59 P.3d 1105, 1110 (Mont. 2002); *Maryland v. Gross*, 760 A.2d 725, 742 (Md. App. 2000); *Nebraska v. McCracken*, 615 N.W.2d 902, 913-15 (Neb. 2000); *State v. Trowell*, 739 So. 2d 77, 80 (Fla. 1999); *Davis v. State*, 877 S.W.2d 93, 93 (Ark. 1994); *Young v. State*, 902 P.2d 1089, 1091 (Okla. Crim. App 1994); *Ponder v. State*, 400 S.E.2d 922, 924 (Ga. 1991); *Foote v. State*, 751 P.2d 884, 887 (Wyo. 1988); *Barnett v. Mississippi*, 497 So. 2d 443, 444 (Miss. 1986); *Loop v. Solem*, 398 N.W.2d 140, 144 (S.D. 1986); *Louisiana v. Counterman*, 475 So. 2d 336, 339 (La. 1985); *Ex parte Sturdivant*, 460 So. 2d 1210, 1212 (Ala. 1984).

Federal habeas cases reviewing federal convictions: *United States v. Shedrick*, 493 F.3d 292, 303 (3d Cir. 2007); *United States v. Hadden*, 475 F.3d 652, 661 n.8 (4th Cir. 2007); *United States v. Snitz*, 342 F.3d 1154, 1159 (10th Cir. 2003); *McIver v. United States*, 307 F.3d 1327, 1329, 1330 (11th Cir. 2002); *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982); *Garcia v. United States*, 278 F.3d 134, 138 (2d Cir. 2002); *United States v. Torres-Otero*, 232 F.3d 24, 29 (1st Cir. 2000); *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998); *Hollis v. United States*, 687 F.2d 257, 259 (8th Cir. 1982); *Dillane v. United States*, 350 F.2d 732, 733 (D.C. Cir. 1965).

Federal habeas cases reviewing state convictions: *White v. Johnson*, 180 F.3d 648, 656 (5th Cir. 1999); *Hannon v. Maschner*, 981 F.2d 1142, 1145 (10th Cir. 1992); *Lozada v. Deed*, 964 F.2d 956, 959 (9th Cir. 1992); *Lombard v. Lynaugh*, 868 F.2d 1475, 1484 (5th Cir. 1989); *Cannon v. Berry*, 727 F.2d 1020, 1025 (11th Cir. 1984); *Mylar v. Alabama*, 671 F.2d 1299, 1302 (11th Cir. 1982); *Passmore v. Estelle*, 607 F.2d 662, 664 (5th Cir. 1979).

example set by this Court. For example, in *Rodriquez v. United States*, 395 U.S. 327 (1969), a federal prisoner alleged that "he had been improperly denied his right to appeal" when "he had told his counsel to perfect an appeal, but that counsel had failed to do so." *Id*. at 328. This Court agreed and provided that the "judgment is reversed and the case is remanded to the District Court where petitioner should be re-sentenced so that he may perfect an appeal in the manner prescribed by the applicable rules." *Id*. at 332. Likewise, in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court approved the same remedy in the context of federal habeas review of a state conviction. In *Evitts*, state-appointed counsel similarly failed to perfect an appeal, leading to its dismissal. *Id*. at 389-90. This Court affirmed the federal district court's grant of a "conditional writ of habeas corpus ordering [the defendant's] release unless the Commonwealth either reinstated his appeal or retried him," *id*. at 390, noting with approval that the practice has been followed in both state and federal courts, *id*. at 399 n.10.

Given their intended function – to place the defendant back in the position he would have been in but for the violation of his constitutional rights – it should come as no surprise that, as discussed next, such appeals operate as part of the process of direct review.

C. A Reinstated Appeal Functions As Part Of Direct Review.

1. There seems to be little dispute that in Texas a reinstated appeal functions precisely in the same

manner as the initial appeal the defendant was wrongfully denied.

The Texas Court of Criminal Appeals has explained that "granting an out-of-time appeal restores the pendency of the direct appeal." *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). Thus, while that appeal is pending, the case is "still on direct appeal" and the defendant's conviction is "not yet final." *Samarron v. State*, 150 S.W.3d 701, 706 n.6 (Tex. App. 2004). *See also*, *e.g.*, *Ex parte Garcia*, 988 S.W.2d 240, 241 (Tex. Crim. App. 1999) (same). In *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), the Fifth Circuit accordingly acknowledged that "[w]hen the Court of Criminal Appeals grants the right to file an 'out-of-time' [petition for discretionary review], it restores the petitioner to the position he was in when he first possessed the right to petition for discretionary review," and therefore places the defendant "in the midst of the direct review process," *id*. at 429; *see also id*. at 429 n.4 (noting same is true with respect to permission to file reinstated appeal).

Because the Texas courts consider a reinstated appeal to be part of the state system of direct review, that should "be the end of the matter." *Carey*, 536 U.S. at 226. In *Carey*, this Court explained that a state's determination that a state habeas petition was untimely was conclusive for purposes of determining whether the petition was "properly filed" within the meaning of AEDPA's tolling provision. 536 U.S. at 226; *see also Evans v. Chavis*, 546 U.S. 189, 194, 198 (2006) (same). The same deference is due to a state's determination that a reinstated

appeal functions as part of the state's system of direct review. *See Orange v. Calbone*, 318 F.3d 1167, 1170 (10th Cir. 2003).

2. In any event, even if the State's determination were not conclusive, it is plainly correct. In every relevant respect, a reinstated appeal functions identically to any other appeal on direct review in Texas.

First, the ordinary direct appeal rules and procedures apply to reinstated appeals. The defendant must, for example, file a timely notice of appeal. *Mestas*, 214 S.W.3d at 2. And his appeal is given a caption indicative of an ordinary direct appeal: the defendant is designated as the "appellant" and the State the "appellee," whereas in a habeas case the defendant is called the "petitioner" or "applicant" and the caption reads "*Ex parte* [Defendant]." *Compare*, *e.g.*, *Duran v. State*, 868 S.W.2d 879, 879 (Tex. App. 1993) (reinstated appeal) *with Ex parte Drake*, 883 S.W.2d 213, 213-14 (Tex. Crim. App. 1994) (habeas petition).

In addition, consistent with their status as part of the direct review of criminal convictions, reinstated appeals are heard by the Court of Appeals, *see*, *e.g.*, *Duran*, 868 S.W.2d at 879-80, which has jurisdiction to decide direct appeals but not collateral claims. *See* Tex. Code Crim. Proc. Art. 4.03, 44.45 (describing jurisdiction of Court of Appeals); *Board of Pardons and Paroles ex rel. Keene v. Eighth Court of Appeals*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (Texas Court of Criminal Appeals has exclusive jurisdiction of state habeas claims); Tex. Code Crim. Proc. Art. 11.07 (same).

Second, during the reinstated appeal, the defendant has a right to court-appointed counsel,[12] a right that is provided in non-capital cases for direct appeals only. *See* Tex. Code Crim. Proc. Art. 1.051(d)(1)-(3), 11.071(2)(a).

Third, the scope of appellate review is the same as in any direct appeal, and different from the scope of review in collateral proceedings. For example, a court hearing a reinstated appeal applies new constitutional rules of criminal procedure that apply only on direct, and not collateral, review. *See, e.g.*, *Samarron v. State*, 150 S.W.3d 701, 702, 705-06 n.6 (Tex. App. 2004) (in determining whether the rule in *Crawford v. Washington*, 541 U.S. 36 (2004), should apply in a reinstated appeal, holding that the retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), was not applicable because the case was "still on direct appeal"); *compare Ex parte Keith*, 202 S.W.3d 767 (Tex. Crim. App. 2006) (holding that *Crawford* did not apply retroactively to state habeas cases); *see also Ex parte Pennington*, 471 S.W.2d 578, 581-82 (Tex. Crim. App. 1971) (new rules apply in

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[12] *See* J.A. 27, 44; *see also*, *e.g.*, *Jones v. State*, 98 S.W.3d 700, 704 (Tex. Crim. App. 2003); *Ex parte Axel*, 757 S.W.2d 369, 375 (Tex. Crim. App. 1988); *Talbert v. State*, No. 01-88-986-CR, 1992 WL 49806 (Tex. App. Mar. 19, 1992) (not designated for publication); *Ex parte Raley*, 528 S.W.2d 257, 259 (Tex. Crim. App. 1975); *see also Garcia v. State*, No. 04-99-00513-CR, 2000 WL 33128686, at *3-*4 (Tex. App. Dec. 6, 2000) (not designated for publication) (holding that it was error for trial court to wait four months after grant of reinstated appeal before appointing counsel to aid on appeal).

reinstated appeals); *Cruz v. State*, 441 S.W.2d 542 (Tex. Crim. App. 1969) (same). At the same time, courts hearing reinstated appeals will *not* decide claims – like ineffective assistance of trial counsel – that may be heard only on habeas review. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

Fourth, the standard of review applied in reinstated appeals is, again, the same as applied in any other direct appeal and different from the standard applied in collateral review. *Compare*, *e.g.*, *Figueroa v. State*, 250 S.W.3d 490, 499 (Tex. App. 2008) (applying ordinary standards of appellate review to reinstated appeal) *with Ex parte Drake*, 883 S.W.2d at 215 (discussing limited scope of habeas review, including bar against reviewing claims previously raised on direct review).

Fifth, if the defendant prevails in the reinstated appeal, the judgment below is directly reversed, in contrast with the traditional remedies applied in collateral view, under which the defendant is ordered freed contingent upon the State providing a new trial or other relief. *Compare*, *e.g.*, *Duran*, 868 S.W.2d at 882 (in reinstated appeal, court "reverse[d] the trial court conviction and remand[ed]") *with Ex parte Byrd*, 162 S.W.3d 250, 254 (Tex. Crim. App. 2005) (in habeas case, ordering that "[r]elief is granted"), *Ex parte Ridgeway*, 579 S.W.2d 935, 936 (Tex. Crim. App. 1979) (habeas court ordering prisoner "released from any further confinement"), *and* Tex. Code Crim. Proc. Art 11.07 § 5 (court in habeas case may issue order "remanding the applicant to custody or ordering his release"). In deciding a reinstated

appeal, the state court thus "is reviewing the *judgment*" (the purpose of direct review) rather than determining "the lawfulness of the [defendant's] custody *simpliciter*" (the hallmark of habeas review). *Coleman*, 501 U.S. at 730 (emphasis in original).

Sixth, a reinstated appeal is treated as direct review under the rules governing habeas claims in Texas. For example, because "granting an out-of-time appeal restores the pendency of the direct appeal," state courts lack jurisdiction over any habeas petition challenging the same conviction while the reinstated appeal is pending. *Ex parte Garcia*, 988 S.W.2d at 241; *Ex parte Torres*, 943 S.W.2d at 472 (citing *Ex parte Brown*, 662 S.W.2d 3, 4 (Tex. Crim. App. 1983)). In addition, neither the petition to reinstate nor the resulting appeal is treated as a prior habeas petition for purposes of the state's prohibition against successive habeas petitions. *See Ex parte Santana*, 227 S.W.3d 700, 703-04 (Tex. Crim. App. 2007); *Ex parte McPherson*, 32 S.W.3d 860, 860-61 (Tex. Crim. App. 2000); *Ex parte Torres*, 943 S.W.2d at 471-74.

II. The Fifth Circuit's Reasons For Refusing To Treat A Reinstated Appeal As Part Of "Direct Review" Are Meritless.

Although acknowledging that a reinstated appeal is functionally indistinguishable from any other form of direct review, the Fifth Circuit nonetheless has concluded that it is not a part of the "direct review" envisioned by Section 2244(d)(1)(A). The court advanced two reasons for this conclusion, neither of which is persuasive.

A. By Providing A Limitations Period That Runs From The Latest Of Several Possible Starting Points, Congress Contemplated That The Time Limit Would Start Over In Some Cases.

The Fifth Circuit objected in *Salinas* that treating reinstated appeals as part of the direct review of a defendant's judgment would inappropriately restart the federal limitations period that had already begun to run when the defendant missed his original appeal deadline. "On its face," the court maintained, "AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the periods in between." 354 F.3d at 429. In the view of the court of appeals, "nothing in AEDPA allows for a properly initiated limitations period to be terminated altogether by collateral state court action." *Id*. at 430. The Fifth Circuit is simply wrong.

As this Court has explained with respect to the 90-day period for filing a petition for certiorari, in some cases "the actions of a party or a lower court suspend the finality of a judgment and thereby reset the 90-day 'clock.'" *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1418 (2007) (citation omitted). For instance, "a lower court's appropriate decision to rehear an appeal may suspend the finality of a judgment." *Id*. In such cases, the time for seeking certiorari, which initially began to run when the lower court issued its judgment, restarts at the conclusion of the reinstated appellate proceedings. *Id*.; *Hibbs v. Winn*, 542 U.S.

88, 97-98 (2004); *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997); S. Ct. R. 13.3.

The same is true when, rather than rehearing an appeal, a court reinstates and hears an appeal after the appeals deadline has passed. The extension "suspends the finality of the judgment" and "reset[s] the . . . clock" for seeking further review of the resulting decision. *Limtiaco*, 127 S. Ct. at 1418. That is why it is accepted without question that a judgment does not become final upon expiration of the time to file an appeal when a court exercises its discretion to reopen the time to appeal under a rule like Tex. R. App. P. 26.3 or Fed. R. App. P. 4(b)(4). This is true even though the necessary consequence of such extensions is a break in the linear progression of the federal limitations period: the day after the time for appealing expired, the federal clock began to run, only to be stopped when the reinstated appeal was allowed and restarted upon the conclusion of the resulting direct review.

There is no reason for a different conception of finality when a state court considers an otherwise untimely appeal because the prior appeal was dismissed, and the defendant's appeal rights lost, as a result of a violation of the defendant's constitutional rights. The state court's decision to rehear petitioner's direct appeal has the same effect on finality as "a lower court's appropriate decision to rehear an appeal" because it has come to doubt the correctness of its decision. *Limtiaco*, 127 S. Ct. at 1418.

Certainly nothing in the text of Section 2244(d)(1)(A) supports the Fifth Circuit's departure

from that traditional understanding. Indeed, the text is directly to the contrary. The provision allows the defendant one year to seek federal habeas review from the date his conviction becomes "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) (emphasis added). By using the disjunctive, Congress ensured that a defendant would have a year from the conclusion of direct review or from the expiration of time for seeking such review in the first instance, whichever came later.[13] And while it may be uncommon for the conclusion of direct review to follow a missed appeal deadline, the practice of allowing reinstated appeals illustrates that this circumstance does arise with some regularity. Under the plain language of Section 2244(d)(1)(A), when that circumstance *does* arise, the time limit runs from the conclusion of direct review, not earlier.

Pointing to the "statutory framework," the Fifth Circuit nonetheless insists that Congress expected that once the federal clock began running, it would not stop except pursuant to the tolling provision. *Salinas*, 354 F.3d at 429-30. But the broader structure of the Act shows the opposite. By providing

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[13] There is no basis to think that Congress intended Section 2244(d)(1)(A) to run from the *earlier* of the "conclusion of direct review or the expiration of the time for seeking such review." Under that reading, the clock would start running before a timely filed appeal was even heard and, if the court took more than a year to brief and decide a case, could expire before direct review was concluded.

that the limitations period "shall run from the *latest* of" a number of events, 28 U.S.C. § 2244(d)(1)(A) (emphasis added), Congress virtually ensured that in some cases the time for filing a habeas petition would be revived after the time for seeking federal relief, by all appearances, had long expired. Take, for example, a prisoner who does not file a federal petition within a year after his conviction became final within in the meaning of subsection (d)(1)(A). Congress nonetheless provided three circumstances in which the federal limitations period would begin anew: (1) the cessation of state action in violation of federal law that prevented the defendant from filing earlier; (2) this Court's recognition of a new, retroactively applied constitutional right; or (3) the discovery of new evidence establishing the factual predicate of a previously unavailable claim. *Id*. § 2244(d)(1)(B)-(D). When any of those circumstances arise, there is a break in the "linear" progression of the federal limitations period and the federal clock is restarted, sometimes many years after it first expired.

Likewise, the statutory definition of a "final" state court judgment in subsection (d)(1)(A) provides two alternative dates and, in so doing, creates the possibility that the time for seeking federal habeas review will be restarted when the later of the two conditions is met, even if the time for seeking habeas review under the first condition has already run. When Congress enacted this definition, it was well established that the "conclusion of direct review" would sometimes post-date the "expiration of time for seeking such review," both under rules like Texas

Rule of Appellate Procedure 26.3, and in ineffective assistance of counsel cases under the aegis of this Court's 1969 and 1985 decisions in *Rodriquez* and *Evitts*. *See supra* n.12.

B. A Direct Appeal Is Part Of "Direct Review" Even If Ordered As A Habeas Remedy For A Constitutional Violation.

The Fifth Circuit has further concluded that a reinstated appeal cannot constitute a form of direct review, at least in Texas, because even if the appeal itself is indistinguishable from any other direct appeal, it is obtained through a collateral proceeding, under the state habeas statute. *Salinas*, 354 F.3d at 430-31. That is, in the Fifth Circuit's view, if the reinstated appeal "is necessarily the product of state habeas review, it does not arise under the 'direct review' procedures of the Texas judicial system" within the meaning of Section 2244(d)(1)(A). 354 F.3d at 431.

This reasoning is based on an incorrect premise. The question under the federal limitations provision is whether *the appeal itself* is a form of "direct review"; the mechanism by which a state considers whether to grant such review is beside the point. It makes no sense to believe that Congress intended the application of the limitations period to turn on the precise mechanism by which the defendant seeks to have his appeal reinstated.

1. The text of Section 2244(d)(1)(A) provides no basis for the Fifth Circuit's rule. The provision simply states that the federal limitations period runs from the "conclusion of direct review"; how the

defendant secured the right to pursue that direct review is irrelevant. *See Frasch*, 414 F.3d at 522-23.

To hold otherwise would lead to arbitrary treatment of similarly situated defendants based on the nomenclature a state uses to describe the procedure which enabled that defendant to obtain consideration of an untimely appeal. To be sure, some states like Texas resolve ineffective assistance of counsel claims through their habeas procedures, which are well-suited for developing the factual predicate of such claims. But courts in other jurisdictions make precisely the same determination without using a collateral proceeding and, as a result, under the Fifth Circuit's reasoning, reinstated appeals in those states would restart the time for seeking federal habeas relief. For example, when an appeal has been dismissed as a result of counsel's failure to perfect or prosecute the appeal, some courts allow the defendant to ask the appellate court to recall its mandate and reinstate the appeal. *See United States v. Winterhalder*, 724 F.2d 109 (10th Cir. 1983) (collecting cases). And in other jurisdictions, defendants may move for reinstatement of their appeals directly in the appellate court. *See*, *e.g.*, *Montana v. Tweed*, 59 P.3d 1105, 1109 (Mont. 2002); *State v. Trowell*, 739 So. 2d 77, 80 (Fla. 1999); Mich. Ct. R. 7.203(B)(5).

No purpose would be served by restarting the federal limitations period when a reinstated appeal is allowed in Montana, but not in Texas, simply because Montana grants such appeals upon a motion filed with the State Supreme Court, while Texas uses a habeas petition filed in the court of conviction and

ruled upon by the Texas Court of Criminal Appeals. And the Fifth Circuit provided no reason to think Congress intended to interject such arbitrary and unequal treatment into the federal habeas system.

2. In any event, there is nothing incongruent, or even unusual, about a successful state habeas petition leading to new direct review proceedings followed by a new right to federal habeas review. The most common example arises when a state habeas court orders a new trial. If the defendant is convicted again, the defendant will be allowed to appeal the judgment entered after his second trial, followed by a fresh round of federal habeas review of the results of that second trial and appeal. *See*, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 790-91 (2001) (reviewing federal habeas petition challenging conviction secured after prior successful habeas petition). To petitioner's knowledge, no court has ever doubted that when a successful state habeas petition results in a new trial, the time for seeking federal habeas review runs from the conclusion of the direct review of the re-conviction, even though the new round of state direct review is concededly "the product of state habeas review." *Salinas*, 354 F.3d at 431. To hold otherwise often would lead to the absurdity of requiring a prisoner to file a federal habeas petition even before his new trial was completed, or was still on appeal.

There is no reason for a different result when the habeas court orders a reinstated appeal, rather than

a new trial to be followed by a new direct appeal.[14] In both instances, the successful habeas petition results in a new round of state proceedings to determine whether the state will continue to deprive the defendant of his liberty. With that new round of proceedings, there is a fresh risk of constitutional error of the kind that federal habeas is designed to remedy. And in both cases, it makes little sense as a practical matter to begin federal proceedings until

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[14] It is no answer that a new trial results in a new judgment and, for that reason alone, the time for seeking federal habeas starts over again. *Cf.* BIO 11-12. The same often is true when courts order a new appeal. In *Rodriquez*, for example, this Court ordered that the prisoner's sentence be vacated and then immediately reinstated to start the appellate process over again. 395 U.S. at 332. In that circumstance, the defendant has a new judgment no less so than if he had been tried again and re-convicted. Here, the Court of Criminal Appeals did not say whether the initial judgment against petitioner was vacated. But, in other cases, the court has been explicit that the reinstated appeal remedy requires vacating the original judgment. *See*, *e.g.*, *Ex parte Axel*, 757 S.W.2d 369, 375 (1988). In any event, the operation of the federal limitations period cannot turn on the esoteric technicality of whether the state court's remedial order expressly vacates the original judgment or simply returns the defendant to the same position he would be in, for all practical purposes, if the judgment had been vacated. This Court should not lightly assume that Congress intended that access to the Great Writ – an historic bulwark against arbitrary government action – would itself depend on arbitrary distinctions in state practice. *Cf. Torres-Otero*, 232 F.3d at 29 (declining to give significance to district court's failure to vacate initial judgment prior to allowing reinstated appeal).

the new round of state review ordered by the habeas court has run its course.

III. Treating Reinstated Appeals As Part Of The Direct Review Process Is Consistent With AEDPA's Purposes.

Construing reinstated appeals as part of "direct review" under Section 2244(d)(1)(A) is consistent with "AEDPA's purpose to further the principles of comity, finality, and federalism," *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (citation omitted), while also promoting the equally critical interest in ensuring meaningful access to habeas remedies and full relief for the violation of defendants' important constitutional rights.

A. Delaying Federal Habeas Until The Conclusion Of A Reinstated Appeal Furthers AEDPA's Goal Of Comity With The State Courts.

Awaiting the final decision of a state court reviewing a reinstated appeal is necessary to show state courts the respect Congress intended AEDPA to afford their judgments.

1. There is no question that a reinstated appeal provides the state "the opportunity to fully consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon the judgment." *Duncan*, 533 U.S. at 178. Indeed, the reporters are full of examples illustrating that reinstated appeals regularly result in the correction of constitutional errors that otherwise would have gone unreviewed

and uncorrected by the state courts.[15] Thus, delaying the start of the federal limitations period until a reinstated appeal has run its course "protect[s] the state courts' role in the enforcement of federal law" and "prevent[s] disruption of state judicial proceedings," *id*. at 179 (citations omitted), no less than in the case of an appeal allowed on the basis of a timely notice of appeal.

2. Respondent's interpretation of Section 2244(d)(1)(A), on the other hand, "violates these principles by encouraging state prisoners to file federal habeas petitions *before* the State completes a full round" of direct review. *Carey*, 536 U.S. at 220 (finding an equivalent defect in an interpretation of a federal tolling provision that would force inmates to seek federal habeas before collateral review was completed). In this case, for example, petitioner became aware of his lost appeal a year after it was dismissed, and eleven months after his conviction became final under the Fifth Circuit's rule.[16] Even if

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[15] *See*, *e.g.*, *Davis v. State*, 631 S.E. 2d 815, 817 (Ga. App. 2006); *Samarron v. State*, 150 S.W.3d 701, 702 (Tex. App.—San Antonio 2004); *Gonzalez v. State*, 148 S.W.3d 702, 704 (Tex. App. 2004); *Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001); *White v. State*, 916 S.W.2d 78, 82 (Tex. App. 1996); *State v. Carney*, 663 So. 2d 470, 471, 473 (La. Ct. App. 1995); *Duran v. Texas*, 868 S.W.2d 879, 880 (Tex. App. 1993); *Cruz v. State*, 411 S.W.2d 542 (Tex. Crim. App. 1969).

[16] It was not unreasonable for petitioner to think that his appeal might still be pending at that point. Over the 10-year period from 1998 to 2007, the average elapsed time between filing and disposition of a criminal direct appeal in Texas was 10.3 months. State of Texas Office of Court Administration,

he had petitioned for and received a reinstated appeal right away, his federal habeas petition would have been due long before the state courts had an opportunity to rule on his reinstated appeal. Indeed, even when defendants become aware of the loss of their appeals rights immediately, it will be the rare case in which the state appellate process – including not only the briefing, argument and decision in the immediate appeal, but also the filing of petitions for discretionary review in the Court of Criminal Appeals and this Court (not to mention the proceedings in either court if such review were granted) – will run its course before a federal petition is due under the Fifth Circuit's construction of the Act. *See supra* n.17.

The result would be untenable. Federal review of the petition would offend basic principles of comity, for "it would be unseemly in our dual system of

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ANNUAL STATISTICAL REPORT OF THE TEXAS JUDICIARY - FISCAL YEAR 2007, at 29, *available at* http://www.courts.state.tx.us/pubs/AR2007/published-annual-report-2007.pdf. Over 13 percent of direct criminal appeals remain pending for more than 12 months. State of Texas Office of Court Administration, COURT OF APPEALS ACTIVITY DETAIL, *available at* http://www.courts.state.tx.us/pubs/AR2007/coas/4-activity-detail-2007.xls

Yearlong delays are common in criminal appeals in other states as well. For instance, during fiscal year 2002-03 (the last year for which statistics are available), at least half of California criminal appeals took 405 days or more to decide, and at least 10 percent took 676 days or more. Judicial Council of California, 2004 COURT STATISTICS REPORT 19, *available at* www.courtinfo.ca.gov/reference/documents/csr2004.pdf.

government for a federal district court to upset a state court conviction without providing the state courts with an opportunity to correct a constitutional violation." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). At the same time, it would be entirely unfair to dismiss the prisoner's petition for failure to exhaust state remedies when the only reason he was filing it before those remedies were exhausted was because an unnecessarily paradoxical interpretation of what counts as "direct review" compelled him to file prematurely. *See Carey*, 536 U.S. at 220 (rejecting construction of Section 2244(d) that would "produce a serious statutory anomaly" by requiring federal courts "to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations)").

In addition, it is difficult to see how federal review of the defendant's judgment would even be possible while a reinstated appeal remained pending. AEDPA pervasively requires federal habeas courts to defer to the course and result of state proceedings that have, Congress assumed, concluded before federal proceedings take place. For example, the federal court must defer to the factual findings of the state court, 28 U.S.C. § 2254(e)(1), and is limited to deciding whether the defendant is imprisoned on the basis of a "decision that was contrary to, or involved an unreasonable application of clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.

§ 2254(d)(1), (2). In a case like petitioner's, the state appellate courts' only occasion to review the facts and apply "established Federal law" will be during the reinstated appeal. Until that process is complete, there is little for the federal courts to review.

3. Perhaps recognizing that its construction of Section 2244(d)(1)(A) would naturally lead to these untenable results, the Fifth Circuit has held that the granting of a reinstated appeal "tolls AEDPA's statute of limitations" while the reinstated review is ongoing, "but it does not require a federal court to restart the running of AEDPA's limitations period altogether." *Salinas*, 354 F.3d at 430. Under that view, if a defendant discovers the loss of his appeal rights quickly enough, and seeks reinstatement in state court within a year of its forfeiture, he will have some time (although perhaps very little) to file a federal habeas petition at the completion of the state review of his reinstated appeal.

Whatever its pragmatic appeal, this solution is entirely incompatible with the text of the statute. The tolling provision applies only during the period a "properly filed application for State post-conviction or other collateral review . . . is *pending*" (emphasis added). Once the application is finally ruled upon – in this case, by ordering the reinstated appeal as a habeas remedy – the *state habeas petition* (as opposed to the direct appeal) is no longer "pending" and the tolling provision no longer applies. *See Lawrence*, 127 S. Ct. at 1083 (holding that once a habeas petition is conclusively granted or denied, the "application for state postconviction review no longer exists" and, therefore, tolling under Section

2244(d)(2) ends); *Carey*, 536 U.S. at 219-20. A reinstated appeal is the *result* of state collateral review, not a continuation of it. It 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.

In addition, the Fifth Circuit's tolling rule would not apply in states that reinstate appeals outside of habeas. For example, in Montana, defendants denied their right of appeal by the ineffective assistance of their counsel file a motion directly with the state supreme court, rather than commencing a separate collateral proceeding. *Montana v. Tweed*, 59 P.3d 1105, 1109 (Mont. 2002); *see also State v. Trowell*, 739 So. 2d 77, 80 (Fla. 1999); Mich. Ct. R. 7.203(B)(5). There is simply no way to characterize the time spent resolving a reinstated appeal in such a state as "time during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). As a result, even under the Fifth Circuit's strained construction of the federal tolling provision, defendants frequently would be forced to file habeas petitions while their reinstated appeals remained under consideration in states like Montana, Florida, and Michigan. There is no reason to think that Congress intended that result, much less that it intended this intolerable situation to arise in some states but not in others.

B. Treating Reinstated Appeals As Part Of "Direct Review" Ensures That Defendants Have A Fair Opportunity To Vindicate Important Constitutional Rights.

Petitioner's construction of the limitations period also accords appropriate respect for the equally important need to ensure that defendants have a fair opportunity to air their constitutional claims, and to obtain remedies for violations of their constitutional rights.

1. Congress set the federal statute of limitations at one year after the completion of direct review in order to ensure that petitioners would have adequate time to prepare a petition to file in federal court. Because state prisoners have no right to appointed counsel in federal habeas proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), the inmate needs time to either find private counsel (who will then need time to review the inmate's case) or undertake the daunting task of researching and preparing the petition *pro se*. A defendant's need for time to accomplish these tasks is no less when that petition follows a reinstated appeal. Moreover, because AEDPA requires federal habeas courts to defer substantially to the proceedings and findings of the state courts, the contours of a plausible federal habeas claim often cannot be determined until the state process has run its course. Yet, under the Fifth Circuit's view – even accepting its tolling rule – a defendant who has been denied effective assistance of counsel, and lost his right to a direct appeal as a consequence, almost always will have much less time

to research and prepare his federal petition than he would have if the state had complied with its Sixth Amendment obligations in the original proceedings.

Petitioner's construction, on the other hand, is consistent with Congress's determination that a full year should be allowed for a habeas petitioner to prepare his federal petition. The preparation of a federal habeas petition is a complex task, with grave consequences when a defendant fails to get it right. Neither the federal courts, nor the cause of justice, are served by requiring inmates to file federal habeas petitions without adequate time to research, prepare and present their claims.

2. Petitioner's construction of the Act also permits state courts to provide fully effective remedies for the violation of state defendants' right to effective assistance of counsel on direct appeal.

Treating a reinstated appeal as part of direct review allows state courts to place defendants in "'the position they would have occupied in the absence of'" a violation of their right to effective assistance of counsel. *United States v. Virginia*, 518 U.S. at 547 (citation omitted); *see also Radcliff v. Texas*, 126 S.W.3d 534, 536 (Tex. Ct. App. 2003). The defendant regains both his right of direct appeal and the full scope of his federal habeas rights.

On the other hand, under the Fifth Circuit's view, while a state court may be able to reinstate the state direct appeal, it can never fully undo the damage wrought on the defendant's federal habeas rights. Even in the best of circumstances – when a defendant quickly discovers the loss of his right to appeal and

promptly secures its reinstatement – the defendant will lose a portion of the time Congress afforded him to prepare and file his federal habeas petition. But the longer the loss goes undiscovered or uncorrected in state court, the less time the defendant will have to file his federal petition at the conclusion of his direct appeal. And if the defendant does not discover and seek redress for the loss of his appeal rights within a year, he will lose his right to federal habeas entirely.[17]

That is hardly an effective remedy for a constitutional violation. *See McIver*, 307 F.3d at 1331 (noting that if a defendant in such circumstances "were denied the opportunity to bring a collateral challenge after waging the out-of-time appeal, he would not in fact be restored to the position he would have occupied had counsel not abandoned him"); *cf.*

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[17] At least, the Fifth Circuit's interpretation would prevent the state court from securing fully effective relief by reinstating the defendant's lost appeal. Oddly enough, the Fifth Circuit's reading might permit the state court to restore the defendant entirely to his prior position – including recapturing his right to eventual federal habeas review – by ordering a new trial rather than a new appeal. In that circumstance, if re-convicted, the defendant apparently would be entitled to a new appeal and, seemingly, a fresh limitations period for federal habeas review of the direct review of the new conviction. *See* BIO 11-12.

Needless to say, no legitimate purpose is served by putting states in the position of having to choose between a fully effective remedy and the needless expenditure of state resources on a new trial. And there is no reason to believe that Congress intended Section 2244 to operate in such a disrespectful manner.

Smith v. Robbins, 528 U.S. 259, 265 (2000) (noting the states' obligation to adopt appellate procedures that "adequately safeguard a defendant's right to appellate counsel").

There is nothing in the text or legislative history of AEDPA that should lead this Court to believe that Congress intended Section 2244(d) to have this untoward effect. To the contrary, elsewhere in the Act, Congress expressly recognized the importance of effective assistance of counsel and took steps to encourage states to improve representation in criminal proceedings. *See* 28 U.S.C. § 2261(b)-(c).

C. Allowing State Courts To Decide If And When To Allow Reinstated Appeals Does Not Intrude On AEDPA's Interest In Fostering Finality.

Finally, awaiting the decision of the state courts on a reinstated appeal does not unduly infringe upon the state's interest in the finality of its judgments.

1. Under petitioner's reading of Section 2244, the question of how to balance the need for finality and the state's equally important obligation to ensure the fairness and constitutionality of its trials is left entirely in the state's hands. Nothing in AEDPA prohibits a state from establishing and strictly enforcing a single appeals deadline, allowing no exceptions under any circumstances. Nor does the statute preclude states from requiring that requests to reinstate appeals be made within a short and definite time after the expiration of the time to appeal.

At the same time, nothing in AEDPA *requires* a state to enact such measures either. Section 2244 says nothing about how long a state may give a defendant to file a notice of appeal or how long a state court may take to decide it. It is silent about whether states must enact a single deadline for taking an appeal, whether they may permit extensions of time after the initial deadline has passed, or whether the courts may permit reinstated appeals and, if so, under what circumstances and time limits. And it includes no requirement that a state measure the timeliness of the invocation of appellate review by firm deadlines rather than flexible concepts such as reasonableness or laches. *See Carey*, 536 U.S. at 222-23 (noting that California permits appeals taken within a "reasonable time" and that although the "California's timeliness standard is general rather than precise," it still governs for purposes of AEDPA).[18]

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[18] This does not mean, of course, that the theoretical possibility that a court may someday allow a defendant to take a reinstated appeal means that the "expiration of the time for seeking such review" never arrives. 28 U.S.C. § 2244(d)(1)(A). As described above, the law provides a number of circumstances in which the finality of a judgment may be suspended – including, for example, by newly discovered evidence, recognition of a new constitutional right with retroactive application, or the *sua sponte* recall of a mandate – but it is commonly understood that once a judgment has achieved finality under the ordinary rules, it remains final unless and until one of those events occurs. Here, once the time for seeking direct review has elapsed without the defendant seeking further appellate review, the criminal judgment should be considered

This is hardly surprising. A statute enacted to better respect the autonomy and dignity of the State courts could hardly dictate to those courts timetables for deciding cases on direct review. Instead, Congress trusted States to make responsible judgments about the competing needs for finality and the protection of defendants' rights. To paraphrase this Court's statement in *Carey*, "it is the State's interests that the [AEDPA time limitations] seek[] to protect and the State, through its Supreme Court decisions or legislation" can adjust state rules for reinstated appeals "should that prove necessary." 536 U.S. at 223.

2. In any event, there is no reason to believe that the Fifth Circuit's rule is necessary to avoid inundating the federal courts with stale habeas claims.

There is every indication that states have taken seriously their responsibility for establishing reasonable deadlines for the completion of direct review. *See*, *e.g.*, *Orange*, 318 F.3d at 1172 (noting that the court's "review of Oklahoma case law suggests that an application for a direct appeal out of time is rarely granted"). As described above, many states have established determinate limits on the time in which a defendant make seek a reinstated appeal. Most require that the defendant do so within a very short time absent a truly compelling justification. *See supra* n.8. Those that allow

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final unless and until a state court suspends its finality by reinstating a direct appeal.

requests for a longer time often require a substantially greater justification before reinstating an appeal. *See*, *e.g.*, Mont. R. App. Proc. 4(6) (imposing no firm deadline, but providing that reinstatement allowed only in "the infrequent harsh case and under extraordinary circumstances amount to a gross miscarriage of justice").

This is certainly true in Texas. Once fifteen days have passed since the filing deadline, defendants like petitioner can obtain a reinstated appeal only by showing that they were deprived of their appeal by the constitutionally defective performance of counsel. *See*, *e.g.*, *Ex parte Crow*, 180 S.W.3d 135, 137-38 (Tex. Crim. App. 2005). The test for ineffective assistance of counsel is not easy, and the defendant bears the burden of proving it. *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006); *Ex parte Galvan*, 770 S.W.2d 822, 823 (Tex. Crim. App. 1989).

Critically, under Texas law, the State is protected against undue delay by the doctrine of laches, *see Ex parte Carrio*, 992 S.W.2d at 488, which this Court and Congress for many years considered to be a wholly adequate means of protecting state's interests in the finality of their judgments. *See also generally Lonchar v. Thomas*, 517 U.S. 314, 326-28 (1996) (discussing history of habeas time limits in federal system). Moreover, even when delay does not result in the outright dismissal of a defendant's application, "a petitioner's delay in seeking relief can prejudice the credibility of his claim." *Ex parte Galvan*, 770 S.W.2d at 824 (quoting *Ex parte Rocha*, 482 S.W.2d 169, 170 (Tex. Crim. App. 1972)). While respondent has noted the delay in this case, it failed to raise

laches in the state courts or, for that matter, to oppose petitioner's request for reinstatement of his appeal on any ground.[19]

The volume of appeals reinstated by the Texas Court of Criminal Appeals corresponds precisely to the severe crisis in indigent defense that plagued the State for many years. *See generally* Brief of Texas Fair Defense Project and Texas Criminal Defense Lawyers Association. There is, however, reason to hope that recent developments may reduce the need for such relief in the future. In 2001, the Texas legislature passed the Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906, in an effort to overhaul and improve the quality of appointed representation in the State. And more recently, the Texas Court of Criminal Appeals amended its Rules of Appellate Procedure to require, for the first time, that trial courts inform a defendant 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) (added Aug. 20, 2007). *See also* Tex. R. App. P. 25.2(h) (requiring that when a "defendant has a right of appeal, the court shall (orally and in writing) advise the defendant of his right of appeal and of the requirements for timely

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[19] Nor did respondent ever attempt to assert a laches defense in federal court. Accordingly, this Court need not decide in this case whether a defendant's delay in seeking reinstatement of his appeal in state court could provide a basis, outside of Section 2244(d)(1)(A), for denying federal habeas relief.

filing a sufficient notice of appeal"). Prior to this point, state courts had no responsibility for informing defendants of their right to appeal, leaving that task to appointed counsel who sometimes failed in their duty, leading to the need for many reinstated appeals. *See*, *e.g.*, *Ex parte Axel*, 757 S.W.2d 369, 371-75 (Tex. Crim. App. 1988).

CONCLUSION

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

Respectfully submitted,

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June 17, 2008