

No. 09-868

In The
Supreme Court of the United States

—◆—
ASHBEL T. WALL, II, 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 FOR RESPONDENT KHALIL KHOLI

—◆—
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QUESTION PRESENTED

When a state provides a method for the discretionary, equitable modification of a criminal judgment and sentence, does that remedy constitute “post conviction or other collateral review” within the meaning of 28 U.S.C. §2244(d)(2) such that it tolls the limitation period for the filing of a federal petition for a writ of habeas corpus?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
State Rule of Criminal Procedure Involved.....	1
Statement of the Case	1
Summary of Argument	6
Argument	10
I. The Plain Language of 28 U.S.C. §2244(d)(2) Supports the Conclusion That a Motion Pursuant to a State Provision Authorizing Discretionary, Equitable Sentencing Relief Following Final Judgment Is an “Application for State Post-Conviction or Other Collateral Review.”.....	10
A. Post-Conviction or Other Collateral Review Is Review Following Direct Review	11
B. Construing “Post-Conviction or Other Collateral Review” to Include Discretionary, Equitable Review of a Sentence Following Final Judgment After Direct Appeal Is Consistent With Principles of Federalism and Comity.....	21
C. Rhode Island’s Attempt to Limit Collateral Review in the AEDPA’s Tolling Provision to Legal Challenges to Judgments Is Not Supported by the Precedent It Cites	28

TABLE OF CONTENTS – Continued

	Page
II. Policy Considerations Support the Conclusion That a Motion Pursuant to a State Provision Authorizing Sentencing Relief Following Final Judgment Is an “Application for State Post-Conviction or Other Collateral Review.”.....	36
Conclusion.....	43
Appendix	
State court proceedings in table form.....	App. 1

TABLE OF AUTHORITIES

Page

CASES

<i>Alexander v. Secretary, Dep't Of Corrections</i> , 523 F.3d 1291 (11th Cir. 2008).....	5, 19
<i>Artuz v. Bennett</i> , 531 U.S. 4 (2000).....	11, 27, 39
<i>Banjo v. Ayers</i> , 614 F.3d 964 (9th Cir. 2010).....	34
<i>Baltimore S.S. Co. v. Phillips</i> , 274 U.S. 316 (1927).....	16
<i>Beard v. Kindler</i> , 130 S. Ct. 612 (2009)	23, 25
<i>Begay v. United States</i> , 533 U.S. 137 (2008)	40
<i>Bishop v. Dormire</i> , 526 F.3d 382 (8th Cir. 2008)	24
<i>Bradley v. School Bd. of Richmond</i> , 416 U.S. 696 (1974).....	16
<i>Bradley v. United States</i> , 410 U.S. 605 (1973)	10
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993).....	18
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	42
<i>Carey v. Saffold</i> , 536 U.S. 214 (2002)	27
<i>Carter v. Litscher</i> , 275 F.3d 663 (7th Cir. 2001)	24
<i>Castille v. Peoples</i> , 489 U.S. 346 (1989).....	32
<i>Chicot County Drainage Dist. v. Baxter State Bank</i> , 308 U.S. 371 (1940).....	16
<i>Clay v. United States</i> , 537 U.S. 522 (2003).....	18
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	21, 31
<i>Cowherd v. Million</i> , 380 F.3d 909 (6th Cir. 2004).....	24

TABLE OF AUTHORITIES – Continued

	Page
<i>Danforth v. Minnesota</i> , 522 U.S. 264 (2008)	24, 42
<i>Dretke v. Haley</i> , 541 U.S. 386 (2004)	23
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	11, 12, 22, 42
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982).....	31, 32
<i>Evans v. United States</i> , 504 U.S. 255 (1992)	29
<i>Federated Dep’t Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981).....	16
<i>Florida v. Burr</i> , 496 U.S. 914 (1990)	30
<i>Ford v. Moore</i> , 296 F.3d 1035 (11th Cir. 2002)	24
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	30
<i>Godfrey v. Dretke</i> , 396 F.3d 681 (5th Cir. 2005).....	34
<i>Harrelson v. Swan</i> , No. 08-41112, 2010 WL 2340827 (5th Cir. June 10, 2010)	34
<i>Hartmann v. Carroll</i> , 492 F.3d 478 (3d Cir. 2007)	5
<i>Howard v. Ulibarri</i> , 457 F.3d 1146 (10th Cir. 2006)	4
<i>Jiminez v. Quarterman</i> , 129 S. Ct. 681 (2009)	11
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983).....	30
<i>Kholi v. Wall</i> , 582 F.3d 147 (1st Cir. 2009)	<i>passim</i>
<i>Kindler v. Horn</i> , 542 F.3d 70 (3d Cir. 2008), <i>rev’d on other grounds</i> , <i>Beard v. Kindler</i> , 130 S. Ct. 612 (2009).....	24
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	30

TABLE OF AUTHORITIES – Continued

	Page
<i>Levin v. Commerce Energy, Inc.</i> , 130 S. Ct. 2323 (2010).....	22
<i>Lockhart v. Nelson</i> , 488 U.S. 33 (1988).....	30
<i>MacKay v. United States</i> , 401 U.S. 667 (1971).....	18
<i>Moskal v. United States</i> , 498 U.S. 103 (1990)	29, 36
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986).....	32
<i>O’Shea v. Littleton</i> , 414 U.S. 488 (1974).....	31, 32
<i>Pace v. DiGuglielmo</i> , 544 U.S. 408 (2005)	11, 27
<i>Panama Mail S.S. Co. v. Vargas</i> , 231 U.S. 670 (1930).....	16
<i>Parker v. Dugger</i> , 498 U.S. 311 (1991).....	30
<i>Rector v. Bryant</i> , 501 U.S. 1239 (1991).....	30
<i>Reed v. Ross</i> , 468 U.S. 1 (1984)	17
<i>Rhines v. Weber</i> , 544 U.S. 269 (2005).....	22
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982)	22
<i>Sanchez-Llamas v. Oregon</i> , 548 U.S. 331 (2006).....	17
<i>Schad v. Arizona</i> , 501 U.S. 624 (1991)	30
<i>Shea v. Louisiana</i> , 470 U.S. 51 (1985).....	17, 32
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	40
<i>Simpson v. Matesanz</i> , 175 F.3d 200 (1st Cir. 1999)	23
<i>Sindar v. Turley</i> , 343 F. App’x 326 (10th Cir. 2009)	34
<i>State v. Furtado</i> , 774 A.2d 38 (R.I. 2001)	19

TABLE OF AUTHORITIES – Continued

	Page
<i>State v. Martinez</i> , 824 A.2d 443 (R.I. 2003)	19
<i>State v. Smith</i> , 676 A.2d 765 (R.I. 1996).....	19
<i>State v. Sostre</i> , 736 A.2d 95 (R.I. 1999).....	19
<i>Streu v. Dormire</i> , 557 F.3d 960 (8th Cir. 2009)....	32, 34
<i>Stuart v. State</i> , 914 P.2d 933 (Idaho 1996)	26
<i>Sweger v. Chesney</i> , 294 F.3d 506 (3d Cir. 2002).....	24
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	40
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	18, 23
<i>Thompson v. Tolmie</i> , 27 U.S. 157 (1829)	16
<i>Trevino v. Texas</i> , 503 U.S. 562 (1992)	17
<i>United States v. Addonizio</i> , 442 U.S. 178 (1979).....	32
<i>United States v. Frady</i> , 456 U.S. 152 (1982)	17, 18
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977).....	32
<i>Walkowiak v. Haines</i> , 272 F.3d 234 (4th Cir. 2001)	4, 5
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	21

STATUTORY AND REGULATORY PROVISIONS

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA)	<i>passim</i>
28 U.S.C.	
§2244(b)(2)(A).....	35
§2244(d)(1).....	6, 10, 38

TABLE OF AUTHORITIES – Continued

	Page
§2244(d)(1)(A).....	11
§2244(d)(1)(C).....	35
§2244(d)(2).....	<i>passim</i>
§2254	27, 35
§2255	19, 35
§2255(a).....	19
Alaska R. Crim. P.	
Rule 35.....	<i>passim</i>
Ark. Code Ann.	
§16-90-111.....	26, 39
§16-112-101	26
Ark. R. Crim. P.	
Rule 37.....	26
Colo. R. Crim. P.	
Rule 35.....	39
Conn. Super. Ct. R. P.	
§43-21	39
Del. Super. Ct. R. Crim. P.	
Rule 35.....	39
D.C. Super. Ct. R. Crim. P.	
Rule 35.....	39
Fla. R. Crim. P.	
Rule 3.800.....	39
Ga. Code Ann.	
§17-10-1(f)	39
Haw. R. Penal P.	
Rule 35.....	39

TABLE OF AUTHORITIES – Continued

	Page
Idaho Code	
§19-4901	26
§19-4902	26
§19-4909	26
Idaho R. Civ. P.	
Rule 60(b)	26
Idaho R. Crim. P.	
Rule 35.....	39
Mass. R. Crim. P.	
Rule 29.....	39
Md. Rule	
Rule 4-345	39
Me. R. Crim. P.	
Rule 35.....	39
Minn. R. Crim. P.	
Rule 27.03(9)	39
N.D. R. Crim. P.	
Rule 35.....	39
N.M. R. Civ. P.	
Rule 60(b)	26
N.M. R. Crim. P.	
Rule 5-801	35
Rule 5-802	26
R.I. Gen. Laws	
§10-9.1-1	4, 19, 25
§10-9.1-2	20

TABLE OF AUTHORITIES – Continued

	Page
R.I. R. Crim. P.	
Rule 33.....	25
Rule 35.....	<i>passim</i>
Rule 35(a)	1, 39
S.D. Codified Laws	
§23A-31-1.....	39
Tenn. R. Crim. P.	
Rule 35.....	39
Vt. R. Crim. P.	
Rule 35.....	39
W. Va. R. Crim. P.	
Rule 29.....	39
Wyo. R. Crim. P.	
Rule 35.....	39

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> (9th ed. 2009).....	7, 15, 20
Laura Braslow & Ross E. Cheit, <i>Appropriate Leniency or Worrisome Discretion? A Systematic Study of Motions to Reduce Criminal Sentences in Rhode Island Superior Court (1998-2003)</i> , 2nd Annual Conference on Empirical Legal Studies Paper, available at http://ssrn.com/abstract=998727	38
Gerald Durrell, <i>My Family and Other Animals</i> (Rupert Hart-Davis, Ltd. 1956).....	13

TABLE OF AUTHORITIES – Continued

	Page
<i>Merriam-Webster's Dictionary</i> (11th ed. 2009)	15
<i>Oxford English Dictionary Online</i> (2d ed. 1989), available at http://www.oed.com	15
<i>Webster's Third New International Dictionary</i> (2002).....	7, 20
Donald E. Wilkes, Jr., <i>State Postconviction Remedies and Relief Handbook</i> (2009).....	20

STATE RULE OF CRIMINAL PROCEDURE INVOLVED

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.



STATEMENT OF THE CASE

Khalil Kholi followed the procedures set out by the State of Rhode Island for directly appealing his December 1993 conviction and seeking state post-conviction review of his conviction and sentence. He first appealed the state Superior Court judgment to the state Supreme Court. That court affirmed the judgment on February 29, 1996; Mr. Kholi did not seek certiorari review in this Court. *Kholi v. Wall*, 582 F.3d 147, 149 (1st Cir. 2009). His direct appeal then

final, Mr. Kholi sought review of his sentence pursuant to Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure, timely filing a motion for a reduction in sentence on May 16, 1996. The trial court denied that motion on August 27, 1996; Mr. Kholi's appeal of that denial was affirmed by the Rhode Island Supreme Court on January 16, 1998. *Id.* at 149-150. While that appeal was pending, Mr. Kholi filed, on May 23, 1997, an application for post-conviction relief pursuant to R.I. Gen. Laws §10-9.1-1 *et seq.*, alleging, *inter alia*, ineffective assistance of counsel. 582 F.3d at 150. That application was denied on April 23, 2003 and the Rhode Island Supreme Court affirmed the denial on December 14, 2006. *Id.*

Having exhausted the available state court avenues for relief from his conviction and sentence, Mr. Kholi filed a *pro se* habeas corpus petition in the federal district court on September 5, 2007, approximately nine months after his state efforts were concluded. 582 F.3d at 150. The district court dismissed his petition as untimely. *Id.* The court determined that Mr. Kholi's conviction had become final on June 12, 1996. *Id.* It concluded that the post-conviction relief application filed on May 23, 1997 and finally decided on December 14, 2006 tolled the one-year limitation period under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) as an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. §2244(d)(2). *Id.* However, it also concluded that the motion filed pursuant to

Rule 35, which in this case sought discretionary sentencing leniency, did not. *Id.* Having determined that the Rule 35 motion did not toll the limitation period, the court calculated that the one-year period for filing had expired on January 4, 2007.¹ A listing of the state court proceedings discussed above is set out in table form at Appendix 1a.

The United States Court of Appeals for the First Circuit reversed the district court, holding that the Rule 35 motion was an “application for State post-conviction or other collateral review with respect to the pertinent judgment or claim” within the meaning of 28 U.S.C. §2244(d)(2), which tolled the period for filing for federal habeas corpus relief. The petition was, therefore, timely filed. *Id.* at 153, 156.

The First Circuit began its analysis with the text of 28 U.S.C. §2244(d)(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.” The court concluded that the text’s “plain meaning strongly favors [Mr. Kholi’s] position.” 582

¹ The district court accepted the state’s assertion that Mr. Kholi’s conviction had become final on June 12, 1996. Pet. App. 25. In fact, his conviction became final on May 29, 1996, when his time for filing a petition for a writ of certiorari in this Court expired. Using the district court’s analysis, the year would have expired on December 20, 2006. This discrepancy makes no difference to the issue in this case.

F.3d at 152. Mr. Kholi’s sentence was the “pertinent judgment,” the court found, citing to *Howard v. Ulibarri*, 457 F.3d 1146, 1148 (10th Cir. 2006) (motion for modification of sentence given tolling effect under §2244(d)(2)), and “[t]he Rule 35(a) motion is obviously a motion that seeks state post-conviction review of that sentence.” 582 F.3d at 152. The court rejected the contention that tolling applies only to motions challenging the legal basis for the judgment. “[W]e deem it significant that, in drafting section 2244(d)(2), Congress employed the expansive term ‘review’ instead of a more confining term (such as ‘challenge’).” *Id.* at 153.

The First Circuit considered and rejected contrary reasoning used in *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001), in which the Fourth Circuit decided that a motion under a West Virginia rule analogous to Rhode Island Rule 35 was not “collateral” for purposes of §2244(d)(2) – and therefore did not toll the limitation period – because it was filed in the original criminal case and did not challenge the validity of the conviction or sentence. *See Kholi*, 582 F.3d at 153-154. The First Circuit viewed the Fourth Circuit’s approach as reading the word “or” out of the statute, and noted that other state motions filed in the original case and heard by the trial judge (such as the application for post-conviction relief filed under R.I. Gen. Laws §10-9.1-1 in this case) had been deemed appropriate tolling mechanisms. *Id.*² It also

² Rhode Island’s assertion that the First Circuit read §2244(d)(2) as permitting tolling for “even *non*-collateral state
(Continued on following page)

noted that a motion for sentencing leniency would be “collateral” within the general meaning of the term; the motion “initiated proceedings that were supplementary to the underlying criminal case (the judgment in which became final independent of the Rule 35(a) motion).” 582 F.3d at 154 n.6.

The First Circuit was similarly “unconvinced” by the reasoning of the Third and Eleventh Circuits in *Hartmann v. Carroll*, 492 F.3d 478 (3d Cir. 2007), and *Alexander v. Secretary, Dep’t of Corrections*, 523 F.3d 1291 (11th Cir. 2008), which, in deciding that state motions for sentencing leniency did not toll the limitations period, focused on the fact that such motions did not implicate the AEDPA’s exhaustion of state remedies requirement. *Hartmann*, 492 F.3d at 483-484; *Alexander*, 523 F.3d at 1297. As the First Circuit recognized, the AEDPA also embodied principles of comity and federalism that supported tolling. *Kholi*, 582 F.3d at 154-155.



court post-conviction applications,” Pet’r Br. 13, ignores the context of the statement. The court was addressing the definition of “collateral” as used in *Walkowiak*; that is, as a motion not filed in the original criminal proceeding. *Kholi*, 582 F.3d at 153. The court also noted that the term “collateral” has a broader scope than that used in *Walkowiak* and that the Rule 35 motion “would likely qualify” as collateral under that broader definition. *Id.* at 154 n.6.

SUMMARY OF ARGUMENT

In 28 U.S.C. §2244(d)(1), Congress provided a one-year limitation period for the filing of an application for federal habeas corpus relief, triggered by one of four enumerated events. Congress also provided for the tolling of that one-year clock during the pendency of “a properly filed State application for post-conviction or other collateral review with respect to the pertinent judgment or claim.” 28 U.S.C. §2244(d)(2). The legislature did not define the terms used in that provision.

Rhode Island, like many other states, provides persons convicted of crimes the opportunity to pursue a variety of post-conviction remedies, including both legal challenges and discretionary, equitable sentencing relief. The federal district court dismissed Khalil Kholi’s petition for federal habeas corpus relief as untimely, adopting the magistrate judge’s report and recommendation that a motion for reduction of sentence under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure did not trigger tolling under §2244(d)(2) because tolling required a motion based on a legal challenge. Pet. App. 29-30.

In reversing the district court and holding that the Rhode Island Rule 35 motion *did* trigger tolling under §2244(d)(2), the United States Court of Appeals for the First Circuit correctly interpreted the undefined phrase “post-conviction or other collateral review” in the AEDPA’s tolling provision. The Rule 35 motion clearly sought post-conviction review; it was

filed after Mr. Kholi's conviction was affirmed on direct appeal to the Rhode Island Supreme Court. *Kholi*, 582 F.3d at 152.

Through the use of the word "other," Congress included post-conviction review as a form of collateral review within the scope of the tolling provision. Collateral review has long meant review distinct and apart from direct appellate review. The use of the expansive word "review" similarly underscores the inclusive and comprehensive nature of the tolling provision. As a "looking over or examination" or "consideration, inspection, or reexamination," see *Webster's Third New International Dictionary* 1944 (2002); *Black's Law Dictionary* 1434 (9th ed. 2009), review is not limited to a legal challenge but includes a motion seeking discretionary, equitable relief. Thus, examining the text of the statute and the common usage and ordinary understanding of its words, and giving meaning and effect to all of its terms, it is clear that the tolling provision encompasses the motion at issue here – a motion seeking a discretionary reduction of sentence.

In sharp contrast, Rhode Island's efforts to limit collateral review to legal challenges is not supported by the statutory text and rests on flawed logic. Rhode Island also ignores the context of the Court's references to legal challenges and collateral review in the habeas cases upon which it relies. While those cases support the proposition that state court proceedings seeking legal redress are within the scope of

collateral review, they do not address the question presented here: whether state court proceedings seeking discretionary, equitable relief also are within the scope of “collateral review” for purposes of the AEDPA’s tolling provision.

The First Circuit’s construction is consistent not only with the statute’s plain language, but also with the principles of federalism and comity reflected in the AEDPA. A state is entitled to determine the opportunities for relief from criminal judgment, including sentence, that it will make available to its prisoners. Congress recognized that states provide a variety of forms of post-conviction relief. It affirmed the respect for state processes at the heart of federalism and comity by linking the statute’s tolling mechanism to *state* applications for review. Respect for a state’s determination that its prisoners should have access to a variety of avenues of post-conviction or other collateral review means, in the habeas context, that comity is not limited to the requirement of exhaustion of state remedies, and it supports the inclusion of post-conviction discretionary sentencing review as a tolling mechanism. This inclusion is also consistent with interests of finality, which the Court has recognized is a state interest rather than a federal interest. If the state provides a particular form of post-conviction review, it does not view use of that form as contrary to its interest in finality.

Policy considerations, in addition to federalism and comity, further support the First Circuit’s conclusion that a motion for reduction of sentence seeking

discretionary relief is a tolling mechanism. A prisoner who obtains relief in the state court may be less likely to pursue federal habeas review, thereby conserving federal judicial resources. Limiting tolling to applications presenting only legal challenges would undermine the predictability and certainty that Congress sought to provide in drawing lines for the initiation of federal habeas proceedings. Many states provide for both legal and equitable sentencing relief in the same provision. If tolling is to turn on the nature of the relief sought, federal courts will have to examine the language of each motion, perhaps with reference to state rules concerning the construction of *pro se* pleadings, and will have to make judgments about whether the language of each application sought legal, equitable, or mixed relief, imposing an additional and unnecessary burden on the federal system.

The First Circuit's decision is supported by the statutory text, the plain meaning and common usage of the statutory words, and is consistent with the policies underlying the AEDPA. Its judgment should be affirmed.



ARGUMENT**I. THE PLAIN LANGUAGE OF 28 U.S.C. §2244(d)(2) SUPPORTS THE CONCLUSION THAT A MOTION PURSUANT TO A STATE PROVISION AUTHORIZING DISCRETIONARY, EQUITABLE SENTENCING RELIEF FOLLOWING FINAL JUDGMENT IS AN “APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW.”**

An application for federal habeas corpus relief “by a person in custody pursuant to a judgment of the State court” must be filed within the one-year limitations period set by Congress in 28 U.S.C. §2244(d)(1). The one-year clock, once started by the occurrence of one of four enumerated events, pauses when the statutory tolling condition found in §2244(d)(2) is met. That provision states: “The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim³ is pending shall not be counted

³ Rhode Island has not questioned whether Mr. Kholi’s motion concerned “the pertinent judgment or claim.” Nor could it. The sentence is part of the final judgment in a criminal case. *See Bradley v. United States*, 410 U.S. 605, 609 (1973). The Rule 35 motion here sought a change in the sentence imposed as part of the judgment. Whether or not it claims illegality in the original imposition of sentence, the motion challenges the merits of the sentence and is, therefore, related to “the pertinent judgment.”

toward any period of limitation under this subsection.” 28 U.S.C. §2244(d)(2).

Congress did not define the phrase “application for State post-conviction or other collateral review” as it is used in §2244(d)(2). This Court must therefore determine whether a state post-conviction motion under a state rule that provides for both discretionary reduction of sentence and correction of an illegal sentence fits within the plain meaning of the statutory language. Here, as in other cases interpreting the terms left undefined in the AEDPA’s statute of limitation provision, the Court must begin with the words of the statute and look to their common usage and understanding. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001) (interpreting “State post-conviction or other collateral review”); *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000) (interpreting “properly filed”); *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) (same); *see also Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009) (interpreting “final” in 28 U.S.C. §2244(d)(1)(A)). Application of these basic tenets of statutory construction demonstrates that a motion for a discretionary post-conviction sentence reduction, such as the Rule 35 motion in this case, is an “application for State post-conviction or other collateral review.”

A. Post-Conviction or Other Collateral Review Is Review Following Direct Review.

In *Duncan v. Walker*, the Court construed the term “State post-conviction or other collateral review”

in 28 U.S.C. §2244(d)(2) as limiting tolling mechanisms to *state* court review. 533 U.S. at 172-175. It also recognized that, by using this language, Congress intended to encompass the variety of available state collateral review processes as tolling mechanisms, and to refer to a class of processes rather than to any particular vehicle. *Id.* at 176-177. The Court observed 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.” *Id.* at 177. Had Congress wished to further restrict the type of state applications that tolls the AEDPA’s limitation period, it could have defined a narrower class. Rhode Island now asks this Court to limit what Congress did not.

The statutory text does not support the limitation Rhode Island seeks. If one applies the basic principles of statutory construction by beginning with the plain language of the statute and giving effect, if possible, to all terms of the statute, *see, e.g., Duncan*, 533 U.S. at 172, 174, it becomes clear that the limitation period of 28 U.S.C. §2244(d)(1) is tolled by a motion seeking discretionary, equitable collateral relief, such as the Rule 35 motion Mr. Kholi filed. If meaning and effect is given to each word of the phrase “post-conviction or other collateral review,” *see, e.g., Duncan*, 533 U.S. at 174-175 (and cases cited therein), “post-conviction” must be construed as a type of collateral review.

To begin, the word “other” generally signifies that its antecedent is part of the subsequent group. By way of illustration, when an advertisement for a drug advises “speak to your doctor if you develop X, Y, Z or other symptoms,” the listener understands X, Y, and Z to be symptoms. The humor in the title of Gerald Durrell’s book “My Family and Other Animals”⁴ comes from the inclusion of his family in the animal group. Post-conviction review, by the plain words of the statute, must be a form of collateral review.

Rhode Island agrees with the general proposition that post-conviction review is a type of collateral review, Pet’r Br. 18-19, but nonetheless seeks to define “collateral” to limit the scope of post-conviction review rather than to encompass the array of state remedies such review includes. Instead of accepting the natural reading of the statute that all post-conviction review with respect to the judgment at issue falls within the scope of “collateral review,” Rhode Island seeks to narrow “collateral review” to include only those applications that challenge or attack the *legality* of a final judgment of conviction or sentence,⁵ and thereby to exclude from collateral

⁴ Gerald Durrell, *My Family and Other Animals* (Rupert Hart-Davis Ltd. 1956).

⁵ However, Rhode Island has also summarized its interpretation of the term “collateral review” as “a proceeding at which a state prisoner seeks to upset an otherwise final judgment of conviction or sentence.” Pet’r Br. 20. A motion for reduction of sentence certainly falls within this interpretation; Mr. Kholi sought to upset his otherwise final sentence by seeking equitable relief.

review an application for post-conviction review of a sentence seeking discretionary, equitable relief. Pet'r Br. 20-35.

This narrowing fails to respect both the plain language of the statute and the commonly understood meaning of the relevant terms. For purposes of determining whether an application for state relief serves to toll the AEDPA's time limitation, the plain language of the statutory text and common understanding require construing the phrase "post-conviction or other collateral review" to include a class of review seeking sentencing relief following final judgment, without regard to whether the relief from judgment sought is legal or equitable. Rhode Island's attempt to exclude equitable post-conviction review from the statutory array of state tolling mechanisms and to limit the scope of "post-conviction or other collateral review" to the state equivalent of federal habeas corpus review is contrary to Congress's choice of the broad terms "post-conviction" and "collateral."

Rhode Island's argument also lacks both logical and textual support. As to logic, Rhode Island in essence argues that habeas review is collateral review; habeas review requires a legal challenge; therefore collateral review requires a legal challenge. This argument is fallacious, equivalent in form to the following: a bachelor is a man; a bachelor is an unmarried person; therefore a man is an unmarried person. While habeas corpus review is unquestionably collateral review and requires a legal challenge, not all collateral review is habeas review. "Other

collateral review” may, or may not, include a legal challenge.

The state’s reasoning is also inconsistent with the ordinary meaning of “collateral” and the Court’s long-time use of that term. In common usage, “collateral” means “not direct.” The Oxford English Dictionary Online defines “collateral” as “[a]ccompanying, attendant, concomitant” and “[l]ying aside from the main subject, line of action, issue, purpose, etc.; side-; subordinate, indirect.” *Oxford English Dictionary Online* (2d ed. 1989), available at <http://www.oed.com>. Merriam-Webster’s defines “collateral” as “accompanying as secondary or subordinate,” and “indirect.” *Merriam-Webster’s Dictionary* 243 (11th ed. 2003). Black’s Law Dictionary defines “collateral” as “[s]upplementary; accompanying but secondary and subordinate to” and defines a “collateral attack” as “[a]n attack on a judgment in a proceeding other than a direct appeal;” *Black’s Law Dictionary* 297-298 (9th ed. 2009).

Consistent with these dictionary definitions, the Court has described “collateral” as “not direct” in a variety of contexts. In reviewing an action of ejectment upon a writ of error, for example, the Court stated:

The counsel for the defendant in error have, in the argument, considered these proceedings open to the same examination and objections, as they would be in an appellate court, on a direct proceeding to bring them under review. This, however is not the light

in which we view the questions now before us. These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal.

Thompson v. Tolmie, 27 U.S. 157, 163 (1829).

In *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), a state negligence action brought after a libel in admiralty concerning the res judicata effect of the libel and the availability of the same grounds for recovery, the Court observed that “[a] judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not bringing another action upon the same cause.” 274 U.S. at 325 (collecting cases); see also *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (quoting *Baltimore S.S. Co.* in price-fixing cases).

Discussing the applicability of a statute concerning attorney’s fees in a school desegregation case, the Court stated that it had “recognized a distinction between the application of a change in the law that takes place while a case is on direct review on the one hand, and its effect on a final judgment under collateral attack on the other hand.” *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 710-711 (1974) (footnotes and citation omitted). Similarly, both *Panama Mail S.S. Co. v. Vargas*, 231 U.S. 670, 671 (1930), and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940), distinguished between review in direct and collateral attacks in,

respectively, a suit in admiralty and an action to recover on bonds.

These cases make clear that “collateral review” of a judgment is review other than review of a judgment in the direct appeal process. This distinction has been used in the habeas corpus context both before and after the AEDPA’s enactment in 1996. *See, e.g., Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-351 (2006) (stating general rule that “a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review”); *Trevino v. Texas*, 503 U.S. 562, 568 (1992) (contrasting availability of relief in “cases pending on direct review or not yet final when [a case] was decided” and in “cases on collateral review”); *Shea v. Louisiana*, 470 U.S. 51, 59-60 (1985) (in distinguishing between collateral and direct review, stating “[t]he one litigant has already taken his case through the primary system. The other has not.”); *Reed v. Ross*, 468 U.S. 1, 10 (1984) (describing North Carolina rule as requiring defendant “initially to raise a legal issue on appeal rather than on post-conviction review”); *United States v. Frady*, 456 U.S. 152, 166 (1982) (distinguishing post-conviction relief from direct appeal). Review apart from direct appeal plainly encompasses post-conviction review following a final judgment. Therefore, whether as a matter of plain meaning or the Court’s usage, “post-conviction or other collateral review” includes review under-taken after a judgment has become final.

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) is further supported by *Teague v. Lane*, 489 U.S. 288 (1989), in which the Court described a collateral remedy as one “‘providing an avenue for upsetting judgments that have become otherwise final.’” 489 U.S. at 306 (quoting *MacKay v. United States*, 401 U.S. 667, 682-683 (1971)). An application filed after a direct appeal has become final is an action seeking collateral review. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (discussing distinction between direct and collateral review and defining direct review involving a federal question as coming to an end after certiorari); *Fradley*, 456 U.S. at 164-165 (in discussion of standard of review of claims raised on collateral review, describing collateral review as arising after expiration of time allowed for direct review or affirmance of conviction on appeal). The Court’s “unvarying understanding of finality for collateral review purposes” is that a conviction is final “when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” *Clay v. United States*, 537 U.S. 522, 527-528 (2003) (collecting cases).

Under this precedent, and contrary to the state’s view, Rhode Island Rule 35 plainly affords collateral rather than direct review. A motion under the rule must be filed, *inter alia*, within 120 days after the judgment has become final. It seeks to vacate the judgment and sentence and obtain a new judgment with a lower sentence. It may ask the court to make a

decision on the basis of information not in the record of a direct appeal. *See State v. Furtado*, 774 A.2d 38, 39 (R.I. 2001) (describing survey of sentences compiled by defendant). The judgment remains in effect while the motion is under consideration. Unlike the state provision at issue in the Eleventh Circuit's decision in *Alexander v. Secretary, Dep't of Corrections*, 523 F.3d 1291 (11th Cir. 2008), a Rule 35 motion may be appealed separately from any direct appeal. *See State v. Smith*, 676 A.2d 765, 766 (R.I. 1996) (remanding denial of Rule 35 motion to reduce sentence where sentencing judge "unduly constricted the broad scope of his discretion in ruling on defendant's motion to reduce his sentence"). The Rhode Island Supreme Court has viewed the motion as a process apart from a direct appeal, stating that complaints about sentences are not appropriate for review on direct appeal, but should be undertaken under Rule 35. *State v. Martinez*, 824 A.2d 443, 451 (R.I. 2003); *State v. Sostre*, 736 A.2d 95, 96 (R.I. 1999).⁶

⁶ Review may be collateral even where the application is heard by the judge in the criminal case resulting in the conviction from which relief is sought. An application for relief pursuant to 28 U.S.C. §2255 is deemed to be collateral review; that motion is heard by the original trial judge. *See* 28 U.S.C. §2255(a) (providing that a "prisoner . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence"). A motion for post-conviction relief filed pursuant to R.I. Gen. Laws §10-9.1-1 *et seq.*, conceded by the state and found by the courts below to be a motion tolling the AEDPA's limitations, is heard by the judge who sat in the underlying criminal

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Turning to the last word of the phrase at issue, Webster's defines "review" as "a looking over or examination with a view to amendment or improvement." *Webster's Third New International Dictionary* 1944 (2002). The word "review" is defined by Black's as "[c]onsideration, inspection or reexamination of a subject or thing." *Black's Law Dictionary* 1434 (9th ed. 2009). These definitions in no way suggest a limitation of tolling mechanisms to applications for review raising only legal challenges to a judgment or sentence. As the First Circuit stated after considering these definitions, had Congress intended to limit tolling mechanisms to those raising only legal challenges, it could have done so by selecting a narrower term than "review" to describe the class of applications triggering the tolling of the AEDPA's limitation period. *Kholi*, 582 F.3d at 153. Congress's choice of the word "review" thus further supports the First Circuit's conclusion that Mr. Kholi's motion for reduction of sentence, filed in the state court after affirmance of the judgment by the Rhode Island Supreme Court in order to seek equitable, discretionary relief from that judgment, was an "application for State post-conviction

case. See R.I. Gen. Laws §10-9.1-2; *Kholi*, 582 F.3d at 153-154. Other states similarly provide that post-conviction relief motions are heard by the trial judge. See Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook* 6 (2009) (hereafter "Wilkes") (stating that in the District of Columbia and 38 states the application for the principal post-conviction remedy is filed in the "convicting court"). Yet these motions, too, are deemed to toll the AEDPA's limitations.

or other collateral review” tolling the AEDPA’s limitation period. Such a motion for equitable, discretionary relief “seeks to upset an otherwise final . . . sentence,” Pet’r Br. 20, even if not on legal grounds. Thus, the plain language of 28 U.S.C. §2244(d)(2) supports the First Circuit’s conclusion that Rhode Island Rule 35 tolls the AEDPA’s limitation period.

B. Construing “Post-Conviction or Other Collateral Review” to Include Discretionary, Equitable Review of a Sentence Following Final Judgment After Direct Appeal Is Consistent With Principles of Federalism and Comity.

The AEDPA reflects Congress’s interests in federalism and comity as well as in finality. Federalism and comity afford respect for state processes. Federalism “concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.” *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

As the Court explained in *Younger v. Harris*, 401 U.S. 37 (1971), addressing federal court abstention, comity is a doctrine based on federalism:

[T]he notion of “comity,” that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and

their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as “Our Federalism.”

Id. at 44; *see also Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2330-2337 (2010) (comity considerations required dismissal of federal suit by taxpayer alleging discriminatory state taxation).

Comity “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Rhines v. Weber*, 544 U.S. 269, 274 (2005) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court implemented the comity principle in *Rhines* by holding that where dismissal of a federal petition for a writ of habeas corpus containing both exhausted and unexhausted claims would result in an inability to refile after all claims had been exhausted, a stay of the petition pending exhaustion in state court could be appropriate, notwithstanding finality interests. 544 U.S. at 277-278; *see also Duncan*, 533 U.S. at 181 (noting “AEDPA’s clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review”).

Congress affirmed these principles in tying the tolling mechanism of §2244(d)(2) to state procedures. Its choice of the broad phrase “State post-conviction

or other collateral review” to define the tolling mechanism ensures that the states receive the deference and opportunities our federal system contemplates and that litigants avail themselves of state court remedies before seeking federal collateral review. No federal interest in uniformity supersedes these principles and purposes. As the Court recently stated, a federal desire for uniformity “does not outweigh the general 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.” *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

In the habeas context, principles of comity clearly extend beyond the requirement of exhaustion of state remedies. For example, a federal court generally will not address habeas claims resolved on independent and adequate state grounds, including state procedural grounds. *See, e.g., Dretke v. Haley*, 541 U.S. 386, 392-393 (2004) (citing cases); *Simpson v. Matesanz*, 175 F.3d 200, 205-206 (1st Cir. 1999). Such grounds may include a discretionary state rule. In *Beard v. Kindler*, 130 S. Ct. 612 (2009), this Court held “that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review,” noting that “discretionary rules are often desirable.” 130 S. Ct. at 618. And in *Danforth*, this Court stated that “considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*.” 552 U.S. at 279-280.

Nor are comity concerns limited to an opportunity for a state to address federal constitutional claims, as illustrated by federal appellate decisions holding that state court proceedings need not present a federal claim to toll the AEDPA limitation period.⁷ Tolling the limitation period to allow recourse to state remedies not related to federal claims presented in a federal habeas petition is consistent with finality concerns and with the fundamental fairness concern of enabling an individual to avail himself of all state remedies prior to seeking federal relief, if necessary. Indeed, the Court has recognized that the finality of state convictions is a state interest rather than a federal interest. *Danforth*, 552 U.S. at 280; *see also Kindler v. Horn*, 542 F.3d 70, 77-78 (3d Cir.

⁷ *See, e.g., Cowherd v. Million*, 380 F.3d 909, 912-914 (6th Cir. 2004) (en banc) (state post-conviction motion that did not include federal claim tolls limitation period); *Ford v. Moore*, 296 F.3d 1035, 1037-1040 (11th Cir. 2002) (motion challenging state sentence as illegal under state law attacked judgment that was subject of federal habeas petition and tolled limitation period); *Carter v. Litscher*, 275 F.3d 663, 665-666 (7th Cir. 2001) (state collateral proceeding based solely on state law issues tolls limitation period); *see also Bishop v. Dormire*, 526 F.3d 382, 383-384 (8th Cir. 2008) (motion to recall mandate held to be an application for state post-conviction or other collateral relief with respect to pertinent judgment or claim even though motion was not necessary to exhaust any federally cognizable claims and raised an issue not cognizable in federal habeas corpus); *Sweger v. Chesney*, 294 F.3d 506, 514, 519-520 (3d Cir. 2002) (state post-conviction proceeding tolls the AEDPA's limitation period if it challenges same judgment challenged in federal petition, whether or not it contains claims presented in federal petition).

2008) (rejecting Pennsylvania’s efforts to “forge a nonexistent link between exhaustion and statutory tolling” and stating that the AEDPA’s “text undermines the Commonwealth’s attempt to read exhaustion into the statute’s tolling requirements”), *rev’d on other grounds, Beard v. Kindler*, 130 S. Ct. 612, 618 (2009).

Whether or not a particular state-authorized avenue of relief available after the conclusion of a direct appeal seeks legal or discretionary, equitable relief, by enacting such a provision a state has determined that defendants should have an opportunity, as part of the state criminal justice process, to pursue that review. It is reasonable to conclude that Congress incorporated all forms of state applications for post-conviction or other collateral review as tolling mechanisms in order to respect the state’s determination that such remedies should be made available to state prisoners.⁸

⁸ A state-by-state compilation of the multiple forms of “post-conviction or other collateral review” can be found in Wilkes, *supra* n.6. A few examples are set out here.

Rhode Island provides a post-conviction remedy to challenge the validity of a conviction or sentence through an application in the court in which the judgment of conviction was entered. The judgment may be appealed to the Rhode Island Supreme Court. R.I. Gen. Laws §10-9.1-1 *et seq.* Rule 33 of the Rules of Criminal Procedure for the Superior Court of Rhode Island provides for the filing of a motion for new trial based on newly discovered evidence within three years after the entry of judgment by the court. As previously discussed, Rule 35(a) of the Rules of Criminal Procedure for the Superior Court of Rhode Island provides

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for the correction or reduction of sentence. Actions on motions for new trial and for correction or reduction of sentence may be appealed to the Rhode Island Supreme Court.

Rule 37 of the Arkansas Rules of Criminal Procedure provides for post-conviction relief through the filing of a petition in the trial court alleging errors of law or jurisdiction. Time frames for filing run from conviction or resolution of appeal. The judgment may be appealed. Habeas corpus and coram nobis are available in limited circumstances pursuant to Ark. Code Ann. §16-112-101 *et seq.* and common law. Ark. Code Ann. §16-90-111 provides for post-conviction relief in the form of correction or reduction of the sentence (including reduction in the exercise of discretionary leniency) within time frames running from conviction or appeal.

Idaho provides for post-conviction proceedings challenging the lawfulness of the conviction or sentence or claiming the existence of “evidence of material facts, not previously presented and heard” that requires vacating the conviction or sentence “in the interest of justice.” Idaho Code §19-4901. The application is filed in the district court in which the conviction took place. Idaho Code §19-4902. A final judgment may be appealed to the Idaho Supreme Court. Idaho Code §19-4909. Rule 35 of the Idaho Rules of Criminal Procedure provides for the correction of an illegal sentence at any time. It provides for the correction of a sentence imposed in an illegal manner and for reduction of a sentence pursuant to a motion filed within 120 days of judgment. An order may be appealed. Coram nobis is available under Rule 60(b) of the Idaho Rules of Civil Procedure. *See Stuart v. State*, 914 P.2d 933 (Idaho 1996).

New Mexico provides for habeas corpus relief pursuant to Rule 5-802 of the New Mexico Rules of Criminal Procedure. Rule 5-801 provides for the correction of an illegal sentence at any time, and a motion to correct a sentence imposed in an illegal manner or to reduce a sentence within, *inter alia*, 90 days of the imposition of sentence or receipt of a mandate after affirmance of a judgment or dismissal of appeal. Coram nobis relief is available under certain circumstances under Rule 60(b) of the New Mexico Rules of Civil Procedure.

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Rhode Island’s analysis, however, suggests that Congress did not intend to leave it to the states to determine the scope of relief available to those it criminally charges. That suggestion ignores this Court’s precedents in which the Court has looked to state law in construing the AEDPA’s undefined terms. In *Artuz*, 531 U.S. at 8-9, and in *Pace*, 544 U.S. at 413-414, the Court construed the term “properly filed” by examining state law and held that an application is properly filed if it meets the criteria set by the state. Similarly, in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), the Court said that a state ruling on timeliness “would be the end of the matter.” Where, as here, a state has established a process for a defendant to seek discretionary, equitable review of his sentence after his conviction has become final, the state has established a form of “post-conviction or other collateral review” within the plain meaning of that phrase and that process should, as the First Circuit held, serve as a tolling mechanism.

Rhode Island further argues that because federal collateral review pursuant to 28 U.S.C. §§2254 and 2255 requires a legal challenge, “it would be incongruous to posit that Congress intended” a different definition in 28 U.S.C. §2244(d)(2). Pet’r Br. 25-26.

All of these forms of relief are in addition to direct appeals. All follow conviction. They illustrate the wide variety of “State post-conviction or other collateral review” processes that, consonant with principles of federalism and comity, may serve as tolling mechanisms under 28 U.S.C. §2244(d)(2).

This argument, however, ignores a key distinction between the requirements for federal review and the requirements for tolling. Interests of federalism and comity both constrain the scope of federal review of state proceedings and support deference to a state's decision to provide both legal and discretionary, equitable judicial review. These interests not only require a claim of jurisdictional, constitutional, or fundamental error to support federal collateral review, but also support the inclusion of both legal and equitable state court post-conviction proceedings seeking relief from a conviction or sentence as tolling mechanisms. Tolling appropriately allows a defendant to seek the judicial relief the state has made available without sacrificing the ability to seek federal review of federal constitutional issues should state relief be inadequate.

In view of the foregoing, this Court should reject Rhode Island's effort to define "collateral review" in the AEDPA's tolling provision as requiring a legal challenge to a conviction or sentence.

C. Rhode Island's Attempt to Limit Collateral Review in the AEDPA's Tolling Provision to Legal Challenges to Judgments Is Not Supported by the Precedent It Cites.

Citing a number of pre-AEDPA cases in which the Court used the term "collateral review" in connection with state court proceedings where a

defendant raised a legal challenge to his state court conviction or sentence, Rhode Island argues that these cases demonstrate that “collateral review” as used in the AEDPA’s tolling provision requires such a legal challenge. Pet’r Br. 21-23. However, these cases do not address or resolve the issue presented in this case. The question to be answered here is not whether state court proceedings in which defendants bring *legal* challenges to their convictions or sentences following direct appellate review constitute collateral review (unquestionably, they do), but whether state court proceedings in which defendants bring *equitable* challenges to their sentences seeking discretionary relief following direct appellate review *also* constitute collateral review.⁹ On this question the cases cited by Rhode Island provide no answer.

The use of the phrases “collateral review” and “legal challenge” in the context of litigation in which a legal challenge has, in fact, been brought on collateral review is not definitional but merely descriptive.

⁹ Rhode Island’s suggestion that there is a settled common law meaning to the term “collateral review,” Pet’r Br. 20-23, ignores the multiple contexts of the term’s use. As this Court concluded in *Moskal v. United States*, 498 U.S. 103 (1990), in discussing whether Congress had adopted a particular common law meaning of an undefined term used in a statute, where a term used at common law had more than one meaning, there was no presumption that Congress had adopted the particular meaning urged by the defendant. *Id.* at 116-117; *see also Evans v. United States*, 504 U.S. 255, 259-269 (1992) (evaluating effect of congressional use of common law term “extortion” in defining elements of Hobbs Act extortion under color of official right).

Indeed, in Rhode Island's quotations from *Schad v. Arizona*, 501 U.S. 624 (1991), *Parker v. Dugger*, 498 U.S. 311 (1991), *Jones v. Barnes*, 463 U.S. 745 (1983), *Murray v. Carrier*, 477 U.S. 478 (1986), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Lockhart v. Nelson*, 488 U.S. 33 (1988), and *Florida v. Burr*, 496 U.S. 914 (1990) (Stevens, J., dissenting from denial of certiorari), see Pet'r Br. 22-23, the Court simply used the term "collateral review" in describing the procedural history of the case; it did not purport to define the scope of the term itself. In *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (concurring opinion of Powell, J.), and in *Rector v. Bryant*, 501 U.S. 1239, 1243 n.2 (1991) (dissent from denial of certiorari by Marshall, J.), the two justices merely described the availability of collateral review of convictions and sentences or its availability to address trial errors.

The Court's use of the terms highlighted by Rhode Island in the other cases it cites at pages 22-23 of its brief similarly sheds no light on whether state provisions for equitable relief are tolling mechanisms within the meaning of 28 U.S.C. §2244(d)(2). Again, there is no suggestion in any of those cases that the Court was purporting to limit the definition of "collateral review" to review presenting substantive legal challenges. Moreover, a number of them also include discussions concerning respect for state processes and the principles of federalism and comity – discussions that support, rather than reject, the inclusion of discretionary, equitable remedies within the scope of "post-conviction or other collateral review."

For example, Rhode Island seeks support from the remark in *Coleman v. Thompson*, 501 U.S. at 755, that “state collateral review is the first place a prisoner can present a challenge to his conviction.” Pet’r Br. 22. It extracts this phrase from a discussion of whether there should be an exception to the rule that there is no right to counsel in state collateral proceedings “*in those cases where* state collateral review is the first place a prisoner can present a challenge to his conviction.” 501 U.S. at 755 (emphasis supplied). Thus, the Court was not suggesting that collateral review was defined by a legal challenge, but simply stating that, under some state systems, collateral review was the first place certain challenges could be brought. The *Coleman* Court also recognized the importance of state rules and respect for the state’s interest in compliance with its rules. *Id.* at 739. *Coleman*, with its emphasis on state procedures and sovereignty, does not support the narrow reading of §2244(d)(2) urged by Rhode Island. By tying tolling to state-determined post-conviction procedures, §2244(d)(2) furthers the goals of federalism and comity.

Rhode Island’s reliance on *O’Shea v. Littleton*, 414 U.S. 488 (1974), and *Engle v. Isaac*, 456 U.S. 107 (1982), is similarly misplaced. *O’Shea* was a civil rights action in which the Court simply listed post-conviction collateral review as among the procedures for addressing discriminatory conduct. 414 U.S. at 502. The Court also discussed the need to respect state administration of its own law and “established

principles of comity.” *Id.* at 499-501; *see also Murray v. Carrier*, 477 U.S. at 490-491 (discussing respect for state court rules and procedures). Similarly, in *Engle*, the Court stated in the course of noting that respondents had exhausted their state remedies that Ohio provides “only limited collateral review of convictions.” 456 U.S. at 124 n.28 (quoted at Pet’r Br. 22). Yet, the Court also discussed principles of comity and finality in holding that state prisoners could not challenge the constitutionality of jury instructions in a federal habeas corpus proceeding where they had not complied with state court contemporaneous objection requirements absent compliance with the cause and prejudice standard. *Id.* at 134-135.

Other cases cited by Rhode Island, *see* Pet’r Br. 22-23, support Mr. Kholi’s position that collateral review is review distinct from direct review. In *Castille v. Peoples*, 489 U.S. 346, 350 (1989), while discussing “recourse to state collateral review” in the context of the exhaustion requirement, the Court also distinguished between direct and collateral review in terms of the timing or order of proceedings. After noting the availability of collateral review to rectify an error in *Shea*, 470 U.S. at 59-60, the Court spoke of collateral review in the temporal sense, as review following direct review. And in *Wainwright v. Sykes*, 433 U.S. 72, 115 (1977), Justice Brennan (in dissent) not only spoke of collateral review as a means of correcting error, but also distinguished between collateral review and appeal. *See also United States v. Addonizio*, 442 U.S. 178, 184-185 (1979) (suggesting

temporal distinction between direct and collateral review), *cited at* Pet'r Br. 26 n.15. The temporal distinctions made in these opinions support a conclusion that a Rhode Island Rule 35 motion seeking equitable sentencing relief, which occurs after judgment or after direct appellate review, is a collateral challenge.

Rhode Island also notes habeas cases decided after the AEDPA's enactment in which the Court used the term "collateral review" in cases involving legal challenges to state convictions. Pet'r Br. 24 n.13. These cases, like those discussed above, do not purport to define "collateral review" in the context of the AEDPA's tolling provision. Again, the Court's use of the terms "legal challenge" and "collateral review" while discussing the merits of collateral review addressing a legal challenge, is hardly unexpected. Nor is it determinative of the issue in this case.¹⁰

¹⁰ Rhode Island also seeks support for its limiting interpretation in various circuit court decisions in federal habeas cases. Pet'r Br. 30-31. With the exception of the decisions creating the circuit split presented in this case, they do not express any views on the classification of discretionary, equitable post-conviction review as a tolling mechanism.

Indeed, the court's focus in *Streu v. Dormire*, 557 F.3d 960 (8th Cir. 2009), on considerations of comity in holding that a motion to reopen state post-conviction proceedings did toll the AEDPA limitation period, even if it did not directly seek relief from the judgment, and its rejection of the argument that tolling applications should be limited to those necessary to exhaust state remedies, supports Mr. Kholi's analysis.

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In *Harrelson v. Swan*, No. 08-41112, 2010 WL 2340827, at *2 (5th Cir. June 10, 2010) (determining that nunc pro tunc proceedings did not seek review of the original judgment and, therefore, did not toll the AEDPA limitation period), the court described tolling proceedings as those that “must at least have sought ‘review’ of the judgments pursuant to which [defendant] was in custody.” It defined “review” as “to *reexamine* judicially and to *go over or examine* critically or deliberately.” *Id.* (internal quotation marks and citation omitted). Again, this supports Mr. Kholi’s analysis.

In *Godfrey v. Dretke*, 396 F.3d 681, 688 (5th Cir. 2005), the court simply concluded that a state application directly challenging the validity of an expired conviction used to enhance a later sentence, without challenging its use in the enhanced sentence, “did not challenge a ‘pertinent judgment or claim’ within the meaning of §2244(d)(2).”

The state filings discussed in *Sindar v. Turley*, 343 F. App’x 326, 328 (10th Cir. 2009), in the context of denying a certificate of appealability were an application for a protective order and “malfeasance in office” complaints against a state court judge, the prosecutor in his case and his initial defense counsel. The court held these did not toll the limitation period since “none of [them] sought post-conviction relief for himself or collateral review of the judgment against him.”

Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010), merely addressed whether a state habeas corpus petition presenting legal challenges to the defendant’s conviction was pending “[u]nder California’s unusual system of independent collateral review.”

In sum, in none of these cases was a court called upon to address whether an application for discretionary, equitable judicial relief would toll the AEDPA’s limitation period; in none of these cases did a court suggest that such an application would not toll the period. Indeed the discussion of the relevance of comity in *Streu* and the definition of “review” in *Harrelson* support the inclusion of discretionary, equitable relief in the scope of “post-conviction and other collateral review.”

That federal collateral review pursuant to either 28 U.S.C. §2254 or §2255 requires a legal challenge in the form of jurisdictional, constitutional, or fundamental error resulting in a miscarriage of justice, *see* Pet'r Br. 25-28, speaks only to the requirements for obtaining relief from final judgments under those provisions. The inclusion of such a requirement in §2254 demonstrates respect for state processes. It does not suggest that respect for state processes requires excluding post-conviction discretionary sentencing relief from the array of tolling mechanisms recognized in 28 U.S.C. §2244(d)(2).

Similarly, Rhode Island's contention that the use of the term "collateral review" in 28 U.S.C. §§2244(b)(2)(A) and 2244(d)(1)(C) "evidences [congressional] intent to define the term as a vehicle for challenging a judgment of conviction or sentence," Pet'r Br. 28, again ignores context. Both of those provisions refer to the type of claim that may be raised in a federal habeas proceeding, which, as noted above, is a proceeding requiring a legal challenge. Moreover, the limitation on the nature of claims that may be brought in a second federal proceeding, *see* §2244(b)(2)(A), and the limitation of the availability of review to newly recognized constitutional rights only where this Court has determined they should be retroactively available on collateral review, *see* §2244(d)(1)(C), are consistent with the recognition of state interests in finality. And, where the state has made discretionary, equitable post-conviction judicial relief available, such relief cannot be deemed inconsistent with the state's interest in finality.

The context of language is important. *See, e.g., Moskal*, 498 U.S. at 108 (stating that “the meaning of language is inherently contextual”). In the cases cited by Rhode Island, the Court discussed or mentioned collateral review in the context of reviewing federal habeas corpus proceedings. Such proceedings are collateral and, by statute, must present legal challenges. It is only to be expected that those cases would involve discussions of legal challenges. It could not be otherwise. But the fact that habeas review is collateral review does not mean that collateral review is limited to habeas review, let alone that all “post-conviction or other collateral review” is so limited. Accordingly, the use of the term “collateral review” in discussions of legal challenges in the review of federal habeas corpus proceedings cannot be deemed to define the scope of collateral review in post-conviction state court proceedings for purposes of defining available tolling mechanisms.

II. POLICY CONSIDERATIONS SUPPORT THE CONCLUSION THAT A MOTION PURSUANT TO A STATE PROVISION AUTHORIZING SENTENCING RELIEF FOLLOWING FINAL JUDGMENT IS AN “APPLICATION FOR STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW.”

A defendant should be entitled to pursue available state procedures for relief from a conviction and/or sentence, whether that relief is discretionary or mandatory, equitable or legal. If he acts in compliance

with state time limits authorizing the filing of applications for state review within the year following final judgment, the time during which those applications are pending should be tolled for purposes of determining the later availability of federal habeas relief. Principles of comity and federalism, considerations of predictability and clarity, and the interests of the AEDPA all support including motions for discretionary, equitable post-conviction sentencing relief as tolling mechanisms under 28 U.S.C. §2244(d)(2).

As set forth in Argument I.B., *supra*, principles of federalism and comity support an interpretation of “post-conviction or other collateral review” that allows a defendant to pursue all available avenues of relief from a final judgment in the state court without forfeiting the right to file a petition for habeas corpus relief in the federal court. Consistent with the requirements of the United States Constitution, states have the right to choose the remedies and review processes they will offer to those convicted of state offenses. Federal courts should respect those choices.

Just as importantly, affording a state the opportunity to rectify any errors and/or determine whether discretionary relief is warranted may eliminate the need for federal review altogether. A defendant who has obtained relief by pursuing state remedies, equitable as well as legal, might not seek federal habeas review, thus conserving limited federal judicial resources. A sentence reduction resulting in a defendant’s release could obviate the need for

subsequent federal action. It may not always be easy to quantify the positive impact on the federal system of respecting the myriad ways in which states may remedy unlawful or unjust convictions and/or sentences, but the impact should nonetheless be considered. In Rhode Island, for example, the state has determined that, among available post-conviction remedies, a defendant should have an opportunity to seek legal or equitable relief from his/her sentence within 120 days after the direct appeal has been concluded. As demonstrated by a study of Rule 35 motions filed in Rhode Island between 1998 and 2003, which shows that 31% of those motions acted upon were granted,¹¹ Rule 35 provides a viable form of post-conviction or other collateral review in practice as well as in theory.

Considerations of predictability and clarity also support including motions for discretionary sentencing relief as tolling mechanisms. In enacting the AEDPA, Congress sought to provide bright-line rules for the initiation of federal habeas corpus proceedings. Section 2244 sets out procedures and requirements for filing applications, including a period of limitation in §2244(d)(1) and a provision for tolling that period of limitation in §2244(d)(2). The Court

¹¹ Laura Braslow & Ross E. Cheit, *Appropriate Leniency or Worrisome Discretion? A Systematic Study of Motions to Reduce Criminal Sentences in Rhode Island Superior Court (1998-2003)*, 2nd Annual Conference on Empirical Legal Studies Paper, available at <http://ssrn.com/abstract=998727>.

recognized such a bright-line rule when it held that a federal court does not look to the merits of a state court application to determine whether it tolls the AEDPA's time limitations; the federal court simply asks whether the state application was properly filed, *i.e.*, whether it was procedurally acceptable to the state court clerk's office. *Artuz*, 531 U.S. at 8-9.

Rhode Island's contention that tolling must be limited to those applications presenting a legal challenge to a conviction or sentence would create unpredictability and defeat clarity. It would require a parsing of the language of each motion where, as in Rhode Island and in other states, a rule authorizes both a challenge to the legality of a sentence and discretionary, equitable relief in the same section of a provision,¹² or within the same provision.¹³ For example, the motion filed in this case was captioned "Motion to Reduce Sentence" and cited "the provisions of Rule 35 of the Rules of Criminal Procedure of the Superior Court." J.A. 8. Rule 35(a) provides for the correction of an illegal sentence and a sentence

¹² See Ga. Code Ann. §17-10-1(f); Idaho R. Crim. P. 35; Minn. R. Crim. P. 27.03(9); N.M. R. Crim. P. 5-801; S.D. Codified Laws §23A-31-1.

¹³ See Alaska R. Crim. P. 35; D.C. Super. Ct. R. Crim. P. 35; Ark. Code Ann. §16-90-111; Colo. R. Crim. P. 35; Del. Super. Ct. R. Crim. P. 35; Fla. R. Crim. P. 3.800; Haw. R. Penal P. 35; Me. R. Crim. P. 35; Md. Rule 4-345; N.D. R. Crim. P. 35; Vt. R. Crim. P. 35; W. Va. R. Crim. P. 35; Wyo. R. Crim. P. 35. See also Mass. R. Crim. P. 29, Tenn. R. Crim. P. 35, and Conn. Super. Ct. R. P. §43-21 for other discretionary sentencing-relief provisions.

imposed in an illegal manner, as well as for the discretionary reduction of a sentence. A federal court could not determine whether a defendant sought legal or equitable relief without further examination of the document filed. Examination of applications might also require the federal court to refer to state rules concerning the construction of *pro se* pleadings and to make judgments about whether the language of each application sought legal, equitable, or mixed relief.

Requiring district courts to examine each state court motion alleged to toll the AEDPA's limitation period to determine whether it sought legal or equitable relief not only would impose an additional burden on the district courts, but would create the unpredictability and lack of uniformity the Court has sought to avoid, not only under the AEDPA, as discussed above, but in other contexts as well. For example, in determining whether an offense is a crime of violence or violent felony for various sentencing purposes, the Court has used a categorical approach, examining the formal elements of the offense of conviction rather than examining the facts of the actual offense. *Begay v. United States*, 553 U.S. 137 (2008); *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990). So too here, 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 would be consistent with the plain meaning of 28 U.S.C. §2244(d)(2), and would provide a predictable rule furthering the interests of

federalism and comity without impinging upon legitimate concerns of finality, or placing an increased burden on federal district courts.

Finally, Rhode Island and its amici argue that tolling the AEDPA's limitation period for motions seeking a discretionary reduction of sentence does not promote exhaustion of state remedies and undermines the interests of finality. Pet'r Br. 36-43; Amici Br. 19-27. Indeed, amici suggest that promoting exhaustion is the only function of tolling. Amici Br. 19-23. That suggestion is untenable. The Court has recognized a relationship between exhaustion and tolling, but that relationship does not exclude all other considerations. Exhaustion of state remedies is not the only reason for the AEDPA's tolling provision. Comity and federalism play a significant role. Consistent with this role, as set out above, courts have recognized that post-conviction applications in state courts raising only state law issues can serve as tolling mechanisms under 28 U.S.C. §2244(d)(2). A construction of the tolling provision that respects 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 furthers the AEDPA's interests in comity and federalism, as well as in finality as defined by the state.

The contentions of Rhode Island and its amici invoking finality also ignore the fact that 28 U.S.C. §2244(d)(2) addresses a state court judgment, and that it is the state that has provided the post-conviction mechanism for seeking equitable relief.

Indeed, in *Danforth v. Minnesota*, the Court averred that “finality of state convictions is a *state* interest, not a federal one,” and reiterated that “[s]tates are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees.” 552 U.S. at 280. While one of the aims of the AEDPA is to promote finality, *see, e.g., Duncan*, 533 U.S. at 179 (citing *Calderon v. Thompson*, 523 U.S. 538, 555-556 (1998)), it is finality as defined by the *state* that the statute is designed to protect. Where Rhode Island has already determined that its interest in the finality of state convictions is not affronted by allowing a defendant to seek a discretionary, equitable reduction of his sentence from the state court, no federal interest is infringed by recognizing an application for such relief as a tolling mechanism.

In sum, policy considerations as well as the statutory language of §2244(d)(2) support the First Circuit’s determination that a motion for discretionary, equitable sentencing review is an “application for State post-conviction or other collateral review with respect to the pertinent judgment or claim” and, therefore, tolls the one-year period of limitation provided in §2244(d)(2).



CONCLUSION

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

Respectfully submitted,

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APPENDIX

The relevant proceedings in the courts of the State of Rhode Island and the federal district court are set out here in table form:

12/15/1993	Conviction	R.I. Superior Ct.
02/28/1994	Sentence	R.I. Superior Ct.
02/29/1996	Conviction affirmed	R.I. Supreme Ct.
05/16/1996	Rule 35 motion to reduce filed	R.I. Superior Ct.
08/27/1996	Rule 35 motion to reduce denied	R.I. Superior Ct.
05/23/1997	PCR application filed	R.I. Superior Ct.
01/16/1998	Rule 35 denial affirmed	R.I. Supreme Ct.
04/23/2003	PCR application denied	R.I. Superior Ct.
12/14/2006	PCR denial affirmed	R.I. Supreme Ct.
09/05/2007	Federal habeas petition filed	U.S. District Ct.
