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

REPLY BRIEF

PATRICK C. LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L. WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R. BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag.ri.gov

Attorneys for Petitioner
A.T. Wall

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT

I. RESPONDENT KHOLI RECOGNIZES THAT IN ORDER TO QUALIFY FOR § 2244(D)(2) TOLLING, THE SENTENCE-REDUCTION MOTION AT ISSUE MUST CONSTITUTE AN APPLICATION FOR "COLLATERAL REVIEW"[1]

Until reading the *Brief for Respondent Khalil Kholi* ("*Resp. Br.*"), which seems to read the First

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[1] To be clear, the relevant state court application filed by Kholi in the Rhode Island Superior Court was "a [Rule 35] motion ... to reduce an imposed sentence that seeks purely discretionary leniency and *does not challenge the validity of the conviction or sentence*" (*Kholi v. Wall*, 582 F.3d 147, 156 (1st Cir. 2009) (emphasis added). Respondent Kholi, by repeatedly referring, no fewer than forty times, in his *Respondent's Brief* to this plea for discretionary sentence leniency as a request for "equitable" sentencing relief (even rephrasing the Question Presented by replacing the clause "sentence-reduction motion consisting of a plea for leniency" (*Pet. Br.* i) with "discretionary, *equitable* modification of a criminal judgment and sentence") (*Resp. Br.* i) (emphasis added)), raises the specter that Kholi's Rule 35 motion might have advanced some legal challenge to his sentence. *See Black's Law Dictionary* 558 (7th ed. 1999) (defining "equitable" as "1. Just; conformable to principles of justice and right. 2. Existing in equity; available or sustainable by an action in equity, or under the rules and principles of equity."). Since neither the below panel decision nor the circuit split this Court, presumably, granted certiorari to resolve, concerned an "equitable" sentencing relief application, and since an "equitable" sentencing relief application might well not be equivalent to, and present an altogether different analysis than does, a "motion to reduce an imposed sentence, in the nature of a plea for discretionary leniency" (*Kholi*, 582 F.3d at 149), the "equitable" sentencing relief formulation utilized by Respondent would appear to be particularly unhelpful.

Circuit's below panel decision to say that only state applications seeking "collateral review" of criminal judgments toll the one-year limitations period of 28 U.S.C. § 2244(d)(1),[2] Petitioner Wall had thought it evident that the basis of the First Circuit's holding – that a Rhode Island Rule 35(a) "plea for discretionary leniency" (*Kholi*, 582 F.3d at 155) qualified as § 2244(d)(2) "State post-conviction or other collateral review" – was predicated upon its determination that such sentence reduction leniency plea constituted "State post-conviction ... review,"[3] *irrespective of whether* the sentence reduction application could be

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[2] *See Resp. Br.* 5 (stating that the *Kholi* panel "noted that a motion for sentencing leniency would be 'collateral' within the general meaning of the term"); *id.* at 4 n.2 ("Rhode Island's assertion that the First Circuit read § 2244(d)(2) as permitting tolling for 'even *non*-collateral state court post-conviction applications,' Pet'r Br. 13, ignores the context of the statement.") (emphasis in original).

[3] *See Kholi*, 582 F.3d at 152 ("The Rule 35(a) motion is obviously a motion that seeks *state post-conviction review* of that sentence") (emphasis added); *id.* at 153 ("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") (emphasis added); *id.* at 149 (framing question presented as whether "a state-court post-conviction motion to reduce an imposed sentence, in the nature of a plea for discretionary leniency ... fall[s] within the scope of the tolling provision."); *id.* at 155 ("After all, [a sentence reduction motion] ... initiates a separate post-conviction proceeding"); *id.* at 156 ("The plain meaning [of § 2244(d)(2)] ... indicates that a state post-conviction motion for a sentence reduction, in the nature of a plea for discretionary leniency, comes within the statutory sweep.").

characterized as "collateral review." *See Kholi*, 582 F.3d at 153 (disagreeing with the Fourth Circuit's view "that the statutory phrase 'State post-conviction or other collateral review' contemplates only '*collateral*, post-conviction review.'") (*quoting Walkowiak v. Haines*, 272 F.3d 234, 236 (4th Cir. 2001) (emphasis in original); *id.* at 153 ("The plain meaning of the statute is not altered by the fact that a post-conviction motion is not 'collateral,' that is, that the motion is filed in the original criminal case."); *id.* at 154 n.6 ("We note that even if the tolling provision is conflated to apply only to applications for *collateral* review – *an interpretation that we reject* – [Kholi's] Rule 35(a) motion would likely qualify.") (second emphasis added).

In any event, as Respondent Kholi, like Petitioner Wall (*Petitioner's Brief* ("*Pet. Br.*") 18-19), recognizes that "[t]hrough the use of the word 'other,' Congress included post-conviction review as a form of collateral review" (*Resp. Br.* 7); *see also id.* at 13 ("Post-conviction review, by the plain words of the statute, must be a form of collateral review."),[4] both

[4] *See also Resp. Br.* 12 ("If meaning and effect is given to each word of the phrase 'post-conviction or other collateral review,' ... 'post-conviction' must be construed as a type of collateral review."); *id.* ("The Court observed [in *Duncan v. Walker*, 533 U.S. 167, 177 (2001)] that '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.'").

parties are now in agreement that the disposition of this case comes down to the meaning of the term "collateral review."

II. RESPONDENT KHOLI'S PROPOSED CONSTRUCTION OF "COLLATERAL REVIEW" IS UNTENABLE

As Petitioner Wall reads the *Brief for Respondent Khalil Kholi*, Respondent Kholi understands the phrase "collateral review," not as *necessarily* comprehending a state court review proceeding capable of entertaining *legal challenges* to a state court judgment of conviction or sentence (*Resp. Br.* 14-15) ("'collateral review' may, *or may not*, include a legal challenge") (emphasis added), but, rather, as merely referring temporally (in time) to any post-judgment criminal proceeding *other than* one in the "*direct* review" (*id.* at 17) (emphasis added) process.[5] Respondent Kholi appears to posit

[5] *See Resp. Br.* 17 ("'collateral review' of a judgment is review other than review of a judgment in the direct appeal process."); *id.* ("Review apart from direct appeal[,]" "review under-taken after a judgment has become final."); *id.* at 17-18 ("Construing the term 'collateral review' in 28 U.S.C. § 2244(d)(2) as concerned with the timing of an application rather than simply the nature of the review sought (legal or equitable)"); *id.* at 18 (review undertaken "after the judgment has become final"); *id.* at 25 (an application qualifies as "collateral review" "[w]hether or not a particular state-authorized avenue of relief available after the conclusion of a direct appeal seeks legal or discretionary, equitable relief"); *id.* at 29 ("challenges ... seeking ... relief following direct appellate review"); *id.* at 32 ("'collateral review' in the temporal sense, as review following direct

(Continued on following page)

both a statutory-language-based reason for this interpretation of the phrase "collateral review," and a decisional-based one.[6]

The statutory-language-based reason is that, if one were to break-up the phrase "collateral review" into its constituent words – "collateral" and "review" – and give to each of those words their "dictionary definitions" (*Resp. Br.* 15), "collateral review" would, in that event, not necessarily comprehend a state court proceeding in which a prisoner mounts a legal challenge to his or her judgment of conviction or sentence (*id.* at 16-17, 20). The evident weakness

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review"); *id.* at 33 ("collateral review" is "temporal[ly] distinct[ ]" from direct review, and is review "which occurs after judgment or after direct appellate review"); *id.* at 40 ("an approach that examines only whether a state court motion was properly filed and sought available judicial relief from a state court judgment apart from direct appellate review").

[6] Unlike his reading of "collateral review," Respondent Kholi presumably recognizes that the phrase "State post-conviction ... review," 28 U.S.C. § 2244(d)(2), *does* comprehend a legal-challenge review proceeding. (*See Black's Law Dictionary* 1186 (7th ed. 1999), which defines a "postconviction-relief proceeding" as "[a] state or federal procedure for a prisoner to request a court to vacate or correct a conviction or sentence. – also termed *postconviction-remedy proceeding*; *PCR action*," and this Court in *Duncan*, 533 U.S. at 177-78, seemed not to find any difference between the words "relief" and "review.") Of course, if this presumption is justified, and if Petitioner Wall had correctly read the *Kholi* panel's decision as resting singularly upon the phrase "State post-conviction ... review," then even Respondent Kholi must acknowledge that the First Circuit erred by predicating its disposition upon the phrase "State post-conviction ... review."

with this contention, though, is that it incomprehensibly presumes that Congress intended that the *phrase* "collateral review," used – as Respondent Kholi recognizes (*Resp. Br.* 35-36) – in numerous other provisions of the AEDPA (even other *sub*sections of the very § 2244 under consideration) to denote "a proceeding requiring a legal challenge" (*Resp. Br.* 35),[7] a proceeding which "*must* present legal challenges" (*id.* at 36) (emphasis added),[8] should be interpreted entirely differently in § 2244(d)(2), by being pulled asunder, with each word to be examined by

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[7] *See* § 2244(b)(2)(A) (claim that "relies on a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court, that was previously unavailable" is excepted from "second or successive" bar) (emphasis added); § 2244(d)(1)(C) (one-year limitations period may run from "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*") (emphasis added); § 2254(e)(2)(A)(i) (exception for undeveloped claim that "relies on ... a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court") (emphasis added); § 2255 (one year limitations period applicable for federal prisoners may run from "date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on *collateral review*") (emphasis added); *id.* (claim that relies on "a new rule of constitutional law, made retroactive to cases on *collateral review* by the Supreme Court" is excepted from "second or successive" bar) (emphasis added).

[8] *See also Resp. Br.* 27-28 ("collateral review pursuant to 28 U.S.C. §§ 2254 and 2255 requires a legal challenge"; "require a claim of jurisdictional, constitutional, or fundamental error to support federal collateral review").

resort to a dictionary. Since the normal rule of statutory construction instructs that identical language used in different parts of the same statute is generally presumed to have the same meaning (*see, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)), it simply cannot be that Congress, in §§ 2244(b)(2)(A), 2244(d)(1)(C), 2254(e)(2)(A)(i), and 2255 of the AEDPA, understood "collateral review" as a phrase denoting "a proceeding requiring a *legal* challenge" (*Resp. Br.* 35) (emphasis added), but intended an altogether different meaning – any temporal post-judgment criminal proceeding distinct from "direct review" (*Resp. Br.* 17-18, 25, 29, 32-33, 40), a meaning derived from a dictionary examination of each word – in § 2244(d)(2) only.

Moreover, Respondent Kholi's temporal-only construction would anomalously result in classifying certain state court applications as collateral, even before the judgment of conviction or sentence had become final. *See Resp. Br.* 18 (indicating that a Rhode Island Rule 35(a) sentence reduction motion, at issue in this case, filed immediately after sentencing, would be a "collateral review" application). Such a construction is inconsistent with a habeas corpus statute of limitations that begins to run only *after* a judgment has become final. *See* § 2244(d)(1). Respondent Kholi's statutory-language-based reason for his interpretation of "collateral review," then, cannot withstand scrutiny, even putting to the side the whole question of this Court's established use of the phrase "collateral review" prior to the enactment of the AEDPA (discussed *infra* at 10-13).

The second reason Respondent Kholi gives to support his broad construction of § 2244(d)(2) "collateral review," is that the phrase's case-law use in connection with the phrase "direct review," indicates that "collateral review" should be taken to denote a temporal sense (*Resp. Br.* 17-18 ("concerned with the timing of an application")) only, to mean review "which occurs *after* judgment or after direct appellate review" (*id.* at 17) (emphasis added). As discussed above, however, since Congress did not, as even Respondent recognizes (*Resp. Br.* 27-28, 35-36), use the phrase "collateral review" in this temporal-only sense in the other provisions of AEDPA, and since such temporal-only construction would result – anomalously in a tolling provision that only begins to run upon entry of final judgment – in the classification as "collateral review" of some state applications filed even before final judgment, Kholi's decisional-based rationale does not hold up either.

Furthermore, while Respondent Kholi may be correct that "collateral review," as used in the case law in connection with the phrase "direct review," does have a temporal component, because Respondent Kholi recognizes, as he must, that the case law has used "collateral review" to describe legal-challenge state court proceedings (*Resp. Br.* 29), Kholi's decisional-based rationale actually supports Petitioner's construction of the phrase "collateral review" as including a post-judgment legal challenge proceeding only. If, that is, the way this Court has used the phrases "direct review" and "collateral

review" indicates the notion of temporalness, it also indicates the notion of legal challenge.

Thus, neither of Respondent Kholi's interpretative rationales for the construction of "collateral review" – the one predicated on the dictionary definition of the separately read words "collateral" and "review," the other on what may be gleaned from the decisions of this Court employing both the phrases "direct review" and "collateral review" – supports his contention that "'[o]ther collateral review' may, or may not, include a legal challenge." (*Resp. Br.* 15.) Respondent's construction, moreover, takes no issue with Petitioner Wall's contention that other sections of AEDPA use "collateral review" as a phrase denoting "a proceeding requiring a *legal* challenge" (*Resp. Br.* 35) (emphasis added),[9] a contention central to Petitioner Wall's construction of § 2244(d)(2) "collateral review" (*Pet. Br.* 25-27).

One basis upon which Petitioner Wall relies upon for his construction of "collateral review" that Respondent Kholi *does* take issue with, is the "presum[ption]

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[9] Respondent Kholi does try to explain why Congress might have intended "collateral review" to mean one thing in § 2244(d)(2) of the AEDPA, but an entirely different thing in the other AEDPA provisions in which the phrase was employed. (*See Resp. Br.* 28 (suggesting that Congress's comity-federalism concerns justify reading "collateral review" one way in § 2244(d)(2), and a different way in other AEDPA provisions where "federal review" concerns predominate); *id.* at 35-36 (same).) This explanation is unconvincing, as it raises more questions than it answers.

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 *lawfulness* of a prior judgment of conviction or sentence" (*Pet. Br.* 21-22.) (emphasis in original). According to Respondent Kholi, merely because this Court's "pre-AEDPA cases ... use[d] the term 'collateral review' in connection with state court proceedings where a defendant raised a legal challenge to his state court conviction or sentence" (*Resp. Br.* 28-29), does not mean that such term can also not refer to a *non*-legal challenge vehicle. (*Resp. Br.* 28-36.)

Because, however, the phrase "collateral review" in connection with state (to say nothing of federal) court prisoner proceedings has *only* been used by this Court in reference to legal-challenge proceedings (*see* cases cited in *Pet. Br.* 20-25), because such phrase has *never* been used by this Court to refer to a sentence-leniency or such other non-legal challenge state court proceeding,[10] because the so called Powell Committee Report (Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989)) upon which a portion of AEDPA was based (*see Lindh v. Murphy*, 521 U.S. 320, 337 n.2 (1997)

[10] Petitioner Wall could find no such usage, ever; presumably, because no such usage was indicated in the *Brief for Respondent Khalil Kholi*, Respondent also could not uncover even one, ever.

(Rehnquist, C.J., dissenting)) evidently and repeatedly uses the term "state collateral review" in the legal-challenge proceeding sense,[11] because the courts of virtually every state have employed the phrase "collateral review" to refer to a state proceeding seeking the invalidation of conviction or sentence,[12]

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[11] *See, e.g.*, Powell Committee Report at Part II (B) (Second Paragraph), *supra* p. 10 ("In sum, the Committee believes that provision of competent counsel for prisoners under capital sentence throughout both *state and federal collateral review* is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.") (emphasis added).

[12] *See, e.g., State v. Glass*, 569 P.2d 10, 13 (Alaska 1979); *Ex parte Love*, 507 So.2d 979, 979 (Ala. 1987); *Ferguson v. State*, 521 S.W.2d 546, 548 (Ark. 1975) (Fogelman, J., concurring); *Wilson v. Ellis*, 859 P.2d 744, 748 (Ariz. 1993); *People v. Jackson*, 514 P.2d 1222, 1223 (Cal. 1973); *People v. Trimble*, 839 P.2d 1168, 1171 (Colo. 1992); *Gaines v. Manson*, 481 A.2d 1084, 1091 n.10 (Conn. 1984); *Bailey v. State*, 588 A.2d 1121, 1125 (Del. 1991); *Kleinbart v. U.S.*, 553 A.2d 1236, 1244 (D.C. 1989); *Garcia v. State*, 622 So.2d 1325, 1329 (Fla. 1993); *Jacobs v. Hopper*, 233 S.E.2d 169, 170 (Ga. 1977); *Hernandez v. State*, 905 P.2d 86, 87 (Idaho 1995); *People v. Strickland*, 609 N.E.2d 1366, 1390 (Ill. 1992); *Morgan v. State*, 469 N.W.2d 419, 422-23 (Iowa 1991); *State v. Neer*, 795 P.2d 362, 367 (Kan. 1990); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1294 (La. 1992); *Kimball v. State*, 490 A.2d 653, 658 (Me. 1985); *Thanos v. State*, 632 A.2d 768, 779 (Md. 1993) (Rodowsky, J., concurring in part and dissenting in part); *Commonwealth v. Szczuka*, 600 N.E.2d 575, 577 (Mass. 1992); *People v. Reed*, 535 N.W.2d 496, 503 (Mich. 1995); *State ex rel. Roy v. Tahash*, 152 N.W.2d 301, 304-05 (Minn. 1967); *State v. Read*, 544 So.2d 810 (Miss. 1989); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 443, 445 (Mo. 1993); *State ex rel. Turner v. Montana Third Judicial Dist. Court, Powell County*, 897 P.2d 1060, 1061-62 (Mont. 1995); *State v. Eutzy*, 496 N.W.2d 529, 531 (Neb. 1993); *Snow v. State*, 779 P.2d 96, 97 (Nev. 1989); *Avery v. Cunningham*, 551 A.2d 952, 954-55 (N.H. 1988); *State v Preciose*,

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and the federal appellate courts have used the phrase in precisely this same way,[13] it is entirely unreasonable to maintain that this Court's pre-AEDPA use of the phrase "collateral review" "provides no answer" (*Resp. Br.* 29) to whether this Court employed, in prisoner cases, the phrase "collateral review" to refer only to a state court legal-challenge vehicle. As Respondent Kholi, then, does not point to any decision, by any court, at any time, in which the term "collateral review" was used to refer to something

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609 A.2d 1280, 1287 (N.J. 1992); *Jones v. State*, 469 P.2d 717, 718-19 (N.M. 1970); *People v. Eastman*, 648 N.E.2d 459, 464-65 (N.Y. 1995); *State v. White*, 162 S.E.2d 473, 478 (N.C. 1968); *State v. Sneed*, 584 N.E.2d 1160, 1172 (Ohio 1992); *Robison v. State*, 818 P.2d 1250, 1252 (Okla. Crim. App. 1991); *Bryant v. Thompson*, 922 P.2d 1219, 1223 (Or. 1996); *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988); *Pailin v. Vose*, 603 A.2d 738, 741-42 (R.I. 1992); *Drayton v. Evatt*, 430 S.E.2d 517, 519 (S.C. 1993); *Archer v. State*, 851 S.W.2d 157, 163 (Tenn. 1993); *Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989); *Andrews v. Morris*, 677 P.2d 81, 83 (Utah 1983); *In re Dunham*, 479 A.2d 144, 148 (Vt. 1984); *State v. Brand*, 842 P.2d 470, 471 (Wash. 1992); *Losh v. McKenzie*, 277 S.E.2d 606, 609 (W.Va. 1981); *State v. Escalona-Naranjo*, 517 N.W.2d 157, 165 (Wis. 1994).

[13] *See, e.g., Robinson v. Ponte*, 933 F.2d 101, 102 (1st Cir. 1991); *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991); *Reynolds v. Ellingsworth*, 23 F.3d 756, 757 (3d Cir. 1994); *Bunch v. Thompson*, 949 F.2d 1354, 1366 (4th Cir. 1991); *Smith v. Black*, 970 F.2d 1383, 1385 (5th Cir. 1992); *Couch v. Jabe*, 951 F.2d 94, 97 (6th Cir. 1991); *Burris v. Farley*, 51 F.3d 655, 657 (7th Cir. 1995); *Prewitt v. Goeke*, 978 F.2d 1073, 1076 (8th Cir. 1992); *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991); *Brecheen v. Reynolds*, 41 F.3d 1343, 1349 n.4 (10th Cir. 1994); *Thomson v. Wainwright*, 714 F.2d 1495, 1504 (11th Cir. 1983); *Garris v. Lindsay*, 794 F.2d 722, 727 (D.C. Cir. 1986).

other than a recognized vehicle to challenge the validity of a conviction or sentence, it is simply implausible to suggest that Congress, in enacting § 2244(d)(2) of the AEDPA, meant to employ the term differently.[14] Indeed, given how the phrase "collateral review" was used prior (and subsequent) (*Pet. Br.* 24) to the 1996 enactment of the AEDPA, it strains credulity to posit that Congress, had it intended tolling to apply to "*all* of the judicial processes a state provides to address all aspects of a state judgment within the state court system before federal review is sought" (*Resp. Br.* 41) (emphasis added), would have settled upon the phrase "collateral review" to convey such an all-embracing conception.[15]

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[14] Although Respondent Kholi is of course correct that, "[w]ith the exception of the decisions creating the circuit split presented in this case," the other circuit courts of appeals have "not express[ed] any views" on whether the type of sentence reduction motion at issue in this case constitutes "collateral review" pursuant to § 2244(d)(2) of the AEDPA (*Resp. Br.* 33 n.10), the Petitioner's Brief at pp. 30-31, 34, did cite to decisions of the Second, Fifth, Eighth, and Ninth Circuit Courts of Appeals (and, at *Pet. Br.* 31, 34, to the leading treatises on habeas corpus and postconviction relief remedies) which indicate the understanding that a state "collateral review" proceeding *is* one seeking the invalidation of a state court judgment of conviction or sentence. Since the submission of the Petitioner's Brief, the United States Court of Appeals for the Seventh Circuit has expressed, even more categorically this same understanding. *See Price v. Pierce*, 617 F.3d 947, 950-51 (7th Cir. 2010) (indicating that only those state court proceedings which are "attack" vehicles, qualify as § 2244(d)(2) "collateral review").

[15] Indeed, *had* Congress wished to convey the "all of the judicial processes" (*Resp. Br.* 41) (emphasis added) construction

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III. THE POLICY ARGUMENTS MADE IN SUPPORT OF RESPONDENT KHOLI'S CONSTRUCTION OF "COLLATERAL REVIEW" DO NOT WITHSTAND SCRUTINY

The policy reasons advanced by Respondent Kholi in support of his construction of § 2244(d)(2) "collateral review," do not withstand scrutiny. Respondent Kholi recognizes, as he must, that his all-embracing "collateral review" construction is at odds with the AEDPA goal of "reduc[ing] delays in the execution of state and federal criminal sentences" (*Woodford v. Garceau*, 538 U.S. 202, 206 (2003)); he moreover recognizes (*Resp. Br.* 41) that his proposed construction does nothing to advance another critical AEDPA concern, "promot[ing] the exhaustion of state remedies" (*Duncan*, 533 U.S. at 178), since there is obviously no point in giving the state court "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights" (*Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)) when the state court application *concedes* the lawfulness of the judgment of conviction and sentence, and cannot be used to assert *any* legal claim, federal or otherwise.

Deprived of the two policy pillars underlying § 2244(d)(2)'s tolling provision (*Duncan*, 533 U.S. at 179 ("[t]he tolling provision of § 2244(d)(2) balances

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posited by Respondent Kholi, it could have simply provided that "the time during which any properly filed application for State court review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

the interests served by the exhaustion requirement and the limitation period.")), Respondent Kholi resorts, somewhat as the panel decision below did (*Kholi,* 582 F.2d at 155-56), to notions of "our federalism" comity, even invoking this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), for what, in the habeas corpus context, is the quite startling conception that Congress intended to "afford respect for state processes" (*Resp. Br.* 21) by making sure that federal habeas corpus review of a state prisoner's sentence would not begin until the state prisoner has "avail[ed] himself of *all* state remedies[.]" (*Id.* at 24) (emphasis added). Respondent Kholi goes so far as to suggest that to interpret § 2244(d)(2) as have the Third, Fourth, and Eleventh Circuits Courts of Appeals, would be an affront to "[a] state's ... entitle[ment] to determine the opportunities for relief from criminal judgment ... that it will make available to its prisoners[,]" (*Resp. Br.* 8), a "[dis]respect [to] the state's determination that [all of its] ... remedies should be made available to state prisoners" (*id.* at 25), and would undermine the "'principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees'" (*id.* at 23 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008))).

Respondent Kholi's states-rights cry misses the mark. In the first place, the proper interpretation of

§ 2244(d)(2) is a matter for the federal courts,[16] charged with interpreting federal law in conformance with congressional mandate (*see, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 589 (1995)), not "respect[ing] th[e] choices" "states have [made in] ... choos[ing] the remedies and review processes they will offer to those convicted" (*Resp. Br.* 37). Moreover, of course, the fact that a state prisoner may find herself time-barred in *federal* court pursuant to *federal* statute, hardly annuls a state's criminal processes or procedure; whatever state remedies are available to a state prisoner remain available, *whether or not* the running of a *federal* limitations period bars that state prisoner from pursuing a *federal* action. Certainly, no argument could be made or case cited to support the fantastic notion that § 2244(d)'s limitations period should not be enforced until a state prisoner had first availed herself of every state remedy and process. Indeed, the "our federalism" comity

[16] *See Clay v. U.S.*, 537 U.S. 522, 531 (2003) ("[F]inality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule."); *Summers v. Schriro*, 481 F.3d 710, 714 (9th Cir. 2007) ("Because the question of what constitutes direct review is intertwined with the question of when a decision on direct review becomes final, it makes sense to decide both questions by reference to uniform federal law."); *Foreman v. Dretke*, 383 F.3d 336, 338-39 (5th Cir. 2004) ("When addressing finality, we have previously discussed the intersection of AEDPA and state law. In so doing, we confirmed that AEDPA, not state law, determines when a judgment is final for federal habeas purposes.").

interest invoked by Respondent Kholi actually points in the other direction: As the *Younger* doctrine is concerned with protecting *a state* from premature federal interference (*see, e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 208 (1988)), no state would complain of federal interference when one of its prisoners has been shut out of federal court pursuant to § 2244(d).

Respondent Kholi further suggests as a matter of policy, much as the panel decision below did (*Kholi*, 582 F.3d at 155-56), that it makes sense to toll the running of § 2244(d)(1)'s limitation period until after all state processes and procedures have been concluded, because a "defendant who has obtained relief by pursuing state remedies ... might not seek federal habeas review, thus conserving limited federal judicial resources." (*Resp. Br.* 37.) Whether or not, however, an application is one for "State post-conviction or other collateral review," pursuant to § 2244(d)(2), is, as even Respondent Kholi recognizes (*Resp. Br.* 11), a matter of Congressional intent as expressed in § 2244(d)(2). If a particular state court application does not qualify as a § 2244(d)(2) tolling mechanism, it does not so qualify; there is no special tolling allowance for a state court application that might moot a later federal habeas corpus action. Indeed, if there is any state application that would moot a later federal habeas corpus action, it would be an application for commutation or clemency, yet it has been held that such petitions do *not* qualify as § 2244(d)(2) "other

collateral review" applications. *See Malcom v. Payne*, 281 F.3d 951, 960 (9th Cir. 2002) ("we conclude that a state prisoner's petition for clemency is not 'State post-conviction or other collateral review' and therefore does not toll AEDPA's limitations clock."); *Emehiser v. Kempf*, No. CV-05-456-C-MHW, 2007 WL 793833, at *4 (D. Idaho March 14, 2007) ("There is no authority indicating that a petition for commutation of sentence is part of the administrative appeal process or a 'state post-conviction or other collateral review' action under § 2244(d)(2) such that it would toll the federal statute of limitations."). Moreover, to the extent that § 2244(d)(2)'s tolling provision is concerned with "conserving limited federal judicial resources" (*Resp. Br.* 37), that concern is advanced by *enforcing* § 2244(d)'s limitations period as intended by Congress, as there are assuredly more § 2254 federal habeas corpus actions dismissed as time-barred than there are such potential actions "mooted" by the grant of favorable state relief.

Penultimately on the considerations of policy, the Respondent's Brief at 41 seems to echo the *Kholi* panel's view that it "would be [an] ... unseemly prospect [for a federal court to] ... review[ ] ... state-court convictions[ ] while parallel proceedings were still ongoing in state court" (*Kholi*, 582 F.3d at 155). Yet, as the cases set out in *Pet. Br.* at p. 39 n.27, and the *Amicus Brief* at p. 19 establish, there is nothing improper, let alone "unseemly" (*Kholi*, 582 F.3d at 155), about an ongoing state court proceeding

during the hearing of a fully exhausted § 2254 federal habeas corpus action. Indeed, the First Circuit itself seems to have expressed this very view (*see Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 77 (1st Cir. 2002) (disapproving of the "broad rule that federal courts must dismiss § 2254 petitions whenever the petitioner is in the process of adjudicating other, related claims in state courts.")), a view consistent with this Court's holdings in *Rhines v. Weber*, 544 U.S. 269, 273-79 (2005) (district court has some discretion to grant or deny a request to stay a habeas petition containing only exhausted claims), and *Lawrence v. Florida*, 549 U.S. 327, 334-35 (2007) (rejecting contention that it would be "awkward" for "state prisoners [to] have to file federal habeas applications while they have certiorari petitions from state postconviction proceedings pending before this Court.").[17] In all events, a rule prohibiting the litigation of exhausted federal constitutional issues in a § 2254 case, while any other relief is being sought in state court, would not only "severely limit the scope of the federal habeas corpus statute" (*U.S. ex rel. Gockley v. Myers*, 411 F.2d 216, 223 n.8 (3d Cir.

[17] That no rule prevents a federal court from passing upon exhausted federal claims, even while state law claims are being litigated in state court, is further supported by § 2254(b)(2) of AEDPA, which is intended to reduce needless returns to state court by allowing district courts to substantively dismiss meritless but *unexhausted* claims.

1969)), but also needlessly delay a state prisoner's federal adjudication of fully exhausted constitutional law claims.

Finally, with respect to policy, Respondent Kholi argues that his construction of "collateral review" – to mean only temporally to any post-judgment criminal proceeding *other than* one in the "*direct* review" (*Resp. Br.* 17) (emphasis added) – is easier to apply than the "legal-challenge" formulation urged by Petitioner Wall and endorsed by the Third, Fourth, and Eleventh Circuit Courts of Appeals. (*Resp. Br.* 38-41.) This is plainly not so, as exemplified by Respondent's own discussion of his "collateral review" formulation as applied to Rule 35(a), and Rhode Island's Post-Conviction Relief Act (R.I. Gen. Laws § 10-9.1-1 *et seq.*) ("PCR Act"). With respect to Rule 35(a), since a sentence reduction motion may be filed under the Rule even before a direct appeal has been taken and the judgment becomes final (*see* Rule 35(a) (motion may be filed "within one hundred and twenty (120) days after the sentence is imposed")), a better argument could made, under Respondent Kholi's temporal, "other than direct review," formulation (*Resp. Br.* 17), that a Rule 35(a) motion is direct, than could be made for that it is collateral.[18] In any event, given the number of state procedural considerations

[18] *See* the Fourth Circuit's persuasive explanation, in *Walkowiak*, 272 F.3d at 237, as to why West Virginia's comparable Rule 35 provision is "direct" and not "collateral review."

Respondent Kholi had to resort to in order to arrive at his "collateral" versus "direct" determination with respect to Rule 35 (*Resp. Br.* 18-19) (examining a number of Rhode Island state law factors), it cannot be said that his proposed "collateral review" formulation would be any easier for a federal court to apply than straightforwardly asking whether the sentence reduction motion presents a legal challenge to the sentence.[19] And while, under the legal-challenge conception endorsed by the Third, Fourth, and Eleventh Circuits, and advocated by Petitioner Wall, an application pursuant to Rhode Island's PCR Act is certainly a tolling event, indeed it is a quintessential

[19] Respondent Kholi also questions whether, under a criminal procedural rule like Rhode Island's Rule 35(a), where an application for sentence reduction and for correction of an illegal sentence is provided for in the same subsection of the Rule, it might be too difficult in a given case for a federal court to determine the sentencing relief that was actually sought in state court. (*Resp. Br.* 39-40.) Of course, that scenario is not present in this case, nor in the cases comprising the circuit split; all such cases involve motions for discretionary sentence leniency (*see Kholi*, 582 F.3d at 155 ("a state-court sentence reduction motion in the nature of a plea for discretionary leniency ... not present[ing] a claim premised on an error of federal law"). Moreover, like Rhode Island's Rule 35(a), the federal Pre-Sentencing-Guidelines Rule 35 had for many years, until the 1979 amendment, also contained within the same subsection the provision for correction and reduction of sentence (*see*, *e.g.*, *U.S. v. Cervallos*, 538 F.2d 1122 n.10 (5th Cir. 1976)), and Respondent Kholi presents no evidence that, until the 1979 amendment, the federal district courts had difficulty deciphering whether a prisoner was requesting sentence leniency, or asserting that her sentence was unlawful.

tolling vehicle (*Pet. Br.* 32-34), under Respondent Kholi's construction of "collateral review," it would be necessary, again, to delve into matters of state procedural law (*see Resp. Br.* 19 n.6 (examining whether the PCR was heard by the same judge or not)) to determine whether such PCR application was "direct" or "collateral."[20] If ease of application should factor into the interpretation of § 2244(d)(2) "collateral review," then Respondent's formulation is inferior to the legal-challenge formulation endorsed by Third, Fourth, and Eleventh Circuit Courts of Appeals.

[20] Of course, the reason a "collateral review" application tolls even if no federal law *claim* is presented within the *application* (*see* cases cited in Respondent's Brief at 24 n.7; *but see Gatson v. Palmer*, 417 F.3d 1030, 1045 (9th Cir. 2005) ("Because this [state habeas] application ... was based on state law, it is irrelevant for purposes of ... state court collateral review of his federal claims.")), is because Congress made a determination to toll for "applications" (§ 2244(d)(2)), not claims, presumably in order to relieve the district courts of having to determine whether a particular *claim* raised in a properly filed state law challenge vehicle was or was not an issue of federal constitutional law.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

PATRICK C. LYNCH
Rhode Island Attorney General
GERALD COYNE
Deputy Attorney General
STACEY PIRES VERONI
Chief, Criminal Division
AARON L. WEISMAN
Assistant Attorney General
Counsel of Record
Chief, Criminal Appeals Unit
CHRISTOPHER R. BUSH
Special Assistant
Attorney General

RHODE ISLAND DEPARTMENT
OF ATTORNEY GENERAL
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400
aweisman@riag.ri.gov

Attorneys for Petitioner
A.T. Wall