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

BRIEF OF DELAWARE, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici States have an incontestable interest in promoting the principle of finality that motivated Congress to enact the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Mayle v. Felix,* 545 U.S. 644, 662 (2005); *see also Duncan v. Walker*, 533 U.S. 167, 179 (2001) (AEDPA's one-year limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments."). The question presented in this case focuses on 28 U.S.C. § 2244(d)(2), a provision which this Court has recognized "limits the harm to the interest in finality [of state court criminal judgments] by according tolling effect *only* to 'properly filed application[s] for State post-conviction or other collateral review.'" *Duncan*, 533 U.S. at 179-80 (emphasis added). In deciding whether a state court petition that requests only a sentencing court's mercy, but that alleges absolutely no legal or constitutional error, is an "application for State post-conviction or other collateral review," this Court decides whether unwarranted delay is tolerated and the finality of state court judgments postponed. Seeking to preserve benefits conferred upon them by Congress, Delaware and the other 27 amici States respectfully submit this brief in support of petitioner.

STATEMENT OF THE CASE

Amy and Julie Smith[1] were ages four and eight, respectively, when their mother divorced their father and began a relationship with Khalil Kholi. Soon thereafter, Kholi moved in and became a father figure to the girls. He controlled the household finances and was the family's sole disciplinarian. Eventually Kholi married the girls' mother, becoming their stepfather.

Kholi engaged in various sexual acts with both girls when they were very young progressing to sexual intercourse when they became teenagers. Amy described how he had engaged in repeated incidents of abuse from the time she was age five until she entered the sixth grade, at which time Kholi began to demand and thereafter consistently demanded intercourse. But it was not until she was seventeen, and only with her then-boyfriend's encouragement, that Amy told a school counselor of Kholi's abuse. It was then reported to social service and law enforcement authorities.

Kholi abused Julie for the first time when she was seven years old. He first demanded that Julie perform oral sex on him when she was approximately seven or eight. At eight or nine years old, Kholi

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[1] These are pseudonyms assigned to the girls by the Rhode Island Supreme Court during Kholi's direct appeal. *State v. Kholi*, 672 A.2d 429, 431 (R.I. 1996). This factual recitation of Kholi's crimes and sentence is taken from the state supreme court's decision on direct appeal. *Id.*

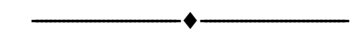
disrobed Julie and took graphic pictures of her. He then repeatedly threatened to show the pictures to Julie's mother and told Julie that if he did, she would have only herself to blame. Julie never disclosed the abuse to anyone until her younger sister confided her own accounts of their stepfather's abuse. Both girls testified that Kholi would condition the giving of necessities or the granting of privileges upon his obtaining sexual favors from them.

Kholi was convicted in the Rhode Island Superior Court of ten counts of first-degree sexual assault of his two stepdaughters. He was sentenced to life imprisonment on each count, with the first six counts to run concurrently with one another, but consecutively to the remaining four counts. In February 1996, the Supreme Court of Rhode Island affirmed Kholi's conviction on direct appeal. *State v. Kholi*, 672 A.2d 429 (R.I. 1996).

In May 1996, Kholi filed in the Rhode Island Superior Court a one-page *pro forma* sentence reduction motion [Joint App. 8-9] under that court's Rule 35 which permits the court to "reduce any sentence when a motion is filed" within certain time limits. R.I. SUPER. CT. R. CRIM. P. 35(a). All agree that Kholi's state court request was "a plea for leniency, simpliciter" that in no way "challenge[d] the *legality* of the sentence." Pet. App. 9, 11 (emphasis in original). *See*, *e.g.*, Resp. Brf. in Opp. 2 (describing such a petition as "a motion filed in state court for a discretionary reduction of sentence"). The motion was denied, and that decision was affirmed on appeal by

the Rhode Island Supreme Court. *Kholi v. State*, 706 A.2d 1326 (R.I. 1998). It is beyond dispute also that if this discretionary sentence reduction motion did not toll the limitations period from the date on which Kholi filed it until the date he finally filed his state post-conviction relief motion that did attack the validity of his conviction and sentence – a span of a year and a week – his federal habeas petition would be untimely. Pet. App. 7, 19.

A magistrate judge of the United States District Court for the District of Rhode Island, citing the holdings of the Third, Fourth and Eleventh Circuits and discounting as "unpersuasive" the contrary reasoning of the Tenth Circuit, concluded that 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 district court accepted the magistrate judge's report and recommendation and dismissed Kohli's habeas petition. Pet. App. 21. The First Circuit reversed, 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)." Pet. App. 19.



SUMMARY OF THE ARGUMENT

Kholi's request for a sentence reduction under Rhode Island's Criminal Rule 35(a) did not constitute an "application for State post-conviction or other collateral review" that tolls AEDPA's limitations period. A *pro forma* petition under a state procedural rule that allows for discretionary relief from an imposed sentence based solely on mercy or grace meets none of the well-established standards of post-conviction or collateral attack. When Congress penned the AEDPA phrase "properly filed application for State post-conviction or other collateral review" it was hardly writing on a clean slate. Instead, Congress expects its statutes to be read in conformity with this Court's precedents. And this Court, on numerous occasions prior to AEDPA's enactment, had described the concept of "collateral review." In light of the Court's repeated description of collateral review as being the means by which a defendant attacks the validity of his conviction or sentence, only a state court proceeding in which the defendant challenges his conviction or sentence is consistent with Congress' use of the term "collateral review" in section 2244(d)(2). On that basis alone, the court of appeals was incorrect in viewing a mere prayer for sentencing leniency as triggering AEDPA's tolling provision.

A state court procedure that a prisoner need not pursue to exhaust state remedies does not toll AEDPA's limitations period. Congress' goal in enacting AEDPA was to speed up federal habeas review. Exhaustion of state remedies to first address federal

claims remained critical, and the tolling provision promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. In this regard, the tolling provision is inextricably intertwined with the core purpose of the habeas statute's exhaustion requirement. At the same time, however, the tolling provision limits the harm to the interest in finality by according tolling effect *only* to "properly filed application[s] for State post-conviction or other collateral review," that is, those motions for state relief that can address federal law questions. The minority view expressed by the First Circuit – which would allow tolling for state sentence reduction motions that are no more than naked pleas for leniency – misapprehends this relationship between exhaustion of state court remedies and the limitations period that underlies the tolling provision itself. Only relevant state court remedies need be exhausted under 28 U.S.C. § 2254. Thus, only applications for such relevant remedies should toll the federal habeas limitations period. Any unwarranted expansion of the class of state applications that act as § 2244(d)(2) tolling mechanisms undermines Congress' intent to protect the States' "well-recognized interest in the finality of state court judgments."

ARGUMENT

I. Categorizing A Prayer For Post-Sentencing Leniency As An "Application For State Post-conviction Or Other Collateral Relief" Is Supported Neither By This Court's Precedents, Which Congress Incorporated In Its Statutory Language, Nor By The Statutory Context In Which The Phrase Appears.

Section 2244(d)(1) of Title 28 "requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year." *Evans v. Chavis*, 546 U.S. 189, 191 (2006). That limitations period is tolled for the "time during which a properly filed application for State post-conviction or other collateral relief is pending." 28 U.S.C. § 2244(d)(2). The vast majority of states give the trial judge the power to modify a sentence,[2] and the modification is usually triggered by a motion from the defendant

[2] *See* ALASKA R. CRIM. P. 35(b); COLO. R. CRIM. P. 35(b); CONN. GEN. STAT. ANN. §§ 51-195 (sentence review procedure for sentence greater than 3 years), 53a-39 (reduction of sentence of less than 3 years by sentencing judge); D.C. SUPER. CT. R. CRIM. P. 35(b); DEL. SUPER. CT. CRIM. R. 35(b); FLA. R. CRIM. P. 3.800(c); GA. CODE ANN. § 17-10-1(f); HAW. R. PENAL P. 35(b); IDAHO CRIM. R. 35(b); 730 ILL. COMP. STAT. 5/5-4.5-50(d); IND. CODE ANN. § 35-38-1-17; LA. CODE CRIM. P. ANN. art. 881.1; MASS. R. CRIM. P. 29; MD. R. 4-344, 4-345; ME. R. CRIM. P. 35(b), (c); N.D. R. CRIM. P. 35(b); N.J. CT. R. 3:21-10(c); N.M. R. CRIM. P. 5-801; OKLA. STAT. ANN. tit. 22, § 982a; PA. R. CRIM. P. 720(B)(1)(a)(v); S.D. CODIFIED LAWS § 23A-31-1; TENN. R. CRIM. P. 35(b); 13 VT. STAT. ANN. § 7042; VT. R. CRIM. P. 35(b); W.VA. R. CRIM. P. 35(b); WIS. STAT. §§ 973.19, 973.195; WYO. R. CRIM. P. 35(b).

asking for the modification.[3] The First Circuit determined that a defendant's motion to modify or reduce his sentence is an "application for State post-conviction or other collateral relief" that tolls the limitation period established by section 2244(d)(1). That conclusion misapprehends the concept of collateral review reflected in section 2244(d).

"State post-conviction or other collateral review" as used in § 2244(d)(2), is not defined in the statute itself. *See generally Duncan*, 533 U.S. 167 (2001); *Artuz v. Bennett*, 531 U.S. 4 (2000); *see also Malcom v. Payne*, 281 F.3d 951, 957 (9th Cir. 2002). In discerning the meaning of certain key phrases of 28 U.S.C. § 2244, this Court has noted that all are not specifically defined and some are "term[s] of art." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). To determine the meaning of undefined phrases in federal statutes, the Court: (1) has recognized that Congress incorporates the settled meanings of such terms established by the Court, *United States v. Wells*, 519 U.S. 482, 495 (1997); and (2) looks to "the statutory context" in which they appear. *Magwood v. Patterson*, 130 S.Ct. 2788, 2797 (2010). Just so with the phrase "application for State post-conviction or other collateral review." *See Duncan,* 533 U.S. at 172-73, 77-78 (comparing text of § 2244(d)(2) to "the language of other

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[3] Some jurisdictions provide that the trial judge may act on his own to modify the defendant's sentence. *E.g.*, MASS. R. CRIM. P. 29(a); ME. R. CRIM. P. 35(c)(1); N.D. R. CRIM. P. 35(b)(2); VT. R. CRIM. P. 35(b); W.VA. R. CRIM. P. 35(b); WYO. R. CRIM. P. 35(b).

AEDPA provisions" in order to determine Congress' intent with regard to the meaning of "State post-conviction and other collateral review"); *Pace v. DiGuglielmo*, 544 U.S. 408, 420 (2005) (Stevens, J., dissenting) ("The words 'properly filed application for . . . collateral review' are not defined in AEDPA. We did, however, interpret those words in *Artuz v. Bennett* [citation omitted], by considering their ordinary meaning in the context of the statutory scheme in which they appear."); *see also Malcom*, 281 F.3d at 957 (*quoting DeGeorge v. United States Dist. Court for Cent. Dist. of California*, 219 F.3d 930, 936 (9th Cir. 2000)) ("Rather, 'to determine the plain meaning of a particular statutory provision, and thus congressional intent, the court looks to the entire statutory scheme.' "). The use here of either approach to statutory construction leads to the same conclusion: the term "application for State post-conviction or other collateral review" does not encompass requests based on mercy or leniency.

II. A Request Under A State's Procedural Rule For Post-Sentencing Discretionary Relief Based Solely On Mercy or Grace Meets None Of The Well-Established Standards of Collateral Attack.

The Court has recognized that Congress, in writing section 2244(d)(2), "may have employed the construction 'post-conviction or other collateral' in recognition of the diverse terminology" used by the States in naming "the different forms of collateral

review that are available after a conviction." *Duncan,* 533 U.S. at 177. Using Florida procedure as an example, the Court observed that "the term 'post-conviction'" might refer to a specific procedure to obtain review of a conviction, distinct from other procedures available to litigate different types of claims for relief. *Duncan*, 533 U.S. at 177.[4] Thus, Congress chose to use the phrase "or other collateral" to make it plain 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." *Duncan*, 533 U.S. at 177.[5]

But that hardly means that Congress was writing on a clean slate. Instead, the Court had several times described the concept of collateral review as involving the challenges to the legality of the conviction or sentence. In 1952, the Court described the procedure established by 28 U.S.C. § 2255 as being

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[4] Modern collateral remedies vary considerably in their scope. Some are available only to defendants who are held in custody, while others permit a challenge by any convicted defendant whose claims have not become moot. The narrowest allow challenges only to jurisdictional defects, while the broadest extend to constitutional violations and various nonconstitutional claims.

W. LaFave, J. Israel, N. King, and O. Kerr, 7 CRIMINAL PROCEDURE § 28.1(a) at 139 (3d ed. 2007).

[5] "The various state and federal procedures for presenting post-appeal challenges are commonly described as 'collateral remedies.'" W. LaFave, J. Israel, N. King, and O. Kerr, 7 CRIMINAL PROCEDURE § 28.1(a) at 139 (3d ed. 2007).

"an independent and collateral inquiry into the validity of the conviction." *United States v. Hayman*, 342 U.S. 205, 222 (1952). The Court wrote in 1969 that "the provision of federal collateral remedies rests . . . upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States*, 394 U.S. 217, 226 (1969); *id*. at 228 ("Congress has determined that the full protection of [a defendant's] constitutional rights requires the availability of a mechanism for collateral attack."). Justice Harlan observed in *Mackey v. United States*, 401 U.S. 667 (1971), that "habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments [of conviction] that have become otherwise final." 401 U.S. at 682-83 (Harlan, J., concurring in part, dissenting in part). In rejecting a Suspension Clause challenge to the post-conviction procedure in the District of Columbia, the Court in *Swain v. Pressley*, 430 U.S. 372, 382 (1977), implied that the purpose of collateral review was "to test the legality of a person's detention. . . ." And "the established standards of collateral attack" were described in *United States v. Addonizio*, 442 U.S. 178, 185-86 (1979), as being challenges to the validity of the conviction or sentence because of jurisdictional, constitutional, or other fundamental errors in the proceedings.[6]

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[6] *See* American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: VOLUME IV, Standard 22-2.1(a) (2d ed. 1980) (describing recommended scope of post-conviction remedy).

Collateral review thus exists for the criminal defendant to challenge the legality of his conviction or sentence. *See Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005) ("a case challenging a sentence seeks a prisoner's 'release' in the only pertinent sense: It seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement . . . "); *Davis v. United States*, 411 U.S. 233, 254 (1973) (Marshall, J., dissenting) ("The traditional scope of collateral relief requires, again, that prisoners be afforded the broadest possible opportunity to present claims that their detention is the result of an unconstitutional procedure."). Because Congress, in writing section 2244(d)(2), used a term – "collateral review" – that has a settled meaning, the Court "must infer, unless the statute otherwise dictates, that Congress mean[t] to incorporate the established meaning" of the term. *NLRB v. AMAX Coal Co.*, 453 U.S. 322, 329 (1981). *See United States v. Wells*, 519 U.S. at 495 (*citing North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)) ("we presume that Congress expects its statutes to be read in conformity with this Court's precedents"). Thus, in light of this Court's repeated description of collateral review as being the means by which a defendant attacks the validity of his conviction or sentence, only a state court proceeding in which the defendant challenges his conviction or sentence is consistent with Congress' use of the term "collateral review" in section 2244(d)(2). *See Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002) (question under § 2244(d)(2) is whether the state court proceeding "challenge[d] the judgment pursuant to which

[the prisoner] is incarcerated"). The claims advanced in the state proceedings need not mirror those eventually presented in a federal habeas corpus petition,[7] but to come within the terms of section 2244(d)(2), the state proceeding has to challenge the validity of the conviction or sentence.

The lower federal courts have repeatedly applied this concept of collateral review to decide whether a particular motion filed by the defendant in state court tolled the limitations period. Motions for appointment of counsel or for post-conviction discovery, for example, do not toll the limitations period: those motions do not challenge the validity of the conviction or sentence. *See, e.g., Brown v. Sec'y of Dep't of Corr.*, 530 F.3d 1335, 1337-38 (11th Cir. 2008); *Voravongsa v. Wall*, 349 F.3d 1, 4-7 (1st Cir. 2003); *Maestas v. Long*, 74 Fed. Appx. 714 (9th Cir. 2003); *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001).

By no stretch of the imagination can a motion to reduce or modify a sentence, such as that filed in Respondent's case, be viewed to challenge the validity of the sentence. At common law, a court could revise a sentence during the term of court in which the sentence had been imposed. The common law rule did not just limit courts to correcting errors in the sentence, but allowed judges to reconsider the

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[7] *E.g.*, *Cowherd v. Million*, 380 F.3d 909 (6th Cir. 2004); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Tillema v. Long*, 253 F.3d 494, 502 (9th Cir. 2001).

appropriateness of the sentence. *See United States v. Benz*, 282 U.S. 304 (1931); B. Carole Hoffman, Note, RULE 35(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: BALANCING THE INTERESTS UNDERLYING SENTENCE REDUCTION, 52 Fordham L. Rev. 283, 288-90 (1983).

When the Federal Rules of Criminal Procedure were promulgated in 1946, the common law power of the judge to reduce a sentence was codified in Rule 35.[8] The courts of appeals consistently viewed a motion for reduction of sentence under Rule 35 to be a plea for leniency, not a challenge to the legality of the sentence. *United States v. Cumbie*, 569 F.2d 273, 274 (5th Cir. 1978); *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973); *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). The purpose of the rule was to give the defendant an opportunity to ask the judge to reconsider the fairness of the sentence or to consider additional information that had not been presented at the time of sentencing. A motion to reduce the sentence presupposed a valid conviction[9] and a legally

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[8] FED. R. CRIM. P. 35, advisory committee note (1944). The rule was rewritten in 1984, the changes being effective November 1, 1987, in light of the Sentencing Reform Act of 1984 and adoption of the Sentencing Guidelines.

[9] *United States v. Sobell*, 314 F.2d 314, 331-32 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963) ("It would be quite improper for this Court, by utilizing Rule 35 to reduce Sobell's sentence, to place the Government in the same position as if the issue had been submitted to the jury and decided in his favor."); *Poole v. United*

(Continued on following page)

imposed sentence.[10] Conversely, "when a defendant requests a break because of events *after* the judgment that affect the judge's 'expectations,' it is impossible to characterize the request as a collateral attack on the judgment." *Romandine v. United States*, 206 F.3d 731, 735 (7th Cir. 2000) (emphasis in original).

Many states have promulgated court rules modeled on Federal Rule 35.[11] These provisions are "intended to provide the court with an opportunity during a limited period after sentencing to exercise leniency in the event the court, for some reason, determines that the sentence imposed was unduly severe or a shorter sentence would be desirable."[12]

States, 250 F.2d 396, 401 (D.C. Cir. 1957) (motion for reduction of sentence "is essentially a plea for leniency and presupposes a valid conviction. [Citation omitted.] It is wholly inappropriate to test the propriety of allowing a guilty plea to stand."). *Cf. Hill v. United States*, 368 U.S. 424, 430 (1962) (motion to correct illegal sentence presupposes a valid conviction; motion does not reach errors supposedly committed during trial).

[10] *United States v. Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970).

[11] *See, e.g.,* COLO. R. CRIM. P. 35(b); DEL. SUPER. CT. CRIM. R. 35(b); FLA. R. CRIM. P. 3.800(c); N.D. R. CRIM. P. 35(b); TENN. R. CRIM. P. 35(b). *See also* American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-7.1(a) (3d ed. 1994) ("The rules of procedure should authorize a sentencing court, upon motion of either party or on its own motion, to reduce the severity of any sentence.").

[12] R.I. SUPER. CT. R. CRIM. P. 35, historical note (1972). *See People v. Arnold*, 907 P.2d 686, 687 (Colo. App. 1995); *People v. Hanna*, 508 N.E.2d 765, 769-70 (Ill. App. 1987); *District Att'y for Northern Dist. v. Superior Court*, 172 N.E.2d 245, 250 (Mass.

(Continued on following page)

A state court motion to reduce a sentence is not a means by which the defendant can attack his conviction or sentence. *Commonwealth v. McCulloch*, 879 N.E.2d 685, 689-90 & nn.6-7 (Mass. 2008); S.D. CODIFIED LAWS § 23A-31-1 ("The remedies provided by this section are not a substitute for nor do they affect any remedies incident to post-conviction proceedings."). By way of example, the Delaware Supreme Court could hardly have been more clear about the difference: Delaware Superior Court Criminal "Rule 61 addresses post-conviction relief, which requires a legal challenge to the conviction, whereas Rule 35(b) allows a reduction of sentence, without regard to the legality of the conviction." *State v. Lewis*, 797 A.2d 1198, 1200 (Del. 2002). *See id*. at 1201 ("Rule 35(b) allows for a reduction of sentence without regard to the existence of a legal defect.").

1961); N.D. R. CRIM. P. 35, explanatory note (2010) ("A motion under the rule is essentially a plea for leniency and presupposes a valid conviction."); TENN. R. CRIM. P. 35, advisory committee's comment (2006) ("The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice."); VT. R. CRIM. P. 35, reporter's notes (2010) (when construed in a manner consistent with Federal Rule 35, invocation of such a rule "urge[s] that the court take a fresh look at its sentence with the hope that the passage of time will find the court more sympathetic to [the prisoner's] position"); S. Grossman & S. Shapiro, JUDICIAL MODIFICATION OF SENTENCES IN MARYLAND, 33 U. Balt. L. Rev. 1, 12 (2003) (noting that in some states, sentence reductions under the particular rule are also used "either as a reward or a response to a defendant's rehabilitation").

Because a motion for reduction of sentence does not challenge the validity of the conviction or sentence, any such motion does not trigger section 2244(d)(2). That point was made by the Fourth Circuit in *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001) when the court held that a motion for reduction of sentence under West Virginia law did not act to toll the limitations period. According to the court, a "collateral" proceeding typically challenged "the legality of the earlier proceeding or judgment," but a motion for reduction of sentence "does not allege any error at all. . . . The only issue before the court on a Rule 35(b) motion is whether the defendant, although sentenced in conformity with applicable laws, nevertheless presents some compelling *non-legal* justification that warrants mercy." 272 F.3d at 238 (emphasis in original). Because the motion for reduction of sentence "[did] not entail a legal challenge to the original sentence," the motion did not toll the limitations period. 272 F.3d at 239. The Third, Seventh, and Eleventh Circuits have reached conclusions identical to that of the Fourth Circuit: only a motion that attacks the validity of the sentence will stop the clock from running on the limitations period. *Hartmann v. Carroll*, 492 F.3d 478, 481-84 (3d Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008) (motion for reduction of sentence under Delaware law (DEL. SUPER. CT. R. CRIM. P. 35(b)); *Lozano v. Frank*, 424 F.3d 554, 556 (7th Cir. 2005) (sentence reduction under Wisconsin law "based on his post-conviction cooperation with authorities"); *Davis v. Barrow*, 540 F.3d 1323, 1324 (11th Cir. 2008) (reduction of sentence under Georgia

law (O.C.G.A. § 17-10-1(f)); *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297-98 (11th Cir. 2008) (motion for reduction of sentence under Florida law (FLA. R. CRIM. P. 3.800(c)); *Bridges v. Johnson*, 284 F.3d 1201, 1204 (11th Cir. 2002) (Georgia sentence review procedure).

The Tenth Circuit has decided, as has the First Circuit in this case, that motions for reduction of sentence do trigger the tolling provision of section 2244(d)(2). *Howard v. Ulibarri*, 457 F.3d 1146, 1147-49 (10th Cir. 2006) (N.M. R. CRIM. P. 5-801(B)); *Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006) (COLO. R. CRIM. P. 35(b)). But the Tenth Circuit and the First Circuit did not recognize that the term "collateral review" is a "term of art," *see Slack v. McDaniel*, 529 U.S. 473, 486 (2000), the meaning of which is derived from this Court's repeated description of "collateral review" as a proceeding in which a prisoner seeks to upset a judgment of conviction. A motion for reduction of sentence might in a broad sense ask the sentencing judge to "review" the sentence he imposed, but only insofar as "review" encompasses "reconsideration;" a motion for reduction of sentence assumes that the conviction is valid. And both the First Circuit and Tenth Circuit give too much weight to "the unseemly prospect" that a prisoner could ask for federal habeas relief while simultaneously asking the sentencing judge to reduce his sentence. Pet. App. 18; *Howard*, 457 F.3d at 1148; *Robinson*, 443 F.3d at 721 (to hold that a motion for reduction of sentence did not toll the limitations

period "'would raise questions of comity'") (*quoting Martin v. Embry*, 1999 WL 1123077 at *2 (10th Cir. Dec. 8, 1999)). Contrary to the thinking of those courts of appeals, there is nothing untoward when a prisoner chooses to litigate in both federal and state court; indeed, there can hardly be any comity concerns when the state court proceedings involve a motion to reduce the sentence, a situation in which only state law claims are likely to be at issue. *See Pringle v. Court of Common Pleas*, 744 F.2d 297, 300 (3d Cir. 1984); *Carter v. Estelle*, 677 F.2d 427, 436 n.4 (5th Cir. 1982); *United States ex rel. Sniffen v. Follette*, 393 F.2d 726, 727 (2d Cir. 1968); *United States ex rel. Boyance v. Myers*, 372 F.2d 111, 112 (3d Cir. 1967) ("It is no bar to federal adjudication of the merits of the present claim that a separate claim for relief on a different ground is pending in a state court.").

III. Because Wholly Discretionary Review Of A Sentence Pursuant To A State Procedure Allowing For Post Hoc Sentencing Leniency Has Nothing To Do With The Exhaustion Requirement, Congress Did Not Intend To Toll AEDPA's Statute Of Limitations During Such Review.

The term "collateral review," while undefined in the statute, has an historic pedigree that cannot be ignored. But the meaning of that term urged by Petitioner and the amici States – which excludes "a plea for leniency, simpliciter" – is likewise altogether

consistent with the purpose of state collateral review in the overall statutory context of AEDPA. And "look[ing] first to the statutory context" of undefined AEDPA phrases is a well-accepted method of statutory construction. *Magwood v. Patterson*, 130 S.Ct. 2788, 2797 (2010).

As this Court explained in *Duncan v. Walker*, "[t]he tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period." 533 U.S. at 179. Congress wanted to accelerate the federal habeas process, while continuing to require prisoners to exhaust their state remedies. Tolling during the pendency of state proceedings that are *not* needed for exhaustion does not serve that balance struck by Congress. To the contrary, it upsets the balance by slowing down the federal habeas process while not furthering the exhaustion requirement. In light of this statutory context, the phrase "application for State post-conviction or other collateral relief" should be read not to encompass state proceedings that seek relief that is unavailable in federal habeas and therefore do not need to be exhausted.

A. Section 2244(d) Balances The Statutory Imperative To Expedite Federal Habeas Review And The Exhaustion Requirement. A State Procedure Not Needed For Exhaustion Should Not Impede The Federal Habeas Process.

As applied here, habeas petitions contain allegations of constitutional violations that occurred at a state trial and which render the subsequent confinement of a prisoner unconstitutional. In short, federal law challenges to a state custodial judgment are the stuff of which federal habeas petitions are made and which must be exhausted. 28 U.S.C. § 2254(a).[13] AEDPA's tolling provision is inextricably intertwined with the habeas statute's exhaustion requirement. AEDPA's exhaustion doctrine requires a habeas petitioner to "give the state courts [the] [ ] opportunity to resolve any *constitutional issues*" through the State's appellate process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (emphasis added); *see also Rose v. Lundy,* 455 U.S. 509, 518-19 (1982) (noting that "[a] rigorously enforced total exhaustion rule" gives state courts "the first opportunity to review *all claims of constitutional error*") (emphasis added). Any requirement of tolling for state sentencing leniency

[13] 28 U.S.C. § 2254(a) provides that: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States*." (emphasis added).

entreaties bears no relationship to the balance between exhaustion of state court remedies for federal legal or constitutional error and the limitations period that underlies the tolling provision itself.

Under the First Circuit's construct, the exhaustion doctrine would encompass not only any claim that brings to the forefront the need for relief from a constitutional violation, but exhaustion of any want of the petitioner for any possible form of state court relief. The First Circuit takes the view that any state proceeding should toll if it has the potential of rendering the federal case moot by reducing the sentence to time served and thus ending the prisoner's confinement, the basis for federal habeas jurisdiction, or if it otherwise satisfies the prisoner. Pet. App. 18 ("The granting of a motion for leniency might well eliminate the incentive for seeking federal habeas review at all (as would be true, say, if the motion were granted and the sentence reduced to time served).").

But this notion does not square with the reality that section 2244's statute of limitations provision, with its concomitant tolling exception, and the exhaustion requirement of section 2254(c) are inseparable and "work together." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007); *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (a state petitioner must comply with both the one-year time limit and the exhaustion requirement). It further ignores the fact that "[t]he tolling provision of § 2244(d)(2) balances the interests

served by the exhaustion requirement[14] and the limitation period." *Duncan,* 533 U.S. at 179. This immutable relationship between the exhaustion requirement and AEDPA's limitation period fatally undercuts any argument favoring the First Circuit's reading; tolling AEDPA's limitation period for sentence leniency motions undermines the State's interest in finality while doing absolutely nothing to advance exhaustion of relevant state remedies. *Hartmann*, 492 F.3d at 478 ("Where the goals of exhaustion end, the need for tolling recedes."). AEDPA's strict statutorily limited tolling, perforce, need only occur to give petitioners the opportunity to exhaust that which they can and must present to a federal habeas court "'and *then* to file their federal habeas petitions *as soon as possible*.'" *Lawrence*, 549 U.S. at 327 (*quoting Duncan*, 533 U.S. at 181) (emphasis in originals).

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[14] The exhaustion doctrine requires that a habeas petitioner present the substance of his claim to the state courts so that those courts have a fair "opportunity to apply controlling legal principles to the facts bearing upon [the petitioner's] *constitutional* claim." *Picard v. Connor*, 404 U.S. 270, 272 (1971) (emphasis added). As this Court noted in *Duncan*, the tolling provision promotes the exhaustion of state remedies for those constitutional claims by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect *only* to "properly filed application[s] for State post-conviction or other collateral review." *Duncan*, 533 U.S. at 180.

B. The Interest In Finality Of State Court Judgments Is Undermined By Tolling For Leniency Proceedings That Are Relatively Illimitable.

A motion to reduce a sentence under a rule such as Rhode Island's Rule 35 is "'essentially a plea for leniency.'" *State v. Mendoza*, 958 A.2d 1159, 1161 (R.I. 2008) (*quoting State v. Burke*, 876 A.2d 1109, 1112 (R.I. 2005); *State v. Ferrara,* 818 A.2d 642, 644 (R.I. 2003)). Such a request is left to the sound discretion of the state trial justice, "who may grant it if he or she decides 'on reflection or on the basis of changed circumstances that the sentence originally imposed was, for any reason, unduly severe.'" *Id*. (*quoting State v. Furtado*, 774 A.2d 38, 39 (R.I. 2001); *State v. Byrnes*, 456 A.2d 742, 744-45 (R.I. 1983)). *See also State v. Gunwall*, 522 N.W.2d 183 (N.D. 1994) (reduction of sentence under North Dakota's Rule 35(b) is not a right but an application for leniency left to the sound discretion of the trial court). The reason for such rules – many of which are modeled after Federal Rule 35 – is to give a sentencing judge a second chance to consider whether the initial sentence is appropriate. *E.g.*, *Ghrist v. People*, 897 P.2d 809, 812 (Colo. 1995). *See Ellenbogen*, 390 F.2d at 543; *see also Maynard*, 485 F.2d at 248 (Rule 35 allows sentencing court "to decide if, on further reflection, the original sentence now seems unduly harsh" . . . such request "is essentially a 'plea for leniency.'") (citations omitted). Not only are the bases for the grant or denial of such a motion relaxed, but the time for filing and

disposition of these applications is relatively unchecked. *E.g.*, *United States v. Springs*, 988 F.2d 746, 748 (7th Cir. 1993) ("The version of Fed. R. Crim. P. 35 applicable to pre-Guidelines sentences allowed district judges to reduce sentences in response to motions filed as late as 120 days after the appellate mandate, which as a practical matter left district judges with several years of superintendence."). Consequently, these leniency applications are fraught with the danger of delay. *See State v. Fisch*, 133 P.3d 1246, 1248-49 (Idaho Ct. App. 2006) (holding that 13 months to decide Rule 35 motion was a "reasonable time" under the rule). And this delay, which sometimes is the result of the trial court's desire to retain prolonged control over the sentence,[15] has required both federal and state courts to address the misuse of Rule 35 reduction motions as "a substitute for the consideration of parole" or similar executive branch consideration of sentence reduction. *United States v. Stollings*, 516 F.2d 1287, 1289 (4th Cir. 1975). *See Diggs v. United States*, 740 F.2d 239, 246-47 (3d Cir. 1984); *United States v. Taylor*, 768 F.2d 114, 117-18 (6th Cir. 1985) (listing cases). *See also Mamula v. People*, 847 P.2d 1135, 1137-38 (Colo. 1993) (trial court cannot be permitted "to hold timely motion for reduction of sentence in abeyance for months or years

[15] *See S. Grossman & S. Shapiro*, 33 U. Balt. L. Rev. at 39-40 (deferring disposition of motions to reduce sentence enabled sentencing judges to follow defendants' progress in substance abuse treatment programs and to monitor defendants' compliance with terms of original sentence).

while the defendant builds a record of conduct within the department of corrections").

Unwarranted expansion of the class of state applications that act as § 2244(d)(2) tolling mechanisms undermines Congress' intent to protect the States' "well-recognized interest in the finality of state court judgments." *Duncan,* 533 U.S. at 179. "Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson,* 523 U.S. 538, 555 (1998). Inclusion of these far less-regulated applications for state sentencing leniency[16] not only prolongs uncertainty concerning the finality of state court judgments, but ultimately subjects those judgments to greater risk of reversal. The longer state or federal review lasts, the greater the risk that "[p]assage of time, erosion of memory, and dispersion of witnesses" will preclude retrial and "reward the accused with complete freedom from prosecution." *Engle v. Isaac,* 456 U.S. 107, 127-28 (1982); *see also David v. Hall,* 318 F.3d 343, 347 (1st Cir. 2003) ("There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear."). As the Third Circuit observed, should mercy petitions be included as § 2244(d)(2) tolling agents, prisoners might be inclined "to file frivolous

[16] *See* nn.2 & 3 *supra.*

requests for leniency merely as a delay tactic." *Hartmann,* 492 F.2d at 478.

CONCLUSION

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

Respectfully submitted,

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