No. 09-868

In The Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

Petitioner,

v.

KHALIL KHOLI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas corpus petition?

PARTIES TO THE PROCEEDING

Khalil Kholi was the petitioner and appellant in the courts below and is the Respondent in this Court. The Rhode Island Department of Attorney General was, by order of the district court, and on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, the designated respondent and appellee in the courts below, and is the Petitioner in this Court.

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BRIEF FOR PETITIONER

Rhode Island Attorney General Patrick C. Lynch, on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the First Circuit that reversed the United States District Court for the District of Rhode Island's judgment dismissing as time-barred Respondent's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus.

OPINIONS BELOW

The report and recommendation of the United States Magistrate Judge dated December 11, 2007, and entered on December 12, 2007, is not reported. Pet. App. 22-31.[1]

The order of the United States District Court for the District of Rhode Island, dated December 28, 2007, and entered on January 3, 2008, adopting the report and recommendation is not reported. Such order, however, as well as the magistrate judge's report and recommendation, is available at 2008 WL 60194 (D.R.I. Jan. 3, 2008). Pet. App. 21.

The panel opinion of the United States Court of Appeals for the First Circuit, dated September 23,

[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed on January 21, 2010.

2009, is officially reported at 582 F.3d 147 (1st Cir. 2009). Pet. App. 2-20.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit entered on September 23, 2009. Pet. App. 1. The Court of Appeals entered an Order denying a timely motion for rehearing *en banc* on October 20, 2009. Pet. App. 32-33. The Petition For Writ Of Certiorari was filed on January 19, 2010, and granted on May 17, 2010. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND PROCEDURAL RULE INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), in particular, the portion codified at 28 U.S.C. § 2244(d), provides in pertinent part:[2]

[2] Title 28, Section 2244, of the United States Code is set forth in its entirety in the Appendix to the Petition For Writ Of Certiorari. Pet. App. 34-37.

(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.

28 U.S.C. § 2244(d) Pet. App. 36-37.

Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may correct a sentence imposed in an illegal manner and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed, or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. The court shall act on the motion within a reasonable time, provided that any delay by the court in ruling on the motion shall not prejudice the movant. The court may reduce a sentence, the execution of which has been suspended, upon revocation of probation.

R.I.R. Crim. P. 35(a).

STATEMENT OF THE CASE

A Providence County, Rhode Island, petit jury convicted Khalil Kholi on December 15, 1993, of having committed ten counts of first degree sexual assault (in violation of R.I. Gen. Law § 11-37-2) upon

his two stepdaughters. *See State v Kholi*, 672 A.2d 429, 431 (R.I. 1996). The trial justice, on February 28, 1994, cumulatively sentenced Mr. Kholi for these crimes to two sentences of life imprisonment at the Rhode Island Adult Correctional Institutions. *See id.* Almost two years to the day later, on February 29, 1996, the Rhode Island Supreme Court affirmed Mr. Kholi's judgment of conviction on direct appeal. *See id.* at 437. Mr. Kholi neither petitioned the Rhode Island Supreme Court to reargue his appeal, nor this Court for the issuance of a writ of certiorari. Pet. App. 4.

On May 16, 1996, some ten weeks subsequent to the Rhode Island Supreme Court's affirmance of Mr. Kholi's judgment of conviction, Mr. Kholi filed in the Rhode Island Superior Court a "Motion To Reduce Sentence" "in accordance with the provisions of Rule 35 of the Rules of Criminal Procedure of the Superior Court." Joint App. 8-9. That motion was ultimately, after due consideration by a Rhode Island Superior Court Justice, *see State v. Kholi*, 706 A.2d 1326 (R.I. 1998), denied on August 27, 1996, and that denial was, in turn, affirmed on appeal by the Rhode Island Supreme Court on January 16, 1998, in a brief *Order* in which the court held, in most relevant part, that Mr. Kholi's lengthy sentence was "justif[ied]" given "[t]he evidence adduced at trial that [Mr. Kholi] . . . had repeatedly sexually abused his stepdaughters from ages five and seven, into their teens." *State v. Kholi*, 706 A.2d 1326, 1326 (R.I. 1998) (mem.).

On May 23, 1997, while Mr. Kholi's appeal of the Superior Court's denial of his "Motion to Reduce Sentence" was pending, he filed in the Rhode Island Superior Court an application for post-conviction relief ("PCR Application") pursuant to Title 10, Chapter 9.1 of the Rhode Island General Laws, a chapter entitled "Post Conviction Remedy." Joint App. 2. This post-conviction relief action ultimately went to hearing on Mr. Kholi's contention that his judgment of conviction should be vacated because (1) he had received, in derogation of the Sixth Amendment, ineffective assistance of trial counsel, and (2) "newly discovered" evidence revealed that the Superior Court had erroneously excluded from his trial evidence of victim-bias. *See Kholi v. Wall*, 911 A.2d 262, 264-65 (R.I. 2006). Both of these claims were, in due course, rejected by the Superior Court, which entered judgment denying Mr. Kholi's PCR Application on April 23, 2003. *See id.* at 264. The Rhode Island Supreme Court affirmed this judgment on December 14, 2006. *See id.* at 266.

On September 5, 2007, nearly nine months after the Rhode Island Supreme Court affirmed the Superior Court's denial of Mr. Kholi's PCR Application, Mr. Kholi filed in the United States District Court for the District of Rhode Island a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging on a number of grounds his state court judgment of conviction. Joint App. 3. The Attorney General for the State of Rhode Island, on behalf of A.T. Wall, Director of the Rhode Island Department of Corrections, and

as designated respondent, moved to dismiss Mr. Kholi's habeas corpus petition on the ground that it was barred by the one-year limitations period in 28 U.S.C. § 2244(d)(1).[3] Joint App. 3; Pet. App. 5.

On December 12, 2007, the United States Magistrate Judge to whom the district court referred the State's motion to dismiss, submitted a report and recommendation recommending the dismissal of Mr. Kholi's habeas petition with prejudice. Pet. App. 5. The magistrate judge determined that, since more than eleven years elapsed between the date on which Mr. Kholi's state court convictions became final – May 28, 1996,[4] and the date on which Mr. Kholi filed the

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[3] Title 28, Section 2244(d)(1) of the United States Code provides, in relevant part, 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. The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

[4] Since the Rhode Island Supreme Court affirmed Mr. Kholi's judgment of conviction on February 29, 1996, his judgment of conviction became "final" pursuant to § 2244(d)(1) ninety days later, on May 28, 1996, when his time for filing a petition for writ of certiorari with this Court elapsed. *See Jimenez v. Quarterman*, 355 U.S. ___, 129 S. Ct. 681, 685, 172 L. Ed. 2d 475 (2009); Sup.Ct. R. 13 (indicating that a party has ninety days from entry of judgment in which to request a petition for a writ of certiorari).

The magistrate judge had actually determined that Mr. Kholi's judgment of conviction became final on June 12, 1996, fifteen days later than it actually did (*see* Pet. App. 25). This

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habeas petition – September 5, 2007, Mr. Kholi's petition would be time-barred unless the limitations period had been sufficiently tolled. Pet. App. 6. There was no dispute that Mr. Kholi's 1997 PCR Application tolled the limitations period from May 23, 1997, when Mr. Kholi filed it in the Rhode Island Superior Court, until December 14, 2006, when the Rhode Island Supreme Court affirmed the Superior Court's denial of Mr. Kholi's PCR Application;[5] nor was there any dispute that if Mr. Kholi's "Motion To Reduce Sentence" did not also toll the limitations period from the date on which Mr. Kholi filed it – May 16, 1996, until the date on which he filed the PCR Application – May 23, 1997, Mr. Kholi's habeas petition would be untimely. Pet. App. 7.

The magistrate judge, embracing the holdings of three federal circuit courts of appeals, *see Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008); *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007); *Walkowiak v. Haines*, 272 F.3d 234, 239

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miscalculation was predicated on the mistaken premise, suggested by the State, that the time for seeking a writ of certiorari began to run only after the expiration of the period Mr. Kholi had to seek re-argument of his direct appeal in the Rhode Island Supreme Court. Of course, the fifteen-day difference between the May 28, 1996, and June 12, 1996, dates has no impact on the timeliness of Mr. Kholi's habeas petition.

[5] A habeas petitioner is not entitled to further statutory tolling for the period available to file a petition for writ of certiorari to this Court following state collateral review, even if the petition for writ of certiorari is actually filed. *Lawrence v. Florida*, 549 U.S. 327, 333-34 (2007).

(4th Cir. 2001), and rejecting as "unpersuasive" the contrary reasoning of a fourth, *see Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006), concluded that Mr. Kholi's "Motion under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure was *not* a 'properly filed application for post-conviction or other collateral review' under 28 U.S.C. § 2244(d)(2), and therefore did not toll the limitations period." Pet. App. 30 (emphasis in original). The magistrate judge explained as follows:

> When a prisoner in State custody opts to file a motion that is a plea for leniency, the State is not being asked to correct legal errors. Whatever interest the State has in deciding the motion, its interest is not one in correcting errors before the Federal Courts assume jurisdiction. Moreover, if this Court was to hold that the Rule 35(a) Motion has the effect of tolling the limitations period of 28 U.S.C. § 2244(d)(1), it would create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic.

Pet. App. 30.

The district court accepted, over Mr. Kholi's objection, the magistrate judge's report and recommendation, and dismissed with prejudice Mr. Kholi's habeas petition. Pet. App. 23. Judgment for the State entered that same day. *Id.*

On August 22, 2008, the United States Court of Appeals for the First Circuit granted Mr. Kholi's *pro se* application for a certificate of appealability, and

invited further briefing on the following issue: "Whether a post-conviction motion to reduce sentence, that seeks merely discretionary leniency and does not challenge the legality of the sentence or conviction, acts as a state tolling mechanism under 28 U.S.C. § 2244(d)(2)." Joint App. 3; Pet. App. 6.

Following full briefing and oral argument by the parties,[6] a panel of the First Circuit, on September 23, 2009, reversed the district court's determination that Mr. Kholi's Rule 35 motion did not preserve the timeliness of his federal habeas corpus petition. *See Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009).[7] Although

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[6] The First Circuit's August 22, 2008, Order granting the certificate of appealability had also directed the clerk's office to appoint the Federal Public Defender's Office to represent Mr. Kholi before it. Joint App. 3; Pet. App. 6.

[7] Before reaching the Rule 35 tolling question, the panel took up Mr. Kholi's argument, not advanced by him in the district court, that a *second* post-conviction relief application he had filed, on October 18, 2005, in the Rhode Island Superior Court (Joint App. 2) – some fourteen months prior to the Rhode Island Supreme Court's December 14, 2006, affirmance of the Rhode Island Superior Court's denial of Mr. Kholi's *first* PCR Application – as well tolled the one-year limitations period, thus making Mr. Kholi's federal habeas corpus application timely, irrespective of tolling for his Rule 35 motion. Rejecting this alternate tolling contention, the *Kholi* panel determined that because the second post-conviction relief application merely challenged the State of Rhode Island's calculation of Mr. Kholi's parole eligibility date, it was not "directed to 'the pertinent judgment or claim,'" and, so, was "devoid of any effect on the limitations period within which [Mr. Kholi] . . . had to seek federal habeas relief." (*Kholi*, 582 F.3d at 151 (*quoting* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application

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the panel "agree[d] with the district court's characterization of [Mr. Kholi's] . . . Rule 35(a) motion as a plea for leniency, simpliciter" that in no way "challenge[d] the *legality* of the sentence," *Kholi*, 582 F.3d at 152-53 (emphasis in original), and (citing to *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d at 1297; *Hartmann v. Carroll*, 492 F.3d at 483-84; and *Walkowiak v. Haines*, 272 F.3d at 239) acknowledged that the district court's "view" had "impressive support in the case law," the panel nevertheless determined that "State post-conviction or other collateral *review*" was *not* "limit[ed] . . . to motions that *challenge the legal* basis of the pertinent judgment," *Kholi v. Wall*, 582 F.3d at 153 (emphasis added). "[W]e deem it significant," the panel continued, that:

> [I]n drafting section 2244(d)(2), Congress employed the expansive term "review" instead of a more confining term (such as "challenge"). The latter terminology would have been a natural fit had Congress wished to focus the tolling provision more narrowly.
>
> In contrast, "review" commonly denotes "a looking over or examination with a view to amendment or improvement." Webster's Third New International Dictionary 1944 (2002); *see also* Black's Law Dictionary 1345 (8th ed. 2004) (defining "review" as the

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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.") (emphasis added)).

> "[c]onsideration, inspection, or reexamination of a subject or thing"). Taking into account this quotidian understanding, it seems self-evident that a motion for a sentence reduction in the nature of a plea for discretionary leniency is a motion that seeks post-conviction "review" of a sentence and, thus, is a motion that falls squarely within the plain meaning of section 2244(d)(2).

Kholi, 582 F.3d at 153.

The panel then addressed the contrary determination reached by three of its sister circuits,[8] beginning with the Fourth Circuit's *Walkowiak* opinion, in which the court had read the phrase "State post-conviction or *other* collateral review" (§ 2244(d)(2) (emphasis added)) to mean that "the applicable one-year statute of limitations is tolled only for state *collateral*, post-conviction review." *Walkowiak*, 272 F.3d at 236 (emphasis in original). Because the West Virginia sentence-reduction motion at issue in *Walkowiak* (1) was "part and parcel of the original [sentencing] proceeding," and (2) did not "entail a *challenge to the legality* of the earlier proceeding or judgment," the Fourth Circuit concluded "that such a proceeding is not 'collateral' within the meaning of § 2244(d)(2) and therefore that the one-year statute of

[8] Although not discussed, the *Kholi* panel, at 582 F.3d at 152, did reference the Tenth Circuit's *per curiam* opinion in *Robinson v. Golder*, 443 F.3d at 720-21, in which the court held that a sentence-reduction motion filed under Colorado law did toll the AEDPA's one-year limitations period.

limitations period in that provision is not tolled during the pendancy of such proceeding." *Walkowiak*, 272 F.3d at 237-39 (emphasis added).

Disagreeing with this analysis, the *Kholi* panel stated that by "[c]onflating the two halves of the phrase 'State post-conviction or other collateral review' to mean exclusively 'collateral, post-conviction review,'" the Fourth Circuit had "read . . . the word 'or' completely out of the statute." *Kholi*, 582 F.3d at 153-54. Reading § 2244(d)(2) properly, the *Kholi* panel continued, permits tolling for even *non*-collateral state court post-conviction applications. *Kholi*, 582 F.3d at 154. Concluding its critique of the *Walkowiak* line of reasoning, the *Kholi* panel determined that whether or not Mr. Kholi's sentence reduction motion was collateral, it qualified as an "application for State post-conviction . . . review."[9] *Id.*

Turning to the Third Circuit's decision in *Hartmann*, holding that "a plea for leniency, directed toward the sentencing court, . . . seek[ing] discretionary relief based on mercy and grace, rather than on the law" was not a "State post-conviction or other collateral review" application, *Hartmann*, 492 F.3d at 483, and the Eleventh Circuit's decision in *Alexander*, holding that a sentence reduction motion that only

[9] Because the *Kholi* panel held that Mr. Kholi's Rule 35 motion was (whether collateral or not) an application for "State post-conviction . . . review" (§ 2244(d)(2)), it had no need to determine whether such motion also qualified as "other collateral review[.]" *Kholi*, 582 F.3d at 154 n.6.

"request[s] leniency from the sentencing court based on mitigating circumstances," is not an "application for State post-conviction or other collateral review," *Alexander*, 523 F.3d at 1295, the *Kholi* panel explained that it could not subscribe to the policy-based reasons advanced in those decisions, because tolling during the time in which a state prisoner pursues even a purely discretionary sentence-reduction motion presents no "insult" to the AEDPA's "exhaustion requirement," and advances the AEDPA's concern that federal habeas corpus review take place only upon the conclusion of the state direct and collateral review process. *Kholi*, 582 F.3d at 154-56; Pet. App. 14-18.

The First Circuit concluded its opinion by reiterating its holding "that a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of 28 U.S.C. § 2244(d)(2)." *Kholi*, 582 F.3d at 156. As a consequence, the *Kholi* panel reversed the district court's order of dismissal and remanded the case for further proceedings. *Id.*

The Court of Appeals denied the Attorney General's motion for rehearing and rehearing *en banc* on October 20, 2009. Pet. App. 32. This Court granted Certiorari on May 17, 2010.

SUMMARY OF THE ARGUMENT

Title 28, Section 2244(d)(2) of the United States Code provides that the one-year limitations period, applicable to petitions for federal habeas corpus filed pursuant to 28 U.S.C. § 2254, is tolled by the submission in state court of "a properly filed application for State post-conviction or other collateral review." The question presented is whether a state court sentence-reduction motion consisting of a plea for leniency constitutes such a tolling application.

This Court should hold that a motion for discretionary sentence reduction does not qualify as an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2). The plain language of this statute establishes that only state applications seeking "collateral review" of judgments of criminal conviction or sentence toll the one-year limitations period of 28 U.S.C. § 2244(d)(1). As for the meaning of State "collateral review" applications, the consistent manner in which this Court has employed the term "collateral review" in its decisions, the established meaning that the term *federal* collateral review has, and the way Congress used the term in other subsections of § 2244, establish that Congress understood and intended applications for "collateral review" to refer only to state court filings that challenge and/or otherwise seek to invalidate a final judgment of conviction or sentence.

This interpretation of § 2244(d)(2), confining "collateral review" applications to those that challenge the validity of an already final judgment of conviction

or sentence, most appropriately balances and advances the sometimes competing interests that the AEDPA is intended to promote – finality of state court judgments, and exhaustion of state court remedies – and properly accounts for why Congress employed the expansive phrase "State post-conviction or other collateral review" in the first place. This construction of the phrase, as well, finds broad support in the decisions of the United States Courts of Appeals.

Accordingly, the First Circuit's dictionary-predicated interpretation of § 2244(d)(2), to provide tolling for essentially *any* properly filed application that requires a state court to "look at" a judgment of conviction or sentence, is irreconcilable with the intended meaning of "collateral review," and otherwise undermines the interests that the AEDPA is designed to advance. Tolling the AEDPA's limitations period for discretionary sentence-reduction motions, then, undermines the interest in the finality of state court judgments, while doing no service to the exhaustion of state remedies doctrine.

Accordingly, this Court should reverse the decision of the United States Court of Appeals for the First Circuit, which vacated the district's court's dismissal of Mr. Kholi's petition for writ of habeas corpus.

ARGUMENT

I. The Phrase "Application For State Post-Conviction Or Other Collateral Review" In 28 U.S.C. § 2244(d)(2) Was Meant To Refer Only To State Applications That Seek To Invalidate Or "Attack" An Otherwise Final Judgment Of Conviction Or Sentence.

"In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction." *Mayle v. Felix*, 545 U.S. 644, 654 (2005). This "tight time line," "enacted . . . to advance the finality of criminal convictions," consists of "a one-year limitation period ordinarily running from '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)."[10] *Mayle*, 545

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[10] Title 28, Section 2244(d)(1), of the United States Code, in its entirety provides:

> (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;

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U.S. at 662. This one-year limitations period is tolled, however, 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 . . . " 28 U.S.C. § 2244(d)(2).

The issue before the Court is whether a state court sentence-reduction motion consisting of a plea for leniency constitutes an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), so as to toll the one-year time period a state prisoner has, from when his or her judgment of conviction becomes final, to file a federal habeas corpus petition.

"The starting point for [this Court's] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739 (1989). Readily apparent from the plain language of § 2244(d)(2), is that "post-conviction . . . review" is one

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> (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.

With respect to capital cases, Congress enacted a separate, shorter limitations period, which may be invoked upon a determination that a capital-sentencing state has met certain appointment-of-counsel prerequisites. *See* 28 U.S.C. §§ 2261, 2263.

type of "collateral review." The use of the correlative adjective "other" before "collateral review" serves to link "post-conviction . . . review" with the term "collateral review," such that "post-conviction . . . review" must be interpreted as one species, a particular kind or denomination, of "collateral review." Moreover, the disjunctive/conjunction "or," when coupled with the correlative adjective "other," even more strongly indicates that "an application for State post-conviction . . . review" is *one* type of application for State "collateral review." *See Malcom v. Payne*, 281 F.3d 951, 958 (9th Cir. 2002) ("[W]e know that the statute – by referring to '*other* collateral review' (emphasis added) – uses the term 'State post-conviction . . . review' as simply one type of 'collateral review.'") (emphasis in original); *Walkowiak*, 272 F.3d at 236 ("[U]nder the plain language of section 2244(d)(2) – 'State post-conviction or *other* collateral review' (emphasis added) – the applicable one-year statute of limitations is tolled only for state collateral, post-conviction review.") (second emphasis deleted) (*citing Duncan*, 533 U.S. at 176-77).

While the plain language of § 2244(d)(2) indicates that "post-conviction . . . review" is one type of "collateral review," the statute does not specifically define what the term "collateral review" itself means. *See Pace v. DiGuglielmo*, 544 U.S. 408, 421 (2005) ("The

words 'properly filed application for . . . collateral review' are not defined in AEDPA.").[11] There are a number of reasons, however, why the term "collateral review" should be interpreted to mean a proceeding at which a state prisoner seeks to upset an otherwise final judgment of conviction or sentence.

First, it is "a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the

[11] Indeed, because § 2244(d)(2)'s operative words are left undefined, this Court has had to resolve a number of questions regarding their meaning. *See Artuz v. Bennett*, 531 U.S. 4 (2000) (holding that state post-conviction or other collateral review application is "*properly* filed" when its delivery and acceptance are in compliance with the applicable state laws and rules governing filings, and that state post-conviction or other collateral review application containing procedurally barred state law claims may nonetheless be deemed "properly filed") (emphasis added); *Duncan v. Walker*, 533 U.S. 167 (2001) (holding that *federal* habeas corpus application is not "application for . . . *other* collateral review") (emphasis added); *Carey v. Saffold*, 536 U.S. 214 (2002) (deciding that the word "pending" as used in § 2244(d)(2) covers the time between a lower state court's post-conviction or other collateral review decision, and the filing of a notice of appeal to a higher state court); *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) (holding that state post-conviction petition that is rejected by state court as untimely under state statute of limitations, does not constitute a "*properly* filed" state post-conviction or other collateral review application) (emphasis added); *Lawrence v. Florida*, 549 U.S. 327 (2007) (deciding that "application for State post-conviction or other collateral review" is not "pending" while this Court considers a state prisoner's certiorari petition).

established meaning of these terms.'" *Neder v. United States*, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322 (1992)).[12] In enacting § 2244(d)(2), it must be presumed that Congress was fully aware that when this Court used the term "collateral review" with respect to a state court proceeding, it did so, uniformly and evidently, to mean a collateral proceeding that *challenges* the

[12] *See also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("It is not only appropriate but also realistic to presume that Congress was thoroughly familiar with our precedents . . . and that it expects its enactments to be interpreted in conformity with them.") (internal quotation marks and brackets omitted); *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("Though dictionaries sometimes help in [determining the meaning of statutory terms] . . . , we believe it more important here to look to the common law, which, over the years, has given to [such] terms . . . a legal meaning to which, we normally presume, Congress meant to refer."); *Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.") (internal quotation marks omitted); *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("The Court acknowledges, as it must, the doctrine that when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs."); *United States v. Arizona*, 295 U.S. 174, 189 (1935) ("When the Recovery Act was passed, the phrases 'adopted by the Congress' and 'recommended by the Chief of Engineer,' when used in acts of Congress relating to river and harbor improvements, had well-understood and definite technical meanings."); *Smith v. Bowersox*, 159 F.3d 345, 347 (8th Cir. 1998) ("When Congress elects to use terminology that has become commonplace in court decisions in a particular field of law, the rules of statutory construction call for us to define the statute's terms in harmony with that accepted judicial meaning.").

lawfulness of a prior judgment of conviction or sentence. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 739, 755, (1991) (using term "collateral review" to refer to state court proceeding at which a federal habeas corpus claim may be raised, and stating that "state *collateral review* is the first place a prisoner can present a *challenge* to his conviction") (emphasis added); *Schad v. Arizona*, 501 U.S. 624, 628-29 (1991) ("Petitioner was convicted and sentenced to death, but his conviction was set aside on *collateral review*.") (emphasis added); *Parker v. Dugge*, 498 U.S. 308, 311 (1991) ("Parker pursued state *collateral review* without success, and then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida.") (emphasis added); *Jones v. Barnes*, 463 U.S. 745, 748 (1983) ("[R]espondent filed two more *challenges* in state court," one of which was "a motion in the trial court for *collateral review* of his sentence.") (emphasis added); *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974) (listing, among the available state procedures that could be used to remedy "*wrongful* [prosecutorial] conduct," state "post-conviction *collateral review*") (emphasis added); *Engle v. Isaac*, 456 U.S. 107, 124 n.28 (1982) (noting that "Respondents . . . long ago completed their direct appeals," and that "Ohio, moreover, provides only limited *collateral review* of convictions[.]") (emphasis added); *Castille v. Peoples*, 489 U.S. 346, 348 (1989) (Court would not "mandate *recourse* to *state collateral review*") (emphasis added); *Murray v. Carrier*, 477 U.S. 478, 481 (1986) (referring to "state habeas corpus" proceeding as "collateral review"); *Shea v. Louisiana*, 470 U.S. 51, 58 n.4 (1985) (referring to

state court that "should *rectify* the [constitutional trial] *error*" as "court conducting *collateral review*") (emphasis added); *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("On state *collateral review*, the trial court denied *relief*, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence.") (emphasis added); *Lockhart v. Nelson*, 488 U.S. 33, 36 (1988) ("State courts *upheld* the enhanced sentence on both direct and *collateral review*") (emphasis added); *Florida v. Burr*, 496 U.S. 914, 915 (1990) (Stevens, J., dissenting) ("Thereafter, in state *collateral review* proceedings, respondent sought to *set aside* his conviction[.]") (emphasis added); *Wainwright v. Sykes*, 433 U.S. 72, 115 (1977) (Brennan, J., dissenting) ("The federal criminal system . . . relies on the belated *correction of error*, through appeal and *collateral review*, to ensure the fairness and legitimacy of the criminal sanction.") (emphasis added); *Rector v. Bryant*, 501 U.S. 1239, 1243 n.2 (1991) (Marshall, J., dissenting) ("For if a prisoner is incapable of recognizing or communicating facts that would facilitate *collateral review*, there is no reason to assume that *collateral review* in his case has rooted out all trial *errors*.") (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (Powell, J., concurring in part and concurring in the judgment) (with regard to the execution of the criminally insane, "[m]odern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both *state* and federal *collateral review*") (emphasis added).

Given, then, that this Court, prior to the AEDPA's enactment, had repeatedly used, in the context of state court proceedings, the term "collateral review" to mean established state court vehicles for challenging judgments of conviction or sentence,[13] Congress should be presumed to have intended that meaning in drafting § 2244(d)(2).[14] *See Panetti v.*

[13] Indeed, *since* the enactment of the AEDPA, this Court has continued to use the term "collateral review" in precisely this same way. *See, e.g., Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (stating that there is "no . . . rule of federal law" which "limits state *collateral review* courts' authority to provide *remedies for federal constitutional violations*") (emphasis added); *Smith v. Texas*, 550 U.S. 297, 300 (2007) ("Smith, on state *collateral review*, continued to *seek relief* based on the inadequacy of the special issues, arguing that the nullification charge had not *remedied* the problem identified in his pretrial objection.") (emphasis added); *Evans v. Chavis*, 546 U.S. 189, 192 (2006) ("California, however, has a special system governing appeals when prisoners seek *relief* on *collateral review*.") (emphasis added); *Daniels v. United States*, 532 U.S. 374, 382 (2001) (referencing state "collateral review" as avenue to challenge a prior conviction); *Lindh v. Murphy*, 521 U.S. 320, 323 (1997) (stating that Lindh had not pursued his "Confrontation Clause" "claim[ ]" on "state *collateral review*") (emphasis added).

[14] Further confirmation is found in the fact that this Court has repeatedly referred to State "post-conviction review" – a species of collateral review (*supra* at 18-20) – to, as well, mean an established state court collateral vehicle for challenging judgments of conviction or sentence. *See, e.g., Polk County v. Dodson*, 454 U.S. 312, 324 (1981) (noting that Iowa's "postconviction review" vehicle is among the "burgeoning . . . postconviction *remedies*," and that such vehicle affords "the extension of legal assistance") (emphasis added); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (discussing the raising of legal issues, in North Carolina, pursuant to "post-conviction review" provision); *Wainwright v. Witt*, 469 U.S. 412, 415 (1985) (referencing Florida state prisoner's

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Quarterman, 551 U.S. 930, 943-44 (2007) ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the . . . AEDPA[.]").

Second, it is well established that the term "collateral review" in the *federal* context, be it a challenge by a *state* prisoner in a § 2254 action, or a *federal* prisoner seeking relief in a § 2255 proceeding, means, by its very nature, an *attack* upon an otherwise final judgment – indeed, not just any attack, but one premised on lack of jurisdiction, constitutional error, or an error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice. *See United States v. Timmereck*, 441 U.S. 780, 783-84 (1979); *Hill v. United States*, 368 U.S. 424, 428 (1962); 28 U.S.C. § 2254 (predicating, in relevant part, federal habeas corpus relief on "ground that [state prisoner] . . . is in custody in violation of the

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unsuccessful effort to challenge his first-degree murder conviction in state "postconviction review" proceeding); *Murray v. Carrier*, 477 U.S. 478, 490 (1986) (discussing requirement that a Virginia state convict "raise his *legal claims* on appeal rather than on postconviction review") (emphasis added); *Pennsylvania v. Finley*, 481 U.S. 551, 557-59 (1987) (referencing Pennsylvania "postconviction review" proceeding at which "State chooses to offer help to those *seeking relief* from convictions") (emphasis added); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (discussing procedural default with respect to the raising of constitutionally cognizable claims in Florida "postconviction review" proceeding); *Victor v. Nebraska*, 511 U.S. 1, 18-19 (1994) (referencing the "postconviction review" undertaken by the Nebraska Supreme Court on a due process challenge to a jury instruction).

Constitution"); 28 U.S.C. § 2255 (remedy for "prisoner . . . under [federal] sentence" to challenge conviction or sentence on constitutional or jurisdictional grounds).[15] "[H]abeas corpus always has been a collateral remedy, providing an avenue for *upsetting* judgments that have become otherwise final." *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (emphasis omitted and added). Given this well-recognized definition of *federal* "collateral review," it would be incongruous to posit that Congress intended to define *state* "collateral review" differently when employing precisely that same term in § 2244(d)(2).

[15] *See also United States v. Addonizio*, 442 U.S. 178, 184-85 (1979) ("When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and *collateral review*. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.") (footnotes omitted; emphasis added); *Stone v. Powell*, 428 U.S. 465, 478 n.10 (1976) ("Even those nonconstitutional claims that could not have been asserted on direct appeal can be raised on [§§ 2254, and 2255] *collateral review* only if the alleged error constituted a fundamental defect which inherently results in a complete miscarriage of justice.") (emphasis added) (internal quotation marks omitted); *Costarelli v. Massachusetts*, 421 U.S. 193, 199 (1975) ("habeas corpus is traditionally thought of as a 'collateral attack' on a judgment of conviction."); *Engle v. Isaac*, 456 U.S. 107, 126 (1982) ("[*c*]*ollateral review* of conviction" referred to as "the Great Writ" of habeas corpus) (emphasis added).

Indeed, since this Court speaks of *state* "collateral review" in the same sense as that term's established *federal* meaning (*see supra*, at 22-24),[16] it is that much

[16] *See also Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004) ("Beyond that, there exists both *state and federal collateral review*. *See* Mich. Rule Crim. Proc. 6.500 (2004); 28 U.S.C. § 2254.") (emphasis added); *Danforth v. Minnesota*, 552 U.S. 264, 300 (2008) ("[T]he reasons the . . . Court provided for adopting Justice Harlan's view apply to *state as well as federal collateral review.*") (emphasis added); *Withrow v. Williams*, 507 U.S. 680, 686 (1993) (referring to federal habeas corpus review as "collateral review"); *Swain v. Pressley*, 430 U.S. 372, 375, 377-78 (1977) (describing § 2255 as establishing a "procedure for collateral review of federal convictions[,]" and the District of Columbia's § 2255-like provision as "a procedure for *collateral review* of convictions") (emphasis added); *Loper v. Beto*, 405 U.S. 473, 479 n.6 (1972) (referring to § 2254 federal habeas corpus court as conducting "second-level *collateral review* of [state court] judgments of conviction") (emphasis added); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-51 (2006) (referring to "federal habeas corpus cases" as "*collateral review*") (emphasis added); *Saffle v. Parks*, 494 U.S. 484, 487 (1990) (as "Parks petitions the federal courts for a writ of habeas corpus[,] . . . he is before us on *collateral review*") (emphasis added); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-53 (1986) (§ 2254 action referred to as "federal collateral review," available to state prisoner launching "collateral attack [ ]" upon conviction); *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 508 (1982) ("Petitioner seeks habeas corpus *collateral review* by a federal court of the Pennsylvania decision. Her application was filed under 28 U.S.C. § 2254(a).") (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (Powell, J., concurring in part and concurring in the judgment) ("Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both *state and federal collateral review*.") (emphasis added). *And see* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas

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more evident that Congress had that established federal meaning in mind in enacting § 2244(d)(2) of the AEDPA.[17]

Third, the context in which Congress used the term "collateral review" in two other parts of § 2244, evidences its intent to define the term as a vehicle for challenging a judgment of conviction or sentence. Section 2244(b)(2)(A) provides that a "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court, that was previously unavailable." *Id.* (emphasis added).[18] In a

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Corpus in Capital Cases, Committee Report and Proposal 5 (Aug. 23, 1989) ("The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true *both during state and federal collateral review.*") (emphasis added).

[17] Moreover, the term "collateral review," with its established federal meaning, was used by Congress as early as 1970, in the context of the Attorney General's record-keeping responsibilities, in 18 U.S.C. § 3662. *See* P.L. 91-452-Oct. 15, 1970; 84 Stat. 948-952, Sec. 1001. That Congress used this same term, with its established federal meaning some twenty-six years prior to the enactment of the AEDPA, is further evidence that "collateral review" was used by Congress in § 2244(d)(2) to mean a state court proceeding which seeks to invalidate a judgment of conviction or sentence.

[18] Title 28, Section 2253, of the United States Code, creates a functionally identical requirement for federal prisoners.

similar vein, § 2244(d)(1)(C) provides that one of the dates from which the one-year limitations period begins to run is "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*." *Id.* (emphasis added).[19] These subsections of § 2244, as well as 28 U.S.C. § 2254(e)(2)(A)(i) (providing for an evidentiary hearing in a § 2254 action in the case of a "previously unavailable" "new rule of constitutional law, made retroactive to cases on *collateral review*") (emphasis added),[20] indicate that a state or federal "collateral review" proceeding is one in which those "constitutional law[s] . . . made retroactive . . . by the Supreme Court" *may be* raised. The corollary is that a proceeding that does *not* allow for the channeling of retroactively applied constitutional law claims, is not a "collateral review" proceeding within the meaning of these subsections of § 2244. Since Congressional intent may be ascertained "by looking to [a] tolling provision's statutory neighbors," *Duncan*, 533 U.S. at 187

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[19] Title 28, Section 2253, of the United States Code, contains a similarly worded provision, applicable to federal prisoners.

[20] *See also* 28 U.S.C. § 2254(e)(2)(A)(i) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court, that was previously unavailable[.]") (emphasis added).

(Breyer, J., dissenting), that other subsections of § 2244 conceive "collateral review" to mean a proceeding at which the constitutional validity of a conviction may be challenged, also indicates that Congress similarly conceived of § 2244(d)(2).

Given the above three reasons indicating that the phrase "application for State post-conviction or other collateral review" refers only to state applications that seek to invalidate or attack a final judgment of conviction or sentence, it is unsurprising that this reading of § 2244(d)(2) finds substantial support in decisions of the circuit courts of appeals. *See*, *e.g.*, *Streu v. Dormire*, 557 F.3d 960, 965 (8th Cir. 2009) (in considering "whether a motion to reopen state post-conviction proceedings in Missouri is an 'application for State post-conviction or other collateral review,'" Court inquires as to whether such motion was 'designed to further the ultimate goal of gaining collateral *relief from the judgment of conviction*.") (emphasis added); *Harrelson v. Swan*, 2010 WL 2340827, at *2 (5th Cir. June 10, 2010) (because "nunc pro tunc proceedings" do not call into question "[t]he *propriety* of the original judgments through judicial reexamination," such proceeding "did not constitute 'other collateral review' of . . . conviction and did not toll the limitations period."); *Godfrey v. Dretke*, 396 F.3d 681, 686 (5th Cir. 2005) ("The important issue is whether Godfrey's October 2001 state habeas applications challenging the expired convictions constitute *attacks* on the 'pertinent judgment or claim.'") (emphasis added); *Sindar v. Turley*,

2009 WL 2734661, at *2 (10th Cir. Aug. 28, 2009) (As "Mr. Sindar's state filings . . . did not *challenge* his conviction or sentence," they did not toll the one-year limitations period) (emphasis added); *Davis v. Barrow*, 540 F.3d 1323, 1324 (11th Cir. 2008) (because "Davis's Georgia state motion to reconsider his sentence . . . did not raise any *legal arguments* or otherwise *attack the legality of his sentence,*" "the one-year statute of limitations was not tolled") (emphasis added); *Alexander*, 523 F.3d at 1298 ("motion . . . which raised no challenge of *legal error* whatsoever . . . is not a tolling motion.") (emphasis added); *Banjo v. Ayers*, 2010 WL 2403751, at *3 (9th Cir. June 17, 2010) ("Only the time period during which a round of habeas review is pending tolls the statute of limitation; periods between different rounds of collateral *attack* are not tolled.") (emphasis added); *Hartmann*, 492 F.3d at 483-84 (no § 2244(d)(2) tolling for "a state court proceeding that is not *attacking the lawfulness* of the conviction or sentence.") (emphasis added); *Walkowiak*, 272 F.3d at 239 (because the sentence reduction motion at issue did "not entail a *legal challenge* to the original sentence, we hold that . . . the one-year statute of limitations period of that provision is not tolled[.]") (emphasis added); *contra Kholi*, 582 F.3d at 153-54. *See also* 1 J. Liebman & R. Hertz, *Federal Habeas Practice and Procedure* § 5.2(b) at 265 n.56 (5th ed. 2005) (stating that the circuit courts of appeals have made "clear that tolling is appropriate, without regard to the nature of the claims in the state pleading, as long as the state application *challenged* the 'pertinent judgment.'") (emphasis added).

Finally, that the term State "collateral review," as used in § 2244(d)(2), denotes, as does federal "collateral review," an attack or challenge to a judgment of conviction or sentence, is supported by the most evident reason Congress chose to employ the expansive phrase "State post-conviction or other collateral review" in the first place: to comprehend the variously denominated collateral review vehicles employed by the fifty states, vehicles which conventionally provide for collateral *challenge* to a final judgment of conviction. This Court stated in *Duncan v. Walker*, 533 U.S. 167, 177 (2001):

> Congress also may have employed the construction "post-conviction or other collateral" in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction. In some jurisdictions, the term "post-conviction" may denote a particular procedure for review of a conviction that is distinct from other forms of what conventionally is considered to be post-conviction review. For example, Florida employs a procedure that is officially entitled a "Motion to Vacate, Set Aside, or Correct Sentence." Fla. Rule Crim. Proc. 3.850 (2001). The Florida courts have commonly referred to a Rule 3.850 motion as a "motion for post-conviction relief" and have distinguished this procedure from other vehicles for collateral review of a criminal conviction, such as a state petition for habeas corpus. See, *e.g., Bryant v. State,* 780 So.2d 978, 979

> (Fla.App.2001) ("[A] petition for habeas corpus cannot be used to circumvent the two-year period for filing motions for post-conviction relief"); *Finley v. State,* 394 So.2d 215, 216 (Fla.App.1981) ("[T]he remedy of habeas corpus is not available as a substitute for post-conviction relief under Rule 3.850"). Congress may have refrained from exclusive reliance on the term "post-conviction" so as to leave no doubt that the tolling provision applies to all types of state collateral review available after a conviction and not just to those denominated "post-conviction" in the parlance of a particular jurisdiction.

Congress, then, by employing, after the more limited term "post-conviction . . . review," the broad term "collateral review," obviated the need to catalog the numerous and varied state court vehicles for effectuating collateral relief – vehicles commonly denominated as habeas corpus, post-conviction relief, *coram nobis*, or motion to vacate sentence.[21] *See*

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[21] In Rhode Island, for example, the recognized statutory vehicle for collaterally attacking a judgment of conviction is the "Post Conviction Remedy," R.I.G.A. § 10-9.1-1, et seq. There are, however, other vehicles that may be used to collaterally challenge a Rhode Island prisoner's conviction or incarceration. *See* R.I.G.L. § 10-9-1, *et seq*. ("Habeas Corpus"). *See also Estate of Sherman v. Almeida*, 610 A.2d 104, 106-07 (R.I. 1992) (discussing the availability of the writ of error *coram nobis*).

And while Rhode Island's "Post Conviction Remedy" tracks the Uniform Post-Conviction Procedure Act (*see generally* L. Yackle, *Postconviction Remedies*, § 1:12, at 51-54) many states use altogether different collateral vehicles to channel challenges to a judgment of conviction or sentence. *See, id.*, at § 1:16, pp.

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L. Yackle, *Postconviction Remedies*, § 1:1, p. 4 (2009) (hereinafter "Yackle") (Congress used "State post-conviction or other collateral review" to "conventionally refer to habeas corpus, *coram nobis* and similar writs or judicial orders that courts issue after a conviction is final, overturning the conviction by reason of some *error of law*.") (emphasis added) (*citing Walker v. Artuz*, 208 F.3d 357, 360 (2d Cir. 2000), *rev'd on other grounds*, 533 U.S. 167 (2001)). The single feature that each of the state court collateral remedies have in common, is their utility as a vehicle for petitioning to *invalidate* an already final judgment of conviction or sentence.[22] The most discernable reason, then, why Congress used the expansive phrase "State post-conviction or other collateral review"

79-85 (setting out detailed and comprehensive state by state breakdown of the various collateral review vehicles employed by the states); 7 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 28.11(b), p. 303 (3d ed. 2007) (hereinafter "LaFave") ("Although all but a few states have adopted expanded collateral remedies, those remedies vary substantially in structure and scope."). It thus makes perfect sense that Congress, recognizing the wide variance in collateral review vehicles made available by the states, would be careful to allow for the diversity inherent in our federal system.

[22] *See, e.g.,* 7 LaFave, § 28.11(b), at 306 ("the Uniform Post-Conviction Act . . . approved by the Commissioners on Uniform State Laws", 11A U.L.A. 274 (1997 Supp.), "provides for a collateral *attack* to be filed in the court of conviction.") (emphasis added); L. Yackle, *Postconviction Remedies*, § 2:3, at 94 ("The nature of the federal writ of habeas corpus is substantially the same as that of the state writ[.]"); *id.* at §§ 1:9, 1:12, at pp. 37-41, 51-54 (discussing the "*coram nobis*" and motion to vacate vehicles employed in the various states).

further confirms that Congress understood a "collateral review" application to mean a state court vehicle used to attack or challenge a final judgment of conviction or sentence.[23]

In sum, the plain language of § 2244(d)(2) establishes that "post-conviction . . . review" is *one* species *of* "collateral review." Although the plain language of § 2244(d)(2) does not define the term "collateral review," it is apparent from the manner in which that term has been used by this Court in its decisions referencing state "collateral review," from the established meaning that the term federal "collateral review" has, and from the way Congress used the term in other subsections of § 2244, that Congress understood and intended the term "collateral review" to mean a proceeding in which a state prisoner seeks to upset an otherwise final judgment of conviction or sentence. This interpretation finds support in a number of decisions of the United States Courts of Appeals, and is consistent with the most likely reason Congress employed the expansive phrase "State post-conviction or other collateral review," in the first place.

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[23] Although *Duncan* did propose an alternative reason why Congress may have employed the broad "State post-conviction or other collateral review" phraseology – in recognition of the fact that 28 U.S.C. § 2254 "federal habeas corpus review may [also] be available to *challenge the legality* of a state court order of civil commitment or a state court order of civil contempt," *Duncan*, 533 U.S. at 176 (emphasis added) – even this alternative Congressional rationale supports a reading of "collateral review" to comprehend only *legal* challenges.

II. Interpreting The Phrase "Application For State Post-Conviction Or Other Collateral Review" In 28 U.S.C. § 2244(d)(2) To Refer Only To State Applications That Seek To Collaterally Invalidate Or "Attack" An Otherwise Final Judgment Of Conviction Or Sentence, Advances The Interests That The AEDPA Is Designed To Promote.

A major purpose for the enactment of the AEDPA was to "reduce delays in the execution of state and federal criminal sentences," *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), and, to that end, the one-year limitations period of § 2244(d)(1) was pressed into service. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 179 (2001) ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. . . . This provision 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.").[24] The one-year limitations period

[24] Prior to the enactment of the AEDPA, this Court had recognized and remarked upon the negative consequences that federal habeas corpus had imposed upon the finality of state court judgments of conviction. *See, e.g., Engle v. Isaac,* 456 U.S. 107, 127-28 (1982) (stating that it "must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution."); *McCleskey v. Zant*, 499

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necessarily acts as a *limitation* on the opportunities a state prisoner might have to fully exhaust his or her state court remedies before pursuing a federal habeas corpus action.[25] Undoubtedly appreciating, however,

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U.S. 467, 491 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *Mackey v. United States*, 401 U.S. 667, 690 (1971) (all parties have an interest in "insuring that there will at some point be the certainty that comes with an end to litigation") (Harlan, J., concurring in the judgment); *Lonchar v. Thomas,* 517 U.S. 314, 333 (1996) (in "Appendix to Opinion of the Court," statement that "[i]n the last 10 years, bills proposing a statute of limitations for federal habeas corpus petitions have been introduced every year in Congress, more than 80 bills in all," followed by an exhaustive listing of such bills).

These concerns for the finality of state court criminal judgments were at the forefront of what ultimately prompted Congress in 1996 to reform the habeas corpus laws. According to the House Conference Report on AEDPA: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." House Conf. Rep. No. 104-518, at 111 (April 15, 1996), *reprinted in* 1996 U.S.C.C.A.N. 944. *See also* Committee Report for the House version, H.R. 729, Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995) (stating that "the bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings," and that "[t]his reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner.").

[25] Prior to the enactment of the AEDPA's one-year limitations period, state prisoners could spend *as much time as they wished* pursuing state post-conviction remedies; with, perhaps, an exception for cases in which a state prisoner's prejudicial delay hampered a state's ability to defend a § 2254 action, *see* former

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the interests served by the established doctrine of requiring state prisoners to exhaust state court remedies prior to filing a § 2254 petition,[26] the statute of limitations enacted by Congress allows for exhaustion of state remedies in two ways. First, by commencing the limitations period, *at the earliest*, after the direct appellate review process has concluded (*see* § 2244(d)(1)(A)); and second, by enacting a tolling

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Habeas Rule 9(a), a state prisoner could move on, from state court, to prosecute a § 2254 action in federal court, whenever he or she decided to. Thus, the AEDPA's aim to reduce delay in the finality of state court judgments comes, to a considerable extent, at the expense of a state prisoner's opportunity for state court litigation. *See* M. Tushnet & L. Yackle, *Symbolic Statutes and Real Laws*, 47 Duke L.J. 1, 29 (1997) ("The filing deadline encourages prisoners to file early, while the exhaustion doctrine demands that they postpone federal habeas petitions until state court opportunities for litigation have been tried. That obvious *conflict of purpose* is exacerbated in cases in which prisoners have multiple claims, the state remedies for which are exhausted at different times.") (emphasis added) (footnote omitted).

[26] The doctrine requiring exhaustion of state remedies, codified in § 2254(b), is designed to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano,* 454 U.S. 1, 3 (1981). The doctrine advances the interests of comity, recognizing that state judiciaries are equally bound to uphold the federal constitution. *See, e.g., Rose v. Lundy,* 455 U.S. 509, 518 (1982); *Ex Parte Royall*, 117 U.S. 241, 251 (1886). As well, the exhaustion doctrine "increases . . . state courts['] . . . familiar[ity] with and hospital[ity] toward federal constitutional issues," and helps ensure that when federal claims *do* arrive in federal court, such claims are accompanied by a complete factual record which may be afforded a presumption of correctness. *Rose v. Lundy*, 455 U.S. at 519.

provision for "properly filed application[s] for State post-conviction or other collateral review" (§ 2244(d)(2)).

By providing this latter exception to the AEDPA's one-year limitations period, then, Congress quite plainly intended to maintain some opportunity for a state prisoner to collaterally challenge in state court his or her judgment of conviction or sentence, without fear that he or she would be time-barred when later filing a federal habeas corpus petition.[27] *See Duncan*,

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[27] Of course, the exhaustion of state remedies doctrine may be taken too far. There does not appear to be, for example, any basis to the *Kholi* panel's view that it would be an "unseemly prospect" for a federal court to take-up a state prisoner's § 2254 habeas corpus application, while that prisoner was litigating in state court an unrelated state law claim. *Kholi*, 582 F.3d at 155. Provided a federal habeas corpus applicant is not seeking to litigate a purely state-law claim in a federal habeas corpus action (which state-law claim, in any event, is obviously not cognizable in the federal forum (*see, e.g., Rose v. Hodges*, 423 U.S. 19, 21 (1975)), there is simply no independent prohibition on "parallel proceedings" (*Kholi*, 582 F.3d at 155) in state and federal court. *See, e.g., Turnage v. Fabian*, 606 F.3d 933, 942 (8th Cir. 2010) (collecting decisions from the federal courts of appeals holding that "parallel state court proceedings do[ ] not necessarily prevent federal courts from adjudicating § 2254 petitions containing fully exhausted federal claims."); *Pringle v. Court of Common Pleas*, 744 F.2d 297, 299-300 (3rd Cir. 1984) ("Since Pringle's petition presents only her federal claims which have been exhausted in the state courts, she has complied with the requirements for federal-court review. Her challenge of the sentence to the [Pennsylvania] superior court is an independent state claim based on alleged defect in a state court sentencing procedure. This state claim is wholly distinct from Pringle's challenge to the validity of her conviction and has never been raised in the *habeas corpus* petition.").

533 U.S. at 178-79 ("The exhaustion requirement . . . ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower courts may entertain a collateral attack upon that judgment.")

Interpreting the phrase "State post-conviction or other collateral review" to refer only to those applications that seek to invalidate judgments of conviction or sentence, strikes the appropriate balance Congress sought to achieve between finality and exhaustion. *See Duncan*, 533 U.S. at 178 (recognizing that courts should seek a construction of § 2244(d)(2) that "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments."). Such an interpretation abides Congressional policy to "reduce delays in the execution of state and federal criminal sentences," *Woodford v. Garceau*, 538 U.S. at 206, while at the same time respects the interests served by adjudicating in state court any claims that may invalidate a federal habeas petitioner's judgment of conviction or sentence.

Because a discretionary sentence-reduction application by its very nature does not seek the invalidation of a judgment of conviction or sentence,[28] there is

[28] The Rule 35 "Motion to Reduce Sentence" filed by Mr. Kholi in this case, for example, in no way "challenge[d] the *legality* of the sentence." *Kholi*, 582 F.3d at 152 (emphasis in original). Indeed, such sentence-reduction motion under Rhode Island state law, which merely seeks (and only "during a limited period after sentencing") "leniency" from the sentencing judge

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obviously *no* federal habeas corpus purpose to be served by tolling for the time during which a discretionary sentence reduction application is litigated in state court. Compromising the AEDPA's concern for the finality of state court judgments without advancing principles of exhaustion, evidently fails to appropriately balance the competing interests of finality and exhaustion. Consequently, affording no tolling to a plea for sentence leniency, does no disservice to the exhaustion doctrine, while affirmatively promoting Congress' interest in the finality of state court judgments. As the *Hartmann* court explained:

> Congress, in enacting AEDPA, intended to further principles of comity, finality, and federalism, which are promoted in large part through the requirement, set forth in 28 U.S.C. § 2254(b), that state remedies be exhausted before seeking federal review. *Duncan v. Walker,* 533 U.S. 167, (2001); *Williams v. Taylor,* 529 U.S. 420, 436 (2000). As such, the Supreme Court repeatedly has explained that courts are to evaluate the tolling rules of 28 U.S.C. § 2244(d) together with the exhaustion requirement. Specifically, we are instructed to seek a construction of § 2244(d)(2) which "promotes the exhaustion of state

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(Reporter's Notes to Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure), actually *concedes* the lawfulness of the sentence. *See, e.g., State v. Byrnes*, 456 A.2d 742, 744 (R.I. 1983) (Rule 35's sentence reduction provision "authorizes a court to reduce a *lawful* sentence") (emphasis added).

remedies while respecting the interest in the finality of state court judgments." *Duncan*, 533 U.S. at 178. The exhaustion requirement, in turn, "ensures 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." *Id.* at 178-79. Obviously, when a prisoner in state custody opts to file a motion for discretionary leniency, the state is not being asked to correct errors of legal moment. Whatever interest the state has in deciding the motion, its interest is not one in correcting errors before the federal courts assume jurisdiction.

This understanding is confirmed by the Supreme Court's recent pronouncement that "AEDPA's exhaustion provision and tolling provision work together." *Lawrence v. Florida*, 549 U.S. 327 (2007). Where the goals of exhaustion end, the need for tolling recedes. Moreover, were we to hold that the optional Delaware Rule 35(b) motion has the effect of tolling the limitations period of § 2244(d)(1), we might create an incentive for prisoners to file frivolous requests for leniency merely as a delay tactic. *Cf. id.* at 1085. Finally, even though AEDPA's tolling provisions may embrace goals other than exhaustion, such as comity and the desire to avoid simultaneous

> litigation, tolling for a leniency petition does not advance those goals.

Hartmann, 492 F.3d at 483-84 (parallel citations omitted).[29]

Interpreting the phrase "State post-conviction or other collateral review," then, to refer only to those applications that seek to invalidate judgments of conviction or sentence, strikes the appropriate balance that Congress sought to achieve between the finality of state court judgments, and the exhaustion of state court remedies.

III. The First Circuit Erred In Holding That A Motion To Reduce Sentence Constituting A Plea For Leniency Was An "Application For State Post-Conviction Or Other Collateral Review," Under 28 U.S.C. § 2244(d)(2).

As the *Kholi* panel recognized, Mr. Kholi's "Rule 35(a) motion [w]as a plea for leniency, simpliciter" which in no way "challenge[d] the *legality* of the sentence." *Kholi v. Wall*, 582 F.3d 147, 152, 153 (1st Cir. 2009) (emphasis in original). Consequently, for the reasons advanced in Parts I-II of the Argument, Mr. Kholi's sentence reduction motion was not an "application for State post-conviction or other collateral

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[29] *See also Alexander*, 523 F.3d at 1291 (because sentence reduction motion filed by Florida inmate did "not advance AEDPA's interests in allowing state courts a full opportunity to consider federal-law challenges or in the finality of state court judgments," such motion could not be a § 2244(d)(2) tolling vehicle).

review," 28 U.S.C. § 2244(d)(2). The Court of Appeals for the First Circuit, in holding otherwise, was in error.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the United States Court of Appeals for the First Circuit, which reversed the United States District Court for the District of Rhode Island's judgment dismissing Mr. Kholi's federal habeas corpus petition as time barred.

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